NORTH CAROLINA COURT OF APPEALS REPORTS

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NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. JEAN C. SMITH OLIVER AND RICHARD THOMAS BRUMMITT

No. 8615SC673

(Filed 7 April 1987)

1. **Indictment and Warrant § 9.11— period of time alleged—indictments not defective**

There was no merit to defendants' contention that indictments were fatally defective because they alleged the offenses occurred during a specified period of time rather than on specific days and because time was of the essence in their trial, since N.C.G.S. § 15A-924(a)(4) specifically allows pleadings to indicate the offense was committed during a designated period of time, and the evidence was to the effect that the offenses occurred between the dates set forth in the indictments.

2. **Witnesses § 1.1— sex offenses—mentally retarded victim—testimony admissible**

In a prosecution of defendants for various sex offenses the trial court did not abuse its discretion in allowing the mentally retarded prosecuting witness to testify, though there were some questions which she could not answer, where the witness was able to tell the court where she went to school, name her teachers, tell how old she was, when her birthday was, and what month it was during the trial, and she said she knew it was bad to tell a lie and was able also to say whether a statement told her was a lie or the truth.

3. **Criminal Law § 87.1— mentally retarded witness—sexual matters—leading questions proper**

In a prosecution of defendants for various sex related offenses the trial court did not abuse its discretion in allowing certain leading questions concerning an extremely delicate matter to be asked of the mildly retarded prosecuting witness.

4. Criminal Law § 51.1— witnesses found to be experts by other courts—testimony improper—witnesses properly qualified

Though the trial court erred in allowing the State's expert witnesses to testify that they had been found to be experts by other courts, such error was harmless when the court did not rely solely upon that testimony but also heard testimony as to the witnesses' knowledge, skills, experience, training, and education.

5. Rape and Allied Offenses § 4— child victim—expert opinion about children's honesty—admissibility

In a prosecution of defendants for various sex related offenses allegedly committed upon one defendant's mentally retarded daughter, the trial court did not err in allowing expert witnesses to testify to the effect that children in general do not lie about sexual abuse, that mentally retarded children generally think in concrete terms, that it would be very difficult to teach them facts and details about sexual acts, and that they would be unable to fantasize about sexual matters, since the testimony was the witnesses' interpretation of facts within their expertise and not their opinion upon the credibility of this specific victim; the witnesses were in a better position to have an opinion than the jury; and the probative value of the testimony was not outweighed by the danger of unfair prejudice or confusion.

6. Criminal Law § 80; Rape and Allied Offenses § 4— expert witness's reliance on literature—admissibility

In a prosecution of defendants for various sex related offenses, literature upon which a medical expert witness relied would come within the Rule 803(18) exception to the hearsay rule as statements contained in periodicals established as reliable authority by the testimony of the witness and relied upon by her in direct examination; furthermore, defendants failed to challenge the reliability of the sources upon which the witness relied and failed to request that the witness reveal those sources.

7. Criminal Law § 73.5— statements made during medical diagnosis and treatment—admissibility as exception to hearsay rule

A medical expert's interview of a sexual abuse victim was conducted for purposes of diagnosis and treatment and statements made by the victim were admissible where the witness was requested to interview the victim by personnel from the Child Mental Health Evaluation Program in order to answer a couple of specific questions; this request was made to the witness because her expertise in developmental disabilities would aid the diagnosis and treatment of the mentally retarded victim; and the interview took place three weeks after law enforcement officers were notified of the abuse, during the same period a pediatrician from the Child Mental Health Education Program examined the victim, and more than seven months before defendant's trial. Moreover, drawings and statements made by the victim to the witness were reasonably pertinent to the victim's diagnosis or treatment, and admission of them therefore was not error.

8. Rape and Allied Offenses § 5— victim as "mentally defective"—sufficiency of evidence

In a prosecution of defendants for second degree sex offenses committed against one defendant's mentally retarded daughter, evidence was sufficient to support a finding that the victim was "mentally defective" under N.C.G.S. § 14-27.1(1) where the victim, though able verbally to protest and able to engage in some physical resistance, was nevertheless substantially incapable of "resisting the act of vaginal intercourse or sexual act" where there was evidence that she complied with defendants' direction and submitted to their abuse.

9. Rape and Allied Offenses § 4.1— defendant's guilt of other offenses—admissibility to show common plan or scheme

Testimony of the prosecuting witness regarding acts of sexual abuse other than those charged in the indictments was properly admitted to establish a common plan or scheme on the part of one defendant sexually to abuse her child.

10. Rape and Allied Offenses § 4.3; Criminal Law § 85.1— victim's reputation for truthfulness—character witness's opinion admissible

The trial court did not err in allowing the prosecution to ask a character witness about the victim's reputation for truthfulness in her school community based on the witness's conversations with and about the victim.

11. Rape and Allied Offenses § 5— mentally retarded victim's testimony—sufficiency of evidence of penetration

Testimony by the mentally retarded victim of sexual offenses that one defendant put her finger "where a tampon goes" was sufficient evidence of penetration to support the conviction of second degree sexual offense under N.C.G.S. § 14-27.5.

12. Rape and Allied Offenses § 5— victim's mother as aider and abettor—sufficiency of evidence

Evidence was sufficient to convict one defendant of aiding and abetting in the second degree rape of her child where the victim testified that her mother was in bed with her during the time of the rape by the male defendant and that her mother was also touching her during that time as well.

13. Criminal Law § 112.1— reasonable doubt—instruction proper

There was no merit to one defendant's contention that the instruction concerning reasonable doubt was in error because it omitted the phrase "convinced to a moral certainty."

APPEAL by defendants from *Farmer, Judge.* Jury verdict entered 9 December 1985. Judgment and commitment entered 13 December 1985 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 9 December 1986.

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

Raiford & Harviel, by Ernest J. Harviel for defendant-appellant Oliver and Frederick J. Sternberg, for defendant-appellant Brummitt.

GREENE, Judge.

Defendants Oliver and Brummitt were arrested and charged with several counts of sex-related offenses committed against defendant Oliver's daughter. State's evidence showed Oliver's daughter had a full scale IQ of 66 or less. The indictments alleged the offenses occurred on a date between 19 December 1984 and 15 April 1985 but did not name a specific day. Before trial, each defendant moved to dismiss the charges. They argued the indictments were defective because they did not designate a specific date.

During the trial, the State presented two experts: Dr. Charles Scott, a pediatrician, and Dr. Betty Gordon, a clinical psychologist. Both experts had personally interviewed the alleged victim who was 16-years old at the time. Dr. Scott testified that in his opinion, the victim functioned mentally at an eight to ten-year-old level. Dr. Gordon's opinion was that she functioned at an eight-year-old level. Dr. Scott further testified in part:

> Q. Based on your education, your experience, and your continued education in reading these periodicals regarding the area, do you have an opinion as to whether or not children fantasize about sexual abuse matters?
>
> * * *
>
> A. Yes, I have an opinion, and that is that children don't fantasize about sexual abuse matters.
>
> Q. Now, can you explain to the jury what you mean by fantasize?
>
> A. In other words, they don't—by fantasize they don't make up stories about sexual abuse and report—
>
> Q. All right. Are you—
>
> A. —and report it to others.

Q. Are—are you acquainted with any—in connection with your opinion, are you acquainted with any age limits we're talking about here or any generally accepted in your profession age limits regarding that?

A. I guess you'd say the younger the child the more believable the story.

Dr. Gordon testified she had been requested to evaluate the victim concerning two questions: Whether she could tell the difference between fact and fantasy and whether she could be influenced to state she had been sexually assaulted. Dr. Gordon further testified:

Q. You indicated there were two questions that you were asked to evaluate and one dealt with the fact and fantasy feature. What was the other question?

A. Whether or not I felt she could have been influenced to say that she had been sexually abused.

Q. And was that coaching basically, coaching her to say that?

A. Yes.

Q. What did you observe—what did you do in connection with evaluating that question?

A. In general, the evaluation of that question is based more on my understanding of mental retardation and the way children think at different ages. Mental retardation means that someone is a slow learner and the degrees of mental retardation simply refer to the—the rate at which one learns, and for someone to influence a child to say something, a child who is mentally retarded, it would take a considerable amount of work simply because they learn very slowly. It's very difficult to teach them, and to teach them facts and details about something, such as sexuality, that a child has limited knowledge and understanding of, would be extremely difficult.

* * *

Q. Have you—have you had any work or—or during the course of your study and education—continuing education, is

there a—any body of literature in your—accepted by your profession regarding children fantasizing about things, that is, making things up in their minds—that aren't true?

A. Developmental literature and the literature about the development of thinking skills deal with that in the sense that children who think concretely need to have experienced something in some way in order to think about it, in order to talk about it. It's like you—they can't think or talk about things that they haven't in some way experienced.

Q. And that experience could be seeing or touching or looking and—

A. Right.

Q. It could be from a number of different things?

A. Right.

Q. Can it be from being told about it?

A. To some extent, but not likely, and again, it depends on what it is. If you tell somebody about something that's an everyday experience. Like if you tell a young child to go get their pajamas they know what pajamas are because they've experienced it a lot and they can probably go get their pajamas, but if you tell the child something about the moon or the stars or numbers or something that they haven't experienced directly, then it would be difficult for them to understand that.

Defendants timely objected to all the questions tendered by the State to the expert witnesses now complained of and timely made motions to strike after each answer. The objections were overruled and the motions to strike denied.

The jury found defendant Oliver guilty of rape of and sexual offense against a mentally defective female (N.C. Gen. Stat. Secs. 14-27.3(a)(2) and 14-27.5(a)(2))—both second degree offenses. It found defendant Brummitt guilty of rape of and sexual offense against a mentally defective female and also guilty of a crime against nature (N.C. Gen. Stat. Sec. 14-177).

I

[1] Defendants contend the trial court erred in denying their motions to dismiss for failure to allege a specific date on the indictments. Defendants say the indictments were fatally defective first, because the indictments alleged the offenses occurred during a specified period of time rather than on specific days and second, because time was of the essence in their trial.

N.C. Gen. Stat. Sec. 15A-924(a)(4) reads as follows:

> (a) A criminal pleading must contain:
>
> * * *
>
> (4) A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. *Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.* (Emphasis added.)

Neither this statute nor the statutes under which defendants were charged require a criminal pleading to allege the specific date of the offense. Further, Section 15A-924(a)(4) specifically allows pleadings to indicate the offense was committed during a designated period of time, as the indictments in this case did.

The statute indicates that error as to the date on the indictment may be grounds for dismissal if time was of the essence with respect to the charge and the defendant was misled to his prejudice. Here, there was no evidence that there was an error in the dates alleged in the indictments. In fact, the evidence was to the effect that the offenses occurred between the dates set forth in the indictments. Since there was no error in the dates alleged, even if time were of the essence in defendants' case, the charges would not be subject to dismissal under Section 15A-924(a)(4).

During the trial in the case *sub judice*, both defendants attempted to prove periods of time when either the prosecuting witness or the defendants were not at defendant Oliver's trailer where the offenses were alleged to have occurred. Defendants

cite one case to support their contention—*State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). We have reviewed *Whittemore* and searched for other authority to support defendants' contention that this case should be dismissed because time was of the essence in their trial. Our search has revealed no decision which would support defendants' contention *unless* the defendants could show they had been *misled to their prejudice* by an error or omission in the indictment. *See, e.g., State v. Wood*, 311 N.C. 739, 319 S.E. 2d 247 (1984); *State v. Christopher*, 307 N.C. 645, 300 S.E. 2d 381 (1983); *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983); *State v. Wilson*, 264 N.C. 373, 141 S.E. 2d 801 (1965); *State v. Hicks*, 84 N.C. App. 237, 352 S.E. 2d 424 (1987). As previously stated above, there was no error in or omission of the dates alleged in the indictments. Defendants' assignment of error as to this issue is dismissed.

II

[2] Defendants contend the prosecuting witness was not competent to testify. In response to defendants' objection at trial, the court allowed a *voir dire* to be had of the witness.

The general rule under North Carolina Rules of Evidence, N.C. Gen. Stat. Sec. 8C-1, Rule 601, is that every person is competent to be a witness unless the court determines he is "incapable of expressing himself concerning the matter as to be understood . . . or incapable of understanding the duty of a witness to tell the truth." Rule 601(b). It matters not that some of the witness's answers during *voir dire* are ambiguous or vague or that they are unable to answer some of the questions which are put to them. Such performance is not unusual when the witness is a young child. *State v. Gordon*, 316 N.C. 497, 503, 342 S.E. 2d 509, 512 (1986). The same applies for a mentally retarded individual. The trial court did not abuse its discretion.

While defendants point out that the prosecuting witness was unable to testify how long it had been since August of that year, that she was unable to answer with specificity where she lived in her town or how long she had lived there and that there were several questions she did not answer at all, the record shows there was sufficient evidence for the trial court to determine she was competent to testify. She was able to tell the court where she went to school, name her teachers, tell how old she was, when

her birthday was, and what month it was during the trial. She said she knew it was bad to tell a lie and was able also to say whether a statement told her was a lie or the truth.

III

[3] Defendants next contend that after finding the prosecuting witness competent to testify, the court erred in allowing leading questions upon direct examination of her.

Under North Carolina Rules of Evidence, "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." N.C. Gen. Stat. Sec. 8C-1, Rule 611(c). It is well recognized that, when the witness has difficulty in understanding the question because of age or immaturity or where inquiry is made into a subject of delicate nature such as sexual matters, leading questions are necessary to develop the witness's testimony. *State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 236 (1974); *State v. Williams*, 303 N.C. 507, 511, 279 S.E. 2d 592, 595 (1981).

In this case, the prosecuting witness was mildly mentally retarded and was testifying to a matter of extremely delicate nature. Our review of the transcript shows the trial judge did not give free rein to the State in asking leading questions on direct but sustained several of defendants' objections. The questions the court allowed were necessary to develop the witness's testimony. The trial court judiciously exercised its discretion and there was no abuse.

IV

[4] Defendants next contend the trial court erred in allowing the State's expert witnesses to testify they had been found to be experts by other courts. While we agree the court committed error, we find defendants failed to show, as required under N.C. Gen. Stat. Sec. 15A-1443(a), how they were prejudiced by the testimony.

North Carolina Rules of Evidence, Rule 702, states: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opin-

ion." N.C. Gen. Stat. Sec. 8C-1, Rule 702. In the absence of a stipulation, a witness which a party is attempting to qualify as an expert must testify to their qualification as set forth in Rule 702. A court may not rule that a witness is expert on the basis that another court has found that witness to be an expert. To do so would allow for the perpetuation of any error in the first finding to affect the later, unrelated trial. It would also make the decision of the trial court impossible to uphold on appeal as there would be no competent evidence to support it. *See, e.g., State v. Combs,* 200 N.C. 671, 675, 158 S.E. 252, 254 (1931).

However, the trial court did not rely solely upon the testimony that the witnesses had been found expert by other courts but also heard testimony as to the witnesses' knowledge, skills, experience, training and education. Since there was sufficient evidence upon which the trial court could base its decision that the witnesses were expert, we find the error harmless.

V

[5] Defendants contend the trial court erred in overruling several of their objections to testimony from the State's expert witnesses. They first contend the testimony of Dr. Scott to the effect that children in general do not lie about sexual abuse was inadmissible.

While a trial court has great discretion regarding the admissibility of expert testimony, *State v. Bullard,* 312 N.C. 129, 140, 322 S.E. 2d 370, 376 (1984), its discretion is limited by directives in the Rules of Evidence. Defendants complain the testimony of the State's experts "enhanced" the credibility of the prosecuting witness. However, the mere fact that an expert's testimony makes the testimony of another witness more believable, thus "enhancing" their credibility, is not sufficient to warrant its exclusion.

N.C. Gen. Stat. Sec. 8C-1, Rule 405(a) of the North Carolina Rules of Evidence provides that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." Rule 608(a), concerning the manner in which a witness's credibility may be attacked or supported, refers to Rule 405(a). The comment to Rule 608 states: "The reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible."

Under this guidance, our courts have held expert testimony inadmissible if the expert testifies that the prosecuting child-witness in a trial for sexual abuse is believable, *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986), or to the effect that the prosecuting child-witness is not lying about the alleged sexual assault. *State v. Heath*, 316 N.C. 337, 341 S.E. 2d 565 (1986) (the expert testified there was nothing in the record or current behavior that indicated the victim had a record of lying. *Id.* at 340, 341 S.E. 2d at 567); *State v. Kim*, 318 N.C. 614, 350 S.E. 2d 347 (1986) (the expert said the victim had not been untruthful with her. *Id.* at 620, 350 S.E. 2d at 351); *State v. Holloway*, 82 N.C. App. 586, 347 S.E. 2d 72 (1986) (the experts testified "that in their opinion the child had testified *truthfully*." *Id.* at 587, 347 S.E. 2d at 73); *State v. Jenkins*, 83 N.C. App. 616, 351 S.E. 2d 299 (1986) (the expert gave his opinion that if the victim said he had been abused, he was not making it up. *Id.* at 623, 351 S.E. 2d at 303); *State v. Keen*, 309 N.C. App. 158, 305 S.E. 2d 535 (1983) (in response to a question about fantasizing, the expert said that in his opinion an attack occurred on the victim; that it was reality. *Id.* at 162, 305 S.E. 2d at 537). However, until now, our courts have not been presented with the question of admissibility of expert testimony on the credibility of children in general who relate stories of sexual abuse.

Dr. Scott testified that children don't make up stories about sexual abuse and that the younger the child, the more believable the story. He did not testify to the credibility of *the victim* but to the general credibility of children who report sexual abuse. Since such testimony was Dr. Scott's interpretation of facts within his expertise, and not his opinion upon the credibility of the specific victim, it is not excluded by Rule 405. The proper test of its admissibility is whether he was in a better position to have an opinion than the jury. *See State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E. 2d 905, 911 (1978). In other words, was Dr. Scott's opinion helpful to the jury? *See* North Carolina Rules of Evidence, Rule 702. (N.C. Gen. Stat. Sec. 8C-1.) We determine that it was.

The nature of the sexual abuse of children, particularly mentally retarded children, places lay jurors at a disadvantage. Common experience generally does not provide a background for understanding the special traits of these witnesses. Such an understanding is relevant as it would help the jury determine the

credibility of a child who complains of sexual abuse. The young child or mentally retarded individual subjected to sexual abuse may be unaware or uncertain of the criminality of the abuser's conduct. Thus, the child may delay reporting the abuse. In addition, the child may delay reporting the abuse because of confusion, guilt, fear or shame. The victim may also recant the story or, particularly because of youth or mental retardation, be unable to remember the chronology of the abuse or be unable to relate it consistently.

Dr. Scott is a pediatrician. He testified he had been a member of the Child Medical Examiners Program for child abuse from its beginning in the early 1970's and since that time had interviewed approximately one to two children each month who had allegedly been sexually abused. Dr. Scott testified he had devoted a portion of his practice to the examination of children involved in sexual abuse and that he had kept abreast of information in that area through professional journals. We find that Dr. Scott was in a better position than the trier of fact to have an opinion on the credibility of children in general who report sexual abuse. His opinion is therefore admissible under Rule 702.

Testimony otherwise admissible may, however, be excluded under Rule 403 of the North Carolina Rules of Evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. Sec. 8C-1, Rule 403. This is a matter left to the discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986).

Dr. Scott's opinion was helpful to the jury in determining the victim's credibility and was therefore probative.

The jury had the opportunity to see and hear the prosecuting witness both upon direct and cross-examination. The defendants had ample opportunity to discount Dr. Scott's testimony both by cross-examination and presentation of their own expert witness had they chosen to do so. We find the trial court did not abuse its discretion by admitting the testimony under Rule 403.

As the testimony was admissible under Rule 702 and Rule 403, we find the trial court did not err in allowing Dr. Scott to

testify on the credibility of children in general who report sexual abuse.

Defendants also assign error to the admission of several statements made by Dr. Gordon on the basis that they enhanced the credibility of the prosecuting witness. In light of the prior discussion, we can deal with these assignments summarily. It was not error for the trial court to admit Dr. Gordon's testimony that mentally retarded children generally think in concrete terms and that it would be very difficult to teach them facts and details about sexual acts. Neither was it error for the court to admit her testimony that they would be unable to fantasize about sexual matters for the same reasons. Dr. Gordon's testimony was in regard to matters about which she was in a better position than the jury to have an opinion. Neither did the trial judge abuse his discretion in determining the probative value of the testimony was not substantially outweighed by other trial concerns under Rule 403.

VI

[6] On direct examination, Dr. Gordon explained that her profession accepted a body of literature regarding sexual abuse. Over defendants' objections, she was permitted during her testimony to mention what the literature said.

Defendants contend the information from the literature was irrelevant and inadmissible hearsay. The testimony complained of regards the ability of children to think abstractly and fantasize. Our review of the record reveals that defendants attempted to show the victim had imagined the alleged sexual abuse and told others it actually happened in order to escape her home situation. We find the testimony relevant and proceed to address whether it should have been excluded as hearsay.

Rule 803(18) provides an exception to the hearsay rule for learned treatises.

> *To the extent* called to the attention of an expert witness upon cross-examination or *relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of* history, *medicine, or other science* or art, *established as a reliable authority by the testimony or admission of the witness* or by other expert

testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. (Emphasis added.)

N.C. Gen. Stat. Sec. 8C-1, Rule 803(18). *See also State v. Wade*, 296 N.C. 454, 462, 251 S.E. 2d 407, 412 (1979).

From the information available to us in the record, the literature upon which Dr. Gordon relied would come within the Rule 803(18) exception to the hearsay rule as statements contained in periodicals established as reliable authority by the testimony of Dr. Gordon and relied upon by her in direct examination. The record indicates defendants not only failed to challenge the reliability of the sources upon which Dr. Gordon relied, but failed even to request Dr. Gordon to reveal those sources. We have previously indicated in *State v. Gary*, 78 N.C. App. 29, 337 S.E. 2d 70 (1985), *disc. rev. denied*, 316 N.C. 197, 341 S.E. 2d 586 (1986), that a party will have difficulty sustaining an objection on the basis of hearsay when they fail to challenge the basis of the expert's opinion admitted under Rule of Evidence 705. *Id.* at 38-39, 337 S.E. 2d at 77. By analogy, we hold that a party who fails to challenge the reliability of authority prima facie admissible under Rule 803(18) must overcome a presumption of admissibility on appeal. Defendants here have failed to overcome that presumption; Dr. Gordon's testimony regarding the basis for her opinions was properly admitted under Rule 803(18).

VII

[7] Defendants also contend that drawings and oral statements made by the prosecuting witness during her interview with Dr. Gordon are inadmissible hearsay and should have been excluded. The State argues both the drawings and the statements were admissible under N.C. Gen. Stat. Sec. 8C-1, Rule 803(4).

Hearsay statements made for the purpose of medical or psychological diagnosis are admissible as an exception to the hearsay rule. N.C. Gen. Stat. Sec. 8C-1, Rule 803(4); 1 H. Brandis, Brandis on North Carolina Evidence Sec. 161 at 635 (1982). Defendants contend neither the drawings nor the statements fall within this exception because Dr. Gordon interviewed the prosecuting witness in preparation for defendants' trial and not for the purpose of medical or psychological diagnosis.

The exceptions to the hearsay rule in Rule 803 embody instances in which out-of-court statements are generally inherently trustworthy because of the context in which they have arisen. *See* Advisory Committee Notes to N.C. Gen. Stat. Sec. 8C-1, Rule 803. Statements made for the purpose of diagnosis or treatment are inherently trustworthy and reliable because the patient is motivated to tell the truth in order to receive proper diagnosis or treatment. *State v. Smith*, 315 N.C. 76, 84, 337 S.E. 2d 833, 839 (1985).

In determining whether the trial court erred in admitting the hearsay evidence we must first determine whether Dr. Gordon's interview was made for the purpose of diagnosis or treatment. If so, we must then determine whether the drawings and statements made by the victim during the interview were reasonably pertinent to the purpose of the interview. *See State v. Aguallo*, 318 N.C. 590, 596, 350 S.E. 2d 76, 80 (1986).

Defendants contend the admitted purpose of Dr. Gordon's interview reveals it was conducted for use at defendants' trial rather than for diagnosis and treatment. Had the interview been conducted for the purpose of "preparing and presenting" the State's theory at trial, the disputed evidence would not be admissible under Rule 803(4). *State v. Stafford*, 317 N.C. 568, 574, 346 S.E. 2d 463, 467 (1986). Dr. Gordon testified she had been requested to interview the victim to determine whether she understood the difference between fact and fantasy and whether she could have been "coached" into saying she had been sexually assaulted.

Our Supreme Court has held that the assailant's identity in a child sexual abuse or child rape case is pertinent to diagnosis or treatment of the alleged child-victim. This is so because "[f]irst, a proper diagnosis of a child's psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home." *State v. Aguallo*, 318 N.C. 590, 597, 350 S.E. 2d 76, 80 (1986) (citations omitted). Whether a child could distinguish between fact and fantasy and whether a child could have easily been coached into alleging sexual assault are equally pertinent to the diagnosis and

treatment of a child who alleges sexual abuse. A child who cannot distinguish fact from fantasy would receive different counselling and psychological therapy than would a child who could make the distinction. The same is true between children who are easily taught and those who are not.

The content of an interview, though, is not controlling in the determination of whether it was a bona fide psychological examination. Had the defendants presented evidence that Dr. Gordon was requested by persons involved in the prosecution of this case to interview the victim or that her interview was far removed in time from the victim's initial diagnosis or close in time to the trial, their assignment of error would have more merit. *See, e.g., State v. Stafford*, 317 N.C. 568, 346 S.E. 2d 463 (1986). However, Dr. Gordon testified she was requested to interview the victim by personnel from the Child Mental Health Evaluation Program in order to answer a couple of specific questions. She indicated this request was made to her because her expertise in developmental disabilities would aid the diagnosis and treatment of the mentally retarded victim. Additionally, Dr. Gordon testified she interviewed the victim on 2 May 1985, three weeks after law enforcement officers were notified of the abuse and during the same period Dr. Scott from the Child Mental Health Education Program examined the victim. Additionally, the interview was conducted more than seven months before the defendants' trial.

Since Dr. Gordon's interview was conducted for the purpose of diagnosis and treatment, we must next consider whether the drawings and the statements made by the victim to Dr. Gordon were reasonably pertinent to the victim's diagnosis or treatment. *See State v. Aguallo*, 318 N.C. 590, 596, 350 S.E. 2d 76, 80 (1986); *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985).

Dr. Gordon testified that during the interview the victim identified male and female "private parts" on anatomical drawings and said she knew it wasn't right for other people to touch one's private parts or for her to touch other people's private parts. She was unable to describe sexual behavior such as sexual intercourse; eventually telling Dr. Gordon she thought it was similar to holding hands. Dr. Gordon also testified that she asked the victim to draw pictures of her family and that the victim expressed "a lot of fear" of her mother while drawing her picture

and that the victim became angry and upset when asked to draw a picture of her mother's boyfriend (defendant Brummitt).

Several statements were hearsay; however, we find they were reasonably pertinent to Dr. Gordon's interview and diagnosis. The doctor explained it was necessary for her to discern the victim's knowledge of sexual matters in order to determine whether she had the capacity to fantasize about them. It was also necessary that Dr. Gordon discover what the victim knew about members of her family and the defendants and how she felt about them in order to gain some insight on whether the defendant could easily be coached into relating events which were not true.

Since Dr. Gordon's interview with the victim was conducted for purposes of diagnosis and treatment and the hearsay statements were reasonably related to her diagnosis, we hold the trial court's admission of the statements was not in error. Defendants have not raised the issue of whether the probative value of the statements was substantially outweighed by their prejudicial value and should have been excluded under Rule 403; we decline to address it here.

VIII

[8] Defendants next contend the trial court erred in denying their motions for nonsuit regarding the second degree sex offense charges against them. They contend the evidence at trial was insufficient to support a finding that the victim was "mentally defective" under N.C. Gen. Stat. Sec. 14-27.1(1). A finding that the victim was mentally defective at the time of the alleged abuse is an element of both second degree sexual offenses each defendant faces.

N.C. Gen. Stat. Sec. 14-27.1(1) defines "mentally defective":

> "Mentally defective" means i) a victim who suffers from *mental retardation,* or ii) a victim who suffers from a mental disorder, either of which temporarily or permanently *renders the victim substantially incapable of* appraising the nature of his or her conduct, or of *resisting the act of vaginal intercourse or a sexual act,* or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act. (Emphasis added.)

Defendants do not argue the victim was not mentally retarded but contend there was insufficient evidence that her mental retardation temporarily or permanently rendered her "substantially incapable of appraising the nature of . . . her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or sexual act." We find the State's evidence was not sufficient to show the victim was substantially incapable of "appraising the nature of . . . her conduct" or "communicating unwillingness to submit to the act of vaginal intercourse or sexual act." However, we find the State did present sufficient evidence to support a finding that the victim was substantially incapable of "resisting the act of vaginal intercourse or sexual act."

If, in the light most favorable to the prosecution, any rational trier of fact could have found the essential element of substantial incapacity to resist the act of vaginal intercourse or sexual act beyond a reasonable doubt, we must uphold the trial court on this issue. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Brown*, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984).

Dr. Gordon testified upon cross-examination:

> Q. And do you have an opinion satisfactory to yourself whether [the victim] is substantially capable of appraising the nature of her conduct?
>
> A. I believe she is in certain circumstances, yes.
>
> Q. And do you also have an opinion satisfactory to yourself whether [the victim] would be substantially capable of resisting any act of—sexual act or an act of intercourse?
>
> A. Only under certain circumstances. Most children are taught to obey people in authority, like teachers and parents and so on, and when people in authority tell children to do something it's very difficult for them not to do it.
>
> Q. Do you also have an opinion satisfactory to yourself that [the victim] would be capable of communicating an unwillingness to submit to any type of sexual act of intercourse?
>
> A. She might be able to communicate an unwillingness, yes.

She also testified upon redirect examination:

> Q. One brief question on what—one of the questions Mr. Steinberg asked. Do you have an opinion whether [the victim] could communicate an unwillingness to submit to a sexual act? You indicated that she could say—say that she—
>
> A. She might say, "No, I don't want to do that." That's not to say that she wouldn't go ahead and do it simply because it was something that she was told to do.
>
> Q. So all that interrelates to who's doing the act?
>
> A. That's correct. If it's a person in authority, it's very difficult for children to—to resist that.
>
> Q. Okay. So there may be some words said indicating an unwillingness?
>
> A. Yes.

The victim's teacher also testified for the State. Upon cross-examination, she said she thought the victim was able to communicate to others what she wanted or did not want. In addition, the victim testified to her attempts to resist the sexual abuse:

> Q. Did you say anything to—to Richard and your mother about all of this while it was going on?
>
> A. Umm. I told them to stop.
>
> Q. Did they stop?
>
> A. No.
>
> Q. Did you try to fight them to make them stop?
>
> A. Umm.
>
> Q. Are you all right, [victim's name]?
>
> A. Yes.
>
> Q. Let me ask that question again. Did you fight with Richard or your mother to make them stop?
>
> A. I told them to let me up.
>
> Q. You told them to let you up?
>
> A. Yes.

Q. Did they let you up?

A. No.

Q. Did you try to hit them or anything to make them stop?

A. I told—

Q. Say that again whatever you said. Did you hit your mother?

A. I told her—I was fussing at them.

Q. You told—what was that now?

A. I was fussing at them.

Q. You fussed at them. Is that what you said?

A. Yes.

Q. But you did not hit them?

A. No.

* * *

Q. Did you want them to do that to you?

A. No.

Q. You fussed at them for doing it?

A. Yes.

We find that the element of "substantially incapable of . . . resisting the act of vaginal intercourse or sexual act" is not negated by the victim's ability to verbally protest or even to engage in some physical resistance of the abuse. The words "substantially incapable" show the Legislature's intent to include within the definition of "mentally defective" those persons who by reason of their mental retardation or disorder would give little or no physical resistance to a sexual act.

There was evidence at trial that the victim verbally protested the sexual abuse to which she was subjected and perhaps even attempted at times to physically resist. But there was also evidence that she complied with defendants' directions and submitted to their abuse. Viewed in the light most favorable to the

prosecution, we find the evidence sufficient to support the trial court's denial of defendants' motion for nonsuit.

IX

[9] The trial court admitted testimony from the prosecuting witness which tended to show that between 19 December 1984 and 15 April 1985, defendant Oliver had committed more criminal sexual acts against her daughter than those with which she was charged.

Evidence of the commission of a crime by the accused, other than the one with which she was charged, is generally not admissible. N.C. Rules of Evidence, N.C. Gen. Stat. Sec. 8C-1, Rule 404. An exception to this Rule is when the second crime tends to show an intent or plan or design on the part of the defendant to commit the crime with which she is charged. Rule 404(b). This exception was also part of North Carolina evidentiary law before the adoption of the current Rules of Evidence. *See State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Our courts have been very liberal in admitting evidence of similar sex crimes in construing this exception to the general rule. *State v. Williams*, 303 N.C. 507, 513, 279 S.E. 2d 592, 596 (1981). *See also State v. DeLeonardo*, 315 N.C. 762, 770, 340 S.E. 2d 350, 356 (1986).

In *DeLeonardo*, the defendant was charged with two counts of first degree sexual offense. The alleged victims were his two sons. The defendant contended the trial judge erred in admitting evidence relating to the defendant's sexual activity involving his minor daughter. The Supreme Court held the challenged evidence tended to establish a common plan or scheme on the part of the defendant to sexually abuse his children. Thus, the evidence was properly admitted under Rule 404(b). *Id.* at 771, 340 S.E. 2d at 357.

We find in the case *sub judice* that the testimony of the prosecuting witness tends to establish a common plan or scheme on the part of defendant Oliver to sexually abuse her child. Therefore, the testimony of the prosecuting witness regarding other acts of sexual abuse was properly admitted.

X

Defendants object to testimony by three of the State's witnesses concerning hearsay statements made by the victim. De-

fendants contend the statements were inadmissible because they were not corroborative of the testimony given by the child. We find it unnecessary to search the lengthy testimony of the prosecuting witness to determine whether the testimony was noncorroborative since the defendants failed to show how they were prejudiced by the admission of that testimony. N.C. Gen. Stat. Sec. 15A-1443(a).

XI

Defendants next contend they were denied the right to select a fair and impartial jury because the State did not disclose two witnesses to defendants before trial. The witnesses were the principal and guidance counselor at the high school of the victim, and they testified to her credibility. The State is not required to furnish defendants with a list of witnesses they will produce at trial. *State v. Smith*, 291 N.C. 505, 523-24, 231 S.E. 2d 663, 674-75 (1977). Defendants' contention is meritless.

XII

[10] Defendants next contend a particular question put to a character witness violated Rules 608 and 405 of the North Carolina Rules of Evidence: "Do you have an opinion satisfactory to yourself based on your talking with [the victim] and with—talking with other people about [the victim]—do you know her reputation for truthfulness in the school community?" Defendants contend this question should have been stricken because it restricts the witness's answer to the victim's reputation in the school community and because it asks the witness's opinion about the victim's veracity on the basis of their talks together. We find this question does not violate the Rules of Evidence.

Both opinion and reputation evidence are admissible as evidence pertaining to a witness's credibility under Rules 608 and 405. As set forth above, the victim testified for the State at the trial. Defendants do not contend the victim's character had not been attacked so as to preclude the testimony of the character witness under Rule 608(a)(2).

The latter part of the prosecutor's question asks the witness to testify to the victim's reputation in the school community. To be admissible, reputation evidence must be evidence as to the witness's reputation in "any community or society in which the

person has a well-known or established reputation." *State v. McEachern*, 283 N.C. 57, 67, 194 S.E. 2d 787, 793 (1973). Our courts have held evidence of one's reputation among a church community, *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262, *modified*, 428 U.S. 902 (1976), and among members of a military community, *State v. Walsh*, 19 N.C. App. 420, 199 S.E. 2d 38, *cert. denied*, 284 N.C. 258, 200 S.E. 2d 658 (1973), to be admissible. Our review of the transcript shows that the victim's school community was a community in which she was well known and of an established reputation.

The first part of the prosecution's question asks the witness for her opinion of the victim's character for truthfulness. There must be a proper foundation laid for the admission of opinion testimony as to another's character for truthfulness. That foundation is personal knowledge. *State v. Morrison*, 84 N.C. App. 41, 49, 351 S.E. 2d 810, 815 (1987). Defendants do not contend the State failed to lay a proper foundation for the opinion testimony but object only to the form of the question. Had defendants expected the witness's answer would have been different had the question been broader, they should have expanded the question upon cross-examination or, as provided in Rule 608(b), confronted the witness with specific instances of the victim's behavior tending to show she was untruthful. Defendants failed to do either. Their contention on both counts is meritless.

XIII

[11] Prior to trial, defendant Oliver moved for a bill of particulars. The State responded that the particular act alleged to have been committed by Oliver in violation of N.C. Gen. Stat. Sec. 14-27.5(a)(2) was "inserting her finger in the vagina" of the victim. Defendant Oliver contends there was insufficient evidence of penetration to support the conviction of second degree sexual offense under N.C. Gen. Stat. Sec. 14-27.5. *See* N.C. Gen. Stat. Sec. 14-27.1(4). This contention is meritless.

On direct examination, the victim responded that defendant Oliver had put her finger "where a tampon goes." Unlike the statement of the prosecuting witness in *State v. Hicks*, 319 N.C. 84, 90, 352 S.E. 2d 424, 427 (1987), this statement is not ambiguous. In *Hicks*, the prosecuting witness stated that the defendant had "put his penis in the back of me." The Supreme Court

held that, given the ambiguity of the statement in the absence of corroborative evidence (such as physiological or demonstrative evidence), the evidence at trial was insufficient to support a verdict of first degree sexual offense. *Id.* at 90, 352 S.E. 2d at 427. The victim had demonstrated to the satisfaction of the trial court that she understood that about which she testified. The trial court admitted the testimony and we do not find he abused his discretion by doing so.

Since the trial court was satisfied that the victim knew that a tampon was to be inserted into the vagina, the evidence is sufficient to prove penetration.

XIV

[12] Defendant Oliver also contends there was insufficient evidence to find her guilty for aiding and abetting the second degree rape of her child. This contention is also meritless.

There was sufficient evidence to find that defendant Oliver had the opportunity but failed to avert the rape of her child. The victim testified her mother was in bed with her during the time of the rape by defendant Brummitt and that her mother was also touching her during that time as well. "[A] mother may be found guilty of assault on a theory of aiding and abetting solely on the basis that she was present when the child was assaulted but failed to take reasonable steps to avert the assault." *State v. Walden*, 306 N.C. 466, 468, 293 S.E. 2d 780, 782 (1982).

In connection with this issue, defendant Oliver also complains of the court's jury instructions regarding aiding and abetting. In light of *Walden*, we find the court's instructions to be without error.

XV

Defendant Oliver next contends the trial court erred in its instructions to the jury concerning reasonable doubt and the definition of mentally defective. We find defendant's contentions to be without merit.

A

[13] Defendant contends the instruction concerning reasonable doubt was in error because it omitted the phrase "to be convinced of moral certainty."

A court's instruction on reasonable doubt is not in error though it omits the phrase "moral certainty" as long as the instruction reaches the substance of the defendant's request. *State v. Satterfield*, 27 N.C. App. 270, 273, 218 S.E. 2d 504, 506 (1975). *See also State v. Herring*, 201 N.C. 543, 551, 160 S.E. 891, 895 (1931).

The defendants requested an instruction which defined reasonable doubt as "to be convinced to a moral certainty." The court instructed the jury that

> [A] reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

In reviewing the court's instructions, we find the court conveyed to the jury the proper meaning of "reasonable doubt."

B

Defendant contends the trial court improperly defined "mentally defective" for the jury.

The court instructed the jury they should find the victim mentally defective if they found beyond a reasonable doubt the victim "had an IQ of 66 or less and as a result was rendered so substantially incapable of appraising the nature of her conduct or resisting the act of the penetration of a finger into her vagina or communicating unwillingness to submit to that sexual act . . . ." The court's instruction regarding second degree rape was substantially the same. Defendant contends the court's instruction implied that if the jury found the victim's IQ to be 66 or less, the victim was also substantially incapable of either appraising the nature of her conduct or resisting the act of penetration of a finger into her vagina or communicating unwillingness to submit to that sexual act. We find the contention meritless. The instruction is without error.

Affirmed as to both defendants.

Judge JOHNSON concurs.

Chief Judge HEDRICK concurs in the result.

DAVIDSON COUNTY v. CITY OF HIGH POINT

No. 8522SC1267

(Filed 7 April 1987)

1. **Counties § 5; Municipal Corporations § 30— sewage treatment facility of city located in county—test for determining controlling zoning**

In determining whether one governmental entity is subject to another's zoning laws, the governmental-proprietary function test, the power of eminent domain test, and the balancing of public interest test are used as a substitute for discerning legislative intent or as an aid in determining legislative intent; where the legislature has spoken, its statement controls and there is no need to resort to the tests.

2. **Counties § 5; Municipal Corporations §§ 4.4, 30— municipal sewage facility—located in county—not subject to county zoning**

The City of High Point did not need to comply with Davidson County zoning ordinances in upgrading a sewage treatment facility and providing sewage service to newly-annexed areas of the city where the sewage treatment facility was located in the county and outside the city's boundaries. Although N.C.G.S. § 153A-347 provides that a county's zoning regulations are applicable to the erection, construction, and use of buildings by the State and its political subdivisions, a sewage treatment facility is a complex systematic activity or undertaking greater in scope than a building. In the absence of specific statutory language, a restriction will not be engrafted on N.C.G.S. § 160A-312 which would curtail its broad grant of authority to operate public enterprises by subjecting a public enterprise to a host jurisdiction's zoning regulations. N.C.G.S. § 153A-340.

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 16 September 1985 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 2 June 1986.

Poyner & Spruill by J. Phil Carlton and Susanne F. Hayes for defendant appellant.

Womble, Carlyle, Sandridge and Rice by Roddey M. Ligon, Jr., Gusti W. Frankel; and Davidson County Attorney James F. Mock for plaintiff appellee.

COZORT, Judge.

The issue presented by this case is whether a city which owns a sewage treatment facility located in a county and outside the city's boundaries must comply with the county's zoning ordinances when upgrading that facility and providing sewage serv-

ice to newly annexed areas of the city. We hold that the city does not have to comply with the county's zoning requirements.

On 27 May 1983 the City of High Point applied to Davidson County for a special use permit in order to upgrade the Westside High Point Wastewater Treatment Facility (hereinafter "Westside Facility") which is owned by the City of High Point and located outside the city limits in Davidson County. A Davidson County zoning ordinance, adopted 27 July 1981, required High Point to obtain a special use permit from the County Board of Commissioners.

On 4 October 1983, the Davidson County Board of Commissioners issued an order granting a special use permit to High Point for the purpose of expanding the city's Westside Facility. The order subjected the permit to a number of conditions, one of which provides that:

> The provision of sewer service to the citizens of Davidson County shall be subject to final approval of the Davidson County Board of Commissioners.

On 5 April 1984, High Point annexed an eight-acre tract located in Davidson County, and on 7 February 1985 High Point, by satellite annexation, annexed a sixty-acre tract of land also located in Davidson County. High Point planned to provide sewer services to the annexed tracts and to use the Westside Facility in the providing of such services; however, High Point planned to make no effort to obtain prior approval from the Davidson County Board of Commissioners.

In a 20 September 1984 letter to the Mayor of High Point, the Chairman of the Davidson County Board of Commissioners stated, among other things:

> The Board of Commissioners remains convinced that annexation by High Point into Davidson County will create unique problems to the county and the city. From our perspective, we have questions concerning increased population density; school attendance; school population; school bus transportation; school capital outlay; provision of public water, fire protection and emergency ambulance service. These are items that can severely impact our county budget.

When the Board of Commissioners reached the decision to issue the special use permit one of the determining factors influencing the decision was the need to upgrade the plant to improve its negative impact to the streams and properties of Davidson County. The Commissioners feel that increased wastewater flow should await the completion of the new plant which will more adequately handle the additional capacity.

Please be advised that annexation of the Ridge property with subsequent provision of sewer would be, in our opinion, a clear violation of the agreed upon conditions of Special Use Permit #2-83-S. Failure to adhere to the conditions set forth in the special use permit can only result in the revocation of the permit. We would hope this situation can be resolved without resorting to such a drastic step. We stand ready to discuss this matter at any time.

On 22 March 1985 Davidson County instituted this action by filing a declaratory judgment action wherein it alleged, among other things:

(a) the defendant's annexation and plans for the provision of sewer services to Davidson County residents using the Westside Wastewater Treatment Facility without the approval of the Davidson County Board of Commissioners violates the conditions upon which the special use permit was issued, and (b) the potential increased population density in the annexed area and the County's responsibility for school capital outlay, provision of public water, public health, social services, emergency ambulance service, adequate road and connector road access in addition to other services to residents of the annexed areas will severely impact on the Davidson County budget, as well as on its exercise of land use controls within its governmental jurisdiction.

Davidson County asked the court to (1) issue an order declaring the 4 October 1983 special use permit issued to High Point valid and binding; and (2) enter an injunction prohibiting High Point (a) from annexing any areas located in Davidson County for which use of the Westside Facility will be made to provide sewer service to the annexed areas, and (b) from using the Westside Facility in providing sewer service to residents of Davidson County in the

annexed areas without prior approval of the Davidson County Board of Commissioners.

On 6 June 1985 High Point filed its answer asserting that the condition of the special use permit (quoted on page 27 above), requiring the Davidson County Board of Commissioner's approval before providing sewer services to the citizens of Davidson County, is outside of the scope of authority of Davidson County to impose. High Point also alleged that this condition is invalid because it does not promote the health, safety, morals, or general welfare of the citizens of Davidson County.

On 22 July 1985 Davidson County moved for summary judgment, which was granted by Superior Court Judge C. Preston Cornelius on 18 September 1985. Judge Cornelius enjoined High Point

> from using the Westside Sewage Treatment Plant to provide sewer services to citizens of Davidson County, whether within or without the City of High Point, without first obtaining the approval of the Davidson County Board of Commissioners.

High Point appealed.

High Point contends that G.S. § 160A-312 gives it the absolute authority, without limitation or restriction, to upgrade its sewage treatment facility and use that facility to provide sewer service to residents of newly annexed areas. G.S. § 160A-312 provides, in pertinent part, that:

> A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate *any* public enterprise *outside its corporate limits*, within reasonable limitations, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.
>
> A city shall have full authority to protect and regulate any public enterprise system belonging to it by adequate and reasonable rules and regulations. [Emphasis added.]

Davidson County relies on G.S. §§ 153A-340 and 153A-347 to support its position that High Point's Westside Facility is subject to Davidson County's zoning regulations. G.S. § 153A-340 allows a county to regulate and restrict, among other things, "(5) [t]he location and use of buildings, structures, and land for trade, industry, residence, or other purposes, except farming." G.S. § 153A-347 provides: "Each provision of this Part is applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions."

In *Duke Power Co. v. City of High Point*, 69 N.C. App. 335, 336, 317 S.E. 2d 699, 700 (1984), we interpreted the first sentence of G.S. § 160A-312 "as granting the City absolute authority, without limitation or restriction, to extend electric service to its city-owned facilities" outside the city limits; and, in *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 383, 317 S.E. 2d 701, 704, *disc. rev. denied*, 312 N.C. 82, 321 S.E. 2d 895 (1984), we interpreted the first sentence of G.S. § 160A-312 "as granting the City absolute authority without limitation or restriction to provide electrical service for the benefit of the City itself or its citizens, *i.e.*, those who live within the corporate limits." We further held that the second sentence of G.S. § 160A-312, providing that a city-proposed extension of electrical service outside its corporate limits must be "within reasonable limitations," has no application "where the City proposes to extend service in order to serve itself." *Duke Power v. City of High Point*, 69 N.C. App. at 337, 317 S.E. 2d at 700.

High Point reasons that if a city has, under G.S. § 160A-312, the absolute authority, without limitation or restriction, to extend a public enterprise outside the city limits in order to serve city-owned facilities, that it also has absolute authority, without limitation or restriction, to use a public enterprise located outside the city limits to serve its citizens since, according to G.S. § 160A-312, a city may use a public enterprise "to furnish services to the city *and its citizens*." G.S. § 160A-312 (emphasis added). Davidson County argues, however, that *Duke Power Co. v. High Point*, 69 N.C. App. 335, 317 S.E. 2d 699 (1984), does not control this case since no interpretation of zoning laws was involved there. Rather, Duke Power Co. merely challenged High Point's authority to extend electric lines outside city limits in

order to serve a police academy, a garbage pulverizer plant, and a pollution control plant, all operated and owned by the City.

[1] The first task in deciding whether the county's zoning regulations apply to the city is to determine what test to apply to resolve the issue. While this specific issue is one of first impression in our State, other jurisdictions have faced similar issues, employed a variety of tests, and come up with varying results. *See* Annot., 59 A.L.R. 3d 1244 (1974); Williams, American Land Planning Law, § 81.18, pp. 503-04 (1985); McQuillin Mun. Corp. § 25.15 (3rd ed. 1983); Note: *Municipal Power to Regulate Building Construction and Land Use by Other State Agencies*, 49 Minn. L. Rev. 284 (1964).

One test commonly used to determine whether one governmental entity is subject to another's zoning laws is the "governmental-proprietary function test." Originally used "by the courts in order to impose common law liability on municipal corporations for the negligence of their agents, servants or officers in the execution of corporate [proprietary] powers and duties" by drawing a distinction between governmental and proprietary functions of governmental units, *Askew v. Kopp*, 330 S.W. 2d 882, 890 (Mo. 1960), the test has been adopted by some courts to exempt governmental units from zoning restrictions when acting in their governmental capacity. *See* Annot., *supra; Williams, supra*; McQuillin, *supra*; Note, *supra.*

A second test commonly used to resolve zoning conflicts is the "power of eminent domain test." If the governmental unit seeking immunity from another jurisdiction's zoning laws has been given the *right* to condemn the land for the purpose which it seeks to use the land, then it is generally held that, by virtue of its power of eminent domain, it need not comply with the host jurisdiction's zoning ordinances. *See* Annot., *supra; Williams, supra*; McQuillin, *supra*; Note, *supra.*

A third test now being adopted by a few courts to determine whether one local government unit is subject to another's zoning ordinances is the "balancing of public interests test." This test permits the courts to make "a case by case determination which takes into consideration all of the factors which may properly influence the result." *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc.*, 322 So. 2d 571, 578 (Fla. Dist. Ct. App.

2d 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976). Properly applied, the balancing of public interest test seeks to determine the legislative intent on the zoning immunity issue

> from a consideration of many factors, . . . includ[ing] the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests . . . .

Rutgers, State Univ. v. Piluso, 60 N.J. 142, 152-53, 286 A. 2d 697, 702 (1972).

Our analysis of the cases and authorities cited reveals that these tests are used as a substitute for discerning legislative intent or as an aid in determining legislative intent. Where the Legislature has spoken on the subject, however, its statement controls and there is no need to resort to the previously mentioned tests. *See City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc.*, 322 So. 2d at 578.

Our research reveals no cases in North Carolina that have adopted either the balancing of public interest test or the power of eminent domain test. Only one case in North Carolina has applied the governmental-proprietary function test to resolve a zoning dispute: *McKinney v. City of High Point*, 237 N.C. 66, 74 S.E. 2d 440 (1953).

In *McKinney*, the court was called upon to decide whether High Point was subject to its own zoning ordinances in the erection, maintenance, and operation of a water tank in an area zoned, not for water tanks, but as a "Residence 'A' District." *Id.* at 69, 74 S.E. 2d at 444. The court applied the governmental-proprietary function test and held that "the erection of this water tank was done by the defendant in its governmental capacity and that its zoning ordinances did not apply." *Id.* at 75, 74 S.E. 2d at 446. In so holding, the court reviewed a number of decisions from other jurisdictions which had applied the governmental-proprietary function test, as well as other factors, to zoning related issues.

Without discussing whether a water tank is a "building" within the meaning of then G.S. § 160-181.1, now G.S. § 160A-392, the court noted the statute's recent enactment. The court, how-

ever, found the statute inapplicable since the water tank was under construction when the statute was enacted:

> The General Assembly of North Carolina at its 1951 session enacted Pub. L. Ch. 1203, codified in G.S. as Sec. 160-181.1, which made zoning regulations applicable to the erection and construction of buildings by the State and its political subdivisions. The act became of full force and effect after its ratification 14 April, 1951. This water tank was in construction when this act was passed.

237 N.C. at 74, 74 S.E. 2d at 446. Thus, there was no need for the court to determine whether a water tank was a "building" within the meaning of G.S. § 160-181.1 since the court had found the statute inapplicable because the water tank was already under construction.

The court's citing of G.S. § 160-181.1, however, denotes a recognition that the application of a judicial test, such as the governmental-proprietary function test, is unnecessary when the Legislature has already expressed its intent on the subject. This reasoning is consistent with the views expressed in McQuillin:

> Since the acts of a municipal corporation in any capacity outside its own boundaries ordinarily are based upon express statutory authorization, the applicability of foreign zoning laws to the municipal corporation usually depends upon the statute empowering it to act in the foreign territory, construed in the light of the statute authorizing the pertinent zoning laws.

McQuillin Mun. Corp. § 25.15 (3rd ed. 1983). Thus, the proper test to be applied is legislative intent, and the three tests previously discussed are to be used only as aids, if needed, in discerning legislative intent.

[2] In discerning the Legislature's intent, we begin our inquiry with an analysis of the statutory framework within which the issue must be decided. The Legislature (1) has given municipalities and counties nearly identical powers to enact zoning regulations, (2) made those zoning ordinances applicable to the erection, construction, and use of "buildings" by the State and its political subdivisions, and (3) has given municipalities and counties nearly identical powers to carry on "public enterprises." Therefore, our

statutory analysis includes an examination of zoning and public enterprise statutes as they relate to both cities and counties, as well as other statutes which give both cities and counties similar powers. It is permissible in the interpretation of statutes to consider other statutes related to the particular subject, or to the statutes under construction. *Abernethy v. Board of Comm'rs*, 169 N.C. 631, 86 S.E. 577 (1915).

High Point maintains that G.S. § 160A-312, which provides, in part, that cities have the authority to acquire, construct, establish, enlarge, improve and operate a "public enterprise," gives it the absolute authority, without limitation or restriction, to upgrade its Westside Facility and use that facility to provide sewer service to residents of the newly annexed areas. Davidson County, on the other hand, contends that G.S. § 153A-340, which authorizes counties of this State to enact zoning ordinances, and G.S. § 153A-347, which makes those ordinances applicable to "buildings," erected, constructed, and used by the State and its political subdivisions, empowers the county to enact its special use permit and subject the City of High Point to its restrictions. The county maintains that although the State grants cities authority to acquire, improve, and operate public enterprises, it does not allow cities to avoid compliance with the zoning of the jurisdiction in which the public enterprise is located.

G.S. § 160A-312 gives cities authority to own and operate public enterprises, both within and outside their borders:

> § 160A-312. *Authority to operate public enterprises.*
>
> A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.
>
> A city shall have full authority to protect and regulate any public enterprise system belonging to it by adequate and reasonable rules and regulations.

G.S. § 153A-275, likewise gives counties authority to own and operate public enterprises inside and outside their borders:

§ 153A-275. *Authority to operate public enterprises.*

A county may acquire, lease as lessor or lessee, construct, establish, enlarge, improve, extend, maintain, own, operate, and contract for the operation of public enterprises in order to furnish services to the county and its citizens. A county may acquire, construct, establish, enlarge, improve, maintain, own, and operate outside its borders any public enterprise.

A county may by ordinance or resolution adopt adequate and reasonable rules and regulations to protect and regulate a public enterprise belonging to or operated by it.

G.S. § 160A-311 defines the public enterprises a city may conduct within the meaning of G.S. § 160A-312:

§ 160A-311. *Public enterprise defined.*

As used in this Article, the term "public enterprise" includes:

(1) Electric power generation, transmission, and distribution systems;

(2) Water supply and distribution systems;

(3) Sewage collection and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems;

(4) Gas production, storage, transmission, and distribution systems, where systems shall also include the purchase and/or lease of natural gas fields and natural gas reserves, the purchase of natural gas supplies, and the surveying, drilling and any other activities related to the exploration for natural gas, whether within the State or without;

(5) Public transportation systems;

(6) Solid waste collection and disposal systems and facilities;

(7) Cable television systems;

(8) Off-street parking facilities and systems;

(9) Airports.

G.S. § 153A-274 defines the public enterprises a county may conduct, within the meaning of G.S. § 153A-275:

§ 153A-274. *Public enterprise defined.*

As used in this Article, "public enterprise" includes:

(1) Water supply and distribution systems,

(2) Sewage collection and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems,

(3) Solid waste collection and disposal systems and facilities,

(4) Airports,

(5) Off-street parking facilities,

(6) Public transportation systems.

The sewage treatment plant in question here is, by definition, a "public enterprise."

G.S. § 153A-340 grants to counties the power to zone and issue special use permits:

§ 153A-340. *Grant of power.*

For the purpose of promoting health, safety, morals, or the general welfare, a county may regulate and restrict

(1) The height, number of stories, and size of buildings and other structures,

(2) The percentage of lots that may be occupied,

(3) The size of yards, courts, and other open spaces,

(4) The density of population, and

(5) The location and use of buildings, structures, and land for trade, industry, residence, or other purposes, except farming.

> These regulations may not affect bona fide farms, but any use of farm property for nonfarm purposes is subject to the regulations. The regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained. The regulations may also provide that the board of adjustment or the board of commissioners may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits.

G.S. § 160A-381 contains a nearly identical grant of power to cities, except that farming is not exempt from zoning.

G.S. § 153A-347 for counties and G.S. § 160A-392 for cities provide that a county's and city's zoning regulations are "applicable to the erection, construction, and use of *buildings* by the State of North Carolina and its political subdivisions." [Emphasis added.] Counties and cities are political subdivisions of the State. G.S. § 153A-11; G.S. § 160A-11. It is G.S. § 153A-347 upon which Davidson County most heavily relies in support of its argument that High Point is subject to its zoning regulations.

We believe the County's reliance on that statute is misplaced because we find the sewage facility in question was not intended by the Legislature to be included in the "buildings" subject to the County's zoning regulations.

Neither Article 18, Part 3 of Chapter 153A, in which § 347 is found, nor Article 19, Part 3 of Chapter 160A, in which § 392 is found, define "building," and our research reveals no cases which have construed these statutes or their predecessors, G.S. § 153-266.21, enacted in 1959, and G.S. § 160-181.1, enacted in 1951, respectively.

Normally, general statutes do not apply to the State unless the State is specifically mentioned therein. *Yancey v. Highway and Public Works Comm'n*, 222 N.C. 106, 22 S.E. 2d 256 (1942). City and county zoning regulations usually do not apply to the State or any of its agencies or political subdivisions unless the

Legislature has clearly manifested a contrary intent. McQuillin Mun. Corp. § 25.15 (3rd ed. 1983).

"In construing a statute, its 'words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise.' *State v. Wiggins*, 272 N.C. 147, 153, 158 S.E. 2d 37, 42 (1967), *cert. denied*, 390 U.S. 1028, 20 L.Ed. 2d 285, 88 S.Ct. 1418 (1968)." *State v. Felts*, 79 N.C. App. 205, 208, 339 S.E. 2d 99, 101, *disc. rev. denied*, 316 N.C. 555, 344 S.E. 2d 11 (1986). Likewise, "[w]hen a statute's language is clear and unambiguous, it must be given effect, and its clear meaning may not be evaded by the courts under the guise of construction." *Id.* at 208-09, 339 S.E. 2d at 101 (citations omitted). A "building," in its ordinary sense, is defined as a "[s]tructure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like. A structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof." Black's Law Dictionary 176 (5th ed. 1979).

The phrase "public enterprise" is not specifically defined in either Article 15, Part 1 of Chapter 153A, in which G.S. § 153A-274 is found, or in Article 16, Part 1 of Chapter 160A, in which G.S. § 160A-311 is found. Giving the word "enterprise," its common ordinary meaning, "enterprise" denotes a complex undertaking or activity, a system. Webster's Third New International Dictionary 757 (1971) defines "enterprise" as a "venture, undertaking, project; . . . an undertaking that is difficult, complicated . . .; any systematic purposeful activity or type of activity . . . ." It follows, therefore, that a public enterprise is any complex systematic purposeful activity or type of activity that is conducted for a public purpose or benefit. A city or county has the authority to conduct a public enterprise if it is listed in G.S. § 160A-311 and G.S. § 153A-274, respectively. Thus, a public enterprise denotes a complex systematic activity or undertaking—something greater in scope than a building.

That a public enterprise denotes something greater in scope than a building is supported by the nature and description of those things defined as a public enterprise in G.S. § 160A-311 and G.S. § 153A-274. With the exception of an airport, which is given its own definition in G.S. § 63-1(8), the words "system" and/or "facility" are used to help describe each particular public enter-

prise. "System" is defined as "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." Webster's Third New International Dictionary 2322 (1971). "Facility" is defined as "something . . . that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." *Id.* at 812-13. Thus, we hold that the word "building" as used in G.S. § 153A-374 does not encompass a "public enterprise."

G.S. § 153A-340, the county zoning enabling statute, upon which Davidson County also relies, is a general grant of zoning power, and does not specifically give counties the authority to regulate another jurisdiction's public enterprises located within its borders. G.S. § 153A-340 gives the county the authority to "regulate and restrict . . . (5) [t]he location and use of buildings, structures, and land for trade, industry, residence, or other purposes, except farming." [Emphasis added.] While our research reveals no North Carolina appellate decision which construes the underlined language, at least one other jurisdiction has construed identical language in a case with an issue similar to the one we have here. In *Askew v. Kopp*, 330 S.W. 2d 882 (Mo. 1960), the court was called upon to decide whether a city in providing for a sewage disposal plant was subject to county zoning regulations. The court construed a zoning enabling statute with language identical to the above-underlined portion of G.S. § 153A-340. Applying the *ejusdem generis* (of the same kind, class, or nature) canon of statutory construction, and prior precedent, the court held

> that the words "trade, industry, residence or other purposes" contained in § 64.090, which are words of general inclusion, relate to private property uses and should not be construed to include the state or its political subdivisions, in such a manner as to encroach upon its sovereign power of eminent domain. The state and its agencies are not within the purview of a statute unless an intention to include them is clearly manifest, especially where prerogatives, rights, titles or interests of the state would be divested or diminished. *Hayes v. City of Kansas City*, 362 Mo. 368, 241 S.W. 2d 888.

Askew v. Kopp, 330 S.W. 2d at 888. We find this rule of statutory construction applicable and the court's reasoning in *Askew v. Kopp* persuasive. Accordingly, we hold that the phrase, "trade, in-

dustry, residence, or *other purposes*" as used in G.S. § 153A-340 relates to private property and the phrase "other purposes" is not to be broadened to include the use of land by a municipality for a public enterprise listed in G.S. § 160A-311. This holding is consistent with (1) the legal principle that city and county zoning regulations usually do not apply to the State or any of its agencies or political subdivisions unless the Legislature has clearly manifested a contrary intent, McQuillin Mun. Corp. § 25.15 (3rd ed. 1983); and (2) our own rule of statutory construction that "when particular and specific words or acts, the subject of a statute, are followed by general words, the latter must as a rule be confined to acts and things of the same kind." *State v. Craig*, 176 N.C. 740, 744, 97 S.E. 400, 401 (1918).

That the Legislature recognizes a distinction between a public enterprise and a "building," as that word is used in G.S. § 153A-347, is also supported by our eminent domain statutes: G.S. § 40A-1, *et seq.* In our eminent domain statutes the Legislature recognizes a distinction between a public enterprise and a building by setting them off in separate subsections of the same section. G.S. § 40A-3(b) provides that:

> For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, *either inside or outside its boundaries*, for the following purposes.
>
> * * * *
>
> (2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.
>
> * * * *
>
> (6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

Thus, while it appears that municipalities or counties may exercise the power of eminent domain for the construction, enlarging or improving of those buildings listed in G.S. § 40A-3(b)(6), the power of eminent domain does not include locating a particular

building in violation of another jurisdiction's zoning laws by virtue of the fact that through G.S. § 153A-347 and G.S. § 160A-392 the Legislature has made zoning regulations with regard to buildings specifically applicable to political subdivisions. The same zoning restrictions do not apply, however, to the construction, establishment, enlargement, improvement, maintenance, ownership or operation of a *public enterprise* unless the Legislature has clearly manifested a contrary intent. McQuillin, *supra.* The Legislature has not manifested an intent to subject one political subdivision's public enterprise to another political subdivision's zoning restrictions when the public enterprise is located within the territory of the zoning political subdivision. Had our Legislature intended to subject a public enterprise to the host jurisdiction's zoning regulations, it could have easily inserted the term "public enterprise" into G.S. § 153-347 and G.S. § 160A-392. This it did not do.

By the broad language the Legislature has used in G.S. § 160A-312 and G.S. § 153A-275 it has evidenced its intent to give cities and counties comprehensive authority to own and operate public enterprises outside their boundaries with respect to the service of themselves and their citizens. We have construed the broad language of G.S. § 160A-312 as granting a city the absolute authority, without limitation or restriction, to establish and conduct a public enterprise for itself and its citizens. *See Duke Power Co. v. City of High Point*, 69 N.C. App. 335, 317 S.E. 2d 699; *Duke Power Co. v. High Point*, 69 N.C. App. 378, 317 S.E. 2d 701. In the absence of specific statutory language we will not engraft upon G.S. § 160-312 a restriction which would curtail its broad grant of authority by subjecting a public enterprise to a host jurisdiction's zoning regulations.

Our Legislature has not seen fit to curtail the broad grant of authority it has given cities and counties in G.S. §§ 160A-312 and 153A-275, respectively, by blanketly subjecting public enterprises to a host jurisdiction's zoning regulations. Rather, when in its judgment it has deemed it necessary to restrict one political subdivision's ability to establish a particular type of public enterprise in another political subdivision the Legislature has enacted a statute to accomplish that specific goal. *See* G.S. § 153A-292 which limits a county's establishment and operation of solid waste

collection and disposal facilities to areas *outside of incorporated cities and towns.*

Accordingly, we hold that High Point need not comply with Davidson County's zoning ordinances in upgrading its Westside Facility and providing sewage service to newly annexed areas of High Point with that facility.

The order of the trial court is

Reversed and the cause is remanded to the trial court for entry of judgment for defendant.

Chief Judge HEDRICK and Judge EAGLES concur.

HENRY F. TWITTY AND WILLIAM TWITTY v. STATE OF NORTH CAROLINA AND HEMAN R. CLARK, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY

No. 869SC949

(Filed 7 April 1987)

1. **Nuisance §§ 1, 8— PCBs landfill disposal facility—no nuisance**

There was no evidence to support plaintiffs' recovery on the basis of nuisance, public or private, for the State's operation of a PCBs landfill disposal facility.

2. **Eminent Domain §§ 2, 13— PCBs landfill disposal facility—diminution in market value—no taking**

In an inverse condemnation action where plaintiffs alleged a taking of their property as a result of the State's construction and operation of a PCBs landfill disposal facility, plaintiffs were required to show that the location and the operation of the facility combined to constitute an actual interference with the use and enjoyment of their property, and a showing only of diminution in market value was insufficient to show a taking.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 17 June 1986 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 4 February 1987.

This is an inverse condemnation action for an alleged taking of plaintiffs' property as a result of the State's construction and operation of a landfill disposal facility for the storage of soil con-

taminated by the toxic chemical polychlorinated biphenyls (referred to hereinafter as PCBs). This action was dismissed as to defendant Heman R. Clark, former Secretary of the North Carolina Department of Crime Control and Public Safety.

Plaintiffs own 775 acres of land in Warren County consisting of six separate tracts, three of which are owned individually by plaintiff Henry Twitty and three of which are owned jointly by both plaintiffs. In their complaint, plaintiffs allege that they have been deprived of their property without just compensation in violation of Article 1, Section 19, of the North Carolina Constitution and the Fourteenth Amendment of the United States Constitution suffering damage by the diminution in value of their property in the amount of $786,940.00.

Defendant moved for summary judgment and alternatively for an order removing the action to an adjacent county on the ground that defendant could not obtain a fair and impartial jury trial in Warren County. The trial court denied defendant's motion for summary judgment but removed the action to Franklin County. On 14 January 1986 defendant filed a motion requesting the trial court to determine all issues except compensation and to direct the preparation of a court-ordered survey. The issues are:

> (1) Has there been a taking of any of plaintiffs' lands, or any interest therein, for which plaintiffs, or either of them, may be entitled to recover just compensation?
>
> (2) If so, when did the taking(s) occur?
>
> (3) Has there been a taking with regard to all of the lots (tracts) or only as to some of said lots (tracts)?
>
> (4) If the Court determines there has been a taking, which of the six lots (tracts) should be joined or considered together for the purpose of assessing damages, if any, in this action?
>
> (5) What interest, if any, has been taken in plaintiffs' lands?

The essential facts, as found by the trial court, are as follows:

During the summer of 1978 many miles of roadside in North Carolina were saturated by a liquid waste containing PCBs. Fed-

eral EPA regulations required disposal of PCBs either in a well-designed, monitored landfill or by incineration. There were no EPA approved incinerators in the United States at that time. As an alternative to landfill disposal, the State considered the possibility of in-place treatment. However, the EPA recommended against in-place treatment and the State began to look for a suitable landfill site. In the face of severe opposition by both local government officials and state residents, the State formally petitioned the EPA to reconsider its position against in-place treatment. On 4 June 1979 the EPA formally denied the State's petition and the State resumed its search for a landfill site.

The State acquired a 142.3-acre tract of land in Warren County. In accordance with federal regulations, the State applied for and received EPA approval of the site. In late 1979, a draft Environmental Impact Statement (EIS) was filed covering the Warren County site. A final EIS was filed in November 1980, but use of the site was delayed by litigation, including an earlier action instituted by the plaintiffs. On 21 May 1982 the EPA issued a "Finding of No Significant Impact." The landfill was constructed by the State and storage of the contaminated soil was completed in the latter part of 1982.

Prior to construction of the disposal facility, the State conveyed the 142.3-acre tract to Warren County, with the exception of 19.317 acres where the landfill facility is actually situated. The State also retained an access easement, a stream monitoring easement and a temporary construction easement. The county's use of the tract surrounding the 19.317 acres was restricted so that the tract would serve as a buffer zone between the landfill and adjacent properties. All residential, commercial, industrial, institutional, recreational, agricultural or any other temporary, periodic, regular or occasional human use or occupancy were prohibited unless approved by the Governor and Council of State as being consistent with the use of the property as a buffer zone.

In addition, restrictive covenants limit the State's use of the 19.317-acre landfill facility. The covenants and restrictions provide that no other hazardous waste as defined in G.S. 130-166.16(4) and no radioactive waste or materials as defined in G.S. 104E-5(9a) and G.S. 104E-5(14) may be placed upon or disposed of or stored on the landfill parcel. Further, except for necessary activities

relating to safe storage and disposal of the EPA approved PCBs material, no other hazardous or radioactive waste management activities may be engaged in on the 19.317-acre tract.

The plaintiffs, Henry and William Twitty, are father and son. Their 775-acre tract of land is adjacent to Richneck Creek and adjoins the north and northeastern portions of the buffer zone conveyed to Warren County. The six tracts of land are identified as Lot 19 (62.5 acres), Lot 20 (356.5 acres), Lot 21 (176 acres), Lot 22 (21 acres), Lot 23 (87 acres) and Lot 24 (54 acres) on Warren County Tax Map E-7. Lots 19, 21 and 22 are owned individually by Henry Twitty. Lots 20, 23 and 24 are owned jointly by the plaintiffs. Only Lots 19, 21 and 24 actually border Richneck Creek.The six tracts are contiguous and have traditionally been utilized as one operating farm for agricultural purposes. The trial court found both "physical unity" and "unity of use" with respect to these six tracts.

The area surrounding the landfill facility is basically rural and agricultural in nature. Warrenton is located three and one-half miles to the north and is the major shopping and labor market in the County. The area is somewhat isolated due to its agricultural use and lack of development. The tract upon which the landfill is located has no road frontage and access to the facility is by an easement extending approximately 1,675 feet to State Road 1604.

The disposal facility is situated on the crest of a hill. U.S. Geological Survey Flood Records establish that the one hundred year flood elevation is not more than eight feet above the average water level in Richneck Creek and its tributaries. The facility is approximately 80 feet above the level of Richneck Creek and is not subject to flooding. Based upon ground water elevation measurements made on 23 and 24 May 1985, there is a separation of 19 feet between the elevation of ground water beneath the landfill site and the PCBs waste material stored there. Surface water infiltration is minimized and surface water runoff is maximized by the topographic position of the landfill facility, the clay subsoils and side slopes of the ridge on which the landfill facility is located. Recharge of ground water resulting from surface water infiltration and percolation is low and there are no significant fluctuations in the water table elevations beneath the ridge oc-

cupied by the disposal facility. There are also seven natural draws located in a radial pattern around the fill site which enhance surface water drainage away from the facility.

The disposal facility was constructed in accordance with plans and specifications approved by the EPA. Artificial and compacted clay liners were constructed below the landfill and along side slopes to prevent hydraulic connection between ground water and the contaminated soil. Artificial and compacted clay liners were also placed on top of the landfill to prevent infiltration of rain and surface water. The compacted clay liner is five feet thick along the side slopes and bottom of the facility. The compacted clay liner is two feet thick over the top of the facility. In addition, there are ten mil thick artificial liners encasing the disposal facility which overlap and are sealed at the seams. The entire encased storage facility is buried two feet below the surface. There is one foot of bridging and one foot of topsoil separating the encased facility from the surface. Constructed within the facility is a leachate collection system designed to remove free liquids from the stored PCBs waste and a leachate detection system designed to indicate the presence of any leachate that might migrate through the encasing liners.

Since October 1982 the State has continuously monitored and inspected the facility on a monthly basis in accordance with EPA permit conditions and approved sampling methodologies. Monitoring activities are the responsibility of the Solid and Hazardous Waste Management Branch, Environmental Health Section, Division of Health Services, North Carolina Department of Human Resources. The fact that no free liquids have ever been discovered in the leachate detection system indicates that there has been no migration of free liquids through the liners which completely encase the contaminated waste material. All free liquids which have been removed from the leachate collection system have resulted from accumulated rainfall in the facility prior to completion of the landfill cap. After completion of the cap, the facility was completely encased by artificial and compacted clay liners which prevent water infiltration. The free liquids removed from the leachate collection system are treated in the on-site treatment works which passes the effluent through a sand filter and an activated carbon filter. The effluent is then discharged into an on-site surface impoundment lined with compacted clay.

After on-site treatment, no detectable levels of PCBs have ever been measured in the free liquids in the surface impoundment.

In addition to monthly monitoring of the leachate systems, samples of ground water, surface water and surface water sediments have been analyzed every six months. The sampling points designated by the EPA include Richneck Creek which is the boundary between plaintiffs' land and the county owned buffer zone. Analyses conducted on all samplings taken from the leachate systems, ground water, surface water and surface water sediments from October 1982 to the present reveal no harmful or dangerous releases of PCBs contaminants from the disposal facility. Further, no ground water, surface water or surface water sediments draining into Richneck Creek from the landfill site or the buffer zone have been contaminated by any detectable levels of PCBs. The site is periodically inspected and maintained to insure security and to prevent outside hazardous conditions from developing. A six-foot chain link fence topped with barbed wire surrounds the entire facility to prevent unauthorized persons and animals from entering the site.

In addition to the above-described findings of fact the trial court also found that prior to acquisition of the land in Warren County, local citizens and government officials voiced severe opposition to the disposal of PCBs contaminated soil in their county. During the hearings held prior to land purchase, State officials received notice that the proposed location would have a chilling effect on county land values especially with respect to property in close proximity to the site itself. Further, the trial court found that plaintiffs introduced evidence establishing that the value of their land has been substantially diminished as a result of the PCBs disposal facility owned and operated by the State.

Based on these findings of fact the trial court made the following conclusions of law:

The State's conduct in maintaining and operating the PCBs disposal facility is not unreasonable and constitutes a proper exercise of the police authority of the State to promote the health, safety and welfare of the people of North Carolina.

So long as the physical integrity of the PCBs disposal facility remains intact, there is no realistic likelihood of environmental

contamination to any adjoining land or any land in the vicinity of the facility. The evidence conclusively establishes that there have been no harmful or dangerous releases of PCBs buried in the disposal facility. Richneck Creek and its tributaries have not been contaminated by any detectable, harmful or dangerous levels of PCBs. There has been no actual physical invasion of plaintiffs' land by the PCBs stored in the disposal facility.

Notwithstanding the foregoing conclusions of law, the trial court concluded that plaintiffs have demonstrated "an actual interference with or disturbance of their property rights resulting in injuries which are not merely consequential or incidental in nature." The State's location and operation of the disposal facility has resulted in a "substantial non-trespassory invasion of plaintiffs' interest in the private use and enjoyment of their property in that it has resulted in a material diminution in value of plaintiffs' lands." The interference with plaintiffs' rights to use and enjoy their property caused by the State's operation of this facility requires that the public bear the cost of the diminution in value to that property.

The operation of the PCBs disposal facility constitutes a public nuisance permanent in nature resulting in a diminution in value of plaintiffs' lands and plaintiffs are entitled to just compensation. The date of taking is 5 October 1982 when the State began operation of the facility. All six parcels should be treated as one tract for the purpose of assessing damages. The plaintiffs shall not be required to obtain a survey of their property.

From judgment decreeing that the disposal facility constitutes a public nuisance permanent in nature and a taking of plaintiffs' property for the purpose of an easement accommodating the continued operation of the disposal facility and ordering that plaintiffs are entitled to just compensation for the material diminution in market value of their property, defendant appeals.

Banzet, Banzet & Thompson by Lewis A. Thompson, III and Bobby W. Rogers for plaintiff-appellees.

Attorney General Thornburg by Assistant Attorney General Roy A. Giles, Jr. for the State.

EAGLES, Judge.

I

[1] The State first assigns error to the trial court's conclusion of law that the State's operation of the PCBs disposal facility "constitutes a public nuisance permanent in nature that has resulted in a diminution in value of plaintiffs' lands for which plaintiffs are entitled to just compensation."

On appeal, the conclusions of law drawn by the trial judge are fully reviewable and may be reversed if erroneous. *Hofler v. Hill and Hofler v. Hill*, 311 N.C. 325, 317 S.E. 2d 670 (1984); *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980). A conclusion of law must be based upon the facts found by the trial judge. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977).

"A public nuisance exists wherever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights. Such nuisances always arise out of unlawful acts." *State v. Everhardt*, 203 N.C. 610, 617, 166 S.E. 738, 741-42 (1932). A public nuisance affects the local community generally and its maintenance constitutes an offense against the State. *Id.*

> To constitute a public nuisance, the condition of things must be such as injuriously affects the community at large, and not merely one or even a very few individuals . . . . Whatever tends to endanger life, or generate disease, and affect the health of the community; whatever shocks the public morals and sense of decency; whatever shocks the religious feelings of the community, or tends to its discomfort—is generally, at common law, a public nuisance, and a crime.

203 N.C. at 618, 166 S.E. at 742.

There are no findings of fact here that support a conclusion of law that the State's operation of the PCBs disposal facility constitutes a public nuisance permanent in nature. Indeed, there is no evidence upon which findings could have been made. This is not an action to abate a public nuisance. *See generally* 9 Strongs, N.C. Index 3d, *Nuisance* Section 10 (1977). Plaintiffs' cause of action is for inverse condemnation.

Plaintiffs argue that the type of nuisance to which they have been subjected is more properly classified as a private nuisance *per accidens* and the trial court's conclusion of a public nuisance rather than private nuisance is not prejudicial error. Plaintiffs rely on 5 Am. Jur. 2d, *Appeal and Error* Section 785 (1962): "The decision of the trial court should be affirmed if it is correct, although the lower court relied upon a wrong ground or gave a wrong reason, or the judgment or order complained of contains inaccurate or erroneous declarations of law. The judgment or order need not be sustained for the same reason or for all the reasons relied upon by the trial court."

The trial court's judgment here cannot be sustained on the basis of private nuisance *per accidens*. An intentional private nuisance *per accidens* is one which constitutes a nuisance by reason of its location or the manner in which it is constructed, maintained or operated. *Watts v. Manufacturing Company*, 256 N.C. 611, 124 S.E. 2d 809 (1962); *Morgan v. Oil Co.*, 238 N.C. 185, 77 S.E. 2d 682 (1953). "It is the *unreasonable* operation and maintenance that produces the nuisance." 256 N.C. at 617, 124 S.E. 2d at 813 (emphasis in original). In addition, for liability to exist, there must be a "*substantial* non-trespassory invasion of another's interest in the private use and enjoyment of property." *Id.* (emphasis in original). Therefore, in order to make out a *prima facie* case plaintiff must show (1) that defendant's maintenance and operation of the enterprise is *unreasonable* and (2) that because of the unreasonable conduct there has been *substantial* injury and loss of value to plaintiff's property. *Id.* at 618, 124 S.E. 2d at 814. The essential inquiry in any nuisance action is whether the defendant's conduct is unreasonable. *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E. 2d 787 (1977).

There is no finding or conclusion of law that the State's conduct in maintaining and operating the PCBs disposal facility was unreasonable. On the contrary, the trial court concluded that the State's conduct "in maintaining and operating the PCBs disposal facility upon the lands in question is not unreasonable and constitutes a proper exercise of the police authority of the State to promote the health, safety and welfare of the people of North Carolina." We have reviewed this conclusion of law in light of the evidence presented and the trial court's findings of fact and have

determined that it is supported by both the evidence and the findings of fact.

There is no evidence to support plaintiffs' recovery on the basis of nuisance, public or private. The trial court's conclusion of law number six, that the State's operation of the PCBs disposal facility constitutes a public nuisance is unsupported by its findings of fact, is in direct conflict with its conclusions of law, is erroneous and must be set aside.

II

[2] The State assigns error to the trial court's conclusion of law that there has been a "taking" of plaintiffs' lands, or an interest therein, for which plaintiffs are entitled to recover just compensation.

The trial court concluded that "plaintiffs have shown an actual interference with or disturbance of their property rights resulting in injuries which are not merely consequential or incidental in nature," and that the State's location and operation of the disposal facility have "resulted in a substantial non-trespassory invasion of plaintiffs' interest in the private use and enjoyment of their property in that it has resulted in a material diminution in value of plaintiffs' lands." Based on its findings and conclusions, the trial court ordered and decreed that:

> The interest taken in plaintiffs' land is an easement for the accommodation of the continued operation of the PCBs disposal facility on the site in question. This interest is maximally defined as the right of the State to continue to operate the PCBs disposal facility so long as the physical integrity of the facility remains intact, and it is operated in such a manner as to prevent any physical invasion of plaintiffs' lands by the PCBs stored therein.

This portion of defendant's appeal addresses the validity of plaintiffs' claim for inverse condemnation. In essence, plaintiffs contend that the State's placement of the PCBs disposal facility in close proximity to plaintiffs' land constitutes a governmental taking for which they are entitled to just compensation under the Fourteenth Amendment to the United States Constitution and under Article 1, Section 19 of the Constitution of North Carolina.

The State, on the other hand, contends that there has been no governmental taking of any kind. We believe that resolution of this issue depends upon our interpretation of *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982).

In *Long* the Supreme Court held that for a "taking" to occur "there need only be a substantial interference with elemental rights growing out of the ownership of the property." *Id.* at 199, 293 S.E. 2d at 109; *see Stillings v. Winston-Salem*, 311 N.C. 689, 692, 319 S.E. 2d 233, 235 (1984). Actual occupation of the land, dispossession of the landowner or even a physical touching of the land is not necessary under the modern construction of the "taking" requirement. 306 N.C. at 198-99, 293 S.E. 2d at 109. Examples of "takings" cited by the court include odors from a nearby trash dump, *Hines v. City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913); odors from an adjacent sewage disposal plant, *Gray v. City of High Point*, 203 N.C. 756, 166 S.E. 911 (1932); and odors, smoke, ashes, rats, mosquitoes and other insects from a sewage disposal plant, *Ivester v. City of Winston-Salem*, 215 N.C. 1, 1 S.E. 2d 88 (1939). As explained by the Court "[t]hough no physical touching was present in those cases, the wafted smoke, odors, dust, or ashes over the plaintiff's land warranted compensation for a 'taking.'" 306 N.C. at 199, 293 S.E. 2d at 109.

"In order to recover for inverse condemnation, a plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental." *Id.* The Court in *Long* added that a "taking" has been defined as "entering upon private property for more than a momentary period, and under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Id.* (quoting *Penn v. Coastal Corp.*, 231 N.C. 481, 57 S.E. 2d 817 (1950)).

Long involved landowners alleging damage caused by low flying aircraft in taking off from and landing in the city owned and operated airport. As the Court pointed out, flights at altitudes that would in no way damage or interfere with the use and enjoyment of land have been held not to constitute a taking or damaging of the property: "[I]t has been recognized that there must be a

substantial interference with the use and enjoyment of the land, not merely incidental damage, before a taking results." *Id.* at 200, 293 S.E. 2d at 110. "A compensable taking of a flight or avigation easement does not occur until overflights constitute a *material* interference with the use and enjoyment of property, such that there is substantial diminution in fair market value." *Id.* (quoting *Cochran v. City of Charlotte*, 53 N.C. App. 390, 397, 281 S.E. 2d 179, 186 (1981) (emphasis original), *cert. denied*, 304 N.C. 725, 288 S.E. 2d 380 (1982)).

Not every act or happening injurious to a landowner, his property or his use of his property is compensable. 306 N.C. at 199, 293 S.E. 2d at 109. The public importance and social utility of activity must be balanced against the inconvenience, annoyance and aggravation to those in its vicinity. *Id.* at 200, 293 S.E. 2d at 110. "This balancing of interests necessarily and properly places a heavy burden on the landowner." *Id.* The balancing of interests is established by "the requirement that in order to recover for the interference with one's property, the owner must establish not merely an occasional trespass or nuisance, but an interference substantial enough to reduce the market value of his property." *Id.* With regard to the issue of compensability (entitlement to recover), "the fair and logical rule is that a landowner is entitled to compensation if the interference caused by the flights is sufficiently direct, sufficiently peculiar and of sufficient magnitude to support a conclusion that a taking has occurred." *Id.* at 201, 293 S.E. 2d at 110. The test is whether the value of plaintiff's property has been substantially impaired by a "taking." *Id.* Property means not only the thing possessed but also "the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use." *Id.* (quoting *Hildebrand v. Telegraph Co.*, 219 N.C. 402, 408, 14 S.E. 2d 252, 256 (1941)). "Thus, where a person's right to possess, use, enjoy or dispose of his land is substantially impaired, his property has been taken, and he is entitled to recover to the extent of the diminution in his property's value." *Id.* at 201, 293 S.E. 2d at 110-11. The measure of damages is the difference in the fair market value of the property immediately before and immediately after the taking. *Id.* at 201, 293 S.E. 2d at 111.

Long requires "an actual interference with or disturbance of property rights resulting in injuries which are not merely conse-

quential or incidental." *Id.* at 199, 293 S.E. 2d at 109. While the term "actual interference" does not require actual physical invasion, actual dispossession or even a physical touching, the term does require that plaintiffs show interference with the use and enjoyment of their property substantial enough to reduce market value. Here the trial court concluded that the plaintiffs had shown actual interference with the private use and enjoyment of their property by showing that the State's location of the landfill "resulted in a material diminution in value of plaintiffs' lands." In essence, the trial court concluded that there was a "taking" because the market value of plaintiffs' lands had been diminished. However, we believe that the trial court skipped an important step and its conclusion is based on a misapprehension of the law.

A reduction in market value, standing alone, does not constitute an "actual interference with or disturbance of" plaintiffs' use and enjoyment of their property. *Long* requires an actual interference (the cause) substantial enough to reduce the market value of plaintiffs' property (the effect). Plaintiffs here have proved the effect—a material diminution in value—but not the cause. They have not demonstrated any actual interference with the use and enjoyment of their property caused by the State's operation of the PCBs disposal facility. Plaintiffs' complain about placement and assert that their damages stem from location of the PCB landfill. However, placement or location is not enough; if it were, then the plaintiffs in *Long* could have demonstrated a right to recover for inverse condemnation without ever having to show that aircraft overflights actually interfered with their use and enjoyment of their property, so long as they could prove reduced market value due solely to the location of and their proximity to the city owned and operated airport. Reading *Long* as a whole, we believe it requires that plaintiffs show more than a diminution in market value. Plaintiffs must show that the location and the operation of the PCBs disposal facility combined to constitute an "actual interference" with the use and enjoyment of their property.

The trial court concluded that the State's conduct in maintaining and operating the disposal facility upon the lands in question is not unreasonable and constitutes a proper exercise of the police authority of the State and that so long as the physical integrity of the State-owned facility remains intact, there is no

realistic likelihood of environmental contamination to any lands either adjoining or in the vicinity of the facility as a result of the PCBs stored in the facility. Additionally, the trial court concluded that the evidence conclusively establishes that there have been no harmful or dangerous releases of PCBs buried in the disposal facility. No ground water, surface water or surface water sediments draining or being discharged into Richneck Creek or its tributaries from the PCBs disposal site, or the county-owned buffer zone which completely surrounds the disposal site, have been contaminated by any detectable or harmful or dangerous levels of PCBs buried in the site. There has been no actual physical invasion of plaintiffs' lands by the PCBs stored in the facility. These conclusions of law are supported by the trial court's findings of fact and the evidence in the record; as a result, they are conclusive and binding on appeal. Plaintiffs have failed to show any actual interference with the use and enjoyment of their property caused by the State's operation of the PCBs disposal facility which is "sufficiently direct, sufficiently peculiar and of sufficient magnitude to support a conclusion that a taking has occurred." 306 N.C. at 201, 293 S.E. 2d at 110.

CONCLUSION

Plaintiffs are not entitled to recover on the ground of nuisance, public or private, and the trial court's conclusions that the State's operation of the PCBs disposal facility constitutes a public nuisance is erroneous and must be set aside. Further, plaintiffs have failed to demonstrate that they are entitled to recover based upon inverse condemnation. The trial court's conclusions that plaintiffs "have shown an actual interference with or disturbance of their property rights resulting in injuries which are not merely consequential or incidental in nature" and that "the State's location and operation of the PCBs disposal facility on the site in question have resulted in a substantial non-trespassory invasion of plaintiffs' interest in the private use and enjoyment of their property in that it has resulted in a material diminution in value of plaintiffs' lands" are not supported by the findings of fact or the evidence of record. Having resolved the first two issues in favor of the State, it is unnecessary to address the State's remaining arguments and assignments of error. The judgment of the trial court is

Reversed.

Judges WELLS and GREENE concur.

STATE OF NORTH CAROLINA v. GERALD WALTER JONES AND WILLIE KATE JONES

No. 8628SC583

(Filed 7 April 1987)

1. **Constitutional Law § 30; Bills of Discovery § 6— records of telephone calls not disclosed to defendant—not examined in camera or sealed—error**

In a prosecution arising from the purchase of hydromorphone from defendants in which an electronic device had been placed on defendant Willie Kate Jones' telephone to record the exact time and duration of each call and the telephone number of either outgoing calls only or of all calls, the trial court erred by failing to examine the records *in camera* or seal them for appellate review.

2. **Criminal Law § 54; Constitutional Law § 30— further access to drugs for testing by defense expert—denied—no error**

The trial court did not err in a prosecution arising from the sale of hydromorphone by finding that the defense had violated a court order which allowed access to the seized substances for the purpose of conducting an independent analysis and in denying the defense further access to the drugs where defendants had two months between the time of the order and the date of the trial to engage a chemist and set up a meeting; the confusion around the test could probably have been avoided if defendants had not sat so long on their right to have an expert examine the drugs; there was ample evidence that defendants' chemist never intended to conduct an independent analysis of the drugs and did not avail himself of the opportunity to do so that evening; and defendants' theory of the inaccuracy of the State's test was adequately brought out during cross-examination. N.C.G.S. § 15A-903.

3. **Criminal Law § 109— SBI chemist misappropriating drugs—defendants' motion to dismiss and for instructions—denied**

In a prosecution arising from the sale of Dilaudid where it was discovered a few months before trial that an SBI chemist had taken some $300,000 worth of drugs from the SBI lab where the drugs in this case were tested, the court did not err by failing to dismiss the indictments because the State refused to grant the chemist immunity in order to testify, and by failing to instruct the jury that the testimony of a missing or absent witness who is peculiarly within the State's power to produce would have been unfavorable to the State's case.

4. **Narcotics § 4— trafficking in hydromorphone—no measurement of actual percentage of hydromorphone—evidence sufficient**

Defendant was properly convicted of trafficking in hydromorphone on the basis of possession and attempted sale of 816 tablets of Dilaudid weighing a total of 73.5 grams where there was no measurement of the percentage of hydromorphone present in the tablets. The legislature's use of "opium or opium derivative or any mixture containing such substance" in N.C.G.S. § 90-95(h)(4) establishes that the total weight of the dosage units is sufficient to charge a suspect with trafficking.

5. **Grand Jury § 2— challenge to sufficiency of evidence—evidence secret**

The trial judge did not err in a prosecution arising from the sale of Dilaudid tablets by denying defendant Gerald Jones' motion to dismiss one of the sale and delivery indictments because the lab report was not prepared until after the grand jury convened. The nature and character of the evidence presented to the grand jury is secret. N.C.G.S. § 15A-623(e).

APPEAL by defendants from *Stephens, Judge*. Judgment entered 10 September 1985 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 2 February 1987.

On 7 May 1985, defendant Gerald Walter Jones was indicted on charges of six counts of sale and delivery of hydromorphone (Dilaudid), six counts of possession with intent to sell and deliver, and one count of conspiracy to sell and deliver. He was also charged with trafficking in hydromorphone by sale, by delivery, by possession and by transporting; in addition, he was charged with conspiracy to traffic in hydromorphone. Each of the five trafficking charges alleged an amount in excess of 28 grams.

Gerald Jones' mother, Willie Kate Jones, was indicted on that same date on five counts of sale and delivery of hydromorphone, five counts of possession with intent to sell and deliver, one count of conspiracy to sell and deliver, and one count of conspiracy to traffic. Both defendants pleaded not guilty, and their cases were joined for trial.

Testimony by the State's principal witness, Special Agent Rick Whisenhunt of the S.B.I., tended to show the following events and circumstances. In October 1984, Whisenhunt began an undercover operation to try to purchase drugs from defendants. On 18 October 1984, Whisenhunt—using the name "Jack"—telephoned Willie Kate Jones at her residence and asked if she had any Dilaudid for sale. She did, and over the next couple of days, they made arrangements by telephone for the sale. On 20 Octo-

ber, Whisenhunt came to Willie Kate's house on Montford Avenue where she introduced him to a woman named Paula. Whisenhunt gave Paula $400 for 20 tablets of Dilaudid and also gave Willie Kate some money for acting as middleman.

The next day, Willie Kate called "Jack" on his undercover telephone line to arrange a sale of 200 tablets; Agent Ramsey, who was monitoring the line, had Whisenhunt call her back. On 22 October, Whisenhunt went to Willie Kate's house and purchased 50 Dilaudid for $1,250 and 20 milliliters of liquid Dilaudid for $350. On 18 November, pursuant to a series of calls back and forth between them, Willie Kate and Whisenhunt agreed to meet at a gas station; the agent bought 75 Dilaudid for $1,875. On 11 December, Whisenhunt again met Willie Kate in order to buy some Dilaudid. This time, however, the meeting took place in a parking lot, and she was accompanied by her son, defendant Gerald Jones, and her stepson Mark. Whisenhunt gave Gerald $4,000 in return for 100 Dilaudid.

After more negotiations by telephone, Whisenhunt met Willie Kate and Gerald at the K-Mart Plaza on 19 December. Willie Kate suggested that, since her granddaughter was in the car, that the actual transaction take place somewhere else. Whisenhunt met Gerald in the men's room of the Burger King and bought 25 pills for $1,125. Back at the car, Willie Kate indicated that she had more drugs to sell.

On 11 January, after another round of negotiations by telephone, Gerald went by the house where Willie Kate, and now Gerald, lived. The exchange took place between Whisenhunt and Gerald, although Willie Kate was present. Whisenhunt bought 25 tablets for $1,125. The three discussed future transactions.

Whisenhunt called the Jones residence a number of times over the next few weeks. A bigger deal of perhaps 300 pills was discussed, but Gerald had only 165 on hand. On 2 March, the two men met in the parking lot of a restaurant in Asheville where Whisenhunt purchased 25 Dilaudid for $1,125. On 21 March, after another meeting had fallen through, Whisenhunt met Gerald and bought 100 pills from him for $4,000. Gerald mentioned that he could get together 500 pills and that Whisenhunt should start arranging financing.

Over the next few weeks, Agent Whisenhunt spoke with Willie Kate and Gerald about the deal for 500 pills. Gerald discovered that his connection could bring 1,000 pills to Asheville, and negotiations began on the price. On 19 April, Whisenhunt called Willie Kate and told her he had to talk to her but not on the phone. She invited him to the house, where he showed her $30,000 which he had gotten from his "money man" to put on the deal. Willie Kate said she could only wait by the phone for the connection to call—she had no way of contacting him. However, the connection did not deliver the pills until a week later. Whisenhunt asked to be shown the pills; he said he wanted to make sure the Joneses were going to hold up their end of the bargain. On Tuesday, 30 April, the agent went to the Jones residence where Gerald showed him two brown pharmaceutical bottles containing the pills. Whisenhunt was caught off guard; he had not expected all 1,000 pills to be ready at that time. He told Gerald it would take some time to find his "money man"; Gerald agreed to hold 900 pills for him—Gerald needed money and planned to sell 100 himself. On Wednesday, 1 May, Gerald and Whisenhunt agreed to meet in the parking lot of the Waffle House at noon. The two met as planned, and when the agent gave the signal, Gerald was arrested by surveillance officers. Whisenhunt seized the two brown pharmaceutical bottles, which were eventually found to contain only 816 Dilaudid.

Senior Special Agent Ramsey of the S.B.I. testified that he had received 16 calls directed to Agent Whisenhunt. He gave exact dates and times for each call. Ralph Johanson, an S.B.I. chemist, testified for the State that the substances submitted to him in this case were Dilaudid tablets containing hydromorphone, and that the bulk weight of the tablets seized on 1 May was 73.5 grams. On cross-examination, Agent Johanson stated that he had not analyzed the tablets using mass spectrometry; he used an ultraviolet scan and two thin-layer chromatography tests. Agent Johanson testified that, although none of the tests he had performed was sufficient alone to establish the presence of hydromorphone, he believed that the collective results were sufficient to establish the presence of hydromorphone.

Neither defendant presented evidence. The trial court dismissed the charges of trafficking by sale and trafficking by delivery against defendant Gerald Jones. The jury returned a verdict

of guilty against Mr. Jones on five counts of sale and delivery of hydromorphone, five counts of possession with intent to sell and deliver, conspiracy to traffic, and trafficking by transporting and trafficking by possessing, all in an amount in excess of 28 grams. Defendant Willie Kate Jones was found guilty on all counts as charged.

From judgments of imprisonment entered on the verdicts, defendants appealed.

Attorney General Lacy H. Thornburg, by John H. Watters, Assistant Attorney General, and Ellen B. Scouten, Assistant Attorney General, for the State.

Bob Warren for defendant-appellant Gerald Walter Jones.

Appellate Defender Malcolm Ray Hunter, Jr., by David W. Dorey, Assistant Appellate Defender, for defendant-appellant Willie Kate Jones.

WELLS, Judge.

Willie Kate Jones' Appeal

[1] Defendant's first assignment of error concerns an electronic device placed surreptitiously on her telephone. According to uncontroverted testimony received on *voir dire*, this device—called a PEN register—records the exact time and duration of each incoming and outgoing call; however, there is some contradictory evidence as to whether the telephone number of the other party is recorded for all calls or only for outgoing calls. Before trial, defendant made a motion for discovery of "mechanical or electronic recordings" as provided in N.C. Gen. Stat. § 15A-903(d); Superior Court Judge Charles Lamm later ordered the prosecution to comply with defendant's discovery requests. Despite the motion and subsequent order, the State did not disclose any evidence of the PEN register until well into the trial. Agent Whisenhunt had already testified that no surreptitious recordings existed; Agent Ramsey admitted the use of a PEN register when co-counsel questioned him using the phrase "electronic surveillance" rather than "recording device." During the subsequent *voir dire*, Agent Whisenhunt again took the stand. He testified that the register was installed on 25 February 1985 pursuant to a

court order based on his own affidavit prepared with the help of Mr. Brown, the district attorney prosecuting defendant's case. The register was removed approximately a week after defendant's arrest.

Defendant requested the witness to show him a copy of the printout, but an objection by the State was sustained. Defendant then made a motion to dismiss on the ground that the State had violated the order of discovery since the PEN register printout constituted a "recording" under the meaning of G.S. § 15A-903(d). Counsel argued that the register was directly relevant to his defense of trying to discredit the agents' testimony. The trial court denied the motion and held—without ever examining the printout—that no relevant evidence had been withheld and that defendant's rights had not been violated. The court added that defendants could call witnesses or present any records to the jury; defendants had asked to subpoena the appropriate people at Southern Bell. The following exchange then took place between the trial court and both defendants' counsel:

> MR. WARREN: Well, Your Honor, as a clarification of that Order, would you allow defense counsel time to talk with the witness before the counsel makes the decision to put that witness on the stand? Obviously, if we don't have the information—The reason, Your Honor, I want to point out why it might be relevant is this records the exact times. Throughout this over a hundred pages of discovery material that we've had, the agents have recorded exact times, 5:03, 5:45. If, in fact, the PIN [sic] Registers show something different or if, in fact, they show that there were calls coming in at times there were no calls—
>
> COURT: Yes, sir, that was my main concern that I addressed to Mr. Brown a few moments ago, and I will permit you to call any witness and ask that witness any question you choose to, inspect any records that that witness has to establish before this jury what you wish to choose to establish.
>
> MR. WARREN: But, Your Honor, the basic due process right to elect a defense is then totally destroyed because if I don't know what the witness is going to say, the first rule in the world that you don't want to do is call a witness that you don't know what they are going to say.

COURT: Well, then, that will be a tactical decision on your part, counsel.

MR. BELSER: Why won't the Court examine it in camera, like *State v. Hardy* requires you to do?

COURT: *State versus Hardy* requires me to examine those items of evidence that I deem that could have some exculpatory value and be materially favorable to the defendant. I have heard no evidence at all that these items fit into that category; therefore, your request is denied.

MR. BELSER: And we can't give you that evidence.

COURT: I don't have to explain to you why I will or will not do anything, but I am giving you the courtesy of telling you that. Your request is denied.

MR. BELSER: Could we call that witness in a pretrial discovery motion?

COURT: No, sir, you may not. That request is denied.

MR. BELSER: I would move for a mistrial based on violation of the discovery statutes, Your Honor.

MR. WARREN: I would, also.

COURT: Your request is denied. Anything further?

Defendant contends that the trial court erred in refusing to grant her motion for mistrial based on the State's failure to inform defendant about the existence of the PEN register despite defendant's discovery motion and the subsequent court order enforcing that motion. Defendant also cites as error the court's refusal to examine *in camera* the PEN records and seal them for appellate review. We address the latter issue first.

In *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963), the United States Supreme Court held that due process requires the prosecution to disclose, upon request, evidence which is material and favorable to the defense. The Supreme Court further refined this holding in *U.S. v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976). The Court found that due process is concerned with the effect which suppressed evidence might have on the outcome of the trial rather than with aiding

the defense in preparation of its case; therefore, the court reasoned, the prosecutor is constitutionally required to reveal the evidence only at trial. Such a requirement is conditioned upon a specific request by the defense. *Id.*

In the case at bar, the State contends that, as the trial court noted, the defense has made no showing that the evidence is material and favorable and thus defendant is not entitled to disclosure of the evidence. However, in *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), our Supreme Court held that,

> . . . since realistically a defendant cannot know if a statement of a material State's witness covering the matters testified to at trial would be material and favorable to his defense, *Brady* and *Agurs* required the judge to, at a minimum, order an *in camera* inspection and make appropriate findings of fact. As an additional measure, if the judge, after the *in camera* examination, rules against the defendant on his motion, the judge should order the sealed statement placed in the record for appellate review.

In the case at bar, the trial court erred in failing to examine the records *in camera* or seal them for our inspection. Such error leaves us unable to determine whether the court should have allowed defendant access to the records; we have before us neither findings of fact by the court nor the records themselves. Nor was the evidence otherwise received into the record. The trial court's refusal to allow defendant to interview the Southern Bell witness before putting him on the stand effectively precluded presentation of his testimony. Since the evidence could well be exculpatory, we are unable to say as a matter of law that the court's error was harmless beyond a reasonable doubt. We therefore grant defendant Willie Kate Jones a new trial as to the charge of conspiracy to traffic in hydromorphone, which is the only conviction based on the two agents' testimony as to telephone conversations with the defendant during the time in which the PEN register was operating.

[2] Of defendant's remaining assignments of error, we need address only one: her contention that the court committed reversible error in finding that the defense violated the court order which allowed them access to the seized substances for the pur-

pose of conducting an independent analysis and in denying the defense further access to the drugs. We disagree.

Two months before the date of the trial, Judge Lamm ordered that defendant Gerald Jones be allowed to hire an expert to test the drugs in this case, as long as the proposed procedure for obtaining and returning the drugs be submitted for approval. Defendant Willie Kate Jones was later allowed to join in this motion. Defendants made no arrangements to have an expert review the substances until 3 September, the date the case was called for trial. The court ordered that defendants' chemist be allowed to conduct tests of the drugs late that afternoon. The S.B.I. chemist and Agent Whisenhunt as well as two other officers met defendants' chemist, William Butler, at the S.B.I. lab a little after 6:00 p.m. Mr. Butler performed no tests on the drugs. During a hearing on the matter the next day, the State presented evidence that defendants' chemist had no intention of actually performing an independent analysis but merely wanted to track the tests used by the S.B.I. chemist in order to later impeach his testimony. The State's witness testified that, although the resources of the lab were available to Mr. Butler, he performed no tests, choosing instead to spend his time questioning the State's chemist about his methods. The defense contended that Mr. Butler performed no tests because he was waiting for Mr. Warren, defendant Gerald Jones' attorney, to arrive with some substances necessary for the test, and that when Mr. Warren arrived, the agents had already left with the evidence. The trial court entered an order finding that Judge Lamm's order "contemplated an entirely separate and independent analysis of the controlled substances" and that defendants sought only to review the procedures followed by the S.B.I. chemist, thus failing to comply with the order. The court further noted that counsel did not act in a timely manner in obtaining the services of a chemist and thus might have avoided the resulting confusion. For these reasons the court denied defendants' request to allow their expert further access to the drugs. The court, however, was incorrect in the interpretation of Judge Lamm's order; it in no way specified that only an independent analysis would be allowed. We therefore consider whether the court was otherwise justified in denying defendants further access to the seized substances.

N.C. Gen. Stat. § 15A-903(e) provides in part that:

> . . . Upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

This provision replaced G.S. § 15-155.4 and § 15-155.5 which, although similar to the current statute, were more liberal in that they also allowed the defendant to interview prospective expert witnesses. *See* Official Commentary to G.S. § 15A-903. Since G.S. § 15A-903(e) does not on its face specify what type of testing procedures must be allowed, we must resolve the question by reference to due process principles. *See State v. McDougald*, 38 N.C. App. 244, 248 S.E. 2d 72 (1978), *appeal dismissed*, 296 N.C. 413, 251 S.E. 2d 472 (1979). As our own courts have not yet addressed the question of to what extent due process requires that defendants be allowed to conduct tests on seized substances, we turn for guidance to decisions of the federal courts which address the issue.

Although the Federal Rule of Criminal Procedure which provides for access to tangible objects is more general than our rule, *see* F. R. Crim. P. 16(a)(1)(c), courts considering the question of access have held that fundamental fairness and due process require that a defendant be allowed the opportunity "to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion." *Barnard v. Henderson*, 514 F. 2d 744 (5th Cir. 1975). This fundamental requirement has been held in drug cases to be essentially the right of the accused to have an independent chemical analysis performed upon the seized evidence. *See, e.g., U.S. v. Pollock*, 402 F. Supp. 1310 (D. Mass. 1975); *U.S. v. Acarino*, 270 F. Supp. 526 (E.D.N.Y. 1967).

In *U.S. v. Gaultney*, 606 F. 2d 540 (5th Cir. 1979), the prosecution refused to provide defendants' chemist with a primary reference sample, of which the quality and purity are known, of the type drug to be tested. The court held that the district court's refusal to order the government to provide defendants with the sample did not place "an unreasonable restriction on the defend-

ant's right to an independent analysis so as to deny him due process of law." *Id.* In reaching its decision, the Court noted that defendants' chemist made no attempt to otherwise examine the evidence to determine whether he could make an independent analysis of its contents.

Relying on this line of cases, we hold that due process requires that defendants have the opportunity to have an independent chemical analysis performed upon the seized substances. Here, the court's refusal to allow defendants further access to the drugs did not violate that due process requirement. Defendants had two months between the time of the order and the date of the trial to engage a chemist and set up a meeting; as the trial court noted, the confusion probably could have been avoided had defendants not sat so long upon their right to have an expert examine the drugs. There was ample evidence that defendants' chemist never intended to conduct an independent analysis of the drugs, and he certainly did not avail himself of the opportunity to do so that evening. In addition, defendants' theory of the inaccuracy of the State's tests was adequately brought out during cross-examination. We therefore find no error in the trial court's refusal to allow defendants' chemist further access to the seized substances.

Defendant Gerald Jones' Appeal

At the outset, we note that defendant Gerald Jones limited his argument at trial to the theory that the State could not prove beyond a reasonable doubt that the drugs were in fact hydromorphone or that, alternatively, the drugs were not present in the amounts necessary for conviction. In his opening argument to the jury, counsel for defendant stated as follows:

> Now, during the trial, certain evidence will be presented by the State to show possession and sale of drugs, the drug Dilaudid allegedly containing hydromorphone. Gerald Jones, the defendant, is not contesting most of those facts. We have even offered to stipulate to some of those facts so that the State will not have to put up witnesses on the stand to show these transactions. That's not the issue in this trial for Gerald Walter Jones, although there may be some transactions that occurred because of what the defendant will allege

as trickery, deception, or other things that the government agent did.

The issue in the trial is whether or not the State can prove beyond a reasonable doubt that the drugs were, in fact, hydromorphone, and that the amounts claimed were, in fact, in some cases in excess of 28 grams, in other cases the substances as charged by the judge.

These statements constitute an admission that defendant Gerald Jones engaged in the drug transactions for which he stands accused. Defendant is therefore limited on appeal to those issues which he did not concede at trial. Accordingly, we overrule defendant's assignment of error regarding the court's refusal to examine the PEN register records.

[3] We first address defendant's assignments of error concerning the testimony of Dr. Charles McDonald. Dr. McDonald was a chemist of the S.B.I. laboratory in Swannanoa. A few months before trial, authorities discovered that Dr. McDonald had taken some $300,000 worth of drugs from the laboratory. At a pretrial hearing, presiding Judge Charles Lamm heard testimony from Dr. McDonald; however, on most questions, McDonald took the fifth amendment. Defendant made a motion for disclosure of Dr. McDonald's personnel file, that the prosecution be required to bring charges against Dr. McDonald or that Dr. McDonald be granted immunity in order to testify in the case against Gerald Jones. These motions were denied. Defendant also requested that the prosecution disclose the investigation file on Dr. McDonald; the court reviewed the material and refused the request, concluding that nothing in the file was relevant to the charges against Mr. Jones. Defendant contends that the trial court erred (1) in failing to dismiss the indictments because the State refused to grant Dr. McDonald immunity, and (2) in failing to instruct the jury that the testimony of a missing or absent witness who is peculiarly within the State's power to produce would have been unfavorable to the State's case. We disagree. Having reviewed the evidence before us, including McDonald's personnel file which the trial court sealed for review on appeal, we find that McDonald's testimony would be neither relevant nor exculpatory to the defendant. Accordingly, these assignments are overruled.

[4] Defendant's next assignment of error concerns his conviction for trafficking in hydromorphone. On the basis of defendant's possession and attempt to sell 816 tablets of Dilaudid with a total weight of 73.5 grams, defendant was convicted of trafficking in hydromorphone in an amount in excess of 28 grams. No measurement was made of the percentage of hydromorphone actually present in the Dilaudid tablets. Defendant contends that the North Carolina and United States Constitutions require that the weight of the hydromorphone contained in the tablets be used in the computation rather than the total weight of the tablets themselves. We disagree.

G.S. § 90-90 lists Schedule II controlled substances. Included in the section are opium and its derivatives, of which hydromorphone is one. G.S. § 90-90(a)(1)(xi). G.S. § 90-95(h)(4)(c) provides that, where any person "sells, manufactures, delivers, transports or possesses" four grams or more of opium or opium derivative "or any mixture containing such substance," he shall be guilty of the felony of "trafficking in opium or heroin" and, where the substance or mixture involved:

> (c) Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a term of at least 45 years in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

Clearly, the legislature's use of the word "mixture" establishes that the total weight of the dosage units of Dilaudid is sufficient basis to charge a suspect with trafficking. This interpretation has been held to be constitutional under Article I § 19 of the North Carolina Constitution and the due process and equal protection clauses of the United States Constitution. *State v. Perry*, 316 N.C. 87, 340 S.E. 2d 450 (1986); *State v. Willis*, 61 N.C. App. 23, 300 S.E. 2d 420, *modified and affirmed*, 309 N.C. 451, 306 S.E. 2d 779 (1983). These cases, which concerned trafficking in heroin, also a Schedule II substance, are clearly analogous to the one at bar; evidence at trial indicated that hydromorphone is used as by addicts as a substitute for heroin. Accordingly, this assignment is overruled.

[5] Defendant asserts that the trial court erred in denying his motion to dismiss one of the sale and delivery indictments against him. He contends that the grand jury could not have returned a

valid true bill on that charge because the laboratory report was not prepared until after the grand jury convened. We disagree.

The nature and character of the evidence presented to the grand jury is by statute secret. *See* G.S. § 15A-623(e). It is against the public policy of this State to allow a defendant to expose the nature of the evidence upon which a true bill was returned; for this reason a defendant is not allowed to cross-examine the witnesses before a grand jury. *State v. Phillips*, 297 N.C. 600, 256 S.E. 2d 212 (1979). The defendant is "adequately protected by his right to object to improper evidence and cross-examine the witnesses presented against him at trial." *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981). Accordingly, this assignment is overruled.

In his final assignment of error, defendant contends that the rulings of the trial court and the conduct of the proceedings below became so tainted with prejudice that the cumulative effect denied defendant the following: a fair trial, due process, equal protection, effective assistance of counsel, the right of confrontation, and the right to present evidence in his defense. However, in reviewing defendant's exceptions and the transcript taken as a whole, we find no support for defendant's scattered-shot proposition. This assignment is overruled.

The results are:

As to defendant Willie Kate Jones, a new trial as to charge 85CRS10009, conspiracy to sell and deliver a controlled substance, hydromorphone. As to all other charges, no error.

As to defendant Gerald Walter Jones, no error.

Judges EAGLES and GREENE concur.

Ipock v. Gilmore

BARBARA S. IPOCK, GUARDIAN AD LITEM FOR JUDITH I. HILL, AND TIMOTHY W. HILL, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR TIMOTHY JASON HILL, A MINOR v. SAMUEL J. GILMORE

No. 868SC848

(Filed 7 April 1987)

1. **Parent and Child § 1— loss of parental consortium—no action in N. C.**

A claim for loss of parental consortium is not recognized in N. C., and it is not a denial of equal protection or due process to allow a spouse but not a child to recover for the loss of consortium of an injured person or to allow the child of a deceased parent but not the child of a brain-damaged parent to recover for such loss.

2. **Physicians, Surgeons and Allied Professions § 11— surgery more extensive than anticipated—no battery**

The trial court did not err in entering a summary judgment order dismissing plaintiffs' claims for battery based on defendant surgeon's expansion of a laparoscopy (band-aid surgery) into a total abdominal hysterectomy where the evidence showed that the surgery was expanded because of conditions discovered during the laparoscopy; a request for sterilization signed by the patient and plaintiff husband authorized defendant to perform a laparoscopy and "to do any other procedure that his judgment may dictate during the above operation"; the patient signed an operation consent form which authorized additional procedures "if any conditions are revealed at the time of the operation that were not recognized before and which call for procedures in addition to those originally contemplated"; and the expanded surgery was thus not unauthorized.

3. **Physicians, Surgeons and Allied Professions § 21— malpractice—no punitive damages**

The trial court in a medical malpractice action properly dismissed plaintiffs' claims for punitive damages where there was no evidence of any aggravated facts which would support such claims.

Judge PHILLIPS dissenting.

APPEAL by plaintiffs from *Llewellyn, Judge*. Judgment entered 18 March 1986 in Superior Court, LENOIR County. Heard in the Court of Appeals 6 January 1987.

On 18 February 1981, Judith Hill was admitted to Lenoir Memorial Hospital for the purpose of undergoing a permanent sterilization procedure called laparoscopy. Laparoscopy, often referred to as "band-aid surgery," is a minor operation where small incisions are made in the abdominal wall, a laparoscope is inserted in the incision, and the fallopian tubes are sealed by clips

or an electric current. The patient generally is released from the hospital the same day.

Both Mrs. Hill and Mr. Hill signed a request for sterilization on 18 February 1981 which authorized Dr. Gilmore to perform the laparoscopy. Mrs. Hill also signed an operation consent form that same day.

On 19 February 1981, during the operation it was discovered that the patient's tubes and ovaries were completely bound down bilaterally by adhesions. Dr. Gilmore also discovered a cystic mass and chronic infection. Dr. Gilmore determined that it would be in the patient's best interest to perform a total abdominal hysterectomy. He left the operating room to consult with Mr. Hill. He then returned to the operating room and performed the hysterectomy.

Post-operatively, Mrs. Hill was noted to be confused. She was subsequently diagnosed as suffering from hypoxic brain damage (brain damage caused by a deprivation of oxygen to the brain) which occurred either during or immediately following the surgery performed by Dr. Gilmore.

On 11 January 1982, Mrs. Hill, through her guardian ad litem, Barbara Ipock, Timothy W. Hill, her husband, and Timothy Jason Hill, her son, through his guardian ad litem, instituted this action against Dr. Gilmore and several others, including an anesthesiologist, a nurse anesthetist and Lenoir Memorial Hospital, Inc., to recover damages for the injuries to Mrs. Hill and her family's loss of consortium.

Defendant Gilmore filed a motion for summary judgment on 5 April 1982. Plaintiffs filed a Rule 56(f) motion requesting an order allowing the late filing of the affidavit of their gynecological expert. The hearing was set for 1 November 1982.

On 17 November 1982, the trial court entered orders denying plaintiffs' Rule 56(f) motion and allowing Dr. Gilmore's motion for summary judgment. Plaintiffs excepted and the case proceeded against Lenoir Memorial Hospital, Inc. and the anesthesia defendants.

Prior to trial, the remaining defendants obtained summary judgment on the issue of Timothy Jason Hill's loss of parental

consortium. After the trial had begun, the anesthesiologist settled with the remaining plaintiffs, Mr. and Mrs. Hill.

At trial the jury returned a verdict in favor of the plaintiff Judith Hill for $600,000 and plaintiff Timothy W. Hill for $150,000 against Lenoir Memorial Hospital and the nurse anesthetist. In its judgment, the trial court reduced Mrs. Hill's award by $100,000, presumably to reflect the earlier settlement.

Plaintiffs appealed the trial court's order granting defendant Gilmore's motion for summary judgment. In an opinion reported in 73 N.C. App. 182, 326 S.E. 2d 271, *disc. rev. denied*, 314 N.C. 116, 332 S.E. 2d 481 (1985), this Court vacated the order granting Dr. Gilmore's motion for summary judgment and remanded the case for further proceedings.

On remand, plaintiffs filed a motion for leave to amend the complaint to allege claims against Dr. Gilmore for battery and for punitive damages. The motion was allowed.

In response to the amended complaint, Dr. Gilmore filed a motion for partial summary judgment, alleging that there was no genuine issue of material fact with respect to (1) the claim of the minor plaintiff, Timothy Jason Hill, for loss of parental consortium and (2) the claims of Barbara Ipock, guardian ad litem for Judith Hill, and of Timothy W. Hill, individually, for battery and punitive damages.

On 18 March 1986, the trial court allowed defendant Gilmore's motion for partial summary judgment and dismissed Timothy Jason Hill's claim for loss of parental consortium, and the claims for battery and punitive damages of Barbara Ipock, guardian ad litem for Judith Hill, and of Timothy W. Hill, individually. The order of partial summary judgment was later amended by the trial court to find that its ruling dismissing part of plaintiffs' claims affected a substantial right of plaintiffs and that there was no just cause for delay of an appeal from said rulings.

On appeal, defendant Gilmore cross-assigns as error the prior decision of the Court of Appeals in *Ipock v. Gilmore*, 73 N.C. App. 182, 326 S.E. 2d 271, *disc. rev. denied*, 314 N.C. 116, 332 S.E. 2d 481 (1985). From the judgments of the trial court, plaintiffs appeal.

Kenneth B. Oettinger, Grover C. McCain, Jr. and Boyce, Mitchell, Burns & Smith, by Robert E. Smith, for plaintiff appellants.

Hornthal, Riley, Ellis & Maland, by L. P. Hornthal, Jr. and Robert B. Hobbs, Jr., for defendant appellee.

ARNOLD, Judge.

[1] Plaintiffs first contend that the trial court committed reversible error in allowing Dr. Gilmore's motion for partial summary judgment, dismissing the claim of Timothy Jason Hill for loss of parental consortium. We disagree.

Recognition of the claim of loss of parental consortium has twice been refused by the courts of this state. *Henson v. Thomas*, 231 N.C. 173, 56 S.E. 2d 432 (1949); *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E. 2d 567 (1984), *rev'd in part on other grounds*, 315 N.C. 103, 337 S.E. 2d 528 (1985), *cert. denied*, 107 S.Ct. 131 (1986). This asserted cause of action was not acknowledged at common law and it has no statutory sanction. *Henson* at 176, 56 S.E. 2d at 434. It is the duty of the judiciary to enforce the law as we find it and to determine if a cause of action is existent or nonexistent as the law now exists, not to create new claims. *Id.*

We are aware of the dictum by way of footnote in the first appeal of this case which stated:

> We do note . . . that in other suits involving an indirect impact on children, our appellate courts have declined to recognize a cause of action for loss of parental consortium. *See Henson v. Thomas*, 231 N.C. 173, 56 S.E. 2d 432 (1949); *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E. 2d 567 (1984). However, arguably in this case, the impact on the child is directly foreseeable.

Ipock v. Gilmore, 73 N.C. App. 182, 188, 326 S.E. 2d 271, 276, *disc. rev. denied*, 314 N.C. 116, 332 S.E. 2d 481 (1985).

While the loss of parental consortium in situations such as the present case may be quite real and worthy of compensation, recognition of a new cause of action is a policy decision which falls within the province of the legislature. "The 'excelsior cry for a better system' in order to keep step with the new conditions and spirit of a more progressive age must be made to the Legislature, rather than to the courts." *Henson* at 176, 56 S.E. 2d at 434.

Plaintiffs contend that it would be a denial of both equal protection and due process (1) to allow a spouse but not a child to recover for the loss of consortium of an injured person, or (2) to allow the child of a deceased parent but not the child of a brain-damaged parent to recover for such loss. We disagree.

First, the spousal relationship and the relationship between parent and child are not the same. Companionship, service, responsibility, love and affection between spouses differ in both degree and kind from those of a parent-child relationship. The law is not constitutionally required to treat these relationships as identical. *See Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or. 543, 652 P. 2d 318 (1982).

Second, allowing the child of a deceased parent but not the child of a brain-damaged parent to recover for such loss does not deny equal protection or due process. The distinction is not between kinds of children but between a defendant's scope of liability for causing fatal as distinct from nonfatal injuries to the people who are the immediate victims of his or her negligence. *Id.*

Also, if the parent lives then the tangible aspects of a child's loss can be included in the compensation awarded in the parent's own cause of action. *Halberg v. Young*, 41 Hawaii 634, 59 A.L.R. 2d 445 (1957). With this in mind, a state legislature could rationally conclude that only upon the death of a parent should a child be compensated for intangible losses. *See Russell v. Salem Transp. Co.*, 61 N.J. 502, 295 A. 2d 862 (1972).

Plaintiffs argue that the middle tier test applicable in some equal protection cases should be used here. *See Dixon v. Peters*, 63 N.C. App. 592, 306 S.E. 2d 477 (1983). We disagree.

There is neither a semi-suspect class nor a semi-fundamental interest involved in the present situation. We find no basis to support plaintiffs' argument that the middle tier (substantial state interest) test should be used. Therefore, all that is needed is a rational basis for denying minor plaintiff's claim. *Id.* Several rationales are listed as follows.

First, there is the possible overlap in recovery of claims between the injured parent and the child. Second, there is the potential increase in insurance costs. There are also the derivative nature and indirectness of the injury; the uncertainty

and remoteness of damages; the multiplication of tort litigation; and the splitting of the basic cause of action. *See Garza v. Kanton*, 54 Cal. App. 3d 1025, 127 Cal. Rptr. 164 (1976); *see also Suter v. Leonard*, 45 Cal. App. 3d 744, 20 Cal. Rptr. 110 (1975).

We do not suggest that in situations such as the one presently before us, that a child's claim is not genuine. However, there must be a line drawn which ends a tort-feasor's liability at some point.

> While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.

Toby v. Grossman, 24 N.Y. 2d 609, 619, 301 N.Y.S. 2d 554, 561, 249 N.E. 2d 419, 424 (1969). It is the legislature's prerogative to extend such liability if they believe it proper, not ours.

This state does not recognize the claim of the minor plaintiff. The trial judge, therefore, properly granted partial summary judgment for defendant dismissing the claim for loss of parental consortium.

[2] Plaintiffs next contend that the trial court committed reversible error in allowing defendant's motion for summary judgment, dismissing the claims of Barbara S. Ipock, guardian ad litem for Judith Hill, and of Timothy W. Hill, individually, for battery, on the ground that there were genuine issues as to material facts and defendant was, therefore, not entitled to judgment as a matter of law. We disagree.

It has been established that only an unauthorized operation constitutes a battery. *See Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E. 2d 829 (1982). In fact, the N. C. Supreme Court stated that:

> . . . where an internal operation is indicated, a surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, even when it means an extension of the operation further than was originally contemplated, and for so doing he is not to be held in damages as for an unauthorized operation.

Kennedy v. Parrott, 243 N.C. 355, 363, 90 S.E. 2d 754, 759 (1956).

The request for sterilization signed by both Judith and Timothy W. Hill authorized Dr. Gilmore to perform the laparoscopy and "to do any other procedure that his judgment may dictate during the above operation." The operation consent form which was signed by Mrs. Hill stated that, "[i]f any conditions are revealed at the time of the operation that were not recognized before and which call for procedures in addition to those originally contemplated, I authorize the performance of such procedures."

In light of the established case law above and the consent forms signed by Mrs. Hill, the trial court properly granted partial summary judgment dismissing plaintiffs' claims for battery because the evidence presented did not support such claims.

[3] Plaintiffs lastly contend that the trial court committed reversible error in allowing defendant's motion for summary judgment, dismissing the claims of Barbara Ipock, guardian ad litem for Judith Hill, and of Timothy W. Hill, individually, for punitive damages, on the grounds that there were genuine issues as to material facts and defendant was, therefore, not entitled to judgment as a matter of law. We disagree.

In order to qualify for punitive damages in North Carolina, some element of aggravation must be proven. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Paris v. Kreitz*, 75 N.C. App. 365, 331 S.E. 2d 234, *disc. rev. denied*, 315 N.C. 185, 337 S.E. 2d 858 (1985). In the context of an intentional tort, aggravated conduct ". . . usually consists of insult, indignity, malice, oppression, or bad motive in addition to the tort." *Paris* at 374, 331 S.E. 2d at 241.

The record does not indicate any evidence of aggravated facts sufficient to support a claim for punitive damages. The trial court did not err in granting partial summary judgment in favor of defendant on plaintiffs' claim for punitive damages.

Defendant makes cross-assignments of error contending that the Court of Appeals erred in its first opinion in this case. "Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case." *N.C.N.B. v.*

Virginia Carolina Builders, 307 N.C. 563, 566, 299 S.E. 2d 629, 631, *reh'g denied*, 307 N.C. 703 (1983). Defendant's cross-assignments of error are without merit.

Affirmed.

Judge ORR concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I dissent from all three holdings by the majority. First, in my opinion the claim of the child Timothy Jason Hill for the wrongful loss of his mother's care, guidance, society and training is well founded, and is not barred by either precedent or the inaction of the General Assembly. As to the notion that a claim for injury wrongfully done should not be considered by our courts unless such a claim either was approved by the courts of England before our republic was founded or has since been expressly authorized by the General Assembly, my views coincide with those expressed by Justice Seawell for himself and Justice Ervin in dissenting from the majority decision in *Henson v. Thomas*, 231 N.C. 173, 56 S.E. 2d 432 (1949). In that case the majority decision disallowed the claim of two children against an interloper who alienated their mother's affections and broke up their home. In Justice Seawell's soundly reasoned dissent, he showed in bold relief the shaky, insecure foundation of the leave it to the legislature doctrine of civil jurisprudence, the main effect and purpose of which is to grant immunity from liability to those who wrongfully injure and ruin others in a manner not previously litigated in our courts unless the claim has been explicitly authorized by the legislature. In doing so Justice Seawell made these compelling and unanswerable points: When we inherited the common law or received it by legislative adoption, we received neither a cadaver beset by *rigor mortis* nor a little short list of recognized rights and wrongs that our courts are limited to considering; what we received and is its genius was a living body of law whose principles can and should be applied to all our people, under all circumstances—a system whose guiding principle is that under the variant and changing circumstances of life each person has a duty

not to wrongfully harm others and is fully accountable for the consequences when he nevertheless does so; the system functions best and best serves the public when the courts apply this principle to all and sundry that come before them and make the adjustments that changing circumstances and the just adjudication of claims require, rather than leave such adjustments to the legislature, which has neither the time, the capacity, nor the inclination to make them; this is no radical doctrine, but is inherent in the law, and by their rulings our courts have been daily expanding and shrinking the elastic fabric of the common law from the beginning. Thus, we have not only the right, but the duty, in my opinion, to consider this child's claim and I vote to do so. Considering the claim would neither create a new cause of action nor impose any new duty on the defendant; though not asserted heretofore apparently, the cause of action has been available all along since no one has ever had the right to wrongfully injure others.

But the claim is entitled to consideration for another reason—for instead of being without legislative support this claim has both legislative and constitutional sanction. *Every person,* so Art. I, Sec. 18 of the Constitution of North Carolina says, "for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." This provision was adopted with a common law system in place and unless the provision is an utterly dead letter, as some of our court decisions would indicate, it certainly means that our courts have the authority and duty to hold wrongdoers accountable for tortiously injuring others whether the subordinate legislature has expressed its approval or not if it has not disapproved the claim, as is the case here. But the fact is the General Assembly has recognized the claim, at least impliedly, by enacting G.S. 28A-18-2(b)(4)b and c, which makes compensable the loss that children suffer when wrongfully deprived of their parents by death; and even under the narrowest view of the judicial function it would be no usurpation to apply that legislative policy to children whose loss of parental consortium is due to the parent being wrongfully brain damaged, rather than killed. These pertinent enactments by the people of the state and the General Assembly should weigh more heavily with our courts than the mere failure of the General Assembly to expressly approve a claim, the justness of which is

self-evident. Nor is the majority opinion in *Henson v. Thomas* any precedent against the enforcement of this child's claim; for as Justice Seawell correctly noted in his dissent that decision is bottomed completely on *non sequiturs*, the premise of which is that our law does not permit a child to recover from his *mother* for her wrongdoing—a problem certainly not present in this case and for that matter not present in that one either, since the Henson children did not sue their mother, but a stranger named Thomas. There being abundant evidence that due to the neglect, and perhaps even the folly, of the defendant this child suffered one of the most grievous injuries that any child can suffer—the loss of his mother's care, guidance, and love when most in need of it —the courts of this state have the clear duty, in my judgment, to consider his claim and not to deny him relief upon the spurious ground that we have no authority to do otherwise. We do have the authority—and law, justice and sound policy require that it be exercised.

Second, in my opinion the battery claim of Judith I. Hill and Timothy W. Hill was erroneously dismissed, because whether Dr. Gilmore was authorized to do the operation that he did is not a question of law that judges can decide, but is a question of fact that a jury must resolve. An authorization for medical treatment, when the intention of the parties is disputed with good reason as in this case, derives its meaning, as do other disputed authorizations and contracts, not merely from the words used, but from the circumstances that caused the writing to be executed in the first place. The context in which Mrs. Hill signed the authorization permitting Dr. Gilmore to invade her body was not that *her body* had to be rendered sterile *at all perils and costs* as Dr. Gilmore's conduct would seem to indicate. The evidence plainly shows that she and her husband merely wanted to avoid another pregnancy by some convenient and safe means, and it is a matter of common knowledge that a number of such means were available to them, some of which required only minor surgery on the wife or husband, and others of which required no surgery at all, but merely the use of a birth control device, of which there are several kinds. It was in that setting that Dr. Gilmore obtained Mrs. Hill's consent to do the band-aid procedure described and when he allegedly discovered that that simple little operation could not be completed as planned because of adhesions that did not jeopardize

her health or life, he had no reason for assuming that she had consented, or would consent if given the chance, to the removal of her fallopian tubes, ovaries and uterus. Common decency and sense, as well as professional duty, required him to recognize, it seems to me, that drastic major surgery at that time was not justified, whether she had technically consented to it or not; for he knew that notwithstanding the boiler plate language in the authorization form, that Mrs. Hill did not expect to awaken with her ovaries, fallopian tubes and uterus gone and that he had done nothing whatever to prepare her for such a traumatic eventuality, the necessity for which, when possible, is a matter of common knowledge. Under the circumstances, therefore, his plain duty in my opinion was to terminate the operation, discuss the remaining alternatives with her, and let her decide whether to give up her bodily organs or not. That instead of doing these things Dr. Gilmore proceeded to conduct an undiscussed, unauthorized, unprepared for major operation and to remove her reproductive organs is evidence aplenty in my opinion that a battery was committed. The sweeping authority that the Court gave to surgeons by *Kennedy v. Parrott*, 243 N.C. 355, 90 S.E. 2d 754 (1956) is not available to the defendant in this case; for *Kennedy* by its terms applies only to instances where the patient is operated on for some health threatening cause and during the operation the surgeon discovers another threat to the patient's health and good surgical practice requires that the operation authorized be extended and it is not feasible to obtain the patient's consent. None of which conditions existed in this case; for the evidence, viewed as we must view it, indicates that nothing was wrong with Mrs. Hill, the operation authorized was elective, and it was not necessary to extend it. Furthermore, even if it had been advisable or necessary to extend the operation the evidence indicates it did not have to be done then and could have been done just as well the next day after Mrs. Hill had given her consent and been prepared for its consequences.

The *Kennedy* opinion is relevant to this appeal, though, for in it Justice Barnhill, contrary to the view he expressed in *Henson v. Thomas* that only the legislature can modify the common law, declared with no encouragement whatever from the General Assembly that the rule of law theretofore in effect which limited surgeons only to operations that their patients had consented to

was outmoded and unsuitable to that modern day and surgeons could thereafter extend operations as the patient's health and good surgical practice required without being liable for exceeding their authority. If without legislative enactment our Courts have the power to extend or modify the law for the benefit of an alleged tort-feasor as was done in *Kennedy*, and has been done in many other cases as the reports show, it would seem to follow as a matter of course that they have the power to do the same thing upon behalf of wrongfully injured children.

Third, the claims for punitive damages were erroneously dismissed, in my opinion, because the evidence before the court, when viewed in its most favorable light for the plaintiffs, is sufficient to support the claim that defendant was either grossly negligent or acted with a reckless and wanton disregard for the bodily integrity and health of Mrs. Hill.

STATE OF NORTH CAROLINA v. WILLIE JAMES WHITE

No. 8626SC879

(Filed 7 April 1987)

1. **Criminal Law § 128.1— mistrial—failure to state grounds—harmless error**

Where the grounds for mistrial were clear from the record before the court on appeal and were obviously clear to the trial court at the hearing on defendant's motion to dismiss, defendant was not prejudiced by the trial judge's failure to make findings supporting the mistrial order, and such omission constituted harmless error.

2. **Criminal Law § 26.8— mistrial for prosecutorial misconduct—retrial not barred**

There was no merit to defendant's contention that retrial was barred due to the prosecutor's intentional misconduct where the trial judge properly considered the evidence and found no intent to provoke a mistrial; furthermore, there was no bad faith prosecutorial overreaching or harassment aimed at prejudicing defendant's chances for acquittal, and it did not appear from the record that the State's case was going so badly and the prejudice resulting from the prosecutor's conduct was so grave that defendant's choice to continue or to abort the proceedings was rendered unmeaningful.

3. **Larceny § 1; Robbery § 1.2— armed robbery—misdemeanor larceny as lesser offense**

In a prosecution of defendant for robbery with a dangerous weapon the trial court erred in refusing to instruct the jury as to misdemeanor larceny,

since misdemeanor larceny is a lesser included offense of armed robbery; defendant's evidence regarding his acquisition of another person's automobile would support a conviction of larceny; and the State introduced no evidence of value, making the larceny punishable only as a misdemeanor.

Judge JOHNSON concurring in part and dissenting in part.

APPEAL by defendant from *Friday, Judge.* Judgment entered 26 March 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 February 1987.

Attorney General Lacy H. Thornburg, by Assistant Attorney General G. Patrick Murphy for the State.

Public Defender Isabel Scott Day and Assistant Public Defender Gail Phillips Merritt for defendant appellant.

BECTON, Judge.

Defendant, Willie James White, was charged in a proper indictment with robbery with a dangerous weapon. On 9 December 1985 a jury was empaneled, and trial commenced before Judge Robert E. Gaines. Near the conclusion of the trial, and due to improper questioning of defendant by the prosecutor, defendant's motion for a mistrial was granted.

On 6 March 1986, prior to a second trial, defendant filed a motion to dismiss the indictment on double jeopardy grounds. After a hearing before Judge Chase B. Saunders, the motion was denied. Upon retrial defendant was convicted and sentenced to the presumptive term of 14 years imprisonment for robbery with a firearm. Defendant appeals.

Defendant presents four arguments on appeal, contending that the trial court erred in (1) denying his 6 March motion to dismiss, (2) refusing to instruct the jury as to misdemeanor larceny, (3) refusing to permit defense counsel to use leading questions on direct examination of an allegedly hostile witness, and (4) sustaining the State's objection to a portion of defense counsel's closing argument. We find merit in defendant's second argument and accordingly award him a new trial.

I

The State's evidence tended to show that the defendant by use of a handgun took a 1974 Honda automobile from its owner,

Roberta Stitt, in Charlotte, North Carolina. Stitt testified that just before midnight on 19 June 1985, she drove to Shelia Smith's house at Piedmont Court Apartments where she waited outside for Smith. Then she and Smith left together to go to a convenience store. On their way, as they rounded a sharp curve on Siegle Avenue at a slow speed, a man opened the driver's door, put a gun to Stitt's head, and pulled her out of the car. Meanwhile, Smith, who was in the passenger seat, jumped from the car and ran. Then the man got into the car and drove away. Stitt and Smith ran together from the scene to a police car.

Shelia Smith testified for the State and corroborated Stitt's story. Both women picked the defendant out of a photographic line-up, and both identified the defendant in court as the robber.

Stitt's vehicle was located across the street from the defendant's girlfriend's house in Forest City. Credit cars belonging to Stitt and keys to the car were located at the girlfriend's house. Vickey Camp testified that on 20 June 1986 defendant tried to sell her a car radio in Forest City. Stitt had testified that her car radio was missing from the dash when she recovered her car.

The defendant testified that he first met Stitt in the parking lot of Piedmont Court Apartments, outside Shelia Smith's residence, where he asked Stitt for a ride to Belmont. Stitt agreed, and after Smith joined them, the three headed toward North Charlotte. On the way, defendant and Stitt engaged in a conversation about drugs, and defendant gave Stitt $35.00 to buy him some cocaine. The car stopped on Alexander Street, a disagreement developed about the purchase, and defendant demanded his money back. Stitt refused and told defendant to get out of the car. Defendant then told Stitt "they was goin' give me somethin', my money or somethin'," and reached toward the front seat. Stitt and Smith jumped from the car and ran, and defendant drove away in the car to Forest City where he was later arrested.

The defense also called Johnsie Smith, Shelia Smith's mother, who testified that when she arrived home after midnight on 20 June 1986, she observed Stitt talking to a man in the parking lot and the man asked for a ride to Belmont. Johnsie Smith then went into her home and told Shelia not to allow the man outside to get into the car or to take him anywhere. Later, Shelia called

from the police station and told her mother that Stitt's car had been stolen while she and Stitt were inside the convenience store.

At the second trial in March 1986, essentially the same evidence was presented. However, Shelia Smith was not called to testify by the State but was called as a witness for the defense. On cross-examination, she testified that she told her mother the car was taken while she and Stitt were in the store because her mother had been "getting onto" her about being out late.

II

We first consider defendant's double jeopardy arguments. During the second day of testimony at the first trial, Judge Gaines sustained an objection to an attempt by the prosecutor, on cross-examination of defendant, to elicit testimony regarding the circumstances of a prior conviction. The prosecutor nevertheless began his re-cross examination with the following improper question:

> Isn't it true that on [the] assault on female conviction you were originally tried on second degree rape?

Defense counsel's immediate motion for a mistrial was granted. The prosecutor apologized to the court and requested a limiting instruction but offered no explanation for asking the question.

Judge Gaines made no findings of fact to support the mistrial order. However, the transcript clearly shows that mistrial resulted from the improper question, which the judge characterized as "probably one of the most flagrant violations of solicitorial power that I have ever observed."

Defendant now contends that the first trial was terminated due to intentional misconduct of the prosecutor, calculated to provoke a mistrial, and, therefore, further prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and by Article I, Section 19 of the Constitution of North Carolina. In addition, he argues that retrial is prohibited because the court failed to make findings of fact before ordering the mistrial as required by N.C. Gen. Stat. Sec. 15A-1064 (1983). We reject both contentions.

A

[1] Regarding the requirement of findings of fact, the *Official Commentary* following G.S. Sec. 15A-1064 states:

> This provision will be important when the rule against double jeopardy prohibits retrial unless the mistrial is upon certain recognized grounds *or unless the defendant requests or acquiesces in the mistrial. If the defendant requests or acquiesces in the mistrial, that finding alone should suffice.* (Emphasis added.)

Ordinarily, "[w]here the mistrial has been granted at defendant's request, there can be no prejudice *to defendant* in the failure to make such findings." *State v. Moses*, 52 N.C. App. 412, 418, 279 S.E. 2d 59, 64, *cert. denied*, 303 N.C. 318, 281 S.E. 2d 390 (1981). However, when, as in the case *sub judice*, a defendant contends that serious prosecutorial misconduct precipitated his motion for mistrial, findings of fact may be as essential to adequate review of his double jeopardy claim as in a case in which mistrial is ordered over the defendant's objection. Nevertheless, because from the record before us, the grounds for the mistrial are clear, and were obviously clear to the trial court at the hearing on defendant's motion to dismiss, we conclude that defendant has not been prejudiced by Judge Gaines' failure to make the required findings and that the omission thus constitutes harmless error.

B

[2] We next turn to defendant's contention that retrial was barred due to the prosecutor's intentional misconduct. In his order denying defendant's motion to dismiss, Judge Saunders made the following pertinent finding of fact:

> 9. Based upon [arguments and briefs of counsel, affidavits, and the transcript of the trial proceeding] . . . the Assistant District Attorney did not intend to goad the defendant into moving for a mistrial so as to improve the chances of the State upon retrial for a conviction.

The court concluded as a matter of law that defendant was not entitled to invoke the protection of either the federal or state constitution and

2. That assuming arguendo, the Assistant District Attorney acted in bad faith, a review of the record and affidavits fails to establish that the prosecutor's behavior in question was conducted so as to afford the prosecution a more favorable opportunity to convict the defendant, the record reflecting that there was ample evidence before the jury upon which a verdict favorable to the State could be returned.

We must determine whether these findings and conclusions are supported by the evidence and whether they, in turn, support the court's denial of relief to defendant.

Freedom from multiple prosecutions for the same offense is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 19 of the Constitution of North Carolina. *See United States v. Dinitz*, 424 U.S. 600, 47 L.Ed. 2d 267 (1976); *State v. Shuler*, 293 N.C. 34, 235 S.E. 2d 226 (1977). As a general rule, the prohibition against double jeopardy does not bar reprosecution when a trial terminates in a mistrial upon the motion, or with the consent, of the defendant, even if the defendant's motion is motivated by a prosecutorial error. *United States v. Jorn*, 400 U.S. 470, 485, 27 L.Ed. 2d 543, 556 (1971); *see also State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243 (1954); *State v. Cuthrell*, 66 N.C. App. 706, 311 S.E. 2d 699 (1984). An exception to this rule exists for certain cases in which the defendant's motion is prompted by serious misconduct by the judge or prosecutor.

1. In *Oregon v. Kennedy*, 456 U.S. 667, 72 L.Ed. 2d 416 (1982), the United States Supreme Court redefined the standard for the prosecutorial misconduct exception so as to limit the circumstances under which a defendant who moves for a mistrial may invoke the double jeopardy bar to those cases in which the prosecutorial misconduct giving rise to the motion was intended to "goad" or provoke the defendant into moving for a mistrial. Prior decisions of that court had phrased the standard in broader terms of "prosecutorial or judicial overreaching," *see United States v. Jorn*, 400 U.S. at 485, 27 L.Ed. 2d at 556, or "prosecutorial impropriety designed to avoid an acquittal," *id.*, n.12. In *Lee v. United States*, the Court had stated that retrial was not barred "unless the judicial or prosecutorial error that prompted petitioner's motion was 'intended to provoke' the motion *or* was

otherwise 'motivated by bad faith or undertaken to harass or prejudice' petitioner." 432 U.S. 23, 33-34, 53 L.Ed. 2d 80, 89 (1977) (*quoting United States v. Dinitz* at 611, 47 L.Ed. 2d at 276) (emphasis added).

The *Oregon v. Kennedy* test is a very narrow one which requires a finding of specific intent to cause a mistrial. Under that standard, a finding by the trial court that the prosecutorial conduct in question was not so intended is conclusive if supported by competent evidence. The existence of such intent must generally by inferred from objective facts and circumstances. In the present case, the trial judge as factfinder considered the evidence and found no intent to provoke a mistrial. We cannot conclude that the court's determination is unreasonable or erroneous based upon the evidence before it. Therefore, defendant's retrial was not precluded by the Double Jeopardy Clause of the federal constitution.

2. We find no appellate decisions of North Carolina courts which expressly set forth the standard for prosecutorial misconduct to be applied in assessing double jeopardy claims under the Constitution of North Carolina. Our state courts are not bound, in interpreting our state constitution, by federal court decisions construing similar provisions of the federal constitution. *Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E. 2d 141 (1974). *See also State v. Barnes*, 264 N.C. 517, 142 S.E. 2d 344 (1965).

In *Oregon v. Kennedy*, Justice Stevens wrote a concurring opinion, joined by three other justices, in which he soundly criticized the majority for "lop[ping] off a portion of the previously recognized exception" to the general rule permitting retrial after a mistrial declared on defendant's motion. We agree with Justice Stevens that

> [i]t is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant. . . . [T]he Court's subjective intent standard would eviscerate the exception.

Oregon v. Kennedy at 688, 72 L.Ed. 2d at 432-33 (Stevens, J., concurring) (footnotes omitted). In our view, the better reasoned

arguments support the broader test that includes bad faith prosecutorial overreaching or harassment aimed at prejudicing the defendant's chances for acquittal, whether in the current trial or a retrial. We believe that

> [T]o invoke the exception for overreaching, a court need not divine the exact motivation for the prosecutorial error. It is sufficient that the court is persuaded that egregious prosecutorial misconduct has rendered unmeaningful the defendant's choice to continue or to abort the proceeding.

Id. at 689, 72 L.Ed. 2d at 433.

Despite our espousal of this broader standard, we nevertheless uphold the trial court's determination that the defendant in this case has not established his double jeopardy claim under our state constitution. Even under the "overreaching" or "harassment" test, a defendant bears a heavy burden of establishing a bar to reprosecution when he has requested the mistrial. *Id.* at 688, 72 L.Ed. 2d at 433.

We make no attempt to identify all the relevant factors that may influence a court's ruling. However, in addition to requiring a finding of deliberate misconduct, we agree with Justice Stevens that

> because the defendant's option to abort the proceeding after prosecutorial misconduct would retain real meaning for the defendant in any case in which the trial was going badly for him, normally a required finding would be that the prosecutorial error virtually eliminated, or at least substantially reduced, the probability of acquittal in a proceeding that was going badly for the government.

Id. at 690, 72 L.Ed. 2d at 434 (footnote omitted). *But see id.* n.31. In the present case, Judge Saunders concluded that there was ample evidence upon which the jury could have convicted the defendant. Although the prosecutor's conduct appears to have been deliberate, from our review of the record we cannot say that the State's case was going so badly and the prejudice resulting from the prosecutor's conduct was so grave that the defendant's choice to continue or to abort the proceedings was rendered unmeaningful.

III

[3] Defendant further claims that he was entitled to a jury instruction on misdemeanor larceny. We agree.

It is a well-established rule in North Carolina that

> [w]hen a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment. Further, when there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon . . . and error in failing to do so will not be cured by a verdict finding a defendant guilty of a higher degree of the same crime.

State v. Weaver, 306 N.C. 629, 633-34, 295 S.E. 2d 375, 377 (1982); *State v. Banks*, 295 N.C. 399, 415-16, 245 S.E. 2d 743, 754 (1978).

Larceny is the felonious taking and carrying away of the personal property of another without his consent and with the intent to permanently deprive the owner of his property. *See State v. Boykin*, 78 N.C. App. 572, 576, 337 S.E. 2d 678, 681 (1985); *State v. Lamson*, 75 N.C. App. 132, 134, 330 S.E. 2d 68, 69, *disc. rev. denied*, 314 N.C. 545, 335 S.E. 2d 318 (1985). In the instant case, the indictment for armed robbery alleged, in part, that the defendant "did unlawfully, wilfully, and feloniously steal, take, and carry away another's personal property" by means of an assault with a firearm. Unquestionably, all of the essential elements of larceny would be proven by proof of the allegations in the indictment. Equally clear is that defendant's evidence regarding his acquisition of Roberta Stitt's automobile would support a conviction of larceny. Furthermore, although the indictment charged that the value of the stolen property was approximately $1,490.00, the State introduced no evidence of value. In order to convict of felony larceny, the State must prove beyond a reasonable doubt that the value of the stolen property exceeded $400; otherwise, the larceny is punishable only as a misdemeanor. *See, e.g., State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380 (1969), N.C. Gen. Stat. Sec. 14-72 (1986). The judge must so instruct the jury. *E.g., State v. Jones*. Based on the foregoing, we conclude that the court's refus-

al to instruct the jury on misdemeanor larceny was prejudicial error.

The State initially argues that defendant was not entitled to the instruction because misdemeanor larceny is not a lesser included offense of armed robbery. Recently, in *State v. Hurst*, 82 N.C. App. 1, 346 S.E. 2d 8 (1986), this Court discussed thoroughly the apparent conflict between two lines of North Carolina Supreme Court decisions on whether larceny is a lesser included offense of armed robbery. There we noted that "the most entrenched and lengthy series of cases stands for the principle that larceny is a lesser included offense of common law robbery, and that both are lesser included offenses of armed robbery," *id.* at 15-16, 346 S.E. 2d at 17. *See* cases cited in accompanying nn.3, 4.

The State relies, however, upon three recent decisions in which the Court reached the opposite conclusion without reconciling the prior cases. *See State v. Murray*, 310 N.C. 541, 548-49, 313 S.E. 2d 523, 529 (1984); *State v. Beatty*, 306 N.C. 491, 500-01, 293 S.E. 2d 760, 766-67 (1982); *State v. Revelle*, 301 N.C. 153, 163, 270 S.E. 2d 476, 482 (1980). We conclude that those decisions do not control the resolution of this appeal. The issue in each of those cases involved the constitutional double jeopardy prohibition, not the defendant's right to a particular jury instruction. Moreover, the Court's discussion and conclusion regarding the lesser included offense issue was unnecessary to the holding in any of the three cases, since each involved multiple offenses separate in time, separate in place, or directed at different victims so as to support the convictions for both larceny and armed robbery. *See generally Hurst* at 16-18, 346 S.E. 2d at 17-18.

Cases which have specifically addressed the jury instruction question presented here support the defendant's claim. In *State v. Chapman*, 49 N.C. App. 103, 270 S.E. 2d 524 (1980), this Court held that the trial judge should have instructed the jury on larceny when the State's evidence tended to show an unlawful taking from a former employer accomplished by an assault with a knife, but the defendant testified that he took the money without the use of a knife or threats. *See also State v. Perry*, 38 N.C. App. 735, 248 S.E. 2d 755 (1978) (error not to submit misdemeanor larceny in prosecution for armed robbery when defendant's evi-

dence showed a taking without the use of a weapon). We find this precedent controlling in the present case.

Furthermore, even if lesser included offenses must be assessed by the same analysis for jury instruction purposes as for double jeopardy purposes, our holding in *Hurst*, a double jeopardy case, supports our ruling in favor of defendant. In *Hurst*, we held that convictions of both armed robbery and larceny could not stand when both convictions were based upon a single taking. In the case at bar, defendant is similarly accused of a single taking and, under the rule enunciated in *Hurst*, could not be convicted of both offenses. Consequently, on these facts (involving a single taking), larceny is not a separate and distinct offense but is subsumed within the crime of armed robbery.

The State maintains that larceny *definitionally* is not a lesser included offense of armed robbery because armed robbery (unlike common law robbery) is defined to require *either* an actual or attempted taking whereas larceny requires an *actual* taking. Thus, the State argues, larceny contains an essential element not contained in armed robbery. However, this reasoning is identical to that rejected by this Court in *State v. Owens*, 73 N.C. App. 631, 327 S.E. 2d 42, *disc. rev. denied*, 314 N.C. 120, 332 S.E. 2d 488 (1985) in which we held, despite the fact that common law robbery requires an actual taking, that common law robbery is a lesser included offense of robbery with a dangerous weapon, and that a jury instruction on the former was proper in a trial for the latter. In the case before us, the indictment charged the defendant with an actual taking, and proof of the taking was essential to a conviction of the offense charged. Moreover, both the State's and the defendant's evidence showed an actual taking. The only conflict in the evidence pertains to whether the taking was accomplished by means of an assault with a weapon. We believe it would be unreasonable under these circumstances to deny the defendant an instruction on larceny merely because the armed robbery statute establishes "attempted taking" as an alternative ground for an indictment.

We summarily reject the State's alternative argument that, even if larceny is a lesser included offense of armed robbery, the defendant's evidence does not support a charge of larceny. The State contends (1) that defendant's statement to Stitt, "y'all gonna

give me somethin' back, my money or somethin' " establishes that he took the automobile under a claim of right, (2) that evidence defendant called Stitt and told her where her car keys were shows that defendant did not intend to permanently deprive Stitt of her car, and (3) that, therefore, the requisite felonious intent for larceny was not established. However, these are merely inferences which the jury could, but need not, draw from the evidence.

For the foregoing reasons, we hold that the court's failure to give the requested instruction on misdemeanor larceny was prejudicial error, and defendant is entitled to a new trial. Because of our holding, we deem it unnecessary to address the defendant's two remaining assignments of error.

New trial.

Judge PHILLIPS concurs.

Judge JOHNSON concurs in part and dissents in part.

Judge JOHNSON concurring in part and dissenting in part.

I concur in the majority opinion except for the part pertaining to the issue of defendant's right to a jury instruction on larceny as a lesser included offense of armed robbery. To that part of the opinion, I respectfully dissent. The majority holds that, for purposes of defendant's right to particular jury instructions, larceny is a lesser included offense of armed robbery. In so holding the majority attempts to distinguish the facts *sub judice* from the facts in *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984), *State v. Beatty*, 306 N.C. 491, 293 S.E. 2d 760 (1982), and *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980).

Although I agree with the majority's reasoning, I am compelled by the clear language in the cases *supra* to dissent. Our Supreme Court said most emphatically in *Revelle, supra*, at 163, 270 S.E. 2d at 482, that armed robbery and larceny "*are legally separate, distinct crimes and [neither] of the offenses is a lesser included offense of the other.*" (Emphasis supplied.) This mandate was reiterated in *Murray, supra*, at 548-49, 313 S.E. 2d at 529, and *Beatty, supra*, at 500-01, 293 S.E. 2d at 766-67. Nowhere in any of

these three cases does the Court limit the scope of its holdings to claims of double jeopardy or failure to give particular instructions. Although the Court did not explicitly overrule its long line of cases holding larceny to be a lesser included offense of armed robbery, *Murray, Beatty* and *Revelle* implicitly overrule those previous cases. Therefore, I must dissent.

MARTHA G. ARMSTRONG v. IVAN O. ARMSTRONG

No. 864DC748

(Filed 7 April 1987)

1. **Appeal and Error § 18— secured performance bond—failure to post—appeal not dismissed**

The Court of Appeals refused to dismiss defendant's appeal for failure to post a secured performance bond in the amount of $7,000 where defendant did post the appeal bond of $250 required by N.C.G.S. § 1-285.

2. **Divorce and Alimony § 30; Pensions § 1— military retirement pay—marital property**

Defendant's right to his military retirement pay was "vested" such that it could be included as marital property under N.C.G.S. § 50-20(b), yet his right to this government benefit was never so far perfected as to permit no statutory interference, and the Legislature's reclassification of defendant's military retirement pay as marital property violated neither the constitutional guarantees of due process nor the law of the land.

3. **Divorce and Alimony § 30; Pensions § 1— military retirement pay—marital property—equal protection**

There was no merit to defendant's contention that he was denied equal protection of the laws because N.C. Const. Art. X, § 4 protects the property, including military retirement pay, of a woman but not a man, since that section expressly states that all rights accorded females by the amendment are subject to legislative regulation and limitation, and N.C.G.S. § 50-20(b) treats military retirement pay no differently whether its recipient is male or female.

4. **Divorce and Alimony § 30— equal division of marital property—findings of fact not required**

The trial court did not abuse its discretion in ordering an equal division of marital property, including defendant's military retirement pay, though the court made no findings of fact, where the court did state in its conclusions of law that it had considered the evidence presented and the "factors enumerated in N.C.G.S. § 50-20," and the evidence did not fail to show any rational basis for the equal distribution.

Armstrong v. Armstrong

APPEAL by defendant from *Martin, James N., Judge*. Order entered 14 November 1985 in District Court, ONSLOW County. Heard in the Court of Appeals 17 December 1986.

Charles William Kafer for defendant-appellant.

Merritt & Stroud, by Timothy E. Merritt, for plaintiff-appellee.

GREENE, Judge.

After a one-year separation, plaintiff brought this action on 14 May 1984 for divorce and equitable distribution of the parties' marital property. Defendant also requested absolute divorce but asserted, among other things, that N.C. Gen. Stat. Sec. 50-20(b)(1) was unconstitutionally amended in 1983 to reclassify his vested military pension as marital property. Defendant's motion to dismiss the suit because of such unconstitutionality was denied by the trial court.

The trial court heard the case without a jury. In connection with its grant of absolute divorce, the court stated in its conclusions of law that "after consideration of the evidence presented and the factors enumerated in North Carolina General Statute 50-20, the court concludes that an equal division of marital property is equitable." Based in part on his constitutional arguments and the trial court's failure to make findings on the parties' health or their relative incomes and property, defendant appealed the court's awarding plaintiff 43.5% of defendant's Marine Corps retirement pay. In connection with defendant's appeal, the trial judge required a secured performance bond in addition to an appeal bond of $250.00.

The evidence tended to show that defendant entered the Marine Corps in June 1948 where he served until his retirement in January 1969. Plaintiff and defendant married in February 1951. The parties separated on 1 April 1983 and did not reside together after that date. The parties stipulated they were married 87% of the time during which defendant's entitlement to retirement pay accrued. After his retirement, defendant went into several different businesses; however, he was eventually hospitalized in Dorothea Dix and Cherry Hospitals in 1978. The parties also stipulated defendant suffered from the psychotic disorder known

as paranoid schizophrenia. Defendant was unemployed at the time of trial. Defendant's only income was his military retirement check in the gross amount of $789.00 per month. At trial, defendant had an injured hand and had hearing aids in both ears. A psychologist testified that defendant's ability to maintain full-time employment was questionable. Defendant was 55 years old and had living expenses in the approximate amount of $1,200 each month.

At trial, plaintiff was employed and had a gross income of approximately $1,550.00 per month. Her 1984 gross income was approximately $29,000.00, out of which she testified she paid two employees' salaries. She had a checking account balance of $1,292.22 and a savings account balance of $342.82. Plaintiff also had $4,000.00 in an IRA account. Plaintiff had had bladder surgery three times. She will possibly need additional surgery resulting in her wearing an external bladder device. Her last surgery was in 1979 or 1980. Plaintiff claimed to suffer from a rare eye nerve disorder which caused her to lose vision in both eyes if she looked in a direction other than straight ahead. Her eyes were checked every three months and seemed normal at the time of trial.

The trial court found the parties' marital property included various items of personal and real property having a value of $54,511.07 on the date of their separation. In addition, the trial court equally divided, but did not value, a silver collection. Defendant's military retirement pay was neither included in the $54,511.07 valuation nor otherwise valued by the trial judge. Since the parties stipulated they were married 87% of the time defendant's entitlement to retirement pay accrued, plaintiff's marital share of defendant's retirement pay was 43.5%.

The issues before this Court are: (1) whether defendant's failure to post a secured performance bond requires dismissal of this appeal; (2) whether the Legislature's reclassification of defendant's military retirement pay as marital property unconstitutionally: (a) deprived defendant of vested property without compensation or (b) denied defendant the equal protection of the laws because of gender; and (3) whether the trial court erred in entering its equitable distribution judgment.

I

[1] In his appeal entry, the trial judge required the defendant post a secured performance bond in the amount of $7,000.00. Plaintiff has moved to dismiss this appeal for defendant's failure to comply with the trial court's bond requirement. Defendant does not dispute his failure to post the secured performance bond.

In a civil action, Rule 6(a) of the Rules of Appellate Procedure provides that an appellant "must provide adequate security for the cost of appeal in accordance with the provisions of G.S. 1-285 and 1-286." N.C. Gen. Stat. Sec. 1-285 states in part:

> To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in the sum of two hundred fifty dollars ($250.00) or any lesser sum as might be adjudged by the court . . . .

N.C. Gen. Stat. Sec. 1-286 simply requires an affidavit of worth from the surety. An appeal must be dismissed when a party does not provide the *appeal* bond ordered by the trial judge. *Lunsford v. Alexander*, 162 N.C. 528, 78 S.E. 275 (1913); Appellate Rule of Procedure 6(d). Defendant has posted his appeal bond of $250.00 as provided under N.C. Gen. Stat. Sec. 1-285. However, posting a "*secured performance* bond" is not a condition precedent to appeal under statute or appellate rules. We therefore refuse to dismiss defendant's appeal.

II

As enacted in 1981, N.C. Gen. Stat. Sec. 50-20(b)(2) provided that "vested pension or retirement rights . . . shall be considered separate property." Effective 1 August 1983, that provision was deleted and Section 50-20(b)(1) was amended to provide that "marital property includes all vested pension or retirement rights, including military pensions eligible under the Uniform Services Former Spouse's Protection Act [hereinafter, the 'USFSPA']." The definition of marital property in Section 50-20(b)(1) was again amended effective 9 July 1985 to include "other deferred compensation rights." The USFSPA is set forth at 10 U.S.C.A. Sec. 1408 (West 1983 & Supp. 1986) and states in relevant part:

> (c)(1) Subject to the limitations of this section, a court *may treat* disposable retired or retainer pay payable to a

member for pay periods beginning after June 25th, 1981, either *as* property solely of the member or *as* property of the member and his spouse in accordance with the law of the jurisdiction of such court. [Emphasis added.]

(c)(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

Section 1408(c)(1) of the USFSPA simply demonstrates Congressional intent that the states legislate the marital classification of military retirement pay. *Cf. McCarty v. McCarty*, 453 U.S. 210, 223 (1982) (whether military retirement is current or deferred compensation, federal interest preempts state community property law). That Section 1408(c)(1) allows state regulation after June 25th, 1981 (the date of *McCarty*) demonstrates Congressional intent that states regulate the marital character of military retirement pay. Given this Congressional authorization, our General Assembly chose in 1983 to reclassify retirement pay as marital property if the pay was otherwise eligible under the USFSPA.

A

[2] Defendant first contends the 1983 amendment to N.C. Gen. Stat. Sec. 50-20(b)(1) constitutes a retroactive law which "deprived" him of a "vested property right" without compensation in violation of N.C. Const. art. I, sec. 19 which states in part:

> No person shall be . . . in any manner deprived of his . . . property but by the *law of the land.* No person shall be denied the equal protection of the laws [.] [Emphasis added.]

Defendant contends the classification of his retirement pay as marital deprived him of vested property without compensation since defendant's benefit level would be reduced by any spousal share allowed under Section 1408(c)(1) of the USFSPA.

"Law of the land" is equivalent to the federal Fourteenth Amendment "due process of law" and federal court interpretations of the latter, though not binding, are highly persuasive in construing our own amendment. *See Bulova Watch Co., Inc. v. Brand Distr. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E. 2d 141, 146 (1974). While Article I, Section 19 does not expressly pro-

hibit taking property without compensation, this right is nevertheless considered a part of the "law of the land" under the amendment. *See Long v. City of Charlotte*, 306 N.C. 187, 195-96, 293 S.E. 2d 101, 107 (1982).

Defendant's contention that his right to military retirement pay is a constitutionally protected "vested property right" is simply incorrect. Defendant's right to retirement pay is a creature of federal statute, not private contract. *See Phillips v. Phillips*, 34 N.C. App. 612, 613, 239 S.E. 2d 743, 744 (1977). The entitlement and requirements for Marine Corps retirement pay are generally set forth at 10 U.S.C.A. Secs. 6321-27 (West 1959 & Supp. 1986). Such pay is computed under 10 U.S.C.A. Sec. 1401 *et seq.* (West Supp. 1986). In *U.S. v. Teller*, 107 U.S. 64, 68 (1883), the U.S. Supreme Court specifically considered military pensions and held:

> No pensioner has a vested legal right to his pension. Pensions are the bounty of the Government, which Congress has the right to give, withhold, distribute or recall, at its discretion.

Accord, Goodley v. U.S., 441 F. 2d 1175, 1178 (Ct. Cl. 1971) (no vested or contractual right to military retirement pay since right is statutory); *see also Dillon v. Wentz*, 227 N.C. 117, 122, 41 S.E. 2d 202, 206-07 (1947) (where pension paid from tax funds, no vested right to pension); *Phillips*, 34 N.C. App. at 613, 239 S.E. 2d at 744 (no vested right to military retirement pay).

With respect to procedural due process guaranteed under the State and Federal Constitutions, defendant's statutory entitlement to retirement pay indeed constitutes a "property interest." *See Kizas v. Webster*, 707 F. 2d 524, 539 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1983). However, entitlement to a government benefit such as retirement pay is not an "indefeasible property right." *See Richardson v. Belcher*, 494 U.S. 78, 81 (1971) (analogy between welfare benefits and "property" does not impose constitutional limitation on congressional power to change entitlement to benefits). A legitimate entitlement does not always rise to the level of "property" protected against "taking" by the due process clauses of our State and Federal Constitutions. *Id.* As the *Kizas* Court noted:

> A legitimate claim of entitlement to a government benefit does not transform the benefit *itself* into a vested right. Rather, due process property interests in public benefits are limited, as a general rule, by the governmental power to remove, through prescribed procedures, the underlying source of those benefits.

707 F. 2d at 539 (emphasis in original). In short, "public benefits are not held in fee simple." *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 796-98 (1980) (Blackmun, J., concurring opinion).

That Congress could alter the level or computation of military retirement pay does not deprive the recipients of due process. *See Costello v. U.S.*, 587 F. 2d 424, 426 (9th Cir. 1978). Accordingly, the State of North Carolina could reclassify defendant's retirement pay as marital property under the USFSPA since defendant's due process "property interest" is not accorded the status of a "vested property right." *Cf. Fullam v. Brock*, 271 N.C. 145, 155 S.E. 2d 737 (1967) (since testamentary right is statutory, no vested right in prior version of statute).

While defendant's property interest in his military retirement pay is not immune to legislative modification or abolishment, his interest in his military retirement pay is of course protected against arbitrary governmental action. Thus, "Congress may grant, increase or decrease [government] benefits subject to the due process limitations against arbitrary action that have no rational justification." *Zucker v. U.S.*, 578 F. Supp. 1239, 1243 (S.D.N.Y. 1984), *aff'd*, 758 F. 2d 637 (1985). In *Flemming v. Nestor*, 363 U.S. 603, 610-11 (1960), the United States Supreme Court held an alien had no "accrued interests" in Social Security benefits such that every defeasance would constitute a prohibited deprivation of property; rather, the alien's interest was protected by due process only against a statute which "manifests a patent arbitrary classification, utterly lacking in rational justification." 363 U.S. at 612. In *Sawyer v. Sawyer*, 54 N.C. App. 141, 282 S.E. 2d 527 (1981), we specifically held the State has paramount power to regulate divorce and amend its divorce laws without violating guarantees of due process. Given the state's legitimate interest in equitable distribution, defendant has failed to persuade us our Equitable Distribution Act is patently arbitrary and without rational justification.

We note in passing that defendant cites our decision in *Morton v. Morton*, 76 N.C. App. 295, 332 S.E. 2d 736, *disc. rev. denied*, 314 N.C. 667, 337 S.E. 2d 582 (1985), for the proposition that defendant's military retirement pay constitutes a "vested property right." In *Morton*, we stated:

> For the first time, military pensions were specifically enumerated as a vested property right: marital property includes all vested pension and retirement rights, including military pensions eligible under the federal Uniform Services Former Spouse's Protection Act. G.S. Sec. 50-20(b)(1) (Supp. 1983).

76 N.C. App. at 296-97, 332 S.E. 2d at 737. *See also Seifert v. Seifert*, 82 N.C. App. 329, 333, 346 S.E. 2d 504, 506 (1986) (noting military pension "vests" after prescribed age and service under federal statutes). That N.C. Gen. Stat. Sec. 50-20(b) treats military retirement pay as a "vested" pension right is permitted, but not required, under 10 U.S.C.A. Sec. 1408(c)(1). However, there is no contradiction in viewing defendant's interest in his retirement pay as "vested" for purposes of equitable distribution, but not constitutionally "vested" against subsequent legislative amendment. Whether a right is vested or not is often a statement of legal conclusion, not legal fact. As Justice (now Chief Justice) Exum stated in *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E. 2d 468, 471 (1980):

> "Vested" rights may not be retroactively impaired by statute; a right is "vested" when it is so far perfected as to permit no statutory interference. The tautology is apparent.

Accordingly, we hold defendant's right to his retirement pay was "vested" such that it could be included as marital property under Section 50-20(b), yet his right to this government benefit was never "so far perfected as to permit no statutory interference." The Legislature's reclassification of defendant's military retirement pay as marital property violated neither the Constitutional guarantees of due process nor the law of the land.

B

[3] Defendant also argues that N.C. Const. art. X, sec. 4 operates to require a female's military retirement pay be classified under

Section 50-20 as her separate property. Article X, Section 4 states in part:

> The real and personal property of any female in this state acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and conveyed by her, *subject to such regulations and limitations as the General Assembly may prescribe.* [Emphasis added.]

Since defendant's retirement pay enjoyed no such alleged constitutional protection, defendant argues he has been denied equal protection of the laws because, as a male, he is not protected by Article 10, Section 4.

However, Article X, Section 4 expressly states that all rights accorded females by the amendment are subject to legislative regulation and limitation. *See generally Fullam*, 271 N.C. at 150, 155 S.E. 2d at 741 (summarizing legislative history of amendment). The historical context of the Article makes clear that wives were simply accorded rights in their property similar to those rights husbands already enjoyed in their own property. *See Turlington v. Lucas*, 186 N.C. 283, 290, 119 S.E. 366, 370 (1923). Whatever the remedial purpose of the amendment, it is by its own terms subject to limitations prescribed by the General Assembly, including any statutory classification and distribution of property under the Equitable Distribution Act. Under Section 50-20(b) of that Act, military retirement pay is treated no differently whether its recipient is male or female.

We therefore reject defendant's equal protection and due process claims as meritless.

III

In applying our equitable distribution statutes, the trial court must follow a three step procedure: (1) classification; (2) evaluation; and (3) distribution. *See Cable v. Cable*, 76 N.C. App. 134, 137, 331 S.E. 2d 765, 767, *disc. rev. denied*, 315 N.C. 182, 337 S.E. 2d 856 (1985). Since we have determined the marital classification of defendant's retirement pay is constitutional, no classification

issue remains. Furthermore, neither party objects to the values assigned by the trial judge.

[4] However, defendant objects to the equal distribution of the parties' marital property. In *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985), the trial court had specifically determined that equal distribution of the parties' marital property was equitable under Section 50-20. In affirming the trial court, our Supreme Court concluded the equitable distribution statute does more than create a presumption that equal division is equitable:

> Instead, the statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made mandatory "unless the court determines that an equal division is not equitable." N.C.G.S. 50-20(c). The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally. [Emphasis in original.]
>
> *When evidence tending to show that an equal division of marital property would not be equitable is admitted,* however, *the trial court must exercise its discretion in assigning the weight each factor should receive in any given case.* It must then make an equitable division of the marital property by balancing the evidence presented by the parties in light of the legislative policy which favors equal division. [Emphasis added.]

Id. at 776-77, 324 S.E. 2d at 832-33; *see also Harris v. Harris*, 84 N.C. App. ---, 352 S.E. 2d 869, 872 (1987) (to determine if equal division is inequitable, court must consider factors set forth at Section 50-20(c)).

In the instant case, the trial court admitted evidence tending to show an equal division of marital property would not be equitable under Section 50-20(c): 1) with respect to income, plaintiff was employed with a gross monthly income of $1,550.00;

defendant was unemployed, his only income being his monthly military retirement benefit of $789.00; 2) with respect to health, plaintiff has had bladder surgery three times, may require a bladder bag in the future, and additionally has substantial eyesight difficulties; defendant suffers from paranoid schizophrenia, probably cannot work and wears hearing aids in both ears; 3) with respect to assets on the date of the hearing, plaintiff had $4,000.00 in an IRA account, $1,292.22 in a checking account and $342.82 in a savings account; defendant had no assets other than the marital property; 4) with respect to expenses, defendant offered an exhibit setting forth his monthly living expenses of $1,147.09. Although there was testimony on plaintiff's expenses, this Court cannot determine from the record their amount.

If a party offers evidence tending to show an equal distribution is inequitable in light of the factors enumerated by Section 50-20(c), the court must under *White* and *Harris* assign each factor its proper weight. The court must then balance the evidence favoring each factor against the strong legislative policy favoring equal division of marital property. The trial judge is vested with great discretion to judge these factors and appellate review is limited to determining whether the court has clearly abused its discretion:

> A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to the trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White, 312 N.C. at 777, 324 S.E. 2d at 833 (citation omitted).

We must consider whether the trial judge properly considered defendant's evidence in connection with the factors set forth in Section 50-20(c). The trial court made no findings which would demonstrate it considered the relevant factors. It did state in its conclusions of law that it had considered the evidence presented and the "factors enumerated in North Carolina General Statute 50-20." That portion of the Court's order, though designated a "conclusion of law," is a finding of fact. Despite its generality, this finding indicates the trial judge considered the evidence relevant to the factors set forth in Section 50-20(c). *See Hartman v. Hart-*

man, 82 N.C. App. 167, 178, 346 S.E. 2d 196, 202, *disc. rev. denied*, 318 N.C. 506 (1986).

On several occasions, this Court has held that, when the trial judge ultimately determines an equal division is equitable, the judge need not make findings on the statutory and nonstatutory factors. *E.g., Hartman*; *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); *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985); *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33, *disc. rev. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985). Findings of fact by the trial judge are nonetheless recommended and will assist the appellate court's determination under *White* and *Harris* that the trial judge considered any evidence relevant to the factors enumerated by Section 50-20(c).

In the instant case, the trial court could have weighed the evidence differently and could have awarded defendant a larger portion of the marital property. However, when coupled with the legislative policy favoring equal division, we cannot say the evidence failed to show any rational basis under *White* for the distribution ordered by the court. Therefore, we find no abuse of discretion.

IV

Affirmed.

Judge JOHNSON concurs.

Chief Judge HEDRICK concurs in the result.

STATE OF NORTH CAROLINA v. SHARON ANNETTE HATFIELD ANDERSON

No. 8625SC792

(Filed 7 April 1987)

Criminal Law § 50.1; Obscenity § 3— disseminating obscenity—community tolerance—expert opinion testimony admissible

In a prosecution of defendant for disseminating obscenity the trial court erred in excluding opinion testimony by a sociologist that the average adult

person in the community would tolerate the magazines defendant allegedly sold and that the material was not patently offensive to the average person in the community, since the witness performed an ethnological study to arrive at his opinion; the study was described in great detail; as a result of the study the expert acquired specialized knowledge of contemporary community standards with respect to what he defined as "adult materials"; and the probative value of his opinion testimony outweighed any potential for prejudice, confusion or undue delay.

APPEAL by defendant from *Lewis (Robert D.), Judge.* Judgments entered 28 March 1986 in Superior Court, CATAWBA County. Heard in the Court of Appeals 12 January 1987.

Defendant was charged in proper bills of indictment with four (4) counts of disseminating obscenity in violation of G.S. 14-190.1(a)(1).

On 7 October 1985 Investigator Mulher of the Hickory Police Department entered the Imperial Newsstand and purchased two magazines entitled *Jets of Jizz* and *Ass Masters, Special #3* from the defendant. On 8 October 1985 he again entered the Imperial Newsstand and purchased two magazines entitled *Super Sex Stars #1* and *Ass Masters, Special #4* from the defendant. On 9 October 1985 the defendant was arrested and charged with four counts of disseminating obscenity in the sale of the magazines.

The jury returned a verdict acquitting defendant of disseminating obscenity in the sale of the magazines entitled *Jets of Jizz* and *Super Sex Stars #1.* The jury convicted defendant of disseminating obscenity in the sale of the magazines entitled *Ass Masters, Special #3* and *Special #4.*

The trial court entered judgments sentencing defendant to three years imprisonment on each count. Execution of the sentences was suspended and defendant was placed on supervised probation for five years. As a special condition of probation defendant was ordered to serve an active prison term of six months in the custody of the Department of Corrections as a committed youthful offender. As a regular condition of probation, defendant was fined $5,000.00 for each count. Defendant appeals.

Attorney General Thornburg by Assistant Attorney General Thomas J. Ziko for the State.

Lipsitz, Green, Fahringer, Roll, Schuller & James by Paul J. Cambria, Jr., Herbert L. Greenman and Cherie L. Peterson and James, McElroy & Diehl by Edward T. Hinson, Jr. for defendant-appellant.

EAGLES, Judge.

At trial defendant presented two expert witnesses, Dr. Charles Winick and Dr. Joseph Scott, to assist the jury in determining "contemporary community standards" relating to publications containing the depiction or description of sexual matters. The trial court excluded from evidence the results of a public opinion poll conducted by Dr. Winick on the issue of community standards. The trial court also refused to allow Dr. Scott to give his opinion about "whether or not [the] four magazines exceeded the community level of tolerance" and whether the magazines "depicted or described sex in a patently offensive way, a way not tolerated by the average adult in the community." Defendant contends that these rulings constitute an abuse of discretion and reversible error. We conclude that the trial court's treatment of Dr. Winick's testimony was appropriate; however, we agree with defendant that the exclusion of Dr. Scott's expert testimony was reversible error and requires a new trial.

In *Miller v. California*, 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607 (1973) the Supreme Court held that obscenity is to be determined by applying "contemporary community standards." *Id.* at 37, 37 L.Ed. 2d at 438, 93 S.Ct. at 2622. As explained by the court, the basic guidelines for the trier of fact must be:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, [citations omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24, 37 L.Ed. 2d at 431, 93 S.Ct. at 2615. Precisely what appeals to the "prurient interest" and what is "patently offensive"

are questions of fact. *Id.* at 30, 37 L.Ed. 2d at 434, 93 S.Ct. at 2618.

The definition of obscenity in G.S. 14-190.1 codifies the *Miller* three-part test. G.S. 14-190.1(b) requires three factual findings before material can be defined as obscene. First, the jury must find that the material depicts "sexual conduct" in a patently offensive way. This requires a two-part inquiry: (1) does the material in question contain descriptions or depictions of sexual conduct defined in G.S. 14-190.1(c), and if so, then (2) is the sexual conduct depicted or described in a "patently offensive way?" Second, the jury must find that the average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex. Third, the jury must find that the material lacks serious literary, artistic, political or scientific value. G.S. 14-190.1(b)(1)-(3).

While G.S. 14-190.1(b) includes "contemporary community standards" only with reference to the "prurient interest" part of the statutory definition of obscenity, the Supreme Court has made it clear that under the *Miller* test "contemporary community standards" provide the measure against which juries decide both the questions of appeal to the prurient interest *and* patent offensiveness. *Smith v. United States*, 431 U.S. 291, 52 L.Ed. 2d 324, 97 S.Ct. 1756 (1977). The principal concern in requiring judgment to be made on the basis of contemporary community standards is to assure that the challenged material is not judged on the basis of each juror's own personal opinion or judged by its effect on a particularly sensitive or insensitive individual or group. *Hamling v. United States*, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887 (1974). As explained by the Court in *Miller* "the primary concern with requiring a jury to apply the standard of 'the average person applying contemporary community standards' is to be certain that . . . [the material] will be judged by its impact on an average person." 413 U.S. at 33, 37 L.Ed. 2d at 436, 93 S.Ct. at 2620.

The Supreme Court has held that there is no constitutional need for expert testimony that the materials are obscene once the materials have been placed in evidence. *Paris Adult Theatre I v. Staton*, 413 U.S. 49, 37 L.Ed. 2d 446, 93 S.Ct. 2628 (1973). The

materials themselves are the best evidence of what they represent. *Id.* The subject of obscenity does not lend itself to the traditional use of expert testimony because expert testimony is usually admitted to explain to juries what they otherwise would not understand. *Id.* "No such assistance is needed by jurors in obscenity cases." *Id.* at 56, 37 L.Ed. 2d at 456, 93 S.Ct. at 2634. However, in *Kaplan v. California*, 413 U.S. 115, 37 L.Ed. 2d 492, 93 S.Ct. 2680 (1973) the court, citing Justice Frankfurter's concurring opinion in *Smith v. California*, 361 U.S. 147, 160, 4 L.Ed. 2d 205, 215, 80 S.Ct. 215, 222 (1959), pointed out that the *defense* is free to introduce appropriate expert testimony in obscenity litigation. 413 U.S. at 121, 37 L.Ed. 2d at 498, 93 S.Ct. at 2685. As explained by Justice Frankfurter:

> [It is] the right of one charged with obscenity—a right implicit in the very nature of the legal concept of obscenity—to enlighten the judgment of the tribunal, be it the jury or . . . the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts.
>
> There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is "applying contemporary community standards" in determining what constitutes obscenity, . . . it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge.

361 U.S. at 164-65, 4 L.Ed. 2d at 218, 80 S.Ct. at 225 (Frankfurter, J., concurring).

While it is established that expert testimony is admissible in obscenity trials, the trial court retains "wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling v. United States, supra* at 108, 41 L.Ed. 2d at 615, 94 S.Ct. at 2903. Once the expert witness demonstrates "knowledge, skill, experience, training or education" as required by Rule 702 of the Rules of Evi-

dence, the test of admissibility is "helpfulness." H. Brandis, *North Carolina Evidence* Section 132 (Cum. Supp. 1986). As explained by this court in *State v. Knox*, 78 N.C. App. 493, 337 S.E. 2d 154 (1985), "[t]he test for admissibility is whether the jury can receive 'appreciable help' from the expert witness." *Id.* at 495, 337 S.E. 2d at 156. "Applying this test requires balancing the probative value of the testimony against its potential for prejudice, confusion, or undue delay." *Id.*

Prior to trial, defendant employed Dr. Joseph Scott to conduct an ethnological study to determine "the level of tolerance for adult material" in Catawba County. Dr. Scott, a sociologist with a background in statistical methodology, testified that ethnology looks at "what is going on in the community" and specifically "in this area with regard to adult material, what is available, what are the behavior patterns, how do they reflect the tolerance in the community or the level of the tolerance of the adult material in the community by the adults in the community." Dr. Scott testified that this type of study is an accepted procedure of sociology to measure the community's level of tolerance for adult material.

In performing his ethnological study, Dr. Scott visited 38 locations in Catawba County where adult magazines were sold. Dr. Scott defined "adult magazines" as ranging from the "extremely mild to naked shots of women [sic] breasts and vulva area and penis and so forth up where you have pictures of couples together where they are engaging in oral, anal and vaginal sex." He viewed the adult magazines displayed at these locations and talked with store clerks to obtain opinions about these magazines as expressed by purchasing and nonpurchasing patrons. After visiting these 38 locations Dr. Scott then met with the general manager of the major distributor of magazines in the area to determine the total number of magazine outlets in the county and the percentage of the magazine outlets that sell adult material. He conducted a comparative study to determine adult magazine circulation in Catawba County as compared to North Carolina and the United States as a whole. Dr. Scott visited 12 video tape rental (and sales) outlets to determine the availability of and demand for adult video tapes, the type of people who rent them and the percentage of video rentals comprised of adult movies. There too he interviewed outlet staff personnel. Dr. Scott also visited three adult bookstores in Catawba County and talked with customers

and clerks there. He visited the local cable television company to determine the number of subscribers to the adult movie channel. He visited local bars which featured topless dancers. He spoke with the local newspaper editor and the person in charge of the newspaper's editorial section. He read every letter to the editor for local newspapers on the subject from 1 January 1985 through October 1985. He testified that his objective was to determine "what was going on" in the community.

Dr. Scott testified that he received a copy of each of the four magazines that defendant sold to Officer Mulher. He explained that based on his ethnological study and his examination of the four magazines, he formed an opinion as to whether or not the sexual conduct depicted in the four magazines "exceeded the community level of tolerance" for sexual conduct in Catawba County. However, following an objection by the State, Dr. Scott was not permitted to state his opinion. On *voir dire* Dr. Scott was questioned by defense counsel and the court as follows:

> Q. [defense counsel] Now as a result of this [study], were you able to render and are you able to render an opinion whether or not the material in this case, these four magazines, depict and describe sexually patently offensive conduct specifically defined by the law of North Carolina?
>
> A. Yes.
>
> COURT: To the average person in the community.
>
> Q. To the average adult person in the community.
>
> A. Yes.
>
> Q. What is your opinion?
>
> A. My opinion is that it is tolerated by the average adult person in the community.
>
> COURT: That is not the question, sir. The question is whether it is patently offensive to the average adult person in the community.
>
> A. My answer would be that it is not patently offensive to the average person in the community.

The trial court sustained the State's objection to Dr. Scott's testimony that in his opinion the average person in Catawba County

would not find the four subject magazines to be patently offensive. Defendant contends that it was error to exclude this opinion testimony. We agree.

We emphasize what the Supreme Court has already made clear, i.e., "contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case." *Smith v. United States, supra*, 431 U.S. at 300, 52 L.Ed. 2d at 334, 97 S.Ct. at 1763. The underlying questions of fact are whether the material appeals to a prurient interest in sex and is patently offensive. *Id.* at 300-01, 52 L.Ed. 2d at 334-35, 97 S.Ct. at 1763-64. Accordingly, in order for a study like Dr. Scott's ethnological study to be relevant, i.e. appreciably helpful to the jury, the study must be related to the underlying factual questions that the jury is being asked to decide.

The transcript of Dr. Scott's testimony indicates that in Dr. Scott's expert opinion contemporary community standards are revealed by what type of activity adults in the community will "tolerate." As Dr. Scott explained, he came to Catawba County at defendant's request to "look at the community and determine what the tolerance level was in this community for adult material." He also explained that he used the ethnological study method in order to determine how community behavior patterns reflect "the level of the tolerance of the adult material in the community." The trial court expressed concern about this use of the word, "tolerance." It appears, from the trial transcript, that defendant's reliance on this standard of what the community will "tolerate" comes from the following language in *Smith v. United States, supra*:

> Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community does not mean, as has been suggested, that obscenity convictions will be virtually unreviewable. We have stressed before that juries must be instructed properly, so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority. See *Miller v. California*, 413 U.S. at 30.

431 U.S. at 305, 52 L.Ed. 2d at 338, 97 S.Ct. at 1766. However, the Court in *Smith* was trying to explain its position in *Miller v. California, supra,* that the primary logic behind requiring juries to apply "contemporary community standards" is to insure that the material under scrutiny is judged by its *impact* on an average person rather than a particularly sensitive or insensitive one. 413 U.S. at 33, 37 L.Ed. at 436, 93 S.Ct. at 2620. Reading *Miller* and the above-quoted portion of *Smith* together, the concern is with the material's impact as measured by its effect on the average person in the community. "Tolerance" in this sense means the ability of the average person in the community to endure the impact or effect of this type of material and not whether the average person in the community "tolerates" widespread availability and the permissive attitudes of others.

Though the State contends otherwise, it is not clear that Dr. Scott's study is entirely based on the impermissible definition of "tolerance." The best way for Dr. Scott to determine the impact of these four magazines on the average person in the community is to go throughout the community showing these magazines to various randomly selected adult community residents. However, as defendants point out and the State agrees, if the magazines are in fact obscene, Dr. Scott is not permitted by law to disseminate them by showing them to randomly selected residents. What he did then was one of the next best things. While some of his methods could be said to demonstrate mere availability, accessibility and generally permissive attitudes, we do not believe that the study is so entirely flawed as to render his opinion on patent offensiveness wholly irrelevant and inadmissible. G.S. 8C-1, Rule 702 of our Rules of Evidence provides that if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." The test for admissibility is whether the jury can receive appreciable help from the expert witness. *State v. Knox, supra.* We are required to balance the probative value of the testimony against its potential for prejudice, confusion or undue delay.

It is clear from the record that as a result of his study Dr. Scott acquired specialized knowledge of contemporary community standards with respect to what he defined as "adult materials."

However, the Supreme Court has said that contemporary community standards take on meaning only when they are applied to the factual questions before the jury, i.e. appeal to prurient interest and patent offensiveness. Therefore, if Dr. Scott, based on his specialized knowledge of contemporary community standards, formed an opinion about whether the challenged materials would be patently offensive to the average person in the community, then we can see no reason, based on a relevancy objection, to prevent the jury from having the benefit of that opinion testimony. Without Dr. Scott's opinion testimony the only evidence defendant was allowed to present to the jury on contemporary community standards were Dr. Winick's two survey questions which informed the jury only that 76% of the people interviewed believed that in recent years standards have changed and the depiction of nudity and sex is more acceptable in movies, video cassettes, publications and other material available to adults but not children.

We believe that the probative value of Dr. Scott's opinion testimony outweighs any potential for prejudice, confusion or undue delay. In reaching this decision, we have been attentive to the Supreme Court's observation in *Kaplan v. California* that the defense is free to introduce appropriate expert testimony on the obscenity question, 413 U.S. at 121, 37 L.Ed. 2d at 498, 93 S.Ct. at 2685. We are similarly advertent to the language in Justice Frankfurter's concurring opinion in *Smith v. California* that "it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are." 361 U.S. at 165, 4 L.Ed. 2d at 218, 80 S.Ct. at 225. Here, the trial court erred in sustaining the State's objection to Dr. Scott's opinion testimony as to the patent offensiveness of these magazines. We cannot say that the effect was not prejudicial here since this was defendant's only relevant evidence of contemporary community standards. Defendant is therefore entitled to a new trial.

New trial.

Judges WELLS and GREENE concur.

PYCO SUPPLY COMPANY, INC. v. AMERICAN CENTENNIAL INSURANCE COMPANY v. CAROLINA ROAD BUILDERS, INC., H. KEITH DUNCAN, CURTIS L. CLARK, PATTY D. CLARK, LEONARD SIMMONS AND BETTY M. SIMMONS

No. 8617SC684

(Filed 7 April 1987)

1. **Limitation of Actions § 1; Principal and Surety § 9.1— statutory limitation period—reduction by contract not permitted**

   To the extent that provisions in a construction bond would reduce the limitation period allowed under N.C.G.S. § 44A-28(b), they are disregarded.

2. **Limitation of Actions § 4.3; Principal and Surety § 9.1— construction payment bond—statute of repose**

   The one-year limitation on construction payment bonds set forth in N.C.G.S. § 44A-28(b) constitutes a statute of repose, compliance with which is a condition precedent to defendant insurer's liability to plaintiff.

3. **Limitation of Actions § 12.4; Principal and Surety § 9.1— liability terminated—amendment of pleadings—no relation back—liability not revived**

   Where, pursuant to N.C.G.S. § 44A-28(b), the applicable statute of repose, defendant's liability on a construction payment bond terminated on 7 March 1985, one year after all work under the contract ceased, plaintiff's motion to amend its action to allow recovery, filed on 24 October 1985, could not revive defendant's liability, irrespective of any "relation back" under N.C.G.S. § 1A-1, Rule 15(c).

4. **Limitation of Actions § 4.3; Principal and Surety § 9.1— contract—issue as to date of "final settlement"—commencement of period of repose in question**

   Where a genuine issue of material fact existed as to the date of "final settlement" between a contracting town and a contractor, and it therefore could not be determined when the period of repose commenced, summary judgment for either party was inappropriate.

Chief Judge HEDRICK dissenting.

APPEAL by defendant American Centennial Insurance Company from *Rousseau, Judge*. Judgment entered 6 March 1986 in Superior Court, SURRY County. Heard in the Court of Appeals 5 January 1987.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks and B. Danforth Morton, for defendant-appellant.

Weinstein & Sturges, P.A., by Hugh B. Campbell, Jr., and Michel C. Daisley, for plaintiff-appellee.

GREENE, Judge.

This is an appeal from a summary judgment for plaintiff on a construction payment bond. The pleadings and affidavits before the trial court tended to show that, on or about 28 September 1982, the Town of Pilot Mountain, North Carolina let four contracts for the construction of water pipeline improvements. Carolina Road Builders, Inc. (hereinafter, "CRB") won three of the four contracts. As required under N.C. Gen. Stat. Sec. 44A-25 *et seq.* (1984), CRB gave three payment bonds respectively covering each of the three water project contracts. American Centennial Insurance Company (hereinafter, "American" or "defendant") executed all three payment bonds as surety for payment of labor and materials furnished in connection with CRB's three contracts. Each of the three payment bonds was separately numbered. Each bond covered one water project contract, which contracts were denominated "Water Line Improvements Contracts" and numbered "One," "Two," and "Four," respectively.

On 2 November 1984, plaintiff brought suit against American on one of its bonds. In its original complaint, plaintiff alleged it had furnished certain materials to CRB between November 1982 and January 1984 "in connection with a contract for construction and completion of water line improvements for the Town of Pilot Mountain, North Carolina." Plaintiff noted and attached to its original complaint a copy of "Water Line Improvements Contract No. Two." It likewise attached the specific payment bond given by American in connection with Contract No. Two. American answered in part that plaintiff's action on this bond (hereinafter, "Bond No. Two") was barred by limitations since all work had ceased under Contract No. Two on 24 June 1983. American argued that Bond No. Two itself provided suit must commence within one year from the date work ceased. American subsequently moved for summary judgment.

On 24 October 1985, plaintiff moved to amend its original complaint. It alleged in part that Pilot Mountain had furnished it the incorrect bond and contract and that the materials for which it remained unpaid were furnished in connection with CRB's work under Contract No. Four. CRB's affidavit showed its work under Contract No. Four was completed on 7 March 1984, less than one year before plaintiff's original complaint, but more than one year

before plaintiff's motion to amend its complaint. The trial court granted plaintiff's motion to amend its original complaint to state a claim under Bond No. Four and granted summary judgment for defendant on plaintiff's original action on Bond No. Two. Defendant's answer to plaintiff's amended complaint included a plea of statutory limitation under N.C. Gen. Stat. Sec. 44A-28(b). Both parties moved for summary judgment on plaintiff's amended complaint. The trial court granted summary judgment for plaintiff in the amount of $14,305.77. Defendant appeals.

The issues before this Court are: 1) whether the one-year period set forth by N.C. Gen. Stat. Sec. 44A-28(b) is a procedural statute of limitation or a substantive statute of repose; 2) whether plaintiff's amended complaint relates back to the date of plaintiff's original complaint under N.C.R. Civ. P. 15(c); and 3) whether plaintiff's amended complaint commenced action upon Bond No. Four within one year of "final settlement" under Section 44A-28(b).

I

We note at the outset the trial court awarded damages against defendant in its summary judgment. Therefore, the trial court's judgment is final and appealable. *Beck v. American Bankers Life Ass. Co.*, 36 N.C. App. 218, 243 S.E. 2d 414 (1978).

[1] We first determine the correct limitation period. Bond No. Four provided:

> That no suit or action shall be commenced hereunder by any claimant . . . after the expiration of one (1) year following the date on which Principal ceased work on said Contract, it being understood, however, that if any limitation embodied in the Bond is prohibited by any law controlling the construction hereof, such limitation shall be deemed to be amended so as to be equal to the *minimum* period of limitation permitted by such law. [Emphasis added.]

In all cases of public construction for which a payment bond is required under N.C. Gen. Stat. Sec. 44A-26, the provisions of the "Model Payment and Performance Bond Act," N.C. Gen. Stat. Sec. 44A-25 *et seq.*, are conclusively presumed to be written into every such bond. N.C. Gen. Stat. Sec. 44A-30(b). Section 44A-30(a) of the Act states that no contract between a contracting body,

contractor or surety may reduce the period of time for commencing action under Section 44A-28(b). Section 44A-28(b) provides:

> No action on a payment bond shall be commenced after the expiration of the *longer* period of one year from the day on which the last of the labor was performed or material was furnished by the claimant, or one year from the day on which final settlement was made with the contractor. [Emphasis added.]

The contractual provisions of Bond No. Four seek to shorten the limitation period to the minimum allowed under Section 44A-28(b). Since the statute instead provides for the longer period, we disregard the contractual limits set out in Bond No. Four to the extent they would reduce the limitation period allowed under Section 44A-28(b).

[2] The trial judge allowed plaintiff to amend its original complaint to allege a claim under Bond No. Four and relate the amendment back to the date of plaintiff's original pleading under N.C. Civ. P. 15(c). However, defendant contends commencing suit on Bond No. Four within the one-year period provided in Section 44A-28(b) is an absolute condition precedent to its alleged liability to plaintiff. Defendant therefore argues its liability on Bond No. Four had expired and could not be revived by plaintiff's procedural amendment. Plaintiff contends the limitation period merely limits plaintiff's remedy and is thus subject to Rule 15(c) as any other statute of limitation. In order to determine the propriety of the trial court's allowing the amendment's relation back, we first consider whether Section 44A-28(b) is a substantive statute of repose or merely a procedural statute of limitation.

Our Supreme Court has recently discussed the distinction between statutes of repose and statutes of limitation:

> Statutes of limitation are generally seen as running from the time of injury, or discovery of the injury in cases where that is difficult to detect. They serve to limit the time within which an action may be commenced after the cause of action has accrued. Statutes of repose, on the other hand, create time limitations which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant.

Trustees of Rowan Tech. College v. J. Hyatt Hammond Assoc., Inc., 313 N.C. 230, 234 n.3, 328 S.E. 2d 274, 276-77 n.3 (1985). In *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E. 2d 469, 474-75 (1985), the Court stated:

> Unlike an ordinary statute of limitations which begins running upon accrual of the claim . . ., the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. . . . Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce. . . . The legislature's adoption of an outer limit or repose . . . clearly [has] the effect of granting the defendant an immunity to actions . . . after the applicable period of time has elapsed.

(Citations omitted.)

The consequence of this distinction is that a statute of repose "constitutes a substantive definition of, rather than a procedural limitation on, rights." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 426, 302 S.E. 2d 868, 872 (1983). Commencement of suit within the allotted time is a "condition to the legal cognizability of [a] claim." *Id.* at 444, 302 S.E. 2d at 882. As the Court noted in *Bolick v. American Barmag Corp.*, 306 N.C. 364, 370, 293 S.E. 2d 415, 420 (1982), "That the legislature has the authority to establish a condition precedent to what originally was a common law cause of action is beyond question."

Under *Rowan* and *Black*, the primary characteristic of statutes of repose is that they commence and ensue independent of the accrual of plaintiff's cause of action. The one-year period in Section 44A-28(b) commences either upon the date labor or materials are last furnished or upon the date of final settlement between the contracting body and the contractor. As the limitation period commences either upon plaintiff's "last act" or upon "final settlement" between third parties, the limitation period clearly runs irrespective of plaintiff's legal injury. That the limitation period under Section 44A-28(b) runs from the last day materials are furnished or upon final settlement comports with the *Rowan* court's characterization of statutes of repose as running "from

defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant." 313 N.C. at 234 n.3, 328 S.E. 2d at 276-77 n.3.

Similarly, it is often said a statute of limitation may not commence until plaintiff is entitled to sue on the cause of action. *E.g., Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 193, 230 S.E. 2d 405, 412 (1976) (Branch, C.J., concurring). In contrast, the one-year period under Section 44A-28(b) commences at least 90 days before plaintiff is entitled to bring suit under Section 44A-27. N.C. Gen. Stat. Sec. 44A-27 (claimant may not bring suit before expiration of 90 days after last day on which claimant furnished labor or materials).

For these reasons, we hold the one-year limitation set forth in Section 44A-28(b) constitutes a statute of repose, compliance with which is condition precedent to American's liability to plaintiff. We acknowledge some federal courts have construed 40 U.S.C. Sec. 270b(b), the federal counterpart to our Section 44A-28(b), to be an ordinary statute of limitation rather than a condition precedent. *E.g., Security Ins. Co. v. U.S. ex rel. Haydis*, 338 F. 2d 444, 449 (9th Cir. 1964). Other federal courts have deemed the same provision a condition precedent or statute of repose. *E.g., U.S. ex rel. Harvey Gulf Int. Marine, Inc. v. Maryland Cas. Co.*, 573 F. 2d 245, 247 (5th Cir. 1978) (citing cases). The *Harvey Gulf* line of cases is more persuasive in light of our Supreme Court's decisions in *Rowan, Lamb* and *Bolick*.

II

[3] Given our construction of Section 44A-28(b) as condition precedent to American's liability, American's liability to plaintiff accordingly ceased one year after either of the two starting dates provided by the statute. While an ordinary statute of limitation limits a plaintiff's remedy, statutes of repose limit liability; accordingly, once defendant's liability terminated, plaintiff's amendment could not revive that liability, irrespective of any "relation back" under N.C.R. Civ. P. 15(c). The legislature's adoption of an outer limit or repose of one year clearly grants sureties immunity to payment bond actions after the applicable period has elapsed. *See Black*, 312 N.C. at 633, 325 S.E. 2d at 475. Those courts construing the federal counterpart as condition precedent have likewise not allowed an amendment to relate back under F.R. Civ. P.

15. *E.g., U.S. ex rel. Flynn's Camden Elec. Supply Co. v. Home Indemnity Ins. Co.*, 246 F. Supp. 27, 30 (E.D. Pa. 1965).

Plaintiff's action on Bond No. Two was dismissed by summary judgment. Plaintiff's motion to amend its action to allow recovery under Bond No. Four was filed 24 October 1985. CRB's undisputed affidavit stated that all work under Contract No. Four ceased on 7 March 1984. Insofar as the period of repose commenced upon the date work under Contract No. Four ceased, plaintiff's action on Bond No. Four was absolutely barred by repose after 7 March 1985. Once plaintiff's claim was so barred, it could not be revived by the relation back of any subsequent amendment.

III

[4] Since the period of repose under Section 44A-28(b) might also commence upon Pilot Mountain's "final settlement" with CRB, we must determine when "final settlement" occurred in order to determine the "longer" limitation period. If "final settlement" had occurred less than one year before plaintiff's motion to amend on 24 October 1985, then the statute had not expired and summary judgment for plaintiff would be appropriate. Conversely, if the pleadings and affidavits show without contradiction that more than one year had passed, then summary judgment should have been granted for defendant. *See Cellu Products Co. v. G.T.E. Product Corp.*, 81 N.C. App. 474, 477, 344 S.E. 2d 566, 568 (1986).

Since there are no reported decisions construing Section 44A-28(b), there is no local guidance on the term "final settlement" in this context; however, the term has had a long history under federal law. The seminal U.S. Supreme Court decision is *Illinois Surety Co. v. U.S.*, 240 U.S. 214 (1916). *See also Redevelopment Auth. of Philadelphia v. Fidelity and Deposit Co. of Md.*, 665 F. 2d 470, 473-76 (3rd Cir. 1981) (discussing *Illinois Surety*). In *Illinois Surety*, the Supreme Court distinguished "final settlement" from "final payment" with respect to commencing suit on surety bonds. The Court held that final settlement occurred when, so far as the government was concerned, the amount which it was bound to pay was administratively fixed by the proper authority. 240 U.S. at 221; *see also, Redevelopment Auth.*, 665 F. 2d at 474 (final settlement is "ministerial" act by authorized person). The date of the final settlement does not depend

upon the contractor's agreement and must be clear, readily ascertainable and occur at a definite time. *Illinois Surety*, 240 U.S. at 221.

The evidence in the record relevant to "final settlement" is meager. The affidavit of CRB's president states that, "final payment on Contract No. Four was received on March 19, 1984." Plaintiff's credit manager states by affidavit that "final approval of the work being done on Contract No. Four was not made by the engineers until March 7, 1984, [sic] from the project engineers employed by the Town of Pilot Mountain to supervise the water works construction . . . ." *Cf. Redevelopment Auth.*, 665 F. 2d at 475 (contracts and documents designated architect to "finally settle" the project). Whether typographical error or not, the record reflects the trial court's finding that work was not completed under Contract No. Four until 27 March 1984 (despite CRB's undisputed affidavit that such work was completed 7 March 1984).

The critical fact is when the Town of Pilot Mountain made the administrative determination of the amount it was bound to pay CRB. N.C.R. Civ. P. 56(c) provides that summary judgment will be granted "if the pleadings . . . 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 date of "final settlement" is a material element of plaintiff's claim.

Based on the pleadings and affidavits before us, we conclude a disputed material fact issue remains as to the date of "final settlement." While plaintiff's credit manager states project engineers "approved" the disputed work, there is no evidence in the record of the project engineers' "ministerial" authority to reach "final settlement" with CRB. Since "final payment" logically follows "final settlement," it is arguable CRB's affidavit of "final payment" requires finding "final settlement" had already occurred. However, Pilot Mountain's retainage of funds casts doubt on whether its 19 March 1984 payment was intended to be a genuinely "final" payment. We note also that, if the trial court's finding that work ended on 27 March 1984 is correct, then final settlement presumably occurred no earlier than that date. The purpose of employing "final settlement" as a yardstick is that it provides a definite time, fixed by public record and readily ascer-

tainable, after which subcontractors must bring suit. *See Redevelopment Auth.*, 665 F. 2d at 476. Section 44A-28(b) expressly commences on one of two specific "days." We cannot readily ascertain from the record the specific "day" anyone with administrative authority from Pilot Mountain fixed the amount Pilot Mountain was bound to pay CRB; indeed, we cannot determine from the record whether final settlement has occurred at all. Accordingly, the disputed material issue of "final settlement" precluded summary judgment for either party.

IV

We therefore reverse summary judgment for plaintiff and remand this matter to the trial court for proceedings consistent with this opinion.

Reversed and remanded.

Judge JOHNSON concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

In my opinion, the trial court did not err in allowing plaintiff to amend its complaint to omit the specific reference to Bond No. AB0018710A, and I vote to affirm summary judgment for plaintiff. G.S. 1A-1, Rule 15(c) allows the matter pleaded in the amendment to relate back so as to affirmatively disclose that plaintiff's claim is not barred by any statute of limitations or repose. The record discloses there are no genuine issues of material fact and the record does not disclose any insurmountable bar to plaintiff's claim. I vote to affirm.

STATE OF NORTH CAROLINA v. RUFUS WOODROW SINGLETON

No. 8625SC977

(Filed 7 April 1987)

1. **Rape and Allied Offenses § 19— taking indecent liberties—indictment—exact acts not alleged**

Indictments for taking indecent liberties sufficiently charged the offenses where they were couched in the language of the indecent liberties statute, and they did not need to specify the exact acts which constituted "immoral, improper and indecent liberty." N.C.G.S. § 15A-924(a)(5).

2. **Constitutional Law § 74— self-incrimination—reasonable belief of witness**

In a prosecution for taking indecent liberties and crime against nature the trial court did not err in refusing to compel a witness to testify about taking nude photographs of the victim, since the witness could reasonably believe that such testimony might be used against him in a criminal prosecution for crime against nature, and the testimony could furnish a link in a chain of evidence which could lead to prosecution.

3. **Criminal Law § 77— statement not against penal interest—exclusion proper**

A witness's statement to a police officer was not admissible under N.C.G.S. 8C-1, Rule 804(b)(3) as a statement against penal interest since the statement did not actually subject the witness to criminal liability.

APPEAL by defendant from *Lewis (Robert D.), Judge.* Judgments entered 23 April 1986 in Superior Court, BURKE County. Heard in the Court of Appeals 3 March 1987.

Defendant was charged in three bills of indictment with two counts each of taking indecent liberties with children in violation of G.S. 14-202.1. The indictments alleged that defendant took indecent liberties with the victim on 5 November 1983, 19 November 1983 and July 1984. Defendant was also charged in a separate bill of indictment with crime against nature with the victim on 5 November 1983 in violation of G.S. 14-177. The State proceeded at trial on one unspecified count in each of the three indictments for taking indecent liberties and on the one count of crime against nature.

The State's evidence tended to show the following:

The victim, whose name is not necessary to the opinion, testified that she was born on 8 August 1969 and that she worked for defendant by cleaning his house. She stated that when she first went to defendant's house to work, defendant pulled her into his

bedroom, took her clothes off, touched her breast and took nude photographs of her. She testified that defendant put his penis into her mouth but withdrew it after she bit him. She stated that defendant then had intercourse with her. The victim further testified that two weeks later and on other occasions until July 1984, that whenever she went to clean defendant's house, he took her clothes off, took nude pictures of her and had intercourse with her.

A friend of the victim testified that she went to defendant's house with the victim and that defendant took her (the friend's) clothes off, took pictures of her and had intercourse with her. She testified that this series of events occurred "a lot."

Marsha DePew, a Burke County special education teacher, testified that both the victim and her friend were special education students.

Mary Tate, an attendance counselor and school social worker for the Burke County Schools, testified that the victim told her that defendant was a "sex maniac" and when asked what she meant, the victim said, "Well, he's got all those photographs, he takes photographs every time he has sex with them, he's got them all over his house everywhere and pornography."

Captain Steve Whisnant of the Burke County Sheriff's Department testified that he seized seven nude photographs of the victim from defendant's bedroom. He also testified that he interviewed Joseph Lutz who volunteered information on the subject of taking pictures. Lutz worked for defendant and resided with him. Whisnant stated that he was involved in the issuance of a warrant against Lutz for crime against nature with the victim. Whisnant also stated that he sought the issuance of the warrant on the basis of Lutz's statements to him.

Defendant presented evidence tending to show the following:

Roy Lee Marcus, defendant's 18-year-old grandson, testified that he resided with defendant from 1982 to June or July of 1984. He stated that his relationship with the victim was that of boyfriend-girlfriend and that he had intercourse with her several times. He stated that he took nude photographs of the victim and placed these photographs in defendant's bedroom. Marcus iden-

tified five of the seven nude photographs of the victim as pictures he had taken.

Joseph Lutz testified that he was 19 years old but refused to answer anything further, invoking his constitutional privilege against self-incrimination.

Defendant did not testify.

The jury convicted defendant of three counts of taking indecent liberties with children finding that on three occasions defendant took nude photographs of the victim, touched her breasts and pubic area, and had vaginal intercourse with her. The jury also convicted defendant of one count of crime against nature. Defendant was sentenced to two consecutive three-year prison terms with an additional five-year suspended term to commence at the expiration of the active sentences upon the conditions that he be placed on supervised probation and pay a $4,000.00 fine. From the judgment of the trial court, defendant appeals.

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

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, by Lawrence D. McMahon, Jr. and Sam J. Ervin, IV, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in denying his motions to dismiss and in entering judgment because all of the indictments fail to charge a criminal offense as required by G.S. 15A-924(a)(5) since they do not specify the exact act performed by the defendant. We do not agree.

G.S. 15A-924(a)(5) states 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.

Each of the six counts in the three indictments for taking indecent liberties quotes the operative language of the indecent liberties statute and alleges that the defendant

> unlawfully, willfully and feloniously did take and attempt to take immoral, improper and indecent liberties with [the victim], who was under the age of 16 years at the time, for the purpose of arousing and gratifying sexual desire. At that time, the defendant was over 16 years of age and at least five years older than that child.

An indictment couched in the language of the statute is generally sufficient to charge the statutory offense. *State v. Palmer*, 293 N.C. 633, 239 S.E. 2d 406 (1977). It is also generally true that indictments need only allege the ultimate facts constituting the elements of the criminal offense. *Id.*

In the present case, the indictments for taking indecent liberties contain plain and concise factual statements which assert facts that support the elements of the offense charged. We find that the indictments clearly inform defendant of the conduct which is the subject of the accusations as required by G.S. 15A-924(a)(5). We therefore hold that the indictments for taking indecent liberties sufficiently charge the offense and need not specify the exact act which constitutes the "immoral, improper and indecent liberty."

Likewise, we find that the indictment charging defendant with crime against nature is sufficient under G.S. 15A-924(a)(5). *See State v. O'Keefe*, 263 N.C. 53, 138 S.E. 2d 767 (1964).

Defendant next contends that the court erred in admitting Mary Tate's testimony because it was not corroborative but presented new and prejudicial evidence. We disagree.

It is not necessary that evidence prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible. *State v. Burns*, 307 N.C. 224, 297 S.E. 2d 384 (1982); *State v. Higginbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985). The term "corroborate" means to strengthen and to add weight or credibility to a thing by additional and confirming facts or evidence. *Id.*

We find that Mary Tate's testimony strengthened the victim's testimony and was clearly corroborative. The character-

ization of defendant as a "sex maniac" was apparent from and consistent with the victim's trial testimony. The mention of the pornography is consistent with the victim's testimony about defendant taking nude photographs. We hold that the trial court properly admitted Mary Tate's testimony.

Defendant also contends that the trial court erred when it precluded him from providing an alternative explanation of the photographs by refusing either 1) to compel Joseph Lutz to testify about taking nude photographs of the victim, or 2) to admit an extrajudicial statement made by Lutz to Captain Whisnant. We find no merit in either argument.

[2] When this case was heard in the trial court, there were charges pending against Joseph Lutz for committing a crime against nature with the victim. Lutz invoked his constitutional privilege against self-incrimination and refused to answer any questions except those asking his address and his age.

> [T]he protection afforded by the privilege against self-incrimination "does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." *Maness v. Meyers*, 419 U.S. 449, 461, 42 L.Ed. 2d 574, 585, 95 S.Ct. 584, 592 (1975); *accord Smith v. Smith*, 116 N.C. 386, 21 S.E. 196 (1895).

Johnson County Nat'l Bank and Trust Co. v. Grainger, 42 N.C. App. 337, 339, 256 S.E. 2d 500, 502 (1979).

Although testimony by Lutz concerning nude photographs of the victim would not in itself subject him to criminal liability, such testimony reasonably could be used against him in a criminal prosecution for crime against nature and may furnish "a link in a chain of evidence" that could lead to prosecution. Therefore, the trial court did not err in refusing to compel Lutz to testify.

[3] Defendant alternatively argues that Lutz's statement to Captain Whisnant was erroneously excluded because it was admissible as a statement against penal interest.

We note that the protection afforded by the privilege against self-incrimination is much broader than the exception to the hear-

say rule which permits the admission of statements against penal interest. A witness may invoke his Fifth Amendment privilege and refuse to testify on *any* matter which may be used against him in a criminal prosecution. The scope of the exception permitting admissions of statements against penal interest, however, *only* extends to matters which actually subject the witness to criminal liability.

On voir dire examination, Whisnant stated that Lutz told him the following:

> Lutz advised he took some nude photographs of [the victim and her friend] and that they took some of each other; he stated he probably could pick out the ones he took; he stated he never took any of [the victim's] sister . . . .
>
> Lutz stated he had intercourse with [the victim's friend] but that [the victim] had performed fellatio on him.

Defendant asserts that Lutz's statement to Captain Whisnant concerning nude photographs of the victim should have been admitted under Rule 804(b)(3) of the North Carolina Rules of Evidence. Rule 804(b)(3) states that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

G.S. 8C-1, Rule 804(b)(3).

Defendant is correct in pointing out that Lutz is an "unavailable witness" under Rule 804(b)(3) due to his invocation of the privilege against self-incrimination. However, we do not believe that Rule 804(b)(3) is applicable to Lutz's statement concerning the nude photographs of the victim.

Rule 804(b)(3) requires that the statement "so far tended to subject him to . . . criminal liability. . . ." In *State v. Haywood,*

295 N.C. 709, 249 S.E. 2d 429 (1978), which was heard prior to the enactment of Rule 804(b)(3) of the North Carolina Rules of Evidence, our Supreme Court set out several specific requirements for the admission of statements against penal interest. The Court held that such statements "must have had the potential of *actually* jeopardizing the personal liberty of the declarant at the time . . . made. . . ." *Id.* at 728, 249 S.E. 2d at 441.

Rule 804(b)(3) of the North Carolina Rules of Evidence "contains no such specifics as were laid down in *State v. Haywood*, . . . but it seems probable that most, if not all of them will carry over under the Rule." 1 H. Brandis, *Brandis on North Carolina Evidence*, § 147 n. 79.4 (2d rev. ed. Supp. 1986).

We hold that Rule 804(b)(3) requires that in order for a statement to be admissible, it must actually subject the declarant to criminal liability.

The fact that Lutz may have taken nude photographs of the victim does not subject him to criminal liability. G.S. 14-202.1 does not apply to Lutz since he is not five years older than the victim. Therefore, we hold that Lutz's statement to Captain Whisnant was properly excluded by the trial court.

Defendant makes an additional argument that the exclusion of Lutz's statement to Captain Whisnant denied him his constitutional right of confrontation. A defendant has a constitutional right in a criminal prosecution to confront his accusers with other testimony. *State v. Hill*, 9 N.C. App. 279, 176 S.E. 2d 41 (1970), *rev'd on other grounds*, 277 N.C. 547, 178 S.E. 2d 462 (1971).

Defendant concedes that some confrontational testimony was provided by Roy Lee Marcus. However, defendant argues that he was prevented from providing additional confrontational evidence. This contention is untenable. Defendant was free to present any relevant evidence so long as it was properly admissible under the North Carolina Rules of Evidence.

The Commentary to Rule 802 of the North Carolina Rules of Evidence states that "hearsay is simply inadmissible unless an exception is applicable." In this case, no exception allowed the admission of Lutz's statement to Captain Whisnant. Thus, we are not persuaded by defendant's argument that he was denied his constitutional right of confrontation.

Defendant further contends that G.S. 14-177, the crime against nature statute, is unconstitutional. The appellate courts of this state have held repeatedly that G.S. 14-177 is not unconstitutional. *State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980); *State v. Poe*, 40 N.C. App. 385, 252 S.E. 2d 843, *disc. rev. denied*, 298 N.C. 303, 259 S.E. 2d 304 (1979), *appeal dismissed*, 445 U.S. 947 (1980).

We have reviewed defendant's remaining assignment of error and find it to be without merit. Accordingly, we find

No error.

Judges MARTIN and GREENE concur.

ROBERT E. WARD, JR. v. ROBERT G. ZABADY

No. 8610SC724

(Filed 7 April 1987)

1. Contracts § 27.2— sufficiency of evidence of breach

Evidence was sufficient to show that defendant breached his contract with plaintiff where the contract provided that defendant would set up a holding company in Luxembourg, execute an employment contract with the holding company, provide plaintiff with information on the corporation's activities, and provide plaintiff with a bimonthly list of expenses, but defendant in his stipulations and testimony admitted that he failed to perform these duties.

2. Contracts § 29.4— breach of contract—damages—investment in corporation—setoff

In a breach of contract action where plaintiff claimed as damages $75,000 which he had invested in a corporation, the trial court erred in awarding him the full $75,000 and in failing to deduct $7,500 which plaintiff received in an arrangement with a third person to buy his shares of the corporation, since plaintiff was entitled to recover only the amount of his actual damages.

3. Unfair Competition § 1— breach of contract—no unfair trade practices

A contract whereby plaintiff invested $75,000 and was to receive in exchange stock in a company to be formed by defendant was not within the scope of N.C.G.S. Chapter 75, and the trial court therefore did not err in dismissing plaintiff's unfair trade practices claim.

APPEAL by defendant from *Hight, Judge.* Judgment entered 20 February 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 11 December 1986.

Plaintiff and defendant organized a North Carolina corporation entitled International Infrastructure Development Corporation (IIDC). After it was formed, they entered into a personal contract to form a Luxembourg corporation, entitled International Infrastructure Development Holding Corporation (IIDHC). IIDHC was to own all of the stock of the North Carolina corporation and was also to act as a contact corporation for lining up construction projects throughout the world.

Defendant was responsible for organizing the holding company in Luxembourg, while plaintiff provided the initial cash investment of $75,000 to get the company started. In return for his investment, plaintiff was to receive 60,000 shares of the holding company's stock. There is no evidence that any other money was ever paid into the corporation, by defendant or anyone else.

The personal contract between plaintiff and defendant required defendant to execute an employment contract with the holding company. The provisions of the employment contract were to state that defendant would receive no salary from the company until plaintiff recovered his cash investments, but that defendant was to be reimbursed for reasonable expenses in connection with his employment. Under his employment contract, defendant was also required to furnish the corporation and its shareholders a statement of his expenses every two months and to keep them informed of the corporation's progress at reasonable intervals.

Defendant never formed a holding company in Luxembourg, but instead formed a corporation, not a holding company, in the Cayman Islands. Defendant never executed an employment contract with the corporation and failed to provide plaintiff with information concerning the corporation's progress or with an accounting of his expenses. The corporation never made any contracts or produced any income, so that it eventually failed.

In order to recover his investment, plaintiff agreed to sell his stock in the Cayman Island corporation to Ronald Barillo for $75,000. Plaintiff received $7,500 down and agreed to accept the

balance in ninety days. Barillo, however, never paid him the balance.

Plaintiff filed suit against defendant alleging that defendant breached their personal contract and claiming damages in the amount of $75,000, plus interest. Plaintiff also claimed treble damages under N.C.G.S. Chapter 75, the Unfair Trade Practices Act. Defendant counterclaimed and alleged that plaintiff breached the contract by failing to line up construction companies to perform in the Middle East, and that as a result he was damaged in the amount of $55,000.

Plaintiff made a motion for summary judgment on his claims against the defendant and on defendant's counterclaim. The court granted summary judgment to plaintiff only on defendant's counterclaim.

At trial, the court found that defendant had breached his contract with plaintiff and that plaintiff was entitled to a recovery of $75,000.

From the judgment entered for plaintiff, defendant appeals. From the court's granting defendant's motion to dismiss plaintiff's unfair trade practices claim, plaintiff appeals.

David R. Cockman, attorney for plaintiff appellee.

DeBank, McDaniel, Heidgerd, Holbrook & Anderson, by L. Bruce McDaniel, attorney for defendant appellant.

ORR, Judge.

I.

[1] Defendant argues that the trial court erred in entering judgment for plaintiff, because there was insufficient evidence that he breached the contract. We disagree.

In ruling that defendant had breached his contract with plaintiff, the trial court, sitting as judge and jury, made the following relevant findings of fact:

> 9. That the defendant without legal excuse and unjustifiedly [sic] failed to provide for the organization of the holding company.

11. That if such a Cayman Island corporation was formed by the defendant, such corporation formation did not fulfill the requirement in paragraph numbered 14 of the "Contract" that Zabady provide for the organization of the holding company.

13. That no employment contract with IIDHC was executed by the defendant.

14. That no employment contract with any identified corporation was executed by the defendant.

17. That the defendant without legal excuse and unjustifiedly [sic] failed to keep Ward informed of the corporation's progress at reasonable intervals.

18. That the defendant unjustifiedly [sic] failed to provide a statement of expenses to Ward or any interested parties (shareholders) at any time.

"When a jury trial is waived, 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. . . . Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts." *Lane v. Honeycutt*, 14 N.C. App. 436, 438, 188 S.E. 2d 604, 605, *cert. denied*, 281 N.C. 622, 190 S.E. 2d 466 (1972).

As to the formation of a Luxembourg holding company, defendant admitted in his deposition and stipulated in the Order on Final Pretrial Conference that he did not set up a holding company in Luxembourg as required in the contract. "[S]tipulations by the parties have the same effect as a jury finding; the jury is not required to find the existence of such facts; and nothing else appearing, they are conclusive and binding upon the parties and the trial judge." *Crowder v. Jenkins*, 11 N.C. App. 57, 63, 180 S.E. 2d 482, 486 (1971).

Defendant argues that he substantially performed this provision of the contract by forming a corporation in the Cayman Islands. The Cayman Island corporation, however, was not a holding company as required by his contract with plaintiff. Furthermore, the Cayman Island corporation never fulfilled any of the

objectives proposed in the contract for the holding company. It never made any contracts to do business with other companies and it never produced any income. If any records were kept concerning the corporation's dealings and its attempts to generate business, defendant could not produce them.

Defendant testified that he never executed an employment contract either with the holding company or with any other corporation. Yet, defendant denies breaching this provision of the contract, since no one ever presented him with a contract to sign or asked him to prepare one. The contract between plaintiff and defendant, however, states that "Zabady agrees to execute an employment contract with IIDHC. . . ." This provision indicates that defendant was to execute the contract on his own initiative. When defendant failed to do so, he breached that provision of the contract.

Defendant also stipulated in the Order on Final Pretrial Conference, that he failed to provide plaintiff information on the corporation's activities and that he never furnished the corporation or its shareholders with a bimonthly statement of expenses. The evidence shows that by letter dated 11 April 1978, plaintiff requested that defendant furnish him with information concerning the corporation's progress. Defendant admitted in his deposition that he never responded to this request.

Plaintiff also requested a list of expenses incurred by defendant in connection with corporation business as early as December, 1977. Defendant admitted in his deposition that he failed to respond to this request and that he failed to furnish a list of expenses to the corporation every two months. Defendant's deposition reveals that after he received plaintiff's money, he had virtually no contact with plaintiff or anyone else concerning the corporation's progress or what expenses he incurred.

Based on the above facts, we hold that there was sufficient evidence to support the trial court's findings that defendant breached his contract with plaintiff.

II.

[2] The trial court found "[t]hat as a result of the defendant's failure to perform his duties under the 'Contract,' the plaintiff has suffered an actual loss of $75,000.00, such amount being his cash

contribution pursuant to the 'Contract.'" Defendant argues that the trial court erred in awarding plaintiff his full $75,000 investment. We agree.

The measure of damages for a breach of contract is the amount which will compensate the injured party for his loss and which will put the plaintiff in as good a position as if the contract had been performed. *Service Co. v. Sales Co.*, 259 N.C. 400, 415, 131 S.E. 2d 9, 21 (1963). To recover compensatory damages in a contract case, plaintiff must show that the damages claimed were the natural and probable result of the acts complained of, and must also show the amount of loss with reasonable certainty. Such damages may not be based on mere speculation or conjecture. *Pike v. Trust Co.*, 274 N.C. 1, 17-18, 161 S.E. 2d 453, 466 (1968).

The evidence shows that plaintiff paid into the North Carolina corporation the sum of $75,000 pursuant to his agreement with defendant. Defendant was to use plaintiff's money to get the business started and to pay for defendant's reasonable business expenses. The evidence shows that defendant used the funds contributed by plaintiff for expenses which were unreasonable under the terms of their contract and for personal expenses, such as purchasing a Cadillac automobile and shipping it from the United States to Europe, where he was allegedly doing business.

Defendant also hired a young woman to serve as the corporation's secretary, although defendant could not recall if she had even typed any letters for him while she was employed by the corporation. Defendant also used corporate funds to pay for his trips not taken for the benefit of the corporation.

When plaintiff learned of defendant's misuse of the corporate funds, he entered into a buy-out agreement with Ronald Barillo in order to recover his cash investment. Barillo agreed to buy all of plaintiff's stock for $75,000, and paid plaintiff $7,500 down at the time the agreement was made. Barillo agreed to pay the balance in ninety days, but never did. However, since Barillo did pay the initial $7,500, plaintiff is entitled to recover only $67,500 from defendant. A plaintiff can only recover his actual losses in a breach of contract case. *See Norwood v. Carter*, 242 N.C. 152, 87 S.E. 2d 2 (1955).

Plaintiff is also entitled to recover interest from 1 October 1977 as granted by the trial court. In a breach of contract case, interest on the amount of damages may be allowed from the date of the breach, *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 127, 123 S.E. 2d 590, 602 (1962), when the amount of damages is ascertained from the contract itself or from relevant evidence, or from both. *General Metals v. Manufacturing Co.*, 259 N.C. 709, 713, 131 S.E. 2d 360, 363 (1963).

III.

Defendant argues that the trial court erred in granting plaintiff's motion for summary judgment which dismissed defendant's counterclaim. We disagree.

Defendant's counterclaim alleged that plaintiff breached the personal contract by failing to arrange for American construction companies to perform certain construction services and that this failure caused him to lose his investment of $55,000.

At trial, defendant could not prove that he had invested $55,000 in the stock of the corporation or that he had personally paid for any corporate expenditures. Furthermore, when questioned about the counterclaim during his deposition, defendant even stated, "I guess I can't prove that claim."

Therefore, we hold that the trial court appropriately granted plaintiff's motion for summary judgment on defendant's counterclaim.

IV.

[3] Plaintiff argues that the trial court erred in dismissing his claim under Chapter 75. We disagree.

N.C.G.S. Chapter 75, the Unfair Trade Practices Act, encompasses only consumer and commercial practices. This matter involved a contract whereby plaintiff invested $75,000 and was to receive in exchange stock in a company to be formed by defendant. We hold that such a transaction is not within the scope of Chapter 75.

Our Supreme Court has given a very narrow interpretation to Chapter 75 and has held that other federal or state statutes may limit its scope. *See 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). Furthermore, the regulation of securities in North Carolina is already governed by the North Carolina Securities Act, N.C.G.S. § 78A-1. If Chapter 75 also applied to securities, it would subject those involved with securities transactions to overlapping supervision. *See Lindner v. Durham Hosiery Mills, Inc.*, 761 F. 2d 162 (4th Cir. 1985). Therefore, we hold that the trial court properly dismissed plaintiff's unfair trade practices claim.

V.

Plaintiff also argues that the trial court erred in not admitting evidence on prior federal indictments against defendant and Barillo. We disagree.

Evidence of the indictments was irrelevant and immaterial to the case *sub judice*, and therefore, was inadmissible under Rule 402 of the North Carolina Rules of Evidence. *See State v. Price*, 313 N.C. 297, 327 S.E. 2d 863 (1985).

Having reviewed the record in this case, we hold that there was sufficient evidence to support the trial court's findings that defendant breached his contract with plaintiff. Furthermore, there is no evidence that plaintiff breached the contract in any way. Therefore, the trial court's conclusion that defendant breached this contract is affirmed.

The damages awarded by the trial court, however, should be reduced by $7,500 to reflect that amount already received by plaintiff from Barillo. That issue alone is reversed and remanded to the trial court for entry of judgment in accordance with this opinion.

Affirmed in part and reversed in part.

Judges ARNOLD and PHILLIPS concur.

VIVIAN C. ALLRED, EXECUTRIX OF THE ESTATE OF SHIRLEY ALLRED TUCCI, SUBSTITUTED PLAINTIFF v. JAMES MICHAEL TUCCI

No. 8621DC946

(Filed 7 April 1987)

1. **Divorce and Alimony § 29; Rules of Civil Procedure § 60.1— divorce from bed and board—motion for relief from judgment—death of party—no bar to motion**

The death of defendant's wife was not a bar to his motion for relief from a judgment for divorce from bed and board, and plaintiff's contention that defendant's motion was not filed within a reasonable time was without merit, since a void judgment is a legal nullity which may be attacked at any time, and a proceeding to set aside an invalid divorce decree is not barred by the death of one of the spouses where property rights are involved. N.C.G.S. 1A-1, Rule 60(b)(4).

2. **Divorce and Alimony § 29— divorce from bed and board—no findings as to grounds—judgment void**

The trial court's judgment for divorce from bed and board was void rather than voidable where the court did not find facts as to the existence of any grounds for divorce from bed and board cognizable under N.C.G.S. § 50-7, and the court was thus without power or authority and therefore jurisdiction to enter the judgment.

APPEAL by plaintiff from *Burleson, Judge*. Judgment entered 11 June 1986 in District Court, FORSYTH County. Heard in the Court of Appeals 15 January 1987.

On 30 September 1985, Shirley Allred Tucci brought this action seeking, *inter alia*, a divorce from bed and board from defendant on grounds that he had committed indignities to her person. After defendant filed answer denying the material allegations of the complaint, a judgment, consented to by the parties and their attorneys, was entered in the District Court on 16 December 1985 as follows:

> THIS CAUSE came on for hearing before the undersigned Judge presiding over the Civil District Court of Forsyth County, North Carolina.
>
> The parties are not present in Court, but counsel of record for the parties are present in Court.
>
> Based on the representation of counsel and the statements contained in this Consent Judgment, the Court finds that the parties have settled all issues and matters in con-

troversy raised by the pleadings and are of the opinion that it is in their best interest to live separate and apart and that the parties be granted a divorce from bed and board.

Based on the foregoing findings of fact, the Court concludes as a matter of law that it has jurisdiction of the parties and the subject matter; that the parties stipulate and agree that it is in their best interest to live separate and apart and they authorize the Court to enter a judgment granting a divorce from bed and board.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the parties be granted a divorce from bed and board from each other and that they live separate and apart from this day forward.

Each party shall bear his or her own costs and attorneys fees.

This the 16 day of December, 1985.

s/ ABNER ALEXANDER
Judge Presiding

On 20 March 1986, Shirley Allred Tucci died. Vivian C. Allred qualified as executrix of her estate. On 20 May 1986, defendant filed a motion, pursuant to G.S. 1A-1, Rule 25, to substitute Vivian C. Allred, Executrix of the Estate of Shirley Allred Tucci as plaintiff. Defendant also moved, pursuant to Rule 60(b), to set aside the consent judgment on grounds that it was "void as a matter of law due to fatal deficiencies in the findings, or lack thereof, as required by North Carolina General Statutes § 50-7 and § 50-10." He also alleged that he had consented to the judgment upon advice of his former counsel and that he had been "mistaken as to the nature and effect of the judgment."

The motions were heard 11 June 1986 before Judge Burleson, who allowed the motion for substitution of parties and, with respect to defendant's Rule 60(b) motion, found and concluded:

1. That Vivian C. Allred has been duly appointed on April 21, 1986, Executrix of the Estate of Shirley Allred Tucci by the Clerk of Superior Court of Forsyth County, North Carolina, and is acting as such. Vivian C. Allred, Executrix of the Estate of Shirley Allred Tucci, deceased plaintiff, has

been duly substituted as plaintiff in this matter by order previously entered herein pursuant to North Carolina Rule of Civil Procedure 25. Said substituted plaintiff filed a verified response, dated May 28, 1986, to defendant's above-referenced motion, and further was represented by counsel at a hearing on said motion.

2. That defendant's above-noted Rule 60(b) motion was filed within a reasonable time after the December 16, 1985, Judgment entered herein.

3. That the defendant has not established any facts constituting mistake, inadvertance [sic], surprise, or excusable neglect, as grounds for relief from the December 16, 1985, Judgment.

4. That the provisions of North Carolina General Statute § 50-10 are applicable to actions for divorce from bed and board as well as to actions for absolute divorce.

5. That the December 16, 1985, Judgment entered herein does not have any findings of fact constituting grounds for a divorce from bed and board prescribed by North Carolina General Statute § 50-7, as mandated by North Carolina General Statute 50-10.

6. That the Court was without power, authority or subject matter jurisdiction to enter the December 16, 1985, Judgment granting divorce from bed and board.

7. That the consent of the parties and the parties' counsel does not and cannot validate the December 16, 1985, Judgment which is void as a matter of law.

Judge Burleson further concluded that the consent judgment of divorce from bed and board was void *ab initio* and ordered that it be set aside pursuant to Rule 60(b)(4). Plaintiff appeals.

Morrow and Reavis, by John F. Morrow and Clifton R. Long, Jr., for plaintiff appellant.

Harrison, Benson, Worth, Fish, North, Cooke & Landreth, by A. Wayland Cooke and Michael C. Landreth, for defendant appellee.

MARTIN, Judge.

[1] G.S. 1A-1, Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (4) The judgment is void. . . .
>
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

Plaintiff's initial argument is that defendant's motion for relief from the judgment of divorce from bed and board was not filed within a reasonable time, as required by the rule. Citing *Nickels v. Nickels*, 51 N.C. App. 690, 277 S.E. 2d 577, *disc. rev. denied*, 303 N.C. 545, 281 S.E. 2d 392 (1981) for the principle that a determination of what is a "reasonable time" must depend on the facts of each case, plaintiff contends that the fact that defendant did not move for relief until after his wife's death establishes, as a matter of law, that the motion was not timely. We disagree. Although Rule 60(b) contains the requirement that all motions made pursuant thereto be made "within a reasonable time," the requirement is not enforceable with respect to motions made pursuant to Rule 60(b)(4), because a void judgment is a legal nullity which may be attacked at any time. 11 Wright and Miller, Federal Practice and Procedure: Civil §§ 2862, 2866 (1973). If the judgment of divorce from bed and board at issue in the present case is void, then, as with any other void judgment, it establishes no legal rights and may be vacated without regard to time. *Cunningham v. Brigman*, 263 N.C. 208, 139 S.E. 2d 353 (1964).

Moreover, contrary to the assertions of plaintiff, a proceeding to set aside an invalid divorce decree is not barred by the death of one of the spouses where property rights are involved. 1 Lee, North Carolina Family Law, § 94 (4th Ed. 1979). Property rights are obviously involved in the present case since a decree of divorce from bed and board would, pursuant to G.S. 31A-1, cause a forfeiture of defendant's rights with respect to Shirley Allred Tucci's estate. For the preceding reasons, we conclude that Shir-

ley Allred Tucci's death is not a bar to defendant's motion for relief from the judgment.

[2] The principal question presented by this appeal is whether the 16 December 1985 judgment of divorce from bed and board is void or whether it is merely voidable. Our Supreme Court has described a void judgment as "one which has a mere semblance but is lacking in some of the essential elements which would authorize the court to proceed to judgment." *Monroe v. Niven*, 221 N.C. 362, 364, 20 S.E. 2d 311, 312 (1942). "When a court has no authority to act its acts are void." *Id.*

> "If a judgment is void, it must be from one or more of the following causes: 1. Want of jurisdiction over the subject matter; 2. Want of jurisdiction over the parties to the action, or some of them; or 3. Want of power to grant the relief contained in the judgment. In pronouncing judgments of the first and second classes, the court acts without jurisdiction, while in those of the third class, it acts in excess of jurisdiction." Freeman on Judgments (4 ed.), p. 176.

Ellis v. Ellis, 190 N.C. 418, 421, 130 S.E. 7, 9 (1925). On the other hand, the Supreme Court has said that a judgment is not void where the court which renders it "has authority to hear and determine the questions in dispute and control over the parties to the controversy. . . ." *Travis v. Johnston*, 244 N.C. 713, 719-20, 95 S.E. 2d 94, 99 (1956). In such case, the judgment is not void even though it may be contrary to law; it is voidable, but is binding on the parties until vacated or corrected in the proper manner. *Worthington v. Wooten*, 242 N.C. 88, 86 S.E. 2d 767 (1955).

In North Carolina, jurisdiction over the subject matter of actions affecting the marriage relationship is authorized only by statute. *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975); *Schlagel v. Schlagel*, 253 N.C. 787, 117 S.E. 2d 790 (1961); *Ellis, supra.* Included within that grant of authority are the provisions of G.S. 50-10, which require that "[t]he material facts in every complaint asking for a divorce . . . shall be deemed to be denied by the defendant, . . . and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury." Those material facts include not only the jurisdictional facts required by G.S. 50-8 to be set forth in the complaint, but also facts constituting the grounds for the claim

for relief. *Schlagel, supra; Pruett v. Pruett*, 247 N.C. 13, 100 S.E. 2d 296 (1957); *Saunderson v. Saunderson*, 195 N.C. 169, 141 S.E. 572 (1928). The provisions of G.S. 50-10 are applicable to actions for divorce from bed and board, the grounds for which are specified by G.S. 50-7. *Schlagel, supra.*

In the present case, there is no question that the District Court had jurisdiction of the parties and of the subject matter involved in the action. However, the judgment of divorce from bed and board entered in this case contains absolutely no finding of the existence of any of the grounds for divorce from bed and board cognizable under G.S. 50-7. "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Eudy, supra* at 75, 215 S.E. 2d at 785. Thus, upon the facts found by it, the District Court was without power or authority, and therefore without jurisdiction to enter the judgment granting the parties a divorce from bed and board.

Ordinarily, where the court has jurisdiction of the parties and of the subject matter and enters a judgment which is not supported by findings of fact, the judgment is, at most, erroneous but not void and may be attacked only by an appeal. *Ellis, supra;* 8 N.C. Index 3d, Judgments, § 19. Where the court acts in excess of its authority, however, the result is different.

> If the court was without authority, its judgment . . . is void and of no effect. A lack of jurisdiction or power in the court entering a judgment always avoids the judgment [citations omitted], and a void judgment may be attacked whenever and wherever it is asserted, without any special plea. [Citations omitted.]

Hanson v. Yandle, 235 N.C. 532, 535, 70 S.E. 2d 565, 568 (1952). *See Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617 (1956); *Ellis, supra; Saunderson, supra.*

Plaintiff argues, however, that the judgment of divorce from bed and board is not void because it was entered by consent. A valid consent judgment may be set aside only with the consent of both parties, or upon proof that consent was not given or was ob-

tained by fraud or mutual mistake. *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956). A void judgment, however, binds no one and it is immaterial whether the judgment was or was not entered by consent. *Hanson, supra.* "[I]t is well settled that consent of the parties to an action does not confer jurisdiction upon a court to render a judgment which it would otherwise have no power or jurisdiction to render." *Saunderson, supra* at 172, 141 S.E. at 574.

Since material facts necessary to the granting of a divorce from bed and board were not found by the court, the court acted beyond its jurisdiction in entering the 16 December 1985 judgment. The judgment is therefore void. "To hold otherwise would be to sanction a divorce for cause not given by statute; and causes for divorce are statutory in North Carolina." *Ellis, supra,* at 421, 130 S.E. at 9.

By her final argument, plaintiff asserts that even if the judgment of divorce from bed and board is void, defendant should be equitably estopped from questioning its validity because of his participation in its procurement. However, the question of estoppel does not arise upon the record before us. Estoppel must be affirmatively pleaded by the party relying upon it. *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E. 2d 656 (1984). Plaintiff did not plead estoppel in either of her responses to defendant's motions and she has not included in the record on appeal any narration or transcription of the evidence below to establish that she presented evidence in support of that theory. She may not, therefore, present the question on appeal. *Gillis v. Whitley's Discount Auto Sales, Inc.*, 70 N.C. App. 270, 319 S.E. 2d 661 (1984); *Nationwide, supra.*

The order granting defendant relief from the void judgment of divorce from bed and board must be affirmed.

Affirmed.

Judges PARKER and COZORT concur.

State v. Edwards and State v. Jones

STATE OF NORTH CAROLINA v. ROOSEVELT EDWARDS

STATE OF NORTH CAROLINA v. ERMA COOPER JONES

No. 867SC909

(Filed 7 April 1987)

1. **Searches and Seizures § 24— search warrant—probable cause for issuance—information from informant**

There was sufficient probable cause for the issuance of a search warrant where the affidavit of the officer who applied for the warrant contained sworn statements that a confidential informant had personal knowledge that marijuana was being sold out of defendants' residence and that this informant had given reliable information in the past, leading to at least five drug related convictions, and the affidavit also stated that a controlled buy of marijuana had been made at defendants' residence.

2. **Searches and Seizures § 39— scope of search warrant—search of bedroom proper**

Officers did not exceed the scope of a search warrant which authorized a search of defendants' "premises, vehicle, (and) person . . ." when officers searched defendants' bedroom and seized marijuana, scales, and plastic bags found there.

3. **Searches and Seizures § 41— search under warrant—knock by officers**

Where defendants' own evidence substantiated that police knocked before entering defendants' premises, there was no merit to defendants' contention that the warrant was improperly served and evidence seized under the warrant should have been suppressed.

4. **Criminal Law § 99.4— "hurry-and-wait" case—no expression of opinion by court**

The trial court did not improperly express an opinion by explaining why the jury was being sent out of the courtroom after a defense objection, apologizing for the delay, and saying that this case was one of "hurry-and-wait."

5. **Criminal Law § 51.1— expert testimony—witness properly qualified**

The trial court did not err in allowing a witness for the State to testify as an expert and to identify the substance seized at defendants' residence as marijuana where the witness had a bachelor's degree in chemistry, worked in the chemical analysis laboratory of the SBI for three years, and completed specialized training courses in chemical analysis.

6. **Narcotics § 4— felonious possession of marijuana—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for felonious possession of marijuana where it tended to show that marijuana was found in the bedroom of a house belonging to defendants; only defendants and two small children were present in the house; and the marijuana found there weighed 193 grams or just under seven ounces.

State v. Edwards and State v. Jones

APPEAL by defendants from *Wright, Judge.* Judgments entered 28 February 1986 in Superior Court, NASH County. Heard in the Court of Appeals 10 February 1987.

Defendants were each indicted on the charge of felonious possession of marijuana. Both made motions to suppress evidence seized during a search of their home conducted pursuant to a search warrant. The evidence seized consisted of approximately seven ounces of marijuana, a set of scales, plastic "baggies" and over $2,000 in cash. The defendants' motions were denied and both were found guilty by the jury. Defendant Roosevelt Edwards was sentenced to five years imprisonment, while defendant Erma Jones received a two-year suspended sentence and five years probation. Defendants appeal.

Attorney General Lacy H. Thornburg by Assistant Attorney General Edmond W. Caldwell, Jr., for the State.

Floyd B. McKissick, Sr., and Earl Whitted, Jr., for defendants-appellants.

PARKER, Judge.

Defendants first assign error to the denial of their motions to suppress evidence seized from their home on 10 January 1985. The items were seized pursuant to a search warrant issued by a Nash County magistrate. The grounds for defendants' motions were: (i) that there was not sufficient probable cause for the warrant to be issued; (ii) that the actual search exceeded the scope authorized by the warrant; and (iii) that the warrant was served in an improper manner.

The trial court conducted a hearing on the motions to suppress pursuant to G.S. 15A-977. At the conclusion of this hearing, the motions were denied. Defendants argue in their brief that the trial court erred in failing to make findings of fact and conclusions of law on the record in ruling on the motions. *See* G.S. 15A-977(f). We note at the outset that defendants elected to use a narrative of the evidence pursuant to N.C. Rule App. Proc. 9(c)(1) rather than a verbatim transcript of the proceedings. Accordingly, this Court cannot determine whether the trial judge made findings of fact from the bench. Furthermore, the record before us does not contain the trial court's denial of the motions and nothing in the

record indicates that defendants objected at trial to the trial judge's failure to make findings.

[1] A review of the record does disclose, however, that the search warrant was properly issued and served. The affidavit of the officer who applied for the search warrant contained sworn statements that a confidential informant had personal knowledge that marijuana was being sold out of defendants' residence and that this informant had given reliable information in the past, leading to at least five drug-related convictions. The affidavit also stated that a controlled buy of marijuana had been made at defendants' residence. This information is clearly sufficient to find the existence of probable cause to search defendants' residence.

[2] The record also shows that the officers did not exceed the scope of the search authorized by the warrant in conducting their search of defendants' residence. The warrant authorized a search of defendants' "premises, vehicle, [and] person . . . ." The marijuana was seen on a table in defendants' bedroom. The scales and plastic bags were also on this table. A search of defendants' bedroom was authorized by the warrant.

[3] Defendants' final contention in their motions to suppress was that the warrant was improperly served, in violation of G.S. 15A-249, *et seq.* Defendant Jones testified on direct examination at the hearing that the officers simply broke down their door without warning, immediately arrested defendant Edwards, then searched the house while reading the warrant to Edwards who was handcuffed. However, defendant Jones testified on cross-examination that the police were banging on the door about five or ten minutes. Defendants also presented the testimony of two of their friends who were visiting them from Tarboro. One of these friends testified that they were outside defendants' house when the police arrived and that the police yanked open the storm door and smashed the wooden door in without knocking or announcing their presence. The other witness testified on direct examination that the police yanked open the storm door and pushed in the wooden door, but on cross-examination, this witness testified that the police banged on the door for about five minutes. Two of the officers involved in the search testified that they knocked on the door and announced their identity. The officers saw the wooden door move slightly, but it did not open. The officers, believing

their entry was being unreasonably delayed, pulled open the screen door and pushed open the already partly-open wooden door. This conflict in the evidence presented at the suppression hearing normally would require the trial court to find facts. *See* G.S. 15A-977(d). However, since defendants' own evidence substantiates that the police knocked before entering, and this is the only evidence in conflict, there is not, in our view, sufficient material conflict in the evidence to render the court's failure to find facts prejudicial error. Where there is no material conflict in the evidence, findings and conclusions are not necessary even though the better practice is to find facts. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980). Defendants' assignments of error based upon the denial of their motions to suppress are overruled.

[4] Defendants next assign error to statements made by the trial judge which, they allege, improperly expressed an opinion about the case. General Statute 15A-1222 prohibits a trial judge from expressing "any opinion in the presence of the jury on any question of fact to be decided by the jury." In this case, all but one of the statements defendants allege to be improper were made outside the presence of the jury and cannot be considered improper under this statute. The other statement by the trial court was not an opinion on an issue of fact to be decided by the jury. *See State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979). The trial judge was explaining to the jury why they were being sent out of the courtroom after a defense objection. The trial judge then apologized for the delay, saying that this case was one of "hurry-and-wait." Defendants contend that this statement made by the trial judge belittled their case in the eyes of the jurors by making it seem like a waste of the court's time to deal with their objections. However, this comment alone is not a sufficient statement of an "opinion" by the trial judge for this Court to conclude that defendants were prejudiced.

Defendant Edwards also contends that the trial judge improperly expressed an opinion by ordering him held in custody during an overnight recess. This statement was also made outside the presence of the jury, but Edwards contends that the jury was prejudiced by seeing him escorted to and from the courtroom by a deputy sheriff. The trial court has the authority to modify a defendant's pre-trial release order, order a defendant held in custody during the trial and may even order a defendant shackled in

the courtroom. *State v. Perry*, 316 N.C. 87, 340 S.E. 2d 450 (1986). Again, since defendants elected to utilize a narrative of the proceeding, we cannot determine what prompted the court to hold defendant Edwards in custody. Further, nothing is in the record concerning the terms of Edwards' pre-trial release. Thus, we are unable to determine if the court was even changing Edwards' custody status in ordering Edwards held. The preparation of the record on appeal is the responsibility of the appellant, *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd on other grounds*, 403 U.S. 948, 91 S.Ct. 2283, 29 L.Ed. 2d 859 (1971), and when an item germane to the determination of an assignment of error is not contained in the record, then the assignment of error should be overruled. *State v. Milby*, 302 N.C. 137, 273 S.E. 2d 716 (1981). Defendant Edwards has failed to demonstrate any prejudice resulting from the actions of the trial judge, and the assignment of error is overruled.

[5] Defendants next assign as error the ruling by the trial court allowing a witness for the state to testify as an expert and to identify the substance seized at defendants' residence as marijuana. The witness gave her qualifications as having a bachelor's degree in chemistry, having worked in the chemical analysis laboratory of the State Bureau of Investigation for three years and having completed specialized training courses in chemical analysis. The trial judge is afforded wide latitude in making the discretionary determination concerning the admissibility of expert testimony, and the finding that the witness possesses the requisite skill and knowledge will not be reversed on appeal unless there is no evidence to support it. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). Here, the evidence was sufficient to support the finding by the trial court that the witness was qualified to express an opinion on the identification of the "green vegetable matter" seized at defendants' home. The assignment of error is overruled. Defendants also put forward two other assignments of error based upon this same argument concerning exhibits admitted through the expert witness. These too are overruled.

[6] Defendants' next assignment of error is that the trial court erred in denying their motions to dismiss the case against them at the close of the evidence. The evidence, viewed in the light most favorable to the state, is sufficient to establish that marijuana was found in the bedroom of a house belonging to defend-

ants; that only the defendants and two small children were present in the house; and that the marijuana found there weighed 193 grams, or slightly under seven ounces. This is sufficient to establish each of the elements of felonious possession of marijuana; that is: (i) knowing (ii) possession (iii) of over one and one-half ounces (iv) of marijuana. G.S. 90-95(a)(3), (d)(4). The assignment of error is overruled.

Defendants' final assignments of error relate to the jury instructions. However, from the record we have before us, it appears that defendants combed the transcript and noted their exceptions. There is no indication that defendants objected to any of the instructions given or that any proposed instructions were submitted and rejected. We conclude, therefore, that the assignments of error based upon the jury charge are not properly preserved for review. *See* N.C. Rule App. Proc. 10(b)(2); *State v. Fennell*, 307 N.C. 258, 297 S.E. 2d 393 (1982).

After careful consideration of the record and briefs, we conclude defendants received a fair trial free from prejudicial error.

No error.

Judges MARTIN and COZORT concur.

IN THE MATTER OF: THE RULEMAKING PETITION OF WARREN WHEELER

No. 8610SC850

(Filed 7 April 1987)

1. **Appeal and Error § 6.3— subject matter jurisdiction—necessity for exceptions or assignments of error**

Notwithstanding the absence of exceptions or assignments of error in the record on appeal, a party may present for review the question of subject matter jurisdiction by properly raising the issue in his brief, and whether one has standing to obtain judicial review of administrative decisions is a question of subject matter jurisdiction.

2. **Administrative Law § 6; Appeal and Error § 7— denial of rule making petition —petitioner not person aggrieved**

Petitioner was not a "person aggrieved" by the DHR's denial of a petition for the adoption of a rule changing requirements concerning the information

which social service workers must report into an information system in connection with the administration of protective services to disabled adults and thus had no standing to seek judicial review of DHR's decision even though petitioner contended that he was dismissed from employment because he refused to provide the information required by DHR. N.C.G.S. § 150A-2(6) (1983).

APPEAL by petitioner from *Farmer, Judge.* Order entered 4 March 1986 in WAKE County Superior Court. Heard in the Court of Appeals 13 January 1987.

On 6 June 1985 Warren Wheeler, a former Adult Protective Services worker with the Durham County Department of Social Services, petitioned the North Carolina Department of Human Resources (DHR) to initiate rule making proceedings pursuant to G.S. 150A-16 (1983), *amended and recodified at* G.S. 150B-16 (Cum. Supp. 1985) (effective 1 January 1986), and 10 NCAC 25 .0200 and 1B .0101 (1985). Petitioner proposed the adoption of a rule changing the requirements for providing information to the state automated information system by social service workers concerning their investigation of allegations of neglect or abuse of disabled adult clients in instances where the allegations are unsubstantiated and the client refuses to accept protective services. By letter dated 3 July 1985, DHR denied the petition for rule making and stated reasons for the denial.

Petitioner filed, in the Superior Court of Wake County, a petition seeking judicial review of DHR's decision, pursuant to Article 4, Chapter 150A of the General Statutes, *amended and recodified at* G.S. 150B-43 to -52 (Cum. Supp. 1985) (effective 1 January 1986). When the case was called for hearing, DHR moved to dismiss the petition for judicial review on the grounds that petitioner was without standing to seek judicial review of DHR's decision. From an order granting the motion, petitioner appeals.

Everett, Hancock & Nichols, by M. Jackson Nichols, for petitioner appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Cathy J. Rosenthal, and Assistant Attorney General Catherine C. McLamb, for respondent appellee.

MARTIN, Judge.

Respondent DHR has moved to dismiss this appeal due to petitioner's failure to comply with the Rules of Appellate Procedure

relating to settling and filing the record on appeal. Petitioner has moved for an extension of the times prescribed by the appellate rules for the doing of these acts. Pursuant to App. R. 27(c), we allow petitioner's motion and consider the record to have been timely settled and filed. Accordingly, DHR's motion to dismiss the appeal is denied.

In the record on appeal filed in this case, petitioner has set out nine assignments of error, each of which lists a correspondingly numbered exception together with a reference to a page in the record. Examination of the pages referred to, however, reveals that no exceptions have been set out in the record on appeal as required by App. R. 10(b)(1), which provides that "[e]ach exception shall be set out immediately following the record of judicial action to which it is addressed. . . ." Exceptions which are not set out as provided by the rule may not be made the basis of an assignment of error, App. R. 10(a), and "[e]xceptions which appear nowhere in the record except in the assignments of error will not be considered on appeal." *State v. Lampkins*, 283 N.C. 520, 526, 196 S.E. 2d 697, 700 (1973).

[1] These violations of the Rules of Appellate Procedure do not, however, require dismissal of this appeal. The superior court's dismissal of the petition for judicial review was based upon its conclusion that petitioner lacked standing to obtain judicial review of DHR's decision and, therefore, that the court was without subject matter jurisdiction. Petitioner's appeal from the order is itself an exception thereto. *West v. Slick*, 60 N.C. App. 345, 299 S.E. 2d 657 (1983), *aff'd in relevant part*, 313 N.C. 33, 326 S.E. 2d 601 (1985). Notwithstanding the absence of exceptions or assignments of error in the record on appeal, a party may present for review the question of subject matter jurisdiction by properly raising the issue in his brief. App. R. 10(a). Whether one has standing to obtain judicial review of administrative decisions is a question of subject matter jurisdiction. *Poret v. State Personnel Commission*, 74 N.C. App. 536, 328 S.E. 2d at 880 (1985). Accordingly, the only issue which we will consider in this appeal is whether petitioner has standing to obtain judicial review of DHR's denial of his petition to initiate rule making. For the reasons set forth in this opinion, we conclude that he does not and we affirm the order dismissing the petition for judicial review.

An agency's denial of a petition for rule making under G.S. 150A-16 is subject to judicial review pursuant to the provisions of G.S. 150A-43, *amended and recodified* as G.S. 150B-43 (Cum. Supp. 1985) (effective 1 January 1986). *Porter v. North Carolina Dept. of Insurance*, 40 N.C. App. 376, 253 S.E. 2d 44, *disc. rev. denied*, 297 N.C. 455, 256 S.E. 2d 808 (1979). In order to have standing to petition for judicial review under the statute: (1) the petitioner must be an aggrieved party; (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) the petitioner must have exhausted all administrative remedies; and (5) there must be no other adequate procedure for judicial review. *Dyer v. Bradshaw*, 54 N.C. App. 136, 282 S.E. 2d 548 (1981).

[2] In the present case, the superior court concluded that petitioner was not "aggrieved" by DHR's decision to deny his petition for rule making. G.S. 150A-2(6) (1983), *amended and recodified as* G.S. 150B-2(6) (Cum. Supp. 1985) (effective 1 January 1986), defines "Person aggrieved" as "any person, firm, corporation, or group of persons of common interest who are directly or indirectly affected substantially in their person, property, or public office or employment by an agency decision." Our Supreme Court has held that "person aggrieved" means "adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." *In re Halifax Paper Company, Inc.*, 259 N.C. 589, 595, 131 S.E. 2d 441, 446 (1963).

In the present case, petitioner sought, by his petition for rule making, to change DHR requirements concerning the information which social service workers must report into an information system in connection with the administration of protective services to disabled adults. *See* G.S. 108A-99 *et seq.* The apparent motivation for the petition was petitioner's contention that the types of record-keeping and information reporting which DHR required were violative of privacy rights of individuals about whom reports were submitted but were ultimately found to be unsubstantiated. Petitioner sought to supplement existing requirements by the promulgation of a rule providing that in such cases only general information, which would not disclose the individual's identity, would be reported. In seeking the adoption of the proposed rule, petitioner purported to act on behalf of unknown third parties whose privacy rights he considered to be infringed upon by the information reporting requirements which he sought to

change. However, there was no allegation or indication that petitioner was acting in any proper representative capacity or that he owed a duty to those persons whose alleged rights were at issue.

Petitioner contends, however, that he was dismissed from employment because he refused to provide the information required by DHR. Therefore, he argues, DHR's denial of his petition to initiate rule making proceedings to change the information reporting requirements substantially affected his employment, rendering him "aggrieved" within the meaning of G.S. 150A-2(6). We disagree. Petitioner was discharged from his employment with the Durham County Department of Social Services on grounds of insubordination. His discharge occurred in April 1985, prior to his submission of any request to DHR to initiate rule making proceedings. The record reflects that he immediately filed a separate legal action in the Superior Court of Durham County challenging his dismissal. Any decision by DHR concerning the petition to initiate rule making proceedings would have no effect upon the outcome of petitioner's dispute with his former employer. Thus, it is clear that petitioner, in requesting the initiation of rule making proceedings, was not seeking to enforce, or to prevent the infringement or denial of, any personal or property right of his own.

Because none of petitioner's personal rights or interests, nor any rights or interests properly attributable to him in a cognizable representative capacity, were either directly or indirectly at issue in the requested rule making proceeding, we hold that petitioner has not been substantially affected by DHR's denial of his petition for rule making. Therefore, he is not a "person aggrieved" as a result of the agency decision and has no standing to seek judicial review thereof. The order dismissing the petition for judicial review must be affirmed.

Affirmed.

Judges PARKER and COZORT concur.

STATE OF NORTH CAROLINA v. CHRISTY CHRISCOE

No. 8622SC1081

(Filed 7 April 1987)

Contempt of Court § 6.2— failure to be present at spouse's trial—insufficiency of evidence of contempt of court

The trial court's order holding defendant in contempt for her failure to be present in superior court at 9:30 a.m. on a given day during the trial of her husband was not supported by the evidence where defendant was not under any legal process or order to be present in court on the named day; there was no evidence that her delay in arriving at court resulted in any interference with the ongoing prosecution of her husband or any other business of the court; and defendant's short delay in arriving at court was not due to willfulness or gross negligence but to a lack of transportation and to her concern for her mother's safety brought about by her mother's failure to pick her up on time and transport her to the courthouse and her mother's failure to answer the telephone. N.C.G.S. § 5A-11(a)(7).

APPEAL by defendant from *Freeman, Judge.* Order entered 24 July 1986 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 9 March 1987.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State.

Scott Y. Curry for defendant appellant.

BECTON, Judge.

I

This is a criminal action against defendant, Christy Chriscoe, for contempt of court, arising out of the criminal prosecution of her husband for second degree sexual offense during the 21 July 1986 Criminal Session of Davidson County Superior Court before Judge William H. Freeman. On 24 July 1986, defendant was served with a show cause order which stated that it was due to her "failure to return to court as ordered by the Judge." In a summary proceeding on the same day, after hearing testimony by defendant and defendant's mother, Judge Freeman made findings of fact and held defendant in contempt of court, pursuant to N.C. Gen. Stat. Sec. 5A-11(a)(7) (1986), for willful or grossly negligent failure to comply with the schedules and practices of the court resulting in substantial interference with the business of the court.

The order sentenced defendant to thirty days imprisonment in the county jail. Defendant gave notice of appeal to this Court.

On 30 July 1986, defendant filed a motion for a writ of Habeas Corpus and a motion for appropriate relief. On the same day, Superior Court Judge Charles Lamm, Jr., issued a writ of Habeas Corpus and, after a hearing, entered an order deferring ruling on the legality of Judge Freeman's order until after the decision of this Court is rendered. Defendant was released from custody under a $100.00 unsecured bond.

We hold that the 24 July 1986 order holding defendant in contempt of court was improperly entered, and therefore we reverse.

II

Defendant was held in contempt of court for her failure to be present in Superior Court at 9:30 a.m. on 24 July 1986 during the trial of her husband for second degree sexual offense. The evidence at the show cause hearing tended to establish facts substantially as set forth in Judge Freeman's findings of fact, and which are summarized as follows.

Defendant's eighteen-year-old mentally handicapped daughter was the prosecuting witness for the State in the trial of her stepfather, Jimmy Chriscoe (defendant's husband). Defendant's fourteen-year-old son was also to be a witness for the State. Defendant was expected to testify for the defense. Both children resided with defendant. Neither defendant, her daughter, or her son were under subpoena.

Defendant and her two children were present in court on 23 July 1986 when the jury was selected, trial began, and one witness testified. Court was adjourned until 9:30 the following morning.

The Department of Social Services and the district attorney's office requested that defendant and her children be at court before 9:00 a.m. Defendant was offered a ride which she refused. Defendant's mother was to pick them up at 8:30 a.m. and give them a ride to the courthouse, but she overslept. When she failed to arrive at 8:30, defendant attempted numerous times to call her mother. When no one answered the telephone, defendant became

upset and concerned about her mother's safety. Defendant telephoned her father at work, and her father later brought her his truck. Defendant arrived at the courthouse at approximately 10:30 or 10:45 a.m.

The court further found that the defendant was a "healthy and able bodied adult," that she lived five blocks from the courthouse, that she had walked home with her children the previous day, and that she did not call or otherwise attempt to notify the district attorney's office or other court officials of her delayed arrival.

III

Three of defendant's four arguments on appeal challenge the sufficiency of the evidence to support the trial court's conclusion of law that "defendant's actions were wilful and/or grossly negligent failure to comply with the schedules of the [sic] practices of the court resulting in substantial interference with the business of the court." Specifically, defendant argues that she was not under any legal process or order to be present in court on 24 July 1986, that her tardiness in arriving at court on that day was neither willful nor grossly negligent, and that there is no evidence that her actions interfered with the court's business.

Judge Freeman obviously based his order upon N.C. Gen. Stat. Sec. 5A-11(a)(7) (1986) which defines criminal contempt to include

> (7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

We agree with defendant that the evidence and the court's findings of fact do not establish the requisite elements of contempt pursuant to this statute.

Although the show cause order cited defendant's offense as "failure to return to court as ordered by the Judge," it does not appear from the record that defendant was subject to any personal instruction or order of the court or under any other legal duty to be present at 9:30 a.m. on 24 July 1986. Judge Freeman's sole finding of fact in this regard states merely that "they were due to be at the courthouse at 9:30 this morning." In the absence

of an order to be present, defendant may not be held in contempt for violation of such an order.

Furthermore, even if defendant were ordered to be there, the court did not find defendant in contempt for willful disobedience to an order of the court pursuant to N.C. Gen. Stat. Sec. 5A-11(a)(3) but rather pursuant to the provisions of N.C. Gen. Stat. Sec. 5A-11(a)(7). In our view, the evidence establishes neither that defendant's actions were willful or grossly negligent nor that her tardiness resulted in "substantial interference with the business of the court."

First, the record is entirely void of any evidence that defendant's delay in arriving at court resulted in any interference with the ongoing prosecution of defendant's husband or any other business of the court. Second, the evidence establishes neither willfulness nor gross negligence on the part of defendant. In order for an act to be "willful" as the term is used in criminal law, it must be done deliberately and purposefully in violation of law, and without authority, justification or excuse. *See West v. West*, 199 N.C. 12, 153 S.E. 600 (1930); 4 Strong: N.C. Index 3d, Criminal Law, Sec. 2, p. 35. "Grossly negligent," for purposes of criminal culpability, implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others. *See, e.g., State v. Boyd*, 61 N.C. App. 238, 300 S.E. 2d 578, *cert. denied*, 308 N.C. 545, 304 S.E. 2d 238 (1983). The evidence in this case shows that defendant's short delay in arriving at court was due, not merely to an absence of transportation, but also to her concern for her mother's safety brought about by her mother's failure to arrive on time or to answer the telephone. We do not believe, under these circumstances, that defendant's behavior rises to the level of willfulness or gross negligence. For these reasons, we hold that the order directing that Christy Chriscoe be imprisoned for thirty days for contempt of court is not supported by the evidence and must be reversed.

Defendant also argues that she received inadequate notice of the specific acts of misconduct for which she was summoned to show cause why she should not be held in contempt. In light of our holding that the evidence was insufficient to establish criminal contempt pursuant to N.C. Gen. Stat. Sec. 5A-11(a)(7), we find it unnecessary to address this contention.

Reversed.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. LEROY EDWARD HARLEE

No. 865SC783

(Filed 7 April 1987)

1. **Criminal Law §§ 34.5, 69— telephone conversation—evidence of defendant's guilt of other offense—admissibility to show identity**

In a prosecution for first degree kidnapping, attempted armed robbery, and unauthorized use of a motor vehicle where defendant's identity as the gunman was the key issue, the trial court did not err in allowing a witness to testify that defendant had telephoned him about a month or so before the attempted robbery about "a stolen TV set," though the testimony indicated that defendant had committed another crime, since the testimony tended to support the witness's claim that he recognized defendant's voice and was thus admissible.

2. **Kidnapping § 1.2— abduction to facilitate attempted armed robbery—sufficiency of evidence**

Evidence was sufficient to support a kidnapping verdict where it tended to show that defendant abducted his victim, a store employee, for the purpose of facilitating an attempted armed robbery with a dangerous weapon in that defendant abducted and threatened his victim with a shotgun in an effort to coerce a store manager into turning store receipts over to him.

APPEAL by defendant from *Stevens, Judge.* Judgments entered 12 March 1986 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 6 January 1987.

Defendant was convicted of first degree kidnapping, attempted armed robbery, and unauthorized use of a motor vehicle. In pertinent part the State's evidence was as follows:

Steven Derbyshire, the night manager of the U-Rent Store in Wilmington, testified that: On 1 November 1985 about 7:15 p.m. he was walking the store manager, Deborah Jones, to her car in the parking lot when a masked man, holding a shotgun and wearing an Army field jacket, faded bell bottom dungarees and white sneakers, confronted them and demanded to know which of the two of them "had the money." He told the gunman the money was

still in the store and the gunman then told him to meet him "at the corner of 10th and Dawson with the money" and grabbed Ms. Jones, pulled her into her car, and made her drive away. He recognized the voice of the gunman as being that of the defendant, who had worked at the store earlier; and he ran into the store and told the security guard to contact the police. Shortly thereafter the store telephone rang; the call was from Ms. Jones, who told him to follow the gunman's instructions; and after defendant got on the phone the witness told him that the police had been told about him abducting Ms. Jones, and defendant replied that he "had changed his plans." Deborah Jones, after corroborating the foregoing testimony, further testified that: After the gunman ordered her into the car she first drove to a dirt road and then to a nearby area, where they waited awhile before driving to a pay telephone, where at the gunman's direction she called the night manager. After she told Derbyshire to do what the gunman wanted, the defendant took the phone and said into it that there had been a change of plans, after which he told her that her "buddy" had just signed her "death warrant." Defendant then forced her back into her car, which he drove away. As they drove past a fast food restaurant a police car, soon joined by three more police cars, began following them, and defendant told her "you have had it now." She then grabbed the barrel of the shotgun defendant was holding, causing him to lose control of the car, which crashed into a parked car and a building. After getting out of the car she ran to one of the police cars and defendant ran into a nearby alley. Cecil Gurganious, the store security guard, testified that: He listened to the gunman's call to the store and heard him tell Derbyshire, "Well, you make sure you bring that money to 10th and Dawson. If you don't I will shoot this girl down in the street." A police officer who pursued the car testified that: After the wreck the gunman disappeared down an alley into an unlighted backyard; and that in a search of the surrounding area a green military field jacket was found and defendant, wearing faded jeans and white sneakers, was caught some blocks away on a fire escape. Wayne King, a store owner, identified the shotgun found in Ms. Jones' wrecked car as being a gun that he sold defendant some weeks earlier.

Attorney General Thornburg, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Appellate Defender Hunter, by Assistant Appellate Defender David W. Dorey, for defendant appellant.

PHILLIPS, Judge.

[1] In appealing defendant makes three contentions, none of which have merit. The first contention is that the court erred in permitting Derbyshire to testify that defendant telephoned him about a month or so before the attempted robbery about "a stolen TV set." The trial judge instructed the jury to consider the testimony only as tending to show that the witness heard the statement and to explain the conduct of the witness upon hearing the statement. Defendant argues that the testimony was inadmissible under Rule 404(b) of the N.C. Rules of Evidence and *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954) because it was about him committing another crime and tended only to show his bad character. But the evidence was relevant to an issue in the case and thus its admission was not forbidden by the rule or decision cited. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). The defendant's identity as the gunman was the key issue in the case and that Derbyshire had received a telephone call from the defendant a month before the attempted robbery tended to support the witness's claim that he recognized defendant's voice and thus was admissible, even though the call also concerned a stolen TV set not involved in the charges he was tried for.

[2] Defendant's next contention is that the evidence does not support the kidnapping verdict in that it does not show that he abducted Deborah Jones for the purpose of facilitating an armed robbery. The indictment alleged five purposes for the kidnapping, all approved by G.S. 14-39—"for the purpose of holding her for ransom, holding her as a hostage, using her as a shield, facilitating the commission of a felony, attempted armed robbery, and terrorizing her"—only one of which had to be proved for the kidnapping verdict to stand. *State v. Moore*, 315 N.C. 738, 340 S.E. 2d 401 (1986). Clearly, the evidence tends to show that defendant abducted Ms. Jones to facilitate the attempted robbery of the U-Rent Store with a dangerous weapon; for it tends to show that while still attempting to complete the robbery he abducted and

threatened Ms. Jones in an effort to coerce Derbyshire into turning the store's money over to him. An attempted robbery occurs when a person with the requisite intent does some overt act calculated to unlawfully deprive another of personal property; *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981); and the evidence indicates that defendant had that intent and abducted Ms. Jones in an effort to effectuate it.

Defendant's final contention—that the trial judge erred in instructing the jury about a purpose for the abduction not stated in the indictment, to facilitate his flight—is not properly before us, because the instruction was not objected to. Rule 10(b)(2), N.C. Rules of Appellate Procedure. Even so we have reviewed it and have determined that the instruction was neither "plain error," *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), nor prejudicial, since it did not deprive defendant of a fair trial and the evidence of defendant's guilt is clear, direct and overwhelming.

No error.

Judges ARNOLD and ORR concur.

DAVID ERIC WILES AND WIFE, NORMA WILES v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 8623SC1064

(Filed 7 April 1987)

1. Evidence § 48— fire insurance—origin of house fire—expert testimony admissible

In an action to recover proceeds of a fire insurance policy where defendant alleged that the fire was caused by deliberate acts of plaintiffs, the trial court did not err in allowing a witness to testify as an expert where the witness was a professor with a doctorate in chemical engineering; he had taught thermodynamics and heat transfer, the underlying sciences of fire and its propagation; he had done consulting work for various companies and individuals in forensics in connection with fires and explosions; he had been called upon to do investigations with the purpose of giving an opinion as to the cause and origin of fires; and he had been previously qualified as an expert to testify within these areas in the courts of this State.

2. Evidence § 18— fire insurance—experimental evidence—admissibility

In an action to recover proceeds of a fire insurance policy where defendant alleged that the fire was caused by deliberate acts of plaintiffs, the admission of evidence of an expert witness's experiment as to burn patterns on steps was in no way prejudicial in light of a strong disclaimer which the witness himself gave for the probative value of the experiment and in light of the large body of other evidence regarding the cause and origin of the fire and the cause of the burn pattern on the steps.

APPEAL by defendant from *DeRamus, Judge.* Judgment entered 15 May 1986, in Superior Court, ASHE County. Heard in the Court of Appeals 11 March 1987.

This is a civil action wherein plaintiffs seek to recover proceeds of a fire insurance policy issued to plaintiffs by defendant, and to recover damages for bad faith for refusal to pay the claim. Plaintiffs' complaint was filed 10 June 1985. Defendant filed an answer alleging that the fire occurred as a result of the deliberate acts of plaintiffs. The case was tried before a jury on 12 May 1986. At the close of plaintiffs' evidence, the court directed a verdict in favor of defendant on the issue of bad faith. The jury returned a verdict for plaintiffs, finding no intentional burning, and the court entered judgment in the amount of $35,894.51 plus interest and costs. From this judgment, defendant appealed.

John T. Kilby for plaintiffs, appellees.

Morris, Golding, Phillips & Cloninger, by John C. Cloninger and Jeff Dunham, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends the trial court erred to its prejudice in allowing Dr. Kenneth O. Baity to testify as an expert on the cause and origin of the fire, on the ground that Dr. Baity was not properly qualified as an expert in the field of cause and origin of fires. Defendant argues that Dr. Baity "never testified to attending any schools in the investigation of the cause and origin of fires" and that Dr. Baity "is not a member of any society involving arson investigation."

Whether a witness is qualified to testify as an expert is a question addressed to the discretion of the trial judge, and his finding is conclusive absent abuse of that discretion. *R-Anell Homes v. Alexander & Alexander,* 62 N.C. App. 653, 303 S.E. 2d

573 (1983). The test for admissibility of expert testimony is whether the jury can receive appreciable help from the expert witness. *State v. Knox*, 78 N.C. App. 493, 337 S.E. 2d 154 (1985). It is not necessary that the expert be experienced with the identical subject area in a particular case or that the expert be a specialist, licensed, or even engaged in a specific profession. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). It is enough that through study or experience the expert is better qualified than the jury to render an opinion regarding the particular subject. *State v. Howard*, 78 N.C. App. 262, 337 S.E. 2d 598 (1985), *disc. rev. denied* and *appeal dismissed*, 316 N.C. 198, 341 S.E. 2d 581 (1986).

In the present case, Dr. Baity is a professor who has a doctorate in chemical engineering and has taught thermodynamics and heat transfer, the underlying sciences of fire and its propagation. He had since 1946 done consulting work for various companies and individuals in forensics in connection with fires and explosions. He had been called upon to do investigations with the purpose of giving an opinion as to the cause and origin of fires, and had been previously qualified as an expert to testify within these areas in the courts of this State. Under these circumstances, we cannot find that the trial judge erred in allowing Dr. Baity to testify as an expert in this case.

[2] Defendant next contends the trial court erred to its prejudice in allowing Dr. Baity to testify about an experiment, and by allowing plaintiffs to introduce into evidence a photograph depicting the results of this experiment. Earlier, defendant's expert had testified that in his opinion the fire was intentionally set on the basement stairs, after a liquid accelerant such as kerosene had been poured on them. The expert based his opinion on the burn pattern on the stairs, among other things. Dr. Baity, plaintiffs' expert, testified that in his opinion the burn pattern on the stairs did *not* indicate that an accelerant had been poured onto the steps, but that burning material had fallen onto the steps from above. In the course of Dr. Baity's testimony, the court allowed plaintiffs to introduce evidence, over defendant's objection, of an experiment which Dr. Baity had conducted. To conduct the experiment, Dr. Baity had built a small set of stairs to resemble those in plaintiffs' home. He then poured a mixture of kerosene and gasoline onto the stairs and ignited it. The burn pattern the

fire produced was much different from that found on plaintiffs' basement stairs. Dr. Baity took a photograph of the result, and this photograph was also introduced into evidence.

Defendant argues that the evidence of the experiment was inadmissible because the circumstances of the experiment were possibly very different from those of the actual fire, in that there were many variables that were not held constant such as amount and direction of draft, amount and type of accelerant used, and method of applying it.

Admission of evidence of an experiment is error unless the circumstances of the experiment are substantially similar to the circumstances of the occurrence before the court. *State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975). However, we need not reach the question of whether the admission of the experiment in the present case was error; in order for a judgment to be overturned because of error, the error must be prejudicial, that is, but for the error it was likely that a different result would have been reached. In the present case any error in the admission of the experiment was clearly not prejudicial, for several reasons.

The two experts gave a total of 185 transcript pages of testimony. Each gave a detailed scenario of how and where the fire began and how it spread. Each gave reasoned arguments as to what caused the burn pattern on the steps. Extensive testimony was presented on wind direction, and other aspects of the fire. Forty-four photographs of the results of the fire, some greatly enlarged, were presented as exhibits. Evidence of the experiment was relatively brief, and only one small photograph of the results was offered into evidence.

More importantly, however, Dr. Baity fully acknowledged the limitations of the experiment, and downplayed its importance: "So the steps which I built, . . . the purpose was not to duplicate but to confirm my own belief based . . . on the science that I knew of how fluids would go down from such steps. . . . As a scientist, I am confident on such an experiment that nobody could . . . effectively duplicate conditions because we cannot know that any accelerant was slung down these stairs. We don't know if it was, how it was done. We don't know how it was scattered and so forth. . . . So it's not intended for anything except to see whether

fluid going down the steps would flow such a track and if it did, would it burn in the crack."

In light of this strong disclaimer Dr. Baity himself gave for the probative value of the experiment, coupled with the large body of other evidence regarding the cause and origin of the fire, and the cause of the burn pattern on the steps, we cannot find that the admission of the evidence of Dr. Baity's experiment was in any way prejudicial.

We hold the trial in the superior court to be free of prejudicial error.

No error.

Judges WELLS and BECTON concur.

WILLIAM E. GLYNN v. STONEVILLE FURNITURE CO., INC., STONEVILLE OF CALIFORNIA, INC., WICKES COMPANIES AND WICKES CORPORATIONS

No. 8610SC1057

(Filed 7 April 1987)

1. **Rules of Civil Procedure § 56— summary judgment hearing—motion to continue properly denied**

The trial court did not abuse its discretion in denying plaintiff's motion to continue the hearing on defendants' motion for summary judgment where plaintiff's affidavit accompanying his motion did not detail any facts necessary to justify his opposition to the summary judgment motion which plaintiff could not present by affidavit. N.C.G.S. § 1A-1, Rule 56(f).

2. **Limitation of Actions § 12.1— action barred by California statute—plaintiff not N.C. resident—N.C. statute inapplicable**

The N.C. "borrowing statute," N.C.G.S. § 1-21, applied to plaintiff's action and required the use of the applicable California statute of limitations to bar plaintiff's action in the courts of N.C., since plaintiff was not a resident of this state at the time his cause of action originally accrued and so could not avail himself of the longer N.C. statute of limitations.

APPEAL by plaintiff from *Farmer, Judge.* Judgments entered 30 May 1986 in WAKE County Superior Court. Heard in the Court of Appeals 4 March 1987.

Plaintiff brought this action on 22 November 1985 seeking, *inter alia*, damages for personal injuries allegedly caused by defendants' negligence. Plaintiff alleged in his complaint that on or about 12 March 1984 plaintiff was a customer in a retail store owned by defendants Wickes Companies and Wickes Corporations (Wickes). While in the store, plaintiff sat in a chair manufactured by defendants Stoneville Furniture Co., Inc. and Stoneville of California, Inc. (Stoneville), and the chair collapsed causing "plaintiff to fall on the cement floor seriously injuring his back. . . ."

Defendants moved for summary judgment. The court denied plaintiff's motion to continue hearing on Wickes defendants' motion for summary judgment. The court then entered summary judgment in favor of all defendants on the grounds that plaintiff's action was barred by the applicable statute of limitations. Plaintiff appealed.

Brenton D. Adams for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Donald H. Tucker, Jr., for defendant-appellees Stoneville Furniture Co., Inc. and Stoneville of California, Inc.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Dan M. Hartzog and H. L. Evans, Jr., for defendant-appellees Wickes Companies and Wickes Corporations.

WELLS, Judge.

[1] Plaintiff contends the court erred in denying his N.C. Gen. Stat. § 1A-1, Rule 56(f) motion for a continuance as against the Wickes defendants. We disagree.

Rule 56(f) provides as follows:

> (f) *When affidavits are unavailable.*—Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The court may grant or deny a continuance pursuant to Rule 56(f) in the exercise of its discretion. *Ipock v. Gilmore*, 73 N.C. App.

182, 326 S.E. 2d 271, *disc. rev. denied*, 314 N.C. 116, 332 S.E. 2d 481 (1985).

We hold that the court did not abuse its discretion in denying plaintiff's motion here. Plaintiff's affidavit accompanying his motion does not detail any facts, as required by Rule 56(f), necessary to justify his opposition to Wickes' motion for summary judgment which plaintiff could not present by affidavit. *See id.* Accordingly, this contention is rejected.

Plaintiff contends the court erred in granting defendants' motions for summary judgment. For the reasons set forth below, we affirm.

[2] The issue is whether the North Carolina "borrowing statute," N.C. Gen. Stat. § 1-21, applies to plaintiff's action and requires the use of the applicable California statute of limitations to bar plaintiff's action in the courts of North Carolina.

G.S. § 1-21 provides:

> If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced within the times herein limited after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action or the enforcement of the judgment. Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State.
>
> The provisions of this section shall not apply to the extent that a court of this State has or continues to have jurisdiction over the person under the provisions of G.S. 1-75.4.

In plaintiff's response to defendants' requests for admission, he admits that "every claim or cause of action alleged in plaintiff's complaint arose . . . in the State of California on or about

March 12, 1984." Further, plaintiff does not dispute the fact that this action is barred in California under the applicable one-year statute of limitations contained in Cal. Civ. Proc. Code § 340 (West 1987 Supp.). Plaintiff nevertheless contends that G.S. § 1-21 does not apply here because defendants were subject to "long-arm" jurisdiction pursuant to N.C. Gen. Stat. § 1-75.4 at the time plaintiff brought this action and that plaintiff is thus entitled to the benefit of the longer North Carolina statute of limitations.

Personal jurisdiction over defendants under G.S. § 1-75.4, standing alone, however, is not sufficient to place plaintiff's action outside G.S. § 1-21. Plaintiff must also be a resident of this State at the time his action originally accrued in order to maintain an action in the courts of this State which is barred by the laws of the jurisdiction in which it arose. *Stokes v. Wilson and Redding Law Firm*, 72 N.C. App. 107, 323 S.E. 2d 470 (1984), *disc. rev. denied*, 313 N.C. 612, 332 S.E. 2d 83 (1985). In *Stokes*, we stated:

> First, we note that the "borrowing statute" is not applicable if a defendant is subject to long-arm jurisdiction under G.S. § 1-75.4 (1983). G.S. § 1-21 (1983); *see* Note, 12 Wake Forest L. Rev. 1041 (1976) (tolled statute of limitations v. long-arm statute amenability). Second, after the cause of action has been barred in the jurisdiction where it arose, only a plaintiff, who was a resident of this State at the time the cause of action originally accrued, has the right to maintain an action in the courts of this State. G.S. § 1-21 (1983).

In plaintiff's response to defendants' requests for admission he admits that he "is not, and was not at the time plaintiff's cause of action arose and/or accrued, a citizen or resident of the State of North Carolina." Plaintiff thus may not avoid the "borrowing statute," G.S. § 1-21, and avail himself of the longer North Carolina statute of limitations since he was not a resident of this State at the time his cause of action originally accrued. *Id.* Accordingly, we hold that G.S. § 1-21 applies to bar plaintiff's action and that the court thus properly entered summary judgment in favor of defendants.

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 APRIL 1987

BEAM v. BEAM No. 8626DC683	Mecklenburg (83CVD6473)	Plaintiff's Appeal— Affirmed Defendant's Appeal— Affirmed
BRADLEY v. BRADLEY No. 8626SC1013	Mecklenburg (84CVS12654)	Dismissed
BRANNAN v. BRANNAN No. 8610DC1047	Wake (86CVD6682)	Vacated and remanded
BUNTING v. FERGUSON No. 8624SC962	Avery (85CVS202)	No error
CAROLINA HOMES v. SIKING MOBILE HOMES No. 8619SC948	Rowan (85CVS581)	No error
CARTWRIGHT v. CARTWRIGHT No. 866SC808	Hertford (84CVS418)	Affirmed
HACKWORTH v. HACKWORTH No. 8625DC822	Caldwell (85CVD356)	Affirmed
HOWELL v. HOWELL No. 8623DC353	Wilkes (84CVD669)	Affirmed
HUFFMAN v. PINE MANOR APARTMENTS No. 8627DC1060	Cleveland (86CVD368)	New Trial
IN RE KENNEDY No. 868DC1165	Wayne (86J38)	Affirmed
IN RE SASSER No. 8619DC1086	Randolph (83J69) (83J71)	Affirmed
IN RE THOMPSON No. 8624DC1072	Yancey (85J18)	Affirmed
JOHNSON v. BROWN No. 8616SC1106	Robeson (83CVS0297)	Modified and Affirmed
LEVENSON v. LEVENSON No. 8612DC987	Cumberland (83CVD785)	Dismissed
MELLOTT v. PINEHURST, INC. No. 8620DC459	Moore (85CVD369)	Affirmed
MITCHELL TRACTOR v. TINGLE No. 862DC956	Beaufort (81CVD72)	Affirmed

MOORE v. N.C. DEPT. OF JUSTICE No. 8622SC1015	Iredell (85CVS1321)	Dismissed
NOWLIN v. GENERAL BEARING No. 867SC1111	Wilson (86CVS148)	Affirmed
OXENDINE v. OXENDINE No. 8616DC815	Robeson (82CVD0974) (85CVD1958)	Affirmed
PETERSON v. ALDRIDGE No. 8610DC907	Wake (85CVD7432)	Affirmed
PISKE v. BUTLER ANIMAL HOSPITALS No. 8626SC936	Mecklenburg (84CVS3060)	Affirmed in part, reversed in part, and remanded for a new trial
RICKENBACKER v. GORE No. 8613SC890	Brunswick (84CVS673)	Affirmed
ROBERTS v. WAKE COUNTY No. 8610SC840	Wake (85CVS4275)	Affirmed
SELLERS v. CLONINGER No. 8627SC904	Gaston (85CVS114)	No error
SHEPHERD v. ROYAL No. 8623SC416	Wilkes (79CVS1329)	Affirmed
SIEGE v. MOORE COUNTY No. 8610SC937	Wake (86CVS1684)	Vacated and remanded
SINATRA v. SINATRA No. 8615DC851	Alamance (83CVD72)	Affirmed
STATE v. BAILEY No. 8619SC968	Montgomery (85CRS6696)	No error
STATE v. BOONE No. 8619SC1159	Rowan (85CRS2275)	No error
STATE v. BUTLER No. 864SC1141	Duplin (86CRS1597)	No error
STATE v. CHAVIS No. 869SC981	Person (86CRS8) (86CRS9) (86CRS10) (86CRS13) (86CRS15) (86CRS17) (86CRS18) (86CRS21)	No error
STATE v. GARTEN No. 863SC1055	Craven (86CRS1126)	No error

STATE v. HAMBY No. 8630SC1042	Cherokee (86CRS69) (86CRS108) (86CRS109) (86CRS321) (86CRS322) (86CRS323) (86CRS324) (86CRS325) (86CRS326)	No error
STATE v. HARRIS No. 8627SC919	Gaston (85CRS22423) (85CRS24665)	Affirmed
STATE v. JOHNSON No. 8618SC1137	Guilford (84CRS72092)	No error
STATE v. KIRKPATRICK No. 8615SC986	Alamance (86CRS1826) (85CRS17405)	Judgment vacated Remanded for Resentencing
STATE v. McKEE No. 8625SC1080	Catawba (85CRS20960)	No error
STATE v. McLEAN No. 8611SC941	Harnett (85CRS10072) (85CRS10073) (85CRS10074)	No error
STATE v. PARKER No. 867SC842	Wilson (85CRS11395)	In the trial of defendant, we find no error. Remand for correction of the judgment
STATE v. PEARSON No. 8620SC739	Richmond (85CRS2813)	No error
STATE v. RICHARDSON No. 866SC793	Halifax (85CRS13029) (85CRS13030)	No error
STATE v. SABIR No. 8615SC950	Orange (79CRS12611)	No error
STATE v. SALTER No. 865SC834	New Hanover (85CRS6787)	No error
STATE v. SWAIN No. 8626SC827	Mecklenburg (85CRS80801)	No error
STATE v. TAYLOR No. 8626SC1180	Mecklenburg (86CRS22420) (86CRS22422)	No error

STATE v. TYLER No. 8626SC1130	Mecklenburg (83CRS10328)	Affirmed
STATE v. WATSON No. 8627SC1123	Gaston (86CRS2414)	No error
STATE v. WHITE No. 863SC1010	Craven (82CRS3699)	No error
STATE v. YOUNG No. 8626SC1026	Mecklenburg (85CRS59030)	No error
STOKES v. WILSON AND REDDING LAW FIRM No. 8617SC675	Stokes (83CVS78)	Affirmed
ZUKOSKI v. SMITHVILLE No. 8613SC831	Brunswick (86CVS92)	Vacated and remanded

JUNE ELLEN DRAIN v. UNITED SERVICES LIFE INSURANCE COMPANY

No. 863SC554

(Filed 7 April 1987)

1. **Rules of Civil Procedure § 12.1— denial of motion to dismiss for failure to state claim—no appellate review after judgment on merits**

Where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case proceeds to judgment on the merits, the unsuccessful movant may not on appeal from the final judgment seek review of the denial of the motion to dismiss.

2. **Insurance § 13— life insurance—effective date of policy—sufficiency of evidence**

Plaintiff's evidence was sufficient to go to the jury in an action to recover under a life insurance policy where the jury could find that, although the application for the policy provided that the policy would become effective on a date after the date of the insured's death, an amendment to the policy had backdated its effective date to a time preceding the insured's death; the premium for the policy was not required to be paid before the policy became effective and, in any event, the insurer had waived the right to receive a premium payment before beginning effective coverage; and a valid contract of insurance had thus been entered into before the insured's death.

3. **Insurance § 37— life insurance—contents of other policies—irrelevancy**

Evidence of the contents of insured's other life insurance policies and the circumstances under which their death benefits were paid was irrelevant in determining when effective coverage of the insured was to begin under defendant's life insurance policy and whether the first premium had to be paid before a valid contract was formed. N.C.G.S. § 8C-1, Rule 401.

4. **Evidence § 31— best evidence rule—amount of insurance applied for**

Testimony by the beneficiary as to the amount of life insurance coverage applied for by the insured did not violate the best evidence rule where the contents of the application for insurance were not at issue. N.C.G.S. § 8C-1, Rule 1002.

5. **Insurance § 37.2— life insurance—possible suicide—state of mind of insured—prior marital difficulties**

The trial court did not err in ruling that prior separations between plaintiff life insurance beneficiary and the insured which occurred at least eighteen months before insured's death were too remote to be of probative value in establishing insured's state of mind at the time of his death.

6. **Death § 1; Evidence § 28.3; Insurance § 37.2— suicide as cause of death—statements in death certificate and medical examiner's report—inadmissibility**

Hearsay and conclusory statements listing suicide as the cause of death on an insured's death certificate and in the medical examiner's report were inadmissible to show the cause of death in an action on a life insurance policy. Such

statements were not rendered admissible by N.C.G.S. § 8C-1, Rule 392, permitting the introduction of self-authenticated copies of public records; N.C.G.S. § 130A-93(h), providing that certified copies of certain documents are *prima facie* evidence of facts stated therein; N.C.G.S. § 8C-1, Rule 803(9), permitting records of deaths made to a public office to be introduced at trial; or N.C.G.S. § 130A-392, permitting a county medical examiner's report to be introduced at trial.

Judge WELLS concurring.

APPEAL by defendant from *Griffin (William C.), Judge.* Judgment entered 10 January 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 11 November 1986.

Ward and Smith, P.A., by Kenneth R. Wooten, attorney for plaintiff appellee.

Sumrell, Sugg & Carmichael, by Rudolph A. Ashton, III and James R. Sugg, attorneys for defendant appellant.

ORR, Judge.

Plaintiff brought this action to recover, as beneficiary, upon a policy of life insurance issued by defendant United Services Life Insurance Company. The policy was issued on the life of Paul Drain, plaintiff's husband. Defendant denied liability, based upon a number of grounds which will be dealt with in subsequent parts of this opinion.

Initially defendant made a motion to dismiss the action for failure to state a claim for relief. The court denied defendant's motion and the action proceeded to a jury trial on the issues.

At trial defendant made a motion for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence. These motions were denied. The jury returned a verdict in plaintiff's favor, finding that a contract had been formed and that plaintiff was entitled to recover $95,166.00 minus a $90.66 premium for insurance coverage for the month of May. In response to the jury's decision, defendant made a motion for judgment notwithstanding the verdict, and in the alternative a motion for a new trial. The court also denied these motions. Defendant appeals the denial of the above five motions. We find no error in the trial court's rulings.

The facts necessary to an understanding of this decision are incorporated in the opinion set forth below.

I.

[1] Defendant first assigns as error the denial of its motion to dismiss the action for failure to state a claim for relief pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

In *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E. 2d 755 (1986), this Court specifically addressed this question and held:

> that where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss.

79 N.C. App. at 682-83, 340 S.E. 2d at 758-59.

Therefore, in conformity with our prior decision on this question, we overrule defendant's first assignment of error.

II.

[2] Defendant's second and third assignments of error contend that the trial court improperly denied defendant's motions for a directed verdict and motion for judgment notwithstanding the verdict. In each motion defendant argued that the evidence established as a matter of law that there was no life insurance contract existing between defendant and Paul Drain.

A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for a directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). "Accordingly, if the motion for directed verdict could have been properly granted, then the subsequent motion for judgment notwithstanding the verdict should also be granted." *Penley v. Penley*, 314 N.C. 1, 10, 332 S.E. 2d 51, 57 (1985). Also, a motion for a judgment notwithstanding the verdict may not address issues on appeal not raised in the motion for a directed verdict. *Miller v. Motors, Inc.*, 40 N.C. App. 48, 251 S.E. 2d 925, *disc. rev. denied*, 297 N.C. 301, 254 S.E. 2d 917 (1979). For the above reasons, this Court will consider the three motions together in determining if the denial of each motion was an error.

In considering a motion for directed verdict or a motion for judgment notwithstanding the verdict,

> the trial court must review all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Penley v. Penley, 314 N.C. at 11, 332 S.E. 2d at 57. Accordingly, the Supreme Court has also held that a motion for judgment notwithstanding the verdict is cautiously and sparingly granted. *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972), *rev'd on other grounds*, 283 N.C. 277, 196 S.E. 2d 262 (1973).

In the case *sub judice*, plaintiff testified at trial that she and her husband, Paul Drain, met with James Diffee, an agent for defendant, to discuss life insurance coverage on 28 April 1983. At this meeting Paul Drain, with Mr. Diffee's aid, filled out and submitted an application for life insurance with defendant. The policy applied for would provide death benefits of $95,166.00 upon Drain's death, payable to plaintiff, and coverage under the policy was to become effective at the later date of either approval of the application or 16 June 1983. Agent Diffee also gave Drain allotment cards, permitting premium payments to be deducted directly from Drain's paycheck. He did not collect any payment from Drain at this meeting.

The evidence at trial further disclosed that Drain's application for life insurance was approved by defendant on 5 May 1983. Later in May 1983, between the 20th and 25th, Agent Diffee met and spoke with Paul Drain several times. As a result of these discussions, the policy was amended and on 25 May 1983 Agent Diffee gave Drain additional forms to fill out including a second allotment card, containing Drain's new insurance policy number.

Shortly thereafter, the Drains received a letter dated 26 May 1983 from George M. Bell, Agent Diffee's supervisor and a vice president of defendant, which said:

> Dear Paul and June:
>
> Jim Diffee, your Field Representative, has informed us your family is now 100% insured with the United Services Life Companies.
>
> We appreciate your business, and we welcome you to the large group of policyowners whose families are 100% insured with *US*. We believe the rapid growth of this group is a compliment to the service provided by our Field Representatives.
>
> If you know any colleagues who are interested in life insurance, we hope you will recommend Jim to them.
>
> Again, thank you for your confidence in *US*.

Agent Diffee received a copy of Drain's life insurance policy and the amendment to that policy from defendant the week of 6 June 1983. However, when Agent Diffee attempted to deliver the documents to Drain and collect the premium due, he was informed that Drain had died on or about 10 June 1983. Thereafter Agent Diffee, at plaintiff's request, visited the home of plaintiff's parents, where plaintiff was staying, and spoke with her father regarding Drain's life insurance policy with defendant. During this visit plaintiff's father showed Agent Diffee the 26 May 1983 letter received from Bell. Plaintiff testified that she overheard Agent Diffee tell her father, after he saw the letter, "that from this letter he felt his company had made a grave error."

At the time of this visit Agent Diffee had Drain's insurance policy and the amendment in his possession, but did not give these documents to plaintiff. Instead, Agent Diffee mailed the documents directly to his supervisor, Vice President Bell, pursuant to Bell's orders. After Bell transferred the documents to defendant's legal department for review, they were destroyed.

When original documents are destroyed, secondary evidence may be submitted to establish the documents' contents. *State v. Baynes*, 222 N.C. 425, 23 S.E. 2d 344 (1942). Defendant submitted a reconstructed policy taken from microfilm records as secondary evidence of the contents of Drain's life insurance policy. However, defendant offered no records from which to reconstruct the contents of the amendment to the policy. As secondary evidence of the contents of the amendment, plaintiff offered the 26 May 1983 letter signed by Vice President Bell.

Based on the above evidence, plaintiff argued that the 26 May 1983 letter evinced that the amendment to the policy either backdated it to 26 May 1983, the date of the letter, or to 16 May 1983, a month earlier than the effective date of 16 June 1983 set forth in the original application. In the alternative, plaintiff contended, the letter reflected defendant's intent to waive the later effective date of 16 June 1983, specified on the policy application, and, instead, begin effective coverage on 5 May 1983, the date the application was approved by defendant.

In support of both contentions plaintiff introduced a provision of Drain's reconstructed insurance policy submitted by defendant, which held:

> . . . a Vice-President . . . of the Company has the power, on behalf of the Company, to change, modify, or waive any provisions of this Policy. Any changes, modifications, or waivers must be in writing.

In support of her argument that the amendment backdated the effective date of the policy, plaintiff presented the following evidence. First, the above mentioned provision gave Bell, as vice president, the authority to make such an amendment. Second, Agent Diffee testified that in some cases defendant would backdate the effective date of a life insurance policy, and then later collect insurance premiums to cover the earlier time period. Third, Agent Diffee acknowledged that he intended to collect the premiums for Drain's policy when he delivered the amended policy to Drain. From this, plaintiff reasoned, the letter notifying the Drains that they were 100 percent covered was secondary evidence that Bell had authorized an amendment to change the effective date. Moreover, plaintiff noted, the letter itself, as a writing, would also qualify as an amendment changing the effective date of Drain's policy.

In support of plaintiff's alternative argument of waiver, plaintiff again relied on the above provision. This provision also authorized Bell to waive the later effective date listed in the application.

> [A]n insurer may be found to have waived a provision or condition in an insurance policy which is for its own benefit. . . . [A] provision . . . is waived by any conduct on the part

> of the insurer or its authorized agent inconsistent with an intention to enforce a strict compliance with the insurance contract in such regard.

Brandon v. Insurance Co., 301 N.C. 366, 370-71, 271 S.E. 2d 380, 383 (1980).

Once again plaintiff contended, the letter, as a writing, reflected a waiver of the later effective date in conformity with the provision in the contract. In notifying plaintiff and Drain that the policy was in effect, the letter was conduct inconsistent with an intent to delay the effective date until 16 June 1983.

Neither plaintiff nor Drain paid any premium on this policy. So to support her contention that consideration was not at issue in formation of this contract, plaintiff submitted evidence of another provision contained in defendant's reconstructed copy of Drain's insurance policy. This provision, plaintiff argued, negated the need for a premium payment by providing that: "Proceeds payable at the death of the Insured will be . . . any insurance on the life of the Insured provided by benefit riders . . . less . . . any unpaid premium which applied to a period prior to and including the Policy month in which the Insured dies." Thus, because the premium for the month of May 1983 could be deducted from the proceeds payable, consideration for the contract was not at issue.

Furthermore, the 26 May 1983 letter may also support the inference that defendant waived the right to receive a premium payment before beginning effective coverage. Payment of a premium is a condition precedent to insurance coverage, unless payment is waived. *Engelberg v. Insurance Co.*, 251 N.C. 166, 110 S.E. 2d 818 (1959) (per curiam); *Allen v. Insurance Co.*, 215 N.C. 70, 1 S.E. 2d 94 (1939); *Thomas v. Ray*, 69 N.C. App. 412, 317 S.E. 2d 53 (1984). However, it is well established that a provision inserted in a policy for the benefit of the insurer may be waived, and such a waiver will be found when it is shown that there is

> a valid agreement to postpone payment or that the . . . [insurer] has so far recognized an agreement to that effect or otherwise acted in reference to the matter as to induce the policy-holder, in the exercise of reasonable business prudence, to believe that prompt payment is not expected and that the forfeiture on that account will not be insisted on.

Murphy v. Insurance Co., 167 N.C. 334, 336, 83 S.E. 461, 462 (1914); *Thompson v. Insurance Co.*, 44 N.C. App. 668, 262 S.E. 2d 397, *disc. rev. denied*, 300 N.C. 202, 269 S.E. 2d 620 (1980).

As the evidence above tends to show, several crucial documents were not available at the trial; notably, the original policy issued to Drain and the later amendment to that policy. Under these circumstances it would not be unreasonable for the jury, considering the evidence in the light most favorable to the plaintiff and resolving all contradictions, conflicts, and inconsistencies in her favor, to find that the effective date of Drain's insurance policy was backdated to a time preceding Drain's death. The evidence would also support a jury finding that the premium for this insurance policy need not be paid before the policy became effective. These conclusions would then support the theory that a valid contract between Drain and defendant had been entered into before Drain died.

For the above reasons, this Court finds no error in the trial court's denial of defendant's motions for directed verdict and motion for judgment notwithstanding the verdict.

III.

Defendant's fourth assignment of error challenges the trial court's denial of the motion for a new trial. In support of this contention defendant lists four actions of the trial court, each of which it argues constituted a reversible error.

[3] First, defendant assigns as error the trial court's refusal to permit defendant to introduce evidence of other life insurance owned by Drain which paid death benefits to plaintiff upon Drain's death.

This evidence is relevant, defendant argues, because it shows that Drain's other life insurance policies had been in effect for several years, that all necessary premium payments had been paid, and that the suicide exclusion clauses in these policies had expired.

The relevancy of evidence to be admitted at trial is governed by N.C.G.S. § 8C, Rule 401. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The contents of Drain's other life insurance policies and the circumstances under which their death benefits were paid, would not aid the jury in determining when effective coverage of Drain was to begin under the defendant's life insurance policy or what the terms of the amendment to this policy were. Neither could Drain's other life insurance policies help the jury in determining whether the first premium payment must be made before a valid contract can be formed. Since these were the crucial questions before the jury, the failure of defendant's proposed evidence to make any necessary fact in this case more probable or less probable renders it irrelevant.

Defendant also contends that this evidence would be relevant in showing that the deceased had owned a substantial amount of life insurance, and thus, did not intend to purchase more life insurance from defendant. Defendant, however, failed to present this theory of relevancy to the trial court when attempting to enter this evidence. Therefore, the trial court's denial of admission of this evidence under this theory was not properly preserved for review by this Court, pursuant to Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure.

It should be noted, though, that most of the challenged evidence was admitted at trial. Defendant's Exhibits 5A, 5B, and 5C, which were individual pages in a Comparative Information Form, listed other insurance policies held by Drain and noted that the suicide exclusion clauses had expired on these policies.

For the above reasons, this Court concludes that evidence of other insurance policies owned by Drain was not relevant in deciding the issues in this case, and was properly excluded at trial.

[4] Defendant's second argument contends that the trial court erred in permitting plaintiff to testify as to the amount of insurance coverage applied for by Drain with defendant.

Defendant contends that N.C.G.S. § 8C, Rule 1002 required admission of the original insurance application to establish the amount listed in its terms, and that plaintiff's testimony on this issue was prejudicial error.

Rule 1002, better known as the "Best Evidence Rule," requires the production of a document "only where the *contents* or *terms* of [the] document are in question." 2 Stansbury's N.C. Evi-

dence § 191 at 103 (Brandis rev. 1973); *McAdams v. Moser*, 40 N.C. App. 699, 701, 253 S.E. 2d 496, 499 (1979).

In the case *sub judice*, the contents of the application for insurance were not at issue. Neither party contested the terms of the insurance application. The parties focused instead on the impact of events occurring after the submission of the application.

Furthermore, the insurance application was admitted into evidence by the defendant; thus, permitting the jury to consider the information contained in the insurance application and rendering harmless plaintiff's testimony as to the amount of insurance coverage applied for by Drain.

Accordingly, this Court finds no error in the introduction of this testimony at trial.

[5] Defendant's third argument is that the trial court erred in refusing to permit defendant to enter evidence of prior marital conflicts between plaintiff and Drain. Defendant noted that it bore the burden of proving that Drain committed suicide. Consequently, defendant reasoned this evidence was relevant to establish Drain's state of mind at the time of his death and to refute plaintiff's testimony showing the marriage to be happy and stable. The trial court rejected defendant's request to enter this evidence, finding that it was too remote in time to be relevant in evaluating the events of this case.

> Whether the existence of a particular state of affairs at one time is admissible as evidence of the same state of affairs at another time, depends altogether upon the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime. The question is one of materiality or remoteness of the evidence in the particular case, and the matter rests largely in the discretion of the trial court. 1 Stansbury, N.C. Evidence (Brandis rev.), § 90.

Adcock v. Assurance Co., 31 N.C. App. 97, 100, 228 S.E. 2d 654, 656 (1976). A discretionary ruling of the trial court is conclusive on appeal, absent a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985).

Defendant was unable to produce any evidence from which to infer that Drain's state of mind at the time of his death was influenced by marital difficulties, other than the evidence of prior separations between Drain and plaintiff, which occurred at least eighteen months before Drain's death on 10 June 1983.

After reviewing the evidence, we find that there was a rational basis for the trial court's ruling that evidence of the prior marital conflicts was too remote to be of probative value in determining Drain's state of mind at the time of his death. This Court concludes, therefore, that the trial court did not abuse its discretion, and overrules this assignment of error.

[6] In its fourth argument, defendant contends that statements listing suicide as the cause of death on Drain's death certificate and in the medical examiner's report were improperly excluded at trial.

Defendant argues that legislative intent permitting the use of such records at trial may be drawn from: (1) N.C.G.S. § 8C-1, Rule 902 which permits the introduction of self-authenticated certified copies of public records at trial; (2) N.C.G.S. § 130A-392 which permits a county medical examiner's report to be introduced at trial; and (3) N.C.G.S. § 130A-93, which states that certified records are prima facie evidence of the facts stated therein.

The admittance of death certificates as evidence at trial was previously addressed by the Supreme Court of North Carolina in *Branch v. Dempsey*, 265 N.C. 733, 145 S.E. 2d 395 (1965). In 1965 N.C.G.S. § 130-73, the statute authorizing admission of death certificates at trial, held that: "Any copy of the record of a . . . death, properly certified by the State Registrar, shall be *prima facie* evidence in all courts and places of the facts therein stated."

In *Branch*, the death certificate contained statements from unidentified sources as to how the deceased had sustained the injuries that caused his death. The Supreme Court noted that the coroner who signed the death certificate did not see the car accident causing the deceased's death, and had he been called as a witness could not have related the hearsay contained in the death certificate. For this reason, the statements as to how the injuries causing death were sustained could not become competent evidence simply by being repeated or summarized in a death certificate.

The Supreme Court then limited the use of a death certificate in a civil trial stating that:

> The purpose of the statute appears to be to permit the death certificate to be introduced as evidence of the fact of death, the time and place where it occurred, the identity of the deceased, the bodily injury or disease which was the cause of death, the disposition of the body and possibly other matters relating to the death. We think it was not the purpose of the Legislature to make the certificate competent evidence of whatever might be stated thereon.

Branch v. Dempsey, 265 N.C. at 748, 145 S.E. 2d at 406.

Since the Supreme Court's decision in *Branch*, the statute pertaining to the admission of death certificates has undergone several revisions. In 1972 N.C.G.S. § 130-66 governed this issue and said in pertinent part that certified records, including death certificates, "shall be prima facie evidence of the facts therein stated." Again the Supreme Court was asked to determine if a death certificate could be used to establish how injuries causing a death were sustained. *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043, 34 L.Ed. 2d 493 (1972). In *Watson*, a criminal trial, the Supreme Court concluded that admitting the "hearsay and conclusory statement contained in the death certificate" would violate a defendant's right to confrontation and his right to fundamental fairness in a criminal trial. *Id.* at 232, 188 S.E. 2d at 295.

The statute governing this issue, in the case *sub judice*, is N.C.G.S. § 130A-93(h), which holds that "[a] certified copy issued under the provisions of this section shall . . . be prima facie evidence of the facts stated in the document."

Another statute, which this Court must also consider in answering this question, is N.C.G.S. § 8C-1, Rule 803(9). Rule 803 governs exceptions to the hearsay rule and subsection nine of this statute permits records of deaths to be introduced as evidence, if the record was made to a public office pursuant to the requirements of law. The commentary to this subsection, however, states specifically that this exception "is not intended to permit the use of statements of the cause of death in a death certificate against a defendant in a criminal case." *Citing State v. Watson*, 281 N.C.

221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043, 34 L.Ed. 2d 493 (1972).

The same rationale underlying the Supreme Court's decisions in *Branch* and *Watson* continues to be valid. In the case *sub judice*, the coroner's statement on the death certificate that the gunshot wound killing Drain was intentionally self-inflicted, is not based on personal knowledge of the events which took place on 10 June 1983 and can only be described as hearsay and conclusory. The admission of such a statement would thwart the fairness of the trial and in essence shift the burden of proof on the issue of the cause of death from defendant to plaintiff. In addition, the official status of a public record would lend this hearsay greater credibility and weight in the eyes of the jury.

Therefore, we conclude that the exclusion of this statement on the death certificate was proper.

Defendant also argues that statements contained in the medical examiner's report, stating that investigators of the incident presumed the wound was self-inflicted, was properly admissible pursuant to N.C.G.S. § 130A-392, which states that "[r]eports of investigations made by a county medical examiner . . . may be received as evidence in any court or other proceeding."

This Court believes that the same fallacies inherent on a death certificate stating how injuries causing death were sustained would also be present in similar statements contained in a medical examiner's report. Therefore, this Court concludes that the statements listing suicide as the cause of death in the medical examiner's report were also properly excluded at trial.

After reviewing the record, this Court concludes that defendant received a trial free from prejudicial error.

No error.

Judges WELLS and BECTON concur.

Judge WELLS concurring.

The dispositive issue in this appeal is whether a contract of insurance was entered into between defendant and Paul Drain. Although Drain's application for insurance clearly provided that

the policy would become effective on the *later* date of approval of the application on 16 June 1983 and although Drain died before 16 June 1983, plaintiff offered evidence from which the jury could find that defendant waived the effective date provision of the application, and on the consideration of Drain's promise to pay premiums when due (his signed payroll allotment card) issued the policy sometime prior to 26 May 1983 (the date of defendant's letter of acceptance to the Drains).

BRANCH BRANKING & TRUST COMPANY v. HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF EASTERN NORTH CAROLINA AND RALPH L. TYSON, SHERIFF OF PITT COUNTY

No. 863SC202

(Filed 7 April 1987)

1. **Estates § 2.1; Mortgages and Deeds of Trust § 17.1— deed of trust as first lien—conveyance of land from mortgagor to lienholder—doctrine of merger inapplicable**

The mortgage estate on land held in trust by plaintiff first lienholder did not merge with the fee simple estate obtained by plaintiff lienholder when it accepted and recorded a deed from the mortgagor conveying the encumbered land, and a junior judgment lienholder thus did not obtain clear title to the land by purchasing it at a sheriff's sale but obtained title subject to plaintiff's deed of trust, where merger would be inimical to the interests of the plaintiff; plaintiff did not represent to the mortgagor that it would accept the deed in satisfaction of the indebtedness or that it would cancel the mortgagor's note and deed of trust; it was not plaintiff's intention to subordinate its interests to the interests of any subsequent lienholder; plaintiff did not cancel and did not intend to cancel the note and deed of trust; and the deed was inadvertently recorded by plaintiff's attorney with no actual knowledge of the judgment lien of the junior lienholder.

2. **Rules of Civil Procedure § 59— denial of amended findings or judgment**

The trial court did not err in denying defendant's motion for amended findings of fact or an amended or new judgment under N.C.G.S. § 1A-1, Rules 52(b), 59(e) and 59(a)(7), where the trial court's decision was supported by the evidence and was not contrary to law.

APPEAL by defendant Home Federal Savings & Loan Association of Eastern North Carolina from *Bowen, Judge.* Judgment entered out of session on 4 January 1985 in Superior Court, PITT County. Heard in the Court of Appeals 20 August 1986.

Allen, Hooten & Hodges by John M. Martin for plaintiff appellee.

Everett, Everett, Warren & Harper by C. W. Everett, Sr., Edward J. Harper, II, and Ryal W. Tayloe for defendant appellant.

COZORT, Judge.

[1] In this appeal we consider whether the mortgage estate on land held in trust by a first lienholder merged with the fee simple estate obtained by the lienholder when it accepted and recorded a deed from the mortgagor conveying the encumbered land to the lienholder, thus allowing a junior lienholder to obtain clear title to the land by purchasing it at a sheriff's sale. We hold the doctrine of merger does not apply in this case and that the junior lienholder's title is subject to the first lienholder's deed of trust. Relevant facts and procedure follow:

On 24 November 1980, George Ronald Taylor signed a note wherein he promised to repay to Branch Banking and Trust Company, plaintiff herein, a loan of $166,000 by making eighty-four (84) monthly installments of $3,440.48 beginning 24 December 1980 and continuing on the same date of each month thereafter until paid in full. The BB&T note renewed a $200,000 loan from BB&T to Taylor on 30 January 1980. Repayment of the loan was guaranteed by four individuals and one corporation. The BB&T note of 24 November 1980 was secured by a deed of trust executed by Taylor on 30 January 1980, which gave as collateral a 38.973-acre tract of land in Pitt County, hereinafter "the land," and a 9,000-square-foot building located thereon. The deed of trust was duly recorded on 30 January 1980 in the Pitt County Public Registry. In the spring of 1982, Taylor was charged with criminal offenses and began encountering difficulties in meeting his financial obligations. By late September of 1982, the loan payments were past due more than $9,600, with an outstanding loan balance of over $150,000. Taylor listed the land for sale through an auction company, hoping to sell the land for an amount sufficient to pay off the debt to BB&T. Taylor entered a guilty plea to the criminal charges pending against him, and in October of 1982, he was sentenced to a term of imprisonment. On 22 October 1982, Taylor executed a deed of trust pledging the land as security for

a $300,000 judgment owed to Harrington Manufacturing Company. This second deed of trust was promptly recorded in the Pitt County Public Registry.

In October of 1982, Vernon H. Rochelle, a Kinston attorney whose law firm was on retainer to provide day-to-day advice for plaintiff bank, was approached by Kenneth Ball, one of the individual guarantors on the BB&T note, about serving as attorney-in-fact for Taylor to assist in the sale of the land. Rochelle agreed and on 1 November 1982, Taylor executed a Limited Power of Attorney appointing Rochelle as his Attorney-in-Fact to do "all acts necessary" to sell the land and to apply the proceeds to his indebtedness to plaintiff BB&T. On 12 January 1983, Taylor and Rochelle executed a deed, which transferred 3.521 acres of the land and the 9,000-square-foot building to L. V. Myles, Incorporated. Harrington Manufacturing Company also executed the deed in order to release its judgment and deed of trust on the land conveyed to Myles. The proceeds of the sale to Myles was applied to Taylor's indebtedness to BB&T, reducing Taylor's debt to BB&T to approximately $75,000. Rochelle prepared the deed conveying the 3.521 acres and building from Taylor to Myles, after doing a "cursory" title search for other outstanding debts. Rochelle's title search revealed no other liens on the land except those of BB&T and Harrington Manufacturing.

During February of 1983, BB&T officials continued discussions with the auction company about selling the remaining 35.416 acres of the land. Rochelle recommended to BB&T officials that the land be foreclosed; however, BB&T preferred to try to sell the land. An auction sale was held on 19 March 1983, and the high bid was $55,000. The bid was rejected by BB&T and the guarantors on the BB&T note. Rochelle told BB&T officials he thought the bid should have been accepted. Over the next few months, Rochelle negotiated the sale of the land's tobacco allotment for $15,000 and the leasing of the land for the 1983 crop year, further reducing Taylor's indebtedness to BB&T. During this period of time, Rochelle and BB&T officials learned that the guarantors of the BB&T note had also become insolvent, with most having filed for bankruptcy. BB&T officials began to consider what other options were available to bring in enough money to satisfy the debt. Ultimately, BB&T decided to have the land deeded from Taylor to BB&T, hoping to sell the land when land prices became higher.

Rochelle drafted a deed transferring the remaining 35.416 acres to BB&T. Taylor signed the deed on 26 May 1983. Harrington Manufacturing Company executed the deed in June of 1983 to release the land from the lien of its deed of trust. The deed was returned to Rochelle's office in late June of 1983. Rochelle intended to take the deed to Pitt County, bring the title up to date and then record the deed. He left the deed with a secretary and asked her to prepare a check to pay the recording fees. The next time he saw the deed, it had already been recorded, with the data showing a recording date of 30 June 1983.

Rochelle then went to Pitt County to update the title, which he had intended to do before recording the deed. His title update revealed that on 22 April 1983, a judgment against Taylor of about $350,000, plus $50,000 in attorney's fees, had been recorded in Pitt County. The judgment had been obtained by Home Federal Savings and Loan Association of Eastern North Carolina, the defendant herein. Upon discovering the Home Federal judgment, Rochelle returned to Kinston, and after researching the effect of the transactions, he transmitted the deed to BB&T and informed BB&T officials of the judgment and the potential problem. At this time, BB&T had not cancelled either the promissory note or the deed of trust. Rochelle again recommended that BB&T begin foreclosure proceedings. He instituted a foreclosure proceeding in late September. The foreclosure proceeding is still pending.

Upon a request by Home Federal, on 12 October 1983 the Clerk of Superior Court for Pitt County entered an Order ordering the Sheriff of Pitt County to institute procedures for the sale of the land in order to satisfy the Home Federal judgment of 22 April 1983. The Pitt County Clerk of Superior Court issued an Execution on 17 October 1983 demanding the Sheriff satisfy the judgment. On 19 October 1983 the Sheriff of Pitt County issued his Notice that the land would be offered for sale to the highest bidder on 18 November 1983. On 18 November, BB&T instituted this action by the filing of a complaint asking the Superior Court of Pitt County to issue a temporary restraining order enjoining the Sheriff's execution sale of the land until the court could determine the rights of plaintiff BB&T and defendant Home Federal and enter a judgment declaring the rights of plaintiff and defendant. No temporary restraining order was entered, and the Sheriff's sale was held on 18 November, with defendant Home

Federal making the last and highest bid of $5,000. On 21 November, Superior Court Judge David E. Reid, Jr., denied plaintiff's request for a temporary restraining order. On 29 November, the Pitt County Clerk of Superior Court entered an Order approving and confirming the Sheriff's sale of the land to defendant Home Federal, and the Sheriff's Deed conveying the land to defendant Home Federal was executed on 16 December. On 21 December 1983, the defendant filed its answer to plaintiff's complaint.

The matter was heard before Superior Court Judge Wiley F. Bowen at the 15 November 1984 Non-jury Civil Session of the Superior Court of Pitt County. On 15 January 1985, Judge Bowen filed an Order holding that "the lien created by [plaintiff's] Deed of Trust and in favor of the plaintiff remained at all times superior to the judgment lien of the defendant . . . [and] [t]hat the defendant holds title to the land subject to the lien created by the aforementioned Deed of Trust." On 21 January 1985, the defendant filed a motion requesting, pursuant to G.S. 1A-1, Rule 52(b) of the Rules of Civil Procedure, that the trial court amend its findings of fact and make additional findings of fact and further requesting, pursuant to Rule 59(e) and Rule 59(a)(7) of the Rules of Civil Procedure, that the court order a new trial, alter or amend the judgment or enter a new judgment cancelling the plaintiff's deed of trust and holding for defendant. Judge Bowen denied defendant's motion on 1 November 1985, and defendant appealed to this Court.

The dispositive question for this appeal is whether the mortgage estate held by plaintiff BB&T merged with the fee estate BB&T obtained when Taylor conveyed the land to BB&T, thus leaving defendant Home Federal with legal title free and clear of all liens pursuant to its purchase of the land at the Sheriff's sale. For reasons which follow, we hold that the doctrine of merger does not apply, and we affirm the trial court's ruling that defendant Home Federal holds title subject to the lien created by plaintiff BB&T's deed of trust.

The doctrine of merger of estates was explained in great detail by our Supreme Court in 1924:

> It is undoubtedly the general rule of law that where one who holds a mortgage on real estate becomes the owner of the fee, and the two estates are thus united in the same per-

son, ordinarily the former estate merges in the latter. *Hutchins v. Carleton*, 19 N.H., 487. The equitable or lesser estate is said to be swallowed up, or "drowned out," by the legal or greater interest. But this rule does not apply where such merger would be inimical to the interests of the owner, as, for example, where it would prevent his setting up the mortgage to defeat an intermediate title—such as a subsequent lien or a second mortgage, as in the instant case—unless the parties intended otherwise; and this intention will not be presumed contrary to the apparent interests of the owner. *Hines v. Ward*, 121 Cal., 115; Jones on Mortgages, sec. 870; 19 R.C.L., 484; Note: 39 L.R.A. (N.S.), 834, *et seq.* As to whether such was intended by the parties is a question of fact; and the courts will "permit or prevent the application of the doctrine as the same may accord with the intent of the parties and the right and justice of the matter." *Odom v. Morgan*, 177 N.C., p. 369.

The following statement of the law, taken from 27 Cyc., 1379, we apprehend, is applicable, in substance at least, to the facts of the present case:

"The technical doctrine of merger will not be applied contrary to the agreement or the express or implied intention of the parties; and, therefore, in equity, there will be no merger of estates when a mortgagee receives a conveyance of the equity of redemption, when such a result would be contrary to his real intention in the transaction, or to the bargain made by the parties at the time. This is the case where the mortgagee means to keep the security alive for his own protection as against other liens or encumbrances, and also where the conveyance is not intended by the parties to be in satisfaction of the mortgage debt, but only as additional security for it. The question whether or not the parties intended that a merger of estates should take place is a question of fact. It is not settled by the mere recording of the deed. But the intention that there should be no merger may be shown by a stipulation in the deed or other express declaration of the parties, or the fact that the mortgage does not cancel or surrender the evidences of the debt or release the mortgage, but on the contrary, retains them, or that he assigns the mortgage to a bona fide purchaser, representing it

> as a good and valid security. On the other hand, if he assumes to deal with the estate as absolute owner, and conveys it to another, it proves a merger. In the absence of any such proof, the question must be determined by a preponderance of the evidence presented."

Washington Furniture Company v. Potter, 188 N.C. 145, 146-47, 124 S.E. 122, 123 (1924).

The defendant contends that the evidence from plaintiff's business records shows a clear intention to accept a deed in lieu of foreclosure which is sufficient to overcome the presumption against merger. Defendant contends the evidence shows plaintiff's officers had the intent to exercise control over the property even prior to the acquisition of legal title. Defendant further contends that when plaintiff received the deed from Taylor in July of 1983, plaintiff's officers had no intention of foreclosing. In support of these arguments, defendant refers to, among other things, several documents in evidence at the trial which were made in the course of business by Joe O. Creech, a BB&T Vice President in charge of the business loan department for plaintiff's Kinston office. One such document, for example, is Creech's Report of Non-Performing Loan prepared on 18 July 1983, wherein Creech states: "Reason for Non Performing Status[:] George Ronald Taylor is in prison for 20 years. Guarantors have filed bankruptcy except Kenneth Edward Ball. Prospects for Collection[:] Ron Taylor has deeded the land to the bank in lieu of foreclosure." Defendant also refers to Creech's testimony at trial, particularly this exchange with defendant's counsel:

> Q. Mr. Creech, at the time you took this deed, did you take it with the intention to instate a foreclosure proceeding on this property?
>
> A. When the deed was received it was not received with any intentions of foreclosure, however that certainly was a possibility at any time, since we did not release and had no intentions of releasing, and typically do not release notes and deeds of trust on any type property, foreclosed or otherwise, until such time as its [*sic*] finally sold and we have received proceeds, therefrom.
>
> Q. Mr. Creech, I ask you again, did you receive the deed from George Ronald Taylor by and through his attorney-in-

fact, that has been designated as Defendant's Exhibit 45, with the intention of instating a foreclosure proceeding on the property described in that deed, yes or not [*sic*]?

A. No, not at that particular time.

We believe this evidence shows that plaintiff accepted the deed in lieu of foreclosure *at that time;* we do not believe it compels a finding that plaintiff intended to merge its estate and thus give up all rights to foreclosure at *any* time, subrogating its rights to those of defendant. We note, initially, that at the time Creech wrote the memo upon which defendant relies (18 July 1983), he was unaware that defendant had a judgment lien against Taylor. As Creech testified:

We did not give up the option, nor the right to foreclose on our existing deed of trust to pay. We did not mark it paid, we did not take it instead or in lieu of, or in place of, until such time as we were assured by certification that we in fact had good title.

* * * *

I don't recall the exact date when I first discovered that there was a problem on this loan with regard to the Home Savings judgment lien, but it seems to me it was in the latter part of August, or so, whenever Mr. Rochelle called or communicated that we might have a problem. . . .

* * * *

The bank's understanding was that we would take the deed only if the deed was free and clear of all encumbrances and it did not prevent us from passing clear deed to a prospective purchaser of the property. We had no agreement with Ron Taylor concerning cancelling his debt or taking the land in complete satisfaction of the note and deed of trust.

Creech also testified, in response to question from counsel:

Q. Had you been made aware of the intervening judgement [sic] by Mr. Rochelle or anybody else before the deed was recorded, what would have been the bank's position?

A. We would have foreclosed . . . .

Of equal significance is testimony from Rochelle that the deed from Taylor was inadvertently recorded before he updated the title:

> My recollection is that the deed was returned to our office sometime at the end of June . . . . There was no rush to record this deed, and I took it to my secretary that handles real estate transactions, put it on her desk, and said I needed a check to record it. I probably said I'll be taking it to Greenville or something like that. . . . The next time I saw the deed there was recording data on it. I had given no instructions to my support staff secretary concerning getting the deed recorded. I had just said get me a check, this has got to go to Greenville, or I am going to take them to Greenville, or something like that. I absolutely did not intend to have this deed recorded before I updated the title. After I learned that the deed had recording data on it and had in fact been recorded I came to Greenville to do what I would have done prior to the time that it was recorded if I had brought it to bring the title up to date.
>
> * * * *
>
> I had no knowledge, at any time before I did my title update in July, 1983, of the Home Federal judgment in Pitt County. I would not have recorded the deed had I updated the title but would have instead have come back and gotten a separate release from Home Federal as I did from Harrington Manufacturing.

Applying the rules set forth in *Washington Furniture Company v. Potter, supra,* to the evidence as found in the testimony of Creech and Rochelle leads to the conclusion that the doctrine of merger does not apply. As was stated in *Washington,* the "rule does not apply where such merger would be inimical to the interests of the owner, as, for example, where it would prevent his setting up the mortgage to defeat an intermediate title—such as a subsequent lien or a second mortgage . . .—unless the parties intended otherwise; and this intent will not be presumed contrary to the apparent interests of the owner." *Id.* at 146, 124 S.E. 2d at 123. It is clear that merger would be inimical to the interests of BB&T and would prevent its defeating the subsequent lien of defendant.

We find the instant case similar to the facts of a case decided by the Supreme Court of South Carolina in 1933. In *McCraney v. Morris*, 170 S.C. 250, 170 S.E. 276 (1933), that court considered this factual situation: Mrs. Mary M. McCraney loaned $400 to Mrs. Edna M. Morris on 8 April 1927, with the debt evidenced by an installment bond secured by a mortgage of real estate. The mortgage was recorded on 22 April 1927. On 10 October 1928, Mrs. Edna M. Morris mortgaged the same real estate to her brother-in-law, Henry Morris, to secure a debt of $340; this mortgage was recorded on 26 February 1929. In the fall of 1931 Mrs. McCraney pressed for payment of the debt; however, Mrs. Morris would not pay. Mrs. McCraney agreed to accept conveyance of the mortgaged premises from Mrs. Morris in exchange for payment of $12 by Mrs. McCraney to Mrs. Morris and settlement of the mortgage debt. Mrs. Morris conveyed the property to Mrs. McCraney on 3 December 1931; and a few days later, Mrs. McCraney marked the mortgage satisfied and delivered it to Mrs. Morris, who had the satisfaction of debt recorded. At the time of the acceptance of the deed, Mrs. McCraney had no actual knowledge of the Henry Morris mortgage. She did not examine the records for liens on the property prior to accepting the deed because Mrs. Morris's husband had written her and told her that she would get clear title to the property, and Mrs. McCraney testified she "always took them to be honest."

Upon learning of the Henry Morris mortgage after she had accepted the deed, Mrs. McCraney tried to repudiate the conveyance and the satisfaction of the mortgage, returned the deed to Mrs. Morris, and filed suit against Mrs. Morris. The lower court held there was a merger of the estates, and denied Mrs. McCraney's request that the Morris mortgage be declared junior and subordinate to her mortgage. The Supreme Court reversed, stating:

> [I]t is entirely manifest that the merger of the mortgage into the fee-simple title was absolutely "opposed to the interest of the person [Mrs. McCraney] in whom the different estates or interests became united." . . .
>
> * * * *
>
> . . . there was some evidence that Mrs. McCraney may have intended for what is known in law as a "merger" to take

> place. Her action in accepting the deed and in satisfying her mortgage give some strength to the theory that it was her intention so to do. But conceding all of this, it must be clear that her acts and intention were due to her ignorance . . . that the Henry Morris mortgage . . . [was a] lien on the real estate being conveyed to her.
>
> . . . If the rights of some subsequent party were in any wise affected by this negligence on the part of Mrs. McCraney, we would, of course, hold her liable because of that negligence. But no subsequent innocent party is affected. . . .
>
> . . . The evidence fails to show that at any time did she seek to take any undue advantage of any one. She was simply endeavoring to protect her rights. . . .
>
> * * * *
>
> . . . Mrs. McCraney, in good faith, accepted the deed, thinking she would get a clear title to the property, free of outstanding liens. . . . Her acts have brought damage to no person except herself, and the court may restore her to her former position without injury or damage to any other person.

Id. at 260-62, 170 S.E. at 279-80.

The reasoning of the South Carolina court is applicable to the facts at hand. BB&T accepted the Taylor deed in ignorance of the Home Federal judgment lien against Taylor. BB&T took the land endeavoring to protect its rights. At the time Taylor conveyed to BB&T, Home Federal held a junior lien on the land. The action of the trial court in subordinating Home Federal's judgment lien to BB&T's mortgage lien returned the parties to their priority at the time Taylor executed the deed. The trial court's decision was correct, and it is hereby affirmed.

The defendant brings forward three other assignments of error for our consideration. The defendant contends that the trial court erred in two significant findings of fact, alleging there is no competent evidence to support them. The challenged findings are:

> 18. That after the Deed was executed by all parties, it was delivered to the law offices of Rochelle. That it was Rochelle's intention that he would personally take the Deed

to Greenville, Pitt County, North Carolina, for the purposes of updating and certifying the title prior to recordation. That, as a result of a mistake occurring in the law offices of Rochelle, the Deed was inadvertently sent to the Register of Deeds of Pitt County, North Carolina, and recorded on June 30, 1983 in Book Y-51, page 387. That this recordation was done without the knowledge of Rochelle and was not instructed to be done by Rochelle. That as of the time of recordation, neither Rochelle nor the plaintiff had any actual knowledge of the judgment lien of the defendant.

19. That, upon learning of the inadvertent recordation of the Deed, Rochelle updated title in Pitt County and discovered the subsequent judgment lien of the defendant. That had he known or discovered this lien prior to recordation, Rochelle would not have recorded the Deed. That, approximately twenty (20) days after he became aware of the defendant's line, [*sic*] Rochelle notified the plaintiff of the mistake and of the intervening judgment lien of the defendant. That after learning of the mistake in recordation and the intervening judgment lien of the defendant, the plaintiff informed Taylor that it would proceed with a foreclosure proceeding.

We disagree with defendant's contention that there is no evidence to support these findings. The testimony of Rochelle and Creech, quoted above, amply supports the trial court's findings. This assignment of error is overruled.

[2] The last two assignments of error concern the defendant's argument that the trial court erred in denying defendant's motion of 21 January 1985 wherein defendant requested amended findings of fact, an amended or new judgment, or a new trial pursuant to Rule 52(b), Rule 59(e), and Rule 59(a)(7) of the North Carolina Rules of Civil Procedure. Rule 52(b) provides: "(b) *Amendment.*—Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59." The primary purpose of a Rule 52(b) motion is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court. If a trial court has omitted certain essential findings of fact, a motion under Rule

52(b) can correct this oversight and avoid remand by the appellate court for further findings. *Parrish v. Cole*, 38 N.C. App. 691, 694, 248 S.E. 2d 878, 879 (1978). In its judgment filed 15 January 1985, the trial court made findings of fact, among others, that plaintiff did not represent to Taylor that it would accept the deed in satisfaction of the indebtedness or that it would cancel the Note and Deed of Trust, that it was not plaintiff's intention to subordinate its interest to the interest of any subsequent lienholder, that plaintiff did not cancel and did not intend to cancel the Note and Deed of Trust, and that the deed was inadvertently recorded by Rochelle with no actual knowledge of the judgment lien of the defendant. These findings are sufficient to support the trial court's judgment that the merger doctrine does not apply; therefore, the trial court properly denied defendant's Rule 52(b) motion.

We likewise reject defendant's argument that the trial court erred in denying defendant's motion for a new trial under Rule 59(a)(7) and its motion to alter or amend the judgment under Rule 59(e). Rule 59(a)(7) provides that a new trial may be granted on the basis of "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law." Under Rule 59(a), we also find:

> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Rule 59(e) provides that "[a] motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment." Defendant argues in his brief that the trial court should have granted its motion because "the evidence was insufficient to justify the judgment and that the Court [should] amend its findings of fact and conclusions of law, make new findings of fact and conclusions of law, and direct the entry of a new judgment in [defendant's] favor . . . ." We have held above that the trial court's decision was supported by the evidence and was not contrary to law. Accordingly, we find no merit to this argument of defendant. This Court and our Supreme Court have consistently held that a trial court's order under Rule

59 is not to be disturbed absent an affirmative showing of manifest abuse of discretion by the judge or a substantial miscarriage of justice. *See, e.g., Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982); and *Pearce v. Fletcher*, 74 N.C. App. 543, 328 S.E. 2d 889 (1985). We have reviewed the record here in its entirety and find neither.

The judgment below is

Affirmed.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. JOHN F. ADAMS

No. 8626SC1019

(Filed 7 April 1987)

1. **Criminal Law § 75.14— noncustodial statements—admissibility without regard to mental competency**

Defendant's noncustodial, self-initiated inculpatory statements were admissible in defendant's murder trial without regard to defendant's mental competency at the time he made the statements.

2. **Homicide § 15.1— admissibility of knife found in vicinity of body**

A knife stained with human blood found in a park 291 feet from a murder victim's body was properly admitted in defendant's murder trial, although there was no direct evidence linking the knife to the crime or to defendant, where an autopsy revealed the victim died of stab wounds to the neck and back; a medical examiner testified that those stab wounds could have been made by such knife; and an officer testified that defendant stated that he "cut off" the victim's head.

3. **Homicide § 21.7— second degree murder—sufficient evidence of unlawfulness and malice**

There was sufficient evidence that defendant killed the victim unlawfully and with malice to support defendant's conviction of second degree murder where there was evidence tending to show that the victim died of stab wounds to the neck and back; an eyewitness saw a fight between defendant and the victim in which defendant attacked the victim some hours before the victim's body was found; a knife stained with human blood was found two hundred ninety-one feet from the victim's body; defendant made statements to two witnesses the day after the victim's death in which defendant indicated that he had cut the victim's throat; several days after the stabbing death of the victim,

defendant appeared at a county jail and told jail personnel that he wanted to confess to killing someone; and defendant thereafter told a police officer that he had "cut off" the victim's head.

4. **Homicide § 30.2— evidence of mental illness and alcoholism—instruction on voluntary manslaughter not required**

In a second degree murder case, defendant's mental illness and alcoholism will not rebut the presumption of malice where the killing was accomplished by the intentional use of a deadly weapon; consequently, evidence of defendant's mental illness and alcoholism did not require the trial court to instruct on the lesser-included offense of voluntary manslaughter.

5. **Criminal Law § 122.2— jury not deadlocked—"dynamite charge"—no abuse of discretion**

The trial court did not abuse its discretion in giving the jury the "dynamite charge" pursuant to N.C.G.S. § 15A-1235(c) prior to an afternoon break when the jury had been deliberating less than two hours and there was no indication that the jury was deadlocked.

APPEAL by defendant from *Friday, Judge.* Judgment entered 16 April 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 February 1987.

On 9 June 1985, the Charlotte police found Alonzo Morris dead from stab wounds on Luther Street in the neighborhood known as the Cherry Community in Charlotte.

Several days later, on or about 11 June 1985, police arrested defendant charging him with the murder of Alonzo Morris. On a motion questioning defendant's capacity to proceed to trial, defendant was sent to Dorothea Dix Hospital where a staff doctor adjudged him incapable of proceeding to trial and recommended his commitment to Broughton Hospital. At Broughton Hospital, defendant was found not to meet the criteria for involuntary commitment, and was returned to Dorothea Dix Hospital for further evaluation. On 8 August 1985, defendant was deemed capable of proceeding to trial.

On 14 October 1985, defendant was indicted by a grand jury for the murder of Alonzo Morris. At trial the jury returned a verdict finding defendant guilty of second degree murder, and the court sentenced defendant to imprisonment for a term of fifteen years. Defendant appealed.

Attorney General Lacy H. Thornburg by Assistant Attorney General Doris J. Holton for the State.

Wishart, Norris, Henninger and Pittman, P.A., by Charles L. Morgan, Jr., for defendant-appellant.

PARKER, Judge.

In this appeal, defendant raises five assignments of error: (i) the court's denial of the motion to suppress defendant's confession; (ii) the court's ruling that a knife found in the vicinity of the victim's body was admissible in evidence; (iii) the court's denial of defendant's motion to dismiss at the close of the State's evidence; (iv) the court's refusal to instruct the jury on the offense of voluntary manslaughter; and (v) the court's decision to give additional instructions after the jury had been deliberating for over two hours. We will address these assignments of error seriatim.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his motion to suppress certain inculpatory statements defendant made to law enforcement officers. Defendant asserts that these statements were involuntarily made because he was mentally incompetent at the time and that these statements should, therefore, be suppressed pursuant to G.S. 15A-974(1). We disagree.

At the hearing before Judge Saunders on defendant's motion to suppress statements he made in June 1985, the evidence tended to show that on or about 11 June 1985, defendant went to the Mecklenburg County Jail and told Sheriff's Department employees that he had killed someone and wanted to confess. Charlotte Police Officer Shelton then came to the jail at the request of jail personnel to escort defendant to the Law Enforcement Center. At this time, Officer Shelton noted that although defendant was coherent, he seemed to have "mental problems." As they walked to the Law Enforcement Center, defendant identified himself, gave his address as 1504 Luther Street, and stated that he had "cut off Alonzo's head" over on Luther Street. Once at the Law Enforcement Center, Officer Shelton checked the current homicide reports and then took defendant to 1504 Luther Street where he was identified by relatives. Officer Shelton gave the information he had gathered to homicide investigators. Later that same day, defendant was taken into police custody.

At the hearing, defendant presented evidence tending to show that he had an extensive history of mental illness. Defendant's expert witness testified that defendant was a paranoid schizophrenic who, in a psychotic condition, when delusional and hallucinating, "wouldn't be able to make use of the fact the Miranda is for his own benefit." The expert also testified that defendant's mental illness prevented him from "participating rationally in the legal process," and that in a psychiatric examination several days after defendant's inculpatory statements, defendant's "behavior and statements were determined more by his mental illness than by his normal self."

After the close of the evidence on the motion to suppress, Judge Saunders ordered that statements made by defendant after he was in police custody be suppressed, but that the other "noncustodial admissions of criminal conduct" made to jail personnel and to Officer Shelton were admissible. At trial, defendant again made a motion to suppress this evidence, and again this motion was denied.

General Statute 15A-974(1) states:

> Upon timely motion, evidence must be suppressed if:
>
> (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina . . . .

The United States Supreme Court has recently held in *Colorado v. Connelly*, 479 U.S. ---, 107 S.Ct. 515, 93 L.Ed. 2d 473 (1986), a case factually similar to the case at bar, that there is no federal constitutional ground for the exclusion of a noncustodial confession. In *Connelly*, the defendant, a chronic schizophrenic who, when in a psychotic state, suffered from hallucinations which interfered with his ability to make free and rational choices, walked up to a Denver Police Officer and confessed to having committed a murder. The defendant sought to suppress his confession on the grounds that his mental state interfered with his free will at the time of the confession. The Supreme Court held that the admissibility of this kind of statement is governed by state rules of evidence rather than by Supreme Court decisions regarding coerced confessions and *Miranda* waivers. *Id.* The basis of this holding is that "coercive police activity is a necessary

predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Connelly*, 479 U.S. at ---, 107 S.Ct. at 522, 93 L.Ed. 2d at 484.

Upon examination of North Carolina decisions, we must conclude that there is no State basis for the exclusion of defendant's noncustodial, self-initiated inculpatory statements. In *State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631, *cert. denied*, 449 U.S. 960, 101 S.Ct. 372, 66 L.Ed. 2d 227 (1980), the North Carolina Supreme Court held that the State may offer in evidence testimony describing a defendant's self-initiated acts, statements, and questions without a preliminary inquiry into defendant's mental competence, so long as these acts, statements, and questions are relevant to an issue in the case. The defendant in *Leonard* was a diagnosed chronic schizophrenic who could not tell the difference between right and wrong because of her mental illness, and who heard and talked to numerous voices including those of God and Satan. While in police custody for the shooting of her sister, after having refused to waive her constitutional rights, defendant asked police, "How many times did I shoot her?" and whether the State still had the death penalty.

We find the *Leonard* case controlling on the facts before us. Defendant relies on *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed. 2d 242 (1960), and *State v. Ross*, 297 N.C. 137, 254 S.E. 2d 10 (1979), to support his argument for suppression of the confession. However, these cases may be distinguished from the case before us because in *Blackburn* and in *Ross* the confessions of the defendants were in response to interrogation by police while the defendants were in police custody. In contrast, in the case before us, as in the *Leonard* case, *supra*, defendant's confession was initiated by defendant, and not a response to interrogation. Additionally, in the case before us, defendant was not even in custody when he made his inculpatory statements. These distinguishing factors make the argument for admissibility of defendant's statements much stronger than in *Ross*. This assignment of error is overruled.

[2] In his second assignment of error, defendant contends that the trial court erred in admitting into evidence State's Exhibit Number 10, a knife stained with human blood found in a park two hundred ninety-one feet from the victim's body. Defendant argues

that there was no evidence that the knife had any relevant connection to the crime and that testimony regarding the knife was irrelevant and unfairly prejudicial. We do not agree.

At trial, the State presented the testimony of a "Crime Scene Search Technician" employed with the Charlotte Police Department Crime Lab who testified that she located a "butcher-type knife stuck in the ground" in a park two hundred ninety-one feet, four inches from where the body was found. The court received that knife into evidence over the objection of defendant. The parties stipulated that stains on the knife were found to be that of human blood, but that the blood could not be typed. No fingerprints could be raised on the knife. The State also presented testimony of the Medical Examiner who stated that his autopsy on the victim revealed that the victim died of stab wounds to the neck and back, and that those stab wounds could have been made by the State's Exhibit Number 10, the knife. Finally, the State presented the testimony of Officer Shelton that on 12 June 1985 defendant stated he "cut off" Alonzo's head.

In a criminal case, any circumstance that is calculated to throw light upon the alleged crime is admissible. The weight of circumstantial evidence is for the jury. *State v. Warren*, 292 N.C. 235, 239, 232 S.E. 2d 419, 422 (1977); *State v. Hamilton*, 264 N.C. 277, 286-287, 141 S.E. 2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 86 S.Ct. 1936, 16 L.Ed. 2d 1044 (1966). Any object having a relevant connection to the crime is admissible in evidence. A weapon may be admitted when there is evidence tending to show it was used in the commission of the crime. *Warren*, 292 N.C. at 239, 232 S.E. 2d at 422; *State v. Sneeden*, 274 N.C. 498, 502, 164 S.E. 2d 190, 193 (1968). While in the case before us there is no direct evidence linking the knife to the crime or the defendant to the knife, the knife was clearly a part of a chain of circumstances tending to show the commission of the crime. The distance between where the knife was found and the body of the victim affects only the probative weight of the evidence and not its admissibility. *See State v. Thomas*, 294 N.C. 105, 118, 240 S.E. 2d 426, 436 (1978). Therefore, it was not error for the trial court to admit the knife into evidence or to allow testimony concerning the knife.

[3] Defendant's third assignment of error is to the trial court's denial of his motion to dismiss the charges against him at the

close of the State's evidence. Specifically, defendant contends that the evidence was insufficient to show defendant committed an unlawful killing. This argument is without merit.

In *State v. Bates*, 313 N.C. 580, 581, 330 S.E. 2d 200, 201 (1985), our Supreme Court addressed the test for denial of a criminal defendant's motion to dismiss:

> A defendant's motion for dismissal for insufficiency of the evidence in a criminal case raises the question of whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. . . . In determining this issue the court must consider the evidence in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn therefrom. . . . If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, a case for the jury is made and a motion to dismiss should be denied. . . . Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Citations omitted.)

However, these principles of law are more easily stated than applied, and each case turns on its own peculiar facts; decisions in prior cases are rarely controlling because the evidence differs from case to case. *State v. White*, 293 N.C. 91, 95, 235 S.E. 2d 55, 58 (1977); *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967).

In this case, the State presented, among other evidence, the testimony of an eyewitness to a fight on Luther Street between defendant and the victim in which defendant attacked the victim hours before the victim's body was found stabbed to death on Luther Street. The State produced a knife stained with human blood less than three hundred feet from where the victim's body was found, and the medical examiner who performed the autopsy testified that the victim had sustained numerous stab wounds to the neck and head. Defendant's cousin, who lived with defendant, and her friend both testified to statements made by defendant the day after the victim's death. Defendant's cousin testified that defendant said to her: "Bitch, you think I cut Alonzo, mother f----.

I will cut your mother f---- throat." The friend of defendant's cousin testified that defendant said to his cousin, "Bitch, I cut Alonzo's throat. I will cut you, too." Finally, several days after the stabbing death of the victim, defendant appeared at the Mecklenburg County Jail and told jail personnel that he wanted to confess to killing someone. Defendant thereafter told the police officer who was summoned to the jail that he had "cut off Alonzo's head" on Luther Street.

Viewing this evidence in the light most favorable to the State, and giving the State every reasonable inference that may be drawn therefrom, we find there is substantial evidence that defendant killed the victim Alonzo Morris unlawfully and with malice.

[4] In his fourth assignment of error, defendant contends that the trial court erred in its refusal to instruct the jury on the offense of voluntary manslaughter. Defendant contends that his mental illness and chronic alcoholism rendered him incapable of forming the *mens rea* necessary to support a conviction of second degree murder. We again disagree.

It is well settled that when there is evidence from which the jury could find the defendant guilty of a lesser-included offense, the defendant is entitled to jury instructions on the lesser offense. *State v. Wallace*, 309 N.C. 141, 145, 305 S.E. 2d 548, 551 (1983); *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). Murder in the second degree is "the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Snyder*, 311 N.C. 391, 393, 317 S.E. 2d 394, 395 (1984). Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation, or deliberation. *State v. Robbins*, 309 N.C. 771, 777, 309 S.E. 2d 188, 191 (1983); *State v. Rummage*, 280 N.C. 51, 55, 185 S.E. 2d 221, 224 (1971). Where there is no evidence of mitigating or justifying factors, a killing accomplished by the intentional use of a deadly weapon is deemed to be unlawful and malicious. *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E. 2d 532, 536 (1982); *State v. Hankerson*, 288 N.C. 632, 650, 220 S.E. 2d 575, 584 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977). As our Supreme Court has stated, "In order for an accused to reduce the crime of second-degree murder to voluntary manslaughter he must rely on evi-

dence presented by the State or assume a burden to go forward with or produce some evidence of all elements of heat of passion on sudden provocation." *Robbins*, 309 N.C. at 777-778, 309 S.E. 2d at 192. In the case before us, no such evidence of the elements of heat of passion on sudden provocation has been presented.

Defendant, however, would have this Court create a new rule that mental illness and chronic alcoholism should be considered in determining whether the State has proven beyond a reasonable doubt the element of malice in a second degree murder charge. This we decline to do.

Our Supreme Court has on numerous occasions rejected the contention that mental disease or incapacity should be considered on the issue of specific intent to kill after premeditation and deliberation. *See, e.g., State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981); *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976). A mental disorder which is insufficient to establish legal insanity may not be used to negate premeditation and deliberation or specific intent. *State v. Kirkley*, 308 N.C. 196, 213, 302 S.E. 2d 144, 154 (1983); *Anderson*, 303 N.C. at 200, 278 S.E. 2d at 247. Moreover, even voluntary drunkenness, which may be used to negate specific intent or premeditation and deliberation in a first degree murder case, is no defense to the general intent crime of second degree murder. *State v. Couch*, 35 N.C. App. 202, 207, 241 S.E. 2d 105, 108 (1978).

Therefore, in a second degree murder case, evidence of a defendant's mental illness and alcoholism will not rebut the presumption of malice where the killing was accomplished by the intentional use of a deadly weapon. Consequently, the trial judge in the case before us did not err in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter.

[5] In his fifth and final assignment of error, defendant contends that the trial court's instruction to the jury pursuant to G.S. 15A-1235 was premature. We find this contention to be meritless.

General Statute 15A-1235(c), sometimes referred to as "the dynamite charge," provides, "If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b)." Subsection (b) of 15A-1235 provides the following instructions:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

In the case at bar, the jury retired to begin its deliberations at 11:06 a.m. on 16 April 1986. The court recessed for lunch from 12:20 p.m. until 2:20 p.m., when the jury resumed its deliberations. At 2:40 p.m., the jury returned to the jury box requesting further instructions. The jury retired again at 2:45 p.m. At 3:30 p.m., when the court called the jury to the jury box in order to give jurors their afternoon break, the judge gave the jury the following additional charge:

> Number one, that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment. Two, each juror must decide the case for himself or herself, but only after an impartial consideration of the evidence with his or her fellow jurors, and, three, that in the course of deliberations a juror should not hesitate to reexamine his or her own views and change his or her opinion, if convinced it is erroneous, and, fourth, that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict. Now, the Court wants to emphasize, Ladies and Gentlemen, that it is the jury's duty to do whatever it can to reach a verdict, if it can be done. You should reason and discuss the matter over together as reasonable men and women and reconcile any differences, if you can without the surrender of any con-

scientious convictions, but the Court would mention that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict.

Defendant contends that the giving of a "dynamite charge" when the jury has been deliberating less than two hours and where there is no indication that the jury is deadlocked is prejudicial error for which defendant should receive a new trial. However, whether or not to give an instruction pursuant to G.S. 15A-1235(c) is clearly within the sound discretion of the trial judge. *State v. Williams*, 315 N.C. 310, 326-327, 338 S.E. 2d 75, 85 (1986). Defendant has failed to show any abuse of discretion.

In any case, the additional charge to the jury was not prejudicial to defendant. In *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980), our Supreme Court held that where the record provided no indication that the jury was deadlocked in its deliberations or in any other way open to pressure by the trial judge to force a verdict, even a charge that is in part impermissible under G.S. 15A-1235 is not prejudicial error requiring a new trial. In the case before us, the contents of the charge were entirely proper under G.S. 15A-1235. Moreover, the charge was given during a break in the deliberations, and no inquiry was made nor indication given as to the numerical division of the jury. After considering the circumstances under which the additional instructions were given and the probable impact of those instructions on the jury, as we are required to do under *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978), we hold that any error in the court's decision to instruct the jury pursuant to G.S. 1235(c) in the absence of any indication of deadlock was not prejudicial to defendant.

After careful review of each assignment of error, we are satisfied that defendant received a fair trial free of prejudicial error.

No error.

Judges MARTIN and COZORT concur.

WILLIAM DOUGLAS CHRISMON AND WIFE, EVELYN B. CHRISMON v. GUILFORD COUNTY; FORREST E. CAMPBELL, PAUL W. CLAPP, OGDEN DEAL, DOROTHY KEARNS, FRED L. PREYER, MEMBERS OF THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY; AND BRUCE CLAPP

No. 8618SC870

(Filed 7 April 1987)

Municipal Corporations § 30.9— rezoning—conditional use district—spot zoning and contract zoning—invalid

The Guilford County Board of Commissioners engaged in invalid spot zoning and contract zoning when property adjacent to plaintiffs' land was rezoned from A-1 Agricultural to Conditional Use Industrial so that the owner of a nearby commercial fertilizer and related sales operation could expand his business where the rezoning clearly constituted spot zoning, there was no reasonable basis for the spot zoning, and the rezoning constituted contract zoning because it was accomplished as a direct consequence of the condition agreed to by the applicant rather than as a valid exercise of the county's legislative discretion. The fact that the property is rezoned to a conditional use district does not change the rule that rezoning may be done only if the location and surrounding circumstances are such that the property should be made available for all uses permitted by the zoning classification to which the property is rezoned. N.C.G.S. § 153A-344.

APPEAL by plaintiff from *Seay, Judge*. Judgment entered 11 April 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 January 1987.

This is an action for a declaratory judgment concerning an amendment to the Guilford County zoning ordinance. The underlying facts are not disputed. Defendant Bruce Clapp (hereinafter referred to as "Mr. Clapp" and who is not related to defendant Paul Clapp, a member of the Guilford County Board of Commissioners) had been operating a business on a 3.18 acre tract of his property in Rock Creek Township, Guilford County since 1948. The business consisted of buying, drying, storing, and selling grain as well as selling and distributing lime, fertilizer, animal feeds, pesticides, and other farm products.

In 1964, Guilford County adopted a comprehensive zoning ordinance. The ordinance zoned the 3.18 acre tract of Mr. Clapp's land, as well as the surrounding area, "A-1 Agricultural" (A-1). Under that classification, Mr. Clapp's grain drying and storing operation was a permitted use but the sale and distribution of the grain, lime, fertilizer, and other farm products was not. Because it

preexisted the ordinance, Mr. Clapp was allowed to continue that unpermitted part of his business only as a non-conforming use.

In 1969, plaintiffs purchased a tract of land from Mr. Clapp and built a home there. Plaintiffs' lot is located at the south side of the intersection of North Carolina Highway 61 and State Road 3106 ("Gun Shop Road"). Highway 61 runs north and south, while Gun Shop Road, a small, unpaved road, begins at Highway 61 and runs east. Mr. Clapp's residence is located at the north side of the intersection, directly across Gun Shop Road from the plaintiffs. The 3.18 acre tract on which the business was operated is adjacent to Mr. Clapp's residence. Across the road from that tract and adjacent to plaintiffs' lot is a 5.06 acre tract, also owned by Mr. Clapp. Prior to 1980, that tract was being used as farmland.

Beginning in 1980, Mr. Clapp moved a portion of his business operation from the 3.18 acre tract to the 5.06 acre tract adjoining plaintiffs' lot. Moreover, Mr. Clapp built some new buildings on the larger tract, erected some new grain bins, and generally enlarged his operation. Because of the increased noise, dust, and traffic caused by the expansion, plaintiffs complained to the Guilford County Inspections Department. The Inspections Department notified Mr. Clapp, by a letter dated 22 July 1982, that the expansion of his commercial fertilizer and related sales operation constituted an impermissible expansion of a non-conforming use. The letter informed him that, although the expansion was in violation of the county's zoning ordinance, he could request the rezoning of his property. The letter stated that rezoning was not guaranteed and that, if the property was not rezoned, he would have to cease all unpermitted uses on the 5.06 acre tract.

Shortly thereafter, Mr. Clapp applied to have an 8.57 acre area, which included both parcels he was presently using for his business, rezoned from A-1 to "Conditional Use Industrial District" (CU-M-2). He also applied for a conditional use permit, specifying in the application that he would use the property as it was presently being used and listing the improvements which he would like to make in the next five years. Under a CU-M-2 classification, Mr. Clapp's commercial sales operation would become a permitted use upon issuance of the conditional use permit. The Planning Board met on 8 September 1982 and voted to approve the recommendation of the Planning Division that the property be rezoned as requested.

On 20 December 1982, the Guilford County Board of Commissioners held a public hearing on the rezoning application. The Commissioners heard statements from Mr. Clapp, plaintiffs, and plaintiffs' attorney. Several other persons had spoken in favor of the rezoning at earlier Board meetings, stating that Mr. Clapp's business provided a service to the farmers in the area. The Board had also been presented with a petition, signed by 88 persons in favor of the rezoning. The Commissioners then voted to rezone the described 8.57 acre area from A-1 to CU-M-2 and, as part of the same resolution, summarily approved the conditional use permit application.

As a result of the county's decision to rezone the property, plaintiff brought this action seeking to have both the zoning amendment and the issuance of the conditional use permit declared invalid. After trial without a jury, the trial court found that the sale and distribution of the farm products in question was compatible with the agricultural needs of the area and that Mr. Clapp would have been entitled to an M-2 zoning classification at the time the original ordinance was passed. The court concluded that the rezoning was not "spot zoning" or "contract zoning" and that the county had not acted arbitrarily. The court made no findings of fact or conclusions of law regarding the issuance of the conditional use permit.

Gunn & Messick, by Paul S. Messick, Jr., for the plaintiff-appellant.

Ralph A. Walker, for the defendant-appellee Clapp.

Samuel M. Moore, for defendant-appellees Guilford County; Forrest E. Campbell, Paul W. Clapp, Ogden Deal, Dorothy Kearns, Fred L. Preyer, members of the Board of Commissioners of Guilford County.

EAGLES, Judge.

There is no substantial controversy regarding the facts. Instead, the dispute is whether the facts support the county's decision to rezone the 8.57 acre area of Mr. Clapp's property. Plaintiff argues that the rezoning constitutes invalid spot zoning and contract zoning. We agree and reverse the judgment of the trial court.

Although there are a number of North Carolina cases dealing with spot zoning and contract zoning, our research has disclosed no case where those questions have arisen in the context of a zoning authority's use of "conditional use districts." For a general discussion of conditional use and special use districts and how they have been applied in North Carolina, see S. Davenport and P. Green, *Special Use and Conditional Use Districts: A Way to Impose More Specific Zoning Controls*, N.C. Inst. of Gov't (1980).

The Guilford County zoning ordinance establishes a "conditional use district" to correspond with each of its other authorized zoning districts. The only uses permitted in a conditional use district are those which the ordinance lists as permitted uses in the corresponding district. The difference between a conditional use district and its corresponding district is that, in the conditional use district, no use is permitted except upon issuance of a conditional use permit by the County's Board of Commissioners. The conditional use permit specifies the use(s) to which the property may be put along with any other restrictions which are listed in the application or which the Commissioners believe are appropriate to serve the purposes of the ordinance and secure the public safety and welfare. Here, for example, the county rezoned the 8.57 acres from an A-1 to a CU-M-2 (Conditional Use General Industrial) classification. Theoretically at least, this would allow Mr. Clapp to use the property for any of the uses permitted in a regular M-2 classification. The "conditional use" nature of the classification, however, did not permit him to use his property in any way, except as a non-conforming use, until he separately applied for and received a conditional use permit specifying the use to which he would put the property. Here, Mr. Clapp's application stated that he would "buy and sell fertilizer, lime, farm pesticides, and buy, sell, dry and store grain."

Where a property owner wishes to utilize his property for an unpermitted use by rezoning the property to a conditional use district, the ordinance sets up a two-step process. First, the rezoning itself must be applied for. Second, a conditional use permit must be applied for. The application for the conditional use permit must specify the use(s) to which the property will be put. Although the two applications are made on separate forms, the record here indicates that the applications were submitted con-

temporaneously and were approved by the Commissioners on the same vote.

G.S. 153A-344 expressly gives counties the power to amend their zoning ordinances. As a legislative function, the county's act of amending its zoning ordinance is entitled to a presumption of validity. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979). Nevertheless, zoning regulations are subject to the North Carolina Constitution's provisions proscribing arbitrary and unduly discriminatory interference with the rights of property owners as well as the limitations of the enabling statute. *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E. 2d 325 (1968). The legislative act of enacting or amending a zoning ordinance is invalid if it is unreasonable, arbitrary, or an unequal exercise of legislative power. *See A-S-P Associates v. City of Raleigh, supra.*

"Spot zoning" is defined as:

> [a] zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected. . . . *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E. 2d 35, 45 (1972).

Zoning generally must be accomplished in accordance with a comprehensive plan in order to promote the general welfare and serve the purposes of the enabling statute. *Godfrey v. Union Co. Bd. of Commissioners*, 61 N.C. App. 100, 300 S.E. 2d 273 (1983); G.S. 153A-341. Because it zones a small area differently than a much larger area surrounding it, spot zoning, by definition, conflicts with the whole purpose of planned zoning. 2 Rathkopf, The Law of Zoning and Planning, section 28.02 (1987). Therefore, unless there is a "clear showing of a reasonable basis," spot zoning is beyond the authority of the county or municipality. *Blades v. City of Raleigh, supra* at 549, 187 S.E. 2d at 45. The rezoning amendment here clearly constitutes spot zoning. The rezoned area was only 8.57 acres and was uniformly surrounded by property zoned A-1. The remaining question then is whether there was a reasonable basis for the county's action in spot zoning the 8.57 acre tract.

An examination of the record reveals that the county has failed to show a reasonable basis for rezoning the 8.57 acre area from A-1 to CU-M-2. There is no indication of any change in conditions which would justify the rezoning. Some authorities have stated that, in order to preserve the purpose of zoning, zoning amendments should be made only when required by changing conditions. *See*, 8 McQuillan, Municipal Corporations, section 25.68 (1983). While none of our cases have stated that a change in conditions is an *absolute* prerequisite to a zoning amendment, they have often referred to a change in conditions as a factor to be considered when determining whether there was a reasonable basis for spot zoning. *See Blades v. City of Raleigh, supra; Rose v. Guilford Co.*, 60 N.C. App. 170, 298 S.E. 2d 200 (1982); *Graham v. City of Raleigh*, 55 N.C. App. 107, 284 S.E. 2d 742 (1981), *disc. rev. denied*, 305 N.C. 299, 290 S.E. 2d 702 (1982); *Stutts v. Swaim*, 30 N.C. App. 611, 228 S.E. 2d 750, *disc. rev. denied*, 291 N.C. 178, 229 S.E. 2d 692 (1976). Here, the record discloses no increase in population, farming or other business activity in the area and no increased need for industrial uses. Until the rezoning of Mr. Clapp's property, there had been no zoning changes in the area since 1972. Furthermore, a member of the county's Planning Division testified that he was not aware of any changes in the area or of anything which would have caused a need to rezone the property to a general purpose industrial district (M-2).

A second factor to which our courts have sometimes looked in determining whether there is a reasonable basis for spot zoning is the particular characteristics of the area being rezoned. In fact, G.S. 153A-341 states that, among other things, zoning regulations should be made with reasonable consideration to "the character of the district and its peculiar suitability for particular uses." In *Walker v. Elkin*, 254 N.C. 85, 118 S.E. 2d 1 (1961), for instance, the court upheld the validity of a zoning amendment, relying in part on the trial court's finding that the topography of the area made it unsuitable for the residential classification for which it was originally zoned. Likewise, in *Zopfi v. City of Wilmington, supra*, the court refused to invalidate a zoning change in which an area zoned mostly for single-family residential uses was rezoned to allow commercial and apartment house development where the rezoned area was a larger, 40 acre area which lay at the intersection of two heavily traveled highways. In *Lathan v. Bd. of Com-*

missioners, 47 N.C. App. 357, 267 S.E. 2d 30, *disc. review denied*, 301 N.C. 92, 273 S.E. 2d 298 (1980), however, the court held that the county there had failed to establish a reasonable basis for spot zoning even though there was evidence that the property in question was unsuitable for residential use.

In the instant case, evidence that the 8.57 acre area is within 300 feet of North Carolina Highway 61 is insufficient to establish its particular suitability for an industrial classification or its unsuitability for agricultural use. Other evidence established that: the area was not a "new industrial area," which is a term used by the ordinance to describe the areas for which an M-2 district is appropriate; an M-2 district is the "most intense and least restrictive" of the industrial zones; the property is 4-5 miles from U.S. Interstate Highway 85; other, agricultural land directly abuts Highway 61; the rezoned area is located adjacent to an unpaved road; the entire area is "rolling farmland" in nature; and, prior to 1980, Mr. Clapp had been growing tobacco on the 5.06 acre portion of the rezoned tract.

Finally, in determining whether a rezoning was invalid as spot zoning, our courts have also considered the classification and development of nearby land. In *Orange County v. Heath*, 278 N.C. 688, 180 S.E. 2d 810 (1971), the court held there was a reasonable basis for rezoning 15 acres to allow for a mobile home park where the rezoned area directly abutted 5 acres already being so used. Similarly, the court in *Nelson v. City of Burlington*, 80 N.C. App. 285, 341 S.E. 2d 739 (1986), found a reasonable basis for spot zoning to a business zone where there was other general business zoning in the immediate vicinity. In *Godfrey v. Union Co. Bd. of Commissioners, supra*, however, the court found no reasonable basis for rezoning 17.45 acres from single family residential to a heavy industrial classification where, although the property in question had certain characteristics which made it suitable for industrial use, it was essentially similar to the surrounding property. In the instant case, the record shows that the classification and development of adjacent and nearby land is not consistent with a CU-M-2 zone. Except for a residential district about a mile away, the surrounding property is zoned A-1 for several miles in all directions. Furthermore, twice in 1971, the county turned down applications to rezone property within a few hundred feet of the 8.57 acre tract.

The only finding of fact which would arguably allow the trial court to conclude that the rezoning was supported by a reasonable basis is that the uses actually authorized were not incompatible with the general area. The evidence clearly shows that Mr. Clapp's operation is beneficial to area farmers. Defendants contend that this evidence is sufficient to support the trial court's conclusion that the rezoning was not invalid spot zoning. We cannot agree.

As we have noted, zoning must be done in accordance with a comprehensive plan. The comprehensive plan requirement is not satisfied by the finding of a reasonable basis for a zoning change in the particular use or uses which the applicant intends to apply the rezoned property. The question is more broad. The issue is whether the rezoning itself serves the purposes enunciated in G.S. 153A-341. *See, Zopfi v. City of Wilmington, supra.* As already noted, we see no basis for rezoning the area to a general industrial district. Defendants, relying on the "conditional use" nature of the industrial classification, would apparently argue that a CU-M-2 zone is a separate and distinct district and, unlike an M-2 district, can be restricted to whatever uses are reasonable and appropriate for the surrounding area. Therefore, they argue a reasonable basis exists if the approved use itself satisfies the purposes of the enabling legislation.

Rezoning, however, may be done only if the location and surrounding circumstances are such that the property should be made available for *all* uses permitted by the zoning classification to which the property is rezoned. *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971). The fact that the property is rezoned to a conditional use district does not change that rule. Undoubtedly, the establishment of conditional use districts is a means to achieve greater flexibility in zoning. By definition, the county's zoning ordinance deems a conditional use district to be inappropriate for all the uses permitted in its corresponding district absent the imposition of "special conditions." It is the imposition of special conditions, through the issuance of the conditional use permit, which will make the use appropriate for the affected area. Nevertheless, in order to properly rezone the area to a conditional use district, the zoning authority initially must determine that the property, under the new zoning classification, is suitable for all the uses permitted in its corresponding district.

Here, it is evident that this was not the situation when the county rezoned the 8.57 acres of Mr. Clapp's property.

For that same reason, the county's action here also constitutes "contract zoning." Rezoning lacks a permissible basis where it is done "on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approval plans." *Id.* at 545, 178 S.E. 2d at 441. *See also, Blades v. City of Raleigh, supra; Willis v. Union County*, 77 N.C. App. 407, 335 S.E. 2d 76 (1985).

The fact that the 8.57 acres was rezoned to a conditional use district does not insulate it from the proscription against contract zoning. As noted, the record clearly shows that the impetus for the decision to rezone the property was to allow the continued sale and distribution of grain, fertilizer, and other farm products. In effect, the rezoning was done on the assurance that Mr. Clapp would submit an application for a conditional use permit specifying that he would use the property only in that manner. The rezoning here was accomplished as a direct consequence of the conditions agreed to by the applicant rather than as a valid exercise of the county's legislative discretion. Indeed, here, the two decisions, whether to rezone to the conditional use district and whether to approve the conditional use permit, were accomplished simultaneously.

Plaintiffs have argued that the commissioners were without authority to enact conditional use zoning ordinances. They argue that since the General Assembly only recently amended G.S. 153A-342 and G.S. 160A-382 to specifically allow counties to establish conditional use districts, defendants' use of them prior to that time without statutory authority was invalid. Appellees argue that the legislation referred to, "An Act To Amend The Municipal And County Zoning Enabling Acts So As To Make Clear The Authority Of Local Governments To Establish Overlay Districts And Special Use Or Conditional Use Districts," 1985 N.C. Sess. Laws, Chapter 607, purported only to remove any possible doubt as to prior county enactments' validity and to ratify the pre-statute county enactments. Because of our disposition of this matter as previously discussed, we have assumed, without deciding, that Guilford County had the authority to establish its conditional use districts prior to enactment of the 1985 legislation.

Since we have reversed the judgment of the trial court, it is unnecessary for us to address plaintiffs' remaining arguments.

Reversed and remanded.

Judges WELLS and GREENE concur.

STATE OF NORTH CAROLINA v. ALPHONSO PLATT, JR., BELTON LAMONT PLATT, AND GERALD BERNARD DAVIS

No. 8626SC963

(Filed 7 April 1987)

1. **Criminal Law §§ 73.2, 89.4— prior statement of witness—inadmissibility as substantive evidence or for impeachment—harmless error**

A witness's prior statement to the police was not admissible as substantive evidence under the "residual" hearsay exception set forth in N.C.G.S. § 8C-1, Rule 803(24), where the trial court failed to make the required inquiry for the admission of such evidence. Nor was the statement admissible under N.C.G.S. § 8C-1, Rule 607, as a prior inconsistent statement for impeachment purposes where the witness never testified to anything with which his prior statement was inconsistent. However, the erroneous admission of the statement was not sufficiently prejudicial to warrant a new trial in light of other similar evidence properly admitted at trial that defendant was a direct participant in the crimes charged.

2. **Assault and Battery § 14.4— five counts of felonious assault—sufficient evidence**

The State's evidence was sufficient to support defendant's conviction of five counts of assault with a deadly weapon with intent to kill inflicting serious injury where it tended to show that there was a shootout between the gangs of two rival drug dealers, defendant and other members of one gang were observed shooting weapons from an apartment, and five persons in the vicinity of the apartment were injured by gunshots during the shootout, since the jury could reasonably infer that defendant, either solely or while acting with other members of one gang, inflicted these injuries during the shootout.

3. **Assault and Battery § 15.7— instruction on self-defense not required**

The evidence in a felonious assault case did not require the trial court to instruct on self-defense where it tended to show that there was a shootout between the gangs of rival drug dealers, that when the shooting started, defendant came out of an apartment, loaded his weapon and began shooting, and there was no evidence showing legal provocation, excuse or abandonment and withdrawal.

4. **Criminal Law § 138.22— aggravating factor—use of weapon normally hazardous to multiple lives—sufficient evidence**

The trial court properly found as an aggravating factor for five counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of felony riot that defendant employed a weapon normally hazardous to the lives of more than one person where several witnesses testified that they saw defendant firing either a machine gun or some kind of rifle, and one witness testified that he heard automatic weapon fire. N.C.G.S. § 15A-1340.4 (b).

5. **Criminal Law § 101.4— taking witness's statement into jury room—prejudicial error**

In a prosecution for one count of felony riot and five counts of assault with a deadly weapon with intent to kill inflicting serious injury which arose from a shootout between rival gangs, the trial court erred in permitting the jury, over defendant's objection and without his consent, to take a witness's prior statement into the jury room during its deliberations. Furthermore, this error was prejudicial and entitled defendant to a new trial on all charges where the statement was inadmissible either for substantive or impeachment purposes and represented the only direct evidence that defendant possessed or fired a gun during the shootout. N.C.G.S. § 15A-1233(b).

6. **Criminal Law § 33.3— money in car of defendant's wife—irrelevancy**

Evidence of currency found in the car of defendant's wife and expert testimony concerning traces of cocaine found on some of the currency was irrelevant in a prosecution for felony riot and assault with a deadly weapon with intent to kill inflicting serious injury arising out of a shootout between the gangs of rival drug dealers. N.C.G.S. § 8C-1, Rule 402.

APPEAL by defendants from *Pachnowski, Judge.* Judgments entered 23 April 1986 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 11 February 1987.

Defendants were tried on indictments charging each of them, respectively, with one count of felony riot and five counts of assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tended to show, in pertinent part, that:

Around 3:00 p.m. on 30 November 1985 an argument started between Louis Samuels and defendant Belton Lamont Platt in an area called "Hollywood Boulevard" located near Piedmont Courts Apartments in Charlotte. The two men were arguing about drug-related activities in the area. A scuffle began and Louis struck Belton in the face with his fist. Belton struck Louis back, and they fought for several minutes. Then a man known as "December" approached the two and tried to prevent them from fighting. Louis picked up December and threw him to the ground. At this

point Charles Locke came over to December, pulled out a gun, and shot him in the leg after saying something to him. Shortly thereafter, several individuals including defendant Alphonso Platt, Jr. and defendant Gerald Bernard Davis began firing weapons in a shootout between the "Platt" group and the "Samuels" group. Five witnesses to the shootout, Veronica Streeter, Sabrina White, Willie H. Doster, Tony Hunter, and Donald White, were injured by the gunshots.

Following the shootout, Belton Platt was observed carrying guns from apartment 231, Piedmont Courts and placing them in the trunk of a car. The police arrived shortly after the shootout and began making arrests. Officer Bridges observed Belton Platt and Gerald Davis remove a weapon from December and throw it into the back seat of a green Cadillac owned by Belton's wife, Delores Platt. However, Officer Bridges was unable to find this gun when she searched the car several minutes later. A subsequent search of the vehicle revealed that it contained approximately $13,000 in cash. An examination of some of the cash by a chemist at the Charlotte-Mecklenburg Crime Laboratory showed the presence of traces of cocaine on the money.

At trial, the trial court admitted the statement of an eyewitness, Willie C. Townsend, which implicated Alphonso Platt and Belton Platt. The court also admitted the currency found in Ms. Platt's Cadillac and permitted expert testimony regarding the traces of cocaine found on some of the bills. At the close of the State's evidence, the court denied defendants' motion to instruct the jury on self-defense as requested by defendants. Over the objection of counsel for defendant Belton Platt, the court permitted the jury to take the Townsend statement into the jury room during their deliberations.

Regarding defendants Alphonso Platt and Belton Platt, the jury returned verdicts of guilty of five counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of felony riot. Regarding defendant Gerald Davis, the jury returned verdicts of guilty of felony riot but not guilty of any of the five counts of assault with a deadly weapon with intent to kill inflicting serious injury.

In sentencing defendants Belton Platt and Alphonso Platt, the court found as an aggravating factor that each defendant

knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

From judgments of imprisonment, defendants Alphonso Platt and Belton Platt appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General David S. Crump, for the State.

Assistant Public Defender Marc D. Towler for defendant Alphonso Platt, Jr.

James H. Carson, Jr. for defendant Belton Platt.

WELLS, Judge.

Appeal of Defendant Alphonso Platt, Jr.

[1] Defendant Alphonso Platt contends the court erred in admitting the prior statement of Willie Townsend. For the reasons below, we hold that the court erred by admitting this statement but that this error was not sufficiently prejudicial to warrant a new trial in light of other similar evidence properly admitted at trial.

The State initially called Willie Townsend to testify as a witness at trial. After stating his name and address, the prosecution handed Townsend a prior statement which he had given to the police on 1 December 1985 regarding his account of the events of 30 November 1985. The statement consists of the following:

> On 11/30/85 at around 2:30 or 3:00 p.m. I was in the two hundred block of Piedmont Court. I was with Louis Samuels. We were standing on the front porch of his old apartment. We walked out into the street, there were several other people standing around. Louis was getting ready to get into his car and "Money Rock" [defendant Belton Platt] came up to Louis. They started arguing and then they started fighting. A guy named "December" came up and grabbed Louis. Louis picked up "December" and threw him to the ground. About that time, Charles Locke came up and "December" reached for a pistol that he had under his jacket. "December" started pull-

ing the pistol out and Charles Locke shot him. I jumped behind a car. I then saw Al Platt stick a shotgun or rifle out the window of apartment 231 and start shooting. I saw "Mitch" (I don't know his real name) shooting a gun from the same upstairs window and a guy named "Toot" was shooting from the upstairs window. I think "Toot" was shooting a rifle or a shotgun too. They were just shooting. It sounded like a big war. Then I saw "Money Rock" who was still in the parking lot beside a green Cadillac shooting at Louis Samuels. He shot Louis in the back and Louis ran to the back of his car and then ran to the back of a garbage can. "Money Rock" was still shooting at him.

After the shooting stopped, Al Platt and "Mitch" came out of the apartment they were shooting from with a bunch of guns in their hands and ran to "Money [Rock's"] green Cadillac and started to put the guns in the Cadillac, and "Money Rock" said, don't put them in there. They opened the trunk and took some more guns out of the trunk and took all the guns and put them in a small brown Toyota. Mitch drove away in the brown Toyota. Then the police came.

Townsend acknowledged his signature and the date of the statement. The prosecutor then asked Townsend to read this statement to the jury without ever attempting to elicit his testimony about the events of 30 November during his examination at trial. Counsel for defendant objected. The court denied the objection and ruled the statement admissible.

After Townsend refused to read the statement to the jury because, as he stated, "it ain't the truth[,]" the prosecutor read the statement to him sentence by sentence and asked whether he made each of these statements. Townsend admitted telling the police certain things but denied making other portions of the statement. The court instructed the jury to consider only the responses by the witness and not the prosecutor's questions as substantive evidence.

The State subsequently called Larry Walker, the officer who took Townsend's statement on 1 December, as a witness. Over objection, the court allowed Officer Walker to read Townsend's statement to the jury. The court instructed the jury to consider the evidence for "impeachment purposes" only. At the close of

the State's evidence, the Townsend statement was passed to the jury to read over defense counsel's objection. At this time the court again instructed the jury that they should only consider this statement for impeachment purposes and not consider it as substantive evidence.

Acknowledging in its brief that the court failed to make the required inquiry for admitting Townsend's out-of-court statement under the applicable "residual" hearsay exception set forth in N.C. Gen. Stat. § 8C-1, Rule 803(24) of the North Carolina Rules of Evidence, the State essentially concedes that this statement was inadmissible as substantive evidence. *See State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). The State contends instead that Townsend's statement was admissible solely for the limited purpose of impeachment as a prior inconsistent statement.

Under N.C. Gen. Stat. § 8C-1, Rule 607 of the North Carolina Rules of Evidence a party may impeach his own witness. Further, "[f]or purposes of impeachment prior inconsistent statements of a witness are always admissible." *State v. McKeithan*, 293 N.C. 722, 239 S.E. 2d 254 (1977). However,

> Inconsistent statements are admissible simply for the consideration of the jury in determining the witness's credibility. Hence they are not ordinarily admissible until the witness has testified to something with which they are inconsistent, although error in admitting them prematurely may be cured if the witness later testifies in such a way as to make them admissible.

1 Brandis, *North Carolina Evidence* § 46 (2d Rev. Ed., 1983 Supp.).

As Townsend never testified to his recollection of the events of 30 November either before or after the court admitted his statement, he never "testified to something with which [his statement was] inconsistent. . . ." *Id.* In essence, there was no testimony by Townsend for the State to impeach. We thus hold that this statement was not admissible for the limited purpose of impeachment. Accordingly, we hold that the court erred in admitting Townsend's statement.

Erroneous admission of evidence, however, is not always so prejudicial as to require a new trial. *State v. Sills*, 311 N.C. 370,

317 S.E. 2d 379 (1984). Defendant has the burden of showing that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed. N.C. Gen. Stat. § 15A-1443(a); *Sills, supra.*

We hold that there is no reasonable possibility that had this error not been committed, a different result would have been reached at trial and that the error was harmless in light of other similar evidence properly admitted at trial. *See id.* Through the testimony of Andre White and Valerie Sturdivant, who were both eyewitnesses to the shootout, the State presented evidence that defendant Alphonso Platt was a direct participant in the crimes charged in that, during the shootout, these witnesses observed him loading and shooting a rifle or machine gun from the doorway of apartment 231, Piedmont Courts. The Townsend statement merely corroborated defendant's participation in the shootout. In light of this properly admitted similar evidence of defendant's participation, "We are not persuaded that the evidence complained of here requires a new trial." *Sills, supra. See also State v. King,* 67 N.C. App. 524, 313 S.E. 2d 281 (1984).

[2] Defendant contends the court erred in denying his motion to dismiss the charges of assault with a deadly weapon with intent to kill inflicting serious injury "where the evidence showed that gunfire erupted from all directions during a fight between two rival groups resulting in wounds to the five victims but failed to show who actually shot any of the victims." We disagree.

The State's theory at trial was that the 30 November shootout constituted a "war" between two rival drug dealers, defendant Belton Platt and Louis Samuels, and their groups or gangs. The evidence presented at trial supports this theory. The evidence also shows that defendant Alphonso Platt belonged to the "Platt" group and participated in the shootout. Specifically, defendant, as well as other members of the "Platt" group, was observed shooting weapons from apartment 231, which constituted the "Platt" group "fortress" during the shootout. During this shootout, five persons in the vicinity of apartment 231 were shot.

We hold that, when the foregoing evidence is considered in the light most favorable to the State, giving it the benefit of every reasonable inference arising therefrom, it is sufficient to

overcome defendant's motion to dismiss. *See State v. Dailey*, 33 N.C. App. 551, 235 S.E. 2d 876, *disc. rev. denied*, 293 N.C. 254, 237 S.E. 2d 258 (1977). Specifically, we hold that, from the evidence that five persons were injured by gunshots and the particular circumstances surrounding those shootings, *viz.*, a shootout between two rival gangs, the jury could reasonably infer that defendant, either solely or while acting in concert with other members of the "Platt" group, inflicted these injuries during the shootout. *See id.* Accordingly, it was " 'for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.' " *Id.*

[3] Defendant contends the court erred in failing to grant defendant's request for instructions on the law of self-defense. In general,

> The right of self-defense is available only to a person who is without fault, and if a person voluntarily, that is, aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it and gives notice to his adversary that he has done so.

State v. Plemmons, 29 N.C. App. 159, 223 S.E. 2d 549 (1976), *quoting State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973).

The evidence here shows that when the "shots started . . ." defendant came out of apartment 231, loaded his weapon and began shooting. By the same token, there is no evidence showing legal provocation, excuse or abandonment and withdrawal. *See id.* Accordingly, we hold that an instruction on self-defense was not warranted by the evidence and that the court thus properly omitted such instruction from its charge. *See id.*

[4] Defendant contends the court erred in finding as an aggravating factor that defendant employed a weapon normally hazardous to the lives of more than one person. We disagree.

Under G.S. § 15A-1340.4(b), when a court imposes a sentence in excess of the presumptive, it must ground its decision on specifically identified aggravating factors proved by a preponderance or greater weight of the evidence. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). Defendant contends that there was insufficient evidence to support this aggravating factor.

We hold that there was sufficient evidence to support this factor. Several witnesses testified that they saw defendant firing either a machine gun or some kind of rifle. One witness testified that he heard automatic weapon fire. Finally, a machine gun is one weapon contemplated by this aggravating factor. *See State v. Bethea*, 71 N.C. App. 125, 321 S.E. 2d 520 (1984).

Defendant further contends that use of this factor to aggravate his sentences for assault with a deadly weapon with intent to kill inflicting serious injury is prohibited by G.S. § 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. . . ." However, in order to prove its case, the State simply needed to show that defendant used a deadly weapon, and it did not need to show, as an essential part of its proof of the charged offenses, that defendant employed a weapon normally hazardous to the lives of more than one person. *Cf. State v. Bethea, supra.* Accordingly, we hold that the court did not err in finding this factor. This contention is rejected.

Appeal of Defendant Belton Platt

[5] Defendant contends the court erred in permitting the jury, over objection and without his consent, to take the Townsend statement into the jury room during its deliberations. We hold that the court erred in allowing this exhibit to go into the jury room and that this error was sufficiently prejudicial to warrant a new trial for defendant on all charges.

N.C. Gen. Stat. § 15A-1233(b) authorizes a judge to allow the jury to take into the jury room exhibits and writings which have been admitted into evidence when the jury so requests and the parties give their consent. *State v. Taylor*, 56 N.C. App. 113, 287 S.E. 2d 129 (1982). Defendant here objected to the jury's taking this statement into the jury room, and the court thus violated G.S. § 15A-1233(b) in allowing the exhibits to go into the jury room. *Id.*

We now consider whether this error was prejudicial; whether there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." G.S. § 15A-1443(a). First, we note that the Townsend statement represented the only direct evidence that

defendant possessed or fired a gun during the actual shootout. The State offered no other evidence indicating defendant's whereabouts or whether he possessed or fired a gun during the shootout. Evidence of defendant's guilt from sources other than the Townsend statement simply shows the following: Defendant and Louis Samuels became involved in an argument about drug-related activities. Louis Samuels struck defendant, and defendant fought back during an ensuing scuffle between the two men. After the shootout, defendant was observed removing a gun from the pants of "December" and throwing it into the back seat of his wife's Cadillac. Defendant was also observed, after the shooting had ceased, carrying guns from apartment 231 and placing them in the trunk of a car.

We previously have held in defendant Alphonso Platt's appeal, *supra*, that the court erred in admitting the Townsend statement. The court then improperly permitted the jury to take this inadmissible evidence which directly implicates defendant in the crimes charged into the jury room during its deliberations.

In sum, we cannot say that the error in allowing the jury to take this inadmissible evidence into the jury room was harmless in light of the other evidence properly admitted at trial. *See State v. Mills*, 83 N.C. App. 606, 351 S.E. 2d 130 (1986). In contrast to the State's case against co-defendant Alphonso Platt, the State, in its case against defendant, did not present any similar direct evidence of defendant's participation in the shootout itself. Given the inadmissibility of the Townsend statement and its highly incriminating nature for both crimes charged, we hold that the court's error in permitting the jury to take the statement into the jury room over objection was sufficiently prejudicial to entitle defendant to a new trial. *See id.*

[6] Defendant contends the court erred in admitting the currency found in Ms. Platt's Cadillac and in permitting expert testimony regarding the traces of cocaine found on some of the bills. This evidence clearly is irrelevant and the court should have excluded it. N.C. Gen. Stat. § 8C-1, Rule 402. *See also State v. Coen*, 78 N.C. App. 778, 338 S.E. 2d 784, *disc. rev. denied*, 317 N.C. 709, 347 S.E. 2d 444 (1986).

Given our disposition of defendant's appeal, we do not reach his remaining assignments of error.

In Nos. 96060, 96073, 96080, 96087, 96088, and 96099 (defendant Alphonso Platt),

No error.

In Nos. 96063, 96072, 96079, 96086, 96091, and 96102 (defendant Belton Platt),

New trial.

Judges EAGLES and GREENE concur.

IRVIN D. BOOE, D/B/A WAUGHTOWN ELECTRIC CO. v. BILLY B. SHADRICK; BOB R. BADGETT; HOUSING PROJECTS, INC.; ELLERBE MANOR APTS., LTD.; WILKES TOWERS, LTD.; SHERATON TOWERS, LTD.; UNITED STATES FIDELITY & GUARANTY INS. CO.; HIGHLAND MORTGAGE CO.

No. 8618SC166

(Filed 7 April 1987)

1. **Evidence § 33.2— construction dispute—reputation of defendant—inadmissible hearsay**

In an action arising from defendants' alleged failure to completely pay plaintiff for electrical installations performed by plaintiff in buildings owned by defendants, the trial court did not err by excluding testimony from the supervising architect that defendant Shadrick had the reputation of assigning small unsophisticated contractors to much larger projects than they normally handled and then blaming them for cost overruns and delays. The testimony was admittedly based on hearsay and not the witness's personal knowledge; any possible relevance of the testimony is far outweighed by its unreliability and by the unwarranted prejudice the evidence would produce. N.C.G.S. § 8C-1, Rule 403.

2. **Evidence § 48— construction dispute—expert architect—opinion that cost plus ten percent reasonable—inadmissible**

The trial court did not err in an action arising from a construction dispute by not allowing the supervising architect, who had been received as an expert in architectural design and construction management, to express his opinion that cost plus ten percent would be a reasonable way to calculate the value of the services rendered by plaintiff. There was no evidence that the witness had any expertise in the field of electrical contracting and he was never asked to determine the reasonable value of the work.

3. Quasi Contracts and Restitution § 2.2— construction dispute—quantum meruit—evidence sufficient for nominal damages only

In an action arising from defendants' alleged failure to finish paying plaintiff for electrical installations performed by plaintiff in defendants' building, plaintiff presented insufficient evidence to support its claim for more than nominal damages under its *quantum meruit* theories where plaintiff totalled his wage and material costs and added ten percent; presented no evidence showing how many hours plaintiff's employees worked; no evidence concerning the wage rate or rates paid to those employees; no evidence detailing the character and nature of the services rendered; and no evidence describing the materials used, establishing the fair market value of the materials or substantiating the quantity of the materials that was necessary or reasonable. However, plaintiff presented ample evidence on all the elements for recovery in *quantum meruit* and was entitled to nominal damages.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Williams (Fred J.), Judge*. Judgment entered 16 September 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 June 1986.

This is a civil action wherein plaintiff sought damages for breach of express contracts covering electrical installations performed by plaintiff at Wilkes Towers in North Wilkesboro and Sheraton Towers in High Point, buildings owned by defendants. In the alternative, plaintiff sought relief in *quantum meruit*.

Without a written contract, plaintiff had begun the electrical work on Wilkes Towers and Sheraton Towers. During the course of the work, plaintiff received periodic payments from defendant Shadrick. These payments totalled approximately $195,500 for Wilkes Towers and $314,000 for Sheraton Towers. According to plaintiff, he received the last payment when the work was about ninety-five percent complete. Plaintiff completed the work, but defendant Shadrick refused plaintiff's demand for more money, insisting that the prior payments were sufficient to cover all work performed by plaintiff.

At the conclusion of the evidence, the judge submitted issues, and contrary to plaintiff's contentions, the jury found no oral contract for cost plus ten percent (10%) on either project and no specific fee contract on either project. The jury answered the following questions as indicated:

4. Did the plaintiff provide electrical material and labor to the defendants on the Wilkes Towers project under such

circumstances that the defendant should be required to pay for them?

ANSWER: Yes

4(a) What amount of damages, if any, is the plaintiff entitled to recover?

ANSWER: $26,000.00

5. Did the plaintiff provide electrical material and labor to the defendants on the Sheraton Towers project under such circumstances that the defendant should be required to pay for them?

ANSWER: Yes

5(a) What amount of damages, if any, is the plaintiff entitled to recover?

ANSWER: $40,500.00

After the jury returned its verdict, the court granted defendants' motion for judgment notwithstanding the verdict and ordered that plaintiff take nothing from the defendants. Plaintiff appealed.

William B. Gibson for plaintiff-appellant.

Brinkley, Walser, McGirt, Miller, Smith and Coles by Stephen W. Coles for defendants-appellees.

PARKER, Judge.

[1] Plaintiff assigns error to the exclusion of the testimony of the witness Arthur Cogswell, the supervising architect on each of the construction projects involved here, concerning the reputation of the defendant Shadrick. On *voir dire*, Cogswell testified that defendant Shadrick had a reputation of being "rather hard on subcontractors" in that he schemed to take advantage of small unsophisticated contractors by signing them on to do a much larger project than they normally handle and then blaming them for cost overruns and delays. Plaintiff contends that this testimony should have been admissible pursuant to G.S. 8C-1, Rule 404(b) to show a pattern of conduct indicative of defendant Shadrick's "mental state toward the contractual relationship." However, this testi-

mony was admittedly based on hearsay and not the witness' personal knowledge. Any possible relevance of the testimony is far outweighed by its unreliability and by the unwarranted prejudice the evidence would produce. G.S. 8C-1, Rule 403; *see Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 317 S.E. 2d 372 (1984).

[2] Next, plaintiff contends the court erred in refusing to allow Cogswell, who had been received as an expert in architectural design and construction management, to express his opinion that cost plus ten percent (10%) would be "a reasonable way" to calculate the reasonable value of the services rendered by plaintiff to defendants. This argument is meritless. There was no evidence that Cogswell had any expertise in the field of electrical contracting. Competency of a witness to testify as an expert on a particular issue is directed to the discretion of the trial judge and that determination will not be disturbed unless there is no evidence to support it or an abuse of discretion. *Hamel v. Young Spring and Wire Corp.*, 12 N.C. App. 199, 182 S.E. 2d 839, *cert. denied*, 279 N.C. 511, 183 S.E. 2d 687 (1971). Moreover, Cogswell was never asked to determine the reasonable value of the work. He was only questioned as to his opinion concerning the reasonableness of the cost plus ten percent (10%) formula; he was never asked and never testified as to what figure constituted a reasonable figure. Plaintiff has failed to demonstrate any prejudice which could have resulted from the exclusion of the testimony. The assignment of error is overruled.

[3] Plaintiff's primary contention is that the court erred by granting defendants' motion for judgment n.o.v. because it presented insufficient evidence to support its claim for more than nominal damages under its *quantum meruit* theories. On a defendant's motion for judgment notwithstanding the verdict, the test is the same as for a motion for directed verdict. The court must consider all the evidence in the light most favorable to the plaintiff, giving plaintiff the benefit of every reasonable inference arising therefrom, to determine if the evidence is sufficient to be considered by the jury. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974); *Tate v. Bryant*, 16 N.C. App. 132, 191 S.E. 2d 433 (1972).

The standard for plaintiff's burden of proof on a *quantum meruit* theory was enunciated by this Court in *Environmental*

Landscape Design v. Shields, 75 N.C. App. 304, 306, 330 S.E. 2d 627, 628 (1985), as follows:

> To recover in *quantum meruit*, plaintiff must show: (1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously . . . . In short, if plaintiff alleged and proved acceptance of services and the value of those services, it was entitled to go to the jury on *quantum meruit*. (Citations omitted.)

Defendants do not question that they accepted these services; rather, they contend that plaintiff failed to prove the reasonable value of his services to recover on a *quantum meruit* theory.

Evidence of the nature of the work and the customary rate of pay for such work in the community at the time the work was performed is necessary to determine the reasonable value of services rendered. *Id.* at 307, 330 S.E. 2d at 629. A bill for services rendered is only some evidence of the value of one's services, and standing alone, it is insufficient to support an award of damages. *Id.*

In the case *sub judice*, in determining the amount owed to him, plaintiff totalled his wage and material costs and then added ten percent. However, from the record plaintiff presented no evidence showing how many hours plaintiff's employees worked; no evidence concerning what wage rate or rates were paid to these employees and no evidence detailing the character and nature of the services rendered. A broadside statement that the workers installed the electrical wiring tells the jury nothing about the complexity of the job and sheds only minimal light on the reasonable value of the work performed. Without documentation or other evidence establishing the wage rates and hours worked, the jury could not reach an informed conclusion as to whether these wage rates and hours were reasonable. Further, with regard to the material costs, the jury only heard testimony concerning the total amount of the costs. Plaintiff adduced no evidence describing the materials used, establishing the fair market value of the materials or substantiating that the quantity of materials used was necessary and reasonable. Accordingly, plaintiff's evidence "establishes no more than a formula by which he arrived at a total and a reiteration of his opinion that his bill was reasonable.

There is no independent evidence or objective indicia by which to gauge whether the plaintiff's rates were customary and reasonable in the business, in the community, and at the time." *Hood v. Faulkner*, 47 N.C. App. 611, 617, 267 S.E. 2d 704, 707 (1980).

Therefore, we conclude that plaintiff did not offer sufficient evidence of the reasonable value of the services for which he sought to hold the defendants accountable. However, in our view, the judgment notwithstanding the verdict was improper as plaintiff presented ample evidence on all the elements for recovery in *quantum meruit*. Where plaintiff establishes those elements, plaintiff is entitled to at least nominal damages. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968). In this case, plaintiff was able to prove that it had rendered certain services to defendants and that those services were knowingly and voluntarily accepted. There was no showing that the services were rendered gratuitously. This evidence is sufficient to entitle plaintiff to nominal damages and the j.n.o.v. was improperly granted.

As we have concluded that plaintiff's evidence was legally insufficient to support a verdict for more than nominal damages, we elect not to reinstate the jury verdict or to award plaintiff a new trial. Instead, this case is remanded to the trial court for entry of an award of nominal damages. *See Harrell v. Lloyd Const. Co.*, 300 N.C. 353, 355, 266 S.E. 2d 626, 628 (1980).

Remanded with instructions.

Judge MARTIN concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Though the evidence as to plaintiff's damages is not as pointed as it might have been, when its many parts are pieced together and the whole is viewed and analyzed in its most favorable light for the plaintiff it is sufficient, in my opinion, to support the verdict and the court erred in setting it aside. In addition to evidence showing what the labor and materials used on the project cost, there is evidence that the materials were obtained from a "very competitive" supplier; that all of plaintiff's work satisfied

the various inspectors (thus complying with the plans and specifications) and was 95% complete when defendant contractor breached their contract; that during the fourteen month period plaintiff worked on the projects defendant contractor daily observed what was being done, was knowledgeable about construction and its costs, periodically received payroll affidavits and lists of the materials plaintiff installed along with their costs, made twenty-two payments on one project and twenty-four on the other without complaint, and periodically certified to HUD that the costs covered by plaintiff's billings had been paid or incurred. The evidence also shows that before plaintiff was taken off the job he had expended $329,577.19 for labor and materials on the Sheraton project of which defendants had paid $314,523.02; and on the Wilkes job he had expended $200,020.03 and defendants had paid $195,514.06; and that defendant Shadrick finished the projects with plaintiff's employees and paid them the same hourly rate plaintiff did.

This evidence, more than a mere scintilla certainly, tends to indicate, in my view, that plaintiff's claimed costs were reasonable and necessarily expended on defendants' projects and that defendants so recognized. Nor was the verdict speculative. The $26,000 verdict on the Wilkes job simply reimbursed plaintiff for his unpaid billings ($4,505.97) and awarded him an 11% overhead charge ($21,494.03) on the $200,020.03 that the evidence shows he spent on that job during the seventeen month period; and the $40,500 verdict for the Sheraton job only paid plaintiff for his past due billings ($15,054.17) and awarded him an 8% overhead charge on the $329,577.19 that plaintiff had spent on that job during substantially the same period. Nor is the overhead or profit award either unreasonable or unsupported by evidence. During the course of construction, so the evidence shows, changes were made in the electrical part of the job several times and on each occasion *plaintiff submitted a request for a change order containing a 15% charge for overhead and profit, which defendants approved.* Furthermore, as is commonly known, overhead charges by businesses of all kinds are not only customary, they are necessary, and the charges that the jury implicitly approved in assessing the value of plaintiff's work were in keeping both with that practice and the evidence presented.

CARL M. WIGGINS AND CLARA P. WIGGINS v. THE CITY OF MONROE, A MUNICIPAL CORPORATION, AND JOHNNIE H. ROLLINS, JR.

No. 8620SC756

(Filed 7 April 1987)

Municipal Corporations § 10— demolition of dwelling—liability of building inspector and city

Plaintiffs' evidence was sufficient for the jury to find that defendant chief building inspector's demolition of plaintiffs' apartment house was malicious or outside and beyond the scope of his duties and that the building inspector and defendant city were thus liable for the building inspector's actions where it tended to show that the inspector directed plaintiffs by letter to repair their house within ten days, signed a building permit authorizing them to begin repairs, and then demolished the house after plaintiffs had begun timely repairs.

APPEAL by plaintiffs from *Walker, Judge.* Judgment entered 19 February 1986 in Superior Court, UNION County. Heard in the Court of Appeals 17 December 1986.

This case has been on appeal to this Court before. *See Wiggins v. City of Monroe,* 73 N.C. App. 44, 326 S.E. 2d 39 (1985).

This is a civil action instituted by plaintiffs, Carl W. Wiggins and Clara P. Wiggins on 19 November 1981, naming as defendants, the City of Monroe and the chief building inspector for the City of Monroe, Mr. Johnnie H. Rollins, Jr.

Plaintiffs' complaint stated two claims for relief: (1) that as a direct and proximate result of the City of Monroe's trespass and demolition of plaintiffs' four unit apartment project plaintiffs were damaged in the amount of $35,000.00, (2) that "Defendant Rollins willfully, wantonly and maliciously ordered, supervised, and participated in the demolition of the Property of the Plaintiffs despite the obvious commencement of repairs within time limits set forth and the presence of materials for on-going repairs."

On 25 January 1982, defendants, pursuant to Rule 12(b)(6), N.C. Rules Civ. P., filed a motion to dismiss and also filed their answer denying liability for the demolition of plaintiffs' property. Defendants, in their answer: (1) pled as a bar to plaintiffs' right of recovery that the operation of a building inspection department

by the defendant, City of Monroe, is a governmental function and the cause or causes of action alleged in the complaint, if any, are within the City's governmental immunity which has not been waived, (2) admitted that defendant Rollins signed a building inspection clearance and supervised the demolition of plaintiffs' improvements, and (3) denied plaintiffs' allegations that defendant Rollins wilfully, wantonly and maliciously supervised the demolition of plaintiffs' improvements despite the obvious commencement of repairs. As a further answer and counterclaim defendants alleged that plaintiffs owed the City of Monroe $781.15 for costs incurred in the demolition of "plaintiffs' house."

On 28 June 1982, plaintiffs filed a motion to strike certain allegations of defendants' further answer and counterclaim. On 4 August 1982, the trial court denied plaintiffs' motion to strike.

Plaintiffs, on 2 September 1982, filed a reply to defendants' further answer and counterclaim. On 22 November 1982, defendants filed a motion for summary judgment, affidavits of defendant Rollins and James E. Hinkel, along with a certified copy of sections of the Monroe City Code that pertained to minimum housing standards. On 6 December 1982 and 17 December 1982 plaintiffs filed affidavits by plaintiff, Carl Wiggins.

On 1 November 1983, the trial court granted defendants' motion for summary judgment on both claims for relief alleged in plaintiffs' complaint. Plaintiffs appealed from the trial court's judgment to this Court.

This Court, after reviewing the Wigginses' allegations in their pleadings and their forecast of evidence, concluded that the trial court erroneously granted summary judgment in favor of defendants. *Wiggins v. City of Monroe*, 73 N.C. App. 44, 326 S.E. 2d 39 (1985).

This case was heard by jury during the 17 February 1986 superior court jury civil term for Union County. Defendants moved the court for a directed verdict at the close of plaintiffs' evidence. The trial court deferred ruling on defendants' motion until the close of all of the evidence. At the close of all of the evidence, defendants renewed their motion for a directed verdict. The trial court granted defendants' motion for a directed verdict. Plaintiffs appeal.

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

Love & Milliken, by John R. Milliken and Wade and Carmichael, by J. J. Wade, Jr., for defendant appellees.

JOHNSON, Judge.

Plaintiffs assign error to the trial court's ruling on defendants' motions for directed verdicts. The dispositive issue presented to us is whether as a matter of law the evidence offered by plaintiffs, when considered in the light most favorable to plaintiffs, is sufficient to be submitted to the jury. *See Roberts v. William N. & Kate B. Reynolds Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). If so, the trial court erred and plaintiffs are entitled to a new trial. We hold that the evidence, even when viewed in the light most favorable to plaintiffs, was sufficient to submit the case to the jury.

In *Wiggins I* this Court reversed the trial court's ruling on defendants' motion for summary judgment. This Court's conclusion in *Wiggins I* that there was a material issue of fact was, in part, based on the following:

> After reviewing the Wigginses' allegations in their pleadings and their forecast of evidence, we conclude that Rollins' motion for summary judgment was improperly granted. First, the Wigginses alleged in their Complaint that Rollins 'wilfully, wantonly and maliciously ordered, supervised, and participated in the demolition of the property of the plaintiffs despite the obvious commencement of repairs. . . .' *Second, the Wigginses' affidavits support their allegations—that Rollins directed them to repair the house within ten days, signed a building permit authorizing them to begin repairs, and then demolished the house after they had begun timely repairs.* The affidavits tend to show that Rollins' behavior was corrupt or malicious or that he acted outside of and beyond the scope of his duties. Therefore, Rollins, on these facts, is not immune from liability.

Wiggins I, supra, at 49, 326 S.E. 2d at 43 (emphasis supplied).

In the case *sub judice*, the trial court ruled upon defendants' motions for directed verdicts as follows:

> It is also obvious that what the Court of Appeals had before it, that is, the allegations in this complaint signed by one of the lawyers in your law firm, not signed by Mr. Wiggins, and the affidavits that were prepared for Mr. Wiggins' signature at the time of the hearing on summary judgment forecast a much different case than has been presented in this courtroom. Those affidavits are at best a gross fabrication and exaggeration of what occurred out there. They are at worst perjurious, in my opinion. I have carefully listened to the evidence in this case and thought through the legal points that were raised by these motions. It is my considered opinion that at most what the plaintiff has shown in this case is a negligent exercise of the judgment, which was incident to and part of the public officials duties, that is, the defendant, Mr. Rollins' duties as Chief Building Inspector. The common law is clear that there is no liability upon a public official or upon a public governmental body. That, if anything, again he perhaps was simply negligent in this assessment and exercise of that judgment as to whether or not repairs had been commenced, based on the evidence that he had before him at the time he ordered the demolition of this building. There is immunity both for Mr. Rollins and for the City of Monroe for mere negligence. That is all that you have shown if you have shown anything. The court at this time allows the motion for directed verdicts in favor of the defendants, Mr. Rollins and the City of Monroe.

We do not agree with the trial court's evaluation of the evidence presented at trial. The most significant aspects of plaintiffs' affidavits in support of their allegations, as noted by this Court in *Wiggins I*, are the assertions that "Rollins directed them to repair the house and then demolished the house after they had begun timely repairs." 73 N.C. App. at 49, 326 S.E. 2d at 43. This forecast of the evidence was held by this Court to be sufficient to establish that "[t]herefore, Rollins, on these facts, is not immune from liability." *Id.*

At trial plaintiffs introduced the following letter into evidence:

EXHIBIT A

LETTER—CITY OF MONROE, NORTH CAROLINA—March 24, 1981

Mr. Carl Wiggins
408 Roosevelt Blvd.
Monroe, N.C. 28110

Re: 300 Charles Street
Monroe, N.C. 28110

Building Inspectors Finding of Fact and Order Dated April 17, 1980
City of Monroe's Ordinance dated May 20, 1980

Dear Mr. Wiggins:

This letter is to inform you that you have 10 days to begin repairs on the structure located at 300 Charles Street; all such repairs are to be completed within 60 days from the date of this letter.

Should you fail to commence repairs within 10 days from the date of this letter and/or complete repairs within 60 days from the date of this letter, the City will demolish the structure and the cost therefore will be billed to you. If you fail to pay the demolition cost, a lien for the cost thereof will be filed against said property.

Your immediate attention to this matter is a must.

Sincerely,

s/JOHNNIE H. ROLLINS, JR.
Chief Building Inspector

This letter by Rollins to plaintiffs establishes that if plaintiffs began repairs within ten days from the date of the letter, then Rollins was not authorized to demolish the structure unless plaintiffs did not complete repairs within sixty days from the date of the letter, 24 March 1981. Plaintiffs' evidence established that on Monday, 6 April 1981, Rollins personally authorized and participated in the demolition of the structure at 300 Charles Street.

Plaintiff, Carl Wiggins, testified that on 2 April 1981, the ninth day from the date of the letter he obtained an authorization signed by Rollins which allowed him to purchase a building permit placard and to commence repairs. The authorization states that the work proposed by Rollins was acceptable. Plaintiff also testified that on 2 April 1981, he secured a placard, put it on the structure, assembled a work crew of three people, carried the workers and equipment to the structure at 300 Charles Street and directed the workers as to what to do and the procedures by which to do it. Plaintiff further testified that he had a conversation with Rollins on 2 April 1987, as follows:

> Q. And you talked to Mr. Rollins that day, did you?
>
> A. That's correct.
>
> Q. What was the nature of the conversation that you had with Mr. Rollins?
>
> A. I told him [Rollins] that I was buying the permit within the time frame of his letter and that the construction would be completed likewise.

Plaintiff, Carl Wiggins, also testified that he and other workers had begun repairs prior to the expiration of the ten day period set forth in the letter from Rollins. Plaintiffs also introduced photographs which they contend show that repairs were underway prior to the property being demolished.

Plaintiff Carl Wiggins' testimony was corroborated by other witnesses who testified that repairs were commenced during the week preceding the demolition of the structure. Therefore, we hold that the evidence when viewed in the light most favorable to plaintiff tends to show that Rollins' behavior was malicious or outside of and beyond the scope of his duties. And the motion for directed verdict should have been denied. The jury should be allowed to weigh the evidence and judge the credibility of the witnesses.

Consistent with our decision in *Wiggins I* at 51, 326 S.E. 2d at 44, we hold that since plaintiffs' evidence tends to show that Rollins is not immune from liability and was sufficient to withstand Rollins' motion for a directed verdict, it was also error for the trial court to grant the City of Monroe's motion for a directed verdict.

For reasons stated the trial court's order directing verdicts in favor of defendants must be reversed. In light of our decision we need not address plaintiffs' remaining Assignment of Error.

Reversed.

Chief Judge HEDRICK and Judge GREENE concur.

EDGAR COLLINS, EMPLOYEE, PLAINTIFF v. CONE MILLS, EMPLOYER, AND SELF-INSURED, LUMBERMENS MUTUAL INS. CO., ADMINISTRATOR, CARRIER, DEFENDANTS

No. 8610IC1029

(Filed 7 April 1987)

Master and Servant § 68— chronic obstructive pulmonary disease—cigarette smoker—exposure to cotton dust not significant factor

The Industrial Commission did not err by finding that plaintiff's chronic obstructive pulmonary disease was not significantly caused by or contributed to by his exposure to cotton dust while in defendant's employ where, although there was ample evidence to support a contrary finding, a pulmonary expert selected by the Commission testified that, considering plaintiff's history of cigarette smoking, his ability to perform work today would be the same had he worked on a farm rather than in the textile industry.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission. Opinion and Award entered 9 June 1986. Heard in the Court of Appeals 5 February 1987.

This is a workers' compensation claim in which plaintiff, a former employee in defendant's mill, seeks compensation for disability allegedly arising from occupational lung disease.

Plaintiff began work for defendant in 1942 as a laborer in defendant's mill. At first plaintiff unloaded coal and cotton in the yard; later he cleaned up in the card room by "blowing down" the carding machines with forced air. In 1945, plaintiff left the mill for a short period. In 1946, plaintiff returned to defendant's mill as a laborer. During this time, plaintiff worked seven days a week in the card and weave rooms cleaning and sweeping up waste dust. In the 1950's, plaintiff began to notice breathing difficulties, and went to his family doctor for treatment. In 1968, plaintiff was

transferred to the supply room of defendant's mill. The air in the supply room was better than that in the card and weave rooms, but still contained cotton dust brought in by the opening and closing of the supply room door. Plaintiff also smoked a pack of cigarettes per day from the time he was seventeen years of age until he quit smoking in 1969. In June 1978, at age 65, plaintiff retired and began to draw social security benefits. On several occasions thereafter, until October 1982, plaintiff returned to his job in the supply room on a part-time basis.

In October 1982, plaintiff filed the claim that is the basis of this lawsuit, stating that he suffers from occupational lung disease caused by exposure to cotton dust. After hearing testimony, Deputy Commissioner Page made findings of fact and conclusions of law, and denied plaintiff's claim on 17 October 1984. Plaintiff appealed to the Full Commission which adopted the Opinion and Award of Deputy Commissioner Page. Commissioner Clay dissented. Plaintiff then appealed to this Court.

Charles R. Hassell, Jr., for plaintiff-appellee.

Smith, Helms, Mulliss and Moore, by J. Donald Cowan, Jr., and Caroline Hudson Wyatt, for defendant-appellee.

PARKER, Judge.

In this appeal, plaintiff first contends that there is no evidence in the record to support the Commission's finding of fact that plaintiff's chronic obstructive pulmonary disease was not significantly caused or contributed to by his exposure to cotton dust while in defendant's employ. We do not agree.

On direct examination of the pulmonary expert selected by the Industrial Commission, Dr. Saltzman, plaintiff's attorney asked the doctor to comment on his examination and testing of plaintiff. He responded,

> This man had severe chronic obstructive pulmonary disease. My assessment was pulmonary emphysema, chronic bronchitis, past cigarette abuse, Class IV AMA impairment, 50 percent whole body impairment. . . . I stated that the available data base does not support a contribution by byssinosis to pulmonary impairment. I stated that I had reviewed several pulmonary function tests and I had reviewed these since then

> and that showed variable responses after the workday, but that with time his pulmonary function had deteriorated and that the decrements were compatible with aggravation of underlying chronic obstructive pulmonary disease in association with his occupational exposure. In my Medical Occupation Assessment I stated that the chest x-ray, pulmonary function and historical findings were mostly suggestive of cigarette-induced chronic bronchitis and pulmonary emphysema and stated that the findings and time course are not suggestive of primary byssinosis as the major contributing factor and that meant to his respiratory impairment. And I stated that the data base did not exist to establish that diagnosis but that the decrements in pulmonary function that have occurred from time to time after his occupational exposure may and perhaps do reflect aggravation. I have since that time reviewed all of the outside data base again and the answers. He has had eight tests of pulmonary function at the Cone Mill by records and the responses are—vary with the earliest tests I have which show already severe impairment. There are—one is that in which there was a significant decrement in the forced vital capacity after the workday. The bulk of the tests show little or no difference after the workday in the setting of already severe pulmonary function test abnormalities.

In response to a hypothetical question incorporating the facts of plaintiff's case and asking if Dr. Saltzman had an opinion as to whether plaintiff's exposure to cotton dust was "a significant contributing factor to the development of [plaintiff's] severe chronic pulmonary disease," the doctor stated, "I have an opinion and I think that his exposure may well have aggravated his lung disease."

On cross-examination, defendant's attorney asked Dr. Saltzman to explain his statements, "Number 1, that contribution by byssinosis is not supported and Number 2, that his pulmonary impairment is not suggestive of primary byssinosis as a major contributing factor." Dr. Saltzman explained in response,

> The time course of his symptoms, the kinds of changes that are seen in this x-ray which are indicative of substantial emphysema, the history of substantial cigarette smoking over a

> long interval of time, all are essentially indicative of a form of chronic obstructive pulmonary disease that is associated with, presumably induced by cigarette smoking induced chronic bronchitis and emphysema. Really, most of the data that we have, all of the data that we have really is consistent with these diagnoses as being his major pulmonary problems. And this is basically what I said, and I also said that the data were not suggestive to me of byssinosis as being his primary pulmonary problem. Now, the issue of aggravation, of course, is a different issue. He was, by nature of his work, for a long period of time exposed to substantial amounts of cotton dust, some history of work place and aggravated symptoms. Aggravation is a reasonable concern in him, but I did not make a diagnosis of byssinosis in this man.

When asked if plaintiff's work exposure were "unimportant in the development of his lung disease," Dr. Saltzman answered,

> That is a very difficult question to answer accurately. I think that—you asked me a hypothetical question and the way you had, that this man had worked on a farm and had never worked in a cotton mill, would he have had substantial lung disease, all those things being equal, and I would say the answer to that is yes. It's really not possible to separate out the work place exposure because the chances induced are so similar. We're dependent upon the record of the fact that he was exposed and that he did have, from his health questionnaire, some occasional symptoms associated with the work place.

Defendant's attorney then asked if plaintiff had worked on a farm, considering his smoking history, "would his pulmonary impairment and capacity today be the same?" Dr. Saltzman answered, "My opinion is that most of the abnormalities would be present. I can't be sure that all of them would." Based on the same hypothetical facts, defendant's attorney then asked if plaintiff's "ability to perform any type of work today would be the same as when [Dr. Saltzman] found him." The doctor responded, "I think it would be. If not the same, near to that level."

On redirect examination of Dr. Saltzman, the attorney for plaintiff asked whether plaintiff's exposure to cotton dust "made a significant contribution to the development by way of aggrava-

tion to the degree of lung disease that [plaintiff] had when [Dr. Saltzman] tested him and examined him in 1982." Dr. Saltzman replied, "Yes, I think it may have."

Finding of fact number ten, adopted by the Full Commission, contains the following assertion:

> 10. Plaintiff has contacted [sic] chronic obstructive lung disease, which was caused by his 39 pack years of cigarettes [sic] smoking and was not caused or aggravated or accelerated in significant part by his 28 years of exposure to variable amounts of cotton dust in his employment with the defendant employer.

In *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E. 2d 359, 369-370 (1983), our Supreme Court held that chronic obstructive lung disease may be an occupational disease if (i) the occupation in question exposed the worker to a greater risk of contracting the disease than that faced by members of the public generally and (ii) the worker's exposure to cotton dust significantly contributed to or was a significant causal factor in the disease's development, "even if other non-work-related factors also make significant contributions, or were significant causal factors." The Court defined "significant" as " 'having or likely to have influence or effect: deserving to be considered: important, weighty, notable.' . . . *Significant* is to be contrasted with *negligible, unimportant, present but not worthy of note, miniscule*, or *of little moment.*" *Rutledge*, 308 N.C. at 101-102, 301 S.E. 2d at 370 (quoting Webster's Third New International Dictionary (1971)) (emphasis in original). The Court sums up by stating,

> The factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.

Rutledge, 308 N.C. at 102, 301 S.E. 2d at 370.

The Industrial Commission is a fact-finding body, and findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is evidence which would support a finding to the contrary. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981).

Dr. Saltzman's testimony that considering plaintiff's history of cigarette smoking, his ability to perform work today would be the same had plaintiff worked on a farm rather than in the textile industry supports the Commission's conclusion that plaintiff's exposure to cotton dust was not a significant factor in the cause of plaintiff's chronic obstructive lung disease. Although there is ample evidence in the record to support a contrary finding, the role of this Court in reviewing the Commission's findings is limited, and we cannot say that the Commission erred as a matter of law.

The plaintiff also contends that the Commission erred in failing to find that plaintiff was disabled as a result of his occupational lung disease. However, the Commission found, based on competent evidence, that plaintiff's exposure to cotton dust was not a significant factor in causing plaintiff's chronic obstructive lung disease; therefore, the conclusion of law, that plaintiff does not have an occupational disease as defined by *Rutledge, supra*, is supported by the findings of fact. For this reason, it is unnecessary for this Court to consider whether the Commission erred in failing to find that plaintiff was disabled as a result of an occupational disease.

For the reasons stated above, the Opinion and Award of the Industrial Commission is

Affirmed.

Judges MARTIN and COZORT concur.

AVRETT AND LEDBETTER ROOFING AND HEATING COMPANY, A NORTH CAROLINA CORPORATION, AND WILSON H. COVINGTON v. MILDRED PAULINE S. PHILLIPS, PERSONAL REPRESENTATIVE OF THE LATE CLARENCE HUGH PHILLIPS, AND MILDRED PAULINE S. PHILLIPS, INDIVIDUALLY

No. 8626SC860

(Filed 7 April 1987)

Corporations § 18— stock transfer agreement—not an option to purchase on death of stockholder

Summary judgment should have been entered for defendant rather than plaintiffs in an action in which plaintiff sought to enforce a stock transfer

agreement following the death of a shareholder where the occurrences listed in the agreement which triggered the first refusal option were all voluntary *inter vivos* transfers and the agreement contained no express restrictions on intestate or testamentary dispositions. A clause mentioning the death of a stockholder did not operate as an option to purchase at the death of a shareholder, but bound the heirs and personal representatives to the agreement by restricting voluntary transfers.

APPEAL by defendant from *Saunders, Judge.* Judgment entered 30 May 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 14 January 1987.

This is an action seeking specific performance of a shareholders' agreement.

Avrett and Ledbetter Roofing and Heating Company is a North Carolina close corporation which has done business in Charlotte for more than sixty years. In 1958 it was owned 50% by Ledbetter, 25% by Phillips, 12.5% by plaintiff Covington and 12.5% by Kirkwood. In 1959 Ledbetter sold his interest to Phillips, Covington and Kirkwood.

On 8 December 1959 Phillips, Covington and Kirkwood executed a shareholders' agreement restricting the sale or transfer of shares by requiring each shareholder who desired to transfer shares to first offer them for sale to the corporation or to the other shareholders. On 23 June 1965 the corporate bylaws were amended to provide that:

> Shares of stock in the corporation shall not be sold or transferred by any of the incorporators to any person other than incorporators without first giving the other incorporators an opportunity to buy said stock at its then book value, in accordance with the stock agreement dated December 8, 1959.

In 1970 Kirkwood retired and sold his stock to Phillips and Covington. Thereafter, Phillips and Covington were each 50% shareholders.

On 23 April 1984 Phillips died. His wife, defendant Pauline Phillips, was named executrix and sole beneficiary of her husband's estate under his will. At the time of Phillips' death, the company's book value was determined to be $359,303.00. Thereafter, plaintiffs tendered to Mrs. Phillips the sum of $179,651.50

representing one-half of the book value and demanded transfer of her late husband's stock. The tender and demand for transfer were made pursuant to the 1959 shareholders' agreement. Mrs. Phillips refused to transfer the stock claiming that the agreement did not restrict testamentary transfers.

Plaintiffs filed their complaint on 13 May 1985. Both parties moved for summary judgment. After holding as a matter of law that the agreement was valid and enforceable, the trial court awarded summary judgment in plaintiffs' favor. Defendant appeals.

Henderson & Shuford by Charles J. Henderson and William A. Shuford for plaintiff-appellees.

Weinstein & Sturges by L. Holmes Eleazer, Jr. and William H. Sturges for defendant-appellant.

EAGLES, Judge.

The issue on appeal is whether the trial court erred in granting summary judgment in favor of plaintiffs. Summary judgment is appropriate where there is no genuine issue as to any material fact and the rights of the parties may be determined as a matter of law. *Taylor v. Taylor*, 45 N.C. App. 449, 263 S.E. 2d 351, *rev'd on other grounds*, 301 N.C. 357, 271 S.E. 2d 506 (1980). Here there is no substantial controversy as to the facts. The existence and validity of the shareholders' agreement is not disputed. What is disputed is the legal effect of certain language in the agreement.

The 1959 shareholders' agreement provides in pertinent part that:

> WHEREAS it is desired by the parties hereto that no stock owned by the parties shall be transferred, sold or assigned unless and until the same shall have first been offered for sale to the other parties; that is, the other stockholders or to the Corporation.
>
> NOW, THEREFORE, it is agreed between the stockholders and the Corporation as follows:
>
> Each Stockholder, agrees for himself, his heirs, legatees and assigns that he will not sell, transfer, assign, pledge, encumber or otherwise dispose of his stock in the Corporation

without first offering said stock to the other Stockholders as provided in the following paragraph.

A Stockholder wishing to dispose of his stock in the Corporation, or any of it, shall first offer said stock to the remaining Stockholders in equal amounts, at a price equal to the book value of the stock or a greater amount per share to be agreed upon between the parties. The offer shall be in writing. If any Stockholder fails to accept such an offer within ninety (90) days, or accepts only part of the offer, then the selling Stockholder shall offer the remaining shares of the stock, at the same price, to the other Stockholders in writing.

If the Stockholders receiving the second offer, as stated in the last sentence of the preceding paragraph, does not accept the offer within thirty (30) days from the date of the second offer, or accepts only a part thereof, then the said selling Stockholder shall offer the remaining shares, in writing, to the Corporation at the same price, for purchase as treasury stock.

If the Corporation does not accept such offer, or all of it, within fifteen (15) days from the date thereof, then the selling Stockholder may sell the remaining shares to anyone he sees fit.

Upon the death of any Stockholder, a party hereto, his heirs and or his personal representatives shall be bound by this agreement and must offer the shares upon the same terms and conditions and in the same manner as provided herein.

The pivotal question is whether the first refusal option is triggered by the death of a stockholder. Our research discloses no North Carolina decision squarely on point but the majority rule is that general restrictions on the sale or transfer of stock do not include testamentary dispositions. See *Application of Blakeman*, 518 F. Supp. 1095 (E.D.N.Y. 1981) and cases cited therein. Restrictions on alienation or transfer of stock are not favored and consequently are strictly construed. *In re Estate of Martin*, 15 Ariz. App. 569, 490 P. 2d 14 (1971); *Matter of Estate of Riggs*, 36 Colo. App. 302, 540 P. 2d 361 (1975). Under this rule of strict construction, courts have required express restrictions on intestate or testa-

mentary dispositions. *Vogel v. Melish*, 31 Ill. 2d 620, 203 N.E. 2d 411 (1964). Words like "sell," "transfer," "assign," "convey" or "otherwise dispose of" describe voluntary *inter vivos* transfers and generally have not been held to restrict testamentary dispositions. *Id. Storer v. Ripley*, 12 Misc. 2d 662, 178 N.Y.S. 2d 7 (1958); *Taylor's Administrator v. Taylor*, 301 S.W. 2d 579 (Ky. 1957).

Here, the agreement provides that each shareholder agrees "for himself, his heirs, legatees and assigns" that he will not "sell, transfer, assign, pledge, encumber or otherwise dispose of his stock" without first offering it to the other shareholders. The occurrences listed which trigger the first refusal option are all voluntary *inter vivos* transfers. The agreement contains no express restriction on intestate or testamentary dispositions. Applying the majority rule to this language, the death of a stockholder would not trigger the first refusal option.

The majority rule cases state that death does not trigger a first refusal option unless death is mentioned as a specified contingency. *Matter of Estate of Spaziani*, 125 Misc. 2d 901, 480 N.Y.S. 2d 854 (1984). Plaintiffs argue that the following language prevents testamentary transfers at the death of a shareholder by automatically requiring the personal representative to offer the stock to the remaining shareholders or the corporation:

> Upon the death of any Stockholder, a party hereto, his heirs and or his personal representatives shall be bound by this agreement and must offer the shares upon the same terms and conditions and in the same manner as provided herein.

Plaintiffs emphasize the words "must offer" and argue that when a shareholder dies, the personal representative has no choice but to offer the stock at a price equal to book value.

Defendant, on the other hand, argues that plaintiffs' interpretation is unreasonable and inequitable. Defendant interprets the "death" provision as operating to bind the heirs and personal representative to the agreement by restricting voluntary transfers. Under defendant's analysis, the agreement contemplates only voluntary, *inter vivos* transfers and plaintiffs have no right to demand tender when no "transfer" has occurred within the meaning of the agreement. We agree.

To adopt plaintiffs' interpretation of the agreement would have the effect of obligating the personal representative to offer the shares for book value to the remaining shareholder or to the corporation. The agreement then would not operate as a first refusal option upon sale or transfer but strictly as an option to purchase at the death of a shareholder. This interpretation is unreasonable, inequitable and contrary to the intent of the shareholders as stated in the first paragraphs of the agreement: "WHEREAS it is desired by the parties hereto that no stock owned by the parties shall be transferred, sold or assigned unless and until the same shall have first been offered for sale to the other parties." Instruments should receive sensible and reasonable constructions and not ones leading to absurd or unjust results. *DeBruhl v. Highway Commission*, 245 N.C. 139, 95 S.E. 2d 553 (1956).

The agreement does not expressly restrict testamentary transfers upon the death of a shareholder. The terms and conditions of the agreement become operative at the time of certain proposed voluntary, *inter vivos* transfers which do not include the passing of title by operation of law through a personal representative to the beneficiary of a deceased shareholder. Accordingly, the personal representative is not required to offer the stock to the sole remaining shareholder or the corporation but may distribute it in kind to the beneficiary of Clarence Hugh Phillips.

The trial court's award of summary judgment in favor of plaintiffs is reversed and the matter is remanded for entry of summary judgment in favor of defendant.

Judges WELLS and GREENE concur.

TONY W. SHREVE v. DUKE POWER COMPANY AND LEWIS STULTZ

No. 8617SC477

(Filed 7 April 1987)

1. Master and Servant § 10.2— wrongful discharge—action barred by arbitration decision

Where a collective bargaining agreement between defendant power company and plaintiff's union called for arbitration of labor disputes, the arbitra-

tor's decision that plaintiff was discharged for "just cause" was binding on plaintiff under N.C.G.S. § 95-36.8 and barred his claim for wrongful or retaliatory discharge.

2. **Torts § 1; Trespass § 2— intentional infliction of emotional distress—action against employer—failure to state claim**

Conduct alleged by plaintiff did not, as a matter of law, constitute extreme and outrageous conduct which would support a claim for intentional infliction of emotional distress where plaintiff alleged that defendant power company falsely represented to him that OSHA rules required employees to be clean-shaven in order to wear safety masks in certain work situations; defendant would demand from time to time that plaintiff shave his beard although plaintiff did not need to be clean-shaven in order to wear an air mask; once plaintiff was clean-shaven, the work requiring an air mask would be canceled or reassigned; and these actions were designed to harass plaintiff and get him to quit work.

APPEAL by plaintiff from *Wood, Judge.* Order entered 9 December 1985 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 14 October 1986.

C. Orville Light for plaintiff appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts by Daniel W. Fouts and David A. Senter for defendant appellees.

COZORT, Judge.

Plaintiff appeals the trial court's granting of summary judgment for defendants on plaintiff's claims for retaliatory discharge and intentional infliction of emotional distress. We affirm, holding (1) plaintiff's claim for retaliatory discharge is barred by G.S. § 95-36.8(b), and (2) as a matter of law plaintiff's allegations are insufficient to establish a claim for intentional infliction of emotional distress.

Plaintiff Tony Shreve, a sixteen-year employee with Duke Power, was discharged by Duke Power on 13 February 1984 for threatening a supervisor, Lewis Stultz. Under the terms of a collective bargaining agreement between Duke Power and International Brotherhood of Electrical Workers Local 962, the Union filed a grievance on 20 February 1984 seeking to have plaintiff reinstated. The parties could not resolve their differences, and the dispute was taken to binding arbitration pursuant to the terms of the collective bargaining agreement. The arbitration hearing was

held on 22 March 1985. On 23 May 1985 the arbitrator issued his decision denying the grievance, finding that Duke Power had just cause for discharging plaintiff because he made the following threat to Stultz:

> "Well, it may not be today, and it may not be tomorrow, and it may be next week, may be next month or next year, but you watch behind you everywhere you go, . . . because your ass is mine."

On 29 January 1985, prior to the arbitrator issuing his decision, plaintiff filed this action in Rockingham County Superior Court, alleging four causes of action: (1) defamation; (2) intentional infliction of emotional distress; (3) wrongful or retaliatory discharge; and (4) conspiracy. On 25 November 1985, defendants moved for summary judgment on plaintiff's claims for wrongful or retaliatory discharge and intentional infliction of emotional distress. On 9 December 1985 the court entered summary judgment in favor of defendants on the wrongful or retaliatory discharge and intentional infliction of emotional distress claims. Plaintiff abandoned his conspiracy claim and took a voluntary dismissal without prejudice on the defamation claim. He appealed the granting of summary judgment on the two other claims.

Summary judgment is proper where the pleadings or proof disclose that no cause of action exists. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Where the only issues to be decided are issues of law, summary judgment is proper. *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). When defendants establish a complete defense to plaintiff's claim, they are entitled to summary judgment. *Ballenger v. North Carolina Dept. of Revenue*, 59 N.C. App. 508, 296 S.E. 2d 836 (1982), *cert. denied*, 307 N.C. 576, 299 S.E. 2d 645 (1983). Taking the facts in the light most favorable to the plaintiff, a defendant is entitled to summary judgment where he shows that plaintiff cannot prove the existence of an essential element of his claim. Summary judgment is appropriate when the pleadings and forecast of evidence demonstrate that, as a matter of law, no claim exists. *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E. 2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140 (1986).

The substance of plaintiff's wrongful or retaliatory discharge claim is that he was fired because he made suggestions pertaining to his safety and safe working conditions and contacted OSHA as to certain safety regulations. He contends summary judgment was improperly granted on the wrongful or retaliatory discharge claim because G.S. § 95-130(8) gives him a private right of action:

> No employee shall be discharged or discriminated against . . . because of the exercise by such employee on behalf of himself or others of any right afforded by this Article.

G.S. § 95-130(8). G.S. § 95-129 provides that employers shall furnish to their employees "a place of employment free from recognized hazards." G.S. § 95-130(1) provides that employees are to comply with occupational safety and health standards, and G.S. § 95-130(2) provides that employees are entitled to participate in the development of these safety standards by commenting on them and participating in hearings. Plaintiff reasons he has a private right of action based on the above cited statutes because he alleges he was fired because of his vocal safety concerns.

[1] We need not decide whether G.S. § 95-130(8) gives plaintiff a private right of action because we hold that plaintiff's wrongful or retaliatory discharge claim is barred by his participation in the binding arbitration.

G.S. § 95-36.8(b) provides that any arbitration award made pursuant to a written agreement to arbitrate labor disputes, "shall be final and binding upon the parties to the arbitration proceedings." The collective bargaining agreement between Duke Power and the Union called for arbitration of labor disputes. Plaintiff was the "grievant" in the arbitration proceedings. He has not alleged he was employed pursuant to any other contract of employment. The arbitrator's decision that plaintiff was discharged for "just cause" is binding on plaintiff and bars his claim for wrongful or retaliatory discharge. G.S. § 95-36.8(b); *Tucker v. General Telephone Co.*, 50 N.C. App. 112, 272 S.E. 2d 911 (1980).

[2] We next consider plaintiff's claim for intentional infliction of emotional distress. The elements of the tort of intentional infliction of emotional distress are: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Hogan v. Forsyth Country Club Co.*, 79 N.C.

App. at 487-88, 340 S.E. 2d at 119. The substance of plaintiff's claim of intentional infliction of emotional distress is that Duke Power falsely represented to him that OSHA Rules required the employees to be clean-shaven in order to wear certain safety masks in certain work situations, and that despite the fact that plaintiff did not need to be clean-shaven to wear the air mask, Duke Power would demand from time-to-time that plaintiff shave his beard. Plaintiff claims that once he was clean-shaven, the work requiring an air mask would be cancelled or reassigned. Plaintiff alleges these actions were designed to harass plaintiff and get him to quit. Plaintiff alleges these acts caused him extreme anxiety and mental distress.

In ruling on a motion for summary judgment, whether a defendant's alleged acts may be reasonably regarded as extreme and outrageous is initially a question of law. *See Briggs v. Rosenthal,* 73 N.C. App. 672, 676, 327 S.E. 2d 308, 311, *cert. denied,* 314 N.C. 114, 332 S.E. 2d 479 (1985); *Hogan v. Forsyth Country Club Co.,* 79 N.C. App. at 493-94, 340 S.E. 2d at 122-23. Conduct is extreme and outrageous when it " 'exceeds all bounds usually tolerated by a decent society.' " *Hogan v. Forsyth Country Club Co.,* 79 N.C. App. at 493, 340 S.E. 2d at 123, *quoting Stanback v. Stanback,* 297 N.C. 181, 196, 254 S.E. 2d 611, 622 (1979). We have carefully examined all of plaintiff's allegations regarding his claim for intentional infliction of emotional distress. We hold that the alleged acts may not be reasonably regarded as exceeding all bounds usually tolerated by a decent society so as to satisfy the first element of the tort, requiring a showing of extreme and outrageous conduct. *Hogan v. Forsyth Country Club Co.,* 79 N.C. App. at 494, 340 S.E. 2d at 123. Because the conduct alleged does not, as a matter of law, constitute extreme and outrageous conduct, plaintiff has not alleged a claim for intentional infliction of emotional distress, and summary judgment was properly granted against him.

In sum, we hold summary judgment was properly granted because (1) plaintiff's claim for wrongful or retaliatory discharge is barred by G.S. § 95-36.8(b), and (2) he has failed to state a claim for intentional infliction of emotional distress.

Affirmed.

Judges PHILLIPS and PARKER concur.

LISS OF CAROLINA, INC., PLAINTIFF v. SOUTH HILLS SHOPPING CENTER, INC., AND DAVID MARTIN, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. RICHARD LISS AND EMILY STRAND, THIRD PARTY DEFENDANTS

No. 8610SC1009

(Filed 7 April 1987)

1. **Contracts § 27.2— breach of contract—prima facie evidence—denial of directed verdict for defendant**

Where plaintiff's evidence established a prima facie case of breach of a lease agreement, defendant's motion for directed verdict was properly denied irrespective of the evidence of damages.

2. **Damages § 13.2— breach of lease agreement—lost profits—competency of evidence**

In an action for breach of a lease agreement, plaintiff's certified public accountant was properly permitted to state his expert opinion as to the loss of profits suffered by plaintiff's store as a result of defendant's breach of the lease agreement where, at defendant's request, the witness disclosed the underlying information upon which he based his opinion, and this information included records kept for accounting purposes by the expert witness and data supplied to him by plaintiff's management employees. N.C.G.S. § 8C-1, Rules 703 and 705.

APPEAL by defendant South Hills Shopping Center, Inc., from *Hight, Judge*. Judgment entered 24 March 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 30 March 1987.

This is a civil action wherein plaintiff, tenant, seeks to recover damages from defendant South Hills Shopping Center, Inc., landlord, for breach of contract. Plaintiff also seeks to recover damages from defendant David Martin, president of the corporate defendant, for obtaining a temporary restraining order against plaintiff "maliciously and without just cause." Defendants filed a counterclaim seeking damages from plaintiff and third-party defendants for plaintiff's alleged breach of the same contract.

The evidence at trial tends to show the following: On 7 September 1982, plaintiff leased from defendant South Hills Shopping Center, Inc. [hereinafter South Hills], a building located in South Hills Service Plaza in Raleigh, North Carolina. On or about 26 November 1982, plaintiff opened a store in the building. Prior to the opening of the store, the roof of the building began to leak.

Although employees of plaintiff complained to defendant Martin about the condition of the roof, it was not repaired and continued to leak. On 27 February 1984, a portion of the roof blew off during a rainstorm. The roof was repaired and the store reopened on 1 March 1984. On 19 March, it rained again and water poured into the store through the roof. On 23 March 1984, plaintiff's employees began removing inventory from the store. Defendant South Hills obtained a temporary restraining order enjoining plaintiff from removing personal property from the store, which was dissolved on 12 April 1984. Plaintiff made its last rental payment on 1 April 1984, and on or about 30 October 1984, plaintiff vacated the premises.

At the close of all of the evidence, defendants made motions for directed verdict. The trial court granted defendant David Martin's motion and denied the motion of defendant South Hills. The following issues were submitted to and answered by the jury as indicated:

1) Did the defendant breach the lease between the plaintiff and defendant?

ANSWER: YES

2) If so, what amount of damages, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: $196,168.00

3) What amount, if any, of the damages sustained by the plaintiff could have been avoided?

ANSWER: 0

4) Is the plaintiff indebted to the defendant for unpaid rent?

ANSWER: YES

5) If so, what amount of unpaid rent is the defendant entitled to recover of the plaintiff?

ANSWER: $31,800.00

6) What amount of unpaid rent could have been avoided by the defendant?

ANSWER: 0

From a judgment entered on the verdict, defendant South Hills appealed. Plaintiff also gave notice of appeal.

David R. Cockman for plaintiff, appellee.

Smith, Debnam, Hibbert & Pahl, by Carl W. Hibbert and Wm. Lewis King, for defendant, appellant.

HEDRICK, Chief Judge.

We note at the outset that no question is raised or argued with respect to the verdict of the jury that defendant South Hills did in fact breach its contract with plaintiff. The only questions argued on this appeal by defendant relate to the issue of damages.

[1] Defendant contends the trial court erred in denying its timely motions for directed verdict and judgment notwithstanding the verdict. In its brief, defendant South Hills argues that the evidence with respect to damages was not sufficient to warrant submitting the case to the jury.

The question presented by a motion for a directed verdict is whether the evidence, when considered in the light most favorable to the plaintiff, will justify a verdict in his favor. *Rayfield v. Clark*, 283 N.C. 362, 196 S.E. 2d 197 (1973). The same question is raised by a motion for judgment notwithstanding the verdict. *Id.* Where the plaintiff's evidence establishes a prima facie case of breach of contract, a motion for directed verdict is properly denied irrespective of the evidence of damage. *Cook v. Lawson*, 3 N.C. App. 104, 164 S.E. 2d 29 (1968). Such cases should be submitted to the jury, because "[w]here plaintiff proves breach of contract he is entitled at least to nominal damages." *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E. 2d 884, 886 (1960). (Citation omitted.)

In the present case the jury found that defendant breached its contract with plaintiff with respect to the leasehold property. The evidence in the record is sufficient to support that verdict and, as stated above, defendant makes no contention on appeal regarding the issue of defendant's breach of the contract. Thus, plaintiff was entitled to have its case submitted to the jury as a matter of law. *Cole v. Sorie*, 41 N.C. App. 485, 255 S.E. 2d 271,

disc. rev. denied, 298 N.C. 294, 259 S.E. 2d 911 (1979). No question is raised on appeal as to the sufficiency of the evidence to support the verdict that plaintiff's damage was $196,168.00. No question is raised on appeal as to the instructions to the jury relative to the issue of damages. Indeed, in oral argument, defendant conceded that he did not challenge the instructions to the jury. The trial court did not err in denying defendant's motion for directed verdict and judgment notwithstanding the verdict.

[2] Finally, defendant contends the trial court erred in allowing plaintiff's expert witness, John Daugherty, plaintiff's certified public accountant, to testify over defendant's objection that in his opinion plaintiff suffered a loss of profits as a result of defendant's breach of contract of $1,449,782.00. Defendant did not contend at trial, nor does it argue on appeal, that plaintiff's certified public accountant was not an expert. The witness was qualified as an expert and allowed to testify as to his opinion as to what the projected net income of plaintiff would have been, had it remained in business for the full term of the lease. Defendant merely argues 1) the witness was not competent to testify as to his opinion based on facts beyond his personal knowledge and 2) the witness gave a "mere guess or opinion, unsupported by facts," as to the damages arising from the breach of contract. Defendant's arguments are meritless.

G.S. 8C-1, Rule 703 provides, in pertinent part, "[t]he 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." G.S. 8C-1, Rule 705 further provides, in pertinent part, as follows:

> 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.

An expert is not required to testify from personal knowledge, as long as the basis for his or her opinion is available in the record

or available upon demand. *Thompson v. Lenoir Transfer Co.*, 72 N.C. App. 348, 324 S.E. 2d 619 (1985).

In the present case, plaintiff's expert witness testified regarding his opinion about what the projected net income of plaintiff's store would have been if it had remained in business. At defendant's request, the witness disclosed the underlying information upon which he based his opinion. This information included records kept for accounting purposes by the expert witness and data supplied to him by plaintiff's management employees. The witness's reliance on such data is permitted by G.S. 8C-1, Rule 703. We hold, therefore, that the court did not err in overruling defendant's objection to the question put to the expert witness and in allowing the witness to give his opinions to the loss of profits suffered by plaintiff as a result of defendant's breach of the lease contract.

Because of our decision herein, it is unnecessary for us to address plaintiff's cross-assignments of error.

No error.

Judges WELLS and BECTON concur.

MARY BYRNE v. MARGARET BORDEAUX AND WINFRED BORDEAUX

No. 8612SC864

(Filed 7 April 1987)

1. Appeal and Error § 6.2— appeal before final judgment—substantial right to have all claims tried at same time

Plaintiff had a substantial right to have all of her claims for relief tried at the same time before the same judge and jury, and her appeal was allowed even though the judgment was not final, where she had filed a complaint alleging that defendant Margaret Bordeaux wilfully, wantonly and maliciously drove her car into the back of plaintiff's car, pulled plaintiff from her car, and assaulted her, and the trial court severed the causes of action for negligence and assault and ruled that the complaint failed to state a claim for punitive damages against defendant Winfred Bordeaux.

2. Automobiles and Other Vehicles § 108— family purpose doctrine—not applied to punitive damages

The trial court did not err by dismissing a claim for punitive damages against a husband arising from his wife's involvement in an automobile accident where the claim against the husband rested on the family purpose doctrine.

3. Appeal and Error § 45.1— failure to cite authority to support argument—deemed abandoned

An assignment of error to a court order separating a cause of action for assault arising from an automobile accident from a claim for negligence was deemed abandoned where plaintiff failed to cite authority in support of her argument. N.C. Rules of App. Procedure, Rule 28(b)(5).

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 21 April 1986 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 2 February 1987.

Plaintiff filed this action on 3 July 1985, alleging wilful and wanton negligence on the part of defendants Margaret and Winfred Bordeaux and seeking personal injury and punitive damages. Defendants filed a N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Defendants also filed a motion to sever two causes of action.

The complaint alleged as follows: At about 1:30 p.m. on 10 May 1984, plaintiff was a passenger in a 1973 Oldsmobile, owned and driven by Anthony Cabeza. They were driving along McPherson Church Road in Fayetteville at a moderate rate of speed, and following them was a 1983 Buick driven by defendant Margaret Bordeaux. The defendant then "wilfully, wantonly, maliciously, recklessly, wrongfully, rudely, forcibly and deliberately" drove the Buick into the rear end of the car in which plaintiff was riding. The impact caused plaintiff to be thrown about inside the car, causing pain, shock and trauma. Plaintiff saw defendant holding a gun. Cabeza stopped his car at a service station; defendant followed. Riding with defendant were her son Jerry and one Johnny Boxley. As the cars stopped, defendant and Jerry left their car and opened plaintiff's car door, pulling her out. They proceeded to assault plaintiff; pulling her hair, knocking her to the pavement and beating her with their fists. These actions inflicted severe bruises and other injuries on the plaintiff. The complaint further alleged that, at the time of the events, Margaret Bordeaux and her husband Winfred were living together in a

family relationship and that Mr. Bordeaux kept the Buick for the use of his family, including his wife. Ms. Bordeaux was driving the car with the consent and authorization of her husband at the time of the incident.

The trial court ruled that the complaint failed to state a claim for punitive damages against defendant Winfred Bordeaux. The court also granted defendants' motion to sever the two purported causes of action—negligence and assault. Plaintiff appealed.

Seavy A. Carroll for plaintiff-appellant.

Singleton, Murray & Craven, by Rudolph G. Singleton, Jr., for defendants-appellees.

WELLS, Judge.

[1] The judgment below not being final as to all claims and all parties, *see* N.C. Gen. Stat. § 1A-1, Rule 54(b) of the Rules of Civil Procedure, the first question we must determine is whether the trial court's judgment dismissing plaintiff's punitive damage claim against Winfred Bordeaux is immediately appealable. Pursuant to the rule established in *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976), we hold that plaintiff has a substantial right to have all of her claims for relief tried at the same time before the same judge and jury, and therefore allow this appeal.

[2] Plaintiff first contends that the trial court erred in dismissing her claim for punitive damages against defendant Winfred Bordeaux for failure to state a claim upon which relief can be granted. Plaintiff argues that Ms. Bordeaux's wilful and wanton negligence may be imputed to Mr. Bordeaux under the "family purpose doctrine." We disagree.

Under the family purpose doctrine, the owner or person with ultimate control over a vehicle is held liable for the negligent operation of that vehicle by a member of his household. In order to recover under the doctrine, a plaintiff must show that (1) the operator was a member of the family or household of the owner or person with control and was living in such person's home; (2) that the vehicle was owned, provided and maintained for the general use, pleasure and convenience of the family; and (3) that the vehicle was being so used with the express or implied consent

of the owner or person in control at the time of the accident. *Williams v. Wachovia Bank & Trust Co.*, 292 N.C. 416, 233 S.E. 2d 589 (1977). The family purpose doctrine is an extension of the theory of *respondeat superior*, whereby the responsible party is the principal and the party actively negligent is the agent. *Id; Grindstaff v. Watts*, 254 N.C. 568, 119 S.E. 2d 784 (1961) and cases cited and discussed therein; *see also Carver v. Carver*, 310 N.C. 669, 314 S.E. 2d 739 (1984).

It is settled in this State that one may recover punitive damages from the driver of a car for his malicious, wilful or wanton negligence in its operation. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956). *McAdams v. Blue*, 3 N.C. App. 169, 164 S.E. 2d 490 (1968); *See also Huff v. Chrismon*, 68 N.C. App. 525, 315 S.E. 2d 711, *cert. denied*, 311 N.C. 756, 321 S.E. 2d 134 (1984). Whether one may recover punitive damages under the family purpose doctrine from the owner of a car based on the wilful and wanton negligence of the driver has not yet been directly addressed by our courts.

Although the family purpose doctrine has long been established in this State, it is not without its limits. *See, e.g., Grindstaff v. Watts, supra.* We are unwilling to say that when a driver uses a family member's automobile wilfully, wantonly, or maliciously to injure another that the family purpose doctrine should be applied so as to allow recovery of punitive damages against the owner based on such use.

We therefore hold that the trial court properly dismissed plaintiff's claim for punitive damages against defendant Winfred Bordeaux.

[3] Plaintiff next assigns error to the court's order separating the assault cause of action from the negligence cause of action. 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 plaintiff has failed to cite authority in support of her 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).

The judgment appealed from is

Affirmed.

Judges EAGLES and GREENE concur.

JENNIFER CASKIE, EMPLOYEE-PLAINTIFF v. R. M. BUTLER & COMPANY, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, CARRIER-DEFENDANTS

No. 8610IC967

(Filed 7 April 1987)

Master and Servant § 65.2— back injury—injury by accident

The Industrial Commission erred by concluding as a matter of law that plaintiff's back injury was not the result of an accident where the Commission concluded that the injury was not the result of a specific traumatic incident, but plaintiff had testified that the repeated lifting of cases of cigarettes coupled with twisting and contorting in a cramped area to reach behind and on top of the cigarette display rack was not part of her regular job routine; the Commission found that plaintiff had never performed as much repetitious lifting and stacking of cases on a single day as she did on September 24; and plaintiff's doctor testified that her injury was the result of the lifting she had done on 24 September 1984 and that it was not unusual for no pain to be felt from such an injury until the day after the actual injury. Even if there is no specific traumatic incident, a claimant should still be provided coverage if he or she meets the definition of injury by accident contained in N.C.G.S. § 97-2(6).

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award entered 22 May 1986. Heard in the Court of Appeals 5 February 1987.

Plaintiff worked as a cashier at defendant-employer's grocery store. Her duties mostly consisted of customer service and operating a cash register. On 24 September 1984, plaintiff was asked by a customer to find a carton of a specific brand of cigarettes. To do this, plaintiff had to push a heavy cigarette rack, which was on rollers, out from the counter. With little room to maneuver, plaintiff reached above her head to move ten or eleven cases of cigarettes stacked on top of one another to see if she could find the brand requested. She then restacked the cases. Immediately after replacing the cigarette cases as they were, another customer re-

quested another specific brand of cigarettes, and plaintiff repeated the same procedure. Immediately after plaintiff finished restacking the cigarettes the second time, the store manager asked plaintiff to shelve a shipment of cigarette cases that had just arrived. In stacking these cases, plaintiff had to bend over to pick the cases off the floor; using one hand under the box and one on top, plaintiff lifted the box up over her head. At one point some cigarettes spilled and plaintiff had to squeeze behind the rack to pick them up. According to plaintiff, this sequence of events required much more lifting and straining than her job normally required.

The next morning, plaintiff awoke with pain in her lower back. She was stiff and had difficulty bending. The following day the pain was worse and she consulted a doctor. The doctor diagnosed her injury as a pulled ligament in the back, caused by the repeated straining and lifting of two days earlier. Plaintiff was unable to work from 25 September 1984 until 22 February 1985.

Plaintiff filed a claim for workers' compensation benefits. The deputy commissioner denied her claim on the ground that her injury was not the result of a specific traumatic incident, was not an interruption of her work routine, was not an "injury by accident," and was not covered by the Workers' Compensation Act. The Full Commission, with one member dissenting, adopted and affirmed the opinion of the deputy commissioner. Plaintiff appeals.

Ling and Farran by Jeffrey P. Farran for plaintiff-appellant.

Smith Helms Mulliss and Moore by J. Donald Cowan, Jr., for defendants-appellees.

PARKER, Judge.

Plaintiff's sole assignment of error is that the Industrial Commission erred in concluding that her injury was not the result of a "specific traumatic incident" but developed gradually and was not, therefore, an accident within the coverage of the Workers' Compensation Act for back injuries.

In 1983, G.S. 97-2(6) was amended to read as follows:

> "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment,

> . . . . With respect to back injuries, however, where the injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

General Statute 97-2(6).

The "specific traumatic incident" amendment was intended by the legislature to supplement the law related to back injuries, not to supplant it. The effect of the amendment was to eliminate the need to show an external cause or unusual conditions in order for a worker to receive compensation for a back injury. Instead, what may be shown is that the back injury arose in the course of the employment and that the injury was "the direct result of a specific traumatic incident of the work assigned." G.S. 97-2(6).

If the injury arises out of and in the course of employment and is the result of a "specific traumatic incident," then the statute as amended mandates that the injury be construed to be "injury by accident." However, if there is no "specific traumatic incident," a claimant should still be provided coverage if he or she meets the definition of "injury by accident" contained in the first sentence of G.S. 97-2(6), as interpreted by our courts.

Under our case law, a back injury is considered to be an "injury by accident" where it is the result of an unlooked for and untoward event not expected or designed by the injured employee, and is not the result of inherent weakness and not an ordinary and expected incident of employment. *E.g., Edwards v. Publishing Co.*, 227 N.C. 184, 41 S.E. 2d 592 (1947). This interpretation includes lifting of an unusually heavy object, *e.g., Davis v. Summitt*, 259 N.C. 57, 129 S.E. 2d 588 (1963), or twisting and straining which is not a part of the injured worker's regular work routine, *e.g., Searcy v. Branson*, 253 N.C. 64, 116 S.E. 2d 175 (1960).

In our opinion, the Commission erred in concluding as a matter of law that plaintiff's injury was not the result of an accident. Plaintiff testified that the repeated lifting of the cases of cigarettes, coupled with the twisting and contorting in a cramped area to reach in behind and on top of the cigarette display rack, was not part of her regular job routine. Indeed, the Commission

found as fact that "plaintiff had never performed as much repetitious lifting and stacking of cases on a single day as she did on September 24." Even though the work may have been part of plaintiff's job description, plaintiff was not merely carrying on her usual and customary duties in the usual way. The fact that plaintiff did not experience immediate pain is not determinative. Plaintiff's doctor testified that her injury was the result of the lifting she had done on 24 September 1984 and that it was not unusual for no pain to be felt from such an injury until the day after the actual injury. Based on the evidence and its own findings, under existing case law, without deciding the issue of specific traumatic incident, the Commission should have concluded that plaintiff's back injury was an injury by accident arising out of and in the course of employment, thereby qualifying as a compensable injury under the first sentence of G.S. 97-2(6).

While this Court is bound by the Commission's findings of fact based on competent evidence, conclusions of law, even if designated as findings of fact, are reviewable. Similarly, where facts are found or the Commission fails to find facts under a misapprehension of the law, the case may be remanded for a consideration of the evidence in its true legal light. *Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 314 S.E. 2d 833 (1984). In the instant case, the Commission appears to have limited its consideration to the specific traumatic incident standard. We, therefore, vacate the Opinion and Award of the Commission denying plaintiff's claim and remand the case for further proceedings consistent with this opinion.

Vacated and remanded.

Judges MARTIN and COZORT concur.

STATE OF NORTH CAROLINA v. MICHAEL SCOTT McRAE AND ANTHONY DWAYNE McNEILL

No. 8615SC1148

(Filed 7 April 1987)

1. **Criminal Law § 138.28— separate aggravating factors—prior convictions—defendant on parole**

The trial court could properly find as separate aggravating factors that defendant had prior convictions for offenses punishable by more than sixty days' confinement and that defendant was on parole at the time of the present offense. N.C.G.S. § 15A-1340.4(a)(1).

2. **Criminal Law § 134.4— failure to make "no benefit" finding—defendants twenty-three years old**

The trial court did not err in failing to make a "no benefit" finding when not sentencing defendants as committed youthful offenders where the record disclosed that both defendants were twenty-three years old at the time of their conviction. N.C.G.S. § 148-49.14.

3. **Criminal Law § 131.2— newly discovered evidence—denial of motion for appropriate relief**

The trial court properly denied defendant's motion for appropriate relief in a breaking or entering case on the ground of newly discovered evidence where the motion was supported by his codefendant's affidavit stating that the codefendant had committed the break-in and defendant had no knowledge of it.

APPEAL by defendants from *McLelland, Judge*. Judgments entered 1 May 1986 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 31 March 1987.

Defendants were charged in proper bills of indictment with felonious breaking or entering, violations of G.S. 14-54(a). They were found guilty as charged. From judgments imposing prison sentences of eight years, defendants appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert E. Cansler, for the State.

Daniel Snipes Johnson for defendant, appellant Michael Scott McRae.

Donnell S. Kelly for defendant, appellant Anthony Dwayne McNeill.

the record discloses that both defendants were 23 years old at the time of their conviction. Therefore, under the plain language of the statute, the court was not required to make a "no benefit" finding.

[3] Defendant Michael Scott McRae filed in this Court on 23 September 1986 a motion for appropriate relief, asking for a new trial or a dismissal of the charges against him, on the ground of newly discovered evidence. He filed in support of his motion an affidavit of his codefendant Anthony Dwayne McNeill, stating that defendant McNeill had committed the break-in himself and defendant McRae had had no knowledge of it. We have examined the record and find defendant McRae is not entitled to the relief he seeks. *See State v. Person*, 298 N.C. 765, 259 S.E. 2d 867 (1979). We deny his motion for appropriate relief.

Defendants had a fair trial free from prejudicial error.

No error.

Judges MARTIN and GREENE concur.

FCX, INC. v. ROBERT H. CAUDILL, JR., INDIVIDUALLY AND ELSIE MAE CAUDILL, D/B/A CAUDILL'S DAIRY, INC.

No. 8610SC1094

(Filed 21 April 1987)

Evidence § 34.3— letter not admission by adoption or silence

In an action involving the issue of whether feed corn purchased from plaintiff was contaminated by fertilizer, a letter from a dairy nutrition counselor stating that fertilizer did not appear to be present in samples sent to him for analysis did not qualify as an admission by adoption because defendant solicited the information and retained the letter in his records without objecting to its contents where there was no evidence that defendant used or relied upon the information contained in the letter in any manner suggesting that he believed it was true. Nor was the letter competent as an admission by silence where there was no evidence of defendant's response or lack thereof upon receipt of the letter and a denial could not reasonably be expected under the circumstances. N.C.G.S. 8C-1, Rule 801(d).

FCX, Inc. v. Caudill

APPEAL by defendants from *Brannon, Judge.* Judgment entered 7 March 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 11 March 1987.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Albert D. Barnes, for plaintiff appellee.

Blanchard, Tucker, Twiggs & Abrams, P.A., by Charles F. Blanchard and Irvin B. Tucker, Jr., and Brown, Brown, Brown and Stokes, by R. Lane Brown, III, for defendant appellants.

BECTON, Judge.

Plaintiff FCX, Inc., instituted this action seeking to recover from defendants, Robert Caudill, Elsie Mae Caudill, and Caudill's Dairy, Inc., $59,984.75 for the balance due on an indebtedness which arose out of the sale of various merchandise, including cattle feed, to the dairy and which was personally guaranteed by the individual defendants. The defendants counterclaimed for negligence and for breach of express and implied warranties, alleging that 45,000 pounds of shelled feed corn delivered to the dairy by FCX was deficient as to grade and quality and was contaminated with fertilizer, a toxic chemical, and with toxic weed seed, which, when consumed by the Caudills' dairy cattle, caused illness and death of many of the cows.

At the conclusion of all the evidence, the trial court directed a verdict for FCX on its contract claim against the Caudills, ordering the payment of $59,984.75 with interest. The Caudills do not appeal the entry of the directed verdict. The negligence and breach of warranty issues raised by the Caudills' counterclaims were submitted to the jury which returned a verdict in favor of FCX.

On 7 March 1986, the Court denied the Caudills' motion for a new trial and entered judgment on the verdict in favor of plaintiff FCX. From that judgment the Caudills appeal, contending that the trial court committed reversible error by admitting in evidence a letter designated Plaintiff's Exhibit 7. We hold that the letter was improperly admitted, and therefore we reverse.

I

Caudill's Dairy, located in Star, North Carolina, is owned and operated by defendant Elsie Mae Caudill and her three sons, one

of whom is defendant Robert Caudill. On 13 April 1983, FCX responded to an urgent order for feed from Caudill's Dairy by delivering a 45,000 pound load of yellow shelled corn. The corn was delivered to the dairy by Gaston Vance Bass, a driver for FCX, in a Killebrew trailer used by FCX for the transportation of fertilizer and feed grains. The corn was first fed to the dairy cows the same afternoon. Thereafter, many cows became ill, at least one died, and a large number of calves were allegedly aborted or stillborn.

The primary issue at trial was whether the corn supplied by FCX contained contaminants which caused the problems with the dairy herd. In support of their counterclaims, the Caudills presented evidence that, on the two days immediately preceding the corn delivery to the dairy, the same Killebrew trailer was used to haul two loads of fertilizer. On the other hand, Mr. Bass, the truck driver, testified on behalf of FCX that prior to the loading of the corn in question, he drove the trailer over 100 miles with the bottom gates open and that the trailer had been washed thoroughly. Other FCX employees testified that the corn was tested for aflatoxin and moisture content after loading, that Robert Caudill and other dairy workers were present during the unloading and made no complaints about the condition of the corn at that time, and that no complaints were received from other customers of FCX who received corn from the same storage bin.

The bulk of the evidence at trial consisted of testimony by expert witnesses for both sides and various reports of the results of laboratory analyses of samples of the corn and of tissue and blood from some of the cows. Dr. Leroy Taul, Caudill Dairy's regular veterinarian, testified on behalf of the Caudills that he was first summoned to the dairy on 15 April 1983 at which time he observed several cows with severe diarrhea and other symptoms. On 17 April, Dr. Taul's associate, Dr. Perry Parks, responded to another call from the dairy. Upon learning that the sick animals had been fed from a new load of corn from FCX, he collected samples of the feed for laboratory analysis and conducted an autopsy of a dead cow, removing organ tissue for analysis. On 19 April, Dr. Taul again visited the dairy and observed that a large portion of the milking herd was affected although none of a number of "dry" cows, which were separated from the milk herd only by a wire fence and were not given the same feed, exhibited

any signs of illness. Based upon their observations of the herd and of granular matter in the feed, upon various laboratory reports, and upon their knowledge of the manner of the corn's delivery, both Dr. Taul and Dr. Parks concluded that the problems with the herd were due to poisoning from contaminants—probably fertilizer—in the feed corn obtained from FCX.

The Caudills also introduced the testimony of Dr. Cecil F. Browne, an expert in animal toxicology and veterinary science, who stated that he had visited the dairy, had talked with Dr. Taul and Dr. Parks, and had examined laboratory reports on the analysis of samples of the corn and mixed feed performed by Woodson-Tenent Laboratories. Based on that information, Dr. Browne was of the opinion that the sickness and death of the cows were due to a reaction between several toxic chemical substances present in the feed which came from fertilizer mixed with the FCX corn.

In rebuttal, FCX offered the testimony of two experts, Dr. Arthur L. Aronson and Dr. Ben D. Harrington, which indicated that the trace levels of substances found in the corn by Woodson-Tenent Laboratories were insufficient to harm the dairy cattle; that the symptoms normally associated with poisoning by organophosphates were not present in the Caudill herd; and that all tests performed on affected cows, cow tissue, feed and corn were negative for poisoning by any substance. Finally, Richard S. Kern, a salesman for MoorMan Manufacturing Company of mineral feed supplements which were mixed with the corn to produce the feed given to the Caudills' cows, testified that he had assisted David Caudill in gathering a sample of the feed which he mailed to the MoorMan Laboratory in Quincy, Illinois for analysis. In response, Kern received a letter or report from Gary Goodall, a dairy nutrition counselor at MoorMan. A portion of that letter, designated Plaintiff's Exhibit 7, was admitted in evidence over the objection of counsel for the Caudills, and stated, following the recitation of percentages of various substances found in the sample: "We have noted that none of the minerals in the sample appear to be fertilizer."

Prior to receiving the letter in evidence, the court excused the jury and held a *voir dire* of the witness, Richard Kern. The foundation established for the exhibit's admissibility is substan-

tially as follows. Kern had sent other samples to the MoorMan laboratory in the past and had communicated with Gary Goodall on previous occasions by telephone and by mail. On this particular occasion, Kern called Goodall prior to sending the Caudills' feed sample, and sent it by way of the U.S. Mail. Kern further testified that he gathered the sample and sent it for testing at Robert Caudill's request. Upon receipt of the letter, which was written on MoorMan letterhead and addressed to Kern, Kern delivered it to Robert Caudill. A brief discussion followed, but Kern did not recall specifically what was said or done upon delivery of the letter.

II

The sole issue on appeal is whether the trial court erred by allowing in evidence the letter from Gary Goodall to Richard Kern.

A

Initially, we summarize some of the various factors which we must consider when determining the admissibility of this type of evidence. First, every writing sought to be admitted must be properly authenticated, *see* Rule 901, North Carolina Rules of Evidence, and must satisfy the requirements of the "best evidence rule," Rule 1002, or one of its exceptions set forth in Rules 1003 *et seq.* Furthermore, if offered for a hearsay purpose, the writing must fall within one or more of the exceptions to the hearsay rule established by Rules 803 and 804.

Whenever, as in the present case, the writing in question contains the results of scientific analysis of real evidence, further considerations also arise. It is normally necessary to lay a foundation for the scientific evidence by way of expert testimony explaining the way the test is conducted, attesting its scientific reliability, and vouching for its correct administration in the particular case. *See Robinson v. Life and Casualty Insurance Co.*, 255 N.C. 669, 122 S.E. 2d 801 (1961). In addition, the substance analyzed must be accurately identified. If by its nature it is not readily identifiable or is susceptible to alteration by contamination or tampering, it may be necessary to prove a chain of custody to insure that the substance came from the source claimed and that its condition was unchanged. *See id.*; McCormick on Evidence Sec.

212 at 667-68 (E. Cleary 3d ed. 1984); Brandis on North Carolina Evidence Sec. 117, n.2 (2d ed. 1982). A sample drawn from a larger mass must be shown to be accurately representative of the mass. McCormick Sec. 212 at 668. Failure to satisfy any of these requirements may, in a particular case, amount to a failure to establish the relevancy of the test results.

B

Based on the testimony of Mr. Kern, the trial judge concluded that the letter was admissible on the theory that it constituted an admission by adoption or by silence of a party, Robert Caudill. The Caudills argue that the letter was improperly admitted because (1) the plaintiff failed to lay a proper foundation for the test results by way of expert testimony establishing their scientific reliability, (2) the plaintiff failed to establish the identity of the feed samples analyzed by tracing a chain of custody, and (3) the exhibit is not an implied or adopted admission of Robert Caudill.

We agree that there is no evidence by any witness, expert or otherwise, explaining how the test was conducted or vouching for its reliability, appropriateness, or correct administration. Neither the qualifications of the declarant, Mr. Goodall, nor the source of the information and conclusions related by him have been demonstrated. Moreover, there is insufficient evidence of a chain of possession, transportation, and safekeeping of the feed samples to establish the likelihood that the samples collected by Mr. Kern are the same as those to which the test results in the letter refer. *See State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977).

The trial judge apparently was of the opinion that, as an admission of a party opponent, the letter did not have to satisfy the foregoing relevancy or reliability requirements and that the deficiencies discussed were thus not fatal. We need not decide to what extent, if any, the foundation requirements for scientific evidence are necessary for statements which fall within the admissions exception to the hearsay rule. For reasons discussed hereafter, we conclude that the evidence in this case falls far short of establishing any acquiescence in or adoption of the statements contained in the challenged writing by the Caudills so as to qualify the letter as an admission. The letter was plainly offered for the truth of its contents, i.e., that there was no fertilizer in the sample, and therefore constituted inadmissible hearsay.

C

An admission may be express or may be implied from conduct. Rule 801 of the North Carolina Rules of Evidence states in relevant part:

> (d) Exception for Admissions by a Party-Opponent. A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . (B) a statement of which he has manifested his adoption or belief in its truth . . . .

The Commentary following the rule quotes from the Advisory Committee's note as follows:

> Under established principles an admission may be made by adopting or acquiescing in the statement of another. . . . Adoption or acquiescence may be manifested in any appropriate manner. . . .

A person may expressly adopt another's statement as his own, or an adoptive admission may be implied from "other conduct of a party which manifests circumstantially the party's assent to the truth of a statement made by another person." McCormick, Sec. 269 at 797. From our review of relevant authority, it appears that adoptive admissions fall generally into two categories—those implied from an affirmative act of a party, and those implied from silence or a failure to respond in circumstances that call for a response. FCX argues that evidence Robert Caudill solicited the information, received the report from Kern, and retained it in his records without objecting to its contents establishes an adoption. We disagree.

The first type of adoption ordinarily requires some affirmative act by which the party relies upon or makes use of the statement of another for his own benefit or otherwise indicates that he believes it is true. *See, e.g., Pekelis v. Transcontinental and Western Air, Inc.*, 187 F. 2d 122 (2d Cir. 1951) (defendant used report of accident investigating board as a basis for remedial measures); *United States v. Morgan*, 581 F. 2d 933 (D.C. Cir. 1978) (Assistant U.S. Attorney held to have adopted statements of informant characterized by him as "reliable" which were used for purpose of obtaining a warrant); *see also* McCormick, Sec. 269. In

our view, mere possession of a written statement does not manifest an adoption of its contents. Nor does a request for testing or for other information automatically establish an adoption of statements contained within the response. There is no evidence that Robert Caudill used or relied upon the information contained in the letter in any manner suggesting that he believed it was true. To the contrary, the evidence shows that the letter was generated during an ongoing investigation in which Caudill was seeking opinions from more than one source as to the cause of the dairy cows' sickness, and that his suspicion that the feed was contaminated with fertilizer was not eliminated by receipt of the letter. We thus conclude that no affirmative conduct of Robert Caudill may be reasonably construed as manifesting an adoption of the statements in the letter as his own.

Likewise, the evidence does not support the finding of an admission implied from silence. Regarding admissions by silence, our Supreme Court stated in *State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975):

> Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having first hand knowledge under such circumstances that a denial would be naturally expected if the statement was untrue and it is shown that he was in a position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission.

Id. at 406, 219 S.E. 2d at 184; *State v. Whitley*, 58 N.C. App. 539, 541, 293 S.E. 2d 838, 839, *disc. rev. denied and appeal dismissed*, 306 N.C. 750, 295 S.E. 2d 763 (1982). Similarly,

> [i]f a written statement is handed to a party and read by him, in the presence of others, his failure to deny assertions contained therein, when under the circumstances it would be natural for him to deny them if he did not acquiesce, may be received as an admission. . . .

McCormick, Sec. 270 at 801. Whether the statement is oral or written, the critical inquiry is whether a reasonable person would have denied it under the circumstances.

In the present case, there is no evidence of Robert Caudill's response or lack thereof upon receipt of the letter from Kern. Kern testified that he could not recall what was said or done at the time. Moreover, even if Caudill in fact failed to deny the letter's assertions, a denial could not reasonably be expected under the circumstances. Neither Robert Caudill nor Richard Kern knew personally whether the sample contained fertilizer but were merely trying to find out. The letter itself did not invite a reply. Nor was the nature of Caudill's relationship with MoorMan Company such as to make it probable that Caudill would have responded to the company with a denial if he questioned the test results. Under these circumstances, it may not be reasonably inferred that Robert Caudill acquiesced in any statements in the letter.

For the foregoing reasons, we conclude that the letter was not admissible as an admission by adoption or silence.

D

FCX argues that the letter was also admissible under Rule 801(d)(D) as "a statement made by [a party's] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." We summarily reject this contention as we find no evidence of any agency relationship between Robert Caudill and Gary Goodall or MoorMan Manufacturing Company.

III

FCX further argues that, even if the admission of the letter was error, it was harmless error. The burden is on the appellant not only to show error but also to show that the error was prejudicial and probably influenced the jury verdict. *See, e.g., Hasty v. Turner,* 53 N.C. App. 746, 281 S.E. 2d 728 (1981); *Emerson v. Carras,* 33 N.C. App. 91, 234 S.E. 2d 642 (1977).

In this case, the letter's erroneous admission was unquestionably material since the evidence bore directly upon a central issue in dispute—whether the corn received from FCX contained fertilizer. The letter, clothed with an aura of authenticity, purported to report results of scientific analysis. In a case involving a battle of experts and conflicting interpretations of various laboratory reports, we believe there exists a substantial probabili-

ty that the admission of this evidence in the final stage of the trial prejudicially influenced the outcome.

The admission in evidence of the letter designated Plaintiff's Exhibit 7 constituted prejudicial error requiring reversal of the judgment.

Reversed.

Chief Judge HEDRICK and Judge WELLS concur.

ROBERT A. WELSH v. NORTHERN TELECOM, INC.

No. 8614SC272

(Filed 21 April 1987)

1. **Pensions § 1— state action for breach of employment contract—failure to bridge prior service—not preempted by ERISA**

In an action in which plaintiff claimed that defendant breached his employment contract by not bridging his prior AT&T System service to increase his benefits, the trial court did not err by failing to find that plaintiff's state law claims were preempted by ERISA, 29 U.S.C. § 1001, *et seq.*, where plaintiff had a claim against defendant for amounts in addition to the pension plan benefits; his action was not against the plan but against defendant for failing to uphold its promises to provide benefits in excess of those to which he would otherwise be entitled under the plan; and his claim neither concerned the substance of the pension plan nor the plan's regulation and was only tangential to the plan.

2. **Master and Servant § 8.1— breach of employment contract—failure to bridge prior service—denial of motion to dismiss and judgment n.o.v.—proper**

The trial court did not err by denying defendant's motion for a directed verdict and judgment n.o.v. in an action arising from defendant's failure to bridge plaintiff's prior AT&T service where there was no dispute as to the type of company benefits that defendant normally offered; defendant admitted in its brief that its vice president's statement concerning company benefits is made intelligible by reference to established company policy or the retirement plan; plaintiff gave an example of bridging as he understood it and as it was operating in the communications employment industry at that time; the testimony of defendant's witnesses at trial did not indicate that there was any confusion as to what the terms bridging and company benefits meant; defense witnesses gave no indication that plaintiff's definition of bridging was incorrect or contrary to their understanding; the only true dispute was whether defendant promised plaintiff that his prior Bell System service would be bridged; and the jury found that defendant's vice president made such a promise.

APPEAL by defendant from *Brannon, Judge.* Judgment entered on 25 October 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals on 28 August 1986.

Newsom, Graham, Hedrick, Bryson & Kennon by William P. Daniell for plaintiff appellee.

Maupin, Taylor, Ellis & Adams by John Turner Williamson, James A. Roberts, III, and Holmes P. Harden for defendant appellant.

COZORT, Judge.

Plaintiff filed a declaratory judgment action pursuant to G.S. § 1-253, *et seq.* seeking a judicial declaration construing his right to receive certain employment benefits, which plaintiff alleged defendant had contracted to provide him in exchange for plaintiff's working for defendant. From a jury finding of fact in plaintiff's favor, the trial court entered judgment for the plaintiff, and defendant appealed.

On appeal, defendant contends the trial court erred (1) in failing to find that plaintiff's state law claims are preempted by the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA") 29 U.S.C. § 1001, *et seq.*; and (2) in denying defendant's motions for directed verdict and judgment notwithstanding the verdict on the grounds that no valid and enforceable contract existed which obligated defendant to "bridge" plaintiff's prior service within the AT&T (Bell) System for purposes of determining the amount of retirement benefits and vacation time to which plaintiff is entitled. We affirm. The facts follow.

Plaintiff testified that he has held various jobs in the communications industry since 1954. For a period of thirteen years and ten months, from November 1954 until September of 1968, he first worked for Bell Telephone Company of Pennsylvania and then for Bell Telephone Company of New Jersey. Both of these companies were subsidiaries of American Telephone and Telegraph Company (AT&T).

During his testimony, plaintiff referred to his employment with Bell Telephone Company of Pennsylvania and Bell Telephone Company of New Jersey as "Bell System service" or service within the "AT&T System." Plaintiff testified that the companies

referred to as the "Bell System" are essentially the same as those which compose the "AT&T System." He further testified that, in the telecommunications industry, the terms "Bell System" and "AT&T" mean essentially the same thing. The Bell System, at one time, consisted of various telephone companies and manufacturing companies throughout North America.

In September of 1968 plaintiff left his job with Bell Telephone Company of New Jersey and accepted employment with Stromberg-Carlson in Rochester, New York, where he remained employed until 30 January 1970. Upon leaving Stromberg-Carlson, he accepted employment with General Telephone Company of Florida in Tampa, Florida. In 1972, plaintiff left General Telephone and went to work for Vista Telephone, also located in Florida. Neither Stromberg-Carlson, General Telephone, nor Vista Telephone were companies within the AT&T System, and none of them had any corporate relationship with AT&T.

In early 1974, while employed by Vista Telephone, plaintiff supervised the installation of certain telephone equipment which was manufactured by Northern Telecom, the defendant in this action. While working on that project, plaintiff met and became known to various employees of defendant. One such employee, Jack Shriner, requested a meeting with the plaintiff in early 1974. At that meeting, Shriner asked plaintiff to come and work for the defendant, but plaintiff was not interested in employment with defendant at that time.

Later in 1974, plaintiff received a telephone call from Gordon Jack, another employee of defendant, and the possibility of plaintiff's coming to work for defendant was again discussed. Gordon Jack advised plaintiff that Ray Bellows, vice president of sales for defendant, would need to interview him before he could be hired by defendant. A meeting was arranged between the plaintiff and Ray Bellows.

Plaintiff and Ray Bellows met in Charlotte, North Carolina. Plaintiff testified that during the meeting he told Ray Bellows the names of the AT&T subsidiaries where he had previously been employed. Plaintiff further testified that at the meeting Ray Bellows stated that "based on [plaintiff's] past Bell System service and the relationship that existed between Northern Telecom and Bell Canada that if [plaintiff] came to work with Northern Tele-

com and worked there five years, that [his] previous Bell System service would be bridged."

Plaintiff further testified that he understood the term "bridging," as used within the Bell System, involved the crediting of the previous time that an employee had worked for a Bell System or related company towards the employee's entitlement to sick time, vacation, and pension benefits. Plaintiff testified that if an employee left a Bell System company and later returned to that company or another Bell System company, the employee would receive credit for all of his "Bell System time" after employment of five years. Plaintiff further testified that, since benefits such as retirement pay and vacation time increased with an employee's longevity, the promise of bridging represented a substantial inducement to him. To plaintiff the promise of bridging meant that, after five (5) years with defendant, he would be entitled to company benefits based upon an accumulated work time of eighteen (18) years and ten (10) months.

Plaintiff testified that, although Ray Bellows informed him that plaintiff would receive "bridging" of his Bell System service for purposes of determining "company benefits," no particular benefits were discussed. Plaintiff testified that at the time of his interview with Ray Bellows, he concluded defendant had essentially the same benefit packages generally offered in the telecommunications industry. Plaintiff did not become aware of the specific employee benefits offered by defendant until after he had commenced his employment with defendant.

After the interview with Ray Bellows in Charlotte, plaintiff was asked to travel to Raleigh, North Carolina, for the purpose of further employment discussions. Plaintiff made the trip to Raleigh in November of 1974. Plaintiff was offered a specific starting salary in a telephone conversation with Gordon Jack in January or February of 1975, and plaintiff indicated he would like the job. At the time of the telephone offer, plaintiff was not advised of the exact terms of his employment. It was agreed that he would complete the Vista Telephone project before commencing his work with defendant.

Shortly before commencing work with the defendant, plaintiff requested that defendant provide him with a letter confirming his employment. Plaintiff testified that he wanted to be certain that

he would not have to relinquish the term "engineer" as part of his job title. Plaintiff received a letter dated 6 October 1975 from Bruce Hanke, employment supervisor, confirming defendant's offer of employment. In addition to confirming the offer of employment the letter provided, among other things, that plaintiff's job title would be "Switching Products Engineer"; plaintiff's salary would be $25,000 annually; and defendant would pay for plaintiff's moving expenses to Raleigh. The next-to-last paragraph of the letter provided:

> As a new employee of Northern Telecom you become eligible on your starting date for life insurance, accidental death and dismemberment insurance, hospital, surgical and major medical coverage; all provided at no expense to you. Complete details of our total benefit program will be discussed with you when you start work.

By letter dated 3 November 1975 plaintiff confirmed his verbal acceptance of the job offer. Neither defendant's letter to plaintiff nor plaintiff's letter to defendant referred to "bridging" of plaintiff's prior service within the AT&T System.

Plaintiff started working for defendant on 1 December 1975, more than a year following the interview with Ray Bellows. Plaintiff testified that throughout his course of negotiations leading up to his acceptance of employment with defendant, the only representative of defendant who ever told him that his prior service within the AT&T System would be "bridged" or credited for the purpose of determining defendant employee benefits was Ray Bellows.

After having worked for defendant for about two years, plaintiff had heard nothing further about the bridging of his prior AT&T service, so he orally requested confirmation of his right to bridging. By way of a memorandum dated 20 December 1978, plaintiff submitted a request to Mike Bruno, director of personnel, for such confirmation. On 7 March 1979 plaintiff was advised in a telephone conversation with Jim Patner, who was employed in defendant's personnel department in Nashville, Tennessee, that his prior AT&T service could be bridged with service for the defendant, but only if his employment with the defendant began before 1 June 1975. The plaintiff in turn responded to that telephone conversation with a memorandum dated 8 March 1979,

in which he set forth his reasons for believing that the 1 June 1975 date should not apply to him. Mike Bruno wrote a memorandum to plaintiff, dated 10 July 1979, in which he stated that the bridging question was still under study.

During the next six months, plaintiff received no further word about his right to bridging, and he again requested a confirmation of his right by way of a memorandum to Mike Bruno dated 14 December 1979. On 26 November 1980, plaintiff was advised by defendant that he would not receive credit for his prior service in the AT&T System. John L. Brown, corporate director of benefits and personnel systems for defendant, testified that at no time prior to rendering its final decision that plaintiff was not entitled to bridging did the defendant make any attempt to contact Ray Bellows to find out what promises he made to plaintiff.

Subsequent to 26 November 1980 plaintiff made several requests for a reconsideration by defendant of his right to bridging of his prior AT&T service. The defendant reaffirmed its decision of 26 November 1980.

Ray Bellows testified that he made no promise to plaintiff concerning "bridging" of plaintiff's prior service within the AT&T System. At the conclusion of all the evidence defendant made a motion for directed verdict, which the trial court denied. The trial court submitted the following issue to the jury:

> 1. Did Ray Bellows promise plaintiff that his prior service within the AT&T (Bell) System would be bridged with his service for the defendant for the purposes of determining the amount of retirement benefits and the amount of vacation time to which he was entitled?

The jury answered this factual issue in the affirmative.

The trial court entered judgment concluding that "a valid and enforceable contract exist[s] between plaintiff and defendant, obligating defendant to bridge plaintiff's prior service within the AT&T System with his service for defendant for the purposes of determining the amount of retirement benefits and the amount of vacation time to which plaintiff is entitled[.]" The court ordered defendant to "provide to the Plaintiff those retirement benefits and vacation time to which the Plaintiff would have been entitled

if the Plaintiff's service with the Defendant had commenced on February 1, 1962." Defendant gave notice of appeal.

[1] Defendant first assigns as error the trial court's failure to find that plaintiff's state law claims are preempted by ERISA, 29 U.S.C. § 1001, *et seq.* In his complaint plaintiff based his claim upon breach of contract and equitable estoppel, and at trial he proceeded on the breach of contract theory. In his complaint plaintiff alleged that as a result of defendant's breach of its employment contract with plaintiff, he has been denied vacation benefits to which he was entitled and pension benefits to which he will be entitled upon his retirement.

The purpose and scope of ERISA is summarized in *Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 306 S.E. 2d 519 (1983), *disc. rev. denied*, 310 N.C. 154, 311 S.E. 2d 294 (1984).

> ERISA was enacted by Congress to foster interstate commerce and to protect the interests of participants in employee benefit plans by requiring the disclosure and reporting of financial and other information to participants and their beneficiaries, by establishing standards for fiduciaries, and by providing appropriate remedies, sanctions, and ready access to federal courts. 29 U.S.C. § 1001(b). "It is hereby further declared to be the policy of [ERISA] to protect . . . the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries" by providing adequate safeguards to assure the equitable character and financial soundness of such plans. 29 U.S.C. § 1001(c).
>
> To eliminate the threat posed by conflicting or inconsistent State or local regulation of employee benefit plans, *see* 120 Cong. Rec. 29933; 120 Cong. Rec. 29197, Congress enacted a pre-emption clause, codified at 29 U.S.C. § 1144(a), which provides:
>
> > (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

> Congress also granted exclusive jurisdiction to the federal courts over all actions arising under the subchapter of ERISA dealing with the protection of employee benefit rights. 29 U.S.C. § 1132(e)(1). It, however, granted concurrent jurisdiction to the states over actions brought by a participant or beneficiary to recover benefits due him or her under the terms of that plan, or to enforce or clarify his or her rights under the terms of that plan. 29 U.S.C. § 1132(e)(1); 29 U.S.C. § 1132(a)(1)(B).

Id. at 607-08, 306 S.E. 2d at 521-22.

Defendant contends that plaintiff's cause of action *relates* to defendant's pension plan and *thus* is preempted by § 1144(a) of ERISA since § 1144(a) specifically provides that the provisions of the subchapter dealing with the protection of employee benefit rights "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" subject to the Act. Thus, the issue we must decide is whether plaintiff's breach of contract claim *relates* to defendant's pension plan.

We find *Shaver v. Monroe Construction Co.*, and authority cited therein, controlling on this issue, and we find defendant's argument unpersuasive.

In *Shaver*, plaintiff brought a claim for fraudulent misrepresentation, among other claims, alleging that defendants misrepresented to plaintiff the continuing existence of a pension plan for the purpose of inducing plaintiff to remain with defendants and to forego bonuses and salary increases. The court held that plaintiff's claim was not preempted by ERISA:

> Plaintiff's claim does not concern the substance of the plan, nor does it concern the regulation of a pension plan. The pension plan is only incidentally or tangentially involved. Because plaintiff's claim is not covered by ERISA, the federal courts do not have jurisdiction. *Fulk v. Bagley*, 88 F.R.D. 153 (M.D.N.C. 1980); *Martin v. Bankers Trust Co.*, 565 F. 2d 1276 (4th Cir. 1977).

Id. at 610, 306 S.E. 2d at 523.

Shaver cited with approval the case of *Shaw v. Westinghouse Elec. Corp.*, 276 Pa. Super. 220, 419 A. 2d 175 (1980). In *Westing-*

house, the employee sued his employer for breach of an employment contract. He alleged, among other things, that one of his employment contract terms was that he would receive a pension equal to 60% of his base salary. He claimed his employer did not pay him promised salary increases, causing him to lose some of his pension benefits. The court held that ERISA did not govern this claim, and thus the employee's state law claim was not preempted. The court concluded that such a claim does not "relate to" the plan or attempt to regulate the plan, even though the trial court may have to make determinations of the employee's present and future rights to benefits under the plan to decide if the employee's rights under the employment contract have been violated.

As in *Westinghouse*, the plaintiff in the case at bar claims that his employer breached the terms of the employment contract by refusing to provide him with promised benefits. In *Westinghouse*, the disputed benefit was additional salary, while in the present case, the disputed benefit was the promised credit for plaintiff's prior years of service with other telecommunications employers.

Here plaintiff has a claim against defendant for amounts in addition to pension plan benefits. His action is not against the plan. Rather, his action is against the defendant for failing to uphold its promise to provide benefits in excess of those to which he would otherwise be entitled under the plan. His claim neither concerns the substance of the pension plan nor the plan's regulation. The plan is only incidentally or tangentially involved. Because plaintiff's claim is only tangential to the plan, his claim is not preempted by ERISA. *Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 306 S.E. 2d 519.

[2] Defendant's other assignments of error concern the trial court's denial of defendant's motions for a directed verdict and judgment notwithstanding the verdict. Defendant contends the trial court should have granted its motions because no valid and enforceable contract existed between plaintiff and defendant obligating defendant to bridge plaintiff's prior service within the AT&T (Bell) System for purposes of determining the amount of retirement benefits and vacation time to which plaintiff is entitled.

In its brief defendant contends there was no valid contract "because the evidence established that Ray Bellows' statement concerning bridging was too indefinite to give rise to a valid contract between plaintiff and defendant, and there was no meeting of the minds with respect to bridging of plaintiff's prior service with the AT&T System." The basis of defendant's contention is that there is no evidence as to what the parties meant by the terms "bridging" and "company benefits."

The standard of review on a motion for directed verdict and a motion for judgment notwithstanding the verdict is the same: whether the evidence taken in the light most favorable to the plaintiff is sufficient as a matter of law. *See Huff v. Thornton*, 287 N.C. 1, 9-10, 213 S.E. 2d 198, 205 (1975).

To constitute a valid contract there must be a meeting of the minds; that is, "the parties must assent to the same thing in the same sense. (Citations omitted.)" *Sprinkle v. Ponder*, 233 N.C. 312, 319, 64 S.E. 2d 171, 177 (1951). "Where there is such uncertainty that it cannot be known what is contracted for, the contract is unenforceable. (Citations omitted.)" *Id.* The law, however, does not favor the destruction of contracts on account of uncertainty, and "the courts will, if possible, so construe the contract as to carry into effect the reasonable intent of the parties, if it can be ascertained." *Fisher v. John L. Roper Lumber Co.*, 183 N.C. 486, 490, 111 S.E. 857, 860 (1922). In order to avoid destruction of contracts, courts should attempt to determine the intent of the parties from the language used, construed with reference to the circumstances surrounding the making of the contract. *Chew v. Leonard*, 228 N.C. 181, 44 S.E. 2d 869 (1947).

In the case at bar, we find the promise of Ray Bellows to the plaintiff is sufficiently definite, when the language used is construed in accordance with the attendant circumstances, to create a contract.

The evidence taken in the light most favorable to the plaintiff shows that Ray Bellows told plaintiff that "based on [plaintiff's] past Bell System service and the relationship that existed between Northern Telecom and Bell Canada that if [plaintiff] came to work with Northern Telecom and worked there five years, that [plaintiff's] previous Bell System service would be bridged." Plaintiff specifically advised Ray Bellows on the exact

companies within the AT&T System he had worked for. Ray Bellows told plaintiff that bridging would be an advantage to plaintiff because of plaintiff's previous Bell System service and that "if [plaintiff] came to work that after five years [his] service would be bridged to the application of company benefits." Plaintiff testified that he was familiar with the telecommunications industry and the types of benefits normally offered, and that companies necessarily offered the same benefits in order to remain competitive. Here there is no dispute as to the type of company benefits, including a retirement plan, that defendant normally offers. Defendant admits in its brief that Ray Bellows' statement concerning bridging and company benefits is made "intelligible by reference to established company policy or the retirement plan." Plaintiff gave a definition of "bridging" as he understood it and as it was operating in the communications employment industry at that time:

> Well, bridging within the context of employment and most assuredly within the context of the Bell System, was a reference made to the crediting of previous time that we had worked for that company or related company of any type towards your seniority again for sick time, vacations, pension benefits, seniority for choosing when you could take your vacation because everybody always wanted vacation in July.
>
> . . . As an example, if you worked five years and then you quit and came back to it three years later, after another five years your time would be bridged and you would have ten years service just as if you had worked the full ten years for that company, whether your previous five years had been for that company or another company in the System, and in some cases even companies that were not within the System. That's bridging, as I understand it and as it was operating at that time.

Furthermore, the testimony of defendant's witnesses at trial did not indicate that there was any confusion as to what the terms "bridging" and "company benefits" meant. In their testimony, defense witnesses Ray Bellows and John Brown gave no indication that plaintiff's definition of "bridging," as he understood it and as generally understood in the industry, was incorrect or contrary to their understanding of "bridging." The only true

dispute is whether Ray Bellows promised plaintiff that defendant would bridge his prior Bell System service as an inducement for plaintiff to take the job. The jury found that Ray Bellows made such a promise. Taking the evidence in the light most favorable to the plaintiff, the evidence was sufficient to constitute a valid and enforceable contract.

No error.

Judges BECTON and JOHNSON concur.

FRANCES A. FOX v. J. BRADLEY WILSON, SAM ERBY, JR., AND CARPENTER, BOST, WILSON AND CANNON, P.A., A PROFESSIONAL CORPORATION

No. 8625SC924

(Filed 21 April 1987)

1. **Appeal and Error § 6.2— dismissal of one count of complaint—right of immediate appeal**

The trial court's dismissal of the second count in plaintiff's amended complaint, resulting in the dismissal of plaintiff's claim against defendant professional corporation, affects a substantial right of plaintiff to have determined in a single proceeding the issues of whether she has been damaged by the actions of one, some or all defendants and is thus immediately appealable. N.C.G.S. 1-277 and 7A-27(d).

2. **Attorneys at Law § 5.2— constructive fraud—legal malpractice—erroneous dismissal of allegations**

The trial court erred in dismissing the second count of plaintiff's complaint since the allegations therein, although in large measure repetitive of the first count with respect to defendant attorney, were relevant to plaintiff's claim against defendant attorney for constructive fraud in plaintiff's transfer of a newspaper to a corporation owned by defendant attorney and the other individual defendant and stated a claim for relief for legal malpractice against defendant attorney.

3. **Attorneys at Law § 5.2— attorney fraud—liability of professional corporation—sufficiency of complaint**

The second count of plaintiff's amended complaint stated a claim for relief against defendant professional corporation for acts committed by defendant attorney where it alleged that defendant attorney and another member of defendant professional corporation undertook to represent her with respect to the sale and reacquisition of a newspaper; at all relevant times they were act-

ing within the course and scope of their capacity as "agents, officers and employees" of defendant professional corporation; and at the direction of defendant attorney, the other member of the corporation prepared documents by which the newspaper was fraudulently transferred by plaintiff to a corporation owned by defendant attorney and the other individual defendant.

4. Conspiracy § 2— civil conspiracy—action for damages—sufficiency of complaint

Plaintiff's amended complaint was sufficient to allege a claim for damages caused by acts committed pursuant to a conspiracy, and the trial court erred in dismissing the claim and striking the allegations of conspiracy from the complaint, where plaintiff alleged that the two individual defendants conspired to defraud her in order to obtain ownership of a newspaper, and plaintiff also alleged specified overt acts committed by each defendant by which plaintiff was defrauded and damaged.

APPEAL by plaintiff from *Downs, Judge.* Order entered 30 June 1986 in Superior Court, CALDWELL County. Heard in the Court of Appeals 3 February 1987.

Plaintiff brought this civil action alleging fraud on the part of defendants Erby and Wilson, and legal malpractice on the part of defendant Wilson and defendant professional corporation. Defendants moved to dismiss the complaint pursuant to G.S. 1A-1, Rule 12(b)(6). The trial court dismissed the complaint, but granted plaintiff leave to file an amended complaint.

Within the time specified in the trial court's order, plaintiff filed an amended complaint containing two counts. In Count I of the amended complaint, plaintiff alleged that she and her late husband had owned and operated *The Granite Falls Press,* a newspaper in Granite Falls, N.C. She alleged that after her husband's death in 1982, she and defendant Erby entered into a relationship of trust and confidence in that defendant Erby advised her in connection with her husband's estate and the operation of the newspaper, and assisted her in arranging an eventual sale of *The Granite Falls Press* to a third party in February, 1984. Plaintiff alleged that because of the confidential relationship, defendant Erby knew that she had accepted a note and a security agreement from the purchaser of the newspaper and that he conspired with defendant Wilson to take advantage of that relationship in order that the two of them might acquire ownership of the newspaper for themselves. Count I of the amended complaint included the following allegations:

6. Defendants Erby and Wilson conspired to defraud Plaintiff and did defraud her in the following manner:

(a) Around the first of January, 1985, Defendant Erby went to Plaintiff's home and told her that the owner of the newspaper was going to file in bankruptcy. Defendant Erby told Plaintiff that he and his partner, Defendant Wilson, wanted to buy the newspaper and that Plaintiff should repossess the newspaper assets and sell to Defendants Erby and Wilson. Defendant Erby told Plaintiff that he and Defendant Wilson would "take care of her." Plaintiff did not agree to sell the newspaper to Defendants Erby and Wilson.

(b) Around the first of February, 1985, Defendants Erby and Wilson went to Plaintiff's house. Defendant Wilson told Plaintiff that the owner of The Granite Falls Press was going to file in bankruptcy; that the only way to save the newspaper was to catch the newspaper owner in default and to repossess the newspaper and its assets. At this meeting, and also at various later times, both Defendants Erby and Wilson told Plaintiff that Defendant Wilson and his associate, Bruce Lee Cannon, would represent Plaintiff as her attorney in repossessing the newspaper and its assets; Defendant Wilson also told Plaintiff that if she ever needed to talk with him and he was not available, then she should talk with Bruce Lee Cannon.

(c) Later in February, 1985, Defendant Erby and/or Wilson went to Plaintiff's post office box, took out the check from the owner of the newspaper payable to Plaintiff, for the February installment payment on the above described promissory note, and took the check to Plaintiff's house. Defendant Wilson told Plaintiff that he had checked with the bankruptcy court and that the newspaper owner had, in fact, filed in bankruptcy. Defendant Wilson also told Plaintiff that he had checked with the bank and that the check which he had taken from Plaintiff's post office box was not good. Defendant Wilson had prepared a letter to the owner of the newspaper declaring default on the promissory note; declaring the entire balance of the promissory note due and payable immediately; stating further that Plaintiff would be happy to discuss the transfer of the newspaper and its assets back to Plaintiff in

complete satisfaction of all sums due to Plaintiff pursuant to the promissory note; and requesting that all communications be directed to Bruce Cannon, who was identified as being Plaintiff's attorney. Defendant Wilson prevailed upon Plaintiff to sign said letter, and Defendant Wilson or Defendant Erby did, in fact, mail said letter to the newspaper owner.

(d) Defendants Erby and Wilson both told Plaintiff repeatedly not to worry, that they would take care of her, and that she would get her money.

(e) Unbeknownst to Plaintiff, Defendants Erby and Wilson formed a partnership named "SKAN Enterprises," consisting solely of Defendants Erby and Wilson, for the purpose of holding title to and possession of The Granite Falls Press.

(f) In February and March of 1985, Defendants Erby and Wilson negotiated the transfer of The Granite Falls Press and its assets from The Granite Falls Press, Inc., to Plaintiff.

(g) Defendant Wilson prepared or directed his associate, Bruce Lee Cannon, to prepare documentation to transfer The Granite Falls Press and its assets first to Plaintiff and then from Plaintiff to SKAN Enterprises.

(h) On March 8, 1985, Bruce Lee Cannon, at the direction of Defendants Erby and Wilson, conducted a closing at which The Granite Falls Press and all of its assets were transferred to Plaintiff. Immediately after the newspaper and its assets were transferred to Plaintiff, Bruce Lee Cannon, at the direction of Defendants Erby and Wilson, procured Plaintiff to sign a document which purported to transfer The Granite Falls Press and its assets to SKAN Enterprises.

(i) At all times from January of 1985, through and including March 8, 1985, Defendants Erby and Wilson knew that Plaintiff was owed approximately $173,000.00 pursuant to the above described promissory note, and that Plaintiff had received each and every installment which was due to her pursuant to said promissory note.

(j) When Defendants Erby and Wilson procured Plaintiff to sign the above described default letter, they knew that the then owner of the newspaper was not in default pursuant to

the terms of the promissory note; that the owner of the newspaper had not filed in bankruptcy; and that the check for Plaintiff's February, 1985, installment payment was good.

(k) At various times from January of 1985 through March 8, 1985, Defendants Erby and Wilson knowingly and willfully misrepresented to Plaintiff the financial status of the then owner of The Granite Falls Press for the purpose of arranging for Plaintiff to reacquire The Granite Falls Press and its assets so that Defendants Erby and Wilson could then acquire the newspaper and its assets from Plaintiff.

(l) Defendants Erby and Wilson knowingly and intentionally took advantage of Plaintiff's trust and confidence in Defendant Erby and her trust in Defendant Wilson as Plaintiff's attorney to obtain Plaintiff's signature on the document by which Plaintiff purportedly conveyed The Granite Falls Press and its assets to SKAN Enterprises.

(m) Defendants Erby and Wilson did not explain to Plaintiff the legal significance of the document which purports to transfer The Granite Falls Press and its assets to SKAN Enterprises; Defendants Erby and Wilson knew that Plaintiff would not have signed said document had Plaintiff known the contents and legal significance of the document; and Defendants Erby and Wilson took advantage of Plaintiff's trust in them to obtain Plaintiff's signature on said document without knowing the contents or the legal significance of said document. Plaintiff received the sum of $1,000.00 from Defendants Erby and Wilson in consideration of the transfer of The Granite Falls Press and its assets to SKAN Enterprises.

(n) Prior to the acts of Defendants Erby and Wilson described above, Plaintiff held a promissory note worth approximately $173,000.00 secured by The Granite Falls Press and all of its assets. Now, and as a result of Defendants' acts described above, Plaintiff has nothing.

She alleged that defendant Erby's actions amounted to actual fraud, constructive fraud, and a civil conspiracy to commit fraud.

In Count II of the amended complaint, plaintiff alleged that defendant Wilson and another attorney, who was also an officer and employee of defendant professional corporation, undertook to

represent her in February, 1985, in reacquiring the assets of the newspaper and that a confidential relationship therefore existed between her and defendant Wilson. She incorporated by reference the allegations of Paragraph 6 of Count I and asserted that defendant Wilson's actions amounted to actual and constructive fraud and a civil conspiracy to commit fraud. She also alleged that his acts amounted to legal malpractice. Finally, she alleged that defendant Wilson was acting within the course and scope of his employment with defendant professional corporation, rendering the corporation liable for his acts.

All defendants moved, pursuant to G.S. 1A-1, Rule 12(b)(6), to dismiss the amended complaint. The trial court dismissed Count II of the amended complaint, dismissed the action as against defendant professional corporation, dismissed plaintiff's claim for relief based upon "civil conspiracy," and struck from the complaint those portions which alleged that defendants Erby and Wilson had "conspired" or which referred to a "civil conspiracy." Plaintiff appeals.

Wilson and Palmer, P.A., by W. C. Palmer, for plaintiff appellant.

Sigmon, Clark and Mackie, by Jeffrey T. Mackie, for defendant appellee, Sam Erby, Jr.

Patton, Starnes, Thompson & Aycock, P.A., by Thomas M. Starnes, for defendants appellees, J. Bradley Wilson and Carpenter, Bost, Wilson and Cannon, P.A.

MARTIN, Judge.

[1] The order of the trial court did not dismiss Count I of the amended complaint and thus did not adjudicate all of the claims or the rights and liabilities of all of the parties. The order dismissing Count II did not contain a certification that "there is no just reason for delay" as required by G.S. 1A-1, Rule 54(b) for entry of a final judgment where fewer than all of the claims or parties are disposed of. Therefore the order is interlocutory and we must determine the threshold issue of whether plaintiff's present appeal is premature.

Although it is the general rule that no appeal lies from an interlocutory order, G.S. 1-277 and G.S. 7A-27(d) permit an im-

mediate appeal from an interlocutory order which affects a substantial right. *Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976). We hold that the dismissal of Count II of the amended complaint, resulting in dismissal of plaintiff's claim against defendant professional corporation, affects a substantial right to have determined in a single proceeding the issues of whether she has been damaged by the actions of one, some or all defendants, especially since her claims against all of them arise upon the same series of transactions. *See Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982); *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E. 2d 354, *disc. rev. denied*, 311 N.C. 758, 321 S.E. 2d 136 (1984). The appeal is not premature.

[2] Plaintiff seeks reversal of the order dismissing Count II of her amended complaint. She contends first that the allegations of Count II are sufficient to state claims for relief against defendant Wilson for fraud, both actual and constructive, and for legal malpractice. She also contends that Count II is sufficient to state a claim, based on the doctrine of *respondeat superior*, against defendant professional corporation. Defendants argue, however, that, as to defendant Wilson, the allegations of Count II are mere surplusage because the allegations of Count I are sufficient to allege claims for actual and constructive fraud against him. They contend further that dismissal of the claim against defendant professional corporation was appropriate because the amended complaint makes clear that any alleged wrongdoing on the part of defendant Wilson was not committed in his capacity as an agent or employee of the firm.

In order to withstand a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must make allegations sufficient to satisfy the substantive elements of at least some recognized claim. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979); *Hewes v. Johnston*, 61 N.C. App. 603, 301 S.E. 2d 120 (1983). In considering the motion, the allegations contained within the complaint must be treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282, 79 A.L.R. 3d 651 (1976). "[A] complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in*

support of the claim." Sutton v. Duke, 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970) (emphasis original).

While the allegations of Count II of the amended complaint are, in large measure, repetitive of Count I with respect to defendant Wilson, some new allegations appear. For example, plaintiff alleges in Count II that Wilson entered into an attorney-client relationship with her in February, 1985, and that the very transaction in which she claims she was defrauded occurred during the pendency of that relationship. In order to establish a claim for constructive fraud, a plaintiff must allege facts sufficient to show the creation of a relationship of trust and confidence and that the defendant took advantage of that relationship to plaintiff's detriment. *Terry v. Terry,* 302 N.C. 77, 273 S.E. 2d 674 (1981). A relationship of trust and confidence "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory,* 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). It has long been recognized that the relationship of attorney and client creates such a relationship of trust and confidence. *See Egerton v. Logan,* 81 N.C. 172 (1879); *Lee v. Pearce,* 68 N.C. 76 (1873); *Stilwell v. Walden* 70 N.C. App. 543, 320 S.E. 2d 329 (1984). The allegations of Count II are therefore relevant to plaintiff's claim against defendant Wilson for constructive fraud.

Plaintiff also sought to predicate her claim for legal malpractice upon the allegations of Count II that defendant Wilson, while acting as her attorney, took advantage of the relationship to his own benefit and that of defendant Erby. An attorney "is answerable in damages for any loss to his client which proximately results from . . . the failure to exercise in good faith his best judgment in attending to the litigation committed to his care." *Hodges v. Carter,* 239 N.C. 517, 520, 80 S.E. 2d 144, 146, 45 A.L.R. 2d 1, 4 (1954). "[A]n attorney who makes fraudulent misstatements of fact or law to his client, or who fails to impart to his client information as to matters of fact and the legal consequences of those facts, is liable for any resulting damages which his client sustains." 7 Am. Jur. 2d, Attorneys At Law § 215, at 258 (1980). Taking the allegations of Count II of the amended complaint as true, which we must do at this stage in the litigation, *Smith v.*

Ford Motor Co., supra, we hold that plaintiff has adequately stated a claim for relief for legal malpractice as against defendant Wilson.

[3] Plaintiff also contends that Count II of the amended complaint was sufficient to state a claim for relief against defendant professional corporation for the acts committed by defendant Wilson. We agree. Plaintiff alleged that defendant Wilson and another attorney who was an officer and employee of the professional corporation undertook to represent her with respect to the newspaper, and that at all relevant times they were acting within the course and scope of their capacities as "agents, officers and employees" of the professional corporation. She alleged that, at Wilson's direction, the other attorney prepared documents by which the alleged fraudulent transfer occurred and procured her signature thereon.

Our Supreme Court has held that a professional corporation may be held liable for the misconduct of one of its officers where the officer is apparently acting within the scope of his authority and as agent for the corporation. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Liberally construed, the complaint sufficiently alleges that Wilson was acting within the course and scope of his employment and with the knowledge of at least one other officer of the corporation. No insurmountable bar to recovery against the corporation appears on the face of the complaint and plaintiff's claim against it was, therefore, erroneously dismissed. *Snug Harbor Property Owners Association v. Curran*, 55 N.C. App. 199, 284 S.E. 2d 752 (1981), *disc. rev. denied*, 305 N.C. 302, 291 S.E. 2d 151 (1982).

For the foregoing reasons, we hold that it was error to dismiss Count II of plaintiff's amended complaint. It was also error to dismiss plaintiff's claim against defendant professional corporation and to discharge the corporation as a party defendant to the suit.

[4] Plaintiff also contends that the trial court erred by dismissing her "claim of civil conspiracy as alleged in the Amended Complaint." Although plaintiff has labeled her action as one for "civil conspiracy," there is actually no such thing as an action for civil conspiracy. *Evans v. Star GMC Sales and Service, Inc.*, 268 N.C. 544, 151 S.E. 2d 69 (1966). Our Supreme Court has stated:

> [a]ccurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof —the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable.

Reid v. Holden, 242 N.C. 408, 414-15, 88 S.E. 2d 125, 130 (1955) *quoting* 11 Am. Jur., Conspiracy, § 45. "In civil conspiracy, recovery must be on the basis of sufficiently alleged wrongful overt acts. The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all." *Shope v. Boyer*, 268 N.C. 401, 405, 150 S.E. 2d 771, 773-74 (1966).

A claim for damages resulting from a conspiracy exists where there is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way, and, as a result of acts done in furtherance of, and pursuant to, the agreement, damage occurs to the plaintiff. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981); *Burton v. Dixon*, 259 N.C. 473, 131 S.E. 2d 27 (1963). In such a case, all of the conspirators are liable, jointly and severally, for the act of any one of them done in furtherance of the agreement. *Burton, supra.*

In the present case, plaintiff has alleged that defendants Erby and Wilson conspired to defraud her in order to obtain ownership of the newspaper. She has also alleged that each of them committed certain specific overt acts by which she was defrauded and, as a result of which, she was damaged. These allegations are sufficient to allege a claim for damages caused by acts committed pursuant to a conspiracy. *See Burton, supra.* It was error for the trial court to dismiss the claim and strike the allegations of conspiracy from the amended complaint.

The order appealed from is reversed and this cause is remanded to the Superior Court, Caldwell County for further proceedings.

Reversed and remanded.

Judges PARKER and COZORT concur.

IN RE: PROCEEDINGS FOR THE CONDEMNATION OF A FEE SIMPLE INTEREST IN LAND OWNED BY: R. D. LEE, RACHEL LEE, W. R. SORRELL, CHARLES B. LEE, MARGARET G. LEE, WILLIAM D. LEE, ANN McLEOD LEE, JOHNNIE G. LEE, SHERRY W. LEE, HAZEL F. YOUNG, ISABELLA McKAY YOUNG, BECKER SAND AND GRAVEL COMPANY, INC., DUNN PRODUCTION CREDIT ASSOCIATION, EDGAR R. BAIN, TRUSTEE, AND MRS. CAROL P. PARKER, EXECUTRIX OF THE ESTATE OF E. A. PARKER

No. 8611SC461

(Filed 21 April 1987)

1. **Eminent Domain § 16— condemnation—rights to sand and gravel—compensable interest**

Petitioner sand and gravel company had a compensable interest in land which had been condemned for an airport where a document executed in 1967 by petitioner and the landowner gave petitioner the exclusive right to enter onto the land, mine the land, and to sell the sand and gravel thereon; the duration of the right was for a term of 30 years, renewable for an additional 20 years; and the document was designated a lease by the parties and was recorded in the register of deeds. The interest held by petitioner is compensable under our eminent domain statutes, which define property broadly enough to include profits a prendre. N.C.G.S. § 40A-2(7).

2. **Eminent Domain § 13— condemnation—value of unexercised sand and gravel rights**

In an action in which petitioner sand and gravel company had a property interest in land condemned for an airport and a jury had already determined the fair market value of the entire acreage taken, the proper measure of petitioner's damages was the fair market value of the sand and gravel in place. Petitioner failed to show by credible and convincing evidence the value of its interest where petitioner attempted to prove the value of its mineral rights by "unit times price" valuation evidence; however, petitioner had and proved a compensable interest and was entitled to nominal damages.

3. **Attorneys at Law § 3— condemnation proceeding—attorney formerly representing all landowners—not disqualified**

In an action to determine the value of respondent's interest in condemned land in which respondent's attorney had been retained by all parties with an interest in the land at the original condemnation hearing, the trial court did not abuse its discretion by denying petitioner's motion to require respondent's

attorney to withdraw or to prohibit the use of certain evidence allegedly secured by the attorney while acting as attorney for all property owners.

APPEAL by respondents from *Hobgood, Judge.* Judgment entered 26 September 1985 in Superior Court, HARNETT County. Heard in the Court of Appeals 14 October 1986.

Respondents-appellants R. D. Lee and his wife were the owners in fee simple of a 705-acre tract of land in Harnett County. On 23 March 1967, the Lees entered into a written agreement with petitioner-appellee Becker Sand and Gravel Company which granted petitioner the right to mine the tract for sand and gravel, remove the sand and gravel, process and sell it. The terms of this agreement were that Becker would pay the Lees royalties for the sand and gravel removed, at the rate of ten cents per ton of gravel and five cents per ton of sand. The agreement did not require Becker to begin excavation immediately, but rather allowed the Lees to remain in possession and farm the land until such time as Becker gave notice of its intention to begin operations. Upon receipt of such notice, which had to be given on or before September 15 of any calendar year, the Lees had until the end of the year to remove whatever they wished from the land, such as crops, fences, structures and timber. Becker would have exclusive possession of the land on January 1 following the giving of the notice.

Although Becker did some testing to determine the quantities and locations of the sand and gravel, the notice required by the agreement was never given and the Lees continued to farm the land and actually conveyed a one-half interest in the land to respondent W. R. Sorrell. R. D. Lee has since died, and his widow and children now jointly own his one-half interest.

In 1979, Harnett County instituted proceedings to condemn 34.65 acres of the 705-acre tract for construction of an airport. The county estimated damages at $76,535 but the majority of the appraisers appointed pursuant to statute reported damages at $261,596. The county appealed to the Superior Court and a jury fixed just compensation at $94,600. That judgment was affirmed by this Court in *In re Lee,* 69 N.C. App. 277, 317 S.E. 2d 75 (1984).

The petitioner in this action, Becker Sand and Gravel, then filed a motion in the cause, pursuant to G.S. 40A-55, seeking to

have a jury determine its share of the compensation award based on the 1967 agreement. The respondents are W. R. Sorrell and the heirs of R. D. Lee. A jury trial was held and, over the objections of respondents, experts testified as to their estimates of the amount of sand and gravel recoverable from the condemned tract and its value. Respondents' motion for directed verdict was denied and the jury determined that Becker was entitled to $25,000 of the $94,600 award. Respondents' motions for judgment notwithstanding the verdict and for a new trial were denied. Respondents appeal.

Bain and Marshall by Edgar R. Bain and Phillip A. Fusco for petitioner-appellee.

Johnson and Johnson, P.A., by W. A. Johnson for respondents-appellants.

PARKER, Judge.

Respondents assign as error the denial of their motion for a directed verdict and the denial of their post-trial motions for judgment n.o.v. and a new trial. Respondents also contend that the trial court erred in admitting certain expert testimony for the petitioner and in failing to instruct the jury on the proper measure of damages to be applied.

[1] Respondents first argue that petitioner had no compensable interest in the condemned property. We disagree. The document executed by the Lees and petitioner in 1967 gave Becker the exclusive right to enter onto the land and to mine the land, and to remove and sell the sand and gravel thereon. The duration of this right was for a term of thirty years, renewable for an additional twenty years. The document was designated a "lease" by the parties and was recorded in the Harnett County register of deeds.

The right to enter another's land and take away minerals, or other things of value such as timber or game, is a profit a prendre. *Council v. Sanderlin*, 183 N.C. 254, 111 S.E. 365 (1922). Although there is no right to sell the sand and gravel in place and the substance must be severed from the ground before title passes, *see* 1 Thompson on Real Property § 136 (repl. ed. 1964), such an interest is an estate in the land. *Council, supra.* Thus, the interest held by petitioner in the land owned by respondents is

compensable under our eminent domain statutes, which define "property" as "any right, title, or interest in land . . . and any other privilege or appurtenance in or to the possession, use, and enjoyment of land." G.S. 40A-2(7). This definition is broad enough to include profits a prendre, requiring just compensation to the owner of that interest when the right to enter upon lands is lost through condemnation. *See generally* 2 Nichols on Eminent Domain § 5.14(7) (3d ed. 1985).

However, determining that petitioner is an "owner" of condemned "property," as those terms are defined in the statute, is just the first step toward resolving this controversy. More difficult questions arise in determining the proper measure by which to value petitioner's interest and the proper evidence to prove the damages.

[2] General Statute 40A-64 mandates that the proper measure of just compensation for a taking shall be the fair market value of the property taken. The general rule in valuing the minerals on a tract of land being taken for public use is that the presence of mineable minerals on the land should be taken into consideration when appraising the fair market value of the land, but the minerals should not be valued separately then added onto the fair market value of the land as currently used. *Highway Commission v. Mode*, 2 N.C. App. 464, 163 S.E. 2d 429 (1968). An exception to this rule is recognized where the minerals alone are taken or the rights to the minerals are held by someone other than the holder of the fee. *See 4 Nichols*, § 13.22(1). Here, however, the first jury has already determined the fair market value of the entire acreage taken to be $94,600. Presumably, that jury considered the value, or lack thereof, of the sand and gravel in determining the highest and best use of the land for valuation purposes.

Petitioner's interest in the property was the right to enter and remove the sand and gravel and sell the same. The consideration for the agreement under which petitioner claims an interest in the property was the royalty to be paid to the fee owners when the sand and gravel were removed and sold. Otherwise, the fee owner received no compensation. The question then is what is the proper measure of compensation to one who loses through eminent domain the right to remove the sand and gravel from the property of another when that right has never been exercised and the sand and gravel remain in the ground untouched.

Construing similar agreements, courts in some jurisdictions have concluded that the contract created a profit a prendre and that the fair market value of the interest entitling the holder to compensation was the value of the sand and gravel in place as it lay undisturbed. *See City of Phoenix v. South Bank Corp.*, 133 Ariz. 90, 649 P. 2d 293 (1982); *Bates Sand & Gravel Co., Inc. v. Commonwealth*, 380 Mass. 933, 404 N.E. 2d 81 (1980). In contrast, in *U.S. v. 1,070 Acres of Land*, 52 F. Supp. 378 (M.D. Ga. 1943), applying Georgia law, the United States District Court recognized the claimant's interest in the sand, but analyzed the agreement as an executory contract and concluded that when the government took the land, performance by the fee holder was excused; therefore, claimant had nothing to be paid for in the condemnation proceeding.

The approach taken by the Arizona and Massachusetts courts is consistent with prior North Carolina cases. *See Light Co. v. Horton*, 249 N.C. 300, 106 S.E. 2d 461 (1959); *Council v. Sanderlin*, *supra*; *Highway Commission v. Mode*, *supra*. In our opinion, the proper measure of damages is the fair market value of the sand and gravel in place. In place, unexcavated, the sand and gravel have only a potential value. While the holder of the profit a prendre has an interest in the sand and gravel, ownership of the sand and gravel does not pass until the sand and gravel have been removed. The value of the sand and gravel in place would, therefore, be what a willing buyer would pay a willing seller, neither being under compulsion, in an arm's length transaction for the contract right to quarry the sand and gravel immediately before the condemnation. Factors bearing on this determination would be (i) potential tonnage, (ii) cost of extracting the sand and gravel, (iii) amount of royalty to be paid under the agreement, (iv) cost of transporting and processing the sand and gravel and (v) an available market for sale of the sand and gravel.

In the instant case, petitioner's evidence to support its claim to the condemnation proceeds was in no way correlated to the $94,600 awarded by the first jury. For example, appellee's first witness was its vice president in charge of finance. This witness testified to the amount of sand and gravel on the condemned tract using the test hole data from the original testing of the site in 1967. Based on this data, which included at least two test holes on the condemned portion, the first witness concluded that there

were 323,157 tons of recoverable gravel and 627,906 tons of mineable sand on the condemned tract and an area of approximately four acres surrounding the tract which, as a result of the airport construction, could not be mined. Multiplying these numbers by a price of ten cents per ton for sand and twenty-five cents per ton for gravel, the witness arrived at a value of the condemned tract of $143,573. From this, the witness subtracted $63,708 in royalties payable to the respondents and concluded that the condemned tract was worth $79,865 to petitioner. The witness did not, however, suggest a source for the additional $48,973 needed to make the parties whole under this theory. Another witness for petitioner, certified by the court as an expert in geology, essentially corroborated the earlier witness' testimony with figures varying only slightly. This witness had used data from test holes made in 1981, after the taking. None of these holes were on the condemned land, however.

Petitioner attempted to prove the value of the mineral rights it held by estimating the amount of mineable sand and gravel on the property condemned and multiplying those figures by a set price per unit. However, this "unit times price" method of valuing minerals in place has been soundly rejected by the courts of other jurisdictions and the federal courts with surprising uniformity. *See, e.g., United States v. 339.77 Acres of Land*, 420 F. 2d 324 (8th Cir. 1970); *Georgia Kaolin Co. v. United States*, 214 F. 2d 284 (5th Cir. 1954), *cert. denied*, 348 U.S. 914, 75 S.Ct. 294, 99 L.Ed. 716 (1955); *H. E. Fletcher Co. v. Commonwealth*, 350 Mass. 316, 214 N.E. 2d 721 (1966). *See generally* Annot., 40 A.L.R. Fed. 656 (1978). This rule has been held to be especially applicable to cases, such as the one at bar, where mining operations have not even begun. *See, e.g., Ringwood Co. v. North Jersey District Water Supply Commission*, 105 N.J.L. 165, 143 A. 369 (1928). The rationale underlying this rule is that such evidence is simply too speculative, as it is based upon unknown and uncertain elements which enter into the operation of mining, processing and marketing the minerals. In *United States ex rel. TVA v. Indian Creek Marble Co.*, 40 F. Supp. 811 (E.D. Tenn. 1941), the court addressed the problem in the following language:

> Fixing just compensation for land taken by multiplying the number of cubic feet or yards or tons by a given price per unit has met with almost uniform disapproval of the

> courts. This is true because such valuation involves all of the unknown and uncertain elements which enter into the operation of the business of producing and marketing the product. It assumes not only the existence, but the continued existence of a stable demand at a stable price. It assumes a stable production cost and eliminates the risks all businessmen know attend the steps essential to the conduct of a manufacturing enterprise. . . . No man of business experience would buy property on that theory of value. True it is that quality and quantity have a place in the mind of the buyer and the seller, but the product of these multiplied by a price per unit should be rejected as indicating market value when the willing seller meets the willing buyer, assuming both to be intelligent. Values fixed by witnesses on such a basis are practically worthless, and should not be accepted. To the extent the valuation fixed by any witness contains this speculative element, to the same extent is its value as evidence reduced.

Id. at 822.

The trial court did not err in admitting this "unit times price" valuation evidence, as the rule on expert testimony allows testimony based upon data learned from reliable scientific technique and absolute certainty is not required. *See State v. Catoe*, 78 N.C. App. 167, 336 S.E. 2d 691 (1985), *disc. rev. denied*, 316 N.C. 380, 344 S.E. 2d 1 (1986). The testimony substantiated that the test hole data used by petitioner's experts was relied upon in the field of sand and gravel mining. We do hold, however, that standing alone this evidence was insufficient to support any award for petitioner. The evidence was too speculative and petitioner's case lacked several critical elements necessary to allow a jury to make a reasoned decision as to the value of petitioner's interest in the condemned land. There was no evidence presented on the cost of extraction of the minerals. No evidence was offered tending to show the costs of processing or transporting the minerals. The testimony of one witness was that it would have been necessary for petitioner to build a processing plant on the site, but no evidence was presented as to the cost or even the feasibility of such a project. Finally, petitioner failed to show that there was even a market for the sand and gravel in 1979. *See United States v. 121.20 Acres of Land*, 333 F. Supp. 21 (E.D.N.C.

1971). In fact, the evidence was to the contrary. The long period of nonuse permits the inference that no market existed. Petitioner had not begun operations on the remaining land at the time of the condemnation and, in the first trial, a former vice president of the company had testified that mining the condemned land had not been economically feasible up until that date. *See In re Lee*, 69 N.C. App. at 285, 317 S.E. 2d at 80.

We conclude that petitioner failed to show by credible and convincing evidence the value of its interest in the condemned land. However, since petitioner does have and proved a compensable interest but failed to prove its value, the petitioner is entitled to nominal damages. *Light Co. v. Horton, supra.* Therefore, the verdict and award in favor of petitioner should be vacated and the case remanded to the trial court for entry of an award of nominal damages. The foregoing discussion and holding resolve respondents' assignments of error related to expert testimony, directed verdict and new trial and obviate the need to further consider error in the jury instructions.

Petitioner cross-assigns as error the failure of the trial court to find as a matter of law that respondents were estopped to assert that petitioner had no interest in the condemned land. The basis for this argument was that respondents had argued in the first trial that the presence of the mineral rights increased the value of the land. However, we need not address this question as any error would be harmless in light of our earlier conclusion that petitioner did, in fact, have a compensable interest in the land.

[3] Petitioner also cross-assigns as error the denial of its pretrial motion to require Attorney W. A. Johnson to withdraw as counsel for respondents-appellants and its alternative motion for a protective order prohibiting the use of certain evidence allegedly secured by W. A. Johnson while acting as attorney for petitioner. Attorney Johnson was retained by all parties with an interest in the condemned land at the original condemnation proceeding. Those parties included both petitioner and respondent in this case. Attorney Johnson was then retained by respondents-appellants to represent them in petitioner-appellee's action to recover a share of the condemnation award.

The Code of Professional Responsibility was in effect at the time of this motion. Canon 5 of the Code required attorneys to "exercise independent professional judgment on behalf of a client." At the time of the motion, Attorney Johnson no longer represented petitioner; therefore, the only concern was that confidences Johnson learned while representing petitioner might be used against it in the second case. However, petitioner failed to convince the trial judge who heard the motions, Superior Court Judge D. B. Herring, that there was the possibility of any prejudice. Such a ruling is discretionary with the trial judge and is not generally reviewable on appeal. *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 275, 300 S.E. 2d 230, *rev'd in part on other grounds*, 309 N.C. 695, 309 S.E. 2d 193 (1983). Judge Herring's ruling was supported by the evidence and was not an abuse of discretion.

Because petitioner failed to meet its burden of proving the damages it sustained as the result of the condemnation, the award must be vacated. However, because petitioner did prove it had an interest in the condemned land, the case is remanded to the Superior Court of Harnett County for entry of an award of nominal damages.

Vacated and remanded.

Judges PHILLIPS and COZORT concur.

JIMMY LEE DULL, PHILLIP E. INGRAM AND WILLIAM EAGLE v. MUTUAL OF OMAHA INSURANCE COMPANY, UNITED BENEFIT LIFE INSURANCE COMPANY, RICHARDSON AGENCY OF WINSTON-SALEM, INC.

No. 8621SC1022

(Filed 21 April 1987)

1. Rules of Civil Procedure § 56— 12(b)(6) motion denied—summary judgment not precluded

The denial of a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6), does not prevent the court from allowing a motion for summary judgment based on the materials permitted by N.C.G.S. § 1A-1, Rule 56.

2. Unfair Competition § 1— termination of insurance agency contract—violation of exclusivity provision—summary judgment for defendants proper

In an action in which plaintiffs sought damages for the termination of their contracts as insurance agents for selling policies of other insurance companies, the trial court did not err by granting defendants' motion for summary judgment on unfair and deceptive trade practice claims where the agency agreements did not involve the sale of any goods between the parties; plaintiffs did not forecast any evidence that consumers were prevented from purchasing insurance contracts on an open market as a result of defendants' acts or that defendants' competitors were in any way foreclosed from marketing insurance products to the public; plaintiffs were free under the terminable at will provisions of the contracts to terminate their relationship with Mutual and United and sell the products of other companies; the non-brokerage restrictions placed upon plaintiffs merely prevented them from using defendants' resources to promote and sell the products of competitors; and the facts of the case disclose no acts or practices on the part of defendants which may be held inequitable, oppressive, offensive to public policy or substantially injurious to consumers. N.C.G.S. § 75-1.1.

3. Unfair Competition § 1— termination of insurance agency contract—no violation of N.C.G.S. § 58-54.4

The trial court properly granted defendants' motion for summary judgment in an action arising from the cancellation of plaintiffs' insurance agency contracts by defendant insurance company for selling policies of other companies where there was no substantial evidence sufficient to sustain an issue of fact as to defendants' violation of either N.C.G.S. § 58-54.4(2) or N.C.G.S. § 58-54.4(4) in that there were mutual rights to terminate the agency contracts at will; there was no evidence of any act of coercion or intimidation tending to result in unreasonable restraint of the business of insurance; and there was no evidence that defendants' acts caused the dissemination of any deceptive or misleading statement with respect to the business of insurance.

4. Contracts § 27.2— termination of insurance agency contracts—breach of implied provisions of good faith—summary judgment for defendants proper

In an action arising from the termination of plaintiffs' insurance agency contracts with defendants for selling policies for other companies, the trial court did not err by granting defendants' motions for summary judgment on plaintiffs' claims that defendants breached implied provisions of their contracts by not acting in good faith where the Mutual contract provided that each agent would procure applications for insurance "only in the Company or its partially or wholly owned subsidiaries"; plaintiffs' agency agreements explicitly provided that they were terminable at the will of either party upon notice; no additional restrictions upon the rights of either party to terminate the agreement were contained therein; and there was no evidence that defendants exercised the termination at will clause of the contracts with the intent to wrongfully deprive plaintiffs of any commissions or other benefits to which they were entitled or for any other wrongful or unconscionable purpose.

APPEAL by plaintiffs from *Bailey, Judge*. Order entered 20 August 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 February 1987.

Plaintiffs brought this action seeking damages which they allegedly sustained when defendants terminated their contracts as insurance agents. Defendant Mutual of Omaha (Mutual) is engaged in the business of selling health and accident insurance in North Carolina. Defendant United Benefit Life Insurance Co. (United), a wholly-owned subsidiary of Mutual, is engaged in the business of selling life insurance in North Carolina. Defendant Richardson Agency of Winston-Salem, Inc. (Richardson) is the general agent for defendants Mutual and United in a thirty-three county territory of the State. Plaintiffs are former insurance agents for Mutual and United who operated out of the offices of the Richardson Agency.

In their complaint, plaintiffs alleged that they each entered into contracts with Mutual and United, respectively, pursuant to which they were independent contractors entitled to sell life, accident and health insurance offered by defendants and by companies other than defendants. Plaintiffs alleged that during the late 1970's and early 1980's sales of life insurance products offered by United began to decline and many existing policies were permitted to lapse by policyholders. They alleged that the decline was directly attributable to the increasing availability, through competing insurance companies, of "current interest sensitive products" (CISP) which were not then offered by United to the majority of plaintiffs' clientele. Subsequently, plaintiffs began to sell, in some instances replacing existing United policies, CISP offered by defendants' competitors. In response to their actions, plaintiffs alleged that in October 1982, defendant Richardson initiated a policy requiring independent agents such as plaintiffs to deal only in products offered by Mutual and United, except with regard to "surplus lines, rejects and requests for coverage not offered by Mutual or United." When plaintiffs continued to broker life insurance products of defendants' competitors, their agency contracts with both United and Mutual were terminated. Plaintiffs alleged that defendants, by instituting the non-brokerage policy and by terminating plaintiffs' contracts, breached their implied covenant of good faith in the performance of the contracts

and engaged in unfair and deceptive trade practices in violation of G.S. 75-1.1.

In their answers, defendants admitted that plaintiffs were independent contractors under contracts with United and Mutual which were terminable at the will of either party upon written notice and that plaintiffs' contracts with United and Mutual were terminated. Defendants denied the remaining material allegations of the complaint. United and Mutual asserted a counterclaim against plaintiffs alleging that plaintiffs had tortiously interfered with United's contractual rights with its customers and other insurance agents.

Defendants' motion for dismissal pursuant to G.S. 1A-1, Rule 12(b)(6) was denied, the cause was set for trial, and extensive discovery ensued between the parties. Defendants thereafter moved, pursuant to G.S. 1A-1, Rule 56, for summary judgment with respect to plaintiffs' claims. Plaintiffs appeal from the entry of an order granting the motion.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by B. Ervin Brown, II, for plaintiffs appellants.

Allman, Spry, Humphreys, Leggett & Howington, P.A., by William D. Spry, Jr., and David C. Smith, for defendants appellees.

MARTIN, Judge.

The issue to be decided in this appeal is whether defendants were entitled to summary judgment with respect to plaintiffs' claims. Plaintiffs argue that summary judgment was improper, contending that the previous denial of defendants' motions to dismiss plaintiffs' claims pursuant to Rule 12(b)(6) established "the law of the case" and precluded the subsequent entry of summary judgment dismissing those claims. In any event, they contend, genuine issues of material fact exist as to whether defendants have engaged in unfair and deceptive trade practices and have breached an implied covenant of good faith in the performance of the independent agent contracts with plaintiffs. We reject these contentions and affirm the trial court's ruling.

[1] There is no merit in plaintiffs' initial contention that summary judgment in favor of defendants was precluded because de-

fendants' earlier motion to dismiss for failure to state a claim had been denied. A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint; a motion for summary judgment pursuant to Rule 56 presents the question of whether, based on materials presented to the court in addition to the pleadings, there is any genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Barbour v. Little*, 37 N.C. App. 686, 247 S.E. 2d 252, *disc. rev. denied*, 295 N.C. 733, 248 S.E. 2d 862 (1978). Therefore, the denial of a Rule 12(b)(6) motion to dismiss does not prevent the court from allowing a subsequent motion for summary judgment based on the materials permitted by Rule 56. *Id.*; *Alltop v. J.C. Penney Co.*, 10 N.C. App. 692, 179 S.E. 2d 885, *cert. denied*, 279 N.C. 348, 182 S.E. 2d 580 (1971).

[2] Plaintiffs also contend that the trial court erred in granting defendants' motion for summary judgment because questions of material fact exist as to whether defendants' actions constitute unfair and deceptive trade practices or amount to a breach of an implied covenant of good faith in the performance of the agency contracts. Summary judgment is appropriate when there are no genuine issues 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). In ruling on the motion, 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). However, questions of fact which are immaterial to the legal issues are insufficient to defeat summary judgment. *Kessing, supra.*

The parties conducted extensive discovery in this action, including interrogatories and numerous depositions. In addition, affidavits were filed in support of, and in opposition to, the motion for summary judgment. Admittedly, there are many facts about which the parties disagree, however, none of these facts are material to our decision. The undisputed facts disclose that each plaintiff entered into a contract with Mutual which specified that his duties would be "[t]o procure applications from insurable risks for health and accident and life insurance, only in the Company or its

partially or wholly owned subsidiaries . . . ." The Mutual contracts, as well as the contracts between plaintiffs and United, specified that either party had the right to terminate the contract at any time upon written notice to the other. The contracts between plaintiffs and Mutual provided that nothing contained therein would be construed to create the relation of employer and employee; the contracts between plaintiffs and United contained a similar provision and specifically provided that the agent would be considered an independent contractor. Even so, plaintiffs were provided office space, telephones, postage, and general office support services by Richardson.

It is also undisputed that, beginning in the late 1970's and early 1980's, each plaintiff became licensed with other competing life insurance companies and began to sell the policies of these other companies, in some cases replacing existing United policies. In November 1982, defendants, in response to increasing brokerage activity by plaintiffs and other Mutual and United agents, implemented a policy consistent with the terms of the Mutual agency contract, restricting brokerage activities by agents, except for surplus lines, rejects and requests for coverage not offered by Mutual or United. Plaintiffs did not conform to that policy. Their contracts were terminated by defendants early in 1984.

Plaintiffs argue that the restrictions placed upon them by defendants amount to an unfair and deceptive trade practice, violative of G.S. 75-1.1, which makes unlawful "[u]nfair methods of competition in or affecting commerce, and unfair and deceptive acts or practices in or affecting commerce. . . ." G.S. 75-1.1 has been held sufficiently broad to provide a remedy for unfair and deceptive practices in the insurance industry, *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E. 2d 271 (1980), and to include practices involving the relationship of company and agent. *See Phillips v. Integon Corp.*, 70 N.C. App. 440, 319 S.E. 2d 673 (1984).

Our Supreme Court has explained that a practice will be considered unfair "when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980).

"A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *Id.* at 264, 266 S.E. 2d at 622. A practice will be considered deceptive "if it has the capacity or tendency to deceive." *Id.* at 265, 266 S.E. 2d at 622. The determination of whether specific conduct amounts to an unfair or deceptive practice in violation of G.S. 75-1.1 is a question of law for the court. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E. 2d 677 (1985); *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 314 S.E. 2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984).

Plaintiffs cite *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 16 L.Ed. 2d 587, 86 S.Ct. 1501 (1966) in support of their argument that defendants, by prohibiting plaintiffs from selling competitive life insurance products, committed an unfair trade practice. In *Brown*, the FTC brought suit against the nation's second largest shoe manufacturer alleging that their franchise contracts unfairly limited competition in violation of Section 5 of the FTC Act, interpretations of which are often looked to by North Carolina courts for guidance in construing the language of G.S. 75-1.1. Under the terms of Brown's franchise contracts, in return for special services and benefits from Brown, retail shoe store operators were required to promise that they would deal primarily with Brown and not purchase comparable lines of shoes from Brown's competitors. The United States Supreme Court concluded that these agreements unfairly limited competition by restricting the freedom of the shoe retailers to purchase in an open market, thereby substantially limiting trade between the retailers and Brown's competitors.

In our view, *Brown* is not analogous to the present case. Initially, we note that the franchise agreement in *Brown* created, between the parties, a buyer-seller relationship which was essential to the Court's decision. The effect of the restrictive contract was to prevent purchasers from buying on an open market and to foreclose Brown's competitors from a substantial number of customers. None of those factors are present in the case *sub judice*. The agency agreements do not involve the sale of any goods between the parties. Plaintiffs have not forecast any evidence that consumers were prevented from purchasing insurance contracts on an open market as a result of defendants' acts or that defendants' competitors were in any way foreclosed from marketing in-

surance products to the public. Moreover, plaintiffs were free, under the terminable at will provisions of the contracts, to terminate their relationship with Mutual and United and sell the products of other companies. The non-brokerage restrictions placed upon plaintiffs merely prevented them from using defendants' resources to promote and sell the products of competitors. The facts of this case disclose no acts or practices on the part of defendants which may be held to be inequitable, oppressive, offensive to public policy, or substantially injurious to consumers.

[3] Plaintiffs also contend that genuine issues of fact exist as to whether defendants have, by their actions, violated provisions of G.S. 58-54.4, which declares certain practices to be unfair or deceptive when committed in connection with the business of insurance. Specifically, plaintiffs argue that defendants, by prohibiting Mutual and United agents from brokering the policies of competitor insurance companies, have coerced the agents to "refrain from counseling with their clients about the advantages of CISP products," and have thereby caused the dissemination of deceptive and misleading statements. They contend that this conduct is violative of G.S. 58-54.4(2) and G.S. 58-54.4(4). The commission of any act or practice prohibited by G.S. 58-54.4 is, as a matter of law, an unfair and deceptive trade practice in violation of G.S. 75-1.1. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E. 2d 174 (1986).

From the record before us, we find no substantial evidence sufficient to maintain an issue of fact as to defendants' violation of either of the subsections of G.S. 58-54.4 cited by plaintiffs. There is simply no evidence, especially in view of the mutual rights of the parties to terminate the agency agreements at will, of any "act of . . . coercion or intimidation . . . tending to result in unreasonable restraint of . . . the business of insurance." G.S. 58-54.4(4) (1982). Likewise, plaintiffs have produced no evidence that defendants' acts caused the dissemination of any deceptive or misleading statement with respect to the business of insurance. G.S. 58-54.4(2) (1982). Defendants were properly granted summary judgment with respect to plaintiffs' claim for relief alleging violations of G.S. 75-1.1.

[4] In their other claim for relief, based on breach of contract, plaintiffs alleged that defendants did not deal with plaintiffs in

good faith, thereby breaching implied provisions of the contract. On appeal from summary judgment for defendants, plaintiffs make the same general assertions and argue that genuine issues of fact exist as to whether defendants acted in good faith in enforcing the non-brokerage policy and in terminating their agency agreements. We disagree.

It is well-established that there is implied in every contract an obligation of good faith and fair dealing by each party in the performance of the agreement. *Weyerhaeuser Co. v. Godwin Building Supply Co.*, 40 N.C. App. 743, 253 S.E. 2d 625 (1979). In view of the provision of the Mutual contract which provided that each agent would procure applications for insurance "only in the Company or its partially or wholly owned subsidiaries . . . ," no genuine issue exists with respect to whether defendants failed to act in good faith by enforcement of the non-brokerage policy. In addition, plaintiffs' agency agreements explicitly provided that they were terminable at the will of either party upon notice; no additional restrictions upon the rights of either party to terminate the agreement were contained therein. Even if, as plaintiffs contend, the agreements carried, in addition to the general requirement to perform in good faith, an implied good faith limitation upon defendants' rights to terminate at will, there is no substantial evidence sufficient to create a genuine issue of fact as to defendants' breach of such a duty. The record discloses no evidence that defendants exercised the termination-at-will clause of the contract with the intent to wrongfully deprive plaintiffs of any commissions or other benefits to which they were entitled or for any other wrongful or unconscionable purpose. There is no evidence that defendants have, since the termination, withheld from plaintiffs any compensation to which plaintiffs were entitled pursuant to the agreements.

We hold that defendants are entitled to summary judgment as to each of plaintiffs' claims for relief. The decision of the Superior Court is affirmed.

Affirmed.

Judges PARKER and COZORT concur.

STATE OF NORTH CAROLINA v. DUANE THOMAS

No. 8626SC767

(Filed 21 April 1987)

1. **Robbery § 4.2— armed robbery—endangering life—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss a charge of robbery of Mrs. Nicoll with a dangerous weapon where, although defendant contended that there was no substantial evidence to show that his violence was not solely for the purpose of taking Mr. Nicoll's property, Mrs. Nicoll had been standing about a foot from her husband during defendant's assault upon him and she had seen defendant reach for her husband's notebook, knock him to the ground, and take his wallet and watch. Defendant clearly made a threat to Mrs. Nicoll's life which continued through the time he took Mrs. Nicoll's shoulder bag. N.C.G.S. § 14-87(a).

2. **Robbery § 5.2— armed robbery—erroneous instructions on threat to life—not plain error**

The trial court erred in an armed robbery prosecution by instructing the jury that defendant was guilty if he had carried property away from Mrs. Nicoll by threatening her or her husband's life where the indictment charged only that Mrs. Nicoll's life had been threatened. However, defendant did not object at trial and there was no plain error because the evidence that Mrs. Nicoll's life was threatened was overwhelming.

3. **Robbery § 6.1— two convictions—one sentencing hearing—consecutive sentences not required**

Consecutive sentences for two armed robbery convictions were vacated and the case remanded for resentencing where it appeared from the record that the trial judge mistakenly believed that N.C.G.S. 14-87(d) required consecutive sentences even though the offenses were being disposed of in the same sentencing hearing.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 11 February 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 January 1987.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan for the State.

Assistant Public Defender James E. Williams, Jr., for defendant-appellant.

GREENE, Judge.

Defendant was tried for robbery with a dangerous weapon from George Nicoll and robbery with a dangerous weapon from

Laurence Dorilla Nicoll. The jury returned a verdict of guilty to both charges, and the trial judge sentenced defendant to 28 years in prison.

The evidence offered during the course of the trial tends to show that on or about 11:30 p.m. on 18 April 1985, Mr. and Mrs. Nicoll pulled their car into the parking lot of their apartment complex in Charlotte. They got out of the car—he from the driver's side, she from the passenger's. As the couple turned toward the apartment building, defendant stood in front of Mr. Nicoll with what appeared to be a shotgun. Two inches of the barrel protruded from a dark cloth. The defendant held the end of the barrel about nine inches from Mr. Nicoll's face. He reached for a notebook protruding from Mr. Nicoll's pocket. When Mr. Nicoll began to explain he had no money there, defendant hit him across the face and he fell to the ground, bleeding from the wound. Then defendant straddled Mr. Nicoll and took his wallet and wristwatch.

During this time, Mrs. Nicoll was about a foot away from her husband. She witnessed the entire assault. After the defendant had taken Mr. Nicoll's wallet and watch, he stepped away from him, and Mrs. Nicoll went toward her husband. As she did, the strap of her shoulder bag slipped off her shoulder onto her upper arm. With the weapon still in his hand, defendant took the shoulder bag from her arm and left. The defendant did not strike Mrs. Nicoll, never pointed the gun at her and never spoke to her.

At the end of State's evidence, defendant moved to dismiss both counts of robbery with a dangerous weapon for insufficient evidence. The trial court denied the motions and instructed the jury on both charges. The jury returned with verdicts of guilty. The trial judge gave the presumptive sentence of 14 years for each charge and ordered the sentences to run consecutively.

Defendant appeals and presents three issues: (1) whether the trial court erred in denying defendant's motion to dismiss the charge of robbery of Mrs. Nicoll with a dangerous weapon, (2) whether the court's instructions to the jury were proper, and (3) whether the court committed error in sentencing the defendant.

I

[1] Defendant argues on appeal there was insufficient evidence he robbed Mrs. Nicoll with a dangerous weapon.

The relevant statute is N.C. Gen. Stat. Sec. 14-87(a):

> Any person or persons who, *having in possession* or with the use or threatened use of any firearms or other dangerous weapon, implement or means, *whereby the life of a person is endangered or threatened,* unlawfully takes or attempts to take personal property from another . . . shall be guilty of a Class D felony. (Emphasis added.)

The crimes described by this statute are commonly known as armed robbery and attempted armed robbery. Defendant contends the record contains no evidence he took Mrs. Nicoll's shoulder bag by threatening or endangering her life with a firearm.

The possession, use or threatened use of a firearm is a separate element from "endangering or threatening" the life of a person in the crime of armed robbery. *State v. Joyner*, 295 N.C. 55, 63, 243 S.E. 2d 367, 373 (1978). The mere possession of a firearm during the course of taking property is not a violation of N.C. Gen. Stat. Sec. 14-87(a), *State v. Gibbons*, 303 N.C. 484, 279 S.E. 2d 574 (1981); the firearm must be used to endanger or threaten the life of a person as that element is the essence of armed robbery. *State v. Covington*, 273 N.C. 690, 161 S.E. 2d 140 (1968).

Defendant contends Mrs. Nicoll's life was not endangered or threatened within the meaning of the statute because there was no substantial evidence to show his violence was not solely for the purpose of taking Mr. Nicoll's property. He contends he took Mrs. Nicoll's shoulder bag as an afterthought and though the evidence might be sufficient to prove common law robbery, it was not sufficient to prove armed robbery. He concedes if he had taken Mrs. Nicoll's shoulder bag while pointing the gun at her or told her to give him her shoulder bag and verbally threatened her life, he would have committed armed robbery. However, it is clear from the evidence that defendant did threaten the life of Mrs. Nicoll. Defendant's assault of Mr. Nicoll in order to take his

property spoke louder than any words of threat could have spoken to Mrs. Nicoll.

Mrs. Nicoll was aware of defendant's taking her purse from her arm; she did not resist. She had been standing about a foot from her husband during defendant's assault upon him. While standing there, she had seen defendant reach for her husband's notebook then knock him to the ground. She had then seen defendant take her husband's watch and wallet. It is clear from this evidence that defendant made a threat to Mrs. Nicoll's life. The threat did not end when defendant finished robbing Mr. Nicoll but continued through the time he took Mrs. Nicoll's shoulder bag. Evidence of a continuing threat meets the element of endangering or threatening a person's life in an armed robbery charge. *See State v. Joyner*, 295 N.C. 55, 64, 243 S.E. 2d 367, 373 (1978). Accordingly, we find the trial court did not err in denying defendant's motion to dismiss the charge of robbery of Mrs. Nicoll with a dangerous weapon.

II

[2] Defendant next complains of a jury instruction to which he did not object at trial.

In Case No. 85CRS31915, the trial court instructed the jury that if they found beyond a reasonable doubt that, among other things, defendant had carried property away from Mrs. Nicoll without her voluntary consent "by endangering or threatening *her or her husband's life* with the use or threatened use of a gun," then it would be their duty to return a verdict of guilty of robbery with a firearm. The indictment in Case No. 85CRS31915, however, charged only that *Mrs. Nicoll's life* was endangered or threatened.

The trial court erred in permitting the jury to convict upon a theory not supported by the bill of indictment. *See State v. Taylor*, 301 N.C. 164, 170, 270 S.E. 2d 409, 413 (1980); *State v. Dammonds*, 293 N.C. 263, 272, 237 S.E. 2d 834, 840-41 (1977). The question then is whether this error is prejudicial.

In *State v. Brown*, 312 N.C. 237, 248, 321 S.E. 2d 856, 863 (1984), the Supreme Court stated that such error is generally prejudicial. But where there was no timely objection to the error, we must decide whether the instructions constitute "plain error"

under *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). *State v. Brown* at 248, 321 S.E. 2d at 862; *see also* N.C. Rules of App. Pro., Rule 10(b)(2).

The *Odom* test is whether there is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice could not have been done, . . . or where it can fairly be said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *Odom*, at 660, 300 S.E. 2d at 378. (Citations omitted.) Under *Odom*, the defendant has the burden of proving the existence of plain error and must establish that without the error the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986).

We have reviewed the record and hold defendant has not shown the jury probably would have reached a different verdict had the trial court not made the error complained of. The evidence that defendant, in the presence of Mrs. Nicoll, violently struck and injured Mr. Nicoll in order to obtain Mr. Nicoll's property and then took Mrs. Nicoll's shoulder bag is uncontradicted. Therefore, the evidence that Mrs. Nicoll's life was threatened is overwhelming. It is not probable that the instructional error had an impact on the jury's finding of guilt. Therefore, there was no plain error in the court's instruction.

III

[3] N.C. Gen. Stat. Sec. 14-87(d) provides in pertinent part: "Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder."

From the record it appears the trial court was under the impression N.C. Gen. Stat. Sec. 14-87(d) requires consecutive sentences for a defendant convicted of more than one armed robbery charge even though the offenses are being disposed of in the same sentencing hearing. After the entry of guilty verdicts, the trial judge noted upon sentencing:

> Well, we don't have much discretion in these matters and even though Mr. Thomas has a prior—has prior convictions, I think that I'll impose the presumptive sentence in each case but they have to run consecutively.

We held in *State v. Crain*, 73 N.C. App. 269, 326 S.E. 2d 120 (1985), "where two or more armed robbery offenses are being disposed of in the same sentencing proceeding, the sentences are not required by G.S. 14-87 to be consecutive to one another. . . ." *Id.* at 271, 326 S.E. 2d at 122. The sentencing court may impose consecutive sentences, but is not required to do so.

Because of the mistaken belief of the trial judge, the consecutive sentence imposed in No. 85CRS31915 is vacated and remanded for the trial court's determination, in its discretion, whether to impose consecutive or concurrent sentences.

IV

For the reasons stated herein, the consecutive sentence imposed in No. 85CRS31915 is vacated and remanded for resentencing in accordance with this opinion. In the denial of defendant's motion to dismiss No. 85CRS31915 and the court's instruction to the jury, we find no error.

Chief Judge HEDRICK and Judge JOHNSON concur.

GARY G. DUNLAP v. LINDA R. DUNLAP

No. 8628DC476

(Filed 21 April 1987)

Divorce and Alimony § 30— marital property—settlement awards for personal injury

The trial court erred in an equitable distribution action by concluding that a monetary settlement received by plaintiff for injuries sustained during the course of his employment and a personal injury settlement defendant received as a result of an injury she sustained at Brendle's Department Store constituted marital property. The parties stipulated that both settlement awards did not include any compensation for lost wages and medical expenses and on remand the trial court should determine whether the settlement awards were compensation for pain and suffering, disability, disfigurement, loss of limbs, lost earning capacity, loss of services, or loss of consortium in accordance with the burdens of proof established in *Johnson v. Johnson*, 317 N.C. 437.

APPEAL by plaintiff from *Roda, Judge*. Judgment entered 4 March 1986 in District Court, BUNCOMBE County. Heard in the Court of Appeals 28 October 1986.

Gray, Kimel & Connolly by Joseph A. Connolly for plaintiff appellant.

John E. Shackelford for defendant appellee.

COZORT, Judge.

This is an equitable distribution action. Plaintiff appeals contending that the trial court erred in concluding (1) that the monetary settlement he received for injuries he sustained during the course of his employment with Southern Railway is marital property, and (2) that the personal injury settlement defendant received as a result of an injury she sustained at Brendle's Department Store is marital property. Finding the reasoning of *Johnson v. Johnson*, 317 N.C. 437, 346 S.E. 2d 430 (1986) applicable to this case, we vacate and remand.

In this equitable distribution action the parties stipulated to the following facts with respect to the settlements they received for their injuries:

> 1. That the Plaintiff, Gary G. Dunlap, has been employed by Southern Railway for a number of years.
>
> 2. That during the course of his employment he received an injury to his right knee.
>
> 3. That the Plaintiff, Gary G. Dunlap, received the sum of Twenty Thousand Seven Hundred Fifty Four Dollars and 83/100 ($20,754.83) as a result of injuries Plaintiff suffered to his right knee.
>
> 4. That said sum of $20,754.83 did not include any compensation for medical expenses and did not include any compensation for loss [*sic*] time from work.
>
> 5. That said sum of $20,754.83 has accumulated interest in the amount of $1,909.66. Said interest having been accumulated since the Plaintiff received the net sum of $20,754.83 as a result of injury to his knee.
>
> 6. That the Defendant, Linda R. Dunlap, received the sum of $2,282.00 as a result of an injury that she sustained at Brendle's Department Store.

7. That said sum of $2,282.00 represents a net amount to the Defendant and did not include any payments for loss [*sic*] time from work or past medical expenses.

8. That the net amount received by the Plaintiff, Gary G. Dunlap, of $20,754.83 plus the interest of $1,909.66 which accrued on said amount and the net amount of $2,282.00 received by the Defendant, Linda R. Dunlap, were received by the respective husband and wife prior to the separation of the parties hereto.

Based on these stipulated facts the trial court concluded that "the funds received by the Plaintiff for the injuries that he suffered to his right knee and the sums received by the Defendant for injuries she sustained are marital property and that an equal distribution of said property would be equitable." Plaintiff contends this conclusion is in error and that the proceeds from the settlements are separate property.

Johnson v. Johnson, 317 N.C. 437, 346 S.E. 2d 430 (1986), was decided after the judgment was entered and the appeal was taken in this case. In *Johnson* the issue was "whether proceeds representing a settlement recovered by a spouse upon a claim for his or her personal injuries sustained during the marriage of the parties constitute marital property subject to distribution upon dissolution of the marriage or whether they are the separate property of the injured spouse." 317 N.C. at 439, 346 S.E. 2d at 431. In *Johnson* our Supreme Court reversed the decision of a panel of the Court of Appeals which had held that a married person's personal injury settlement or recovery is his "sole and separate property," *Johnson v. Johnson*, 75 N.C. App. 659, 660, 331 S.E. 2d 211, 212 (1985), and adopted an "analytic approach" in determining whether a spouse's personal injury settlement is marital or separate property. The analytic approach focuses on what the award was intended to replace. The Supreme Court explained that

> [g]enerally, under the analytic approach the personal injury award may be seen as composed of three potential elements of damages: (1) those compensating the injured spouse for pain and suffering, disability, disfigurement, or lost limbs; (2) those compensating for lost wages, lost earning capacity, and medical and hospital expenses; and (3) those compensating

> the non-injured spouse for loss of services or loss of consortium. . . .
>
> . . . Those courts which employ the analytic approach consistently hold that the portion of an award representing compensation for non-economic loss—i.e., personal suffering and disability—is the separate property of the injured spouse; the portion of an award representing compensation for economic loss—i.e., lost wages, loss of earning capacity during the marriage, and medical and hospital expenses paid out of marital funds—is marital property.

Johnson v. Johnson, 317 N.C. at 447-48, 346 S.E. 2d at 436.

In adopting the analytic approach the Supreme Court held that the injured spouse

> [has] the burden of showing what amount or proportion of the whole [award] represents compensation for loss of, or injury to, his "separate property," to wit, compensation for his pain and suffering, disfigurement, loss of earning capacity subsequent to separation, lost wages subsequent to separation, hospital and medical expenses incurred subsequent to separation. [The injured spouse] may satisfy that burden by a preponderance of the evidence. Should the [non-injured spouse] claim that any portion of the "net settlement" represents compensation for loss of, or injury to, *her* separate property, she may attempt to so prove by a preponderance of the evidence, if the pleadings are found to allege such a claim.

Id. at 454, 346 S.E. 2d at 439-40. The Supreme Court further held that

> [b]ecause each element of recovery comprising [a personal injury settlement] must necessarily compensate for loss of, or injury to, the injured spouse's separate property, *or* the non-injured spouse's separate property, *or* the marital property of the spouses, any portion of the [personal injury settlement] not proved by a preponderance of the evidence to compensate for loss to a spouse's separate property must, necessarily, fall into the category of "marital property." Therefore, *to the extent* that the parties fail to prove that the [personal injury settlement] compensates for injury to

> separate property and is therefore properly classified as separate property in the amounts proved, the proceeds of the [injured spouse's] personal injury [settlement] shall be classified as marital property [footnote omitted] and subject to distribution according to N.C.G.S. § 50-20. [Footnote omitted.]

Id. at 454, 346 S.E. 2d at 440.

In so holding the court overruled, in a footnote, *Loeb v. Loeb*, 72 N.C. App. 205, 209, 324 S.E. 2d 33, 38, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985), and *McLeod v. McLeod*, 74 N.C. App. 144, 157, 327 S.E. 2d 910, 918, *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985), to the extent those cases held that the Equitable Distribution Act "creates a *presumption* that all property acquired by the parties during the course of the marriage is 'marital property.' " *Johnson v. Johnson*, 317 N.C. at 454 n. 4, 346 S.E. 2d at 440 n. 4. In overruling *Loeb v. Loeb* and *McLeod v. McLeod*, the court stated that:

> Several equitable distribution states have provided by statute a presumption that property acquired during the marriage is marital property. [Citations omitted.] The North Carolina General Assembly, unlike legislatures in those states, did not choose to provide such a presumption by statute, and this Court will not infer one by judicial decision. We believe that the legislature's decision not to provide by statute for a marital property presumption was deliberate. Moreover, we perceive no need for such a presumption, express or implied, in our equitable distribution scheme. Under our statutory scheme, without the aid of any presumption, assets, the classification of which is disputed, must simply be labeled for equitable distribution purposes *either* as "marital" *or* "separate," depending upon the proof presented to the trial court of the nature of those assets.

Id.

We find the Supreme Court's reasoning in *Johnson v. Johnson* applicable to the settlements at issue in this case. Therefore, we vacate and remand this case for proceedings consistent with the opinions expressed herein.

The parties have stipulated that both settlement awards do not include any compensation for lost wages and medical ex-

penses. On remand, the trial court should determine, based upon the evidence presented by the parties in accordance with the burdens of proof established in *Johnson v. Johnson*, whether (1) the settlement awards are compensation for pain and suffering, disability, disfigurement, loss of limbs of the injured spouse; (2) lost earning capacity; and, (3) if the pleadings are amended to allege such a claim, whether the settlement awards compensate the non-injured spouse for loss of services or loss of consortium. If the parties fail to prove that the settlement awards are compensation for injury to their separate property, then the proceeds of the settlement shall be classified as marital property in the amounts not proved to be separate property. *Johnson v. Johnson*, 317 N.C. at 454, 346 S.E. 2d at 440.

Vacated and remanded.

Chief Judge HEDRICK and Judge MARTIN concur.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS v. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE, INC., AND W. HORACE LOWDER, DEFENDANTS; AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* FOR STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENNELL H. RATTERREE, DAVID P. LOWDER, JUDITH R. LOWDER HARRELL, EMILY P. LOWDER CORNELIUS AND MYRON P. LOWDER, INTERVENING DEFENDANTS

No. 8620SC939

(Filed 21 April 1987)

Receivers § 12.1— allocation of receivership fees and expenses—no error

The trial court did not err by allocating receivership fees and expenses among several corporations in the proportion that each corporation's net assets available for distribution to shareholders after liquidation bore to the total of that figure for all the corporations where, beginning with the initial order appointing the receivers, the corporate defendants were operated as one integrated business entity; the receivers apparently did not and could not assign each expense to specific corporations; Consolidated, which had only one asset, a farm which was leased to another defendant, was not charged with

any expenses prior to a liquidation order; Consolidated was required to pay only those expenses involved in liquidating and dissolving the corporations and was relieved from any disability for expenses incurred in either the tax disputes or in managing the other corporations; the total value of the assets of each corporation after liquidation and payment of liabilities is a reasonable indication of the amount of time and effort expended for that corporation while in receivership; and defendants did not show that the application of the trial court's formula will subject any corporation to a burden out of proportion to the benefit it received.

APPEAL by defendants from *Seay, Judge.* Order entered 3 June 1986 in Superior Court, STANLY County. Heard in the Court of Appeals 4 February 1987.

This appeal concerns the allocation of liability for receivership fees and expenses among several corporations subject to the receivership. This litigation began on 11 January 1979, both as a shareholder's derivative suit on behalf of All Star Mills, Inc. (Mills), Lowder Farms, Inc. (Farms), and their subsidiary companies, and as an individual action against W. Horace Lowder. Plaintiffs' complaint alleged, in part, that W. Horace Lowder misappropriated corporate opportunities for his own benefit by wrongfully diverting assets of Mills and Farms to other corporate defendants. On 9 February 1979 the trial court appointed two temporary receivers to manage the Lowder family corporations, including Mills, Farms, Consolidated Industries, Inc. (Consolidated), All Star Foods, Inc. (Foods), All Star Industries, Inc. (Industries), and Airglide, Inc. (Airglide). Airglide was later discharged from the receivership. The court also enjoined W. Horace Lowder from interfering with the receivers. That order was upheld on appeal. *See Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E. 2d 247 (1981).

After a jury verdict for plaintiffs on 25 January 1984, the trial court imposed a constructive trust in favor of Mills on the assets of Hatcheries, Foods, and Industries. Shortly thereafter, on 30 April 1984, the trial court made the receivership permanent and authorized the liquidation and dissolution of the corporations. That order was affirmed in *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E. 2d 649, *disc. review denied*, 314 N.C. 541, 335 S.E. 2d 19 (1985). For additional background information and a more complete procedural history of this case *see also Lowder v. All Star Mills, Inc.*, 82 N.C. App. 470, 346 S.E. 2d 695 (1986);

Lowder v. Doby, 79 N.C. App. 501, 340 S.E. 2d 487, *disc. review denied*, 316 N.C. 732, 345 S.E. 2d 388 (1986); *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 699, 300 S.E. 2d 241, *disc. review denied*, 308 N.C. 387, 302 S.E. 2d 250 (1983); *Lowder v. Mills, Inc.*, 60 N.C. App. 275, 300 S.E. 2d 230, *aff'd in part and rev'd in part*, 309 N.C. 695, 309 S.E. 2d 193 (1983).

On six occasions during the receivership, the trial court has approved various fees and expenses for the receivers and for the attorneys and accountants which they employed. Included among these fees and expenses are those incurred in the negotiation and settlement of tax disputes between the corporate defendants, excepting Consolidated and Airglide, and the Internal Revenue Service and the North Carolina Department of Revenue. Apparently, none of the fees or expenses approved have been paid.

On 3 June 1986 the trial court allocated the receivership's expenses. The order stated that those expenses incurred prior to the 30 April 1984 order be apportioned between Mills, Farms, Industries, Hatcheries, and Foods, but not Consolidated. The expenses incurred after 30 April 1984 were allocated among all the above corporations, including Consolidated. The court ordered that the expenses be allocated in the proportion that each corporation's net assets, available for distribution to shareholders after liquidation, bore to the total of that figure for all the corporations. From the order apportioning the receivership expenses, defendants appeal.

Moore & Van Allen, by Jeffrey J. Davis, for the plaintiff-appellees.

Kluttz, Hamlin, Reamer, Blankenship & Kluttz, by William C. Kluttz, Jr., for the receivers-appellees.

Boyce, Mitchell, Burns & Smith, by Lacy M. Presnell, III, for the defendant-appellants.

Hopkins, Hopkins & Tucker, by William C. Tucker, for the intervening defendant-appellants.

EAGLES, Judge.

Defendants argue that the method the trial court used to allocate the receivership's expenses constitutes error. We disagree.

Those who benefit from the receivership should bear its expense and, where several parties benefit, the expense should be allocated in proportion to the benefit received. *See Bank v. Country Club*, 208 N.C. 239, 179 S.E. 882 (1935); *Graham v. Carr*, 133 N.C. 449, 45 S.E. 847 (1903). Because the benefit received from the receivers' services will largely depend on the facts in each case, the trial court has discretion in apportioning the expenses of receivership. *See Simmons v. Allison*, 119 N.C. 556, 26 S.E. 171 (1896); *First Federal Sav. & Loan Ass'n of Gainesville v. Stephens*, 226 Ga. 867, 178 S.E. 2d 170 (1970). After examining the record, we cannot say that the trial court abused its discretion in allocating the expenses based on the value of the net assets of each corporation after liquidation.

Defendants argue that the trial court's method, by itself, does not fairly and equitably determine the benefit received by each corporation. Instead, defendants contend, the method forces shareholders of those corporations whose assets and liabilities are more easily managed to pay an unfair portion of the receivership's expenses. Consolidated, for example, has only one asset, a farm which it leased to Hatcheries. Because of the simplicity of Consolidated's business activity, defendants state that the trial court's formula requires Consolidated's shareholders to pay for expenses which were actually incurred in managing the business affairs of those corporations with more complex operations. Consequently, defendants argue that each expense and fee should be separately attributed to the specific corporation(s) it benefited.

Those arguments, however, ignore the realities of the situation. Beginning with the initial order appointing the receivers, the corporate defendants were operated as one integrated business entity. As a result, the receivers apparently did not, and could not, assign each expense to specific corporations. In addition, the trial court's order did not charge Consolidated with any of the receivership's expenses incurred prior to the 30 April 1984 order. From what appears in the record, the order requires Consolidated to pay only those expenses incurred in liquidating and dissolving the corporations and relieves it from any liability for expenses incurred in either the tax disputes or in managing the other corporations.

Moreover, given that it was impossible, and perhaps even inappropriate, to allocate each particular receivership expense to

the particular corporation(s) which incurred it, the method employed by the trial court here is as fair and reasonable a method as the circumstances would allow. The receivers were initially charged with managing the various corporations. Subsequently, they were charged with the duty of liquidating and dissolving them. The total value of the assets of each corporation after liquidation and payment of liabilities is a reasonable indication of the amount of time and effort expended for that corporation while in receivership. Furthermore, defendants have not shown that the application of the trial court's formula will subject any corporation to a burden out of proportion to the benefit it received.

In the past, our courts have allocated the expense of receivership through a pro rata method designed to place liability in proportion to the benefit received. *See Bank v. Country Club, supra; Kelly v. McLamb*, 182 N.C. 158, 108 S.E. 435 (1921); *Graham v. Carr, supra.* Absent a showing by defendants that there is a better method of accomplishing that objective, that is also feasible, we cannot hold that the trial court abused its discretion.

Defendants' remaining assignments of error are without merit.

Affirmed.

Judges WELLS and GREENE concur.

LUEDELL McK. HIGHTOWER v. OBEY HIGHTOWER

No. 8612DC932

(Filed 21 April 1987)

1. Divorce and Alimony § 19.4— modification of alimony—insufficient showing of changed circumstances

The trial court did not err in a motion in the cause to reduce alimony payments by failing to conclude that plaintiff wife's increase in income, coupled with defendant husband's plans to remarry, justified a decrease in the amount of alimony he was required to pay where the original order was clearly calculated on the assumption that plaintiff would be able to secure a job paying at least minimum wage, so that her doing so did not substantially alter the relative position of the parties, and defendant did not offer such evidence of in-

creased expenses or other factors which would make his situation unduly burdensome.

2. **Appeal and Error § 16.1; Rules of Civil Procedure § 58— oral order—notice of appeal—authority to enter written findings**

In a motion in the cause to modify alimony in which a notice of appeal was given after the court entered an oral order, the trial court was not divested of authority to make written findings supporting the reasonableness of attorney fees awarded to the wife or findings supporting a judgment for civil contempt. N.C.G.S. § 1-294; N.C.G.S. § 1A-1, Rule 58.

3. **Divorce and Alimony § 19— modification of alimony—attorney fees—evidence sufficient**

There was sufficient evidence in an action to modify alimony to find that plaintiff wife was without means to defray expenses where plaintiff and defendant submitted detailed affidavits of their incomes and expenses, and plaintiff's own uncontradicted evidence showed that her monthly expenses exceeded her monthly income by $632.85.

APPEAL by defendant from *Pate, Judge*. Judgment entered 13 May 1986 in CUMBERLAND County District Court. Heard in the Court of Appeals 9 March 1987.

Plaintiff and defendant were married on 10 October 1964. No children were born of this marriage. On 6 January 1986, the couple were divorced. Prior to the divorce, plaintiff brought an action for alimony. At the time of the hearing on 12 January 1984 defendant was unemployed but had an income of approximately $2,000 per month as a result of payments for a total disability. Plaintiff, although unemployed, was found by the court to be capable of employment and able to secure a job paying at least minimum wage. The court's order directed the payment of permanent alimony in the amount of $550 per month.

On 9 April 1986, defendant filed a motion requesting modification of the previous order of support. He alleged that the income and assets of his former wife had substantially increased and that his own ability to support her had decreased due to additional obligations and dependents. Plaintiff denied these allegations and filed a motion in the cause seeking enforcement of the prior order, alleging that the defendant was wilfully in violation of the order and in arrears on his payments to her. Plaintiff also requested attorney's fees. At the hearing, plaintiff testified that she was 43 years of age and that she was employed at Cape Fear Valley Hospital and earned $4.35 or $4.45 an hour and that her

take-home pay was $538.00 per month. Her duties included cleaning. Defendant testified that he intended to remarry shortly and that his fiancee had two children; he needed to be able to support his new family. Still totally disabled, he was receiving a tax-free income of $2,092 per month; that amount had increased by $40 since 1984. Both parties submitted affidavits of expenses and income.

The trial court entered the following order in open court:

> COURT: Alright. In this case based upon the evidence that has been presented to the Court, the only change in the actual circumstances of the parties, will be that in 1984 Mrs. Hightower was unemployed; and as of this date she is employed. Now, the judgment that was entered in January of 1984, actually entered the twenty-fifth day of October, signed the twelfth day of January, 1984. Paragraph Two. The Judge entered a finding that the plaintiff is capable of supporting herself through a job paying the minimum wage, which would indicate to the Court that the award of alimony in that order took into account that she is entitled to some support. Therefore I find no change in circumstances since the entry of that order that would justify a modification of the order. Therefore the motion is denied.
>
> MR. MITCHELL: May I approach the bench?
>
> COURT: Yes.
>
> (At this point there was a bench conference.)
>
> COURT: He has to pay arrearage and a, three hundred dollars in Counsel fees.
>
> MR. BLACKWELL: Thank you, Your Honor.
>
> MR. MITCHELL: Mr. Hightower desires to give notice of appeal to the North Carolina Court of Appeals. And I'll have Judge Pate enter an order on that.

On 22 May the court signed a formal written order including specific findings of fact and conclusions of law. Defendant was held in contempt of court, the execution of which was suspended on condition of payment of arrearages and $300 attorney's fees. From this order, defendant appealed.

No brief for plaintiff-appellee.

Harris, Sweeny and Mitchell, by Ronnie M. Mitchell, for defendant-appellant.

WELLS, Judge.

[1] Defendant first contends that the court erred in failing to conclude that plaintiff's increase in income, coupled with defendant's own plans to remarry, justified a decrease in the amount of alimony he is required to pay. We disagree.

Upon a showing of changed circumstances, an order for alimony may be modified at any time. N.C. Gen. Stat. § 50-16.9(a). However, the change must be substantial, and the moving party has the burden of proving that the award is either inadequate or unduly burdensome. *Medlin v. Medlin*, 64 N.C. App. 600, 307 S.E. 2d 591 (1983). In the original order, the court clearly calculated the amount of alimony on the assumption that plaintiff would be able to secure a job paying at least minimum wage. That plaintiff has now done so has not substantially altered the relative positions of the parties. With respect to his own change in plans, defendant did not offer such evidence of increased expenses or other factors which would make his situation unduly burdensome. This assignment is overruled.

[2] Defendant next contends that the trial court erred in making no findings of fact in its oral order as to the reasonableness of attorney's fees and as facts supporting his judgment of civil contempt. Defendant acknowledges that findings were made in the subsequent written order, but argues that, upon defendant's notice of appeal given in court after the oral order was entered, the cause was removed from the trial court and it had no power to proceed further and enter a written judgment. Defendant bases his theory upon G.S. § 1-294. That statute provides in pertinent part:

> *Scope of stay; security limited for fiduciaries.* When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.
>
> . . .

Defendant misinterprets the meaning of the phrase "all further proceedings." This Court has previously held that pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 58 of the Rules of Civil Procedure, after "entry" of judgment in open court, a trial court retains the authority to approve the judgment and direct its prompt preparation and filing. *See Condie v. Condie*, 51 N.C. App. 522, 277 S.E. 2d 122 (1981). Such authority necessarily includes making appropriate findings of fact and entering appropriate conclusions of law, and the giving of notice of appeal in open court after "entry" of judgment does not divest the trial court of such authority.

[3] Defendant contends that there was insufficient evidence from which the court could find that plaintiff was without means to defray expenses of the action and that the trial court erred in awarding plaintiff partial payment of attorney's fees. We disagree. Plaintiff submitted a detailed affidavit of her income and expenses, as did defendant. Plaintiff's uncontradicted evidence showed that her monthly expenses exceeded her monthly income by $632.85. This was sufficient to support the trial court's finding that plaintiff lacked sufficient means to sustain the burden of attorney's fees in this action. *See Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E. 2d 129 (1985). This assignment of error is overruled, and the order of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

CURTIS E. DIXON v. BRYCE A. STUART, ALEXANDER R. BEATY AND SAM H. OWEN INDIVIDUALLY AND IN THEIR CAPACITIES AS AGENTS OF THE CITY OF WINSTON SALEM, NORTH CAROLINA; AND THE CITY OF WINSTON SALEM, NORTH CAROLINA, A MUNICIPAL CORPORATION

No. 8621SC1197

(Filed 21 April 1987)

Torts § 1; Trespass § 2— intentional infliction of emotional distress—claim sufficiently stated

Plaintiff sufficiently stated a claim for intentional infliction of emotional distress where, although he did not allege specific acts, he alleged that the individual defendants ridiculed and harassed him in the workplace and that those acts were intended to and did cause plaintiff to suffer extreme emotional distress. If the individual defendants are found liable for intentional infliction of emotional distress, it cannot be said that it was beyond doubt that plaintiff could prove no set of facts that would entitle him to recover from their employer, defendant Winston-Salem. N.C.G.S. 1A-1, Rule 12(b)(6).

APPEAL by plaintiff from *Morgan, Judge.* Order entered 12 August 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 April 1987.

This is a civil action wherein plaintiff seeks compensatory and punitive damages for loss of employment opportunities, injured professional standing, emotional and physical illness resulting in permanent injury, and suffering of humiliation and embarrassment.

In his complaint, plaintiff alleged that he, as well as defendants Stuart, Beaty and Owen, were at all relevant times employed by the City of Winston-Salem. Plaintiff also alleged as follows:

> 5. Defendants Bryce A. Stuart, Alexander Beaty and Sam Owen . . . unlawfully agreed and conspired to intentionally hinder, obstruct, and injure plaintiff's career advancement with the City of Winston Salem and to induce the City of Winston Salem not to promote plaintiff by:
>
> (a) placing and continuing plaintiff in job assignments outside of his training and expertise;
>
> (b) denying plaintiff training benefits;
>
> (c) denying plaintiff work opportunities;

(d) falsely lowering plaintiff's job performance evaluations;

(e) ridiculing plaintiff in the workplace;

(f) denying plaintiff office benefits afforded other employees;

(g) downgrading his job status;

(h) harassing plaintiff in the workplace as to deny him quiet enjoyment of the workplace;

(i) denying plaintiff access to the grievance process of the City of Winston Salem;

(j) in other respects to be shown at trial.

6. All of the foregoing acts occurred since the summer of 1983 and are part and parcel of ongoing conspiracy to deny plaintiff promotional opportunities and said acts have been willful, malicious, and with reckless disregard of plaintiff's contractual rights of employment and without justification.

7. As a direct result of the acts of the individual defendants, plaintiff has been denied employment opportunities; injured in his professional standing; suffered severe emotional and physical illness which has resulted in permanent injury, and has suffered humiliation and embarrassment in the workplace.

. . .

9. The acts of the individual defendants were extreme and outrageous conduct.

10. The acts of the individual defendants were intended to cause and did in fact cause plaintiff to suffer extreme emotional distress.

11. As a result of the acts of the individual defendants, plaintiff has suffered humiliation, embarrassment, loss of professional status, physical illness and severe mental distress, including loss of quiet enjoyment in the workplace.

Defendants moved that the action be dismissed pursuant to Rule of Civil Procedure 12(b)(6), on the ground that it fails to state

a claim upon which relief can be granted. The trial court granted the motion and thereby dismissed the action. Plaintiff appealed.

W. Steven Allen for plaintiff, appellant.

Womble Carlyle Sandridge & Rice, by Anthony H. Brett, for defendants, appellees.

HEDRICK, Chief Judge.

A complaint is deemed sufficient to withstand a motion to dismiss under Rule 12(b)(6) where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim. Detailed fact pleading is not required. *Deitz v. Jackson*, 57 N.C. App. 275, 291 S.E. 2d 282 (1982). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Property Owners Assoc. v. Curran*, 55 N.C. App. 199, 284 S.E. 2d 752 (1981), *disc. rev. denied*, 305 N.C. 302, 291 S.E. 2d 151 (1982). In analyzing the sufficiency of the complaint, the complaint must be liberally construed. *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E. 2d 562 (1981).

In the present plaintiff's complaint, he alleges that defendants Stuart, Beaty and Owen "ridicul[ed]" and "harass[ed]" him in the workplace, that the acts of these defendants "were intended to cause and did in fact cause plaintiff to suffer extreme emotional distress." We cannot say that it appears beyond doubt that plaintiff can prove no set of facts in support of these allegations which would entitle him to relief from these defendants for intentional infliction of emotional distress. Extreme and outrageous ridiculing and harassing has been grounds for recovery under this tort before. *See, e.g., Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E. 2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140 (1986); *Woodruff v. Miller*, 64 N.C. App. 364, 307 S.E. 2d 176 (1983). Although in the present plaintiff's complaint the specific acts constituting the ridicule and harassment were not alleged, such specificity is not required where, as here, the complaint is sufficient to apprise the defendant of what the claim is and what events produced it. *See Deitz v. Jackson*, 57 N.C. App. 275, 291 S.E. 2d 282 (1982).

If defendants Stuart, Beaty and Owen are found liable for intentional infliction of emotional distress, we cannot say that it appears beyond doubt that plaintiff can prove no set of facts that would then entitle him to recover from their employer, defendant Winston-Salem. In *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E. 2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140 (1986) this Court held that there was a jury question as to whether the plaintiff could recover for intentional infliction of emotional distress from the employer of the person who was allegedly harassing her, under the doctrine of respondeat superior.

Plaintiff's complaint in the present case discloses no insurmountable bar to recovery under the tort of intentional infliction of emotional distress, and it gives defendants adequate notice of the nature and extent of a legally recognized claim. Therefore, dismissal of plaintiff's claim was improper.

We need not and do not reach the question of whether it is possible for plaintiff to prove facts which would entitle him to relief under any tort other than intentional infliction of emotional distress.

Reversed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. ALLEN RICHARD BLYTHE AND DANIEL LESTER BRYSON

No. 8630SC1186

(Filed 21 April 1987)

Receiving Stolen Goods § 2— indictments charging receiving stolen goods—conviction for possession of stolen goods—invalid

The trial court lacked authority to try, convict and sentence defendants for possession of stolen goods on indictments which charged that defendants "did receive and have" stolen firearms. Receiving stolen goods and possession of stolen goods are separate and independent statutory offenses under N.C.G.S. 14-71 and N.C.G.S. 14-71.1, neither of which is a lesser included offense of the other; the indictment of defendant Blythe specifically charged him

with violation of N.C.G.S. 14-71, which makes it a crime to receive stolen goods; an indictment containing identical "receive and have" language has been held sufficient to charge one with receiving stolen goods; defendants had no reason to believe they were being charged with anything other than receiving stolen goods in violation of N.C.G.S. 14-71; and "receive" and "possess" are material words which must be used in indictments to distinguish the two offenses, while the word "have" is surplusage.

ON certiorari to review judgments of *Burroughs, Judge.* Judgments entered 19 January 1984 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 6 April 1987.

The Haywood County grand jury returned the following true bill of indictment:

INDICTMENT—RECEIVING STOLEN GOODS—83CRS4415

STATE OF NORTH CAROLINA — In the General Court of Justice
HAYWOOD COUNTY — Superior Court Division

STATE
v
ALLEN RICHARD BLYTHE

Date of Offense: May 29, 1983
Offense in Violation of G.S. 14-71

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did receive and have 9 rifles and/or shotguns (see list attached) and 4 pistols of unknown brand and serial numbers, the personal property of Walter Wells valued at $2000.00, knowing and having reasonable grounds to believe the property to have been feloniously stolen, taken and carried away pursuant to a violation of section 14-54 of the Gen. Statutes of North Carolina.

An identical bill of indictment was returned as to defendant Bryson, except that the statutory reference was omitted. Both defendants pleaded not guilty. A jury returned verdicts finding each defendant guilty of felonious possession of stolen goods and

the trial court sentenced each defendant to an active prison term. After entry of the judgments but before expiration of the session, defendants moved to arrest judgment on the ground that they could not be convicted of possession of stolen goods when they were charged with receiving stolen goods. The court denied the motion. Both defendants gave notice of appeal, however, their appeals were subsequently dismissed due to the failure of their alleged counsel to properly serve a record on appeal.

On 30 June 1986, defendants, through their present counsel, filed a motion for appropriate relief, alleging that they were denied effective assistance of counsel in connection with their direct appeal, and, after an evidentiary hearing, the trial court so found. This Court granted certiorari on 7 July 1986 to review defendants' trial as upon direct appeal.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General T. Buie Costen, for the State.

Reid G. Brown, for defendant-appellants.

MARTIN, Judge.

The single issue presented by this appeal is whether defendants could properly be convicted of possession of stolen goods based upon the indictments returned against them. For the following reasons, we hold that the trial court erred in submitting to the jury the issue of defendants' guilt of the offense of possession of stolen goods and in denying defendants' motion to arrest judgment.

Receiving stolen goods and possession of stolen goods are separate and independent statutory offenses under G.S. 14-71 and 71.1, neither of which is a lesser-included offense of the other. *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981). Our Supreme Court has held, therefore, that a defendant cannot be convicted of possession of stolen goods on an indictment charging him with receiving stolen goods. *Id.*

The purpose of an indictment is (1) to give the defendant notice of the charge against him in plain intelligible and explicit language so that he may prepare his defense and be in a position to plead former acquittal or former conviction in the event he is

again brought to trial for the same offense; and (2) to enable the court to pronounce judgment in the event of a conviction. *State v. Dorsett*, 272 N.C. 227, 158 S.E. 2d 15 (1967); *State v. McBane*, 276 N.C. 60, 170 S.E. 2d 913 (1969). The indictments in the present case are captioned "Receiving Stolen Goods." The indictment of defendant Blythe specifically charges him with violation of G.S. 14-71, which makes it a crime for one to receive stolen goods. The bodies of the indictments charge that defendants did "receive and have" stolen goods. An indictment containing identical "receive and have" language has been held sufficient to charge one with receiving stolen goods. *State v. Matthews*, 267 N.C. 244, 148 S.E. 2d 38 (1966). Defendants had no reason to believe that they were being charged with anything other than receiving stolen goods in violation of G.S. 14-71.

The State argues, however, that the use of the word "have" in the indictments was sufficient to charge defendants with possession of stolen goods in violation of G.S. 14-71.1. We disagree. As noted, *supra*, both receiving stolen goods and possession of stolen goods are offenses created by statute. "Where the words of a statute are descriptive of the offense, the indictment should follow the language and expressly charge the described offense on the defendant, so as to bring it within all the *material words* of the statute." (Emphasis added.) *State v. Liles*, 78 N.C. 496, 498 (1878); *State v. Gibbs*, 234 N.C. 259, 66 S.E. 2d 883 (1951). The statutory provisions of G.S. 14-71 and 71.1 are identical except for the substitution of the words "possess" and "possessor" in G.S. 14-71.1 for the words "receive" and "receiver" in G.S. 14-71. *State v. Davis, supra.* The words "receive" and "possess" are thus material words which must be used in indictments to distinguish the two offenses. The word "have" in the present indictment is surplusage.

The court lacked jurisdiction to try, convict and sentence defendants for possession of stolen goods on indictments charging them with receiving stolen goods. The defendants' judgments must be arrested.

Judgments arrested.

Judges WELLS and JOHNSON concur.

ROBERT E. BAKER, JR., CLAIMANT v. NORTH CAROLINA DEPARTMENT OF CORRECTION, DEFENDANT

No. 8610IC920

(Filed 21 April 1987)

State § 8.3— negligence of prisoner—closing window on finger of another prisoner

The Industrial Commission erred by concluding that an inmate, Willingham, was not negligent in closing a window on the finger of another inmate where the findings made by the Commission disclosed that Willingham knew that plaintiff and others were cleaning windows outside the building, particularly the windows in the sickroom, and that he closed the window in the sickroom to keep the water being used to clean the windows from getting into the sickroom. The uncontroverted findings of fact dictate the conclusion that Willingham was negligent and that such negligence was a proximate cause of the injury to plaintiff's finger.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission. Order entered 4 June 1986. Heard in the Court of Appeals 6 April 1987.

On 17 December 1984, plaintiff filed a claim for damages under the North Carolina Tort Claims Act, G.S. 143-291. Plaintiff sought to recover $6,500 in damages, alleging that his finger had been injured when an employee of defendant, Eastern Willingham, closed a window on it.

Following a hearing the Commission made the following uncontroverted findings of fact:

1. On 9 July 1984, plaintiff Robert Baker, Jr. was an inmate at the Iredell County Unit of the North Carolina Department of Correction. He was assigned to wash windows of a dormitory which included an area referred to as the sick room.

2. As plaintiff and others worked around the building, Eastern Willingham, another inmate, observed the work and went to the sick room to close the windows so that water would not get into the room and onto the beds. Reaching between two bunk beds, Willingham shut the window, which opened from the top into the room, against the right index finger of plaintiff whom Willingham had not seen. At the time of the accident, plaintiff had been clearing dirt from the bottom of the window so that he could close it.

3. Willingham had requested the task of cleaning the sick room in which he and other inmates slept, and he had been assigned the job as one of his tasks. He received emergency gain time for his work in the sick room in addition to regular gain time from working in the clothes room.

4. When Willingham shut the window, he knew that plaintiff and others were cleaning the windows but he had no reason to know that plaintiff was at the very window Willingham was shutting or that plaintiff was in any position of danger. Willingham gave no warning prior to his closing the window.

The Commission further found "[i]n closing the window, Willingham had the duty to take reasonable care in avoiding harm to anyone that he knew to be in the area. Having no knowledge of plaintiff's presence, he breached no duty to plaintiff."

Based on these findings, the Commission concluded that on 9 July 1984, Eastern Willingham was an "involuntary servant and an agent" of defendant, acting within the scope of his agency and servitude at the time he closed the window in the sickroom, but that he was not negligent in closing the window. From an order denying his claim, plaintiff appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Randy Meares, for the State.

N. C. Prisoner Legal Services, Inc., by Marvin Sparrow, for plaintiff, appellant.

HEDRICK, Chief Judge.

The one question presented on this appeal is whether the Commission erred in concluding that Willingham "was not negligent in his closing of the window of the sick room."

The law imposes upon every person who enters upon an active cause of conduct the positive duty to exercise ordinary care to protect others from harm and a violation of such duty constitutes negligence. *Williamson v. Clay*, 243 N.C. 337, 90 S.E. 2d 727 (1956); *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 326 S.E. 2d 632 (1985).

The Commission in the present case made the finding that Willingham "had no reason to know that plaintiff was at the very window Willingham was shutting," and based on this finding concluded that Willingham was not negligent in closing the window. The evidence and other findings made by the Commission do not support the finding that Willingham had no reason to know that plaintiff was at the window. The findings made by the Commission disclose that Willingham knew that plaintiff and others were cleaning the windows outside the building and particularly the windows in the sickroom. Indeed, Willingham closed the window in the sickroom to keep the water being used to clean the windows from getting into the sickroom.

The only conclusion to be drawn from the findings of fact already made by the Commission is that Willingham failed to exercise ordinary care to protect plaintiff from harm when he closed the window to the sickroom on plaintiff's finger without first determining whether his course of action in closing the window could be done without injuring anyone when he knew or should have known that plaintiff and others were washing the windows outside the sickroom. The uncontroverted findings of fact dictate the conclusion that Willingham was negligent and that such negligence was a proximate cause of the injury to plaintiff's finger. Thus, the order of the Commission must be reversed and the cause remanded for an entry of an order concluding that Willingham was negligent and such negligence was a proximate cause of the injury to plaintiff's finger. The Commission must conduct a further hearing to determine the amount of damages plaintiff is entitled to recover for such injuries as were proximately caused by Willingham's negligence.

Reversed and remanded.

Judges EAGLES and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 APRIL 1987

BROWN v. TURRENTINE No. 8614SC1210	Durham (85CVS107)	New trial
CONWAY v. CONWAY No. 8610DC1231	Wake (83CVD1720)	Appeal dismissed
CRAFTIQUE, INC. v. STEVENS AND CO., INC. No. 8622SC805	Iredell (84CVS1195)	Summary judgment for plaintiffs reversed. Remanded for entry of summary judgment for defendants. Denial of attorney's fees affirmed.
ECHEVARRIA v. BURROUGHS No. 8612DC1174	Cumberland (85CVD3818)	Affirmed
HENSLEY v. BRUMMER No. 8628DC1250	Buncombe (84CVD3371)	Appeal dismissed
HULL v. HULL No. 8622DC1294	Alexander (86CVD171)	Appeal dismissed
IN RE GRAHAM No. 8626DC1275	Mecklenburg (79J699) (84J259) (84J260) (84J261)	Affirmed
IN RE MILLS No. 8618DC1206	Guilford (83J213)	Dismissed
IN RE STEPHENS No. 8623DC1281	Ashe (86J14) (86J15)	Affirmed
IN RE YOUNG No. 8629DC1284	McDowell (86J43)	Vacated
MAYO v. MAYO No. 8615DC786	Orange (85CVD796)	Affirmed in part; vacated and remanded in part.
N. C. FARM BUREAU v. NATIONWIDE INSURANCE No. 863SC638	Craven (83CVS1666)	Affirmed
PROPST v. PROPST No. 8610DC463	Wake (85CVD5131)	Dismissed

RHODES v. KIRK No. 8610SC1063	Wake (86CVS2351)	Reversed
STATE v. BELLAMY No. 863SC1110	Pitt (86CRS6461) (86CRS6462)	Appeal dismissed
STATE v. CARROLL No. 8612SC1224	Cumberland (86CRS9662)	Assault on a female by a male person: Judgment arrested. Non-felonious breaking or entering: No error
STATE v. COBB No. 862SC1245	Beaufort (86CRS1267)	No error
STATE v. COBB No. 8610SC1236	Wake (85CRS19319) (85CRS19320) (85CRS19322) (85CRS19325)	No error in cases #85CRS19319, #85CRS19322, and #85CRS19325. Remanded for resentencing in case #85CRS19320.
STATE v. DUDLEY No. 8620SC1177	Stanly (86CRS1813) (86CRS1900) (86CRS2119) (86CRS2120)	No error
STATE v. FAIRCLOTH No. 8614SC847	Durham (84CRS4840)	No error
STATE v. FARRINGTON No. 8614SC1112	Durham (85CRS17465) (85CRS17466)	Appeal dismissed
STATE v. GOINS No. 8611SC1194	Harnett (85CRS8922)	No error
STATE v. HAYES No. 8623SC468	Wilkes (82CRS130) (82CRS131) (82CRS133)	Reversed and remanded for resentencing
STATE v. JENNINGS No. 8618SC1050	Guilford (85CRS91489)	Vacated and remanded for a new sentencing hearing.
STATE v. JONES No. 867SC1176	Edgecomb (86CRS811)	No error
STATE v. JONES No. 8617SC1277	Rockingham (85CRS11945)	Judgment vacated

STATE v. McKOY No. 8612SC1263	Cumberland (84CRS33247)	Affirmed
STATE v. MUSSELWHITE No. 8616SC1096	Robeson (86CRS2963)	New trial
STATE v. RAWLES No. 864SC1262	Onslow (86CRS4157)	No error
STATE v. RHODES No. 8619SC1249	Rowan (86CRS8542)	Remanded for new sentencing hearing.
STATE v. TURNAGE No. 863SC1162	Pitt (85CRS18349) (86CRS8450) (86CRS14409) (86CRS7054) (86CRS7055)	Affirmed
STATE v. WEBSTER No. 865SC1221	New Hanover (86CRS10660) (86CRS10661) (86CRS10662) (86CRS10663) (86CRS10664)	Appeal dismissed and Petition for Writ of Certiorari denied.
STATE v. WILKES No. 864SC1211	Onslow (85CRS020225) (85CRS020226) (85CRS020227) (85CRS020901)	No error as to trial; remanded for resentencing No error No error No error
STATE v. WILKINS No. 8610SC918	Wake (85CRS75047)	No error
STATE v. WOODS No. 8618SC983	Guilford (85CRS20647)	No error
STATEN ISLAND HOSPITAL v. HOWDEN No. 8610SC1199	Wake (86CVS6390)	Appeal dismissed; Petition for Writ of Certiorari denied.
TODD v. TODD No. 8628DC1152	Buncombe (85CVS1529)	Affirmed
TURLINGTON v. TATE No. 8611SC1244	Harnett (86CVS157)	Dismissed

IN RE APPLICATION OF CHARLES STEVEN MELKONIAN FOR A SPECIAL EXCEPTION USE PERMIT (FORMERLY STEVEN MELKONIAN, PETITIONER v. BOARD OF ADJUSTMENT OF THE CITY OF HAVELOCK, ORGANIZED AND EXISTING UNDER THE HAVELOCK CITY CODE AND N.C.G.S. 160A-338, RESPONDENT)

No. 863SC982

(Filed 5 May 1987)

Intoxicating Liquor § 1.2; Municipal Corporations § 30.6— city's denial of special use permit for tavern—preemption by ABC permit

The decision by the ABC Commission to grant petitioner a permit for the sale of malt beverages preempted and rendered unlawful a decision by respondent city board of adjustment to deny petitioner a special exception use permit to operate a tavern, since N.C.G.S. § 18B-901 establishes the General Assembly's intent to delegate to the ABC Commission the exclusive authority to determine the suitability of applicants to obtain permits to sell alcoholic beverages.

APPEAL by respondent and cross-appeal by petitioner from *Phillips, Herbert, III, Judge.* Order entered 3 July 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 4 February 1987.

This is a proceeding to judicially review a zoning board decision. Petitioner Steven Melkonian, pursuant to G.S. 160A-388(e), petitioned the Superior Court, Craven County, to issue a writ of certiorari to respondent, the Board of Adjustment of the City of Havelock.

Petitioner applied to the City of Havelock, North Carolina, for a privilege license so that he could operate a business which would, among other things, sell alcoholic beverages. The location of petitioner's proposed business was known as the "Luzzader Building." The "Luzzader Building" is situated in the "Slocum Village Shopping Center." Petitioner was informed that pursuant to Havelock Zoning Ordinances, he was required to obtain a Special Exception Use Permit so that he might operate a tavern.

Petitioner filed a Special Exception Use Permit Request to allow "a tavern in the Luzzader Bldg. (Formally Furniture Distributors) located in the Slocum Village Shopping Center." At a regular meeting of the Havelock Planning Board a motion was made to forward to respondent, with recommendation for approval, petitioner's Special Exception Use Permit Request.

On 13 November 1985, pursuant to G.S. 18B-901, petitioner filed an application with the North Carolina Alcoholic Beverage Control Commission (hereinafter ABC Commission) for an on-premise malt beverage permit for a business to be known as "Bonzo's."

On 20 November 1985, respondent conducted a public hearing at which time the planning board's recommendation for approval of petitioner's Special Exception Use Permit Request (hereinafter S.E.U. permit request) was considered. In a letter dated 21 November 1985, respondent informed petitioner that his S.E.U. permit request was denied.

On 9 December 1985, petitioner's application for an on-premise malt beverage permit was denied by the ABC Commission for the stated reason that "[t]he applicant and location cannot be considered suitable to receive or hold said permit due to local government objections." Petitioner requested of the ABC Commission that he be given an opportunity to show cause why he should be issued an on-premise malt beverage permit. A hearing date was set for 3 April 1986.

On 13 December 1985, petitioner applied for and was issued a city license "to practice or carry on the Trade, Profession or Business of Bonzo's." Petitioner's application characterized his proposed business as an "arcade and dance hall."

On 20 December 1985, petitioner, pursuant to G.S. 160A-388 (e), filed a "Petition For a Writ of Certiorari." Petitioner, in his petition, requested judicial review of the 20 November 1985 Order of respondent that denied petitioner's "request for a Special Exception Use Permit to put a tavern in the Luzzader Building." In his pleading, captioned, "Petition For Writ of Certiorari," petitioner alleged, *inter alia*: that defamatory statements made by a member of the Havelock Board of Adjustment were untrue and were an attempt to sabotage petitioner's efforts to secure an S.E.U. permit; that the record was totally devoid of any competent evidence to support the findings and or conclusions of respondent; and that respondent's denial of petitioner's request "is arbitrary and capricious and is wholly unsupported by competent evidence, findings of fact, conclusions, and the laws of this state."

On 7 February 1986, this matter was heard in Superior Court, Craven County. In an order filed 18 March 1986, the trial court retained jurisdiction and remanded this matter to respondent to "the end that it [respondent] may enter an appropriate order, allowing or denying the application, in which it states the basic facts adduced from the evidence presented to it at its hearing conducted on November 20, 1985, on which it relies in entering the order, with sufficient specificity to inform the parties and the court what induced its decision." (85CVS1997) The trial court ordered that respondent return the new order by 25 March 1986, in default of which the court stated it would order respondent to grant petitioner's S.E.U. permit request.

On 3 April 1986, petitioner went before an ABC Commission Hearing Officer for the purpose of showing cause why he should be issued a permit for operation of a business trading as "Bonzo's." The hearing officer made findings of fact including, *inter alia*, that "[t]he type business Melkonian proposes to operate is a combination tavern, gameroom & nightclub, and is a 'retail business' as defined in G.S. 18B-1000(7)." In making his recommendation for approval of petitioner's application to the ABC Commission, the hearing officer concluded that "[t]he North Carolina Alcoholic Beverage Control Commission has the authority to determine the qualifications of an applicant and the suitability of a location for the issuance of ABC permits, and to issue or deny issuance of permits according to the ABC laws. G.S. 18B-901."

On 5 May 1986, in accordance with G.S. 18B-104 and G.S. 150A-36, the ABC Commission reviewed the hearing officer's findings of fact and recommendations so that a final administrative decision could be reached. On 5 May 1986, after the hearing, the ABC Commission approved petitioner's application and directed that petitioner be issued an on-premise and off-premise malt beverage permit.

On 5 May 1986, petitioner applied to the Tax Collector of the City of Havelock for a beer license. The tax collector refused to issue petitioner a beer license.

On 8 May 1986, the City of Havelock filed a petition in Superior Court, Craven County, seeking judicial review of the final administrative decision by the ABC Commission to grant petitioner a permit to sell malt beverages on and off petitioner's business

premises (86CVS653). On the following day, 9 May 1986, the City of Havelock filed a complaint, also in Superior Court, for a declaratory judgment. The City of Havelock, in its complaint for a declaratory judgment, sought a declaration, *inter alia*, that "the City's Zoning Ordinance and its Board of Adjustment's decision concerning the unsuitability of Defendant Melkonian's proposed site for his tavern in the City is superior to, and takes precedence over, any authority which the ABC Commission may have to make any ruling as to suitability of a particular location for use as a tavern." Petitioner and the ABC Commission were named as defendants in respondent's complaint that prayed for a declaratory judgment.

On 10 June 1986, the ABC Commission, pursuant to Rule 12, N.C. Rules Civ. P., made a motion to dismiss the City of Havelock's action for judicial review of the ABC Commission's final administrative decision to grant petitioner an on-premise and off-premise permit (86CVS653). Petitioner made a motion to join in the ABC Commission's motion to dismiss.

On 10 June 1986, petitioner filed his answer to the City of Havelock's complaint filed in the declaratory judgment action (86CVS658). Petitioner, on 10 June 1986, also filed a Rule 12(c), N.C. Rules Civ. P., motion to dismiss the City of Havelock's declaratory judgment action (86CVS658).

Petitioner, on 11 June 1986, filed a motion in this action he instituted 20 December 1985 (85CVS1997). Petitioner, in his motion, suggested to the court "that the questions raised by the appeal from the respondent Board of Adjustment of the City of Havelock are now moot [by virtue of the fact that the ABC Commission issued petitioner a permit] and moves the Court for entry of an order directing the issuance of a certificate of zoning compliance by the Havelock Zoning Officer, Charles Satanski, the Executive Secretary of the respondent Board of Adjustment, and/or the special exception use permit by the Board of Adjustment. . . ." Attached to petitioner's motion were the pleadings filed in 86CVS653 and 86CVS658 along with a copy of the permit issued by the ABC Commission.

In an order filed 3 July 1986, the trial court made findings of fact, conclusions of law, and ordered the Tax Collector of the City of Havelock to issue petitioner "those city licenses to which he is

entitled" (85CVS1997). From the 3 July 1986 order, petitioner and respondent appeal.

Ward, Ward, Willey & Ward, by A. D. Ward, for petitioner appellant.

Ward and Smith, P.A., by William Joseph Austin, Jr., for respondent appellant.

JOHNSON, Judge.

Respondent, in its brief, brings forward three Assignments of Error. Respondent's fourth Assignment of Error is not supported by argument; therefore, we deem that it is abandoned. Rule 28(b)(5), N.C. Rules App. P.

Petitioner, in his brief, presents a single Assignment of Error, for our review. Petitioner assigns error to the trial court's finding of fact that respondent's findings in its second order were supported by competent evidence.

Although the Record on Appeal contains numerous pleadings and references to pleadings filed by petitioner and the City of Havelock, we have only one order (85CVS1997) that is properly before us for our review. We first address respondent's appeal from the 3 July 1986 order.

Respondent's Appeal

By its second Assignment of Error respondent contends that the trial court erred by addressing and ruling upon the question presented by petitioner's motion, to wit: whether the ABC Commission's granting of a permit to petitioner preempted respondent's decision to deny petitioner's S.E.U. permit request and therefore rendered the issues before the court as moot. For reasons to follow, we hold that the trial court correctly ruled that the decision by the ABC Commission to grant petitioner a permit for the sale of malt beverages preempted respondent's decision to deny petitioner an S.E.U. permit to operate a tavern. Accordingly, we affirm the trial court's order.

I

Petitioner's "Petition For Writ of Certiorari" alleged, in pertinent part, the following:

3. That the record reveals that, at the November 20, 1985 hearing, the Havelock Board of Adjustment allowed incompetent and immaterial evidence to be admitted to the prejudice of the petitioner, which resulted in the decision of the Havelock Board of Adjustment being based upon moral issues, *outside of the scope of its authority*, in violation of the petitioner's rights to due process.

4. That the conclusions of law contained in the Order of the Havelock Board of Adjustment are not supported by the Findings of Fact contained therein.

5. That based upon the foregoing and the record in this cause, the decision of the Havelock Board of Adjustment denying the petitioner's request for a Special Exception Use Permit is arbitrary and capricious and *is wholly unsupported by* competent evidence, findings of fact, conclusions, and *the laws of this state.*

(Emphasis supplied.)

It is evident from the emphasized portions of the petition that petitioner was alleging that respondent's decision to deny his S.E.U. permit request was contrary to law. The basis of petitioner's motion was: that "no city in the State of North Carolina, including the City of Havelock, may regulate, by zoning ordinance or otherwise, a field which has been preempted by the State of North Carolina," G.S. 160A-174(b); that G.S. 18B-901 vests in the ABC Commission, "the sole power in its discretion, to determine the suitability and qualifications of an applicant for a permit"; that upon payment of prescribed tax, issuance of a State or local license is mandatory if an applicant holds the corresponding ABC permit; and that petitioner was lawfully entitled to the appropriate local licenses since he was in possession of the corresponding ABC Commission permit.

A zoning board acts in a quasi-judicial capacity when it hears evidence to determine the existence of facts and conditions upon which the ordinance expressly authorizes it to issue a special use permit. *Humble Oil & Refining Co. v. Board of Aldermen of the Town of Chapel Hill*, 284 N.C. 458, 469, 202 S.E. 2d 129, 137 (1974). The zoning board's decision is "subject to the right of the courts to review the record for errors in law and to give relief against

its orders which are arbitrary, oppressive or attended with manifest abuse of authority." *Id.*

Petitioner, pursuant to G.S. 160A-388(e), filed his "Petition For Writ of Certiorari." G.S. 160A-388(e) states in pertinent part, the following:

> Every decision of the board shall be subject to review by the superior court by proceeding in the nature of certiorari.

In *Coastal Ready-Mix Concrete Co., Inc. v. Board of Commissioners of the Town of Nags Head*, 299 N.C. 620, 624, 265 S.E. 2d 379, 382, *rehearing denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980), the North Carolina Supreme Court stated, "we cannot believe that our legislature intended that persons subject to zoning decisions of a town board would be denied judicial review of the standard and scope we have come to expect under the North Carolina APA." The Court in *Coastal Ready-Mix Concrete Co.*, extrapolated from the scope of review set forth in the Administrative Procedures Act, G.S. 150A-51, the following tasks of a court reviewing a decision on an application for a conditional use permit:

> (1) Reviewing the record for errors in law,
>
> (2) *Insuring that procedures specified by law in both statute and ordinance are followed,*
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Id. at 626, 265 S.E. 2d at 383.

From the foregoing it is apparent that the trial court did not exceed its scope of review that was in the nature of certiorari. Accordingly, we hold that it was incumbent on the trial court to *insure* that respondent's decision was not contrary to State law and was authorized by local ordinance. If the ABC Commission had rendered a statutorily authorized decision contrary to re-

spondent's decision to deny petitioner's S.E.U. permit request then it was necessary for the trial court to consider the question of whether respondent's decision was contrary to State law.

II

It is well settled that a municipal corporation is a creature of the General Assembly and that a municipal corporation can only exercise such powers as are expressly conferred by the General Assembly or such as are necessarily implied by those expressly given. *Davis v. The City of Charlotte*, 242 N.C. 670, 674, 89 S.E. 2d 406, 409 (1955). "Municipal ordinances are ordained for local purposes in the exercise of a delegated legislative function, and must harmonize with the general laws of the State. In case of conflict the ordinance must yield to the State law." *Id.* at 674, 89 S.E. 2d at 409 (quoting *State v. Freshwater*, 183 N.C. 762, 762-63, 111 S.E. 161, 162 (1922)).

G.S. 160A-174 establishes, *inter alia*, that local ordinances are preempted by North Carolina State law when local ordinances are not consistent with State law; and that an ordinance is not consistent with State law when, *inter alia*:

> (2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;
>
> (3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;
>
> (4) The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law;
>
> (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation. . . .

From the foregoing principles it is abundantly clear that if the General Assembly intended to delegate to the ABC Commission the exclusive authority to determine the suitability of applicants to obtain the appropriate permits and licenses to sell intoxicating beverages, then the use of any ordinance to achieve a result inconsistent with the General Assembly's delegation of authority to the ABC Commission would be unlawful.

The General Assembly, in G.S. 18B-100, has expressed its intent to establish a uniform system of control over the sale of alcoholic beverages. Moreover, G.S. 18B-100 states:

> Except as provided in this Chapter, *local ordinances establishing different rules* on the manufacture, sale, purchase, transportation, possession, consumption, or other use of alcoholic beverages, *or requiring additional permits or fees, are prohibited.*

(Emphasis supplied.) The statute we hold to be controlling in the case *sub judice*, G.S. 18B-901, extensively establishes the General Assembly's intent to delegate to the ABC Commission the exclusive authority to deny or grant permits to sell alcoholic beverages. The procedure for issuance of permits is stated in G.S. 18B-901 as follows:

> (a) Who Issues. All ABC permits shall be issued by the Commission. Purchase-transportation permits shall be issued by local boards under G.S. 18B-403.
>
> (b) Notice to Local Government.—Before issuing an ABC permit, for an establishment, the Commission shall give notice of the permit application to the governing body of the city in which the establishment is located. If the establishment is not inside a city, the Commission shall give notice to the governing body of the county. The Commission shall allow the local governing body 10 days from the time the notice was mailed or delivered to file written objection to the issuance of the permit. To be considered by the Commission, the objection shall state the facts upon which it is based.
>
> (c) Factors in Issuing Permit. Before issuing a permit, the Commission shall be satisfied that the applicant is a suitable person to hold an ABC permit and that the location is a suitable place to hold the permit for which he has applied. To be a suitable place, the establishment shall comply with all applicable building and fire codes. Other factors the commission *may consider* in determining whether the applicant and the business location are suitable are:
>
> (1) The reputation, character, and criminal record of the applicant;

(2) The number of places already holding ABC permits within the neighborhood;

(3) *Parking facilities and traffic conditions in the neighborhood;*

(4) Kinds of businesses already in the neighborhood;

(5) Whether the establishment is located within 50 feet of a church or public school or church school;

(6) *Zoning laws;*

(7) *The recommendations of the local governing body;* and

(8) Any other evidence that would tend to show whether the applicant would comply with the ABC laws and whether operation of his business at that location would be detrimental to the neighborhood.

(d) Commission's Authority.—*The Commission shall have the sole power, in its discretion, to determine the suitability and qualifications of an applicant for a permit.*

(Emphasis supplied.)

The General Assembly, by the plain language of G.S. 18B-901, clearly provided that the ABC Commission *may* consider local government objections and local zoning laws. There is a provision in G.S. 18B-901 which allows local governments to object to the issuance of a permit by the ABC Commission. However, G.S. 18B-901 expressly delegates the decision making power solely to the ABC Commission. The very factors that purportedly led to respondent's denial of petitioner's S.E.U. permit request are factors, such as parking and the effect on the neighborhood, that the ABC Commission has the sole power to determine, G.S. 18B-901. The North Carolina Supreme Court has recognized the extent of the decision making powers of the ABC Commission as follows:

> The State Board exercises sole discretionary powers in determining fitness of the applicant, the number of retail outlets permitted in any locality, and supervision over those who sell wines. It may revoke or suspend such permits for cause. G.S. 18-109 relieves licensing authorities state and local, of responsibility *with respect to the fitness of the applicant or place* where wines may be sold. . . . To interpret it so as to permit

> local communities to override and set at nought the conclusions reached by the State Board might well reproduce the condition deplored by the 1945 Legislature.

Staley v. The City of Winston-Salem, 258 N.C. 244, 248-49, 128 S.E. 2d 604, 607-08 (1962) (emphasis supplied).

In the case *sub judice*, petitioner, without objection by respondent, argued that the decision of the ABC Commission to grant him a permit preempted respondent's denial of his S.E.U. permit request since the zoning ordinance, upon which respondent's denial was based, attempted to regulate the sale of alcoholic beverages which is a violation of State law. We conclude that the trial court did not err in concluding that petitioner, "as the holder of a valid ABC permit issued by the State Alcoholic Beverage Control Commission, is entitled to be issued a city beer license."

III

Respondent next argues that the trial court lacked authority to order the Tax Collector of the City of Havelock to issue any city license. After careful consideration, we disagree.

G.S. 105-113.70 states: "[u]pon proper application and payment of the prescribed tax, issuance of a State or a local license *is mandatory* if the applicant holds the corresponding ABC permit." (Emphasis supplied.) Petitioner was a holder of a valid ABC permit and, therefore, it was mandatory that the Tax Collector of the City of Havelock issue to petitioner the city licenses to which he was entitled.

Petitioner's "Petition for Writ of Certiorari" requested of the trial court that he "have such other and further relief as the court may deem just and proper." Furthermore, petitioner's subsequent motion in this matter of his application for an S.E.U. permit raised the issue of the City of Havelock's attempt, through its zoning ordinance, to control the sale of alcoholic beverages. Petitioner placed before the court, without objection by respondent, proper documentation and supporting legal authorities that established he was entitled to issuance of a city license by the tax collector and that it was mandatory for the tax collector to issue the appropriate license. The trial court, *ex mero motu*, treated petitioner's motion as one in the nature of a motion for a writ of mandamus. We find no reversible error in the trial court's order.

IV

Respondent argues that it was error for the trial court not to affirm its decision to deny petitioner an S.E.U. permit since its decision was supported by competent evidence. Consistent with our discussion, hereinabove, we need not address this issue due to the preemption of respondent's decision by the ABC Commission's decision to grant petitioner's request for a permit.

Petitioner's Cross-Appeal

Petitioner, by way of a cross-appeal, challenges the trial court's conclusion that respondent's findings of fact were supported by competent evidence. In light of our decision to affirm the trial court's order, petitioner's cross-appeal is rendered moot and the same hereby is dismissed.

The decision of the trial court is

Affirmed.

Judges BECTON and PHILLIPS concur.

RICHARD MILLER AND HIS WIFE, BRENDA MILLER v. C. W. MYERS TRADING POST, INC.

No. 8621DC1059

(Filed 5 May 1987)

1. **Landlord and Tenant § 8— premises fit for habitation—implied warranty**

By the enactment in 1977 of the Residential Rental Agreement Act, the legislature implicitly adopted the rule that a landlord impliedly warrants to the tenant that rented or leased residential premises are fit for human habitation.

2. **Landlord and Tenant § 19— noncompliance with Residential Rental Agreement Act—action for rent proper**

A tenant may bring an action for recovery of rent paid based on the landlord's noncompliance with N.C.G.S. § 42-42(a).

3. **Landlord and Tenant § 19— action for rent abatement—three year statute of limitations applicable**

The three year statute of limitations applied to plaintiffs' action for a retroactive rent abatement for defendant's alleged violations of the Residential Rental Agreement Act.

4. Landlord and Tenant § 19— action for rent abatement—three year statute of limitations

In plaintiffs' action for rent abatement filed on 17 May 1985, plaintiffs would be entitled to recover for any period of their occupancy following 17 May 1982 during which they could establish that the condition of the premises was substandard, regardless of whether the conditions complained of first existed prior to that time, when the city inspector was contacted, or when the premises were inspected.

5. Landlord and Tenant §§ 8, 19— unfit premises—action for rent abatement—tenant's acceptance of premises no defense

In plaintiffs' action for rent abatement based on defendant's alleged violation of the Residential Rental Agreement Act, defendant was not entitled to summary judgment on the ground that plaintiffs never expressed dissatisfaction with the premises, since whether plaintiffs provided notification to defendant of needed repairs was a controverted issue of fact, and N.C.G.S. § 42-42(b) provides specifically that the landlord is not released of his obligation to provide fit premises by the tenant's explicit or implicit acceptance of the landlord's defaults.

6. Landlord and Tenant §§ 8, 19— unfit premises—action for rent abatement—amount of rent below market value—no defense

The rental or lease of residential premises for a price which is "fair" or below fair rental value does not absolve the landlord of his statutory obligation to provide fit premises and is not a defense to plaintiffs' claims for rent abatement; rather, plaintiff tenants may recover damages in the form of rent abatement calculated as the difference between the fair rental value of the premises if as warranted and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved.

7. Landlord and Tenant §§ 8, 19— unfit premises—action for rent abatement—no punitive damages

Punitive damages are not recoverable in an action for a contractual remedy based on breach of an implied warranty of habitability when the breach neither constitutes nor is accompanied by tortious conduct.

APPEAL by plaintiffs from *Alexander, Judge.* Judgment entered 5 May 1986 in District Court, FORSYTH County. Heard in the Court of Appeals 30 March 1987.

John T. Newman for plaintiff appellants.

Molitoris & Connolly, by Anne Connolly and Theodore M. Molitoris for defendant appellee.

BECTON, Judge.

Plaintiffs, Richard and Brenda Miller, instituted this action on 17 May 1985 against defendant, C. W. Myers Trading Post, Inc., seeking a retroactive rent abatement for defendant's alleged violations of the Residential Rental Agreement Act. The alleged violations included failure to comply with the Housing Code of the City of Winston-Salem, failure to make repairs necessary to put and keep the rented premises in a fit and habitable condition, and failure to maintain in a good and safe working order and promptly repair all electrical, plumbing, sanitary and other facilities supplied by defendant as required by N.C. Gen. Stat. Sec. 42-42(a)(1), (2) and (4) (1984). Plaintiffs also sought to recover punitive damages, alleging that the number of Housing Code violations and defendant's prolonged failure to make repairs after notice from the City of Winston-Salem and from plaintiffs "evidences a reckless and wanton disregard of the plaintiffs' rights to live in a dwelling fit for human habitation." Defendants answered, denying the material allegations of the Complaint, setting forth several defenses, including the statute of limitations, and counterclaiming for court costs and attorney's fees based on allegations that plaintiffs instituted the action in retaliation for defendant's efforts to sell the house rented by them.

Defendant moved for summary judgment and submitted depositions of both plaintiffs in support of the motion. Plaintiffs filed no additional materials in opposition but relied upon the allegations in their verified Complaint. On 5 May 1986, the trial court entered summary judgment for defendant, dismissing the action on the grounds that there was no genuine issue of material fact. From that judgment, plaintiffs appeal. We reverse as to the claim for a retroactive rent abatement but affirm the judgment against plaintiffs on their claim for punitive damages.

I

The pleadings and depositions considered in the light most favorable to plaintiffs tend to show the following. Beginning in August of 1978, plaintiffs rented and occupied, as tenants of defendant, a house located at 410 Peden Street, Winston-Salem, for $175 per month. From the beginning of their tenancy, the premises were defective in numerous respects, including leaking gutters, rotten porches, torn and fallen screens, loose steps, leaking

plumbing, falling plaster, peeling paint, rotten kitchen cabinets, electrical problems, and a malodorous "cess pool" in the yard. Defendant represented to Mrs. Miller that the premises would be repaired once they were rented. However, despite repeated written requests by plaintiffs, defendant failed to make repairs. On one or more occasions, Mrs. Miller called the city inspector. In May 1984, the Community Development Department found the premises unfit for human habitation due to substandard conditions and violations of the City Housing Code. Some of the deficiencies were corrected in July and November of 1984 and January of 1985, while others remained uncorrected as of 17 May 1985, when this action was filed. As of 22 November 1985, when plaintiffs' depositions were taken, most problems were corrected except a hole under the kitchen sink cabinet, falling plaster in one bedroom, two cracked windows, and the unpleasant smell from the yard.

II

The sole issue on appeal is whether the trial court erred in granting defendant's motion for summary judgment.

A

Summary judgment is appropriate only when the materials before the court show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. Sec. 1A-1, Rule 56 (1983); *Kent v. Humphries*, 303 N.C. 675, 281 S.E. 2d 43 (1981). The burden of establishing the lack of any triable issue of fact is on the party moving for summary judgment, and that party's papers are carefully scrutinized while those of the opposing party are regarded with indulgence. *Stroup Sheet Metal Works, Inc. v. Heritage, Inc.*, 43 N.C. App. 27, 258 S.E. 2d 77 (1979). Movant's burden may be met by proving the non-existence of an essential element of plaintiff's claim for relief, *Southerland v. Kapp*, 59 N.C. App. 94, 295 S.E. 2d 602 (1982), or by establishing a complete defense to plaintiff's claim, *Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E. 2d 240 (1984). Summary judgment is also appropriate whenever the pleadings or proof disclose that no cause of action exists. *Williams v. Congdon*, 43 N.C. App. 53, 257 S.E. 2d 677 (1979).

The record fails to disclose the specific grounds upon which summary judgment was deemed appropriate by the trial court.

Therefore we briefly discuss a number of grounds suggested by the pleadings and the briefs.

B

We first address the propriety of the judgment as to plaintiffs' claim for a retroactive rent abatement.

Although the parties have not expressly raised the issue, we deem it important to consider initially the appropriateness of the theory upon which the plaintiffs have based their claim for relief since defendant's Answer includes a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim, and since summary judgment would be proper if no legally cognizable cause of action exists. Historically, North Carolina adhered to the common law rule of *caveat emptor* in the landlord-tenant context. Landlords had no duty to repair or maintain structures, *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E. 2d 889 (1982), and the law implied no warranty as to the quality or condition of leased premises. *See Gaither v. Hascall-Richards Steam Generator Co.*, 121 N.C. 384, 28 S.E. 546 (1897); *Robinson v. Thomas*, 244 N.C. 732, 94 S.E. 2d 911 (1956); *see generally* Fillette, North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability in Landlord-Tenant Relations, 56 N.C.L. Rev. 785 (1978). Even when a landlord made express promises to repair, such covenants were considered independent of the tenant's covenant to pay rent. *Id.* at 786.

[1] By the enactment in 1977 of the Residential Rental Agreements Act, N.C. Gen. Stat. Secs. 42-38 *et seq.*, our legislature implicitly adopted the rule, now followed in most jurisdictions, that a landlord impliedly warrants to the tenant that rented or leased residential premises are fit for human habitation. The implied warranty of habitability is co-extensive with the provisions of the Act. *Jackson v. Housing Authority of High Point*, 73 N.C. App. 363, 326 S.E. 2d 295, *disc. review denied*, 313 N.C. 603, 330 S.E. 2d 611 (1985), *aff'd*, 316 N.C. 259, 341 S.E. 2d 523 (1986). Section 42-42 of the Act provides in pertinent part:

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such

codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code;

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in safe condition; and

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.

The statute does not make clear what remedies are available for breach of these provisions. (For a thorough discussion of possible remedies and defenses available under the Act, *see generally* Fillette, 56 N.C.L. Rev. 785.) The only existing appellate decisions involving violation of the Act deal with tort actions for personal injury or wrongful death in which a landlord's failure to comply with the statute was considered evidence of negligence. *See Jackson; Brooks v. Francis; O'Neal v. Killett,* 55 N.C. App. 225, 284 S.E. 2d 707 (1981).

[2] This then, is a case of first impression in that we must consider what remedies are available apart from a tort action. We limit our consideration solely to the appropriateness of the rent abatement remedy sought by plaintiffs.

In a pre-Act case, *Thompson v. Shoemaker,* 7 N.C. App. 687, 173 S.E. 2d 627 (1970), this Court held that a tenant could not recover rent payments on the theory that the rented dwelling was maintained by the landlord in violation of the city housing code and was unfit for human habitation, when the tenant had voluntarily continued to pay rent and to occupy the premises with knowledge of the violations. Leading decisions from other jurisdictions have held that recognition of an implied warranty of habitability makes available to tenants the basic common law contract remedies of damages, reformation, and rescission. *See, e.g., Teller v. McCoy,* 162 W.Va. 367, 253 S.E. 2d 114 (1978); *Ber-*

zito v. Gambino, 63 N.J. 460, 308 A. 2d 17 (1973); *King v. Moorehead*, 495 S.W. 2d 65 (Mo. App. 1973); *Mease v. Fox*, 200 N.W. 2d 791 (Iowa 1972). A number of courts have expressly recognized, among other remedies, an affirmative cause of action for recoupment of all or part of rents paid, which is available even to a tenant who does not abandon the premises. *See, e.g., Hilder v. St. Peter*, 144 Vt. 150, 478 A. 2d 202 (1984); *Teller v. McCoy; Berzito v. Gambino; Kline v. Burns*, 111 N.H. 87, 276 A. 2d 248 (1971).

G.S. Sec. 42-41 states that the tenant's obligation to pay rent and the landlord's obligation to comply with Section 42-42(a) are "mutually dependent," while Section 42-44(a) provides that "[a]ny right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity." However, tenants are prohibited from unilaterally withholding rent prior to a "judicial determination" of the right to do so, G.S. Sec. 42-44(c). We construe these provisions to provide an affirmative cause of action to a tenant for recovery of rent paid based on the landlord's noncompliance with G.S. 42-42(a) and, thus, to overrule *Thompson v. Shoemaker*. Plaintiffs have adequately alleged nonfulfillment of defendant's obligations so as to set forth a claim for relief under the statute for breach of the implied warranty of habitability. Therefore, summary judgment was not appropriate on the grounds that plaintiffs failed to set forth a viable cause of action.

[3] We also reject defendant's contention that plaintiffs' claims are barred by the applicable statute of limitations. Defendant first maintains that the one year statute of limitations established by G.S. Sec. 1-54(2) (1983) applies to this action. We disagree. That section requires commencement within one year of an action "[u]pon a statute, *for a penalty or forfeiture*, where the action is given . . . in whole or in part to the party aggrieved. . . ." (emphasis added). We conclude that the rent abatement remedy sought by plaintiff does not constitute a "penalty or forfeiture" within the meaning of the statute. G.S. Sec. 1-54(2) applies only to actions based on statutes which *expressly* provide for a penalty or forfeiture, the purpose of which is punitive. *See Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E. 2d 1, *disc. rev. denied*, 298 N.C. 806, 261 S.E. 2d 919 (1979). The "forfeiture" of rents sought by plaintiffs in this case is a remedy which is not

spelled out but which is implied from the statute, and which is not punitive but rather in the nature of a restitutionary remedy. Consequently, we hold that the applicable statute of limitations is three years, pursuant to G.S. Sec. 1-52(1) and (2) (1983), and plaintiffs are thus not entitled to recover any rents for occupancy prior to 17 May 1982.

[4] Defendant further argues that, even if a three-year limitation period applies, plaintiffs have failed to establish a genuine issue of fact regarding an actionable violation of the Winston-Salem Housing Code and G.S. Sec. 42-42(a)(1) because the deposition testimony of both plaintiffs indicates that they cannot establish that their complaints to the city or the actions of the city inspector occurred after 17 May 1982. Similarly, defendant maintains that there is no genuine issue of fact regarding defendant's noncompliance with G.S. Sec. 42-42(a)(2) and (4) because both plaintiffs admitted in their depositions that various repairs had been made and that the plumbing, heating, and electrical components all worked, and because neither specified the date that the repairs occurred. We agree with defendant that, in order to be actionable, the alleged violations of the statute must have existed after 17 May 1982. However, in our view, such violations constitute a continuing offense. Thus, plaintiffs would be entitled to recover for any period of their occupancy following 17 May 1982 during which they can establish that the condition of the premises was substandard as measured by the statute, regardless of whether the conditions complained of first existed prior to that time.

Therefore, for purposes of this appeal, neither the date the city inspector was contacted nor the date the premises were inspected is of critical importance. Nor is the fact that repairs had been made as of the date of the deposition determinative of the issues. In their verified Complaint, plaintiffs alleged that the house was found unfit for human habitation and in violation of the City Housing Code by the Community Development Department in May of 1984; that some repairs were made in July and November of 1984, others were made in January of 1985, and other deficiencies ordered corrected by the city were uncorrected at the filing of the Complaint; and that the premises were never in a fit and habitable condition from the beginning of their tenancy until the date the Complaint was filed. We conclude that these allegations are sufficient to raise issues of fact regarding whether, during some period following 17 May 1982, the premises were in

material violation of the local housing code or were otherwise not fit and habitable. Furthermore, the deposition testimony of both plaintiffs generally corroborates these allegations, and we find nothing therein which defeats their claims as a matter of law.

Defendant, in the Answer to plaintiffs' Complaint, alleged that all needed repairs were promptly made, denied that the city found the premises unfit, and alleged that the minor deficiencies cited were promptly corrected. Defendant further alleged, by way of affirmative defense, that all deficiencies in the premises were caused by intentional or negligent acts of the plaintiffs in violation of their obligations as tenants under G.S. Sec. 42-43. However, defendant has presented no evidence which establishes any of these claims or defenses as a matter of law. All are issues of fact for the jury.

[5] Defendant has further asserted that plaintiffs never expressed dissatisfaction with the premises or with the amount of rent, and that the $175 per month rent was fair and below market value. We first note that of the three subsections of G.S. Sec. 42-42(a) which plaintiffs claim were violated, only G.S. Sec. 42-42(a)(4) expressly conditions the landlord's obligations to make repairs upon prior receipt of notification of the need for repairs. Section 42-42(b) provides specifically that the landlord is *not* released of his obligation to provide fit premises by the tenant's explicit or *implicit* acceptance of the landlord's defaults. Moreover, based on the pleadings and depositions in this case, whether plaintiffs provided notification to defendant of needed repairs is a controverted issue of fact. For these reasons, summary judgment was not proper on the grounds that plaintiffs failed to complain.

[6] Defendant's arguments regarding the rental value of the premises likewise do not justify the judgment against plaintiffs. The rental or lease of residential premises for a price that is "fair" or below fair rental value does not absolve the landlord of his statutory obligation to provide fit premises and is not a defense to plaintiffs' claims. The implied warranty of habitability entitles a tenant in possession of leased premises to the value of the premises *as warranted*, which may be greater than the rent agreed upon or paid. *See* Fillette, 56 N.C.L. Rev. at 792. In accordance with leading decisions in other jurisdictions, we adopt the rule that a tenant is liable only for the reasonable value, if

any, of his use of the property in its defective condition while he remains in possession. *See, e.g., Boston Housing Authority v. Hemingway,* 363 Mass. 184, 293 N.E. 2d 831 (1973); *Berzito v. Gambino.* Accordingly, a tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with G.S. 42-42(a)) and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved. *See Hilder v. St. Peter; Teller v. McCoy; Mease v. Fox. See also Andrews & Knowles Produce Co. v. Currin,* 243 N.C. 131, 136, 90 S.E. 2d 228, 231 (1955) (special damages allowed for landlord's breach of implied warranty of quiet enjoyment); *Sloan v. Hart,* 150 N.C. 269, 274, 63 S.E. 1037, 1039 (1909) (special damages allowed for landlord's breach of implied covenant to deliver possession). *See generally* Fillette, 56 N.C.L. Rev. at 792-794.

In the present case, Mrs. Miller testified that the rental value of the property in its unrepaired state was about $50 to $75 a month. Mr. Miller also testified that $175 per month was not a fair amount of rent for the house prior to its repair. This testimony, along with the plaintiff's allegations of violations of the statute, is sufficient to raise a genuine issue of fact as to the amount, if any, that the rental value of the premises as warranted was reduced by defective conditions.

For the foregoing reasons, we conclude that defendant has failed to meet the burden of establishing the non-existence of any triable issue of fact regarding plaintiffs' claim for a retroactive rent abatement. Consequently, we hold that summary judgment was improper as to that claim.

C

[7] We further hold, however, that summary judgment was appropriate as to plaintiffs' claim for punitive damages. The action for a rent abatement for breach of an implied warranty is wholly contractual. The general rule in North Carolina is that punitive damages are not recoverable for breach of contract even though the breach be willful, malicious, or oppressive. *E.g., Newton v. Standard Fire Insurance Co.,* 291 N.C. 105, 229 S.E. 2d 297 (1976);

Murray v. Allstate Insurance Co., 51 N.C. App. 10, 275 S.E. 2d 195 (1981). Furthermore, plaintiffs' claim for relief is based on a statute which makes no provision for punitive damages. We conclude that punitive damages are not recoverable in an action for a contractual remedy based on breach of an implied warranty of habitability when the breach neither constitutes nor is accompanied by tortious conduct.

The judgment against plaintiffs is reversed as to their claim for a rent abatement and affirmed as to their claim for punitive damages.

Affirmed in part and reversed in part.

Chief Judge HEDRICK and Judge WELLS concur.

BARBARA HAND, BY HER GUARDIAN AD LITEM, JESSE HAND, EMPLOYEE v. FIELDCREST MILLS, INC., EMPLOYER, SELF-INSURER

No. 8610IC819

(Filed 5 May 1987)

1. **Master and Servant § 94.3— workers' compensation—head injury—plaintiff not initially incompetent**

In a workers' compensation case where plaintiff's head was struck repeatedly by a loom and plaintiff's last temporary total disability compensation payment was more than two years before she was diagnosed as having permanent organic brain damage, the Industrial Commission did not err by finding that plaintiff was not incompetent at the time she initially returned to work and for two years thereafter, thus barring her claim by the two-year statute of limitations of N.C.G.S. § 97-47. N.C.G.S. § 97-50.

2. **Master and Servant § 93— workers' compensation—wrong form furnished to employee—no equitable estoppel**

Defendant was not equitably estopped from relying on the statute of limitations in a workers' compensation proceeding in which defendant had furnished plaintiff with an outdated Form 28-B which incorrectly stated that plaintiff had only one year to make a claim for further benefits where there was no allegation that plaintiff's delay in filing her request for review was induced by the incorrect form, or any other acts, representations or conduct of defendant, and there was no evidence that defendant acted in bad faith.

3. Master and Servant § 77.2— workers' compensation—Form 21 agreement—final award—statute of limitations not tolled for unknown condition

An Industrial Commission Form 21 agreement is the equivalent of a final award, and the time limit provided in N.C.G.S. § 97-47 is not tolled because the award did not provide compensation for permanent organic brain damage then unknown. The two-year time limit of N.C.G.S. § 97-47 begins to run upon receipt and acceptance of the last compensation check, not when the injury constituting a change of condition is first diagnosed.

4. Master and Servant § 85.3— workers' compensation—Industrial Commission authority to set aside own judgments—statute of limitations

While the Industrial Commission has the authority to set aside one of its judgments in a proper case, it does not have the authority to provide relief from the operation of the statute of limitations.

APPEAL by plaintiff from an Opinion and Award of the North Carolina Industrial Commission entered 24 February 1986. Heard in the Court of Appeals 13 January 1987.

Smith, Patterson, Follin, Curtis, James & Harkavy by Henry N. Patterson, Jr., and Jonathan R. Harkavy for employee appellant.

Smith Helms Mullis & Moore by J. Donald Cowan, Jr., and Caroline Hudson Wyatt for employer appellee.

COZORT, Judge.

Plaintiff suffered a compensable injury while in the employ of defendant. She did not realize the seriousness of her injuries until more than three years after she had received what amounted to the final award for her injuries. She attempted to reopen her case by writing a letter to the Industrial Commission. After a hearing, the Commission dismissed her request to reopen, finding that her claim for additional compensation was barred by the two-year statute of limitations in N.C.G.S. § 97-47, and further finding that the statute of limitations should not be waived on the basis of mental incompetence because there was evidence she was not incompetent during the two-year period. While we concur with plaintiff that the result is harsh, the law compels that we affirm the Commission.

Plaintiff was injured while working for defendant on 8 May 1976. She was attempting to oil the crank arms of a loom when a weaver unexpectedly started the loom, catching plaintiff's head

and neck between two steel poles as they moved back and forth at the rate of ninety (90) times per minute, thereby repeatedly twisting and striking her head and neck. The blows resulted in visible discoloration to the right rear of plaintiff's head, as well as lateral to her left eye. She was treated on that date at Morehead Memorial Hospital by a physician who diagnosed her condition as mild contusions to the right mastoid area and left zygoma.

On the following Monday, plaintiff had begun to experience intermittent episodes of headaches, dizziness, blurred vision, and soreness in her neck. Plaintiff was examined by staff physicians associated with defendant's medical department and allowed to return to work that day. She worked until 23 June 1976 when, because the symptoms continued, she became temporarily disabled for the following two weeks and five days. She returned to work on 12 July 1976 and at that time signed a "Form 21" agreement, pursuant to which defendant paid to her temporary total disability compensation for the time she had missed work. Plaintiff's last and only compensation check for $407.98 ($158.98 for lost wages and $249.00 for medical expenses) was paid to her on 12 July 1976. The Form 21 agreement, which contained no provision for any payment in the event of permanent injury or disability, was approved by the Industrial Commission on 20 July 1976.

On 25 October 1976, defendant completed and forwarded to the Commission and to plaintiff Form 28-B, Report of Compensation and Medical Paid, indicating the amount of compensation and medical expenses paid to plaintiff, and also indicating that the Form 28-B closed the case, including final compensation payments. The Form 28-B used by defendant was an outdated one which incorrectly notified plaintiff that she had only one year to make a claim for further benefits. (The law had been amended in 1974 to give employees two years to make a claim for further benefits. N.C.G.S. § 97-47.)

When plaintiff returned to work on 12 July 1976, she was earning the same wages as when she left work nearly three weeks before. Although she sometimes did the "smashing job," which had a higher rate of pay, the majority of the time following her injury plaintiff worked as a "draw-in hand." Plaintiff had worked as a draw-in hand from 1972 to 1975. The repetitive draw-in hand job required physical and mental dexterity, including the

ability to calculate and remember. Despite plaintiff's injury and continuing symptoms, she was able to satisfactorily perform these duties until her condition worsened to the point that she stopped working in January of 1982.

After plaintiff returned to work on 23 June 1976, she was treated by several physicians over the next six years. She was diagnosed as having a mild concussion and neck sprain. She was prescribed different medications for her symptoms of headaches, dizziness, blurred vision, and facial numbness.

On 20 March 1980, plaintiff submitted a handwritten letter to the Industrial Commission, in which she sought to reopen her case in an attempt to obtain additional compensation for the injuries she suffered in the 8 May 1976 accident. On 1 April 1980, by letter, the Industrial Commission acknowledged plaintiff's request to reopen her case, but also indicated to her that the statutory period for reopening her case had expired. The letter informed plaintiff that if she disagreed she had the right to request a hearing. On 12 December 1980, plaintiff's attorney wrote to the Commission to confirm her request for additional compensation.

Plaintiff stopped working for defendant in January of 1982. After having seen several physicians, plaintiff was referred to Dr. Angus Randolph, a psychiatrist at Bowman Gray School of Medicine in Winston-Salem. She was examined by Dr. Randolph on 10 June 1982; and, as a result of that examination, Dr. Randolph was of the opinion that plaintiff's symptoms were organic, rather than functional in nature, and due to the post-concussional syndrome that plaintiff had developed as a result of a permanent brain injury suffered when she was struck in the head while attempting to oil the loom. Dr. Randolph referred plaintiff to Dr. Frank Wood, a neuropsychologist associated with Bowman Gray, for neuropsychological testing in order to confirm his diagnosis and identify the particular aspect of the brain so affected. The 26 June 1982 tests by Dr. Wood objectively demonstrated, for the first time, that plaintiff was suffering from permanent organic brain damage involving her left temporal lobe.

On 28 March 1983 defendant made a motion to dismiss plaintiff's claim based on the ground that plaintiff's claim for additional compensation was barred by the two-year statute of

limitations period in N.C.G.S. § 97-47. On 8 April 1983 Deputy Commissioner Linda Stephens appointed plaintiff's husband as her guardian ad litem to pursue her claim. Hearings were held before Deputy Commissioner Lawrence B. Shuping, Jr., on 30 August 1983, 20 December 1983, and 15 March 1985. On 18 September 1985, Deputy Commissioner Shuping granted defendant's motion to dismiss plaintiff's claim.

Plaintiff appealed to the Full Commission. On 24 February 1986 the Industrial Commission entered its Opinion and Award affirming and adopting as its own Deputy Commissioner Shuping's Opinion and Award. The Commission stated:

> [P]laintiff's claim must fail on two grounds. She has failed to show she sustained a change in condition within two years of the last payment of compensation in this case; and, further she has failed to show that she was mentally incompetent at the time her right to reopen her case accrued as provided in G.S. 97-49. Under these conditions, there is nothing this office can do for plaintiff.

Commissioner Charles A. Clay dissented, voting to set aside the Commission's "final award" and to consider the plaintiff's claim on its merits, relying on the Supreme Court's decision in *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E. 2d 477 (1985).

On appeal plaintiff contends: (1) her claim for disability is not barred under N.C.G.S. § 97-47 because she was mentally incompetent within the meaning of N.C.G.S. § 97-50; (2) the Commission erred in barring plaintiff's claim under N.C.G.S. § 97-47 because defendant's conduct equitably estopped it from relying on that statute of limitations; (3) the time limit in N.C.G.S. § 97-47 does not apply to plaintiff's claim because there was no "award" to be reviewed concerning a permanent disability; and (4) plaintiff is entitled to reopen her case based on the Commission's supervisory authority over its own judgments.

The scope of our review in this case is twofold: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether the Commission's findings of fact justify its conclusions of law and decision. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). The Industrial Commission is the sole judge of the witnesses' credibility

and the weight to be given their testimony. *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965). This Court does not have the right in this case to weigh the evidence and decide the issue on the basis of its weight. *Id.* If there is any competent evidence to support a finding of fact of the Industrial Commission, such a finding is conclusive on appeal, even though there is evidence that would have supported a finding to the contrary. *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963). Finally, the Commission's conclusions of law may not be disturbed if supported by the findings of fact. *Robinson v. J. P. Stevens & Co., Inc.*, 57 N.C. App. 619, 292 S.E. 2d 144 (1982).

[1] In this case plaintiff first assigns as error the Commission's finding of fact and conclusion of law that plaintiff was not incompetent at the time she initially returned to work after the compensable injury and for two years thereafter, thus barring plaintiff's claim by the two-year statute of limitations in N.C.G.S. § 97-47. Plaintiff argues that her claim is not barred under N.C.G.S. § 97-47 because she was mentally incompetent within the meaning of N.C.G.S. § 97-50.

N.C.G.S. § 97-47 provides, in part, that upon its own motion or application of a party "on the grounds of a change in condition," the Industrial Commission may review an award of compensation and increase it, provided, however, that "no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article . . . ." N.C.G.S. § 97-47. Thus, the Industrial Commission is given authority to review an award and increase it only when there has been a change in condition of the claimant as provided in N.C.G.S. § 97-47. Where the harmful consequences of an injury are unknown when the amount of compensation to be paid is determined by agreement, but later develop, the amount of compensation to which the employee is entitled can be redetermined within the statutory period of reopening under N.C.G.S. § 97-47. *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 181 S.E. 2d 588 (1971). The two-year time limitation in N.C.G.S. § 97-47 is a statute of limitations, a technical legal defense which may be asserted by the employer. *Id.*

N.C.G.S. § 97-50 provides, however, that "[n]o limitation of time provided in this Article for the giving of notice or making

claim under this Article shall run against any person who is mentally incompetent . . . as long as he has no guardian, trustee, or committee."

In finding of fact number 14 the Commission found the following:

> Although due to the progressive deterioration in her condition . . . plaintiff is obviously presently incompetent to handle her affairs, and has been for the last several years thereby necessitating the appointment of the guardian Ad Litem herein; she was not incompetent at the time she initially returned to work for the defendant-employer on July 12, 1976 and contemporaneously received her last payment of compensation benefits pursuant to the Commission's prior final award herein; nor did she become incompetent at any time within the two years thereafter within which she could have experienced additional periods of compensable disability for which she was entitled to claim further compensation benefits . . . .

Based upon this finding of fact the Commission concluded the following:

> Although plaintiff is presently incompetent to handle her business affairs; she was not incompetent on the date that her right to claim further benefits initially accrued pursuant to the provisions of G.S. 97-47, or otherwise, when she received her last, and only, payment of compensation benefits under the Commission's prior final award herein or for more than two years thereafter; therefore, neither the two-year statute within which plaintiff could apply for a review of the Commission's prior final award pursuant to the provisions of G.S. 97-47 nor the lesser one-year period in which she could claim relief from the same award on the basis of newly discovered evidence was tolled herein . . . .

Plaintiff argues that the Commission's finding that plaintiff was not incompetent between the date of her injury and the date she applied for additional compensation and its conclusion that the two-year limit in N.C.G.S. § 97-47 bars plaintiff's claim have no meaningful basis in the record. We have carefully examined the record in this case. While there is evidence which would sup-

port a finding that plaintiff was incompetent during the relevant period, there is also evidence which supports the Commission's finding of fact that plaintiff was *not* incompetent. For example, defendant presented evidence that plaintiff performed her job, which required physical and mental dexterity, in a satisfactory manner, understood her pay scale and contested the amount when she thought it was too low. As such, the Commission's finding is conclusive. *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865. Thus, the Commission's finding that plaintiff was not incompetent supports its conclusion that N.C.G.S. § 97-47 bars plaintiff's claim.

[2] Next, plaintiff argues that the Commission erred in barring plaintiff's claim under N.C.G.S. § 97-47 because defendant's conduct equitably estopped it from relying on that statute of limitations. Plaintiff argues that defendant supplied plaintiff with an outdated Form 28-B which incorrectly stated that plaintiff had only one year to make a claim for further benefits, when she actually had two years under N.C.G.S. § 97-47. The Commission found that defendant was not estopped because plaintiff did not detrimentally rely on the incorrect notice when she brought her claim more than three and one-half years after her receipt of the last payment of compensation. The Commission also found that "there is no other evidence of record that [defendant] engaged in any acts, representations or conduct that would similarly estop [defendant] from asserting the untimeliness of [plaintiff's] present claim (for further benefits)." Based on these findings the Commission concluded that defendant was not estopped to rely on the statute of limitations defense contained in N.C.G.S. § 97-47.

The law of estoppel applies in workers' compensation proceedings. *Willis v. Davis Industries, Inc.*, 280 N.C. 709, 186 S.E. 2d 913 (1972). The facts of this case, however, are insufficient to invoke the doctrine. There is no allegation that plaintiff's delay in filing her request for review was induced by the incorrect Form 28-B or any other acts, representations, or conduct of defendant. Furthermore, there is no evidence that defendant acted in bad faith. The Commission was correct in finding that plaintiff did not rely on the form to her detriment and in holding that defendant was not estopped to rely on the statute of limitations in N.C.G.S. § 97-47. This assignment of error is overruled.

[3] Plaintiff next contends that N.C.G.S. § 97-47 does not apply to her claim because there was no "award" to be reviewed concerning a permanent disability. She argues that she is at least entitled to a hearing on her claim relating to her uncompensated organic brain injury regardless of the time limit in N.C.G.S. § 97-47. Plaintiff argues she received no compensation for any permanent disability or for any permanent loss or injury to any body organ because of her compensable injury.

An agreement for the payment of compensation, when approved by the Industrial Commission, is the equivalent of an award and is binding on the parties as any order, decision or award of the Commission unappealed from, or an award of the Commission affirmed on appeal. *White v. Shoup Boat Corp.*, 261 N.C. 495, 135 S.E. 2d 216 (1964); *Tucker v. Lowdermilk*, 233 N.C. 185, 63 S.E. 2d 109 (1951). Thus, contrary to plaintiff's contention, the Form 21 agreement approved by the Industrial Commission in her case is the equivalent of a final award. The time limit provided for in N.C.G.S. § 97-47 is not tolled because the award did not provide compensation for the permanent organic brain damage then unknown. As our Supreme Court stated in *Smith v. Mecklenburg County Chapter American Red Cross*, 245 N.C. 116, 122, 95 S.E. 2d 559, 563 (1956):

> Where the harmful consequences of an injury are unknown when the amount of compensation to be paid has been determined by agreement but subsequently develops, [*sic*] the amount of compensation to which the employee is entitled can be *redetermined within the statutory period for reopening*. It is a "change of condition" as the term is used in the statute. (Emphasis added.)

N.C.G.S. § 97-47 gave plaintiff two years from the date of last payment of compensation to bring her claim based upon change of condition. She did not file such a claim until 20 March 1980, more than three and one-half years after her receipt and acceptance of the last payment of compensation. Since she did not bring her claim based upon change in condition within the time allowed, her claim is barred by N.C.G.S. § 97-47. *Id.*

That plaintiff's permanent organic brain damage as a result of her compensable accident was not objectively demonstrated until June of 1982 does not relieve plaintiff from the time limit of

N.C.G.S. § 97-47. Unfortunately for plaintiff, the two-year time limit of N.C.G.S. § 97-47 begins to run upon receipt and acceptance of the last compensation check, not when the injury constituting a change of condition is first diagnosed. We cannot take into account that plaintiff's claim otherwise appears to have merit. As Justice Bobbitt stated in *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E. 2d 508, 514 (1957):

> Statutes of limitation are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. . . .
>
> It is not for us to justify the limitation period prescribed . . . . Suffice to say, this is a matter within the province of the General Assembly.

[4] Plaintiff's final argument is that the Commission erred in failing to exercise its inherent authority over its own judgments by not setting aside the final award to reopen the case. We do not agree.

In *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 129, 337 S.E. 2d 477, 478 (1985), the court held that the Industrial Commission has inherent power to set aside one of its former judgments "when the paramount interest in achieving a just and proper determination of a claim requires it . . . ."

We find *Hogan* inapposite to this case. Plaintiff herein does not seek relief from the 1976 final award. Instead, what plaintiff seeks is an additional award increasing the amount of compensation previously awarded, and relief, not from the operation of a former judgment or order, but from the statute of limitations in N.C.G.S. § 97-47. When the Industrial Commission reopens a case based on a change of condition under N.C.G.S. § 97-47, it does not set aside or provide relief against the operation of a former judgment. Rather, it simply enters an opinion and award finding that the employee has sustained a change of condition and is therefore entitled to additional compensation. While *Hogan*, in a proper case, gives the Commission the authority to set aside one of its judgments, *Hogan* does not give the Commission the authority to provide relief against the operation of a statute of limitations.

The Opinion and Award of the Commission is

Affirmed.

Judges MARTIN and PARKER concur.

LESTER H. YANDLE, JR. AND MARY H. YANDLE v. MECKLENBURG COUNTY, NORTH CAROLINA

MECKLENBURG COUNTY, NORTH CAROLINA v. TOWN OF MATTHEWS AND LESTER H. YANDLE, JR.

No. 8626SC1043

(Filed 5 May 1987)

1. **Municipal Corporations § 2— annexation and condemnation proceedings—failure to find equivalency—application of prior jurisdiction rule improper**

The trial court erred in concluding that an annexation proceeding had priority over a condemnation proceeding under the "prior jurisdiction rule," thus enjoining Mecklenburg County from initiating a condemnation proceeding for the land in question, without first determining whether the annexation and condemnation proceedings were equivalent proceedings relating to the same subject matter.

2. **Municipal Corporations § 2; Eminent Domain § 1— annexation and condemnation proceedings—no equivalency**

For determining whether the prior jurisdiction rule applies, eminent domain proceedings and annexation proceedings are not equivalent, since an annexation proceeding gives a municipal corporation the authority to bring property within its corporate limits, but ownership of the property does not change hands, while a condemnation proceeding concerns the ownership of the land itself.

3. **Municipal Corporations § 2; Eminent Domain § 1— voluntary annexation and condemnation proceedings—priority of condemnation proceeding—annexation raised for consideration in answer**

When a county initiates condemnation of property for a sanitary landfill, and the property is being considered for voluntary annexation into a municipality, the county may proceed with the condemnation action; the county is entitled to an injunction enjoining the annexation proceeding; and the property owners and the municipality may raise the proposed annexation in the answer to the condemnation complaint for appropriate consideration by the court.

APPEAL by Mecklenburg County from *Lewis (Robert D.), Judge.* Judgment entered 1 August 1986. Heard in the Court of Appeals 10 February 1987.

Ruff, Bond, Cobb, Wade & McNair by James O. Cobb and Marvin A. Bethune for appellant Mecklenburg County.

Charles R. Buckley, III, for appellee Town of Matthews; and Frank B. Aycock, III, and Griffin and Ruff by Joseph M. Griffin for appellees Mr. and Mrs. Yandle.

COZORT, Judge.

This case involves a dispute between private property owners, the Town of Matthews, and Mecklenburg County. The County wants to condemn certain land to be used as a sanitary landfill. The owners of the land initiated proceedings for voluntary annexation into the Town, which, if approved, would prevent the County from using the land as a sanitary landfill. The landowner obtained a temporary restraining order which enjoined the County's condemnation proceeding, and the County obtained a temporary restraining order to enjoin the annexation. After a bench trial on the merits, the trial court dissolved both temporary restraining orders, entering a judgment which enjoined the County's condemnation proceeding and permitted the Town's annexation proceedings to go forward. The trial court's judgment was based on (1) its finding of fact that the Town's certification of the annexation petition preceded the County's notice of intent to condemn the land, and (2) its conclusion of law that the "prior jurisdiction rule" is controlling in this case. We find the trial court erred in its conclusion of law, and we vacate the judgment. Further, we remand the cause to the trial court for entry of an order restraining the Town's annexation proceedings until such time as the County has had a reasonable opportunity to pursue condemnation of the land under Chapter 40A of the General Statutes of North Carolina.

The facts are not in dispute, having been stipulated to by the parties. On 1 October 1984, prior to noon, Lester H. Yandle, Jr., and Mary H. Yandle filed a petition with the Town of Matthews for voluntary annexation of five separate parcels of real property, including two parcels which, unknown to Mr. Yandle, were being considered by Mecklenburg County as possible sanitary landfill sites. The petition for voluntary annexation was filed in accordance with N.C.G.S. § 160A-31. The aggregate area comprising these five parcels was contiguous to the corporate limits of Matthews and was eligible for annexation.

At its regular meeting on 1 October 1984, and after 2:00 p.m., the Board of Commissioners for Mecklenburg County made public for the first time its consideration as an alternative landfill a site at U.S. Highway 74 and Ridge Road which included property owned by Mr. Yandle. On that same date, the County Manager mailed a notice to Mr. Yandle that Mecklenburg County might go upon the land in question to make surveys, borings, examinations, and appraisals.

On 8 October 1984, the Matthews Town Clerk certified the sufficiency of the Yandles' petition for annexation and on that date the governing board of the Town of Matthews, by resolution, set 22 October 1984 for a public hearing on the annexation question and directed that notice of the public hearing be published. At the Town's public hearing on 22 October 1984 Mr. Yandle spoke in favor of annexing the five parcels, while no one spoke against the annexation.

On 5 November 1984, in executive session, the Mecklenburg County Board of Commissioners authorized and directed the County Manager to send "Notices of Intent to Condemn" to the owners of eight parcels of land, two of which are owned by the Yandles. On 6 November 1984, the County Manager mailed such notice to Mr. Yandle with respect to the two parcels which are part of the potential landfill site at Highway 74 and Ridge Road.

At a meeting on 26 November 1984, the Matthews Town Council adopted the following resolution:

> Be it resolved, that the Board of Commissioners of the Town of Matthews supports private development of the Tank Town, Ridge Road area and we are opposed to any public development, i.e., landfills involving said Ridge Road and Tank Town Road and that those documents be forwarded to County Commissioners both existing and newly elected and to the North Carolina Division of Health Services.

On 5 December 1984 the Yandles filed a civil action in Mecklenburg County Superior Court seeking a temporary restraining order, a preliminary injunction, and a permanent injunction which would prohibit Mecklenburg County from condemning the land in question for use as a sanitary landfill. On 6 December 1984, the

Yandles obtained the temporary restraining order against the County.

At its regular meeting on 7 December 1984, the Mecklenburg County Board of Commissioners authorized the institution of condemnation proceedings against the property belonging to Mr. Yandle. (The Commission's authorization of condemnation affected other property owners who are not party to this action.) That same day, Mecklenburg County filed a civil action against the Town of Matthews and Mr. Yandle seeking a temporary restraining order, a preliminary injunction, and a permanent injunction, which would prohibit Matthews from annexing the Yandle property. Mecklenburg County obtained the temporary restraining order on that date. The Matthews Town Council had scheduled for its meeting of 10 December 1984 the consideration of passage of an ordinance annexing all five parcels of the Yandle property.

On 31 December 1984, the superior court entered an order which preliminarily enjoined Mecklenburg County from taking further steps to condemn the Yandles' land, preliminarily enjoined the Town of Matthews from taking further action to annex the Yandles' land, and preliminarily enjoined the Yandles from taking action affecting title to their property. All parties appealed. We dismissed the appeals as premature, except for the portion of the order restricting the Yandles' right to convey their property, which was vacated. *Yandle v. Mecklenburg County and Mecklenburg County v. Town of Matthews*, 77 N.C. App. 660, 335 S.E. 2d 915 (1985).

On 21 July 1986, the case was tried, without a jury, on its merits. After adopting as findings of fact stipulations made by the parties, the court made two additional findings of fact:

> [T]hat the first mandatory public procedural step in the N.C.G.S. 160A-31 voluntary annexation of property was taken by the Town of Matthews on October 8, 1984, when the Town Clerk certified the sufficiency of the petition filed by Mr. and Mrs. Yandle.
>
> [T]hat the first mandatory public procedural step in the N.C.G.S. Chapter 40A statutory process for condemning the relevant Yandle property was taken by Mecklenburg County on November 6, 1984, when the notice of intent was mailed to Mr. & Mrs. Yandle pursuant to G.S. 40A-40.

Based on its findings of fact the court made the following pertinent conclusions of law:

1. The prior jurisdiction rule adopted in *City of Burlington v. Town of Elon College*, 310 N.C. 723 (1984) controls in this case; and this rule makes moot or academic the question of whether the voluntary annexation proceedings and the condemnation proceedings are equivalent proceedings. The Court reaches no conclusion as to whether the proceedings are equivalent.

2. Since the Town of Matthews took the first mandatory public procedural step, it and Mr. and Mrs. Yandle are free to continue with the annexation proceedings; and for so long as such proceedings are pending or when such proceedings are completed, Mecklenburg County is prevented from condemning the land because N.C.G.S. 153A-292 limits County sanitary landfills, and the condemnation of land therefor, to areas outside of incorporated cities and towns.

3. The preliminary injunction issued in the 84CVS11911 case, in which Mecklenburg County is the plaintiff, should be and hereby is dissolved, and this case is dismissed. The preliminary injunction entered in the 84CVS11992 case, in which Mr. and Mrs. Yandle are the plaintiffs, is hereby dissolved, but this case is not dismissed.

The court then entered the following judgment:

1. The Town of Matthews is entitled to adopt an ordinance annexing parcels 215-061-06 and 215-062-01 belonging to Lester H. Yandle, Jr., pursuant to the Petition for Voluntary Annexation filed by Mr. and Mrs. Yandle.

2. The County of Mecklenburg is not entitled to condemn parcels 215-061-06 and 215-062-01 while the Petition for Voluntary Annexation is pending or after an annexation ordinance is adopted by the Town of Matthews.

3. The injunction in case number 84CVS11911 is dissolved and that case is dismissed.

4. The injunction in case number 84CVS11992 is dissolved.

5. Pursuant to the provisions of N.C.G.S. 1-500, the adoption of an annexation ordinance by the Town of Matthews is stayed pending a final determination in the Appellate Division.

Mecklenburg County appealed.

[1] The first issue to be decided on appeal is whether the trial court erred in concluding that the annexation proceeding has priority under the "prior jurisdiction rule," thus enjoining the County from initiating a condemnation proceeding for the land. The basis of the court's judgment is its conclusion of law that the prior jurisdiction rule adopted in *City of Burlington v. Town of Elon College*, 310 N.C. 723, 314 S.E. 2d 534 (1984), is applicable to this case, thus making moot the question of whether the annexation and condemnation proceedings are equivalent. We find the trial court's analysis of the law to be in error.

In *Burlington*, the question was whether Elon College prevailed in its *voluntary* annexation of areas which had been included in Burlington's proposed *involuntary* annexation plan. The court held that the resolution of that issue turned on the applicability of the "prior jurisdiction" rule. With respect to this rule the court stated:

> "The rule that *among separate equivalent proceedings* relating to the same subject matter, that one which is prior in time is prior in jurisdiction to the exclusion of those subsequently instituted, applies, generally speaking, to and among proceedings for the municipal incorporation, annexation, or consolidation of a particular territory, *i.e.*, in proceedings of this character, while the one first commenced is pending, jurisdiction to consider and determine others concerning the same territory is excluded. Thus, where two or more bodies or tribunals have concurrent jurisdiction over a subject matter, the one first acquiring jurisdiction may proceed, and subsequent purported assumptions of jurisdiction in the premises are a nullity."

. . . Additionally, we recognize that the prior jurisdiction rule is based upon priority in time and "ordinarily is determined by the time of the commencement or initiation of the

> proceedings, and not by the time of completion thereof." 2 McQuillin, *supra* at 378. The time of commencement of proceedings, for purposes of the rule, is the "taking of the first mandatory public procedural step in the statutory process for . . . annexation of territory." *Id.*

310 N.C. at 727-28, 314 S.E. 2d at 537, *quoting* 2 McQuillin, Municipal Corporations § 7.22a (3d ed. 1966) (emphasis added). The court held that Burlington had taken the first mandatory public procedural step in the statutory process for annexation of territory and thereby acquired prior jurisdiction of the disputed area making any subsequent attempts by Elon College to acquire jurisdiction null and void. In so holding, the court rejected Elon College's contention that voluntary and involuntary annexation proceedings are not equivalent proceedings, which would have made the prior jurisdiction rule inapplicable. The court held that "[f]or purposes of the prior jurisdiction rule, annexation proceedings, regardless of their nature, are 'equivalent proceedings . . . .' " 310 N.C. at 729, 314 S.E. 2d at 538. In so holding it quoted with disapproval and overruled a portion of the court's prior opinion in *Town of Hudson v. City of Lenoir*, 279 N.C. 156, 181 S.E. 2d 443 (1971), which stated that voluntary and involuntary annexation proceedings are not equivalent proceedings. The court, however, did not do away with the equivalency requirement of the prior jurisdiction rule.

[2] The court below concluded that the prior jurisdiction rule was applicable without first considering whether the annexation and condemnation proceedings are " 'equivalent proceedings relating to the same subject matter.' " *City of Burlington v. Town of Elon College*, 310 N.C. at 727, 314 S.E. 2d at 537. This conclusion was in error. The court should have first made the determination of whether the proceedings are equivalent. If they are, the prior jurisdiction rule would apply. If they are not equivalent, the court could not use the prior jurisdiction rule and must look elsewhere to determine how to proceed. We hold that, for determining whether the prior jurisdiction rule applies, eminent domain proceedings and annexation proceedings are not equivalent.

Black's Law Dictionary 486 (5th ed. 1979) defines "equivalent" as "[e]qual in value, force, measure, volume, power, and effect or having equal or corresponding import, meaning or significance;

alike, identical." An annexation proceeding gives a municipal corporation the authority to bring property within its corporate limits. The ownership of the property does not change hands. In many cases, annexation has little effect on the use or value of the property. On the other hand, a condemnation proceeding concerns the ownership of the land itself, and has long been regarded as one of the strongest inherent powers of government. In *Raleigh & Gaston Railroad Company v. Davis*, 19 N.C. 451, 455-56 (1837), our Supreme Court stated:

> The right of the public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged. Writers upon the laws of nature and nations treat it as a right inherent in society. . . . [W]hen the use is in truth a public one, when it is of a nature calculated to promote the general welfare, or is necessary to the common convenience, and the public is, in fact, to have the enjoyment of the property or of an easement in it, it cannot be denied, that the power to have things before appropriated to individuals again dedicated to the service of the state, is a power useful and necessary to every body politic. . . . [I]ts existence in every state is indispensable and incontestible.

We hold that the annexation proceeding below is not equivalent to the condemnation proceeding, and the "prior jurisdiction rule" does not apply to the proceedings below. The trial court erred in its conclusion, and we vacate the judgment of 1 August 1986.

Finding that the court erred by ruling in favor of the Yandles and the Town based on the prior jurisdiction rule, we now turn our attention to resolving the issues left before the court. Vacating the judgment of 1 August 1986 would leave in place the 31 December 1984 order enjoining the County from initiating the condemnation action and enjoining the Town from annexing the land. Thus we turn our attention to that injunctive order.

In *Centre Development Company v. The County of Wilson*, 44 N.C. App. 469, 261 S.E. 2d 275, *appeal dismissed and disc. review denied*, 299 N.C. 735, 267 S.E. 2d 660 (1980), this Court held that landowners could not invoke the aid of a court of equity to enjoin a county from condemning their land for a public pur-

pose if the landowners had an adequate remedy at law. In the case below, our review of the record and the applicable law demonstrates that the Yandles have an adequate remedy at law. Mecklenburg County's condemnation of their land must be conducted under Chapter 40A of the General Statutes of North Carolina. N.C.G.S. § 40A-1 provides that the provisions of Chapter 40A shall be the "exclusive condemnation procedures to be used in this State by . . . all local public condemnors." N.C.G.S. § 40A-41 provides for the institution of a civil action by the filing in superior court of a complaint. Under N.C.G.S. § 40A-45, the owner of the property may file an answer which shall contain "[s]uch affirmative defenses or matters as are pertinent to the action . . . ." N.C.G.S. § 40A-45(a)(3). This statute gives the Yandles an opportunity to raise in court the issue of the pending annexation proceeding. Thus, we hold that the Yandles have an adequate remedy at law and are not entitled to the injunctive relief granted by the trial court. The portion of the order enjoining the County from proceeding with the condemnation must be dissolved and the action commenced by the Yandles must be dismissed.

In the other action initiated by the County, we believe the injunctive relief barring the annexation is proper. N.C.G.S. § 153A-292 provides that county landfills can be established only in areas "outside of incorporated cities and towns . . . ." If the voluntary annexation is allowed to proceed, the Yandles can effectively stop the condemnation by voluntary annexation into the corporate limits of the Town of Matthews. That action would constitute irreparable harm to the County and is a proper basis for injunctive relief. We hold that the portion of the order enjoining the annexation of the property is valid.

[3] In summary, we hold that when a county initiates condemnation of property for a sanitary landfill, and the property is being considered for voluntary annexation into a municipality, the county may proceed with the condemnation action. The county is entitled to an injunction enjoining the annexation proceeding, and the property owners and the municipality may raise the proposed annexation in the answer to the condemnation complaint, for appropriate consideration by the court.

For the reasons expressed above, the Judgment of 1 August 1986 is vacated. The cause is to be remanded to the Superior

Court of Mecklenburg County for entry of an order (1) dissolving the injunctive relief granted for the Yandles and against Mecklenburg County in Case No. 84CVS11992, (2) dismissing Case No. 84CVS11992, (3) continuing the injunctive relief granted for the County and against the Town and the Yandles in Case No. 84CVS11911, and (4) setting a reasonable time within which the County must file the condemnation action under N.C.G.S. § 40A-41.

Vacated and remanded.

Judges MARTIN and PARKER concur.

SANDRA KAY PETTY v. CITY OF CHARLOTTE, NORTH CAROLINA, A MUNICIPAL CORPORATION, AND THE HOUSING AUTHORITY OF THE CITY OF CHARLOTTE, NORTH CAROLINA

No. 8626SC863

(Filed 5 May 1987)

1. **Negligence § 50.1— automobile collision with fence pole—Housing Authority property—no evidence of City's dominion and control**

In an action against the City and the Housing Authority for injuries sustained when the driver of plaintiff's car swerved off the road to avoid an oncoming car in his lane and an overhanging fence pole impaled plaintiff's car and pierced plaintiff's face and throat, the trial court correctly denied the Housing Authority's motion for a directed verdict and judgment n.o.v., made on the grounds that the City had dominion and control of the fence, where the overwhelming evidence was that the fence was located on Housing Authority property and the Housing Authority failed to come forward with evidence from which the jury could determine either the nature of the relationship between the Housing Authority and the City or the extent to which either the City or the Housing Authority controlled the fence.

2. **Negligence § 10.1— defective fence post—negligence of City—Housing Authority not insulated**

In an action against the City and the Housing Authority for injuries sustained when plaintiff's car collided with an overhanging fence post, the City's negligence was concurrent and did not insulate the Housing Authority.

3. **Negligence § 10.3— defective fence post—negligence of driver—Housing Authority not insulated**

Where plaintiff was injured when her car collided with a fence post, defendant Housing Authority's negligence was not insulated by the negligence

of an unknown driver who caused plaintiff's car to leave the road where the only evidence was that the unknown vehicle swerved over the center line; there may have been legally justified reasons for the car crossing the center line; and, even if the unknown driver was negligent, it was not so highly improbable an occurrence as to bear no reasonable connection to the harm threatened by the Housing Authority's original negligence.

4. **Negligence § 19— collision with fence post—driver of plaintiff's car swerved—not contributory negligence**

In an action by a plaintiff who was injured by an overhanging fence post when her car left the road, plaintiff was not contributorily negligent as a matter of law where the only evidence was that the driver of plaintiff's car left the road because an unknown vehicle crossed into his lane of travel.

5. **Appeal and Error § 31.1— assignment of error to jury instructions—not reviewed**

The Court of Appeals in a negligence action would not review portions of a jury charge to which defendant failed to object where defendant clearly failed to abide by Rule 10(b)(2) of the Rules of Appellate Procedure.

6. **Negligence § 43— defective fence post—issue as to dominion and control of fence—not submitted—no error**

In an action arising from the collision of plaintiff's car with a fence post, the trial judge did not err by failing to instruct the jury that the City had dominion and control over the fence where defendant's counsel was given the opportunity to propose issues for the jury but instead joined with opposing counsel and the trial court in formulating the issues actually submitted; the trial court was deemed to have found against defendant on the issue of the City's dominion and control because the issue was not submitted to the jury and the trial court failed to make a finding on the issue; and the trial court could have properly concluded that there was no substantial evidence requiring defendant's proposed instruction on dominion and control.

7. **Rules of Civil Procedure § 60.4— Rule 60 motion on appeal—remanded to trial court**

A motion under N.C.G.S. § 1A-1, Rule 60 to modify a judgment was properly filed with the Court of Appeals, but the matter was remanded because the trial court was in a better position to resolve the issues.

APPEAL by defendant The Housing Authority of the City of Charlotte, North Carolina, from *Friday, Judge*. Judgment entered 28 January 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 January 1987.

Golding, Crews, Meekins & Gordon, by James P. Crews, for defendant-appellant.

Gerdes, Mason, Wilson & Tolbert, by C. Michael Wilson and J. David Tolbert, for plaintiff-appellee.

GREENE, Judge.

Plaintiff brought this suit against the City of Charlotte (hereinafter, the "City") and The Housing Authority of the City of Charlotte (hereinafter, the "Housing Authority" or "defendant") for personal injuries sustained in an automobile collision with a defective fence post allegedly located on Housing Authority property. The jury found plaintiff was injured by the negligence of both the City and the Housing Authority and allowed her recovery of $1,200,000.00. The Housing Authority and the City gave notice of appeal. Pending appeal, plaintiff settled her claim with the City for the sum of $600,000 plus court costs. The City then withdrew its appeal to this Court.

Thus, the primary issues for this Court's determination are: 1) whether there was evidence of the Housing Authority's possession and control of the fence on its property sufficient to submit the issue of the Housing Authority's negligence to the jury; 2) whether the Housing Authority's negligence, if any, was insulated as a matter of law by the negligence of the City and the driver of an unknown vehicle; and 3) whether plaintiff was contributorily negligent as a matter of law.

I

At the conclusion of all the evidence, the Housing Authority argued there was insufficient evidence to submit its negligence to the jury and moved for directed verdict. The Housing Authority's motion was denied. After the jury returned its negligence verdict, the Housing Authority's motion for judgment notwithstanding the verdict was also denied. Under N.C. Gen. Stat. Sec. 1A-1, Rule 50(a) (1983), a defendant's motion for directed verdict challenges the sufficiency of the evidence to justify a verdict for plaintiff when the evidence is considered in the light most favorable to plaintiff. *See Kelly v. Int. Harvester Co.*, 278 N.C. 153, 157, 179 S.E. 2d 396, 398 (1971). The same test applies to a motion for judgment notwithstanding the verdict under N.C. Gen. Stat. Sec. 1A-1, Rule 50(b) (1983). *See Snellings v. Roberts*, 12 N.C. App. 476, 478-79, 183 S.E. 2d 872, 874, *cert. denied*, 279 N.C. 727, 184 S.E. 2d 886 (1971).

Cast in the light most favorable to plaintiff, the evidence tended to show that, since the late 1930's, the Housing Authority

had owned an approximately 30 acre tract on Oaklawn Avenue in Charlotte. The Housing Authority operated a public housing project, Fairview Homes, on the property. A chain link fence was situated on the tract and surrounded a large portion of the property. For at least twenty years, the City operated a park known as Oaklawn Park on a portion of the Housing Authority property bordering McCall Street. Defendant maintained no part of the fence bordering the park since it claimed it assumed the City would maintain the fence. There was no express agreement between the Housing Authority and the City governing use of the parkland or maintenance of the fence.

At the portion of the park adjoining McCall Street, the fence was located approximately three feet six inches from the street pavement. This particular part of the fence had been damaged and torn down on several occasions after which the City repaired the fence and replaced fence poles on occasion. Neither party offered evidence of how long the park had existed nor under what claim of right, if any, the City occupied the park area. No evidence was offered by defendant directly showing when or by whom the fence was originally erected; however, plaintiff offered evidence that the fence sections, which nearly surrounded the tract, had all been erected at the same time.

The fence bordering McCall Street had sporadically been in a state of disrepair for several months preceding plaintiff's injury. Through its manager of Fairview Homes, the Housing Authority received actual notice of the dilapidated condition of the fence on 23 March 1983, three days before plaintiff's injuries. At 1:00 a.m. on 26 March 1983, plaintiff, as passenger in her own vehicle, was proceeding south on McCall Street. A northbound car crossed onto plaintiff's side of the street. The driver of plaintiff's car drove partially off the pavement to his right. A metal pole hung down horizontally from the top of the fence at an angle toward McCall Street. The pole impaled plaintiff's car, pierced plaintiff's face and throat and exited the rear of the car. Plaintiff survived her massive injuries.

[1] The Housing Authority's motion for directed verdict was grounded on its contention it had no duty to plaintiff because the fence injuring plaintiff was under the "dominion and control" of the City. *See Green v. Duke Power Co.*, 305 N.C. 603, 612, 290

S.E. 2d 593, 598 (1982) (where landowner had no control over easement, landowner not liable since control, not ownership, determined liability); *see generally* 35 Am. Jur. 2d *Fences* Sec. 46-47 (1967). However, defendant has failed to offer any evidence sufficient to demonstrate the City's exclusive "dominion and control" of the defective fence. The fact of possession or occupation underlies most forms of premises liability. *E.g., Ridge v. Grimes*, 53 N.C. App. 619, 620, 281 S.E. 2d 448, 449 (1981) ("possessor" of "public" way deemed liable to public); *see generally* Restatement (Second) of Torts Sec. 328E *et seq.* (1965) (possessor, as defined, incurs premises liability). However, the rebuttable "presumption [is] that possession is in him who has the true title." *Memory v. Wells*, 242 N.C. 277, 280, 87 S.E. 2d 497, 500 (1955). Section 328E(c) of the Restatement (Second) of Torts similarly presumes that the "possessor of land" is the "person who is entitled to immediate occupation of the land, *if no other* person" occupies, or last occupied, the land "*with the intent to control it.*" (Emphasis added.)

Accordingly, once its ownership (and therefore its right to immediate occupancy) of the park land and fence was sufficiently established, the Housing Authority was required to rebut its duty as presumed possessor or occupier by coming forward with evidence sufficient to show it had parted so completely with possession and control of the offending fence that it was unable to perform its duty of care. *See Torres v. U.S.*, 324 F. Supp. 1195, 1200 (E.D.N.Y. 1969) (construing New York law, owner held to have burden of showing unable to perform duty of care); *Hedrick v. Akers*, 244 N.C. 274, 275, 93 S.E. 2d 160, 161 (1956) (where neither tenant's obligation to provide drainage nor tenant's installation of pipe nor tenant's duty of upkeep was shown, owner, not tenant, liable for injuries resulting from pipe installed in front of leased premises); *see also* 62 Am. Jur. 2d *Premises Liability* Sec. 12 at 240 (1972) (ownership is sufficient to give control and impose duty).

The overwhelming evidence is that the fence along McCall Street was located on Housing Authority property. Despite its superior position of knowledge as record titleholder, the Housing Authority came forward with no evidence from which the jury could fairly determine either the nature of the relationship between the Housing Authority and the City or the extent to which either the City or the Housing Authority controlled the fence.

The City's occasional repair of the fence does not itself prove the City's intent to possess and control the fence since these repairs might reflect no more than the City's statutory duty as a municipality to clear streets and rights-of-way. *See* N.C. Gen. Stat. Sec. 160A-296(a)(2) (1982).

The evidence was insufficient to show the City exercised such control over the fence that defendant's duty of care as possessor or occupier was supplanted. Considered in the light most favorable to plaintiff, the evidence of defendant's ownership of the fence, coupled with actual notice of its disrepair, was therefore sufficient under these facts to establish defendant's duty to plaintiff. Accordingly, insofar as defendant's motions for directed verdict and judgment notwithstanding the verdict were based on the contention that defendant owed plaintiff no duty, the motions were appropriately denied.

II

In its motion for directed verdict, defendant also argued any negligence on its part was insulated by the negligence of either the driver of the unknown vehicle who crossed the center line or the City. The trial judge submitted the issue of insulating negligence to the jury. The Housing Authority now argues the court should have found as a matter of law that the Housing Authority's negligence was insulated by the negligence of both the City or the unknown driver.

In *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 236-37, 311 S.E. 2d 559, 566-67 (1984), our Supreme Court restated the basic principles of insulating negligence:

> Insulating negligence means something more than a current and contributing cause. It is not to be invoked as determinative merely upon proof of negligent conduct on the part of each of two persons, acting independently, whose acts unite to cause a single injury. . . . [Citations omitted.]
>
> "An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been in-

troduced, if the original cause remains active, the liability for its result is not shifted. . . ." *Harton v. Tel. Co.*, 141 N.C. 455, 462-63, 54 S.E. 299, 301-02 (1906) (citation omitted).

. . .

"The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. . . ." *Riddle v. Artis*, 243 N.C. 668, 671, 91 S.E. 2d 894, 896-97 (1956) (citations omitted).

A

[2] The Housing Authority first contends the City's negligence insulated its own negligence. There is no dispute among the parties that the City had a duty to maintain the streets free from unnecessary obstructions and to keep them in a reasonably safe condition. *See* N.C. Gen. Stat. Sec. 160A-296(a)(2) (1982) (city has affirmative duty to keep streets clear); *see also Stancill v. City of Washington*, 29 N.C. App. 707, 710, 225 S.E. 2d 834, 836 (1976). Evidence showed McCall Street was a city street and that a city policeman had observed the fence's dangerous condition. Assuming the City's negligent failure to maintain McCall Street, the question under *Hairston* is whether the Housing Authority could have reasonably foreseen the City's negligence and the resultant harm to the plaintiff.

We hold the City's negligence was in the nature of concurrent, not insulating, negligence. While inexcusable, the City's negligence was not "so highly improbable and extraordinary an occurrence as to bear no reasonable connection to the harm threatened by [the Housing Authority's] original negligence." *Hairston*, 310 N.C. at 238, 311 S.E. 2d at 567-68. As the trial judge properly charged the jury on insulating negligence, we reject the Housing Authority's contention the trial court should have found this issue in defendant's favor as a matter of law.

B

[3] Second, defendant contends its negligence was insulated by the negligence of the unknown driver that caused plaintiff's vehicle to leave the road. After reviewing the record, we find no

evidence the unknown driver was negligent at all. The only evidence before the trial court was that the unknown vehicle swerved over the center line. That is not itself sufficient evidence of negligence: there may have been legally justified reasons for the car's crossing the center line. As the Housing Authority has failed to prove the unknown driver's negligence, its argument of insulating negligence has no merit. Even if we assume the unknown driver negligently crossed the center line, we again find it not so highly improbable an occurrence as to bear no reasonable connection to the harm threatened by the Housing Authority's original negligence. The law fixes the Housing Authority with notice of the exigencies of traffic and the prevalence of that "occasional negligence which is one of the incidents of human life." *Hairston*, 310 N.C. at 234, 311 S.E. 2d at 565 (quoting *Beanblossom v. Thomas*, 265 N.C. 181, 188, 146 S.E. 2d 36, 41 (1966)).

III

[4] Defendant next argues plaintiff was contributorily negligent as a matter of law. This argument is also without merit. It is true that, as a matter of law, any negligence on the part of the driver of plaintiff's car is imputed to her when she sues anyone other than the driver. *See Etheridge v. Norfolk So. Rwy. Co.*, 7 N.C. App. 140, 142-43, 171 S.E. 2d 459, 461-62, *cert. denied*, 276 N.C. 327 (1970). In this case, however, there is no evidence the driver of plaintiff's vehicle was negligent. It is true he swerved off the road a few inches and struck the overhanging fence. However, the only testimony is that he left the road because an unknown vehicle crossed into his lane of travel. The evidence at best merely raised an issue which the court appropriately submitted to the jury.

IV

[5] The Housing Authority further raises several assignments of error specifically concerning the charge to the jury. Defendant was given an opportunity to make its objections to the charge after the trial court had excused the jury. Defendant did not request an instruction conference prior to the jury's retiring. Defendant failed to submit any instructions or object to the absence of any instructions regarding any Charlotte city ordinances, any supposed tenancy by the City, or plaintiff's contributory negli-

gence. Rule 10(b)(2) of the Rules of Appellate Procedure states that,

> no party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects on the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

As defendant clearly failed to abide by Rule 10(b)(2), this Court will not review those portions of the jury charge to which defendant failed to object.

[6] Defendant did object to the trial court's failure to instruct the jury that the City had dominion and control over the fence in question. We note defendant waived its right to a jury trial on the issue of dominion and control and related issues since it failed to demand submission of these issues before the jury retired. N.C.R. Civ. P. 49(c); *Superior Foods, Inc. v. Harris-Teeter Super Markets, Inc.*, 288 N.C. 213, 225-26, 217 S.E. 2d 566, 575 (1975). Counsel for defendant was given the opportunity to propose issues for the jury but instead joined with opposing counsel and the trial court in formulating the four issues that were actually submitted. Since the issue of the City's dominion and control was not submitted to the jury, and since the trial court failed to make a finding on the issue, the court is deemed to have found against defendant on the issue of the City's dominion and control. N.C.R. Civ. P. 49(c). Thus, since the City was deemed not to have dominion and control of the defective fence under Rule 49(c), the trial court was not required to give any abstract instructions of law pertaining to the omitted issue. *See State v. Johnson*, 282 N.C. 1, 26, 191 S.E. 2d 641, 658 (1972) (error to charge upon abstract principle of law not applicable to evidence in case).

Given the incomplete record and our earlier discussion of defendant's directed verdict motion, the trial court could have in any event also properly concluded there was no substantial evidence requiring defendant's proposed instruction on dominion and control. *See State v. White*, 77 N.C. App. 45, 52, 334 S.E. 2d 786, 791-92, *cert. denied*, 315 N.C. 189, 337 S.E. 2d 864 (1985). A proposed instruction must be supported by evidence which does

more than "merely sho[w] it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so . . . ." *State v. Gaskins*, 252 N.C. 46, 48-49, 112 S.E. 2d 745, 747 (1960).

V

[7] We have reviewed the remaining assignments of error raised by defendant and find them without merit. Defendant has also filed a motion with this Court requesting modification of the judgment below under N.C. Gen. Stat. Sec. 1A-1, Rule 60. Since defendant filed its Rule 60 motion while this case was pending on appeal, the motion was properly filed in this Court. *Swygert v. Swygert*, 46 N.C. App. 173, 181, 264 S.E. 2d 902, 907-08 (1980). However, the trial court is in a better position than this Court to resolve these questions. *Id.* Therefore, we remand disposition of this motion to the Superior Court of Mecklenburg County for the purpose of determining all issues raised by defendant's motion under Rule 60. The Clerk of this Court is directed to prepare copies of the motion and defendant's answer thereto and copies of all affidavits filed in this Court in support of and in opposition to the motion and certify same to the Clerk of the Superior Court of Mecklenburg County. Upon remand, the Superior Court shall hear and determine the motion upon such affidavits and additional evidence as is presented to the court.

No error.

Defendant's motion under Rule 60 is remanded.

Judges WELLS and EAGLES concur.

MARY MURROW v. EDITH E. DANIELS, EXECUTRIX OF THE ESTATE OF WALTER CLEE DANIELS, EDITH E. DANIELS, INDIVIDUALLY, AND EDITH E. DANIELS, D/B/A HENRY JOHNSON'S MOTOR LODGE & RESTAURANT

No. 8511SC1208

(Filed 5 May 1987)

1. **Innkeepers § 5; Negligence § 27.2— robbery and rape at motel—evidence of other crimes in area—admissibility on foreseeability issue**

In a negligence action where plaintiff alleged that she was robbed and raped and that defendant motel owners failed to provide her a safe place to stay, plaintiff's evidence was sufficient to show that the criminal activity at both the Smithfield interchange to I-95, where defendants' motel was located, and at the Selma interchange, two miles away where other motels were situated, had been high for several years before the night involved and that such activity could reasonably be expected to be repeated thereafter. The trial court did not err either in receiving this evidence or in charging the jury that it could be considered on the foreseeability question.

2. **Innkeepers § 5; Negligence § 34.1— robbery and rape at motel—contributory negligence of victim—refusal to instruct error**

In a negligence action where plaintiff, who was robbed and raped, alleged that defendant motel owners failed to provide her a safe place to stay, but defendants alleged that plaintiff was contributorily negligent in failing to call the desk or look out the bathroom window before opening her door to men who had refused to identify themselves, the trial court erred in refusing to instruct the jury that they could consider plaintiff's failure to look out the bathroom window as a basis for finding that she was contributorily negligent.

3. **Innkeepers § 5; Negligence § 27.3— robbery and rape at motel—subsequent precautions by another motel owner—evidence admissible—lack of security precautions as gross negligence—expert's testimony improperly admitted**

In a negligence action where plaintiff alleged that she was robbed and raped and that defendant motel owners failed to provide her a safe place to stay, the trial court did not err in allowing another motel operator to testify as to security measures which he took after the incident involving plaintiff at defendants' motel, but the court did err in failing to strike the opinion of plaintiff's expert witness on motel security that defendants' lack of security precautions at the time of plaintiff's injuries was "gross negligence."

Judge BECTON dissenting.

APPEAL by defendants from *Herring, Judge*. Judgment and order entered 16 July 1985 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 9 April 1986.

During the night of 2 June 1982 while a guest of Henry Johnson's Motor Lodge in Smithfield plaintiff, a 62-year-old retired

schoolteacher from New York, was robbed, raped and otherwise abused by two men who forced their way into her room after she opened the door to see who was there. The motor lodge, adjacent to Interstate Highway 95, was then owned and operated by defendant Edith Daniels and her late husband, Walter Daniels. Plaintiff, traveling alone, was on her way back to New York after visiting her daughter in Florida, a trip she had made several times before. Her room in the motel was at ground level; its door had neither a peephole nor a chain latch and the only window facing the approach to the room had frosted glass and was in the bathroom. Around 11 o'clock there was a series of loud knocks on the room door; plaintiff asked who was there and what was wanted and the response was a loud command to open the door. When the door was not opened more knocks followed, plaintiff again asked who was there and what was wanted, and again a voice commanded her to open the door. After this happened several times plaintiff opened the door and two strange men forced their way into her room, and for the next hour or so they abused her in many ways: They threatened her with a knife, fondled her roughly, raped her several times, forced her to perform different abominations upon them, took her money, bound her hand and foot, and urinated on her before leaving. After freeing herself, which took a few minutes, plaintiff telephoned the motel front desk. Law enforcement officers were already on the premises investigating an earlier attempt by the same men to break in another motel room, an attempt that failed because the occupant had a gun and indicated that he would use it. The men were quickly apprehended and were later convicted of and sentenced for their crimes. In suing defendants plaintiff stated claims for negligence, gross negligence and breach of contract, and alleged that defendants failed to provide her a safe place to stay, as they were obliged to do, and that as a result thereof she was substantially injured and damaged. The defendants denied plaintiff's principal allegations and alleged that in failing to look out the window and call the motel office, and in opening her room door that plaintiff was contributorily negligent. The claim based on contract was dismissed by summary judgment before trial, the gross negligence claim was dismissed by directed verdict at the close of plaintiff's evidence, and the trial of the negligence claim resulted in a verdict that defendants were negligent, that plaintiff was not contributorily negligent, and that plaintiff had been damaged in the

amount of $50,000. Defendants' post trial motions for a new trial and judgment notwithstanding the verdict were denied; but plaintiff's motion for a new trial on the damages issue only was allowed.

The evidence presented at trial, some of which will be stated in more detail in the opinion, may be broadly summarized as follows: Plaintiff testified to her activities and abuse as stated above and to the nature, extent and expense of her physical and emotional injuries. An expert psychologist, who had treated her on more than fifty occasions, testified that she had a permanent and totally disabling post stress disorder caused by the incident involved. Several Johnston County residents, some of whom were law enforcement officers or motel managers, testified that the motor lodge was in or near a high crime area and that similar crimes had been committed in the area earlier. A qualified expert in motel security expressed his opinion that the security at defendants' motel on 2 June 1982 was inadequate in several respects. On the other hand, defendants' evidence tended to show that plaintiff did not have to open the door to see who was there but could have looked through a bathroom window; that most of the criminal activity plaintiff's witnesses testified to occurred in the vicinity of the Selma exit to I-95, two miles away from the Smithfield exit where defendants' motel was situated; that defendants' security measures were adequate; and that the effect of the incident upon the plaintiff was temporary and non-disabling.

Law Offices of Marvin Blount, Jr., by Marvin Blount, Jr. and Charles Ellis, and Law Offices of Joseph T. Nall, by Joseph T. Nall, for plaintiff appellee.

Teague, Campbell, Dennis & Gorham, by C. Woodrow Teague and Linda Stephens, and Mast, Tew, Armstrong & Morris, by George B. Mast, for defendant appellants.

PHILLIPS, Judge.

In substance, defendants' contentions are that as a matter of law the evidence presented failed to establish their negligence and established plaintiff's contributory negligence; that they were prejudiced by much inadmissible evidence; that the jury instructions were erroneous in several respects; and that it was error to grant a new trial on just the damages issue. Since a new trial on

all issues raised by the pleadings and evidence is necessary because of a prejudicial error in charging the jury, we will rule on only those other questions likely to arise in the next trial; and in doing so will avoid repetition by grouping alleged errors either as argued in the briefs or as seems appropriate.

I.

[1] First, we discuss and overrule defendants' contention that the evidence presented shows as a matter of law that they were not negligent because the harm done plaintiff by the criminal intruders was not reasonably foreseeable. An innkeeper owes a duty of reasonable care to his guests and that duty includes taking precautions to protect guests from the reasonably foreseeable criminal acts of third persons. *Urbano v. Days Inn of America, Inc.*, 58 N.C. App. 795, 295 S.E. 2d 240 (1982). Such foreseeability can be proven by evidence of prior criminal activity on the premises involved, *Urbano v. Days Inn of America, Inc., supra*, or in the area in which the inn is situated. *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E. 2d 855, *disc. rev. denied*, 301 N.C. 239, 283 S.E. 2d 136 (1980); *Sawyer v. Carter*, 71 N.C. App. 556, 322 S.E. 2d 813 (1984), *disc. rev. denied*, 313 N.C. 509, 329 S.E. 2d 393 (1985). In this case plaintiff's evidence is clearly sufficient to show that the criminal activity at both the Smithfield interchange to I-95, where defendants' motel is located, and at the Selma interchange, two miles away where other motels are situated, had been high for several years before the night involved and that such activity could reasonably be expected to be repeated thereafter. According to the testimony of the law enforcement officers and motel operators and the records of the local police and sheriff's departments over 300 crimes were committed at the two interchanges between 1978 and 1982, 100 of which were at the Smithfield interchange. Defendants contend that all this evidence was improperly admitted because none of the reported crimes occurred on their premises; that the offenses at the Selma interchange were irrelevant because that interchange is one neighborhood and the Smithfield interchange another; and that the crimes that occurred were not similar to those committed on plaintiff. These contentions have no merit. In *Sawyer v. Carter, supra*, we held that evidence pertaining to the foreseeability of a criminal attack will not be limited to crimes that occurred on the premises in question. Though Smithfield and Selma are geographically and

politically distinct entities, the evidence indicates that the two interchange areas are parts of one business community that serves the needs of motorists traveling on that short, two mile stretch of I-95. The businesses at the interchanges are similar and the adjacent interchanges, but two minutes apart, are as continuing and similar, it seems to us, as two businesses at opposite ends of a city block in one neighborhood as in *Wesley*. The general rule, stated by our learned authority on the law of evidence, is as follows:

> When substantial identity of circumstances and reasonable proximity in time is shown, evidence of similar occurrences or conditions may, in negligence actions, be admitted as relevant to the issue of negligence . . . .

1 Brandis N.C. Evidence Sec. 89 (1982). *See also* Byrd, *Proof of Negligence, Pt. II*, 48 N.C. L. Rev. 731, 739-44 (1970). Thus, the evidence of criminal activity at the Selma interchange was not irrelevant to what defendants should have foreseen might occur on their premises; for it tends to show that the adjacent interchanges with their accompanying businesses are equally inviting and accessible to motorists traveling that short stretch of I-95—and to criminals who prey upon them. And as to the crimes reported in the area not being similar to those committed on plaintiff both the law and the evidence has an answer. The law does not require that the precise crimes committed be foreseeable, only that some criminal act might be suffered, *Urbano v. Days Inn of America, Inc., supra*; and the evidence shows that the crimes reported, not just in the general area but immediately adjacent to defendants' motel and about which defendants were informed, included at least five armed robberies, the harm of which, obviously, could have exceeded that suffered by plaintiff. Thus, we rule that the court did not err either in receiving this evidence or in charging the jury that it could be considered on the foreseeability question. We also hold that this evidence, along with the other evidence indicating that defendants' security arrangements were inadequate, is sufficient to support the jury finding that defendants were negligent.

II.

[2] Defendants' contention that plaintiff was contributorily negligent as a matter of law is based upon evidence mostly from

her that without calling the desk or looking out the bathroom window she opened her room door to persons who had refused to identify themselves. But plaintiff testified that the urgency and loudness of the knocking and of the voices that responded to her questions seemed to require an immediate response and made her think that an emergency of some kind might exist and that it was appropriate to open the door. Each claim of contributory negligence must be decided according to its own circumstances, *Thomas v. Thurston Motor Lines, Inc.*, 230 N.C. 122, 52 S.E. 2d 377 (1949), and to say the least the circumstances in which plaintiff found herself were not those ordinarily faced by motel guests. Her door had neither latch nor peephole; the only window available to her was in the bathroom and had to be adjusted before it could be seen through; and two men were noisily and insistently knocking and demanding that the door be opened, whereas most criminals intent on entering a house or room and attacking the occupant act quietly so as not to attract the attention of others within earshot. Whether plaintiff's reaction to these exigent circumstances amounted to contributory negligence is plainly a question that reasonable minded persons can differ about, it seems to us, *Daughtry v. Cline*, 224 N.C. 381, 30 S.E. 2d 322 (1944), and thus the court did not err in refusing to rule that plaintiff was contributorily negligent as a matter of law.

But we agree with defendants that in charging on the contributory negligence issue the court committed prejudicial error in refusing to instruct the jury that they could also consider plaintiff's failure to look out the bathroom window as a basis for finding that she was contributorily negligent. In asserting this defense three grounds were alleged—the failure to use the bathroom window, the failure to call the motel office, and the opening of the door—and defendants' evidence tended to support all three grounds at least to some extent. Though according to the evidence the window was inconveniently arranged and situated and to see through it she would have had to stand in the bathtub and slide an adjustable panel of frosted glass over, its availability was nevertheless a material aspect of this defense and the jury should have been permitted to determine whether ordinary care required plaintiff to use it; for it cannot be said as a matter of law that either the window had no utility or it was not contributory negligence to fail to use it. Thus, since the other two grounds for

the defense were charged on the failure to charge as to the availability of the window had the inevitable effect, it seems to us, of erroneously depriving defendants of that part of their defense. When this case was tried G.S. 1A-1, Rule 51(a), N.C. Rules of Civil Procedure, required the judge to declare the law arising on the facts and state the evidence necessary to explain the application of the law to them. *Brown v. Scism*, 50 N.C. App. 619, 274 S.E. 2d 897, *disc. rev. denied*, 302 N.C. 396, 276 S.E. 2d 919 (1981). That rule required the court to instruct the jury as to the things that plaintiff did or failed to do, according to the evidence, that could constitute contributory negligence, *Zach v. Surry-Yadkin Electric Membership Corp.*, 57 N.C. App. 326, 291 S.E. 2d 290 (1982), and in not charging that plaintiff's failure to use the bathroom window could constitute contributory negligence the rule was violated to defendants' prejudice.

III.

[3] Of the many items of evidence that defendants contend were erroneously received against them we discuss only the following: The testimony of another motel operator as to security measures that *he took* after the incident involving plaintiff at defendants' motel did not violate G.S. 8C-1, Rule 407, N.C. Rules of Evidence, as defendants contend. For that rule applies only to remedial measures "which, if taken previously, would have made the event less likely to occur," and the evidence involved was as to measures taken by other persons on other properties. *See generally*, 2 Weinstein's Evidence, United States Rules, para. 407[01] (1985). Whether a 1980 newspaper article regarding thefts from a Selma motel was inadmissible, as defendants contend, because it contained unsworn statements and its author could not be cross-examined, cannot be ruled upon since the challenged article does not appear in the record, or among the exhibits submitted with the record, as required by Appellate Rule 9. Furthermore, the record fails to indicate whether the article was offered merely to illustrate the witness's testimony, for which purpose it would have been admissible, or as proof of the truth of the matters stated therein. *See generally*, 1 Brandis N.C. Evidence Sec. 138 (1982). The testimony of Thomas Kindler, plaintiff's expert witness on motel security, that he could not see through a certain bathroom window in defendants' motel, was not irrelevant though the window was not in the room that plaintiff occupied when as-

saulted; because the evidence indicates that the rooms were similarly situated and equipped. Thus, the testimony that that window could not be seen through tended to show that plaintiff's window could not be seen through either, and was quite relevant to an issue in the case. *State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975); *State v. Hedgepeth*, 230 N.C. 33, 51 S.E. 2d 914 (1949); 1 Brandis N.C. Evidence Sec. 94 (1982). But defendants' contention that the court erred in failing to strike Kindler's opinion that defendants' lack of security precautions at the time of plaintiff's injuries was "gross negligence" has merit. Though G.S. 8C-1, Rule 704, N.C. Rules of Evidence, permits a witness to express an opinion on the "ultimate issue to be decided by the trier of fact," Kindler's opinion amounted to a legal conclusion he was not qualified to make and the court is not authorized to receive. So far, in interpreting Rule 704 our Supreme Court has stopped short of allowing testimony that amounts to a legal conclusion. "[E]ven under the new rules of evidence, an expert may not testify that a particular legal conclusion or standard has or has not been met, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness." *State v. Ledford*, 315 N.C. 599, 617, 340 S.E. 2d 309, 321 (1986). "Gross negligence" clearly has legal significance and that characterization by the witness should not have been permitted. Even so, since the gross negligence and punitive damages issue was eliminated from the case the prejudicial effect of the evidence is not clearly indicated; for, as has been authoritatively observed, the prejudicial effect of opinion testimony containing a legal term of art is gauged by the sense in which the objectionable words were used, 1 Brandis N.C. Evidence Sec. 130 (1982), and the precise context of Kindler's words is not clear because the parties chose to narrate the testimony. The record only indicates that the witness was not asked to state a legal conclusion of any kind, as the witness was in *State v. Ledford, supra*, but was describing the security situation at defendants' motel when he used the words "gross negligence." Even so, the characterization was inappropriately received as evidence.

IV.

Another instruction to the jury that defendants complain of is that—

> [I]nnkeepers should foresee that necessarily large amounts of money and credit cards are carried by their guests and consequently increased security is required in these days of rapidly increasing assaultive crimes.

Defendants contend that this instruction was erroneous because no evidence was presented that motel and hotel guests carry large amounts of money and credit cards or that these are days of rapidly increasing assaultive crimes. This contention is rejected for two reasons. First, there was evidence that motel guests usually have enough money to pay their bills and that a number of assaultive crimes had occurred in that area. Second, it is not necessary to prove that which is commonly known, 1 Brandis N.C. Evidence Sec. 11 (1982), and that motel and hotel guests often carry credit cards and large amounts of cash, and that assaultive crimes have greatly increased in this country are facts well known to all. For even in our smaller towns assaults and robberies are reported almost daily by the media and rarely does a year go by without an increase in violent crime being publicly lamented by national, state and local agencies of different kinds.

New trial.

Judge COZORT concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

In my view, the record does not contain even a scintilla of evidence supporting a finding that plaintiff was contributorily negligent by her failure to look out the bathroom window. To suggest that a sixty-two-year-old woman must go to a bathroom, stand on a bathtub, crank open a window and stick her head out to see who was knocking to overcome a contributory negligence defense is anomalous in view of the jury's conclusion that plaintiff's act of opening the door and her failure to call the desk clerk was not contributory negligence. I vote to affirm.

ADA PEARL STONE AND CECIL GLYNN JERNIGAN, INDIVIDUALLY AND AS SHAREHOLDERS OF CREEKSIDE ENTERPRISES, INC. v. R. L. MARTIN, JR., AND LARRY G. SANDERFORD AND CREEKSIDE ENTERPRISES, INC.

No. 8610SC973

(Filed 5 May 1987)

1. **Appeal and Error § 68— order compelling discovery—prior Court of Appeals opinion—law of the case**

A prior Court of Appeals opinion that an order compelling discovery did not violate defendant's constitutional rights against self-incrimination was the law of the case.

2. **Corporations § 13; Damages § 11.1— malfeasance in corporate management—punitive damages—evidence sufficient**

In an action for malfeasance in conducting the affairs of a corporation, the trial court did not err by denying defendants' motions for a directed verdict on the grounds that the evidence was insufficient to raise an issue of punitive damages where the jury found that defendants had wrongfully converted to their own use money belonging to the corporation, which was a breach of the fiduciary duty defendants owed the corporation and thus a fraud. Punitive damages are available for fraud and additional elements of aggravation are not necessary.

3. **Damages § 13— punitive damages—evidence of net worth admissible**

The trial court did not err by admitting evidence of defendants' net worth in an action for malfeasance in conducting the affairs of a corporation where the evidence sufficiently raised an issue of punitive damages.

4. **Damages § 11.1; Corporations § 13— malfeasance in managing corporation—punitive damages—not excessive**

In an action for malfeasance in conducting the affairs of a corporation, the jury did not abuse its discretion in awarding punitive damages, even though the award of punitive damages significantly exceeded the award of compensatory damages, because defendants were fiduciaries and the purpose of punitive damages is to punish.

5. **Corporations § 5.1; Bills of Discovery § 6— refusal to permit examination of corporate records—penalty**

In an action for malfeasance in managing a corporation, a statutory penalty assessed against defendants for refusing to allow plaintiffs to see the books and records of the corporation was properly assessed where the trial court's findings of fact were supported by the evidence. N.C.G.S. § 55-38(d).

6. **Corporations § 18— stock issued to officer—dissolution of shares—defendants' stock canceled**

The trial court properly canceled defendant's shares in a corporation where there was no evidence that the board of directors enacted a resolution determining the value of labor and services defendant allegedly supplied to the

corporation as consideration for the stock, the jury rejected defendant's testimony that he had rendered labor and services to the corporation, and the jury found that defendant had not paid cash for the stock. N.C.G.S. § 55-53, N.C.G.S. § 55-46.

7. Appeal and Error § 31.1— issue of joint and several liability not submitted—no objection at trial—no appeal

Plaintiffs lost their right to contend on appeal that the trial court erred by not holding defendants jointly and severally liable where the jury determined the separate and individual liability of defendants for compensatory and punitive damages, the issue of joint and several liability could have been submitted to the jury but was not, and the issues submitted were submitted without objection.

APPEALS by defendants (R. L. Martin, Jr. and Larry G. Sanderford) and plaintiffs from *Preston, Judge*. Order and Judgment entered 11 February 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 10 March 1987.

Plaintiffs, shareholders in defendant corporation, brought this action for compensatory damages, punitive damages, arrest and bail, and body execution of the individual defendants for their alleged malfeasance in conducting the affairs of the corporation. The corporation's sole business was the operation of a nightclub called "Players." Plaintiffs served interrogatories and requests for admission on the individual defendants, who refused to answer, claiming the privilege against self-incrimination.

Defendants continued to assert their claim of privilege after Judge Preston ordered them to comply with most of the discovery requests. Judge Lee consequently imposed sanctions pursuant to N.C.G.S. § 1A-1, Rule 37(b), striking the individual defendants' answers, ordering them not to oppose the claims in the complaint, adjudging them to be in default and ordering a trial to determine the amount of the judgment to be entered. Defendant Martin appealed from the order imposing sanctions.

This Court affirmed that order in a decision reported at 53 N.C. App. 600, 281 S.E. 2d 402 (1981). Upon petition for rehearing, that opinion was withdrawn and superseded by an opinion reported at 56 N.C. App. 473, 289 S.E. 2d 898, *disc. rev. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982). The latter opinion affirmed Judge Lee's order on the ground that the information which was the subject of the discovery order would not necessarily tend to subject defendants to punitive damages and body execution and thus

did not fall within the constitutional privilege against self-incrimination.

The individual defendants then moved that the trial court set aside the order of default and allow them to comply with the discovery order. Judge Farmer granted their motions, and this Court in an opinion reported at 69 N.C. App. 650, 318 S.E. 2d 108 (1984), affirmed that order. Defendants Martin and Sanderford then responded to the discovery requests.

The case was tried before a jury, and the trial court entered the following order and judgment:

> THIS CAUSE coming on to be heard before the undersigned Judge Presiding at the January 6th, 1986 term of Wake County Civil Superior Court, Wake County, North Carolina, before the Honorable Judge Edwin S. Preston and a jury presiding and the issues having been submitted to the jury and answered by them as follows:
>
> (1) How much cash did R. L. Martin, Jr. pay for any stock issued to him by Creekside Enterprises, Inc.?
>
> ANSWER: None.
>
> (2) How much cash did Larry Sanderford pay for any stock issued to him by Creekside Enterprises, Inc.?
>
> ANSWER: $3,000.00.
>
> (3) How much cash did Ada Stone pay for any stock issued to her by Creekside Enterprises, Inc.?
>
> ANSWER: $3,000.00.
>
> (4) How much cash did Glenn [sic] Jernigan pay for any stock issued to him by Creekside Enterprises, Inc.?
>
> ANSWER: $3,000.00.
>
> (5) What amount of money belonging to Creekside Enterprises, Inc., if any, did R. L. Martin, Jr. wrongfully convert to his own use?
>
> ANSWER: $11,000.00.

(6) What amount of money belonging to Creekside Enterprises, Inc., if any, did Larry Sanderford wrongfully convert to his own use?

ANSWER: $19,000.00.

(7) What amount of money, if any, should R. L. Martin, Jr. pay to Creekside Enterprises, Inc. for punitive damages?

ANSWER: $150,000.00.

(8) What amount of money, if any, should Larry Sanderford pay to Creekside Enterprises, Inc. for punitive damages?

ANSWER: $150,000.00.

IT FURTHER APPEARING UNTO THE COURT that this Court has accepted and approved of the jury's answers as their jury verdict and has directed the Clerk to enter the jury verdict on its records.

BASED UPON THE EVIDENCE PRESENTED TO THE COURT, the Court makes the following additional:

FINDINGS OF FACT

1. That Creekside Enterprises, Inc. is a corporation. The sole directors of this corporation from the time of its incorporation until the date of trial were R. L. Martin, Jr., Larry G. Sanderford and Benjamin Franklin Carraway.

2. That throughout the existence of the corporation, R. L. Martin, Jr. served as Secretary-Treasurer of the corporation and Larry G. Sanderford served as President.

3. That although Benjamin Franklin Carraway is a Director of the corporation, as stated above, he was never advised of any meetings of the Board of Directors and never voted on any matters, if any, which came before the Board of Directors.

4. There was never a meeting of the Board of Directors to evaluate and establish the value of any services rendered to the corporation by the defendants, R. L. Martin, Jr. or Larry G. Sanderford.

5. That the plaintiff, Cecil Glynn Jernigan, made demand upon the defendants, R. L. Martin, Jr. and Larry G. Sanderford, for inspection of the financial statements of the corporation and the defendants, Martin and Sanderford, refused to allow Cecil Glynn Jernigan to see those records although Cecil Glynn Jernigan was at all times mentioned in the Complaint, a shareholder of the corporation, Creekside Enterprises, Inc. and held more than 5% of the outstanding stock of the corporation. That the plaintiff, Ada Pearl Stone, on several occasions went to the premises of the nightclub known as "Players" and made demand upon the bookkeeper and the manager of that club to see the books and records of the corporation. She was told by the manager that she could not see those books and records without the approval of R. L. Martin, Jr. The plaintiff, Ada Pearl Stone, was never allowed to see the books and records of the corporation and they were not made available to her as a result of her demand upon management to see those records. Ada Pearl Stone is, and was at all times mentioned in the Complaint, a shareholder in the corporation and held more than 5% of the outstanding stocks of the corporation.

6. That the corporate defendant, Creekside Enterprises, Inc., is in imminent danger of insolvency by reason of the mismanagement of its corporate officers, the defendants, Martin and Sanderford.

7. That the fact that the defendant, R. L. Martin, Jr., issued to himself stock in the defendant, Creekside Enterprises, Inc., without paying any consideration for that stock resulted in a dilution of the shares of the other stockholders who did pay cash for their stock.

8. That the action of the plaintiffs in this cause and their lawyer have provided a substantial benefit to the corporation.

9. That a receivership is necessary for the full protection of all corporate interests and, the defendants Martin and Sanderford have, through their lawyers, stipulated that a receiver may be appointed for the corporate defendant.

10. That the jury has found by its verdict as mentioned above, that R. L. Martin, Jr. paid nothing for the stock issued

to him. Therefore, the shares issued to R. L. Martin, Jr. should be cancelled and the only stockholders of the defendant corporation are therefore the plaintiffs, Ada Pearl Stone and Cecil Glynn Jernigan, and the defendant Larry G. Sanderford, who each contributed $3,000.00 for their stock. Larry G. Sanderford, as the jury verdict holds, paid $3,000.00 for his stock.

WHEREFORE, having made the foregoing findings of fact, and the jury having answered the issues submitted to it as set out above, the Court makes the following:

CONCLUSIONS OF LAW

(1) That the defendant corporation, Creekside Enterprises, Inc., is entitled to recover compensatory damages from the defendant R. L. Martin, Jr., in the amount of $11,000.00 with interest from May 7, 1979, until paid and the corporation is entitled to recover punitive damages from the defendant, R. L. Martin, Jr., in the amount of $150,000.00.

(2) That the corporate defendant, Creekside Enterprises, Inc., is entitled to recover compensatory damages against the defendant, Larry G. Sanderford, in the amount of $19,000.00 with interest from May 7, 1979, and is entitled to recover punitive damages against the defendant, Larry G. Sanderford, in the amount of $150,000.00.

(3) That the corporate defendant is in imminent danger of insolvency by reason of mismanagement of the individual defendants and it is necessary for the full protection of all corporate interests that a receiver be appointed to take charge of the assets of the corporate defendant.

(4) That the stock of the corporate defendant, Creekside Enterprises, Inc., held by the defendant R. L. Martin, Jr., should be cancelled.

(5) That the plaintiffs, Stone and Jernigan, are entitled to be reimbursed by the corporate defendant for their expenses of litigation, including counsel fees.

(6) That the corporate defendant, Creekside Enterprises, Inc., is entitled to recover from the defendants, Martin and

Sanderford, in addition to the sum set out above, all expenses of litigation including attorney's fees.

(7) That the plaintiffs, Stone and Jernigan, are entitled to recover from the defendants, Martin and Sanderford, a penalty of $500.00 each in accordance with the provisions of N.C.G.S. Section 55-38(d) for failure to provide the information described therein.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the defendant corporation, Creekside Enterprises, Inc., shall have and recover compensatory damages from the Defendant, R. L. Martin, Jr., in the amount of $11,000.00 with interest from May 7, 1979, until paid and the corporation shall have and recover punitive damages from the defendant, R. L. Martin, Jr., in the amount of $150,000.00 with interest from January 9, 1986.

2. That the corporate defendant, Creekside Enterprises, Inc., shall have and recover compensatory damages against the defendant, Larry G. Sanderford, in the amount of $19,000.00 with interest from May 7, 1979, and Creekside Enterprises, Inc. shall have and recover punitive damages from the defendant, Larry G. Sanderford, in the amount of $150,000.00 with interest from January 9, 1986.

3. That the plaintiff, Ada Pearl Stone, have and recover of the defendant, R. L. Martin, Jr., $500.00.

4. That the plaintiff, Ada Pearl Stone, have and recover of the defendant, Larry G. Sanderford, $500.00.

5. That the plaintiff, Cecil Glynn Jernigan, have and recover of the defendant, R. L. Martin, Jr., $500.00.

6. That the plaintiff, Cecil Glynn Jernigan, have and recover of the defendant, Larry G. Sanderford, $500.00.

7. That all stock in the corporate defendant, Creekside Enterprises, Inc., which is held by the defendant, R. L. Martin, Jr., is hereby cancelled and is therefore null and void and the Court hereby declares that R. L. Martin, Jr., owns no stock or interest whatsoever in the corporate defendant, Creekside Enterprises, Inc.

8. That a receiver shall be appointed for the corporate defendant, Creekside Enterprises, Inc., under the provisions of Part 2, Article 38 of the North Carolina General Statutes. The Court, by a separate order will appoint a receiver to take charge of the assets of the corporate defendant.

9. That the plaintiffs shall be reimbursed by the corporate defendant, Creekside Enterprises, Inc., for the reasonable expenses of bringing this litigation including counsel fees. The Court will set the amount of such expenses at a subsequent hearing.

10. That the defendants, Martin and Sanderford, are liable, jointly and severally, for the expenses of this litigation incurred by the plaintiffs on behalf of the corporate defendant, Creekside Enterprises, Inc. The Court shall set the amount of such expenses and attorney's fees at a subsequent hearing.

From the order and judgment of the trial court, defendants (Martin and Sanderford) and plaintiffs appeal.

Brenton D. Adams, attorney for plaintiffs.

Hunter, Wharton & Howell, by John V. Hunter III, attorney for defendant R. L. Martin, Jr. and George R. Barrett, attorney for defendant Larry G. Sanderford.

ORR, Judge.

I.

[1] Defendants first contend that the trial court violated their privilege against self-incrimination when it compelled them to answer discovery requests and when it admitted the answers to the discovery requests into evidence at trial.

This Court previously held that the order compelling the discovery in this case did not violate defendants' constitutional right against self-incrimination. *Stone v. Martin*, 56 N.C. App. 473, 289 S.E. 2d 898, *disc. rev. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982). Our decision in the previous appeal constitutes the law of the case. *See Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E. 2d 181 (1974). Therefore, defendants' contention is without merit.

[2] Defendants next contend that the trial court erred in denying their motions for a directed verdict because the evidence was insufficient to raise an issue of punitive damages. We do not agree.

N.C.G.S. § 55-35 states:

> Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its shareholders and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions.

The jury found that Martin and Sanderford wrongfully converted to their own use money belonging to the corporation. The conversions constituted a breach of the fiduciary duty that defendants, as officers and directors of Creekside Enterprises, Inc., owed to the corporation and its shareholders.

Fraud exists when there is a breach of a fiduciary duty. *See Miller v. Bank*, 234 N.C. 309, 67 S.E. 2d 362 (1951). Punitive damages are available for fraud. *See Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976).

Defendants argue that North Carolina law requires proof of malice or other aggravating factor in addition to the breach constituting fraud before punitive damages may be awarded. In *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976), our Supreme Court stated, " 'Punitive damages are never awarded, except in cases when there is an element either of fraud, malice, . . . or other causes of aggravation in the act or omission causing the injury.' " 290 N.C. at 136, 225 S.E. 2d at 808 (citations omitted).

Punitive damages are available for fraud. Defendants committed fraud by breaching their fiduciary duty. Since fraud is present in the case *sub judice*, additional elements of aggravation are unnecessary. *See Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297. We find that the conversions which constituted the breach support an award of punitive damages in this case. Therefore, we hold that the trial court properly denied defendants' motions for a directed verdict since the evidence sufficiently raised an issue of punitive damages.

[3] Defendants also contend that the trial court erred in admitting evidence of Martin's net worth when there was insufficient evidence to raise an issue of punitive damages. Defendants concede that evidence of a defendant's net worth is relevant and admissible in punitive damages cases. Having determined that the evidence in this case sufficiently raised an issue of punitive damages, we hold that the trial court did not err in admitting evidence of Martin's net worth.

[4] Defendants next contend that the jury's award of punitive damages "exceeded permissible bounds and should have been reduced or a new trial should have been awarded." We disagree.

It is for the jury to determine (1) whether punitive damages in any amount should be awarded, and if so (2) the amount of the award. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956). These questions are determinable by the jury in its discretion. *Id.*

We are aware that the award of punitive damages significantly exceeds the award of compensatory damages in the present case. However, because defendants were fiduciaries and in view of the fact that the purpose of punitive damages is to punish, we find no evidence of an abuse of discretion by the jury.

[5] Defendants further contend that "it was error to assess a statutory penalty against the defendants for allegedly refusing to allow the plaintiffs to see the books and records of the corporation, where the evidence on this score showed no such refusal." We disagree.

In its findings of fact, the trial court found that defendants refused to allow plaintiffs to see the books and records of the corporation. After reviewing the record, we hold that the trial court's findings of fact are supported by the evidence. Therefore, the trial court properly assessed the statutory penalty.

[6] Defendants finally contend that "the trial court's cancellation of the shares of the stock of the defendant Martin was not justified by the evidence and was legally erroneous." We do not agree.

N.C.G.S. § 55-46 sets out the consideration required for the issuance of shares in a North Carolina corporation. It states in part that shares may be issued for "[m]oney or property, tangible or intangible," or "[l]abor or services actually rendered."

Martin argues that his testimony, that he made various payments which inured to the benefit of the corporation and that he rendered labor and services to the corporation, is sufficient evidence of consideration. The jury rejected Martin's testimony and found that he did not pay any cash for the stock.

Martin is correct in pointing out that labor and services may constitute sufficient consideration for the issuance of stock. However, N.C.G.S. § 55-46(f) requires that before stock is issued in consideration for labor and services, "the board of directors shall state by resolution their determination of the fair value to the corporation of such consideration." There was no evidence that such a resolution was ever enacted by the Board of Directors.

The trial court rejected Martin's testimony and specifically found as fact that Martin paid no consideration for the stock and caused a dilution of the shares of the other shareholders. N.C.G.S. § 55-53 provides cancellation as a remedy for the dilution of shares. Therefore, the trial court properly cancelled defendant Martin's shares.

II.

[7] In their sole assignment of error, plaintiffs contend that the trial court erred "in failing to hold the defendants Martin and Sanderford jointly and severally liable for the combined verdicts of compensatory and punitive damages against both of them when the evidence showed that the defendants Martin and Sanderford were the controlling parties of the corporation and that they acted in concert with respect to the wrongs perpetrated upon the plaintiffs." We disagree.

In the case *sub judice*, the jury determined the separate and individual liability of Martin and Sanderford for compensatory and punitive damages. Although the issue of joint and several liability could have been submitted to the jury, it was not. The issues were submitted without objection, and plaintiffs have lost their right to object to them on appeal. *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960). Therefore, we hold that the trial court did not err in failing to hold Martin and Sanderford jointly and severally liable.

No error.

Judges MARTIN and GREENE concur.

LELAND H. WILLIAMS, ERIC M. AUPPERLE, AND L. DUANE PYLE v. INSTITUTE FOR COMPUTATIONAL STUDIES AT COLORADO STATE UNIVERSITY

No. 8614SC1036

(Filed 5 May 1987)

Process § 14.3— foreign corporation—contract to be performed in North Carolina—minimum contacts with North Carolina—exercise of personal jurisdiction proper

The trial court had personal jurisdiction over defendant with regard to the claim of the North Carolina plaintiff but not over the claims of the Michigan and Texas plaintiffs where the parties entered into a consulting contract whereby each plaintiff was to render separate and distinct services to defendant in exchange for $5,000 in compensation; none of the plaintiffs accepted defendant's offer in North Carolina but one plaintiff was to perform and did in fact perform substantially in this state; and defendant's contacts with this state, including a telephone hook-up with TUCC, of which the North Carolina plaintiff was president, and a charter membership for TUCC in defendant, were sufficient so that exercise of personal jurisdiction did not violate due process. N.C.G.S. § 1-75.4(5)a and b; N.C.G.S. § 55-145(a)(1).

Judge WELLS concurring in part and dissenting in part.

APPEAL by defendant from *Lee, Judge*. Order entered 30 June 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 February 1987.

Plaintiffs filed suit in Durham County, North Carolina, against defendant, the Institute for Computational Studies at Colorado State University (hereinafter, ICS). The complaint alleges that plaintiffs entered into a contract with ICS for consultation services, and that although plaintiffs performed the services required by the contract, ICS failed to pay plaintiffs as agreed. The complaint also alleges that ICS is a Colorado corporation, that plaintiff Leland H. Williams is a citizen of Durham County, North Carolina, and that plaintiffs Eric M. Aupperle and L. Duane Pyle are citizens of Michigan and Texas, respectively. Before filing its answer, ICS filed a motion to dismiss for lack of personal jurisdic-

tion and for insufficient service of process pursuant to G.S. 1A-1, Rules 12(b)(2) and 12(b)(5). The motion was denied, and ICS appeals.

Haywood, Denny, Miller, Johnson, Sessoms and Patrick by George W. Miller, Jr., and Robert W. Oast, Jr., for plaintiff-appellees.

Mills and Associates by William S. Mills and Maria J. Mangano for defendant-appellant.

PARKER, Judge.

The sole issue to be decided in this appeal is whether the trial court erred in denying ICS's motion to dismiss plaintiffs' claims for lack of personal jurisdiction. As to the claim of plaintiff Williams, we hold that the court had jurisdiction over ICS and properly denied the motion. As to the claims of plaintiffs Aupperle and Pyle, however, we hold there is no personal jurisdiction; therefore, the court below erred in denying the motion as to those claims.

The pleadings, affidavits, and documents in the record as well as the testimony of plaintiff Williams tend to show the following facts. The ICS Articles of Incorporation were executed by its incorporators 12 April 1984. Among the purposes of ICS listed in this document was to "[o]perate unique, state-of-the-art, high performance computation facilities in an optimum manner for the maximum benefit of its member institutions." The prospectus for ICS listed eight institutions as having submitted letters of intent to participate as members, including the University of Michigan, the University of Houston, and Triangle Universities Computation Center (hereinafter, TUCC), a non-profit North Carolina corporation. Among those listed in the prospectus as chairmen of the five "technical committees" of ICS were plaintiff Williams of TUCC, as chairman of the "Operations and Services Committee," plaintiff Aupperle of the University of Michigan, as chairman of the "Data Communications Committee," and plaintiff Pyle of the University of Houston, as chairman of the "Research Committee." In the ICS budget for the twelve months beginning 15 April 1984, under the heading "Fees," was listed $25,000 for "Technical Committee Chairmen."

In January 1984, prior to the execution of the ICS Articles of Incorporation, a meeting of the committee chairmen, including plaintiffs, took place in Fort Collins, Colorado. Also in January 1984, the computer facilities at TUCC, in Research Triangle Park, North Carolina, were linked to the computer facilities at ICS, in Fort Collins, Colorado, by means of a "dedicated" telephone line installed by AT&T especially for that purpose.

Some time in April 1984, TUCC received from ICS a "Membership Agreement" providing that TUCC purchase a charter membership in ICS for $10,000. This document was signed under the heading "AGREED TO" by plaintiff Williams, in his capacity as president of TUCC, on 30 April 1984 in Durham, North Carolina. Plaintiff Williams then mailed this document to ICS in Fort Collins, Colorado, where the director of ICS signed the agreement under the heading "ACCEPTED BY" on 5 May 1984.

In July 1984, there was a second meeting of the ICS committee chairmen, including plaintiffs, in Fort Collins. At this meeting, gaining funds for ICS from the National Science Foundation was discussed.

From 1 July 1984 to 30 June 1985, researchers and professors from various North Carolina universities made use of a Cyber 205 "supercomputer" located at ICS in Fort Collins through the line linking TUCC to ICS. Although TUCC received periodic invoices stating an "amount due" for this use of the ICS facilities, TUCC was not required to pay for the first 200 hours of computer time under the terms of its charter membership with ICS. During this period, TUCC's North Carolina users used only about 70 hours of computer time. Plaintiff Williams testified that parties other than TUCC's North Carolina users also used the TUCC facility to gain access to the ICS computer through the special AT&T line, although he could only say "with certainty" that the University of Houston had to come through the TUCC facility. He could not say the same "with as much certainty" as to the other institutions who were ICS members.

In April 1985, ICS sent TUCC a letter informing TUCC of the "revised sponsorship arrangement" for the upcoming year and asking TUCC to sign up for another year of membership at an increased rate. ICS also sent a follow-up reminder to TUCC, dated 5 June 1985, requesting information regarding TUCC's intentions as

to membership renewal. TUCC did not respond. In a letter dated 3 June 1985, ICS requested that AT&T discontinue service on the dedicated long line circuit linking ICS to TUCC.

In order for our courts to exercise jurisdiction over the person of a nonresident defendant such as ICS, two criteria must be met: first, the court must have jurisdiction over the person of defendant under our State's "long-arm" statute, and second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment of the United States Constitution. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 348 S.E. 2d 782 (1986); *Miller v. Kite*, 313 N.C. 474, 329 S.E. 2d 663 (1985). Once jurisdiction is challenged, plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists. *Marion v. Long*, 72 N.C. App. 585, 325 S.E. 2d 300, *disc. rev. denied*, 313 N.C. 604, 330 S.E. 2d 612 (1985).

Defendant argues that there is no statutory long-arm jurisdiction over ICS pursuant to G.S. 55-145(a)(1). Our long-arm statute permits the courts of this State to exercise jurisdiction over the person of a properly-notified defendant when, *inter alia*, a special jurisdiction statute applies. G.S. 1-75.4(2). One such special jurisdiction statute is G.S. 55-145(a)(1) which provides:

> (a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
>
> > (1) Out of any contract made in this State or to be performed in this State . . . .

From the record before this Court, the evidence was not, in our view, sufficient for the claims of plaintiffs Aupperle and Pyle to come within the purview of the long-arm statute. Williams testified at the hearing about the services he performed and where he entered into the contract; there is no similar evidence as to when Aupperle and Pyle entered into the contract, where their services were to be performed, and the nature of the services they were to render pursuant to the contract. Neither Aupperle nor Pyle submitted affidavits or testified. Plaintiffs in their brief emphasize that the contract for consulting services was an

oral contract and concede that plaintiffs accepted the contract in different places. According to plaintiffs' brief, "Plaintiffs were to provide this [consulting] service in their capacities as the chairmen of several advisory committees . . . ." The ICS prospectus listed these "advisory committees" under separate titles, including "Operations and Services," to be chaired by plaintiff Williams, "Data Communications," to be chaired by plaintiff Aupperle, and "Research," to be chaired by plaintiff Pyle. These separate titles indicate that the consulting services to be rendered by each of the plaintiffs were distinct in scope from the services to be rendered by the others. Plaintiffs' complaint alleges that ICS owed to each plaintiff separately the sum of $5,000.

For a contract to be made in this State, the last act necessary to make it a binding obligation must be performed in this State. *Leasing Corp. v. Equity Associates*, 36 N.C. App. 713, 245 S.E. 2d 229 (1978). On the facts alleged by plaintiffs, acceptance of the ICS offer was the final act necessary to create a binding contractual obligation. Accordingly, on the evidence before us, none of the plaintiffs made his contract in North Carolina so as to fall within the coverage of G.S. 55-145(a)(1). Although plaintiffs' brief claims that plaintiff Williams accepted the ICS offer in North Carolina, at the hearing on the motion to dismiss, plaintiff Williams testified that the alleged contract for his consultation services "came into being approximately at the time of the January 1984—January 22 to 24, 1984, meeting of Committee Chairmen *at Colorado State University.*" (Emphasis added.) Plaintiffs concede in their brief that plaintiffs Aupperle and Pyle did not accept the ICS offer in North Carolina.

For a contract to be "performed" in this State so as to fall under G.S. 55-145(a)(1), the contract must be performed here "to a substantial degree." *Koppers Co., Inc. v. Chemical Corp.*, 9 N.C. App. 118, 175 S.E. 2d 761 (1970); *Bowman v. Curt G. Joa, Inc.*, 361 F. 2d 706 (4th Cir. 1966) (applying N.C. Law). There is sufficient evidence in the record to support a finding that plaintiff Williams was to perform and did in fact perform substantially in this State. However, except for conclusory statements in plaintiffs' brief that plaintiffs Aupperle and Pyle were parties to the same oral contract as plaintiff Williams and that this contract contemplated substantial performance in North Carolina, there was no basis for

the trial court to find jurisdiction over ICS under G.S. 55-145(a)(1) as to the contractual claims of plaintiffs Aupperle and Pyle. Plaintiffs Aupperle and Pyle were not affiliated with TUCC, and from the record, they did not perform any consulting services in North Carolina. Therefore, we conclude there is no statutory basis for the court's exercise of long-arm jurisdiction over ICS under G.S. 55-145(a)(1) as to the claims of plaintiffs Aupperle and Pyle.

As an alternative basis of statutory long-arm jurisdiction over ICS, plaintiffs contend that subsections (5)a and (5)b of G.S. 1-75.4, the North Carolina long-arm statute, permit jurisdiction over ICS in this case. General Statute 1-75.4(5) permits a court to exercise long-arm jurisdiction over a properly-notified defendant in any action which

> a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
>
> b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant . . . .

G.S. 1-75.4(5)a and b. Again we find that while the record supports a finding that plaintiff Williams' alleged contract with ICS for consulting services was to be performed in this State or was in fact performed in this State, there is no support for such findings as to plaintiffs Aupperle and Pyle.

Since the court below had no jurisdiction over ICS as to the contractual claims of plaintiffs Aupperle and Pyle under the State's long-arm statute, it is unnecessary to address the second question of due process as to these claims. However, we do reach a due process inquiry as to the contractual claim of plaintiff Williams.

The "constitutional touchstone" of an inquiry into whether the exercise of jurisdiction over a nonresident defendant comports with due process is the defendant's purposeful establishment of "minimum contacts" with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed. 2d 528

(1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In order to be subject to the jurisdiction of the forum state, there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the forum state's laws. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed. 2d 1283, 1298 (1958). The defendant's conduct and connection with the forum state must be "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed. 2d 490, 501 (1980). Generally, maintenance of the suit must not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283 (1940). *See also International Shoe, supra.*

When the controversy is related to or arises out of the defendant's contacts with the forum state, that state is said to exercise "specific jurisdiction" over the defendant, and the focus of the inquiry is upon the relationships among the defendant, the forum, and the litigation. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed. 2d 404, 411 (1984). However, the cause of action is unrelated to defendant's activities in the forum state, that state may nonetheless exercise "general jurisdiction" so long as there are sufficient "continuous and systematic" contacts between the defendant and the forum state. *Helicopteros Nacionales*, 466 U.S. at 414, 104 S.Ct. at 1872, 80 L.Ed. 2d at 411.

On the facts of the case before us, the controversy between plaintiff Williams and ICS is based on an alleged oral contract between the parties whereby plaintiff Williams was to provide "consulting services" to ICS in exchange for compensation of $5,000. The alleged oral consulting contract between plaintiff Williams and ICS is clearly related to the ICS contacts with North Carolina through TUCC. TUCC, of which plaintiff Williams was president, had executed a written contract with ICS under which TUCC paid $10,000 for a charter membership in ICS. Membership in ICS entitled TUCC to 200 hours of use on the ICS "supercomputer." As a result of this contract, a special AT&T long-line circuit was dedicated as a link between the ICS facilities

and the TUCC facilities in Research Triangle Park, North Carolina.

While we would hesitate to say that these contacts of ICS with North Carolina are sufficient to permit the exercise of general jurisdiction over ICS in a claim unrelated to the contacts, this ICS activity in its relation to TUCC and TUCC's North Carolina computer users is sufficient to support specific jurisdiction of our courts over a claim arising out of or related to the contacts. As our Supreme Court has stated, "Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this State." *Tom Togs, Inc.*, 318 N.C. at 367, 348 S.E. 2d at 786. After examining the relationships among the defendant ICS, the State, and the cause of action, we conclude that as to the contractual claim of plaintiff Williams, the ICS contacts with North Carolina are sufficient to justify the assertion of jurisdiction over defendant ICS without violating the requirements of due process.

ICS also contends that the trial court erred in failing to dismiss plaintiffs' claim because the complaint contains insufficient allegations to show the existence of personal jurisdiction over ICS. We disagree.

The failure to plead the particulars of jurisdiction is not fatal to the claim so long as the facts alleged permit the inference of jurisdiction under the statute. Defendant may challenge the court's jurisdiction pursuant to G.S. 1A-1, Rule 12(b)(2). Plaintiff then has the burden of establishing *prima facie* that a statutory ground for asserting jurisdiction applies. *Marion, supra.* When the defendant's motion to dismiss is based on facts not appearing in the record, the court may hear the matter on affidavits, or may direct that the matter be heard wholly or partly on oral testimony or depositions. G.S. 1A-1, Rule 43(e).

With regard to the claims of plaintiffs Aupperle and Pyle, plaintiffs failed to show a basis for statutory jurisdiction, and the trial court therefore erred in failing to grant ICS's motion to dismiss these claims. With regard to plaintiff Williams' claim, plaintiffs met their burden of showing statutory jurisdiction, and

the exercise of that jurisdiction comports with the requirements of due process. The trial court therefore correctly denied ICS's motion as to plaintiff Williams' claim.

Consequently, for the reasons stated above, we affirm the denial of defendant's motion as to the claim of plaintiff Williams; as to the claims of plaintiffs Aupperle and Pyle we reverse the denial of defendant's motion.

Affirmed in part; reversed in part.

Judge COZORT concurs.

Judge WELLS concurs in part and dissents in part.

Judge WELLS concurring in part and dissenting in part.

I concur with the majority as to the trial court's denial of defendant's motion to dismiss as to plaintiff Williams.

As to plaintiffs Aupperle and Pyle, my impression of the materials before the trial court persuades me that the trial court could have reasonably found that the contract between these plaintiffs and defendant was to be and was in fact substantially performed in North Carolina. I therefore vote to affirm the trial court's denial of defendant's motion as to these plaintiffs.

NEIL WILSON McKINNEY, EXECUTOR OF THE ESTATE OF GORDON HENRY BAKER v. NITA MOSTELLER, CHARLES MOSTELLER, HARRY INGOLD, EDWARD BAKER INGOLD, NELLIE KATE INGOLD HARDIN, JOE R. HILTON, MISS RUBY HILTON, RACHEL WILLIS TROXLER, JOHN DAVID WILLIS, EUGENE BAKER WILLIS, LORETZ L. RAMSEUR, HELEN RAMSEUR MARLEY, TAMMIE LEIGH McKINNEY, CASSIDY DALE HAMPTON, A MINOR, CHAD ELLIOTT HAMPTON, A MINOR, ANDREW NEIL McKINNEY, A MINOR, JAMES ALDRIN McKINNEY, A MINOR

No. 8625SC777

(Filed 5 May 1987)

Wills §§ 28.4, 32.1— distribution of residuary estate—intention of testator—gift by implication to children unrelated to testator

A testator did not intend the distribution of his residuary estate to depend entirely upon whether or not his wife survived him, and a gift by implica-

tion could be found in favor of testator's friends where testator had indicated that his primary concern was to see that his wife would be provided for first; at the time testator made his will, he had a very close relationship with the children named therein; he indicated to a number of people his desire to make some provision for the education of the children; in none of his previous wills did testator make any provision for his heirs at law; and testator did provide a residuary clause indicating his intent that none of his property would pass by intestacy to his heirs at law.

APPEAL by defendants Tammie Leigh McKinney, Cassidy Dale Hampton, a minor, Chad Elliott Hampton, a minor, Andrew Neil McKinney, a minor, and James Aldrin McKinney, a minor, by and through their guardian ad litem from *Lewis (Robert D.), Judge*. Judgment entered 17 April 1986 in Superior Court, CATAWBA County. Heard in the Court of Appeals 17 December 1986.

This is a declaratory judgment action seeking the interpretation and construction of the last will of Gordon Henry Baker. The following opinion is limited to a determination as to whether Mr. Baker died partially intestate or whether he left a valid residuary clause. This determination depends upon whether the Court can infer that the language of Mr. Baker's will sufficiently expresses his intention that his residuary property be distributed one-half to Neil Wilson McKinney and his wife in fee simple and the balance in trust to the five Hampton and McKinney children. Any question of undue influence in the preparation of this will is not before this Court.

Gordon Henry Baker died on 16 November 1984. He was predeceased by his wife and son and left no lineal descendants. Between May 1970 and 16 September 1983, the date of his last will, he executed four wills and one codicil, all of which followed the same testamentary scheme. They provided for his wife for her life and his son for his life, with the final disposition of his estate to institutions or individuals not related to him.

Item Four of Baker's last will provides in part:

> If my wife, Ione Harris Baker, does not survive me, then, and in that event, I will, devise and bequeath the 32.14 acre tract of land hereinafter described and also the approximately ten (10) acres of land hereinafter described, unto Neil Wilson McKinney and his wife, Loretta Boone McKinney, absolutely and in fee simple. . . .

Item Five of Baker's last will provides in part:

If my said wife, Ione Harris Baker, survives me, then and in that event, I direct that . . . my Executor shall deliver and convey all the rest and remainder of my aforesaid estate . . . to Neil Wilson McKinney, in Trust, for the use and purposes hereinafter set forth, and I direct that such remainder of my residuary estate hereinafter referred to as my Trust Estate so passing to my Trustee, shall be administered and disposed of upon the following terms and provisions, that is to say:

1. I direct that during the lifetime of my wife, Ione Harris Baker, the net income from my trust estate shall be paid over to my wife, Ione Harris Baker, or be applied for her benefit in monthly or quarterly installments.

. . .

3. . . . If said 32.14 acre tract of land and said approximately 10 acre tract of land is still owned by my Trust Estate at the time of the death of my wife, Ione Harris Baker, I direct my said Trustee or his successor to convey said property to my friends, Neil Wilson McKinney and wife, Loretta Boone McKinney, absolutely and in fee simple. . . .

4. The rest and remainder of the real property and other assets in my trust estate shall be sold at either public or private sale, and the proceeds of said sale added to the funds in said trust, and one half of the funds in said trust shall be given or transferred to my friends Neil Wilson McKinney and wife Loretta Boone McKinney, absolutely and in fee simple.

. . .

5. The remaining one-half of said funds I direct my said Trustee to divide into five equal portions. One of the said five portions shall be used for the purpose of assisting each of the five children hereinafter named, to obtain an education. The five children are as follows: Cassidy Dale Hampton and Chad Elliott Hampton, who are the children of Ronald (Ronnie) Dale Hampton and Jean S. Hampton; and Andrew Neil McKinney, Tammy Leigh McKinney, and James Aldrin McKinney.

Baker was extremely fond of the Hampton and McKinney children and felt that the best way he could benefit them would be to provide for their education. Before his death, Mr. Baker expressed a desire to leave part of his estate to these five children and said that he did not want his relatives to receive anything.

Mr. Baker, however, failed to include a provision in his will for the distribution of his residuary estate, in the event his wife predeceased him. This in fact occurred, as Mrs. Baker died several months after the will's execution, but before her husband.

Neil Wilson McKinney, the executor of Baker's estate, filed a declaratory judgment action requesting the court to construe and interpret Baker's will, and to advise him as to the proper distribution of the residue of the estate. The named defendants in the action are Mr. Baker's heirs at law (his nieces and nephews), and the Hampton and McKinney children named in his will.

The trial court found that Item Five of Baker's will did not take effect, because the condition precedent to Item Five, that his wife survive him, did not occur. Therefore, the trial court found that the residuary portion of Mr. Baker's estate passed intestate to his heirs at law. From this judgment, the defendants named in Item Five of the will appeal.

Sigmon, Clark and Mackie, by E. Fielding Clark, II, attorney for Tammy Lee McKinney, Guardian ad litem for Cassidy Dale Hampton, a Minor, Chad Elliott Hampton, a Minor, Andrew Neil McKinney, a Minor, and James Aldrin McKinney, a Minor, defendant appellants.

Charles E. Brooks, attorney for Eugene Baker Willis, defendant appellee.

Essex, Richards & Morris, P.A., by Stephen H. Morris, attorney for Helen Ramseur Marley, defendant appellee.

Joe P. Whitener, attorney for Nita Mosteller, Charles Mosteller, Harry Ingold, Edward Baker Ingold, Nellie Kate Ingold Hardin, Joe R. Hilton and Ruby Hilton, defendant appellees.

ORR, Judge.

The sole question for determination on this appeal is whether Mr. Baker intended the distribution of his residuary estate to de-

pend entirely upon whether or not his wife survived him. We hold that Baker possessed no such intention.

"The paramount aim in the interpretation of a will is to ascertain if possible the intent of the testator." *Entwistle v. Covington*, 250 N.C. 315, 318, 108 S.E. 2d 603, 606 (1959). "This intent is to be gathered from a consideration of the will from its four corners, and such intent should be given effect *unless contrary to some rule of law* or at variance with public policy." *McCain v. Womble*, 265 N.C. 640, 644, 144 S.E. 2d 857, 860 (1965) (emphasis supplied). In addition, " '[i]n ascertaining the intent of the testator, the will is to be considered in the light of the conditions and circumstances existing *at the time the will was made.*' " *Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E. 2d 246, 250 (1956) (emphasis supplied and citations omitted).

Clearly Mr. Baker intended to provide educational trusts for the Hampton and McKinney children, regardless of whether or not his wife survived him. It would not be reasonable to assume that these trusts were conditioned solely on Mrs. Baker surviving her husband. Mr. Baker included the phrase, "if my wife survives me," in the beginning of Item Five of his will merely to insure that his wife would be provided for first. As was his intention in each of his previous wills, Mr. Baker wanted to be sure that his estate was used to take care of his wife for the rest of her life, before any remaining property was distributed to anyone else. Mr. Baker structured his wills in this manner because he always felt that his wife was going to survive him. Therefore, he had each will drawn with that as his first premise.

At the time he made his will, Mr. Baker had a very close relationship with the Hampton and McKinney children. All of these children visited him frequently, both when he was at his home and after he went to the nursing home. In fact, the relationship between Mr. Baker and the children was almost like that of a grandfather and grandchildren. Mr. Baker told his attorney that he wanted to do something for these children and he felt the best thing he could do for them would be to help them get an education.

Mr. Baker also told Mr. McKinney at the time that he made his last will that he did not want his relatives to receive any of his property when he died. He made this same statement to his

attorney and to a social worker at the nursing home. Finally, Mr. Baker told the social worker after his wife died that he had his will like he wanted it. He said that he wanted to see that the McKinney children got a good education and that now he could die in peace.

In searching a will to determine the testator's intent, "courts are guided by the presumption that 'one who makes a will is of disposing mind and memory and does not intend to die intestate as to any part of his property.' " *Wing v. Trust Co.*, 301 N.C. 456, 463, 272 S.E. 2d 90, 95 (1980) (citations omitted). " 'Having undertaken to make a will at all, it is not consistent with sound reasoning that the testator would have left his estate dangling.' *Coddington v. Stone*, 217 N.C. 714, 720-21, 9 S.E. 2d 420, 424 (1940)." *Id.* at 463, 272 S.E. 2d at 95-96.

During his life Mr. Baker took time to execute four wills and one codicil, none of which expressed a desire to let any part of his estate pass by intestacy. Each will was designed to devise his entire estate, first to his wife, and then to institutions or individuals not related to him. Also, none of his wills left anything to his heirs at law.

The presumption against intestacy is strengthened by the presence of a residuary clause in a will. *Gordon v. Ehringhaus*, 190 N.C. 147, 150, 129 S.E. 187, 189 (1925). A residuary clause in a will should be construed so as to prevent an intestacy as to any part of the testator's estate, unless there is an apparent intent to the contrary, plainly and unequivocally expressed in the will. *Faison v. Middleton*, 171 N.C. 170, 172, 88 S.E. 141, 142 (1916).

The residuary clause in Mr. Baker's will stated that he wanted the "rest and remainder" of his estate, left after providing for Mrs. Baker, to pass one-half to the McKinneys and one-half to the Hampton and McKinney children in five equal portions. Mr. Baker intended through this residuary clause to dispose of all of his remaining property, so that none would pass by intestacy to his heirs at law.

If a testator's intention can be ascertained, it will be given effect, even though not declared in express terms. *Trust Co. v. Schneider*, 235 N.C. 446, 451, 70 S.E. 2d 578, 582 (1952). Although the law does not favor gifts by implication, they will be permitted

when it clearly appears to have been the intention of the testator. *Finch v. Honeycutt*, 246 N.C. 91, 98, 97 S.E. 2d 478, 484 (1957).

> 'If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express or formal words, the court may supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared.' 1 Underhill on Wills Section 463.

Id.

In *Wing v. Trust Co.*, 301 N.C. 456, 272 S.E. 2d 90, the testator established a testamentary trust which did not provide for a distribution of the corpus upon the trust's termination. The Court stated:

> The trust provision of the will before us lends itself to two possible constructions. The silence of the will on the distribution of the corpus might be construed to mean that testator did not intend to dispose of the corpus by his will; the result of such construction would be to cause the corpus to pass by intestate succession to his heirs at law at the time of testator's death. Alternatively, the will as a whole might be construed to support a gift by implication of the trust corpus in favor of testator's natural born great nieces and great nephews in proportion to their income interests at the time of the termination of the trust.
>
> . . .
>
> Here, testator's will does not expressly dispose of the corpus of the trust into which he placed the great bulk of his estate. If partial intestacy is to be avoided and the corpus is to pass under the will, then it must be through the vehicle of a bequest or gift clearly implied by the terms of the will.

Id. at 462-63, 272 S.E. 2d at 95-96.

The will in *Wing* stated "*I give, devise, and bequeath the remainder of my estate, of whatsoever kind, character or description, whether real or personal* into the hands of my brothers [as

executors and trustees] . . . ." *Id.* at 464, 272 S.E. 2d at 96 (emphasis supplied). The Court said that:

> [t]his language indicates that testator intended, by use of the trust, to dispose of his entire estate. When the language following an introductory phrase which purports to dispose of all of testator's property can be interpreted to result in complete disposition or partial intestacy, 'the introductory statement, *pointing to a complete disposition*, ought to be considered, and that sense adopted which will result in a disposition of the whole estate.' 1 Underhill, *supra*, § 464 (emphasis in original). Thus, the presence of this introductory statement is some evidence of testator's intent to dispose of the entire estate and supports the finding of a gift by implication.

Id.

This same logic should be followed in the case *sub judice*. In Section Four of Item Five of his will Baker states, "[t]he rest and remainder of the real property and other assets in my trust estate shall be sold at either public or private sale, and the proceeds of said sale added to the funds in said trust . . . ." As in *Wing*, this language indicates that Mr. Baker intended to dispose of all the rest of his property through the residuary clause. Therefore, Mr. Baker's entire estate should be disposed of by virtue of the introductory statement and a gift by implication should be found in favor of the McKinneys and the Hampton and McKinney children.

A gift by implication, however, cannot rest upon mere conjecture and will not be inferred except upon cogent reasoning. "The probability that the testator intended that which is imputed to him 'must be so strong that a contrary intention "cannot reasonably be supposed to exist in testator's mind," and cannot be indulged merely to avoid intestacy.' (Citations omitted.) However, the inference need not be irresistible; it is sufficient if all factors, taken as a whole, leave no doubt as to testator's intent." *Wing v. Trust Co.*, 301 N.C. at 464, 272 S.E. 2d at 96.

It cannot reasonably be assumed that Mr. Baker wished the devise of the residue of his estate to fail and pass by intestacy should his wife predecease him. In none of his previous wills had

he left any of his property to any of his heirs at law. This is some evidence that Mr. Baker did not wish his nieces and nephews to receive any of his property, which would occur if the residuary devise is allowed to pass by intestacy.

In *Welch v. Schmidt*, 62 N.C. App. 85, 302 S.E. 2d 10 (1983), the testator devised a tract of property to his daughter provided his wife died in a common accident or within thirty days after his death. The testator, however, failed to provide for the distribution of this tract of land in the event his wife predeceased him, which in fact happened. The court stated that it was "consistent with sound reasoning" to assume that he intended to provide for the disposition of the property in the event that his wife predeceased him, as well as in the event that his wife's death occurred in a common accident or within thirty days after his death. " 'To effectuate the intention of the testator the court may transpose or supply words, phrases and clauses when the sense of the devise in question "as collected from the context manifestly requires it." ' *Jernigan v. Lee*, 279 N.C. 341, 344-45, 182 S.E. 2d 351, 354 (1971)." *Id.* at 88, 302 S.E. 2d at 12.

The logic of *Welch* should also be applied to the case at hand. The phrase "if my wife survives me" should not prevent Mr. Baker's intentions from being accomplished or prevent the McKinneys from receiving one-half of the residuary estate and the Hampton and McKinney children from receiving their educational trusts.

From the circumstances existing at the time Mr. Baker executed his will, it may reasonably be inferred that he wished to provide for the McKinneys and the Hampton and McKinney children, regardless of whether or not his wife survived him. Furthermore, we find nothing in Mr. Baker's will that indicates that he intended part of his estate to pass by intestacy. Therefore, we hold that the residuary clause is valid and that the trial court should be reversed.

Reversed.

Judges ARNOLD and PHILLIPS concur.

JOHN B. HATFIELD, JR. AND KATHRYN K. HATFIELD v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, INC.

No. 8618SC483

(Filed 5 May 1987)

1. **Easements § 4— alleyways—action to enforce easement—summary judgment for plaintiffs proper**

The trial judge correctly granted summary judgment for plaintiffs in an action for injunctive relief to reopen two alleyways in downtown Greensboro where both parties derived title from a common grantor, the original deed in defendant's chain of title showed easements in the alleyways, the original deed in plaintiffs' chain of title conveyed title to both their lots and the adjoining alleyways, and subsequent deeds each contained a grant of an easement. There was no material dispute on the facts; the only question was whether the deeds granted plaintiffs an easement over the alleyways.

2. **Easements § 8.4— alleyway—other means of access—easement kept open**

Where plaintiffs were granted an easement over alleyways by deed, it was not unreasonable for the court to require that the alleyways be kept open, even though plaintiffs had other means of access to adjacent streets.

3. **Easements § 8.2— alleyways—right to enforce easement—argument that defendant planned a better use for the property**

The trial court did not err by granting summary judgment for plaintiffs in an action for injunctive relief to reopen two alleyways where both parties had easements and defendant argued that plaintiffs were not entitled to enforce their rights because defendant's plans constituted a better use of the property without reducing the value of plaintiffs' property.

4. **Equity § 2— injunctive action to enforce easement—laches**

Plaintiffs were not barred by the doctrine of laches from asserting their easement rights in two alleyways closed by defendant where plaintiffs filed for a mandatory injunction within fourteen days of the erection of the walls and completion of the impediments and the wall and plant areas erected by defendant were very unsubstantial.

5. **Rules of Civil Procedure § 15.1— injunctive action to enforce easements—motion to amend answer denied—no abuse of discretion**

The trial court did not abuse its discretion in an action to enforce easement rights in two alleyways by denying defendant's motion to amend its answer where defendant wanted to assert unclean hands in that plaintiffs had without justification rejected defendant's offer of settlement. N.C.G.S. § 1A-1, Rule 15(d).

APPEAL by defendant from *Long, Judge.* Judgment entered 12 December 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 November 1986.

Hatfield & Hatfield by John B. Hatfield, Jr., for plaintiff appellees.

Smith Helms Mulliss & Moore by Bynum M. Hunter and Lynn G. Gullick for defendant appellant.

COZORT, Judge.

This appeal concerns easement rights to two alleyways in downtown Greensboro. Both plaintiffs and defendant claimed easement rights to the alleyways. When defendant erected impediments to close off portions of the alleyways, plaintiffs filed suit requesting injunctive relief to reopen the alleyways. The trial court granted summary judgment for plaintiffs, ordering defendant to remove the impediments. Defendant appeals, and we affirm. The facts follow.

Plaintiffs own lots numbered one through three of a block of West Washington Street in downtown Greensboro. Defendant owns lots numbered four through thirteen on West Washington Street and South Greene Street in the same block as plaintiffs' lots. The lots are part of a subdivision properly recorded in the Guilford County Registry. The disputed easement in this appeal involves two alleyways: (1) a fifteen-foot wide alley behind lots numbered one through eight running parallel to West Washington Street and connecting with (2) a twelve-foot wide alley running parallel to South Greene Street. The alleyways provide ingress, egress, and regress from the rear portion of each lot (one through thirteen) to West Washington Street and Federal Place.

Both parties derived title from a common grantor, Summit Avenue Building Company (hereinafter "Summit"). In a deed dated 20 May 1926 Summit conveyed one portion of its property, including lots numbered one through fifteen and the adjoining alleyways to National Investment & Realty Corporation (hereinafter "National Investment"), and this deed was recorded on 14 August 1926. In a separate deed dated 20 May 1926 another portion of the property, known as the "Theatre Site," was conveyed in a separate deed to National Amusement Corporation (hereinafter "National Amusement") and this deed was recorded on 13 August 1926.

The deed from Summit to National Investment conveyed the ownership of both the disputed alleyways to National Investment.

The deed to National Amusement conveyed easement rights in both the disputed alleyways for the use of the "Theatre Site."

Plaintiffs, owners of lots numbered one through three, trace their easement rights in the alleyways through chain of title. After the original conveyance of lots numbered one through fifteen from Summit to National Investment, lots numbered one through three were conveyed by National Investment to W. Y. Preyer on 15 April 1927. This deed contains easement rights in the alleyways expressed as:

> Together with the right of ingress, regress and egress over and along a 12 foot alley leading from West Washington Street and a 15 foot alley leading from South Ashe Street as shown on aforesaid map.

The same three lots with identical easement provisions were conveyed by W. Y. Preyer and his wife, Mary N. Preyer, on 31 October 1957 to Ralph Price. On 28 June 1968 Ralph Price and his wife, Janie P. Price, conveyed lots numbered one through three with the identical easement language to Armistead W. Sapp, Jr., and his wife, Ada Jane Sapp. The plaintiffs derived title to lots numbered one through three in a 1 July 1981 conveyance by Ada Jane Sapp (widow). This deed contained the language, "This conveyance is made subject to restrictions and easements of record . . . ."

The complete chain of title for defendant is not in the record. Defendant obtained title to lots numbered four through thirteen with easement rights identical to those of plaintiffs in a 28 February 1983 conveyance. Defendant also obtained title to the "Theatre Site," with easements in the alleyways, in a 1943 conveyance. Defendant conveyed the "Theatre Site" on 14 February 1977 to the United Arts Council of Greensboro, Inc. (hereinafter the "Council"), containing the perpetual easement language.

In June of 1983 the defendant and the Council agreed that defendant would close the twelve-foot wide alley and part of the fifteen-foot wide alley. The defendant further agreed to open a new twelve-foot wide alley through lot four to give the Council access to West Washington Street. The new alley is located next to plaintiffs' property. Plaintiffs were not notified of these negotiations and were never consulted by the defendant.

On 21 September 1983, the defendant closed the alleyways by erecting concrete walls and areas for plants to enclose lots numbered four through thirteen. It had purchased those lots primarily for a parking lot for its employees. On 5 October 1983 plaintiffs filed suit requesting a mandatory injunction to have the alleyways opened. On 9 October 1985 plaintiffs moved for summary judgment.

Defendant submitted an offer of judgment on 12 November 1985 which plaintiffs did not accept. On 12 November 1985, defendant also filed a motion to amend its answer to allege the defense of "unclean hands." This motion was denied by the trial court at the summary judgment hearing on 13 November 1985.

Plaintiffs' motion for summary judgment was also heard on 13 November 1985. On 12 December 1985 the trial court filed an order granting summary judgment for plaintiffs.

On appeal defendant raises five assignments of error: (1) that summary judgment was improper because there is no evidence that the plaintiffs have the right of ingress, egress, or regress over the twelve-foot alley or the fifteen-foot alley; (2) that summary judgment was improper because even if plaintiffs have rights in the alleyways, it was unreasonable of the trial court to require defendant to keep the alleyways open; (3) that summary judgment was improper because plaintiffs have an adequate remedy at law; (4) that summary judgment was improper because plaintiffs' rights are barred by the doctrine of laches; and (5) that the trial court erred in denying defendant's motion to amend its answer to allege the defense of "unclean hands."

We first address defendant's arguments concerning the granting of summary judgment for plaintiff. Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). "The moving party has the burden of clearly establishing by the record properly before the court the lack of any triable issues of fact." *Communities, Inc. v. Powers, Inc.*, 49 N.C. App. 656, 660, 272 S.E. 2d 399, 402 (1980).

[1] Defendant first argues that summary judgment for plaintiffs was improper because there was no evidence plaintiffs had any right of ingress, egress, or regress over the twelve-foot or fifteen-foot alleyways. Defendant argues that the original 1926 deeds from Summit show that easement rights in the alleyways were only for the benefit of the owners of the "Theatre Site." While we agree that the owners of the "Theatre Site" have an easement in the alleyways, we disagree with defendant's assertion that they are the only ones who have this easement right.

In two separate deeds dated 20 May 1926, Summit conveyed two parcels of property. One parcel, known as the "Theatre Site," was conveyed to National Amusement. The pertinent easement language in the deed is as follows:

> Together with a perpetual easement in, along, over, under and through the fifteen foot alley running along part of the northern boundary of the above-described lot, and leading out to South Ashe Street, [now known as "Federal Place,"] and twelve foot alley extending from the northern boundary of this property northwardly to West Washington Street, and an alleyway five (5) feet by twelve and two one-hundredths (12.02) feet long at the northeast corner of the above-described lot, all as shown on said map or plat, for the purposes of *ingress, egress* and *regress*, and for electric, gas, water and sewer lines, fire escapes, exits, and other purposes, or such of said uses as grantees, their successors or assigns, from time to time may desire the use of said alleys. (Emphasis added.)

The other deed of the same date conveying lots numbered one through fifteen to National Investment reads, in pertinent part, as follows:

> [S]ame being all of lots One (1) to fifteen (15), inclusive *and adjoining alleyways*, and all of lots twenty-four (24) to thirty-one (31), inclusive, as shown on map of National Investment and Realty Corporation, to be filed in office of Register of Deeds of Guilford County at the time this deed is filed. See Plat Book 7, Page 44. Subject, however, to the easement rights and privileges in and to a fifteen-foot alley leading along part of the northern margin of Theatre site and out to South Ashe Street, and in and to a twelve-foot alley leading from Theatre

> site northwardly to West Washington Street, and an alleyway five (5) feet wide by twelve and two one-hundredths (12.02) feet long at the northeast corner of lot designated Theatre site, this day granted by grantor here in [*sic*] to National Amusement Corporation in deed for said Theatre site. (Emphasis added.)

We agree with defendant that easements in the alleyways were not granted with the conveyance to National Investment. However, there was no need to grant an easement to National Investment because the deed conveyed title to both the lots *and* the adjoining alleyways. When National Investment later conveyed the lots to other parties, each deed contained a grant of an easement over the twelve-foot and fifteen-foot alleyways. This grant of an easement continued through the chain of title up until the parties in this case obtained title. Plaintiffs own lots numbered one through three; defendant owns lots numbered four through thirteen; and the Council owns the "Theatre Site." All have easements granted through their deeds for the twelve-foot and fifteen-foot alleyways.

In *Andrews v. Lovejoy*, 247 N.C. 554, 556, 101 S.E. 2d 395, 397 (1958), the Supreme Court held when the owner of a tract of land abutting a highway sells a portion of the property not adjacent to the highway by deed expressly granting the right of ingress and egress to the highway, the deed creates an easement over the land retained, the deed being under seal and duly recorded. In the case below, National Investment had title to the alleyways and lots. It sold the lots and granted easements over the alleyways to the adjacent streets. All of the deeds were under seal and duly recorded. The deeds gave defendant and plaintiffs an expressly granted easement appurtenant in the alleyways. The Council also obtained an easement in its deed from defendant which originally came from National Amusement.

Therefore, the trial judge was correct in granting summary judgment for the plaintiffs based on their right as a matter of law to have ingress, egress, or regress over the twelve-foot or fifteen-foot alleyways. There was no material dispute raised by defendants to the facts; the only question was whether the deeds granted plaintiffs an easement over the alleyways. We find the deeds granted an easement, and we hold summary judgment for the plaintiffs was correctly granted.

[2] Defendant's second assignment of error alleges that even if plaintiffs have rights in the alleyways it was unreasonable of the trial court to require the alleyways be kept open. Defendant argues the ruling is unreasonable because the plaintiffs have sufficient access to their property without the alleyways in question.

In *Hensley v. Ramsey*, 283 N.C. 714, 733, 199 S.E. 2d 1, 12 (1973), the Supreme Court stated: "When an easement is created by a deed, the existence or nonexistence of other access to the highway does not affect the easement." In the case at bar we find that plaintiffs' easement was granted by deed and that it does not matter if plaintiffs have other means of access to the adjacent streets. Plaintiffs have the right to exercise their easement. Defendant's second assignment of error is overruled.

[3] The third assignment of error alleged by defendant is that the trial court erred in granting summary judgment because the plaintiffs have an adequate remedy at law. In its brief, defendant relies on *Winterville v. King*, 60 N.C. App. 730, 299 S.E. 2d 838 (1983), citing the following language from the opinion:

> In its eagerness to prove that defendants dedicated at least a portion of their property to be used as a public street, the plaintiff seems to have lost sight of the rule that a permanent injunction *will not lie where there is a full, adequate, and complete remedy at law* and without a determination that the applicant will suffer *irreparable injury* from the acts and conduct of the party to be enjoined. (Citations omitted.)

Id. at 734, 299 S.E. 2d at 841 (emphasis added). We disagree with defendant and find the plaintiffs are not required to accept monetary damages.

The question posed by this case is whether plaintiffs have a right to keep the alleyways open. An exchange between the trial court and defendant's attorney at the summary judgment hearing demonstrates why defendant's reliance on *Winterville* is misplaced.

> THE COURT: You keep suggesting equitable remedy. But to relegate the plaintiff property owners to remedies at law; that is, damages, would be to grant to the defendant the right of imminent [*sic*] domain.

And I don't—as far as I know, it is not such a corporation or entity that has a right of imminent [*sic*] domain.

MR. HUNTER: No. I'm not contending that we have the right of imminent [*sic*] domain. I'm proceeding strictly on equitable principles.

THE COURT: Do you argue that you are entitled, assuming that the plaintiffs have interest in it, do you argue that you are entitled to take it and require the plaintiffs to accept damages?

MR. HUNTER: Well,—

THE COURT: That is nothing short of imminent [*sic*] domain. And the law says that imminent [*sic*] domain is not a private right.

In *Winterville,* this Court was faced with a fact situation where the plaintiff, the Town of Winterville, did have the power of eminent domain. Winterville sought an injunction to stop defendants from obstructing a street. In finding the injunction improperly granted by the trial court, we stated that the remedies at law available to the plaintiff included the filing of criminal charges against defendant. *Id.* at 735, 299 S.E. 2d at 841.

Obviously, the case at bar is a completely distinguishable situation, with one party contesting the right of a second party to use of the alleyways in which both parties have an easement. After the trial court's remarks we have quoted above, defendant's counsel argued to the court that while the defendant did not have the right of eminent domain, the plaintiffs should not be entitled to equitable relief because the impediments constructed by defendant, when viewed with the new alley constructed by defendant, did not decrease the value of plaintiffs' property. He argued to the trial court, and he argues here, that plaintiffs are not entitled to enforce their rights because defendant's plans constitute a better use of the property without reducing the value of plaintiffs' property. Our research has found no authority for the proposition that a private property owner must give up his interests in an easement because a second property owner wants to pay him damages for taking away that easement so that a more economical use of the second owner's property can be pursued. We de-

cline to so hold. The defendant's third assignment of error is not sustained.

[4] Defendant's fourth assignment of error alleges that summary judgment for plaintiffs was error because plaintiffs' rights to the twelve-foot and fifteen-foot alleyways were barred by the doctrine of laches. Defendant argues that plaintiffs did not assert their rights to the alleyways in time because they waited until defendant had made significant improvements to the entire area before filing for a mandatory injunction, instead of filing for an earlier temporary restraining order. In response, plaintiffs argue that the motion for a mandatory injunction was filed within fourteen days of the erection of the walls and completion of the impediments.

In *East Side Builders v. Brown*, 234 N.C. 517, 67 S.E. 2d 489 (1951), the doctrine of laches is stated as follows:

> "Laches is such delay in enforcing one's rights as works disadvantage to another. . . . To constitute laches a change in conditions must have occurred that would render it inequitable to enforce the claim." 30 C.J.S., section 112, page 520, *et seq.*

Id. at 521, 67 S.E. 2d at 401.

The wall erected by defendant was very unsubstantial, one foot of concrete underground and one foot above ground. There were also enclosed plant areas. We find none of these changes to be substantial enough to invoke the doctrine of laches. The fourteen-day period between the completion of the impediment and the filing of the motion for a mandatory injunction with the Superior Court of Guilford County does not constitute the type of delay the doctrine of laches was created to remedy. The filing of plaintiffs' motion for a mandatory injunction to prevent the closing of the alleyways was within a reasonable time.

[5] Defendant's final assignment of error contends the trial court committed reversible error in denying defendant's motion to amend its answer. Defendant alleges it should have been allowed to amend its answer to assert the defense of "unclean hands." The defendant wanted to amend its answer (1) to show that plaintiffs had rejected defendant's offer of judgment, which would have given plaintiffs an easement in a new alleyway constructed

by defendant in exchange for plaintiffs giving up their rights in the original alleyways; and (2) that plaintiffs' rejection of the offer was unjustified. Defendant further argues that the trial judge is required to set out specific reasons for not allowing defendant to amend its answer through a supplemental pleading under N.C. G.S. § 1A-1, Rule 15(d).

Plaintiffs respond that the motion to amend set forth by defendant alleges settlement proposals and offers, none of which raises a material issue of fact that would have altered the outcome of the case. Plaintiffs also argue that the trial judge, as a trier of fact, cannot consider settlement negotiations.

The ruling on defendant's motion to amend its answer is within the discretion of the trial court. The test for the trial court's abuse of discretion has been set out as follows:

> A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White v. White, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985). We find no abuse of the trial court's discretion denying defendant's motion to amend.

The order granting summary judgment for plaintiffs is

Affirmed.

Chief Judge HEDRICK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JOHNNY FRANKLIN HALL

No. 8610SC944

(Filed 5 May 1987)

1. Rape and Allied Offenses § 4.1— attempted rape—prior conviction for assault with intent to rape—admissibility to show intent

In a prosecution of defendant for attempted rape, evidence of defendant's 1977 conviction for assault with intent to rape was properly admitted since evidence of the prior conviction was crucial to the State's case due to the

unavailability of other kinds of evidence of defendant's intent, and, though the prior conviction was nine years old, evidence was introduced over defendant's objection to show that defendant had been released from prison for that offense only two days before the charged offense occurred, a fact which enhanced its probative value.

2. **Rape and Allied Offenses § 5— attempted rape—sufficiency of evidence of intent**

Evidence was sufficient to allow a jury to infer that defendant intended to rape his victim where it tended to show that defendant, who had just been released from prison after serving a sentence for assault with intent to rape, wrapped his arm around the victim's neck, pulled her shirt down, touched her breasts with his hands, and physically abused her; furthermore, defendant's lack of interest in the victim's wallet, her car, or its contents indicated that robbery was not his objective.

3. **Criminal Law § 101.2— questioning jury about newspaper article—no error**

The trial court did not commit reversible error when questioning the jurors about a newspaper article.

4. **Criminal Law § 138.35— mental condition or capacity—mitigating factors—no finding required**

The trial court was not required to find as mitigating factors that defendant suffered from a "mental condition" or from "limited mental capacity" which significantly reduced his culpability for the offense, since there was no evidence that defendant suffered from a mental disease or illness, and a psychological evaluation which established that defendant had below average intelligence and that his level of intelligence resulted in a below average ability to determine the causes and consequences of his behavior did not clearly establish that his culpability for the offense was significantly reduced.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 9 January 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 11 February 1987.

Defendant was indicted on charges of first degree kidnapping and first degree attempted rape. The only evidence at trial was presented by the State. It tended to show that, at 1:00 a.m. on 28 June 1985, defendant accosted Alice Midyette in the parking lot of the restaurant where she worked. Ms. Midyette had just opened her car door and was taking her wallet out of her pocketbook when defendant put a knife at her waist and ordered her to close the door. Ms. Midyette placed her wallet on the seat of the car and closed the door. Defendant immediately pulled her shirt down to her waist and began touching her breasts with his hands. He then wrapped his arm around her neck and started dragging her across the parking lot. During this time, when his victim re-

peatedly asked him not to hurt her, defendant became angry, told her to "shut up," pulled her hair, and jerked her with his arm. After defendant had dragged her for a short distance, Ms. Midyette saw a man sitting on a nearby wall with his back to them. She screamed to get the man's attention and pushed defendant away. Defendant hesitated momentarily and then fled. He was apprehended shortly thereafter, as he was leaving an alley next to the restaurant. Ms. Midyette later positively identified defendant as her attacker.

At the close of the evidence, defendant moved to dismiss the charges. The trial court denied the motion and submitted charges of second degree kidnapping and attempted first degree rape to the jury. The jury found defendant guilty of both charges.

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

Purser, Cheshire, Parker & Hughes by Joseph B. Cheshire V, and Gordon Widenhouse, for the defendant-appellant.

EAGLES, Judge.

At the outset, we note that this appeal is subject to dismissal for failure to follow the Rules of Appellate Procedure. *See Marisco v. Adams*, 47 N.C. App. 196, 266 S.E. 2d 696 (1980). Rule 9 requires that exceptions appear in the record in the manner provided for in Rule 10. Rule 10(b)(1) states that exceptions "shall be set out immediately following the record of judicial action to which it is addressed." The purpose of the rule is to make appellate review more effective by narrowing the scope of inquiry to, and providing a visible reference point in the record for, the particular judicial action which the appellant assigns as error. *See Darden v. Bone*, 254 N.C. 599, 119 S.E. 2d 634 (1961); Commentary to Rule 10(b)(1). In all but one of his assignments of error, defendant has failed to make clear reference in the record or transcript of the particular action complained of. Nevertheless, pursuant to Rule 2, we elect to address the merits of his appeal.

After carefully examining and considering each of defendant's assignments of error, we hold that he received a fair trial free of prejudicial error.

I

[1] Defendant first assigns as error the trial court's admission of evidence of his 1977 conviction for assault with intent to rape.

It is well established that extrinsic evidence of another offense is not admissible to show the character of the accused or his propensity to commit the crime with which he is charged. *State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981); G.S. 8C-1, Rule 404(b). Evidence of a prior offense is admissible, however, when it is offered to prove some other, relevant purpose, such as motive, opportunity, knowledge or intent. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); G.S. 8C-1, Rule 404(b). Therefore, when a specific mental intent or state of mind is an essential element of the charged offense, evidence of previous acts of the same kind is admissible to prove the defendant's intent or state of mind. *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928, 54 L.Ed. 2d 288, 98 S.Ct. 414 (1977). Here, evidence of defendant's prior conviction was offered to prove that his intent in assaulting and kidnapping his victim was to rape her. We hold that it was properly admitted for that purpose.

In cases involving sexual offenses, our courts have been liberal in construing the exceptions to the general rule that evidence that defendant committed another, separate offense is inadmissible. *State v. Cotton*, 318 N.C. 663, 351 S.E. 2d 277 (1987). Whether a defendant's previous conviction for a sexual offense is pertinent in his prosecution for an independent sexual crime depends on the facts in each case, *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982), and, among other things, the availability of other forms of proof. *See State v. May, supra*; G.S. 8C-1, Rule 404(b) official commentary. We believe the facts here support the admission of defendant's prior conviction for assault with intent to rape under former G.S. 14-22 (now attempted rape under G.S. 14-27.6).

Defendant admits that his identity and the fact of the assault were not seriously in issue. Therefore, his intent was the central question during trial. Because it involves a determination of the defendant's state of mind, the question of intent usually must be inferred from circumstantial evidence. *State v. Riggsbee*, 72 N.C. App. 167, 323 S.E. 2d 502 (1984). Since the victim managed to escape before the offense was completed, evidence of defendant's

intent was necessarily limited. Therefore, the evidence of defendant's prior conviction was probative of his intent in assaulting Ms. Midyette. *See State v. Searles, supra; State v. May, supra; State v. Moser*, 74 N.C. App. 216, 328 S.E. 2d 315 (1985); *State v. Bagley*, 39 N.C. App. 328, 250 S.E. 2d 87 (1979); 77 A.L.R. 2d 841 (1961) and Later Case Service. *But cf., State v. Gammons*, 258 N.C. 522, 128 S.E. 2d 860 (1963), *overruled on other grounds, State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973); *State v. Alston*, 74 N.C. App. 320, 327 S.E. 2d 927 (1985).

Defendant also argues that the age of his prior conviction makes it too remote to be admissible under Rule 404(b). While remoteness of another offense is relevant to its admissibility to show *modus operandi* or a common scheme or plan, *see State v. Riddick*, 316 N.C. 127, 340 S.E. 2d 422 (1986), remoteness usually goes to the weight of the evidence, not its admissibility. *State v. Brown*, 280 N.C. 588, 187 S.E. 2d 85, *cert. denied*, 409 U.S. 870, 34 L.Ed. 2d 121, 93 S.Ct. 198 (1972). Under these facts, we believe the age of defendant's prior conviction affects only its weight, not its admissibility.

Even if evidence of another offense is admissible under Rule 404(b), the trial court must nevertheless exclude it if it determines that its probative value is substantially outweighed by the danger of unfair prejudice. *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986); G.S. 8C-1, Rule 403. Whether to exclude otherwise admissible evidence under Rule 403, however, rests in the discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986). We find no abuse of discretion here. As noted, evidence of the prior conviction was crucial to the State's case due to the unavailability of other kinds of evidence of defendant's intent. In addition, although the prior conviction was nine years old, evidence was introduced over defendant's objection to show that defendant had been released from prison for that offense only two days before the charged offense occurred, a fact which enhances its probative value. *See State v. Riddick, supra.* Therefore, we hold that the evidence of defendant's prior conviction, as well as the fact of his recent release from prison, was properly admitted.

II

[2] Defendant also argues that the evidence of his intent to rape was insufficient as a matter of law and that the trial court should have granted his motion to dismiss. We disagree. In ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference which can be drawn from the evidence. *State v. Covington*, 315 N.C. 352, 338 S.E. 2d 310 (1986). If, in so doing, there is substantial evidence on each element of the charged offense, the case should be submitted to the jury. *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973). There is substantial evidence in the record here that defendant intended to rape his victim.

Before a defendant may be convicted of attempted rape, the State must prove, beyond a reasonable doubt, that the defendant: (1) had the specific intent to rape the victim, and (2) committed an act which goes beyond mere preparation but falls short of the actual commission of the rape. *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982). Since defendant's assault clearly goes beyond mere preparation, the only remaining question is whether the evidence is sufficient to show the requisite intent. To show an intent to rape, the State must prove that defendant intended to have sexual intercourse with the victim notwithstanding any resistance on her part. *State v. Edmondson*, 302 N.C. 169, 273 S.E. 2d 659 (1981). It is sufficient if defendant has the intent at any point during the assault and it need not be shown that he made an actual, physical attempt to have intercourse. *State v. Hudson*, 280 N.C. 74, 185 S.E. 2d 189 (1971), *cert. denied*, 414 U.S. 1160, 39 L.Ed. 2d 112, 94 S.Ct. 920 (1974).

Defendant contends, however, that the evidence can equally support a finding that he intended to rob Ms. Midyette or commit a sexual offense other than rape. Our courts have rejected similar arguments before, holding that sexually motivated assaults may give rise to an inference that defendant intended to rape his victim notwithstanding that other inferences are also possible. *See State v. Whitaker*, 316 N.C. 515, 342 S.E. 2d 514 (1986). In *State v. Hudson, supra*, for example, the court held that defendant's sexual assault and abuse of his victim were sufficient to show an intent, at some point in the assault, to rape her. Similarly, in *State*

v. Whitaker, supra, where the defendant grabbed his victim by the throat, told her that "I want to eat you," ordered her to drive to a secluded area and turn out the car's lights, pulled her pants down to her knees, and inquired about her underclothing, the court held the evidence was sufficient for the jury to find an intent to rape. Moreover, in *State v. Norman,* 14 N.C. App. 394, 188 S.E. 2d 667 (1972), the court held that evidence that defendant touched the victim's breasts and then choked her into unconsciousness was sufficient to support his conviction for assault with intent to rape. *See also State v. Wortham,* 80 N.C. App. 54, 341 S.E. 2d 76 (1986), *reversed in part,* 318 N.C. 669, 351 S.E. 2d 294 (1987); *State v. Powell,* 74 N.C. App. 584, 328 S.E. 2d 613 (1985).

The evidence here shows that defendant, who had just been released from prison after serving a sentence for assault with intent to rape, wrapped his arm around the victim's neck, pulled her shirt down, touched her breasts with his hands, and physically abused her. In addition, defendant's lack of interest in her wallet, her car or its contents, indicate that robbery was not his objective. We hold that this evidence is sufficient to allow a jury to infer that defendant intended to rape his victim.

III

[3] Next, defendant contends that the trial court committed reversible error when questioning the jurors about a newspaper article. Before the jury retired to deliberate, the court, at the request of defendant's counsel, addressed the jury as follows:

> It's been called to my attention, ladies and gentlemen, that in yesterday afternoon's Raleigh Times there was a story concerning the fact that I did not permit the alleged victim in a previous rape case from testifying as to whatever went down in that occurrence.
>
> Did any of you all read that article? Real sure?

None of the jurors indicated that they had read the article and the court admonished them that, even if they had, they should not consider it in determining the case. Defendant contends that the trial court's questioning amounted to a comment on the weight of the evidence, informed the jury of the article's contents to his prejudice, and damaged his credibility. We disagree.

By his failure to object to the questioning or move for a mistrial, defendant has failed to preserve this issue for appeal. Even had he done so, this argument would be without merit. While a new trial may be required when information from newspaper accounts reaches the jurors, *see State v. Reid*, 53 N.C. App. 130, 280 S.E. 2d 46 (1981), there is no evidence that any of the jurors read the article. The court's statements imparted very little information and did not relate it to this particular trial or the defendant. Moreover, we see no possible form of prejudice from the questioning nor do we see how it can be construed as a comment on the evidence.

IV

[4] Defendant's last assignment of error is the trial court's failure to find certain statutory mitigating factors in sentencing. At the sentencing hearing, defendant submitted the results of a psychological evaluation which stated that defendant's IQ was 79 and that he was "functioning at a below average level in terms of intelligence." The report also stated that "he is below average in his ability to see causes and consequences of behaviors." Defendant argues that the report required the trial court to find the mitigating factors provided for in G.S. 15A-1340.4(a)(2)(d) and (e). We disagree.

G.S. 15A-1340.4(a)(2)(d) provides as a mitigating factor that the defendant was suffering from a "mental condition" which substantially reduced his culpability for the offense. A "mental condition," however, is defined as a mental disease or illness. *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983). Since there is no evidence that defendant suffered from a mental disease or illness, subsection (d) is simply inapplicable.

G.S. 15A-1340.4(a)(2)(e) provides as a mitigating factor that the defendant was suffering from a "limited mental capacity" which significantly reduced his culpability for the offense. A "limited mental capacity" is defined as a low level of intelligence or IQ. *State v. Taylor, supra.* While the report is some evidence of a limited mental capacity, which reduced defendant's culpability for the offense, it does not *require* the trial court to find it as a mitigating factor.

Where the evidence in support of a mitigating factor is substantial, uncontradicted, and credible, the trial court must find it.

State v. Milam, 65 N.C. App. 788, 310 S.E. 2d 141 (1984). The defendant, however, bears the burden of showing that the evidence regarding the existence of the factor "so clearly establishes the fact in issue that no reasonable inference to the contrary can be drawn." *State v. Jones*, 309 N.C. 214, 219-20, 306 S.E. 2d 451, 455 (1983). The trial court's determination under G.S. 15A-1340.4(a)(2)(e) involves a two part inquiry: (1) whether the defendant suffers from a limited mental capacity (or from "immaturity"), and (2) if so, its effect on his culpability for the offense. *State v. Moore*, 317 N.C. 275, 345 S.E. 2d 217 (1986). While the report established that defendant had a below average intelligence, its statement that his level of intelligence resulted in a below average ability to determine the causes and consequences of his behavior does not clearly establish that his culpability for the offense was significantly reduced.

We find that defendant's remaining argument regarding the admissibility of his prior conviction under G.S. 8C-1, Rule 609 to be without merit.

No error.

Judges WELLS and GREENE concur.

MILL-POWER SUPPLY COMPANY v. CVM ASSOCIATES, A NORTH CAROLINA GENERAL PARTNERSHIP, COMPOSED OF SAMUEL M. LONGIOTTI AND CHANDON INVESTMENT COMPANY, N.V., AS PARTNERS

No. 8610SC882

(Filed 5 May 1987)

Contracts § 6.1— improvement to realty—licensing requirement—general contractor—genuine issue of material fact

Plaintiff's erection of a space-frame and skylight assembly over the entrance to defendant's shopping mall constituted the construction of an "improvement" within the meaning of the general contractor licensing statute, N.C.G.S. § 87-1. However, a genuine issue of material fact existed as to whether plaintiff exercised such a degree of control over the entire mall renovation project as to make plaintiff a general contractor under N.C.G.S. § 87-1 and require that plaintiff be licensed in order to bring an action for breach of the construction contract.

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 3 June 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 3 February 1987.

This is a civil action brought by plaintiff to enforce a lien against defendants' property for labor and materials furnished by plaintiff. Plaintiff claimed that defendants failed to pay plaintiff in full for building a roof above the entrance to Crabtree Valley Mall owned by defendants. After hearing arguments on defendants' motion for summary judgment, and reviewing the pleadings and affidavits for both parties, the trial court granted defendants' motion for summary judgment.

Plaintiff's complaint alleged that on or about 11 April 1984, plaintiff contracted with defendants to furnish materials and labor for a space-frame and skylight over the entrance to defendants' mall. Plaintiff further alleged that the parties agreed on a contract price of $205,000.00, and that $42,519.61 remains unpaid by defendants. Plaintiff filed a claim of lien pursuant to G.S. 44A-12 on 4 October 1985, and brought this action to enforce the lien pursuant to G.S. 44A-13 on 3 December 1985.

Plaintiff's salesman Maxie Funderburk said in an affidavit that he negotiated the construction contract with defendants' construction manager, Carl Duell. Mr. Funderburk stated that Mr. Duell "advised me that the installation of the space frame and skylight was one part of the complete renovation of the Crabtree Valley Mall"; that Clancy and Theys Construction Co. contracted with defendants to remove the old roof over the entranceway to the mall, and to construct new columns; and that Clancy and Theys did not work under the direction or supervision of, nor had a contract with, plaintiff. Mr. Funderburk listed several other "renovations" being performed by other contractors at the same time plaintiff was building the new roof. Mr. Funderburk stated further in his affidavit that defendants maintained a construction office on the job site from where Andy Dorton, who replaced Carl Duell as defendants' construction manager, "directed and coordinated the institution and completion of all the renovation projects, including plaintiff's only project for the improvement of the front entrance."

Included in the record on appeal as part of plaintiff's affidavits are five building permits and one building permit application

issued by the Permit Office Administrator for the City of Raleigh, North Carolina, to defendants. The permits were issued for "additions," "alterations," and "new construction" at Crabtree Valley Mall. On the application and all of the permits, the contractor was listed variously as "CVM Construction," "Crabtree Valley Mall," "Crabtree Valley Mall Const.," and "Crabtree Valley Mall Construction." Plaintiff's affiant, Charles A. Lysaght, owner of a structural engineering consulting firm in Raleigh, said that he reviewed the drawings for the skylight drafted by defendants' architect and concluded that the roof system was prefabricated and was installed independent of the main structure; that before the space-frame and skylight could be installed, the columns had to be constructed by Clancy and Theys Construction Co.; and that, in his opinion, the construction and installation of space-frames and skylights is not work performed by general contractors, and that the general contractor commonly obtains the building permit for a job site.

Defendants admitted that plaintiff furnished part of the labor and materials to build the space-frame and skylights, but alleged and defended that, because plaintiff was not licensed as a contractor pursuant to G.S. 87-1, and the cost of improving the structure exceeded $30,000.00, plaintiff is barred from recovering for an alleged breach of contract. Defendants' affiant, H. M. McCown, Secretary-Treasurer of the North Carolina State Licensing Board for General Contractors, said that plaintiff is not licensed as a general contractor under G.S. 87-1. Defendants' affiant Samuel M. Longiotti, a partner in defendant CVM Associates, stated that the cost of the construction and improvement exceeded $30,000.00; that defendants have paid $169,042.01 to plaintiff; that the construction for the roof was an improvement to the existing mall structure; and that all negotiations pursuant to the contract were directly between plaintiff's representatives and defendants.

Based on the pleadings and affidavits, the trial court granted summary judgment for defendants. Plaintiff appeals.

Bode, Call & Green, by Howard S. Kohn and S. Todd Hemphill, for plaintiff appellant.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Jane Flowers Finch and Albert D. Barnes, for defendant appellees.

JOHNSON, Judge.

Plaintiff raises on appeal the issue of whether the trial court erred by finding from the forecast of the evidence presented that no genuine issue existed as to any material facts regarding plaintiff's status as a general contractor, and granting defendants a summary judgment based on that finding. The judge's role in ruling on a motion for summary judgment is to determine, based on the parties' pleadings and affidavits, whether any material issues of fact exist that require trial. If the only issues to be decided are issues of law, then summary judgment is proper. *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 3-4, 249 S.E. 2d 727, 729 (1978), *aff'd*, 297 N.C. 696, 256 S.E. 2d 688 (1979). The burden is on the movant to show the lack of any triable issue of fact. *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). We find that the trial court improperly granted summary judgment in defendants' favor.

I.

In North Carolina, a person who contracts to construct a building or structure costing $30,000.00 or more, pursuant to Chapter 87 of the General Statutes, must be licensed to recover from the owner for breach of contract or on the theory of *quantum meruit*. *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E. 2d 507, 510-11 (1968); *Spears v. Walker*, 75 N.C. App. 169, 171, 330 S.E. 2d 38, 40 (1985). A general contractor is defined in G.S. 87-1 as:

> [A]ny person . . . who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person . . . that is not licensed as a general contractor pursuant to this Article, the construction of any building . . . improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more, shall be deemed to be a 'general contractor' engaged in the business of general contracting in the State of North Carolina.

The North Carolina Supreme Court has distinguished between general contractors and subcontractors for purposes of licensure under G.S. 87-1, holding that persons found to be subcontractors are not required to be licensed, and may sue the gen-

eral contractor for breach of contract. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 133, 177 S.E. 2d 273, 282 (1970). The Court in *Vogel, supra*, reasoned that the purpose of licensing—to protect the public from incompetent builders—is not involved where the general contractor stands between the subcontractor and the owner. If the owner is damaged, his remedy is against the general contractor. *Id.* The public is protected by testing the competence of the general contractor through licensing.

Plaintiff in the case *sub judice* alleges that it is at most a subcontractor, and should be allowed to maintain claims for breach of contract or for reasonable services on *quantum meruit* against defendant-owners for alleged underpayments. Defendants argue that plaintiff is a general contractor, was not licensed under G.S. 87-1, and is therefore barred from bringing this action. We must look to the case law interpreting G.S. 87-1 to see whether, on the facts in the case *sub judice*, plaintiff is a general contractor.

II.

A.

The parties orally agreed that plaintiff would construct a new roof over the entrance to defendants' Crabtree Valley Mall. The record shows that other construction projects by other construction companies were underway at the mall during the same time. The old roof was removed by Clancy and Theys Construction Co., and plaintiff was to furnish labor and materials to construct the new one. The new roof is made of a space-frame and skylight assembled and erected by plaintiff atop eight reconstructed columns. Clancy and Theys Construction Co. reconstructed the columns. Plaintiff's salesman, Maxie Funderburk, said in an affidavit that Clancy and Theys Construction Co. did not work under plaintiff's direction, and that no contractual relationship existed between the two companies.

Defendants answered and defended that they have paid plaintiff $169,042.01 on the contract, and that the new roof was poorly and incompletely constructed. At no time during construction of the new roof was plaintiff licensed under Chapter 87 as a general contractor.

B.

We must first decide whether plaintiff constructed an "improvement" under G.S. 87-1. The Court in *Vogel, supra*, held as a subcontractor a company that contracted to furnish and erect walls, subfloors, windows, doors, roofing materials, and to complete painting in the construction of a one hundred sixty-eight unit apartment complex. In reasoning that these activities did not constitute construction of an *improvement* under G.S. 87-1, the Court stated:

> Where the Legislature defines a word used in a statute, that definition is controlling even though the meaning may be contrary to its ordinary and accepted definition. Words and phrases of a statute 'must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.'

Vogel, supra, at 130-31, 172 S.E. 2d at 280 (citations omitted). The Court further stated:

> The term 'improvement' does not have a definite and fixed meaning. . . . As used here it connotes the performance of construction work and presupposes the prior existence of some structure to be improved. . . . There was no existing building or structure to be improved, and in our view the term 'improvement' as used in G.S. 87-1 has no application to the facts in this case.

Id. at 132-33, 177 S.E. 2d at 281-82 (citations omitted).

The facts in the case *sub judice* differ significantly from the facts in *Vogel, supra*. The subcontractor in *Vogel* constructed parts of apartment buildings then under construction. Plaintiff in this case put up a new roof over the entrance to an existing building. Construction such as in the case *sub judice* presupposes the prior existence of some structure to be improved, namely, the Crabtree Valley Mall. Plaintiff does not contend in its complaint or affidavits that the mall was not complete when it began working on the new roof. As this Court stated in *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 786, 336 S.E. 2d 108, 110 (1985) (contractor who renovated apartments held to be a general contractor), *cert. denied*, 316 N.C. 379, 242 S.E. 2d 897 (1986),

"[c]learly, the renovation improved already existing buildings and constituted construction within the meaning of the statute." We find that plaintiff undertook to construct an "improvement" under G.S. 87-1 by adding a roof over an existing structure.

C.

If deciding that plaintiff constructed an improvement were all that was necessary to establish plaintiff's status as a general contractor, we could stop here. However, case law requires that we go a step further and determine the extent of plaintiff's control over the entire project. As this Court noted in *Helms v. Dawkins*, 32 N.C. App. 453, 456, 232 S.E. 2d 710, 712 (1977) (citations omitted), *overruled on other grounds, Sample Const. Co. v. Morgan*, 311 N.C. 717, 722-23, 319 S.E. 2d 607, 611 (1984):

> Not every person who undertakes to do construction work on a building is a general contractor, even though the cost of his undertaking exceeds $30,000.00. . . . [T]he principal characteristic distinguishing a general contractor from a subcontractor or other party contracting with the owner with respect to a portion of the project, or a mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project. Ordinarily the degree of control a contractor has over the construction of a particular project is to be determined from the terms of the contract.

Under the *Helms* "control test," we ordinarily look to the terms of the contract to determine the degree of control exercised by a particular contractor over the entire project. Since in the case before us there is no evidence of a written contract between Mill-Power and CVM, we must look to the record for other evidence regarding contract terms.

Plaintiff's complaint alleges that on or about 11 April 1984, it contracted with defendants to furnish labor and materials for the construction and erection of a space-frame and skylight assembly above the entrance to defendants' mall. Defendants' answer admits that plaintiff furnished part of the labor and materials necessary to erect the space-frame and skylight assembly for the main entrance above the mall. The affidavit of CVM Associates' partner, Samuel Longiotti, addresses negotiations between the parties regarding construction of the new roof over the entrance

to the mall, and admits that plaintiff did undertake to construct such a roof. Nowhere in the record is there evidence that plaintiff was involved in any other work during the renovation of defendants' mall.

We find that the forecast of the evidence is at least sufficient to raise a genuine issue of material fact as to whether plaintiff exercised control over the entire renovation project. Under the terms of the contract as they exist in the record, the evidence tends to show that plaintiff and defendants agreed that plaintiff would construct and erect a space-frame and skylight assembly over the entrance to defendants' mall. Plaintiff did not contract to do construction anywhere else in defendants' mall, and was not shown to have had the opportunity to exercise control over the other contractors renovating the mall. Plaintiff's salesman, in his affidavit, stated that plaintiff did not supervise the work of Clancy and Theys Construction Co. which built the columns upon which plaintiff secured the roof assembly. Defendants do not show in the record that plaintiff exercised control over Clancy and Theys Construction Co. or any other contractor at the job site. In fact, plaintiff's salesman said that defendants' employee directed and coordinated the entire renovation project, which tends to show that defendant CVM and not plaintiff exercised control over the entire project. We find that, although plaintiff constructed an improvement under G.S. 87-1, a genuine issue of material fact exists as to whether, following the *Helms* "control test," plaintiff exercised such a degree of control over the entire renovation project as to make plaintiff a general contractor under G.S. 87-1, requiring plaintiff to be licensed in order to bring an action for breach of contract. We hold, therefore, that the trial court erred by granting summary judgment as a matter of law for defendants. The judgment appealed from is

Reversed.

Judges BECTON and PHILLIPS concur.

LINDA H. (HALL) KNOTTS v. BENNY T. HALL; JAMES O. BUCHANAN, TRUSTEE; AND THE UNITED STATES OF AMERICA ACTING THROUGH FARMERS HOME ADMINISTRATION, U.S. DEPARTMENT OF AGRICULTURE

No. 8620SC954

(Filed 5 May 1987)

1. **Tenants in Common § 3— one tenant in possession—payment of property taxes—reimbursement proper**

The trial court did not err in ordering reimbursement of defendant for payment of real property taxes on property owned jointly by the parties, and the court was not required to apply the exception, as argued by plaintiff, that a tenant who is in exclusive or sole possession of jointly-owned property is not entitled to reimbursement, since defendant's mere presence on the property did not amount to a *prima facie* showing of exclusive possession.

2. **Tenants in Common § 3— one tenant in possession of household goods—lien on goods—reimbursement for interest proper**

There was no merit to plaintiff's contention that because defendant was in sole possession of the parties' household goods and furnishings, the trial court erred in ordering that he be reimbursed for interest payments on a lien on the household goods.

Judge PHILLIPS dissenting.

APPEAL by petitioner from *Preston, Judge.* Judgment entered 5 May 1986 in Superior Court, STANLY County. Heard in the Court of Appeals 4 February 1987.

David A. Chambers for petitioner-appellant.

Michael W. Taylor for respondent-appellee.

BECTON, Judge.

Petitioner, Linda Knotts, brought this action seeking to partition real and personal property she owned jointly with her former husband, respondent Benny Hall. The trial judge ordered a partition sale specifying that, from the sale proceeds, Hall be reimbursed for his payments of certain outstanding liens, mortgages and taxes and that Knotts be reimbursed for tax payments she made. Knotts appeals the reimbursement order. We affirm.

I

The following facts are not in dispute. Linda Knotts and Benny Hall purchased a house and lot in the Lakeside Heights sub-

division and some household goods and furnishings while they were married. During the marriage they mortgaged the Lakeside Heights real property to the United States through the Farmer's Home Administration (the FHA loan) to secure a debt of $19,500.00, and to Barclays-American Credit, Inc. (Barclays) to secure a debt of $7,600.74. They also encumbered their household goods and furnishings through a security agreement with Welcome Finance Company (Welcome Finance).

After Knotts and Hall divorced in 1983, Hall and the couple's son continued to live in the Lakeside Heights house, and Knotts and Hall co-owned the property as tenants in common. During this time Hall paid the following: FHA—$710.59 principal, $3,970.41 interest; Barclays—$6,883.40 principal, $2,556.89 interest; Stanly County real property taxes 1983-1985—$453.35; and Welcome Finance—$64.66 principal, $539.55 interest.

In 1986 Knotts paid $103.38 for Stanly County real property taxes on the Lakeside Heights property.

The trial judge concluded that the properties were indivisible and ordered a partition sale. Additionally, the trial judge entered an order reimbursing both Knotts and Hall for the above expenditures from the sale proceeds.

Essentially, Knotts' several assignments of error can be lumped into the following four contentions: (1) Hall was in exclusive possession of the Lakeside Heights real property, thus he was not entitled to reimbursement for payments of interest on the FHA and Barclays mortgages, nor the Stanly County real property taxes (Knotts' assignments of error numbers I, II, III and VI); (2) Hall was in exclusive possession of the household goods and furnishings, thus he was not entitled to reimbursement for interest payments to Welcome Finance (Knotts' assignment of error number IV); (3) the trial judge's order did not properly weigh the equities in Knotts' favor (Knotts' assignment of error number VII); and (4) $453.00 of the reimbursement award was not supported by any evidence (Knotts' assignment of error number V).

Hall makes the following cross-assignments of error: (1) the trial court erred in admitting evidence regarding Hall's possession of the Lakeside Heights property; and (2) the trial court

erred in admitting evidence regarding the disbursement of funds obtained through the Barclay's loan before the parties divorced.

II

We first consider Knotts' four contentions.

A

[1] Knotts contends that the trial judge's order reimbursing Hall for payment of real property taxes was erroneous because the trial judge failed to apply an exception to the normal rule that a joint tenant is entitled to reimbursement at a partition sale. The exception, Knotts argues, provides that a tenant who is in *exclusive* or *sole possession* of jointly owned property is not entitled to reimbursement. Not only does Knotts argue that Hall was in exclusive possession of the Lakeside Heights property as a matter of law, but she also argues that the same exception should apply to interest on mortgage payments. (Knotts' assignments I, II, III and VI.) We will address these arguments in order.

N.C. Gen. Stat. Sec. 105-363 (1985) sets forth the general rule regarding reimbursement of cotenants who pay a disproportionate share of the real property taxes. That section allows a cotenant who pays a greater share of the "taxes, interest and costs" to enforce a lien in his favor upon the shares of the other joint owners "in a proceeding for actual partition, a proceeding for partition and sale, or by any other appropriate judicial proceeding." The statute itself contains no exceptions. However, its statutory predecessor, Revisal Sec. 2860 was held not to apply to a case in which one cotenant purchased the jointly held property at a tax sale by paying his cotenant's share of the taxes. *Smith v. Smith*, 150 N.C. 81, 63 S.E. 177 (1908). In *Smith* the North Carolina Supreme Court reasoned that the lien should not arise in a cotenant's favor when he was in "sole possession" of the property and "all of the cotenants [were not] on the same footing." Permitting the lien to arise in *Smith* would allow the cotenant in possession, who was already in the better position to know what actions were pending against the property, to purchase his cotenants' interest out from under them.

Knotts argues that the *Smith* exception requires that the cotenant in *sole* possession who pays all the taxes, is not entitled to reimbursement. We disagree. *Smith* only precludes the cotenant

from acquiring an interest superior to that of his cotenants when purchasing jointly owned property at a tax sale. *See Pearce v. Rowland*, 227 N.C. 590, 592, 42 S.E. 2d 683, 684 (1947); *Steel v. Trust Co.*, 223 N.C. 550, 553, 27 S.E. 2d 524, 527 (1943). At least one commentator has noted, however, that a cotenant in *exclusive* possession is not entitled to reimbursement for taxes paid during the time he held the property exclusively. *See* James A. Webster, Jr., Revised by Patrick Hetrick, *Webster's Real Estate Law in North Carolina*, Sec. 117 (1981). No evidence of exclusive possession was presented in the case *sub judice*.

The trial judge heard testimony concerning who was in possession of the property, but entered no findings on the issue of exclusive possession. Knotts testified that she had not lived at the property since 1983. She said Hall and their son lived there. She now maintains that the trial judge should have found that Hall was in exclusive possession as a matter of law.

Exclusive possession is not merely sole possession. Each cotenant is entitled to possess the entire property; therefore, Hall's mere presence on the property does not amount to a *prima facie* showing of exclusive possession. Consequently, the trial judge did not, and was not required to, make findings on that issue. We find that the trial judge properly ordered reimbursement under G.S. Sec. 105-363.

Knotts also argues that the exception denying reimbursement of tax payments to a cotenant in exclusive possession should be extended to payments of mortgage interest. Because we believe the issue of exclusive possession was not raised on the above facts, we offer no opinion whether a cotenant in exclusive possession is entitled to reimbursement of mortgage interest at a partition sale. Knotts' assignments of error numbered I, II, III and VI are overruled.

B

[2] Knotts next contends that the trial judge erred in ordering reimbursement for Hall's interest payments to Welcome Finance because Hall had exclusive possession of the household goods and furnishings. (Knotts' assignment of error number IV.) She cites no authority but argues that Hall's possession of the property compensated him for the interest payments. Therefore, since he was

in sole possession, he should shoulder the full responsibility for interest. We fail to see any reciprocal link between the interest payments and Hall's possession. Knotts and Hall were both entitled to full possession of the property and Hall's payment of the liens made the property available to both of them. Although this Court has held that possession has some value to a cotenant and has followed the long-standing rule that a cotenant in sole possession is not entitled to contribution for repairs or improvements (*see Craver v. Craver*, 41 N.C. App. 606, 255 S.E. 2d 253 (1979)), we see no compelling reason to extend that rule to include interest payments on outstanding liens. Again, Knotts appears to argue that sole possession is the equivalent of exclusive possession, and she has demonstrated only that Hall had sole possession. The record suggests no wrongdoing by Hall; he made no attempt to withhold the property from Knotts, and she made no demand for the property. There was no basis for a finding of exclusive possession in Hall. Knotts' assignment of error number IV is overruled.

C

Knotts next contends that the trial judge erred in failing to consider in her favor the equities raised in her reply to Hall's request for reimbursement. (Knotts' assignment of error number VII.) Knotts' major objection is that, while she and Hall were married, she used the proceeds from the home loans to make improvements to the house. As noted in the previous section, a cotenant is not entitled to reimbursement for improvements. Furthermore, the trial judge was not required to take into account disbursements that were made before the tenancy in common actually came into existence. We find no indication that the trial judge failed to treat the parties fairly. Knotts' assignment of error number VII is overruled.

D

Knotts lastly contends that the trial judge's legal conclusion number 7(e) which states that Hall is entitled to receive $453.00 for payment of real property taxes, is not supported by any evidence. (Knotts' assignment of error number V.) Apparently the trial judge attempted to correct a clerical error. In factual findings numbers 9, 10 and 12 the trial judge determined that Hall had paid a total of $14,574.64 on the two mortgages. But when the

judge entered legal conclusion number 7(c) he ordered reimbursement of only $14,121.64 which is $453.00 less than Hall had paid. Then in legal conclusion number 7(e) he made a separate order for $453.00. However, we granted leave to Hall to amend the record to reflect a single reimbursement of $14,574.64 from the real property proceeds. At any rate the clerical error was not prejudicial to Knotts.

Having affirmed the judgment of the trial court, we need not reach Hall's cross-assignments of error.

Judgment is affirmed.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the trial judge erred in not finding that respondent was in exclusive possession of the property involved after the divorce and in giving him credit for the payments he made on the mortgage debts and property taxes while enjoying such possession. The uncontroverted facts are these: The Halls are divorced and after the decree was obtained Mrs. Hall became the wife of another man; the real property involved consists of a small three bedroom house that the Halls could not live harmoniously in while they were married; since the divorce respondent, along with the parties' grown son, has lived in the house continuously and petitioner has not lived in it or used the personal property at all. These salient facts are certainly evidence that respondent's possession of the house and personal property was exclusive; and in my view they lead to that conclusion as a matter of law. For the central purpose of our law is to promote civil order and domestic tranquility; the law of tenancy in common, no less than other law, is based on reason and experience; and it is contrary to all reason and human experience to suppose that an estranged and divorced couple, either by themselves or joined by the new spouse of one of them, can tranquilly occupy one little dwelling house and use its furnishings together. Under the circumstances respondent's possession was exclusive in both the practical and technical sense; and since his payments were ap-

parently less than the occupancy and use of the property were worth, the credit allowed him was contrary to both equity and law. There was also evidence, though disputed, that respondent had the locks on the doors to the house changed, striking proof, I would think if more were needed, of his exclusive possession.

MAXINE DOCKERY, WIDOW, REX DOCKERY, DECEASED, EMPLOYEE, PLAINTIFF v. ROBERT B. MCMILLAN, D/B/A MCMILLAN HOMES, INCORPORATED, EMPLOYER; NON-INSURED, AND/OR RANDY DOCKERY, EMPLOYER; NON-INSURED, DEFENDANTS

No. 8610IC970

(Filed 5 May 1987)

Master and Servant § 49— workers' compensation—father in son's employ—father as employee

Plaintiff's husband was an employee within the meaning of the Workers' Compensation Act at the time he fell from a roof to his death, though the employer-employee relationship in this case was somewhat unusual or informal because it was between father and son, where the evidence tended to show that for a number of years, when he was able and when he was needed, the deceased provided valuable roofing skills and services for his son, and in exchange for these services, which furthered his business, the son would provide his father with three to four hundred dollars worth of necessities per month.

APPEAL by plaintiff from Opinion and Award of the Industrial Commission entered 27 May 1986. Heard in the Court of Appeals 15 January 1987.

Don H. Bumgardner for plaintiff appellant.

Essex, Richards & Morris by B. Garrison Ballenger, Jr., for defendant appellee Robert B. McMillan, d/b/a McMillan Homes, Inc.

COZORT, Judge.

Plaintiff appeals the Commission's Opinion and Award, filed 27 May 1986, adopting Deputy Commissioner Sellers' 27 January 1986 Opinion and Award, finding that Rex Dockery was not an employee within the meaning of N.C.G.S. § 97-2(2) but was a "mere volunteer." Commissioner Charles A. Clay dissented. We reverse.

Robert G. McMillan, president of McMillan Homes, Inc., as general contractor for the construction of a residence at 4105 Columbine Circle in Charlotte, North Carolina, subcontracted with roofing contractor Randy Dockery in the middle of July of 1983 to put a roof on the house under construction. When Robert McMillan contracted with Randy Dockery, Dockery did not give McMillan any certificate of insurance as to workers' compensation, and McMillan does not remember whether he asked Dockery for such a certificate.

Randy Dockery learned the roofing business from his father, Rex Dockery. Due to problems with his back Rex Dockery stopped working full time in the roofing business in 1975, and he went on disability in September 1975. In 1975 or 1976 Randy Dockery formed his own roofing business. After Rex Dockery stopped roofing full time and went on disability he would "work" for his son, Randy, on a part-time basis. On 23 July 1983, a Saturday, Rex Dockery went with Jeff Roberson and Curt Dockery, Rex's son and Randy's brother, to roof the house on Columbine Circle. Jeff Roberson and Curt Dockery were Randy Dockery's only full-time employees at the Columbine Circle house. While working on the roof, Rex Dockery fell off the roof and to his death on a concrete patio.

In finding and concluding that Rex Dockery was not an "employee" within the meaning of the Workers' Compensation Act, and thus leaving the Commission without jurisdiction in this case, the Commission made three numbered findings of fact:

> 1. The deceased, Rex Dockery, was in partnership with his brother for a number of years working as a roofing subcontractor until back difficulties, which qualified him for social security disability benefits since September of 1975, caused him to dissolve the partnership. Thereafter, on an occasional basis the deceased assisted his son, defendant Randy Dockery, who had also become involved in the roofing business. There existed between the deceased and defendant Randy Dockery no written contract for hire and, in fact, there was no implied contract for hire for the reason that the deceased "came and went as he pleased." Further, he was not subject to being fired by defendant Randy Dockery, nor did defendant Randy Dockery have a right of control over what

the deceased did or when he might do what he did. Any monies which defendant Randy Dockery paid the deceased was not based on the value of services rendered, but was rather gratuitous based on whether the deceased was in need of money for medicine, for shoes or for a house payment.

2. Defendant Robert G. McMillan d/b/a McMillan Homes, Inc., is a general contractor in the business of constructing residential dwellings. On one such dwelling the roofing work had been subcontracted to defendant Randy Dockery. On 23 July 1983 the deceased fell to his death from the roof of this house.

3. At the time of his death, the deceased was not an employee of defendant Randy Dockery who was a subcontractor for the general contractor, defendant Robert McMillan d/b/a McMillan Homes, Inc., but was rather a mere volunteer who occasionally received monies unrelated to the values of services rendered.

In his dissenting opinion Commissioner Clay stated:

I believe the majority errs in dismissing this claim for lack of jurisdiction. Contrary to the Deputy Commissioner's conclusion, an employer-employee relationship clearly existed between the deceased worker and his son, a sub-contractor. The fact that this relationship was some-what [*sic*] unusual or informal because it was between father and son does not, in my opinion, mean that the relationship did not exist within the meaning of the Act.

The decision affirmed by the majority finds that money paid to the father by the son was "not based on value of services rendered, but was rather gratuitous based on whether the deceased was in need of money for medicine, for shoes or for a house payment." These are among the basic things, of course, that most people work to earn money for.

Certainly the $300.00 to $400.00 a month the son paid the father before the latter was killed in a fall on a roofing job was of substantial if not great benefit to the son from the standpoint of furthering the son's business. The son testified that after he took over the business, his father priced roofing and did other things the son didn't know how to do. This is

> evidence that the father did indeed perform valuable services in his job and more than earned the $300.00 to $400.00 a month he was paid for his work.

We agree with Commissioner Clay.

N.C.G.S. § 97-19 holds a general contractor, in this case defendant McMillan, who fails to require a subcontractor to obtain from the Industrial Commission a certificate of compliance with N.C.G.S. § 97-93, liable to a subcontractor's employees for compensation under the Workers' Compensation Act to the same extent the subcontractor would be liable if the subcontractor were subject to the Act, irrespective of the number of employees the subcontractor employs.

An injured person, however, is entitled to compensation under the Act only if he was an employee of the alleged employer at the time of the accident. *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965). Since the Act applies only in an employer-employee relationship, the question of whether the relationship existed at the time of the accident is jurisdictional. *Carter v. Frank Shelton, Inc.*, 62 N.C. App. 378, 303 S.E. 2d 184 (1983), *disc. rev. denied*, 310 N.C. 476, 312 S.E. 2d 883 (1984). Therefore,

> [n]otwithstanding G.S. 97-86, the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. *The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.*

Lucas v. Li'L General Stores, 289 N.C. 212, 218, 221 S.E. 2d 257, 261 (1976) (emphasis added). Thus, our task is to examine the whole record and make our own determination of whether Rex Dockery was an employee, within the meaning of the Act, at the time he fell to his death. The claimant has the burden of proof that the employer-employee relationship existed at the time the injury by accident occurred. *Id.*

N.C.G.S. § 97-2(2) defines an employee as "every person engaged in an employment under . . . [a] contract of hire . . ., express or implied, oral or written, . . . whether lawfully or un-

lawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer . . . ." This statutory definition adds nothing to the common law meaning of the term, and whether an employer-employee relationship existed is to be determined by the application of ordinary common law tests. *Lucas v. Li'L General Stores*, 289 N.C. 212, 221 S.E. 2d 257. The relationship of employer-employee "is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied." *Hollowell v. North Carolina Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934). "An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the Workmen's Compensation Act, in case of injury sustained by accident arising out of and in the course of the employment." *Id.* at 210, 173 S.E. at 605.

In essence, what we must determine is whether at the time of the accident resulting in Rex Dockery's death there existed a contract of hire between Randy Dockery and his father, Rex. For the reasons stated herein, we hold there was an implied oral contract of hire, and the Commission erred in finding Rex Dockery was not an employee and by thus dismissing the claim for lack of jurisdiction.

With respect to the question of an employer-employee relationship between Randy Dockery and Rex Dockery, Randy Dockery, who learned the roofing business from his father, testified on direct examination to the following:

During the summer of 1983 Rex was employed with him as a troubleshooter on a full-time basis. Randy did not know how to price a roofing job and his father did that for him. As far as getting his father on a roofing job, however, they did not get him on the job that often, for Rex would come when he felt like coming. His father's time on the job varied depending upon how his father, who was drawing social security disability, felt or what work Randy had for him to do. As pay or compensation for coming and helping with the actual job site, Randy would get him anything he needed as far as cars, car insurance, a house payment, and the like. This compensation amounted to three to four hundred dollars per month.

On direct examination, Randy Dockery further testified that on the date of the accident he had two full-time employees, Jeff Roberson and Randy's brother Curt.

On cross-examination Randy Dockery testified that when he was single and worked for his father, Rex Dockery paid him like Randy later paid him, by giving him spending money and seeing "to it that [he] didn't need for anything." After Randy got married, however, his father paid Randy just like Randy pays his other roofers, by the square.

Randy further testified on cross-examination that normally he would have himself and two other workers on a jobsite. For a seven, twelve pitch roof he paid the other two workers seven or eight dollars per square. As to how it was decided who would go work on a job, just whoever wanted to go went. Randy testified that "if they don't want to go you're not going to get them to." Randy further testified that he had "a hundred people work for [him] off and on. They would work maybe one day and then never see them again and maybe work one day one week and three months later come in a [*sic*] work another day or something." From time to time Randy would fire his brother Curt but then he would put him back to work the next day.

On cross-examination Randy acknowledged that he could not have hired or fired his father. He testified that his father worked when he felt like it:

> Like in cold weather, or rainy weather, a lot of weather his back gave him a lot of problems and he didn't like to get out. Like I said, dad was always an independent type anyway. He done what he wanted to.

In response to defense counsel's question concerning whether Randy told his father what to do on the job, Randy testified:

> I really didn't know how to tell him what to do. If there was something I wanted done and said anything to him about it he would see to it it got done, but you just didn't tell him what to do.

While on cross-examination Randy acknowledged that if at all possible whether his father worked for him or not he would have tried to take care of him, his father's working for him "had a lot to do with taking care of [him]."

Maxine Dockery, Rex Dockery's widow, testified that after her husband became disabled, he continued to go up on roofs. His doctor had told him that he could work if he was feeling all right but not to do any climbing if his back was giving him trouble. According to Mrs. Dockery, her husband followed his doctor's advice; he knew when he was able to work and when he wasn't. Rex Dockery only worked for Randy.

With respect to what income Rex brought home, Mrs. Dockery testified that whatever they needed that they could not afford out of their disability checks, Randy provided for them. This averaged one hundred to one hundred twenty-five dollars per week. They never reported this on their income tax because someone at H & R Block told her that as long as Randy was paying taxes on it, they did not have to. Finally, Mrs. Dockery testified that "Randy could not have afforded to do the things that he actually done [for Rex] had Rex not have done some of the things he done for [Randy] either."

While the testimony may at first blush appear conflicting as to a contract of hire, we believe the testimony shows that there was an implied oral contract of hire between Randy Dockery and his father Rex. That Randy did not pay his father in money does not lessen the employer-employee relationship for "[t]he element of payment, to satisfy the requirement of a contract of hire, need not be in money, but may be in anything of value." 1C Larson's Workmen's Compensation Law, § 47.43(a) (1986). The casual nature with which Rex Dockery worked, which the evidence shows was primarily due to his back injury, does not detract from job status as an employee, for under N.C.G.S. § 97-2(2) a casual employee is not excluded from coverage under the Act unless his employment is *not* in the course of the trade, business, profession or occupation of his employer.

While Randy Dockery testified that he could not have hired or fired his father, we do not believe this testimony, in the context of Randy Dockery's whole testimony, makes Rex a mere volunteer. Due to the nature in which Randy ran his business, his employees worked when they wanted to. Randy testified that you could not get them to work if they didn't want to and that people would work one day one week, disappear, and then not show up to work again until three months later.

That Randy did not tell his father what to do likewise does not make his father a mere volunteer. Rex was far more experienced in the roofing business than Randy. The import of Randy's testimony is that, while you just didn't go and order his father, Rex, around, he knew how to get him (Rex) to do what he wanted him to, that is, what needed to be done:

> I really didn't know how to tell him what to do. If there was something I wanted done and said anything to him about it he would see to it it got done, but you just didn't tell him what to do.

An employer-employee relationship is not negated because the employer uses subtle, indirect means to obtain the desired kindly services from the older, more experienced employee.

We agree with Commissioner Clay that the fact that the employer-employee relationship in this case was somewhat unusual or informal because it was between son and father does not mean the relationship did not exist under the Act. The evidence shows that for a number of years when he was able, and when Randy Dockery needed him, Rex Dockery provided valuable roofing skills and services for his son. In exchange for these services, which furthered his business, Randy Dockery would provide his father with three to four hundred dollars worth of necessities per month. The evidence shows that without Rex Dockery's skills and services Randy Dockery would not have been able to afford to provide the three to four hundred dollars worth of necessities per month, even though apart from their business relationship, Randy, as Rex's son, may have wanted to help out his father. We hold that there existed an implied oral contract of hire between employer-son Randy Dockery and employee-father Rex Dockery.

The Opinion and Award of the Commission is reversed and remanded for proceedings consistent with this opinion.

Reversed and remanded.

Judges MARTIN and PARKER concur.

STATE OF NORTH CAROLINA v. ALICE CLAY

No. 8612SC251

(Filed 5 May 1987)

1. **Constitutional Law § 60; Jury § 7.14— peremptory challenges of blacks—waiver of objection**

Defendant waived her right to contest the State's use of peremptory challenges to exclude blacks from the jury by failing to object to that action until after the State had presented its evidence.

2. **Criminal Law § 80— records of telephone calls—admissibility of testimony**

The trial court did not err in permitting a telephone company employee to testify about the contents of the records of calls made on defendant's telephone.

3. **Criminal Law § 116— defendant's failure to testify—unrequested instruction**

While it is the better practice for the trial court not to instruct on defendant's failure to testify absent a request, the court's unrequested instruction was not prejudicial error where the instruction made it clear that defendant's decision not to testify created no presumption against her and that her silence was not to influence the jury's decision in any manner.

4. **Criminal Law § 114.3— instructions—no statement of opinion**

The trial court did not improperly imply that defendant was guilty of charges relating to accessory before the fact to various crimes when it instructed that the last four counts in an indictment "refer to the allegation of acting as an accessory before the fact—or rather guilt of those crimes charged as an accessory before the fact."

5. **Criminal Law § 117.1— prior convictions of witnesses—instructions on consideration**

The trial court did not err in refusing to give defendant's requested instruction that the guilt or conviction of a witness shall not be considered as any evidence of defendant's guilt where the court gave an instruction concerning the consideration of prior convictions on the question of a witness's credibility which complied with the pattern jury instruction and prior appellate decisions.

APPEAL by defendant from *Herring, Judge.* Judgments entered 1 August 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 27 August 1986.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General Charles J. Murray for the State.

Edward J. David for defendant appellant.

COZORT, Judge.

The defendant was charged in proper indictments with several felonies. At the 22 July 1985 Session of Cumberland Superior Court, she was convicted of one count of solicitation to commit first-degree murder, one count of conspiracy to commit first-degree burglary, two counts of conspiracy to commit robbery with a dangerous weapon, one count of conspiracy to assault with a deadly weapon inflicting serious injury, one count of accessory before the fact to first-degree burglary, two counts of accessory before the fact to armed robbery, and one count of accessory before the fact to assault with a deadly weapon inflicting serious injury. The defendant appeals from the Judgment and Commitment orders imposing a lengthy term of imprisonment in the N. C. Department of Correction. The primary argument advanced by defendant on appeal is that "the Assistant District Attorney's use of his peremptory challenges solely on the basis of race to exclude blacks from the jury violated the defendant's rights under the United States Constitution and the North Carolina Constitution . . . ." We hold that the defendant is entitled to no relief on this claim because her objection to the prosecutor's use of the State's peremptory challenges was not timely made. The defendant did not object at the time of the use of the peremptory challenges; rather, the objection came after the State had presented its evidence and rested. We also find no merit to four other assignments of error argued by the defendant, and we thus find no error in the trial below.

[1] We first address the defendant's argument concerning the State's use of its peremptory challenges to exclude blacks from the jury. In *Batson v. Kentucky*, --- U.S. ---, 90 L.Ed. 2d 69, 106 S.Ct. 1712 (1986), the United States Supreme Court held, in an opinion filed 30 April 1986, that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at ---, 90 L.Ed. 2d at 83, 106 S.Ct. at 1719. In *State v. Jackson*, 317 N.C. 1, 343 S.E. 2d 814 (1986), a decision filed 3 June 1986, the North Carolina Supreme Court, following precedent from the United States Supreme Court (*e.g.*, *United States v. Johnson*, 457 U.S. 537, 73 L.Ed. 2d 202, 102 S.Ct.

2579 (1982)), held that "the ruling in *Batson* is not to be applied retroactively. The ruling will only be applicable to those cases where the jury selection took place after the *Batson* decision was rendered." *State v. Jackson*, 317 N.C. at 21, 343 S.E. 2d at 826. On 13 January 1987 the United States Supreme Court reexamined prior rulings and held, in *Griffith v. Kentucky*, --- U.S. ---, 93 L.Ed. 2d 649, 107 S.Ct. 708 (1987), that *Batson* shall be given retroactive application:

> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

Id. at ---, 93 L.Ed. 2d at 661, 107 S.Ct. at 716. Giving *Batson* the appropriate retroactive application to this case now pending review on direct appeal, we shall examine defendant's argument.

The defendant was tried at the 22 July 1985 Session of Cumberland County Superior Court. The jury was empaneled and the State began its evidence on 24 July 1985. On 26 July 1985, the State rested. On 29 July 1985, the defendant filed a motion to dismiss all charges against her on the ground that the State violated defendant's constitutional rights by systematically excluding five members of the jury of the black race, the same race as the defendant. The trial court declined to consider the motion, informing defendant's counsel that the objection is "deemed waived at this point." At the conclusion of the defendant's evidence, defendant again raised the issue, and the trial court denied defendant's motion. For reasons which follow, we hold the defendant waived her right to argue this issue by failing to timely object to the State's use of its peremptory challenges.

In *Batson*, the Supreme Court stated that the defendant "made a *timely* objection to the prosecutor's removal of all black persons on the venire." *Batson v. Kentucky*, --- U.S. at ---, 90 L.Ed. 2d at 90, 106 S.Ct. at 1725 (emphasis added). Although the *Batson* court did not discuss the issue of timeliness, the court's recitation of the facts of the case shows that the defendant moved to discharge the jury *before it was sworn*. *Id.* at ---, 90 L.Ed. 2d at 78, 106 S.Ct. at 1715. In *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *death sentence vacated*, 403 U.S. 948,

29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971), the defendant argued, among other things, that the trial court erred by excluding three jurors who refused to take the customary oath. The court held the defendant waived his right to question the composition of the jury, by failing to object at the time of the court's action:

> While the record shows an exception by the defendant to each of these actions of the court, it does not show any objection thereto interposed *at the time*. . . .
>
> * * * *
>
> [I]t has been settled in this State since as long ago as *State v. Ward*, 9 N.C. 443, that an irregularity in forming a jury is waived by silence of a party *at the time of the court's action*. . . .
>
> * * * *
>
> . . . In any event, the defendant, having the same opportunity as the trial judge to observe these three prospective jurors in the courtroom, did not object to their being excused from the jury until after the verdict was rendered.

Id. at 308-10, 167 S.E. 2d at 253-54 (emphasis added).

We find the rules expressed in *Atkinson* applicable to this case. We hold that the defendant herein waived her right to contest the State's use of its peremptory challenges by not objecting to that action until after the State had presented its evidence.

[2] In her second assignment of error, the defendant contends the trial court erred by permitting testimony from one of the State's witnesses, a representative of Carolina Telephone and Telegraph Company (hereinafter CT&T), about the contents of the records of transactions of the phone of the defendant. We find the assignment of error to be without merit.

Robert Elliott Henry, an employee of CT&T, was called as a State's witness. He testified about how the phone company makes and maintains records of calls made by customers. The State then moved for the admission of copies of records, with parts missing, of the defendant's telephone transactions. The defendant objected and, after a lengthy *voir dire*, the trial court *sustained* the objection. The defendant's exception upon which this argument is

based appears in the transcript at the point where the trial court begins the *voir dire*. Later, the witness was recalled by the State, and the State offered a more complete set of telephone records. The trial court admitted those records, over the objection of the defendant. The defendant took no exception to the admission of the more complete records. Furthermore, the defendant does not argue in her brief that the trial court's admission of the records was erroneous. Instead, the defendant argues that the error occurred when the court allowed Henry to testify about the contents of "a business document . . . without the document being produced or any evidence being introduced explaining the failure to produce the document." In her brief, the defendant refers continuously to "the document in question," without stating whether she is referring to the first document which was not admitted, or the second document, whose admission she does not challenge on appeal. In either event, her argument is obviously predicated on a misconstruction of the facts of the case and is therefore frivolous. The records were admitted, and the witness's testimony about those records was not error.

[3] Next, the defendant argues that the trial court erred in its instructions to the jury by referring to the defendant's failure to testify. In the record on appeal, the defendant has excepted to this statement by the trial court:

> Now the defendant, Alice Clay, in this case has not herself testified. The law gives every defendant this privilege. This same law also assures a defendant that a decision not to testify will create no presumption against her in any way whatsoever.
>
> Therefore, her silence is not to influence your decision in any manner or in any way in this case.

In *State v. Chambers*, 52 N.C. App. 713, 280 S.E. 2d 175 (1981), we held that it was not always prejudicial error for the trial court to give an unrequested instruction regarding defendant's failure to testify. "There is no prejudicial error if the instruction 'makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him . . . .' (citation omitted)." *Id.* at 717, 280 S.E. 2d at 178. After examining the

language objected to herein, we find it conforms to the rule set forth in *Chambers*, and we hold it did not violate defendant's constitutional rights. We repeat the caveat expressed in *Chambers* "that our finding of no error should not be construed as an endorsement of the instructions." *Id.* at 718, 280 S.E. 2d at 178.

[4] In her fourth assignment of error, the defendant claims the trial court erred during its instructions to the jury by giving an instruction which could have misled the jury into believing or inferring that the defendant was guilty of the charges relating to being an accessory before the fact of various crimes. The language to which the defendant complains is:

> Now those are the outstanding charges against the defendant for your consideration. I would call your attention to the fact that in case number 84CRS22629, the multiple count bill of indictment, the first four counts refer to the allegation of the crime of conspiracy, whereas, the last four counts—that is, count five through eight inclusive—refer to the allegation of acting as an accessory before the fact—or rather guilt of the crimes charged as an accessory before the fact.

"[A] charge must be construed 'as a whole in the same connected way in which it was given.' When thus considered, if it 'fairly and correctly presents the law, it will afford no ground for reversing the judgment, even if an isolated expression should be found technically inaccurate.' (Citations omitted.)" *State v. Tomblin*, 276 N.C. 273, 276, 171 S.E. 2d 901, 903 (1970). Following the rule set forth in *Tomblin*, we find no prejudicial error.

The trial court's statement to which the defendant objects occurred at the beginning of his charge to the jury. It was a part of the judge's opening instructions wherein the court informed the jury of the specific charges against the defendant. The court was reminding the jury that the first four counts of that particular indictment related to various charges of conspiracy, while the last four counts accused the defendant of being guilty as an accessory before the fact to various crimes. Later, when the trial court instructed the jury on each specific count, he correctly instructed on each element the State must prove in order for the jury to find the defendant guilty. On each count, he correctly instructed the jury that if they had a reasonable doubt as to any one or

more of those things the State must prove, it would be their duty to return a verdict of not guilty.

Considering the entire charge, we are convinced the jurors were not misled by the portion of the charge to which the defendant excepts. This assignment of error is not sustained.

[5] Finally, the defendant contends the trial court erred by failing to grant the defendant's request for special jury instructions. In her brief the defendant makes reference to requests on five different issues; however, she makes argument on only one request. The other four are deemed abandoned, and we consider the one argued by defendant.

Defendant filed a written request asking the trial court to instruct the jury:

> 5. That the guilt or conviction of a witness shall in way [*sic*] be considered as any evidence of the Defendant's guilt whatsoever.

The trial court instructed the jury on this issue as follows:

> There is evidence which tends to show that certain witnesses in this case have been convicted of various crimes. I instruct you, members of the jury, that evidence of the commission of crime has been admitted for one purpose only and that is if, considering the nature of the crime or crimes for which a witness has been convicted, you believe that it has some bearing upon the truthfulness of that witness in giving testimony in this case, then you may consider that fact together with all the other facts and circumstances bearing upon that witness' truthfulness in deciding whether you will believe or disbelieve his or her testimony given at this trial. But except as it may bear upon this decision, this evidence may not be considered by you in your determination of any fact in this case unless it has been shown that a witness has no criminal record, or that his criminal record is relatively insignificant.

Citing no authority, the defendant argues in her brief that the court's instructions "did not adequately emphasize that such evidence shall not be considered as evidence of the defendant's guilt." The defendant's argument has no merit. First, she cites no

authority, and we are aware of none, which requires that the court instruct in the precise language requested by defendant. Second, the instruction given by the trial court is consistent with that found in N.C.P.I. Crim. 105.35 and is consistent with instructions found sufficient by this Court. *See, e.g., State v. Artis*, 9 N.C. App. 46, 175 S.E. 2d 301 (1970).

In summary, in the defendant's trial, we find

No error.

Judges BECTON and JOHNSON concur.

ELLEN TEAGUE HUNT v. KEITH HAYWOOD HUNT

No. 8610DC1066

(Filed 5 May 1987)

1. **Evidence § 34.5; Divorce and Alimony § 30— equitable distribution—gifts—statement as to intent of donor—not hearsay**

The trial court did not err in an equitable distribution action by permitting the plaintiff's father to testify that checks from plaintiff's dead grandmother to defendant were gifts to plaintiff where the testimony was not hearsay in that it did not contain a "statement," and the requirements of N.C. G.S. § 8C-1, Rule 601(c) were not met because neither plaintiff nor her father was testifying against the interest of plaintiff's grandmother. N.C.G.S. § 8C-1, Rule 801(a).

2. **Divorce and Alimony § 30— equitable distribution—checks to defendant by plaintiff's grandmother—gifts to plaintiff—evidence sufficient**

The evidence in an equitable distribution action adequately supported the trial court's finding that checks written to defendant by plaintiff's grandmother were gifts to plaintiff only.

3. **Divorce and Alimony § 30— equitable distribution—gifts to plaintiff—used to purchase entirety property—presumption of marital property—not rebutted**

The trial court erred in an equitable distribution action by holding that checks written by plaintiff's grandmother to plaintiff and to defendant remained plaintiff's separate property after plaintiff placed that money into property titled in the entireties where plaintiff did not rebut the presumption that money placed into property titled in the entireties is a gift to the marital estate.

4. Divorce and Alimony § 30— equitable distribution—separate property contributed to marital estate—remanded on other grounds

The trial court erred in an equitable distribution action by determining that plaintiff contributed separate property in the amount of $39,918.80 for the purchase of the family home where the correct figure is $38,368.88; however, the figure was of no great importance because plaintiff did not overcome the presumption that she did not intend a gift to the marital estate when she placed the money into property titled in the entireties. On remand, the trial court may reconsider its holding that an equal distribution of marital property is equitable and may consider the individual contributions of separate property under N.C.G.S. § 50-20(c)(12).

5. Divorce and Alimony § 30— equitable distribution—CPA's opinion on gift tax—excluded

In an equitable distribution action involving funds given to plaintiff and defendant by plaintiff's grandmother, there was no prejudicial error from the trial court's denial of defendant's request for a *voir dire* to make a showing of what a CPA's opinion would have been concerning the grandmother's gift tax returns if such returns had been filed.

6. Divorce and Alimony § 30— equitable distribution—proceeds from sale of car—no error

The trial court did not err in an equitable distribution action by holding that the $3,000 realized from the sale of the parties' 1982 Volvo was marital property where the car was purchased during the marriage; the parties had traded in two cars belonging to plaintiff and her parents and one car belonging to defendant; no evidence was produced as to the value of the cars that were traded for the Volvo; and in view of the total value of the marital property, any error was of limited significance and did not require a recomputation of the asset.

7. Divorce and Alimony § 30— equitable distribution—mortgage payments

In an equitable distribution action, all of the money used for payment on the marital home up until the date of separation consisted of either marital funds or funds presumed to be gifts to the marital estate; however, payments by defendant after separation consisted entirely of defendant's separate property and, on remand, defendant should be credited with at least the amount by which he decreased the principal owed on the marital home.

8. Divorce and Alimony § 30— equitable distribution—credibility of witnesses

Defendant's contentions on appeal regarding the credibility of witnesses in an equitable distribution action were of no consequence since the credibility of witnesses is to be resolved by the trier of fact.

APPEAL by defendant from *Redwine, Judge.* Order entered 12 May 1986. Heard in the Court of Appeals 11 March 1987.

Plaintiff and defendant were married on 17 October 1982 and separated on 7 January 1985. An absolute divorce was granted to the parties on 4 March 1986.

During the course of their marriage the parties purchased a house on Woodbury Drive in Raleigh. Money for the down payment came partially from separate property of defendant and partially from money supplied by plaintiff's grandmother, Ethel Teague. Plaintiff's grandmother provided the money in the form of checks, some of which were written to plaintiff and some of which were written to defendant.

The trial court held that Ethel Teague intended these checks as gifts only to plaintiff. The court also held that when this money was used as a down payment for the house, that plaintiff did not intend to make a gift of this money to the marital estate.

The trial court held that an equal division of the marital property was equitable. However, the court awarded plaintiff 85.2% of the proceeds from the sale of the marital home and 14.8% to defendant. Although not expressly stated in the judgment, this was done to reflect the differing amounts of separate property contributed to the down payment of the home.

In its findings of fact, the trial court stated that the mortgage payments made by defendant and plaintiff during their marriage and the payments made by the defendant after separation were living expenses and not subject to any consideration in equitable distribution. From the judgment of the trial court concerning the property distribution, defendant appeals.

Gerald L. Bass for plaintiff appellee.

Norman M. York, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant attacks various portions of the equitable distribution judgment. His exceptions relating to the unequal division of the proceeds from the sale of the marital home have merit and demand that we vacate the distributive award as ordered and remand the case for further proceedings.

[1] Defendant contends that the trial court erred in holding that the checks from plaintiff's grandmother listing him as payee were gifts to plaintiff and not defendant. Essential to the resolution of this issue is the determination of defendant's argument that the trial court erred "by allowing Edward Teague [plaintiff's father]

to testify as to what his dead mother's gift intentions were." Defendant's contention is that this testimony was hearsay and should not have been allowed due to G.S. 8C-1, Rule 801 and Rule 802. This argument is unfounded.

Defendant is incorrect in stating that this evidence was hearsay. " 'Hearsay' is a *statement*, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." G.S. 8C-1, Rule 801(c) (emphasis added). G.S. 8C-1, Rule 801(a) defines a statement as ". . . (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

The testimony in question contained no such "statement" qualifying as hearsay. It is possible that Edward Teague's testimony might have been based on hearsay, but there is no way of knowing the basis of his testimony from the record. Defendant should have objected at trial as to the foundation for Mr. Teague's knowledge concerning his mother's purpose or intention but he did not. While this testimony as presented may have been objectionable on other grounds, it was not hearsay.

Defendant also argues that G.S. 8-51 prevents both plaintiff and her father from testifying about the donor's intent because these parties have an interest in the outcome. This statute was repealed effective 1 July 1984 and replaced by G.S. 8C-1, Rule 601(c). 1983 N.C. Session Laws Ch. 1037.

Rule 601(c) is a compromise between the traditional "Dead Man's Act" and complete abolition. In order for this rule to apply, four requirements must be met: 1) the witness must be a party or person interested in the event, or a person from, through or under whom such party or interested person derives his interest or title, 2) the witness must testify in his own behalf and against the representative of the deceased, 3) the testimony must relate to an oral communication between the witness and the deceased and 4) the case must fall within the four exceptions listed in the rule. G.S. 8C-1, Rule 601(c).

In the case *sub judice*, the requirements are not satisfied. Neither plaintiff nor her father are testifying against the interest of Ethel W. Teague. Defendant's contention is without merit.

[2] Having determined that the evidence concerning intent was not improperly admitted under Rule 601(c), we turn to defendant's contention that the trial court erred by holding that the checks written to defendant were gifts to plaintiff only.

It is well established that findings of fact made by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979). The evidence concerning Ethel Teague's intent adequately supports the finding that the checks written to defendant were gifts to plaintiff only.

[3] Defendant next contends that the trial court erred by holding that the checks written to plaintiff and the checks written to defendant remained plaintiff's separate property because plaintiff did not rebut the presumption that money placed into entireties property is a gift to the marital estate. We agree.

When a spouse furnishes consideration from separate property and causes property to be conveyed to the other spouse in the form of tenancy by the entireties, a presumption of a gift to the marital estate arises which is rebuttable only by clear, cogent and convincing evidence. *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E. 2d 910, *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985). This rule is consonant with the presumption that gifts between spouses are marital property, the definition of separate property in G.S. 50-20(b)(2), and the common law rule stated in *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982). *Id.* It is also consistent with the partnership concept that is the foundation of the Equitable Distribution Act. *Id.; see* Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. Rev. 195 (1987).

While there is evidence that Ethel Teague intended the checks written to plaintiff and the checks written to defendant only as a gift to plaintiff, the record is void of any evidence concerning plaintiff's intent when placing those checks into property titled in the entireties. Plaintiff, therefore, did not rebut the *McLeod* presumption by clear, cogent and convincing evidence. The trial court erred by finding that plaintiff did not intend to make a gift to the marital estate.

[4] Defendant also contends correctly that the trial court committed reversible error in determining that plaintiff contributed separate property in the amount of $39,918.80 for the purchase of the family home because there is no finding of fact to support this figure.

Based on the figures that the trial court found were contributed by plaintiff to the down payment of the house, the trial court should have arrived at a total contribution of separate property by plaintiff in the amount of $38,368.88. Having determined above, however, that plaintiff did not overcome the presumption that she did not intend a gift to the marital estate when she placed this money into property titled in the entireties, this figure is no longer of great importance.

The fact that plaintiff contributed a substantial amount more than did defendant to the down payment has possible relevance only under G.S. 50-20(c)(12) which provides that a court shall consider "[a]ny other factor which the court finds to be just and proper." Upon remand the trial court shall reconsider its holding that an equal distribution of marital property is equitable. In doing so, the trial court may consider the individual contributions of separate property if it views these contributions as an appropriate factor under G.S. 50-20(c)(12).

This Court is in no way suggesting that an equal distribution would not be equitable. We are, however, in light of our holding that plaintiff's separate property became marital when placed in the entireties, merely permitting the trial court to reevaluate its position as to whether an equal division would be proper. The trial court may find it appropriate to consider the manner in which the marital property was acquired. We note that this factor is specifically listed in the equitable distribution statutes of Delaware, Indiana, Kansas, Maryland, Nevada, Vermont, Virginia and Wyoming. Remand of this case, however, does not allow reconsideration of other potential distributive factors since the trial court has already made such evaluations.

[5] Defendant next contends that the trial court committed reversible error when it denied the defendant's request for a *voir dire* to make a showing of what the C.P.A.'s opinion would have been concerning possible entries on Ethel Teague's gift tax returns if such returns had been filed. We disagree.

Assuming *arguendo* that it was error for the trial court to exclude such testimony, it was not prejudicial error. Plaintiff herself presented evidence that Ethel Teague wrote checks totaling $10,000 to defendant for tax purposes only, thus implying that if gift tax returns had been filed, defendant would have been listed as the donee. That is precisely the point that defendant was trying to make with this line of questioning.

The trial court, however, was persuaded more by the testimony that Ethel Teague actually intended the money as a gift to only her granddaughter. The opinion of the C.P.A. as to nonexisting gift tax returns would have added nothing. Defendant's contention is without merit.

[6] Defendant next argues that the trial court committed reversible error in holding that all of the proceeds from the sale of the parties' 1982 Volvo were marital property because the down payment for the automobile consisted of funds generated prior to the marriage. Again we disagree.

The trial court found that the parties purchased a 1982 Volvo during their marriage and that as a part of the transaction, the parties traded in two cars belonging to plaintiff and her parents, and one car belonging to defendant. The parties produced no evidence as to the value of the cars that were traded for the Volvo. The trial court held that the 1982 Volvo was marital property and equally divided the $3,000 realized from the sale of the car.

In view of the total value of the marital property and the fact that both parties contributed comparable separate property to the acquisition of this particular asset, any error made by the trial court in failing to allocate the respective marital and separate interests is of limited significance and does not require a recomputation of this asset. *See Harris v. Harris*, 84 N.C. App. 353, 352 S.E. 2d 869 (1987). It is important to note that the parties here presented no evidence as to the value of the automobiles traded for the Volvo.

Defendant also contends that the trial court committed reversible error by holding that the mortgage payments made during the marriage and the mortgage payments made by the defendant after separation were living expenses and not subject to any consideration in equitable distribution.

[7] We first deal with the mortgage payments made during the marriage. Having determined that the trial court incorrectly concluded that money contributed to the down payment of the house remained separate property, this contention becomes unimportant. All of the money used in payment on the marital home up until the date of separation consisted of either marital funds or funds presumed to be gifts to the marital estate. *See Draughon v. Draughon*, 82 N.C. App. 738, 347 S.E. 2d 871 (1986), *cert. denied*, 319 N.C. 103, 353 S.E. 2d 107 (1987); *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E. 2d 910, *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985).

The payments made by defendant after separation, however, consisted entirely of defendant's separate property. From the record before us, it would appear that defendant should be credited with at least the amount by which he decreased the principal owed on the marital home. Upon remand the court shall make a determination as to this issue.

[8] Defendant also contends that the trial court committed reversible error by placing too much credibility in the testimony of the plaintiff and her only witness, and that the trial court erred in not giving sufficient weight to the testimony of the C.P.A. and to the exhibit of the expert C.P.A. The credibility of a witness, however, is a matter to be resolved by the trier of fact. *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E. 2d 450 (1971). Defendant's contentions concerning credibility are therefore without consequence.

We have examined the remainder of defendant's contentions and have determined them already to have been answered in this opinion or to be without merit.

Judgment vacated; cause remanded for further proceedings consistent with this opinion.

Judge GREENE concurs.

Judge MARTIN concurs in the result.

STATE OF NORTH CAROLINA v. JAMES LARRY ARNETTE

No. 8613SC789

(Filed 5 May 1987)

1. **Criminal Law § 138.34— drug addiction as mitigating factor—finding not required**

The sentencing judge did not err in refusing to find defendant's drug addiction a factor in mitigation of his sentence where defendant's evidence could justify a finding that the crimes were committed to support his habit, but he presented no evidence which would compel the conclusion that his culpability for the offense committed was significantly reduced because of his drug addiction. N.C.G.S. § 15A-1340.4(a)(2)d.

2. **Criminal Law § 138.39— breaking into unoccupied instead of occupied car—exercise of caution to avoid bodily harm—finding of mitigating factor not required**

The sentencing judge did not err in failing to find as a mitigating factor that defendant was exercising caution to avoid the possibility of serious bodily harm or fear because he broke into an unoccupied rather than an occupied car. N.C.G.S. § 15A-1340.4(a)(2)j.

3. **Criminal Law § 138.40— acknowledgment of wrongdoing—finding of mitigating factor not required**

The sentencing judge did not err in failing to find as a mitigating factor that, at an early stage of the criminal process, defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer, though there was evidence that defendant confessed, since there was no evidence establishing when in the criminal process the confession was made, and there was no evidence as to the importance of the confession in investigating and prosecuting the case. N.C.G.S. § 15A-1340.4(a)(2)l.

4. **Criminal Law § 138.35— limited mental capacity—finding of mitigating factor not required**

The sentencing judge did not err in failing to find that defendant's limited mental capacity at the time of the commission of the offense significantly reduced his culpability for the crime, since the phrase "limited mental capacity" is used in the sense of limited intelligence or low I.Q., and the only evidence presented as to defendant's intelligence or I.Q. was that he had earned an associate degree in mechanical engineering from the University of Kentucky. N.C.G.S. § 15A-1340.4(a)(2)e.

APPEAL by defendant from *Clark, Judge.* Judgment entered 26 March 1986 and Order entered 28 May 1986 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 6 January 1987.

Defendant, pursuant to a plea agreement, pled guilty to twenty-three felony charges and eleven misdemeanor charges, which arose out of a two month crime spree in which a number of automobiles were broken into and their contents stolen. In return for the guilty pleas, the State dismissed three felony and eleven misdemeanor charges also pending against defendant, agreed that the first five years of any active sentence received as a result of the guilty pleas would run concurrently with the sentence defendant was then serving, and limited to thirty years the active sentence defendant could receive for all charges pled to.

In conformity with the plea agreement, defendant pled guilty to one charge of breaking and entering an automobile and one charge of felonious possession of stolen property. The charges, arising out of an automobile break-in on 7 September 1985, were consolidated for sentencing.

At the 26 March 1986 sentencing hearing defendant presented evidence that he was a long-term drug abuser with a nine hundred dollar a day drug habit. Judge Clark found that no mitigating factors were present and found in aggravation of defendant's sentence that defendant had prior convictions for criminal offenses punishable by more than sixty days' confinement. Defendant received the maximum permissible sentence of ten years for the consolidated charges. Following sentencing, defendant filed a motion for appropriate relief requesting a new sentencing hearing contending that the sentence imposed was not supported by the evidence introduced at the sentencing hearing. The court heard and denied the motion.

From the judgment and order defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Debbie K. Wright, for the State.

Mark A. Lewis, for defendant appellant.

ORR, Judge.

Defendant contends that the sentencing judge erred in refusing to find and consider several statutory mitigating factors, which defendant argues were proven by a preponderance of the evidence.

A refusal to find a statutory mitigating factor supported by uncontradicted and credible evidence is reversible error. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). The defendant, however, bears the burden of proving the existence of a factor by the preponderance of the evidence and convincing the sentencing judge "that 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.' " *Id.* at 220, 306 S.E. 2d at 455 (citations omitted).

I.

[1] First, defendant assigns as error the sentencing judge's refusal to find that defendant was suffering from a mental or physical condition which was insufficient to constitute a defense, but significantly reduced his culpability, pursuant to N.C.G.S. § 15A-1340.4(a)(2)d.

At the sentencing hearing, defendant's evidence established that he was a long-term drug abuser with an expensive drug habit. However, "[d]rug addiction is not *per se* a statutorily enumerated mitigating factor." *State v. Bynum*, 65 N.C. App. 813, 815, 310 S.E. 2d 388, 390, *disc. rev. denied*, 311 N.C. 404, 319 S.E. 2d 275 (1984). To require the finding of this factor defendant must establish an essential link between the drug addiction and the culpability for the offense, and prove that his condition did in fact reduce his culpability. *State v. Torres*, 77 N.C. App. 345, 335 S.E. 2d 34 (1985); *State v. Salters*, 65 N.C. App. 31, 308 S.E. 2d 512 (1983), *disc. rev. denied*, 310 N.C. 479, 312 S.E. 2d 889 (1984).

Although defendant's evidence could justify a finding that the crimes were committed to *support* his habit, he presented no evidence that would compel the conclusion that his culpability for the offense committed was significantly reduced because of his drug addiction. Therefore, defendant did not establish a right to such a finding. This Court concludes there was no error in the sentencing judge's refusal to find defendant's drug addiction a factor in mitigation of his sentence.

II.

[2] Defendant next assigns as error the sentencing judge's failure to find that defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or

that defendant exercised caution to avoid such consequences, pursuant to N.C.G.S. § 15A-1340.4(a)(2)j. In essence defendant contends that since he broke into an unoccupied car, he was exercising caution to avoid the possibility of serious bodily harm or fear.

"This mitigating factor is available only when a defendant exercises caution to prevent or cannot reasonably foresee harm that *actually occurs.*" *State v. Kornegay*, 70 N.C. App. 579, 583, 320 S.E. 2d 421, 423 (1984), *disc. rev. denied*, 313 N.C. 175, 326 S.E. 2d 34 (1985) (emphasis supplied). No bodily harm, serious or otherwise, occurred during the commission of any of the offenses underlying defendant's convictions. The simple fact that defendant could have broken into an occupied car instead of an unoccupied car is insufficient to invoke this mitigating factor. "The statutory factor in question was not designed to benefit an offender who merely chooses to commit lesser crimes when greater ones are within his grasp." *Id.* at 583, 320 S.E. 2d at 424. Therefore, this Court finds no error.

III.

[3] Defendant contends in his third assignment of error that the sentencing judge erred in refusing to find that at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer, pursuant to N.C.G.S. § 15A-1340.4(a)(2)l.

If substantial, uncontradicted, and credible evidence is presented that defendant's confession was made prior to the issuance of a warrant, or upon the return of an indictment, or prior to arrest, whichever comes first, the sentencing judge must find this factor in mitigation or commit reversible error, even if defendant has not requested this factor be found. *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983); *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984).

If defendant's confession was made after indictment, arrest, or issuance of the warrant, or if defendant fails to establish by a preponderance of the evidence when the confession was made, it is "for the . . . [sentencing] judge to decide, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating factor." *State v.*

Hayes, 314 N.C. 460, 473, 334 S.E. 2d 741, 749 (1985); *State v. Brown*, 314 N.C. 588, 336 S.E. 2d 388 (1985). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985).

The State's evidence established that defendant, after being stopped by police, confessed to committing other crimes in the Long Beach and Caswell Beach areas. At the time he confessed, defendant gave police a fictitious name, although later he gave police his real name.

No evidence, however, was presented by either the defendant or the State establishing when in the criminal process the confession was made. Therefore, defendant failed to meet his burden of proof and was not entitled to the finding of this factor by right. Instead, the decision was subject to the sentencing judge's discretion.

A review of the record reveals no evidence as to the importance of the confession in investigating and prosecuting this case. For this reason, we decline to say that failure to find this factor in mitigation was so arbitrary it could not have been the result of a reasoned decision. We, therefore, find no error.

IV.

[4] Defendant's fourth assignment of error contends that the sentencing judge erred in failing to find that defendant's limited mental capacity at the time of the commission of the offense significantly reduced his culpability for the offense, pursuant to N.C.G.S. § 15A-1340.4(a)(2)e.

"The phrase 'limited mental capacity' is used in the sense of limited intelligence or low I.Q." *State v. Taylor*, 309 N.C. 570, 579, 308 S.E. 2d 302, 308 (1983).

The only evidence presented as to defendant's intelligence or I.Q. was that defendant had earned an associate degree in mechanical engineering from the University of Kentucky. This evidence is insufficient to support defendant's contention and thus there is no error.

V.

Defendant also assigns as error the sentencing judge's failure to find non-statutory mitigating factors. Specifically, defendant contends the sentencing judge erred in refusing to consider that defendant was a long-term drug addict, under the influence of drugs, and stealing to support his habit.

A sentencing judge "is not required to consider whether the evidence supports the existence of non-statutory mitigating factors in the absence of [a] specific request by defense counsel." *State v. Gardner*, 312 N.C. at 73, 320 S.E. 2d at 690.

Even if such a factor is requested,

> a trial judge's consideration of a non-statutory factor which is (1) requested by the defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect, is a matter entrusted to the sound discretion of the sentencing judge under N.C.G.S. § 15A-1340.4(a). Thus, his failure to find such a non-statutory mitigating factor will not be disturbed on appeal absent a showing of abuse of discretion.

State v. Spears, 314 N.C. 319, 322-23, 333 S.E. 2d 242, 244 (1985).

At the sentencing hearing, defendant offered evidence of his drug addiction only as a basis for the finding of statutory mitigating factors.

In defendant's memorandum in support of his motion for appropriate relief defendant argued "that, with respect to his long-term drug addiction, that the same should mitigate his sentence in these matters and that the Court should have taken drug addiction into account as a sickness in imposing a just sentence in these matters." Even if this statement could be construed as a request for a finding of a non-statutory mitigating factor, the decision would still be subject to the sentencing judge's discretion. There is no evidence in the record showing any abuse of discretion. Accordingly, this Court finds no error and concludes that the sentencing judge properly found that there were no factors in mitigation of defendant's sentence.

VI.

Finally defendant assigns as error the denial of his motion for appropriate relief, contending that the sentence imposed was not supported by the evidence introduced at the sentencing hearing, pursuant to N.C.G.S. § 15A-1414(b)(4).

As a post trial motion, the disposition of a motion for appropriate relief is subject to the sentencing judge's discretion and will not be overturned absent a showing of abuse of discretion. *State v. Clark*, 65 N.C. App. 286, 308 S.E. 2d 913 (1983), *disc. rev. denied*, 310 N.C. 627, 315 S.E. 2d 693 (1984).

Defendant puts forth the same basic arguments in his motion for appropriate relief, as those presented at the sentencing hearing. He contends he is entitled to a reduced sentence because of his drug addiction and because he committed only nonviolent property crimes. As previously discussed, the sentencing judge's decision to not consider such factors in mitigation of defendant's sentences was proper. Therefore, this Court finds no error in the sentencing judge's denial of the motion for appropriate relief.

As to defendant's other assignments of error, this Court finds they are without merit and concludes that defendant received a fair sentencing hearing and that the motion for appropriate relief was properly denied.

No error.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JAMES LARRY ARNETTE

No. 8613SC790

(Filed 5 May 1987)

APPEAL by defendant from *Clark, Judge*. Judgment entered 26 March 1986 and Order entered 28 May 1986 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 6 January 1987.

Defendant, pursuant to a plea agreement, pled guilty to twenty-three felony charges and eleven misdemeanor charges, which arose out of a two month crime spree in which a number of automobiles were broken into and their contents stolen. In return for the guilty pleas, the State dismissed three felony and eleven misdemeanor charges also pending against defendant, agreed that the first five years of any active sentence received as a result of the guilty pleas would run concurrently with the sentence defendant was then serving, and limited to thirty years the active sentence defendant could receive for all charges pled to.

In conformity with the plea agreement, defendant pled guilty on 13 February 1986 to one charge of breaking and entering an automobile and one charge of felonious possession of stolen property. The two charges, arising out of an automobile break-in on 31 August 1985, were consolidated for sentencing.

At the 26 March 1986 sentencing hearing defendant presented evidence that he was a long-term drug abuser with a nine hundred dollar a day drug habit. Judge Clark found that no mitigating factors were present and found in aggravation of defendant's sentence that defendant had prior convictions for criminal offenses punishable by more than sixty days' confinement. Defendant received the maximum permissible sentence of ten years for the consolidated charges. Following sentencing, defendant filed a motion for appropriate relief requesting a new hearing, contending that the sentence imposed was not supported by the evidence. The court heard and denied the motion.

From the judgment and order, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Debbie K. Wright, for the State.

Mark A. Lewis, for defendant appellant.

ORR, Judge.

Defendant raised numerous assignments of error on appeal.

Since the identical issues, arising out of the same sentencing hearing, are addressed in detail in our prior opinion, *State v. Arnette*, 85 N.C. App. 492, 355 S.E. 2d 498 (1987), we decline to repeat this discussion, and instead, incorporate the above men-

tioned case. In that case, after reviewing the assignments of error, we concluded that defendant's sentencing hearing was free from error. Likewise, in the case *sub judice* we conclude that there was no error.

No error.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. OTIS JUNIOR MABE, DEFENDANT

No. 8621SC978

(Filed 5 May 1987)

1. **Automobiles § 122— impaired driving—ramp in parking lot—public vehicular area**

A ramp for wheelchairs or handicapped persons in the parking lot of a motel was a part of a "public vehicular area" within the meaning of N.C.G.S. § 20-4.01(32) so that defendant could properly be convicted of impaired driving in violation of N.C.G.S. § 20-138.1.

2. **Automobiles § 127.2— impaired driving—defendant behind wheel of car with motor running—sufficiency of evidence**

Evidence was sufficient to support a finding that defendant was in actual physical control of a vehicle, and the trial court properly denied defendant's motion to dismiss in an impaired driving prosecution, where the evidence tended to show that defendant was seated behind the steering wheel of a car which had its motor running, and, when aroused, defendant himself turned off the car's engine.

APPEAL by defendant from *Morgan, Judge*. Judgment entered 8 July 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 February 1987.

Defendant was convicted of impaired driving in violation of G.S. 20-138.1. At approximately 2:15 a.m. on 9 March 1986, Deputy Robert Hunt of the Forsyth County Sheriff's Department was called to the Econo Lodge Motel in Winston-Salem. When Deputy Hunt arrived, he observed a car parked directly in front of the motel entrance on an inclined ramp that extended from the motel door into the parking lot. Deputy Hunt approached the car and saw the defendant, alone in the vehicle, seated in the driver's seat

with his head slumped over the steering wheel. The car engine was running and the defendant appeared to be asleep or passed out.

Deputy Hunt called to the defendant through the closed car window. When the defendant did not respond, the deputy opened the car door and spoke to him several more times. When the defendant still did not respond, the deputy reached into the car and shook him. The defendant then awoke and turned off the car engine.

Deputy Hunt smelled a strong odor of alcohol and observed a fifth-size whiskey bottle on the front floorboard of the passenger side of the car. The bottle was one-third full and, in the deputy's opinion, its contents smelled like whiskey.

Deputy Hunt asked defendant to step out of the car. He advised him of his rights and informed him that he was being charged with impaired driving. Deputy Hunt observed the defendant walk from his car to the patrol car. He described defendant's walk as "staggered," "swayed" and "kind of wobbly." Based upon all these observations, Deputy Hunt testified that in his opinion "[t]he defendant had consumed a sufficient amount of alcoholic beverage to appreciably impair his mental and physical abilities."

A chemical analysis of defendant's breath was administered by Sergeant G. W. Cooper, a licensed breathalyzer operator with the State Highway Patrol. Sergeant Cooper reported that the test results were "1400 parts per 210 milliliters of breath." In his opinion, based upon his observation of defendant, the defendant "had consumed sufficient quantity of an impairing substance to such an extent so that his physical faculties were appreciably and noticeably impaired."

The defendant presented no evidence. His motions to dismiss the charge were denied. The jury returned a verdict of guilty of impaired driving on the basis of driving after consuming alcohol when defendant had an alcohol concentration of 0.10 or more. G.S. 20-138.1(a)(2). The trial court imposed Level Two punishment and sentenced defendant to 12 months in the custody of the Department of Corrections, suspended upon the condition that defendant serve a term of imprisonment of seven days and two weekends. Defendant appeals.

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

Jerry Rutledge for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant assigns error to the trial court's denial of his motion to dismiss on the ground that the State's evidence was insufficient as a matter of law to permit a finding that the offense occurred upon a "public vehicular area" as defined in G.S. 20-4.01(32). We disagree.

A "public vehicular area" is defined in G.S. 20-4.01(32) (Supp. 1985) as "[a]ny area within the State of North Carolina that is generally open to and used by the public for vehicular traffic, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of:

> b. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public";

Defendant contends that because his car was stopped on a wheelchair or handicapped pedestrian ramp, there is no evidence that the offense occurred in a "public vehicular area." The evidence shows that the back tires of defendant's car were in the parking lot proper, the front tires and most of defendant's car were on the inclined ramp. There were no available parking spaces in the parking lot that night. Photographs show that the ramp is located directly in front of the motel door next to a parking space designated as "Handicapped." The ramp is wide enough to accommodate a large automobile and extends, at a slight angle, from the sidewalk out into the parking lot the length of a parking space. There is no handrail or partition of any kind which separates the inclined ramp from the parking lot itself.

The Econo Lodge Motel parking lot, including its designated parking spaces, is a "public vehicular area" as defined in G.S. 20-4.01(32). The handicapped or wheelchair ramp is part of the

parking lot. While the ramp itself is not intended to be used as a parking space or for vehicular traffic, it is part of the "public vehicular area." The statute states that "[t]he term 'public vehicular area' shall not be construed to mean any private property not generally open to and used by the public." G.S. 20-4.01(32). Here, the ramp is part of the parking lot, a public vehicular area and the ramp is generally open to and used by the public. By way of analogy, courts have universally held that a "street" includes not only the roadway and travelled portions but also the sidewalks. *State v. Perry*, 230 N.C. 361, 53 S.E. 2d 288 (1949) (Barnhill, J., concurring). "The sidewalk is simply a part of the street which the town authorities have set apart for the use of pedestrians." *Id.* at 364, 53 S.E. 2d at 290. Likewise, the wheelchair or handicapped ramp is part of the parking lot which the motel owner has set apart for the use of pedestrian customers and patrons. "To hold otherwise would be to say that an intoxicated person may operate his motor vehicle down a crowded sidewalk with impunity insofar as the Motor Vehicle Law is concerned." *Id.*

We believe the legislature clearly intended to protect persons within public parking lots from the dangers posed by others who drive there while impaired. To exclude a handicapped ramp which is part of the public parking lot from the definition of "public vehicular area" would be contrary to that legislative purpose. Statutory construction which operates "to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *State v. Carawan*, 80 N.C. App. 151, 153, 341 S.E. 2d 96, 97, *disc. rev. denied*, 317 N.C. 337, 346 S.E. 2d 141 (1986).

Accordingly, we hold that the evidence was sufficient to permit a finding that the handicapped or wheelchair ramp upon which defendant's car had been stopped was part of a "public vehicular area" within the meaning and intent of that phrase as used in G.S. 20-4.01(32). The trial court correctly denied defendant's motion to dismiss since there was evidence to support a finding that defendant's car was within a public vehicular area.

II

[2] Defendant also assigns error to the trial court's denial of his motion to dismiss on the ground that the State's evidence did not establish that defendant "operated" a motor vehicle because

defendant did not have "actual physical control of the automobile."

G.S. 20-138.1(a) provides that:

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

The statute prohibits "driving" a motor vehicle under the conditions set out and we have held that one "drives" a motor vehicle within the meaning of G.S. 20-138.1 "if he is in actual physical control of a vehicle which is in motion or which has the engine running." *State v. Fields*, 77 N.C. App. 404, 406, 335 S.E. 2d 69, 70 (1985); *see* G.S. 20-4.01(7) and (25).

The evidence was plenary that defendant was seated behind the steering wheel of a car which had its motor running. This evidence alone brings the defendant within the purview of the statute as to operation of the vehicle. *See State v. Turner*, 29 N.C. App. 163, 223 S.E. 2d 530 (1976) (where defendant found in a stopped automobile with the engine running, slumped over the steering wheel and leaning toward the door) and *State v. Carter*, 15 N.C. App. 391, 190 S.E. 2d 241 (1972) (where defendant found in parked car with engine running, seated in the driver's seat, knees pulled up to his chest and asleep). Further, the evidence here shows that when aroused, the defendant himself turned off the car's engine. The evidence was sufficient to support a finding that the defendant was in actual physical control of the vehicle and the trial court properly denied defendant's motion to dismiss.

III

Defendant assigns error to the trial court's refusal to instruct the jury that "a person in a deep sleep sitting behind the steering wheel of a car is not in actual physical control of the car." We disagree.

It is the duty of the trial judge to "declare and explain the law arising on the evidence relating to each substantial feature of the case." *State v. Everette*, 284 N.C. 81, 87, 199 S.E. 2d 462, 467

(1973); G.S. 15A-1232. Defendant's requested instruction does not accurately declare and explain the law arising on the evidence of this case. The trial court properly instructed the jury that they must find that the defendant was in actual physical control of a vehicle in motion or which has the engine running. This assignment is without merit and is overruled.

The trial court properly denied defendant's motion to dismiss and defendant received a fair trial free from prejudicial error.

No error.

Judges WELLS and GREENE concur.

ASA DOUGLAS HALL v. MALCOLM HOWELL COPLON

No. 8621SC1153

(Filed 5 May 1987)

1. **Assault and Battery § 2— civil assault—plaintiff breaking into defendant's house—reasonableness of defendant's force**

The trial court erred in an action for personal injuries received by plaintiff after breaking into defendant's home by directing a verdict for defendant on the issue of defendant's shooting plaintiff in the back. The reasonableness of defendant's use of deadly force in shooting plaintiff in the back should have been submitted to the jury.

2. **Assault and Battery § 2— civil assault—plaintiff breaking into defendant's house—provocation as mitigating damages**

In an action for personal injuries received when plaintiff was shot after breaking into defendant's house, the trial court erred by refusing to instruct the jury that provocation could be considered in mitigating plaintiff's damages.

3. **Assault and Battery § 3.1— civil assault—plaintiff shot several times—retrial—medical expenses to be allocated to injuries**

In an action to recover for personal injuries received when plaintiff was shot after breaking into defendant's house which was remanded for a new trial on other grounds, evidence allocating plaintiff's medical expenses to each injury would permit the jury to award damages in line with defendant's liability if the jury should determine that defendant is not liable for all of plaintiff's injuries.

4. **Evidence § 33.2; Assault and Battery § 3.1— civil assault—testimony concerning events leading up to assault—not hearsay**

The trial court did not err in an action to recover for injuries received when plaintiff was shot after breaking into defendant's house by admitting testimony concerning the events leading up to the break-in and plaintiff's and defendant's relationships with two other people involved in the break-in. The evidence was not offered as proof of the matters asserted but to help explain plaintiff's conduct before and after the break-in.

5. **Evidence § 13; Assault § 3.1— civil assault—statement written by defendant—not privileged**

In an action to recover for injuries received when plaintiff was shot after breaking into defendant's house, defendant's statement detailing his relationship with two other people involved in the break-in was not the privileged work product of his attorneys and was properly admitted where defendant admitted that he personally prepared the statement.

APPEAL by defendant from *Stephens, Judge.* Judgment entered 24 June 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 1 April 1987.

Plaintiff instituted this action for assault to recover for personal injuries he received after breaking into defendant's home. Defendant counterclaimed for assault to recover for personal injuries he sustained when plaintiff and an accomplice broke into his home.

Plaintiff's evidence at trial tended to show the following:

Prior to the break-in, Fred Wall and Shirley Holland approached plaintiff and told him that defendant had silver and gold that belonged to Wall. Wall and Holland asked plaintiff to accompany Hal Blackburn to defendant's home and open defendant's safe. Wall told plaintiff that defendant had "done him very dirty" and that defendant was "trying to beat [Wall] out of an awful lot of money." Plaintiff agreed to accompany Blackburn and open the safe. After breaking into defendant's home through a basement door, Blackburn alone approached defendant. The two men were struggling with Blackburn's revolver when plaintiff came up the stairs. Plaintiff separated them and told Blackburn not to shoot defendant. Plaintiff and Blackburn then fled in different directions. Plaintiff ran away from defendant's home and was shot in the back by defendant. Defendant approached plaintiff as plaintiff was lying on the ground. Plaintiff put his hands out in front of him and told defendant that he would cause him no trouble. De-

fendant stuck the pistol between plaintiff's legs and threatened to "take his manhood." Defendant repeatedly asked plaintiff who had sent him. Defendant then shot plaintiff in the left hand, picked up the shell casing, shot plaintiff in the right hand, picked up the shell casing and hit plaintiff six or seven times in the back of the head with the pistol. The police arrived and plaintiff was taken to a hospital. Plaintiff was later convicted of breaking and entering and sentenced to a 3-year term of imprisonment.

Defendant presented evidence tending to show the following:

On 12 May 1983, defendant was working inside his home and his daughter was outside sunbathing. Plaintiff and Hal Blackburn broke into defendant's home and surprised defendant in his study. Blackburn pointed a revolver at defendant, told defendant that he was being robbed and demanded to see the contents of defendant's safe. Defendant grabbed the revolver and a struggle ensued. Plaintiff struck defendant several times with the brass ends of a closed pocketknife, and the revolver fired as defendant and Blackburn were "rolling around." Blackburn wrestled the revolver from defendant's grasp, pointed it at defendant's head and pulled the trigger, but the gun misfired. Plaintiff and Blackburn then fled. Defendant activated an automatic police alarm, grabbed a pistol from his study and ran outside. Defendant shot plaintiff in the back as plaintiff was running through defendant's yard. Defendant returned to the house, grabbed another pistol and ran into the yard. Defendant approached plaintiff as plaintiff was lying on the ground. When plaintiff moved his hands towards defendant, plaintiff shot him in one hand. When plaintiff moved his hand towards a knife in his pocket, defendant shot plaintiff in the other hand.

The trial court granted defendant's motion for a directed verdict on plaintiff's claim that defendant committed an intentional tort when defendant shot plaintiff in the back. The jury found that plaintiff suffered personal injuries when defendant shot plaintiff in both hands and struck him in the head with the pistol. The jury also found that defendant did not act justifiably and awarded plaintiff $20,000 for his personal injuries and $25,000 in punitive damages. Defendant was awarded $77.78 for his personal injuries and $30,000 in punitive damages. The trial court entered judgment offsetting these awards, leaving a net recovery in plain-

tiff's favor. From the judgment of the trial court, defendant appeals and plaintiff sets out cross-assignments of error.

Petree, Stockton & Robinson, by G. Gray Wilson; and Horton and Kummer, by Hamilton Horton, for defendant appellant.

Victor M. Lefkowitz for plaintiff appellee.

ARNOLD, Judge.

Both plaintiff and defendant attack various aspects of the trial held in this matter. Assignments of error by both parties have merit and demand that we reverse the judgment of the trial court and remand the case for a new trial.

[1] As a cross-assignment of error, plaintiff contends that "the trial judge invaded the province of the jury by granting a directed verdict in favor of the defendant on the issue of the defendant's shooting the plaintiff in the back."

A motion for a directed verdict presents the question whether the evidence, when considered in the light most favorable to the nonmoving party, is sufficient for submission to the jury. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

Deadly force may be employed to repel a felonious assault where such force reasonably appears to be necessary to prevent death or great bodily harm. *State v. Hunter*, 315 N.C. 371, 338 S.E. 2d 79 (1986). The reasonableness of the apprehension of death or great bodily harm must be determined by the jury on the basis of all the facts and circumstances as they appeared to the party at the time. *State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176 (1979).

The reasonableness of defendant's use of deadly force in shooting plaintiff in the back is a question that should have been submitted to the jury. Therefore, the trial court erred in granting defendant's motion for a directed verdict on that issue.

We are not persuaded by plaintiff's remaining cross-assignments of error.

[2] Defendant assigns error to the trial court's refusal to instruct the jury that provocation may be considered in mitigation of damages.

Although provocation is not a defense to an action for assault and battery, it may be considered in mitigation of damages. *Lail v. Woods*, 36 N.C. App. 590, 244 S.E. 2d 500, *disc. rev. denied*, 295 N.C. 550, 248 S.E. 2d 727 (1978). If the provocation is great, the damages may be reduced to a nominal sum. *Id.*

In the case *sub judice*, the breaking and entering into defendant's home and defendant's struggle with plaintiff and Blackburn provide ample evidence of provocation. Therefore, we hold that the trial court erred in refusing to instruct the jury that provocation may be considered in mitigating plaintiff's damages.

[3] Defendant also contends that the trial court erred in failing to segregate the medical expenses attributable to plaintiff's hand injuries from the expenses attributable to plaintiff's back injury.

Since the trial judge directed a verdict on the issue of defendant's shooting plaintiff in the back, he instructed the jury that plaintiff's recovery for medical expenses would be limited to treatment for injuries to plaintiff's hands and head. However, plaintiff's evidence of medical expenses did not break down those expenses with respect to his specific injuries.

We briefly note that should the jury determine on retrial that defendant is not liable for all of plaintiff's injuries, evidence allocating the medical expenses to each injury suffered would permit the jury to award damages in line with defendant's liability.

[4] Defendant next contends that the trial court erred in admitting "plaintiff's self-serving testimony concerning his motive for breaking into defendant's home and other testimony by plaintiff and others concerning the events which transpired there and other matters because this evidence was irrelevant and incompetent hearsay which substantially prejudiced defendant and denied him a fair trial." We do not agree.

The evidence defendant complains of is primarily testimony concerning the events leading up to the break-in and plaintiff's and defendant's relationships with Wall and Holland. The trial judge gave a limiting instruction to the jury that the testimony could be considered only for the limited purpose of "understanding why [plaintiff] thereafter engaged in whatever conduct he engaged in."

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." G.S. 8C-1, Rule 801(c). If the statement is offered for any other purpose, it is admissible. *Livermon v. Bridgett*, 77 N.C. App. 533, 335 S.E. 2d 753, *disc. rev. denied*, 315 N.C. 391, 338 S.E. 2d 880 (1985).

In the present case, the evidence was not offered as proof of the matters asserted. The testimony helped to explain plaintiff's conduct during and after the break-in and was admissible for that purpose. Thus, the trial court did not err in admitting the testimony.

[5] Defendant further contends that the trial court erred in admitting a written statement "on the grounds that [it] was privileged work product containing hearsay which was incompetent, irrelevant and prejudicial."

The statement, which detailed defendant's relationship with Wall and Holland, was dated 16 May 1983 and entitled "Statement by Malcolm H. Coplon (Addendum to statement of May 13, 1983)." At trial, defendant was represented by two attorneys, G. Gray Wilson and Hamilton Horton. Wilson informed the court that Horton inadvertently gave the statement to the police who were investigating the incident. Wilson also informed the court that defendant did not prepare the statement. He further stated that the statement was prepared by Horton. However, defendant admitted that he personally prepared the statement. We hold that the statement is not privileged work product and was properly admitted as relevant evidence.

We need not address defendant's remaining assignments of error inasmuch as we are remanding the case for a new trial.

Reversed and remanded for a new trial.

Judges MARTIN and GREENE concur.

STATE OF NORTH CAROLINA v. KENNETH MORRISON

No. 8614SC1067

(Filed 5 May 1987)

1. **Rape and Allied Offenses § 4.1— defendant's attempt to rape witness—admissibility of testimony to show common plan or scheme**

The trial court in a rape case did not err in allowing a witness to testify that defendant had attempted to rape her when the witness's account was similar to that of the victim in this case, and the witness's testimony was therefore properly admissible to show that the prior crime involved a common plan or scheme.

2. **Rape and Allied Offenses § 4; Criminal Law § 78— stipulation as to penetration—admissibility**

There was no merit to defendant's contention that the trial court erred in admitting into evidence a stipulation signed by the defense attorney and the prosecutor establishing an essential element of second degree rape—that is, the act of sexual intercourse or penetration—without any showing that defendant himself had personally stipulated to this essential element of the charged crime, since the attorney was presumed to have the authority to act on behalf of his client and the record was free of any indication to the contrary.

3. **Rape and Allied Offenses § 5— second degree rape—sufficiency of evidence of force**

There was sufficient evidence of the element of force to convict defendant of second degree rape where it tended to show that defendant locked his bedroom door and pushed the victim toward the bed; the victim stated that she was afraid defendant would hurt her and that she began to cry; and when the victim tried to stop defendant from undressing her, he pushed her hands aside and told her that her crying "was going to make it worse."

APPEAL by defendant from *Lee, Judge*. Judgment entered 16 May 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 4 March 1987.

Defendant was charged in a proper bill of indictment with rape in violation of G.S. 14-27.2(a)(2) and G.S. 14-27.3(a)(1).

The State's evidence tended to show the following: The victim, whose name is not necessary to this opinion, testified that on 28 May 1985, defendant offered her a ride home from the North Carolina Central University campus. Although she did not know defendant, she accepted the ride. Defendant drove the victim to her apartment and they arranged to go to a park later that day. Defendant told the victim that his name was Gary.

Approximately an hour later, defendant returned to the victim's apartment. They both waited in the apartment for approximately 15 minutes until the victim's brother arrived. During that time, the victim changed her clothes. Defendant and the victim left for the park in defendant's car. On the way to the park, defendant told the victim that he needed to stop by his apartment to change clothes. Defendant warned the victim that his apartment had little furniture. They entered the sparsely furnished apartment, and defendant told the victim that she could watch television in his bedroom. The victim made several phone calls and then sat down on the bed to watch television.

Defendant sat down next to her and tried to kiss her. She told him "no," but he moved closer and tried again. She put her knees up to keep him from leaning on her and told defendant that she was ready to go home. Defendant told her that she had plenty of time. The victim repeated her request to go home, and defendant got up and locked the bedroom door. The victim got up and headed for the door but defendant pushed her toward the bed and yelled at her to sit down. The victim testified that defendant was "losing it" and that she believed the defendant was going to hurt her.

Defendant then began to undress the victim and she began to cry. When she tried to stop defendant with her hands, he pushed her hands aside and told her that if she cried, "it was going to make it worse." The victim testified that she stopped resisting because she had "read too many cases of people resisting or fighting back an attacker or getting beat up or getting killed, and that was the first thing in [her] mind, [her] mom would have to bury [her] because of somebody." Defendant then had intercourse with the victim.

Although defendant wanted to have intercourse a second time, he let the victim get up and get dressed. Defendant then drove the victim back to her apartment and apologized several times. Upon arriving back at her apartment, the victim told a neighbor what had happened and reported the matter to the Durham Police Department.

Defendant was convicted of second degree rape and was sentenced to a 12-year term of imprisonment. From the judgment of the trial court, defendant appeals.

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

Loflin & Loflin, by Thomas F. Loflin III, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in allowing a witness (whose name need not be mentioned) to testify that defendant had attempted to rape her.

The witness testified that she met defendant through a mutual friend when she agreed to let defendant borrow her typewriter. Defendant took the witness for "fast-food" to repay her for the use of her typewriter. At that time, defendant tried to get the witness to go home with him but she declined and exited the car abruptly. Defendant called her ten minutes later to apologize for his behavior.

Defendant called the witness repeatedly to ask her to dinner. On 28 April 1985, she finally agreed. When defendant arrived to take the witness to dinner, he was dressed in sweat clothes. He told her that he had helped a friend fix a car and needed to stop by his apartment to change clothes. The witness went into defendant's apartment with him and as she was looking for a light switch, defendant locked the door. Just as the witness found a light, defendant pushed her into the bedroom and blocked the entrance so she couldn't get out. Defendant pushed her back onto the bed and "started getting rough." He rubbed his body against her, and she resisted. In the ensuing struggle, defendant attempted to take her clothes off and choked her to stop her from screaming. Defendant attempted to have intercourse with the witness but she continued to resist and hit him with a hammer. She then escaped and fled his apartment partially disrobed.

Defendant argues that the witness's testimony was not properly admissible. We do not agree.

G.S. 8C-1, Rule 404(b) permits evidence that a defendant committed similar offenses "when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission."

State v. DeLeonardo, 315 N.C. 762, 770, 340 S.E. 2d 350, 356 (1986). In *State v. Gordon*, 316 N.C. 497, 504, 342 S.E. 2d 509, 513 (1986), our Supreme Court stated:

> This Court has been quite "liberal in admitting evidence of similar sex crimes" under the common plan or scheme exception. *State v. Effler*, 309 N.C. 742, 748, 309 S.E. 2d 203, 207 (1983). This position has included allowing the admission of evidence showing sexual assaults by the defendant against people other than the victim in the crime for which he is on trial.

The witness's testimony was properly admissible to show that the prior crime involved a common plan or scheme to the present offense charged. In both the present case and the case involving the witness, defendant lured the women into his apartment on the pretext that he needed to change clothes before their dates. Once inside, defendant's pattern of behavior was nearly identical. His demeanor changed and he became threatening. The witness testified, "[h]e was looking different. He had a very wild and very hateful look in his eye that frightened me." The victim testified that defendant was "losing it" and that she thought he would hurt her because of "the way he looked and the tone of his voice." Defendant then pushed the women toward the bed, disrobed them and attempted intercourse. Therefore, the testimony was properly admitted under Rule 404(b).

Defendant also argues that the admission of the testimony was unfairly prejudicial and violated Rule 403 of the Rules of Evidence. We disagree.

Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986). Defendant has failed to show that the trial judge abused his discretion. Thus, we hold that the testimony was properly admitted.

[2] Defendant next contends that "the trial court erred in admitting into evidence a stipulation signed by the defense attorney and the prosecutor establishing an essential element of second degree rape—that is, the act of sexual intercourse or penetration—without any showing on the record that the defendant himself had personally stipulated to this essential element of the charged

crime, and without anything in the record showing that defendant knowingly, voluntarily, and understandingly consented to such a stipulation being entered and read to the jury." We do not agree.

In *State v. Watson*, 303 N.C. 533, 279 S.E. 2d 580 (1981), defense counsel entered a stipulation regarding an element of the offense with which his client was charged. On appeal, defendant alleged error by its admission since he had not signed it and there was nothing in the record to indicate that he knowingly and intelligently consented to it. The Court found his contention meritless and stated:

> It is well-established that stipulations are acceptable and desirable substitutes for proving a particular act. Statements of an attorney are admissible against his client provided that they have been within the scope of his authority and that the relationship of attorney and client existed at the time. In conducting an individual's defense an attorney is presumed to have the authority to act on behalf of his client. The burden is upon the client to prove lack of authority to the satisfaction of the court. (Citations omitted.)

Id. at 538, 279 S.E. 2d at 583.

In *Watson*, the record was free of any indication that defense counsel was acting contrary to the wishes of his client. The same is true of the present case. Therefore, we hold that the trial court properly admitted the stipulation.

[3] Defendant also contends that there was insufficient evidence of the element of force to convict him of second degree rape. We do not agree.

Second degree rape is vaginal intercourse by force and against the will of the victim. G.S. 14-27.3(a)(1). *State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298 (1981). In the present case, the victim testified that defendant locked the bedroom door and pushed her towards the bed. She stated that defendant was "losing it" and yelled at her to sit down. She also stated that she was afraid defendant would hurt her and that she began to cry. When she tried to stop defendant from undressing her, he pushed her hands aside and told her that her crying "was going to make it worse."

The force required to constitute rape must be actual or constructive force used to achieve the sexual intercourse. Either is

sufficient. *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984). In the case *sub judice*, there is evidence of both actual and constructive force. The actual force occurred when defendant pushed the victim towards the bed and when he pushed her hands aside. Constructive force occurred when defendant locked the door, yelled at the victim and placed her in fear that she would be hurt. *See id.*

Therefore, we hold that there was ample evidence of the element of force to withstand defendant's motion to dismiss.

We have reviewed defendant's remaining assignment of error and find it to be without merit.

No error.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. CURTIS WIKE

No. 8626SC1048

(Filed 5 May 1987)

Automobiles and Other Vehicles § 126.5— breathalyzer—disbelief of results—refusal of second test—admission of defendant's statements

Evidence that after defendant blew into the breathalyzer and was shown the reading, he refused to take a second test and made statements indicating his disbelief of the result did not violate the prohibition of N.C.G.S. § 20-139.1 against admitting a single test result. Nor was the admission of such evidence prejudicial error because it permitted the jury to infer that defendant registered a high reading on the test.

APPEAL by defendant from *Kenneth A. Griffin, Judge.* Judgment entered 5 May 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 March 1987.

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

Public Defender Isabel Scott Day by Assistant Public Defender Marc D. Towler for defendant appellant.

BECTON, Judge.

Defendant, Curtis Wike, was convicted of "driving a motor vehicle on a street or highway while under the influence of an intoxicating beverage" and was sentenced to imprisonment for one year. He appeals. We find no error.

I

The State's evidence showed that defendant's automobile was stopped by Officer Mills on 26 April 1985. The officer testified that he saw defendant's car drive off the side of the road, jerk back onto the pavement and then cross the center line several times in a weavelike pattern before he stopped the car. The officer described defendant as glassy-eyed, using slurred speech and an uncertain gait, and having a strong odor of alcohol. Defendant admitted to the officer that he had consumed beer. The officer arrested defendant and drove him to the police station where defendant agreed to submit to a breathalyzer test. After the first reading, however, defendant refused to continue the breathalyzer test.

II

Defendant raises two issues on appeal. He first contends that the trial judge erred by admitting evidence that after defendant blew into the breathalyzer and was shown the reading, he made statements indicating his disbelief at the result. Defendant argues that that evidence created an inference that he had registered a reading in excess of the legal limit on the first test. This inference, he maintains, violated the prohibition against admitting a single test result. Additionally, defendant argues, even if the evidence was relevant to show his refusal, the probative value of the evidence was outweighed by its prejudicial effect because it supported an inference that he registered a high reading on the test.

N.C. Gen. Stat. Sec. 20-139.1 (1983) requires that at least two sequential breath samples be taken and that only the lower of the two readings may be used by the State as proof of a person's alcohol concentration in a court proceeding. Section 20-139.1 is complemented by N.C. Gen. Stat. Sec. 20-16.2(a)(3) (1983) which provides that the fact of defendant's refusal to take a breathalyzer test is admissible in evidence at trial. Defendant posits a ques-

tion of first impression in North Carolina which is at what point, if any, does admissible evidence of defendant's refusal to take a breathalyzer test rise to the level of inadmissible evidence of a single test result?

In the instant case defendant stipulated before trial that he had refused to take the breathalyzer test, but the State nonetheless chose to put on evidence of defendant's refusal. Officer Mills gave the following testimony regarding defendant and the test:

Q. Did you ask that he submit to the Breathalyzer Test?

A. Yes, I did.

Q. Did he agree to do so?

A. Yes, he did.

Q. And did he blow into the machine?

A. Yes, he—

ASSISTANT PUBLIC DEFENDER TOWLER: OBJECTION.

THE COURT: OVERRULED.

A. Yes, he did.

Q. Did it register a result?

ASSISTANT PUBLIC DEFENDER TOWLER: OBJECTION.

THE COURT: Objection SUSTAINED as to that.

Q. Did the defendant see the result of this test?

ASSISTANT PUBLIC DEFENDER TOWLER: OBJECTION.

THE COURT: SUSTAINED as to form.

Q. What happened after the Defendant blew?

A. The machine was—showed a reading—

ASSISTANT PUBLIC DEFENDER TOWLER: OBJECTION.

MOVE TO STRIKE.

THE COURT: Since this is—objection SUSTAINED. Do not consider that showed reading, members of the Jury.

Q. After the Defendant blew, were you there during the time the Defendant was taking the test?

A. Yes. I never left. He never left.

Q. After blowing the first time, did he blow again?

A. No.

Q. What, if anything, did you say at that time?

A. After the results were told him of the first test—

ASSISTANT PUBLIC DEFENDER TOWLER: OBJECTION.

THE COURT: Objection SUSTAINED. Do not consider that, after he was told.

A. He stood up and said—

ASSISTANT PUBLIC DEFENDER TOWLER: OBJECTION.

THE COURT: OVERRULED.

A. He stood up and said, This God dam [sic] machine is not right. There's something wrong with this God dam [sic] machine, and I'm, I'm not taking that test.

Q. What happened then?

A. He was asked to resubmit to another test, or two tests are required, and he was asked to take a breathalyzer again for the second time, and he stated that he would not.

The State need not accept defendant's stipulation to a fact that the State is entitled to prove. It is also clear beyond cavil that proof of any fact, including the fact of a refusal, must be accomplished through the use of relevant evidence. Defendant's exclamations were thus relevant to show his refusal to take the breathalyzer test. Defendant's outburst, however, also contained irrelevant statements regarding his doubts about the machine's accuracy. Defendant argues either that these irrelevant outbursts amounted to the admission of a single reading or at least their probative value was outweighed by their prejudicial effect because the evidence allowed the inference that he registered a high reading. We disagree.

Despite the Prosecutor's persistent attempts to refer in some way to the reading on the breathalyzer test, the trial court permitted none of it. No doubt any mention of a particular reading or a characterization of a reading would have violated N.C. Gen. Stat. Sec. 20-139.1. And such inadmissible evidence could not be saved even if it was couched in terms of a refusal. However, the evidence here did not suggest a reading.

Defendant also argues that evidence that his refusal was adamant after he took the test once was prejudicial because it allowed the jury to infer that he must have registered a reading beyond the legal limit on the first test. The jury is permitted to infer guilt from defendant's refusal. *See South Dakota v. Neville*, 459 U.S. 553, 565, 74 L.Ed. 2d 748, 759 (1983) ("[W]e do not think it fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt . . ."). Defendant would have us make a distinction that, in this case, has no legal significance. He would have us find that he was prejudiced because although the jury could infer that he refused to take the test because he was guilty, they could not infer that he refused to take the test because he would have gotten a high reading. In light of the other evidence of defendant's guilt, including his refusal, we find the possible inference of a high reading harmless in this case.

Because of our resolution of the first issue, we summarily reject defendant's second contention that the trial judge committed prejudicial error by refusing to instruct the jury that they could not infer that defendant received a high reading from his refusal to blow into the breathalyzer a second time.

We find no error.

Chief Judge HEDRICK and Judge WELLS concur.

ABDULATI BOLKHIR, GAL. OF AHMED BOLKHIR, MINOR v. NORTH CAROLINA STATE UNIVERSITY

No. 8610IC1212

(Filed 5 May 1987)

Landlord and Tenant § 8.5; Negligence § 57.1— repair of screen panel in door— substitution of glass—child injured—landlord not negligent

The Industrial Commission's ultimate finding and conclusion that the State was negligent in maintaining leased premises was not supported by its findings where plaintiff and his family were residents of an apartment owned by defendant; the single entrance to the apartment had a storm door with a lower aluminum panel, and a middle and upper panel which were glass or screen, depending on the placement of the panels; defendant's employee put the screen in the upper panel of the door and the glass in the middle to keep the children from repeatedly pushing the screen out; plaintiff's three-year-old son pushed against the glass panel in the middle of the door when the older children locked him out; the panel shattered and the child fell through the door, cutting both his wrists and his foot; the child had surgery twice to repair lacerated tendons in his foot and retained a 10 percent partial disability of the foot; there was no evidence that the switching of panels was negligently done; no evidence that the glass panel was in any way defective; no finding that the glass in the door was not tempered glass; and the Commission found that the storm door was the common and usual type of storm door and that the only type available for replacement was the type that was in plaintiff's apartment.

APPEAL by defendant from an opinion and award of the North Carolina Industrial Commission. Order entered 27 August 1986. Heard in the Court of Appeals 8 April 1987.

On 10 August 1983, plaintiff, Abdulati Bolkhir, as guardian ad litem for his minor son, Ahmed Bolkhir, filed a claim for damages under the North Carolina Tort Claims Act, G.S. 143-291, *et seq.* Plaintiff alleged that his minor son, Ahmed, was injured when a glass pane in a storm door to an apartment leased to plaintiff by defendant, shattered as he pushed against it.

Following a hearing, the Commission made findings of fact, which except where quoted are summarized as follows: Plaintiff and his family, including his minor son Ahmed, were residents of an apartment owned by defendant from March 1981 until September 1982. There were two doors at the single entrance to the apartment. One door was solid wood and the other was a storm door with an aluminum frame and three panels; the lower panel was constructed of aluminum and was not movable and the mid-

dle and upper panels "could be either glass or a wire screen depending on the placement of the respective panels." On three or four occasions between 17 July 1981 and 1 June 1982 employees of defendant repaired the screen in the middle panel of the door of plaintiff's apartment. At some time between June 1982 and 28 August 1982, defendant's employee, Charles Wegman, "put the screen in the upper panel of the storm door and glass in the middle panel to keep the children from repeatedly pushing the screen out. The screen was repeatedly pushed out in plaintiff's apartment and the maintenance department considered it a problem to keep replacing it." On 28 August 1982, Ahmed Bolkhir, plaintiff's three-year-old son, and the two older children were playing outside plaintiff's apartment. The older children went inside and locked the door, leaving Ahmed outside. Finding that he could not get in the door, Ahmed "pushed against the glass panel in the middle of the door and it shattered." Ahmed fell through the door cutting both his wrists and his left foot. As a result of the accident, Ahmed had surgery twice to repair lacerated tendons in his foot. He retains a "10 percent permanent partial disability of the foot as a result of this injury."

Based on these findings, the Commission concluded that defendant's employee, Charles Wegman, had "negligently failed to exercise due care in repairing the storm door on the premises leased to plaintiff by the defendant, by creating an unsafe condition in switching the glass and screen panels in the storm door when he knew or in the exercise of reasonable care should have known that a glass panel in the middle of the door would be dangerous for the same small children that had been pushing out the previous screen panel." The Commission further concluded that as a proximate result of defendant's employee's negligence, that plaintiff and his wife had sustained damages in the amount of $4,741.38 for medical expenses and that Ahmed had sustained damages in the amount of $35,000.00 for "pain and suffering, scarring and permanent disability."

From an order awarding plaintiff and his wife $4,741.38 in damages and awarding Ahmed Bolkhir $35,000.00 in damages, defendant appealed.

Michael E. Mauney for plaintiff, appellee.

Attorney General Lacy H. Thornburg, by Associate Attorney General Randy Meares, for the State.

HEDRICK, Chief Judge.

The only question presented on this appeal is whether the uncontroverted findings support the ultimate finding and conclusion made by the Commission that defendant's employee was negligent in "creating an unsafe condition in switching the glass and screen panels in the storm door when he knew or in the exercise of reasonable care should have known that a glass panel in the middle of the door would be dangerous for the same small children that had been pushing out the previous screen panel."

A landlord owes the duty of ordinary care to the residents of the leased premises. G.S. 42-42; *Brooks v. Francis*, 57 N.C. App. 556, 291 S.E. 2d 889 (1982). One who owes the duty of ordinary care to another is not an insurer but is liable only for actionable negligence in maintaining the premises. *Cagle v. Robert Hall Clothes and Beaty v. Robert Hall Clothes*, 9 N.C. App. 243, 175 S.E. 2d 703 (1970).

We find the case now before us indistinguishable from *Cagle v. Robert Hall Clothes*, cited above, where the minor plaintiff was injured when he fell through the glass door of the defendant's store when he pushed on the glass in an effort to exit the premises. There, this Court held that the trial court had properly entered directed verdicts for the defendant, because there was no evidence that the defendant was negligent in maintaining the premises.

In the present case, it is clear that defendant was the landlord and plaintiff and his family were the residents of the leased premises. Thus, defendant in the present case would be liable for any injury to the residents of the leased premises proximately resulting from the landlord's negligence in maintaining the premises.

In the case before us there is no evidence that the "switching" of the panels in the storm door was negligently done. The conclusion drawn by the Commission is that the fact of the switching of the panels created an unsafe condition proximately

causing injury to Ahmed. There is no evidence or finding that the glass panel which "shattered" was in any way defective. While the Commission's findings refer to "tempered glass" in other doors in the apartment complex, there is no finding that the glass panel switched in the storm door in the present case was not tempered glass. Indeed the Commission found as a fact that:

> The storm door on plaintiff's apartment was the common and usual type of storm door that is available in this community. In the summer of 1982, only two apartments had similar storm doors with a large screen and glass panel. The other apartments had storm doors with large aluminum bottom panels. When those had to be replaced, the only type available were the type that was in the plaintiff's apartment.

We hold, therefore, that the mere "switching" of the panels in the door did not create an unsafe condition, and the findings made by the Commission do not support the ultimate finding and conclusion that defendant was negligent in maintaining the leased premises, and the opinion and award of the Industrial Commission must be reversed.

Reversed.

Judges EAGLES and PARKER concur.

MALENE BRIDGES (MURAD) v. DAVID A. BRIDGES

No. 863DC976

(Filed 5 May 1987)

Divorce and Alimony § 24.10— child support—college education—not required

The trial court had no authority to require defendant to pay the expenses of college educations for his children where there was no written modification to the separation agreement, which did not require defendant to pay the children's college expenses; the record is devoid of any evidence or indication that defendant agreed at the hearing to pay for the children's college expenses; and there was no contention or indication that either child met the statutory criteria for support after majority. N.C.G.S. § 50-13.4(c).

APPEAL by defendant from *Rountree, Judge.* Order entered 10 April 1986 in District Court, PITT County. Heard in the Court of Appeals 10 March 1987.

Plaintiff brought this action on 21 June 1985, alleging that she and defendant were married to each other on 25 November 1966, separated in June 1970, and were divorced in October 1973. Two children were born of the marriage, Bryan Bridges and Kimberly Bridges, who were ages eighteen and sixteen, respectively, at the time the complaint was filed. Plaintiff alleged that defendant had agreed, in a separation agreement which the parties executed in June 1971, to pay $230.00 per month for support of the children until the youngest child reached eighteen years of age, and that he was $6,605.00 in arrears in those payments. She also sought an increase in prospective child support, alleging that Kimberly's needs had substantially increased since the date of the separation agreement. Plaintiff further alleged that defendant had promised to provide a college education for the children and she sought an order requiring defendant to pay "his proportionate part of the college education of the children born of the marriage." A copy of the separation agreement was attached to the complaint; it contained no provision relating to the payment of educational expenses for the children.

At the hearing, the parties stipulated that defendant was in arrears $6,605.00 in child support payments under the terms of the separation agreement, and that the separation agreement had not been modified in writing. After hearing testimony from each party, the trial court entered an order requiring defendant to pay $250.00 per month for Kimberly's support and to pay a portion of the arrearage. With respect to educational expenses, the trial court found:

> 14. That from the testimony of both plaintiff and defendant the Separation Agreement was modified so that the plaintiff did not seek additional child support, said forbearance being based on the defendant's contract with the plaintiff to provide for the higher education for the minor children.
>
> 15. That there was in fact a contract between plaintiff and defendant, whereby defendant obligated himself to provide for the higher education of his children.

16. That at the trial of this cause, the defendant agreed to be fully responsible for all the higher educational expenses of his son and for ½ of all higher educational expenses of his daughter, the expenses being all, over and above any educational grants and/or scholarships either of the children might obtain; . . .

The court ordered defendant to pay for all educational expenses for Bryan, beginning in the school year 1985-1986 and continuing through four years at an accredited college or university. With respect to Kimberly's college education, defendant was ordered to pay one-half of her educational expenses. Defendant appealed.

No brief for plaintiff-appellee.

Dallas Clark, Jr., for defendant-appellant.

MARTIN, Judge.

Defendant assigns error only to those portions of the trial court's order which require him to pay the expenses of the children's college educations. He excepts to Findings of Fact 14, 15 and 16, contending that such findings are not supported by the evidence. He further contends that, in the absence of an agreement to pay such expenses, the court was without authority to require him to provide any support for the children after they attained their majority and graduated from high school. We agree with each of his contentions.

Where the trial court sits without a jury, its findings of fact have the force and effect of a jury verdict and are conclusive on appeal if supported by competent evidence, even though there may be evidence to support contrary findings. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). However, if there is no competent evidence to support a finding of fact, an exception to the finding must be sustained and a judgment or order predicated upon such erroneous findings must be reversed. *Morse v. Curtis*, 276 N.C. 371, 172 S.E. 2d 495 (1970).

The testimonial evidence in the present case is set out in narrative form in the record on appeal, pursuant to App. R. 9(c)(1). Plaintiff's testimony relating to the alleged agreement by defendant to pay the children's college expenses was as follows:

> After we separated and signed the Separation Agreement, I tried to seek an increase in child support. David told me that he had put money away for college education and he could not make any extra payments for child support.
>
> At some point in 1985, I talked to David about college education for the children, and he said that he would not make that payment. David told me that Bryan had the option to join the service, or ROTC at college, to assist in his education. . . . I just assumed that David was going to pay for Bryan's college education.
>
> David never consented to paying the college education for Bryan or Kim, and he has furnished no support for Bryan's education. I am helping send Bryan to college this year, . . . David is paying nothing toward his college.

Defendant testified:

> I never made an oral agreement, or any other kind of agreement, with Malene to pay for the college education for Bryan or Kim.

The parties stipulated that no written modification had ever been made to the separation agreement. Thus, the trial court's Findings of Fact 14 and 15 are unsupported by the evidence and must be disregarded. Likewise, the record is absolutely devoid of any evidence or indication that defendant agreed at the hearing to pay for the children's college expenses; therefore, Finding of Fact 16 is unsupported and defendant's exception to it must be sustained.

G.S. 50-13.4(c) provides, in pertinent part, that:

> Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:
>
> (1) If the child is otherwise emancipated, payments shall terminate at that time;
>
> (2) If the child is still in primary or secondary school when he reaches age 18, the court in its discretion may order support payments to continue until he graduates, otherwise ceases to attend school on a regular basis, or reaches age 20, whichever comes first.

Thus, it is clear that in the absence of an enforceable contract otherwise obligating a parent, North Carolina courts have no authority to order child support for children who have attained the age of majority unless the child has not completed secondary schooling, or, pursuant to G.S. 50-13.8, the child is mentally or physically incapable of self-support. *Appelbe v. Appelbe*, 75 N.C. App. 197, 330 S.E. 2d 57, *disc. rev. denied*, 314 N.C. 662, 336 S.E. 2d 399 (1985). There being no enforceable contract in the present case, and no contention or indication that either child meets the statutory criteria for support after majority, we hold that the trial court had no authority to require defendant to pay the expenses of college education for his children. Accordingly, we vacate that portion of the order. Insofar as the order requires defendant to pay a portion of the arrearage in past due support payments and to provide support for Kimberly until she reaches the age of eighteen, we affirm.

Affirmed in part; vacated in part.

Judges ARNOLD and GREENE concur.

EMPIRE DISTRIBUTORS OF NORTH CAROLINA, INC., PETITIONER-APPELLANT v. NORTH CAROLINA ALCOHOLIC BEVERAGE CONTROL COMMISSION, RESPONDENT-APPELLEE, AND FETZER VINEYARDS, INC., RESPONDENT-INTERVENOR-APPELLEE

No. 8610SC1179

(Filed 5 May 1987)

Intoxicating Liquor § 2— contract dispute involving distribution rights—jurisdiction of ABC Commission

The trial court erred in determining that the ABC Commission did not have subject matter jurisdiction over a contract dispute involving distribution rights for respondent's wine. N.C.G.S. § 18B-1205(d).

APPEAL by petitioner from *McLelland, Judge*. Order entered 17 July 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 7 April 1987.

In February 1985, appellant, Empire Distributors of North Carolina, Inc. (hereinafter referred to as Empire), petitioned the

North Carolina Alcoholic Beverage Control Commission (hereinafter referred to as the ABC Commission) for a hearing alleging that Fetzer Vineyards, Inc. (hereinafter referred to as Fetzer) violated Article 12 of Chapter 18B of the North Carolina General Statutes. Fetzer had refused to appoint Empire as its distributor after C & G Sales, Inc., sold its business, which included its contract rights with suppliers, to Empire. A hearing was held and the Commission ordered that the charges against Fetzer be dismissed.

On 30 July 1985, Empire appealed the Commission's decision to the Wake County Superior Court. The trial court ordered that Empire's petition for judicial review be dismissed because the ABC Commission did not have subject matter jurisdiction. From this order, petitioner appeals.

Murchison, Guthrie & Davis, by Dennis L. Guthrie; and Bauer, Deitch & Raines, by Gilbert H. Deitch, for petitioner-appellant.

David S. Crump for respondent-appellee.

Maupin, Taylor, Ellis & Adams, by Armistead J. Maupin, Charles B. Neely, Jr. and M. Keith Kapp, for respondent-intervenor-appellee.

ARNOLD, Judge.

Petitioner contends that the trial court erred in dismissing its action by holding that the ABC Commission lacked jurisdiction over the subject matter in this case.

In its petition filed with the ABC Commission, Empire asked for the following relief.

> 1. For a hearing on Fetzer Vineyards, Inc. appointment of Prestige Wines, Inc. as its representative in the Charlotte-Mecklenburg marketing area and its termination of the statutory granted wholesale distribution agreement with Empire.
>
> 2. For official notification from the North Carolina Alcoholic Beverage Control Commission to Fetzer Vineyards, Inc. notifying it that pursuant to § 18B-1200 et seq. the distribution agreement between Fetzer Vineyards, Inc. and

Empire shall continue in effect pending the Commission's decision and any judicial review.

3. For a Pre-Hearing conference pursuant to Title 4, Subchapter 2R, Section .0810 of the North Carolina Alcoholic Beverage Control Commission Rules.

G.S. 18B-1205(d) states:

> Upon receiving a written request from the winery or wholesaler for a hearing, the Commission shall, after notice and hearing, determine if the wholesaler has rectified the conditions or if good cause exists for the amendment, termination, cancellation, or nonrenewal of the agreement, as appropriate.

This statute expressly gives authority to the ABC Commission to conduct a hearing on the contract dispute presently before this Court.

The statute also directly spells out what the status of a contract shall be while under review by both the agency and the judiciary. G.S. 18B-1205(d) states:

> In any case in which a petition is made to the Commission for such a determination, the agreement in question shall continue in effect, pending the Commission's decision and any judicial review thereof.

Petitioner asked only for what the statute allows and in fact used the exact wording of G.S. 18B-1205(d) when requesting for the contract to remain in effect until final review. Empire's petition was incorrectly dismissed by the trial court.

This case is remanded to the trial court for judicial review pursuant to G.S. 150A.

Reversed and remanded.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. ROBERT L. JACKSON

No. 8626SC1052

(Filed 5 May 1987)

Robbery § 5.4— attempted armed robbery with hammer—weapon not dangerous as matter of law—no instruction on common law robbery—error

The trial court erred in a prosecution for attempted armed robbery by not submitting the lesser-included offense of common law robbery where defendant used a hammer in the attempted robbery and the judge clearly did not conclude that the hammer was a dangerous weapon as a matter of law because she submitted the determination of the hammer's dangerousness to the jury. It is error to refuse to submit common law robbery to the jury where the evidence does not compel a finding that the weapon allegedly used was a dangerous weapon as a matter of law.

APPEAL by defendant from *Hyatt, Judge*. Judgment entered 19 May 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 March 1987.

Defendant was charged in a proper bill of indictment with robbery with a dangerous weapon in violation of G.S. 14-87.

The State's evidence tended to show the following:

On 30 October 1985, Charlotte police officers John T. Moore and D. L. Beaver were working undercover looking for storebreakers. As the officers walked down the street at approximately 10:30 p.m., defendant yelled "something about $15" and motioned the officers to come closer to him. When the officers were within two feet of defendant, defendant pulled a hammer out of a tool belt, held it in a threatening manner, and said, "You'd better give me $15, man." Both officers reached for their guns without making them visible, and defendant put the hammer back into the tool belt. The hammer was identified and admitted into evidence.

After defendant put the hammer away, the officers had a brief conversation with defendant, and an unidentified man came over and offered the officers a cigarette. Defendant and the man then walked away. The officers followed and arrested defendant in a vacant house.

Defendant offered no evidence.

Defendant was convicted of attempted armed robbery and was sentenced to a 14-year term of imprisonment. From the judgment of the trial court, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Assistant Public Defender Todd H. Fennell and Public Defender Isabel Scott Day for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred by failing to instruct the jury on the lesser included offense of common law robbery because the hammer was not found to be a dangerous weapon as a matter of law. We agree.

Common law robbery is a lesser included offense of armed robbery. *State v. Smallwood*, 78 N.C. App. 365, 337 S.E. 2d 143 (1985). It is error to refuse to submit common law robbery to the jury where the evidence does not compel a finding that the weapon allegedly used is a dangerous weapon as a matter of law. *Id.*

In the present case, the trial judge properly left the question of whether the hammer was a dangerous weapon to the jury. In her charge to the jury, the trial judge stated, "In determining whether a hammer was dangerous to the life of Officer Moore, you would consider the nature of the hammer, the manner in which the defendant used it or threatened to use it, and the size and strength of the defendant as compared to Officer Moore." Since the trial judge submitted the determination of the hammer's dangerousness to the jury, she clearly did not conclude that the hammer was a dangerous weapon as a matter of law.

The evidence in the present case did not compel a finding that the hammer was a dangerous weapon. Therefore, we hold that the trial court erred in refusing to instruct the jury on the lesser included offense of common law robbery.

Inasmuch as our decision resolves this appeal, we need not address defendant's remaining assignments of error.

New trial.

Judges MARTIN and GREENE concur.

In re Notice of Claim of Lien of Woodie

IN THE MATTER OF "NOTICE OF CLAIM OF LIEN OF DANIEL W. WOODIE D/B/A DAN WOODIE CONSTRUCTION, FILED JANUARY 16, 1986, AND DOCKETED IN JUDGMENT BOOK 33, AT PAGE 167"

No. 8625SC905

(Filed 5 May 1987)

Laborers' and Materialmen's Liens § 8.1— deposit of funds with clerk—cancellation of lien—action on contract required

Where funds were deposited with the clerk of court in accordance with an agreement between the parties pursuant to N.C.G.S. § 44A-16(5) that a builder's lien for labor and materials be cancelled and that the money be held by the clerk until the amount owed by the owner to the builder was finally determined, but the funds were inadvertently released to the builder, the trial court properly required the builder to return the funds and properly denied the owner's motion that the funds be released to him, although no action to enforce the lien had been filed under N.C.G.S. § 44A-13(a) within 180 days of the last furnishing of labor and materials, since the funds were controlled by the agreement rather than by N.C.G.S. § 44A-13(a), the builder's only action is to establish the amount of the owner's debt under the building contract, and the three-year statute of limitations applies to such an action.

APPEAL by respondent Michael B. Lackey from *Ferrell, Judge.* Order entered 26 June 1986 in Superior Court, CALDWELL County. Heard in the Court of Appeals 3 February 1987.

Michael P. Baumberger for petitioner appellee.

Wilson and Palmer, by W. C. Palmer and David S. Lackey, for respondent appellant.

PHILLIPS, Judge.

On 16 January 1986 Daniel W. Woodie, d/b/a Dan Woodie Construction, filed a Notice of Claim of Lien in the Superior Court of Caldwell County against real property owned by Michael B. Lackey; the claim, in the amount of $11,599.74, was for the cost of labor and building materials allegedly supplied Lackey in constructing a house. On 14 February 1986, as authorized by G.S. 44A-16(5), Woodie and Lackey both executed a document entitled "Discharge of Record Lien by Cash Deposit" and the document was filed with the court on 17 February 1986. Incident to the execution and filing of this document Lackey paid $4,000.96 to Lowe's Companies, Inc. for materials included in Woodie's Notice of Claim of Lien and paid the $7,598.78 balance of Woodie's

claimed lien into the Office of the Clerk of Superior Court. The document requested the Clerk of Court to cancel the lien, which was done, and it stated in pertinent part that Lackey and Woodie had agreed that the monies Lackey had paid into court were to be held and "applied to the payment finally determined to be due as between Michael B. Lackey and Daniel W. Woodie." On or about the 10th day of March, 1986 the Clerk's office inadvertently released the funds involved to Woodie. On 6 May 1986 Lackey moved that the funds be released to him for the reason that more than 180 days had passed since the last materials and labor were furnished by Woodie, no action to enforce the lien had been filed, and G.S. 44A-13(a) provides that an action to enforce a lien against real estate cannot be commenced later than 180 days after the last furnishing of the labor or materials involved. The motion was transferred to Superior Court Judge Ferrell who found facts somewhat as above stated, required Woodie to return the money inadvertently received and denied the motion. Lackey appealed.

This appeal is unauthorized because it is from an interlocutory order that affects no substantial right in need of immediate protection. G.S. 1-277(a). Even so, the parties and the court below will be better served if the appellant's meritless contention is not left unresolved any longer, and we affirm the order appealed from. Obviously, the funds deposited with the court pursuant to the agreement of the parties are controlled by the agreement rather than by G.S. 44A-13(a); and the funds must be held by the court, as the agreement plainly provides, until the amount that Lackey owes Woodie because of the construction involved is finally determined. G.S. 44A-13(a), *which only limits the time for suing to enforce a lien on real property,* has no application to the circumstances of this case, since there is no lien on real estate that Woodie can now sue to enforce. The lien that he might have sued to enforce was cancelled and discharged both by the terms of the agreement and the provisions of G.S. 44A-16(5); and his only action now is to establish the amount of Lackey's debt under their building contract, which is governed by the three-year statute of limitations. G.S. 1-52(1).

Affirmed.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. PAUL W. BURKHEAD

No. 8614SC460

(Filed 5 May 1987)

Criminal Law § 142.4— assaults—restitution—not supported by evidence

The trial court erred when sentencing defendant for assault with a deadly weapon with intent to kill inflicting serious injury by recommending as a condition for work release that defendant pay restitution for "pain, suffering, and the like" in the amount of $5,000 to the victim of the assaults where there was no evidence as to the amount of the victim's pain and suffering and the only evidence supporting the amount of restitution was that the victim had unpaid medical bills of $442.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 10 October 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals 13 October 1986.

Defendant pleaded guilty to assault with a deadly weapon with intent to kill inflicting serious injury and was sentenced to a five-year term of imprisonment. The presumptive term is six years. The court recommended work release and further recommended that as a condition of attaining work release, defendant pay restitution "for pain, suffering and the like" in the amount of $5,000.00 to the victim of the assault. In an order filed on 20 October 1986, the Court of Appeals dismissed defendant's appeal because he was appealing a sentence which was less than the presumptive term. Upon consideration of a petition filed by defendant for a writ of certiorari, the Supreme Court remanded the case to the Court of Appeals with instructions to address defendant's original sixth assignment of error relating to the order of restitution.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Victor H. E. Morgan, Jr., for the State.

Loflin & Loflin, by Ann F. Loflin, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred in recommending, as a condition of work release, that he pay restitution in the amount of $5,000.00 because the evidence presented at the trial

and the sentencing hearing did not support the $5,000.00 figure. We agree.

The trial court is not required to make specific findings of fact in support of its recommendation of work release. *State v. Hunter*, 315 N.C. 371, 338 S.E. 2d 99 (1986). However, any order or recommendation for restitution to the aggrieved party as a condition of obtaining work release must be supported by the evidence. *State v. Killian*, 37 N.C. App. 234, 245 S.E. 2d 812 (1978); G.S. 15A-1343(d).

Restitution is defined as "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action." G.S. 15A-1343(d). Restitution, however, cannot be comprised of punitive damages. G.S. 15A-1343(d) states that the purpose of restitution measures are to promote rehabilitation of the criminal offender and to provide for compensation to victims of crime. They shall not be construed to be a fine or other punishment. G.S. 15A-1343(d); *State v. Killian*, 37 N.C. App. 234, 245 S.E. 2d 812 (1978).

While it is clear that punitive damages are not appropriate in restitution orders, the issue of whether pain and suffering damages can be included has not yet been addressed by the appellate courts. However, even if it is assumed *arguendo* that a trial court's recommendation of restitution can include damages for pain and suffering, the evidence in the case *sub judice* did not support the recommendation. The only evidence supporting the amount of restitution was that the victim had unpaid medical bills in the amount of $442.00. There was no evidence as to the amount of the victim's pain and suffering. The evidence as reported in the record does not support restitution in the amount of $5,000.00.

In its brief, the State points to the case of *State v. Hunt*, 80 N.C. App. 190, 341 S.E. 2d 350 (1986), which held that, "[w]hen, as here, there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." In that case, the trial court recommended that defendant be required to pay restitution in the amount of $18,364.00. The relevant evidence before the court was the victim's testimony that the hospital bill was $10,364.00 and that the doctor's bill was approximately $8,000.00. In that case, the evidence amply supported

the recommendation. *State v. Hunt* is not determinative to the present case.

Since the trial court's recommendation of restitution is not supported by the evidence, that portion of the judgment is vacated and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

Chief Judge HEDRICK and Judge ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 MAY 1987

BURNETTE v. TEW No. 8610SC1172	Wake (85CVS4232)	Affirmed in part, reversed in part and remanded
CALCOTE v. BUILDER'S INVESTMENT No. 8620SC999	Moore (84CVS918)	Affirmed
CAROLINA TEL. & TEL. CO. v. McLEOD No. 8611SC1188	Harnett (86CVS0159)	Affirmed
DAVE BROWN REALTY, INC. v. ORANGE WATER AND SEWER No. 8615SC910	Orange (85CVS1033)	Affirmed
DIXON v. SNELGROVE No. 863SC1145	Carteret (84CVS466)	No error
LAKE v. PHILLIPS INVESTMENT BUILDERS, INC. No. 8626SC1127	Mecklenburg (84CVS11244)	Reversed
MARSH BROADWAY CONSTRUCTION v. SESCO, INC. No. 8626DC1128	Mecklenburg (85CVD4599)	Affirmed
MILLER v. PARLOR FURNITURE No. 8625DC1157	Catawba (85CVD442)	Affirmed
MILLS v. CHEMTRONICS No. 8610IC990	Ind. Comm. (507325)	Vacated and Remanded
PARKS v. PARKS No. 8620DC823	Union (86CVD78)	Vacated and Remanded
ROWLAND v. TERMINIX SERVICE No. 8619SC695	Rowan (85CVS265)	Vacated and Remanded
SAUNDERS v. JONES and SAUNDERS v. MOORE No. 8629SC1191	Henderson (81CVS611) (81CVS612)	Affirmed
SCHNEIDER MILLS, INC. v. NORMTEX No. 8622SC873	Alexander (85CVS258)	Affirmed
SCOTT v. ELLER No. 8621SC1154	Forsyth (85CVS4886)	Reversed and Remanded

STATE v. ANSTEAD No. 867SC1135	Nash (85CR15006)	No error
STATE v. BOWMAN No. 8617SC1121	Surry (85CRS8833) (85CRS8834) (85CRS8948) (85CRS8949)	No error
STATE v. HARDY No. 8621SC1131	Forsyth (86CRS18784)	Vacated and Remanded
STATE v. NICHOLSON No. 8626SC1082	Mecklenburg (85CRS88272) (85CRS88273) (85CRS88274) (86CRS8996) (86CRS8997)	No error
STATE v. SALKEY No. 863SC888	Pitt (85CRS24898)	No error
STATE v. SASSER No. 865SC1163	New Hanover (86CRS7225) (86CRS7226) (86CRS7227) (86CRS7228) (86CRS7229)	No error
STATE v. WILLIAMS No. 8622SC1034	Davidson (84CRS15591)	No error

LYNN M. HARVEY, WIDOW AND ADMINISTRATRIX OF THE ESTATE OF MICHAEL E. WICHMANN, DECEASED, EMPLOYEE v. RALEIGH POLICE DEPARTMENT, CITY OF RALEIGH, EMPLOYER, SELF-INSURED

No. 8610IC891

(Filed 5 May 1987)

1. **Master and Servant §§ 64.1, 68— workers' compensation—suicide by police officer—occupational disease—insufficiency of findings**

The Industrial Commission's conclusion that the death of an employee, a police officer who committed suicide, was not due to an occupational disease was not supported by findings of fact where plaintiff's claim was based on her allegation that her husband's suicide was the result of a dysthymic disorder caused by his employment, but the Commission failed to determine whether the employee had a dysthymic disorder and failed to determine whether a dysthymic disorder was an occupational disease.

2. **Master and Servant §§ 64.1, 68— workers' compensation—suicide by police officer—causation—insufficiency of findings**

The Industrial Commission erred in concluding that an employee's suicide was not caused by his occupation where the Commission failed to determine whether the employee's employment caused his dysthymic disorder and whether the dysthymic disorder was the cause of his suicide.

3. **Master and Servant §§ 64.1, 68— workers' compensation—suicide—conclusion of willful intention to injure or kill self—insufficiency of findings**

The Industrial Commission's conclusion that an employee came to his death by reason of his willful intention to injure or kill himself was not supported by the findings of fact where the Commission made no findings as to whether the employee became mentally deranged and deprived of normal judgment as a result of an occupational disease and committed suicide in consequence.

4. **Master and Servant §§ 64.1, 68— workers' compensation—suicide caused by occupational disease—compensability**

An employee's suicide caused by an occupational disease is compensable under the Workers' Compensation Act.

5. **Master and Servant §§ 64.1, 68, 93.3— workers' compensation—employee's suicide—psychological autopsy—expert evidence admissible**

In a workers' compensation proceeding where plaintiff claimed that her husband's suicide was the result of a dysthymic disorder caused by his employment, evidence of a psychological autopsy performed by an expert in psychiatry, suicidology, and police stress was admissible for the purpose of determining the mental state of the deceased at the time of his suicide.

APPEAL by plaintiff from an Opinion and Award of the Industrial Commission filed 22 May 1986. Heard in the Court of Appeals 14 January 1987.

Michaels Law Offices, P.A., by Gregory M. Martin, for plaintiff-appellant.

Dawn S. Bryant for defendant-appellee.

GREENE, Judge.

In February of 1978, the Raleigh Police Department hired Michael Wichmann as a police officer. Four years later, Wichmann committed suicide. His widow instituted this action under the Workers' Compensation Act.

When Wichmann applied for the position of police officer in January of 1978, he took some psychological tests. The tests revealed no signs of anxiety or depression. However, during the last six months of his life, Wichmann suffered from anxiety, impotence, fatigue, and indigestion and often had violent outbursts of anger. The outbursts occurred right after he would arrive home after his shift at the department. Several times after 1978, he threatened suicide—sometimes over what would seem to be a small problem arising out of his work.

At the initial hearing before the Deputy Commissioner, Dr. Bruce L. Danto testified for the plaintiff. He was tendered as an expert in psychiatry, suicidology and police stress. Dr. Danto indicated he had never seen or spoken with Wichmann but had performed a "psychological autopsy" on the decedent. A psychological autopsy involves interviewing family members and reviewing records—generally employment records, school records and psychiatric notes. Its purpose is to determine the probable cause of death or the person's state of mind at the time of the death. Dr. Danto testified he had conducted hundreds of psychological autopsies during his practice.

Dr. Danto was of the opinion that Wichmann suffered from a dysthymic disorder (depression), that his employment significantly contributed to the disorder and that the disorder was the direct cause of his suicide. Dr. Danto also testified to the amount and type of stress police officers are exposed to compared to the general public.

Dr. John McCall was tendered as an expert in psychology and testified for the employer. Dr. McCall was of the opinion that it is not possible to positively diagnose a mental illness not

diagnosed prior to a person's death. He also expressed his opinion that the stress to which law enforcement officers are exposed is not significantly different from the stress to which other professional persons are exposed. Dr. McCall indicated there were many stressors in Wichmann's life, including some not related to his employment. He did not know which one caused Wichmann to commit suicide.

The Deputy Commissioner found for plaintiff and awarded her compensation, attorney fees, burial expenses, Dr. Danto's witness fee and the costs of Danto's deposition. Defendant appealed to the Full Commission.

On review, the Commission vacated the Deputy Commissioner's award, denied plaintiff's claim and taxed the costs of Dr. Danto's deposition to the defendant. Plaintiff appeals from the denial of her claim.

This Court's review is limited to whether there was competent evidence before the Commission to support its findings of fact, whether the findings justify the Commission's conclusions and whether the conclusions support the Commission's decision. *Henry v. A. C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E. 2d 760, 762 (1950). The issues before us concern the Commission's conclusions, the competency of Dr. Danto's testimony and whether the Commission erred in ordering the defendant-employer to pay the costs of Dr. Danto's deposition. The Commission's conclusions will be addressed in the first three sections. The pertinent conclusion is set out in italics at the beginning of each section.

I

[1] 1. *The employee's death was not due to a compensable disease within the meaning of G.S. 97-53(13).*

This conclusion is not supported by the findings of fact for two reasons. First, the Commission failed to determine whether Wichmann had a dysthymic disorder.

The Industrial Commission is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends. *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E. 2d 856, 859 (1977), *citing Smith v. Construction Co.*, 27 N.C. App. 286, 218 S.E. 2d 717 (1975).

Plaintiff's claim is based on her allegation that her husband's suicide was the result of a dysthymic disorder caused by his employment. Thus, whether Wichmann suffered from a dysthymic disorder is a crucial fact.

On this question, the Commission only found:

> The deceased employee never sought medical attention or professional care for any dysthymic disorder or depressive reaction or depression while he was alive and was never diagnosed while living by any medical professional as being depressed.

The Commission's finding merely recites evidence presented at the hearing. Whether Wichmann sought medical attention or was diagnosed before his death does not answer the issue of whether Wichmann suffered from a dysthymic disorder. Therefore, the Commission failed to determine a crucial fact.

Second, there are no findings adequate to support a conclusion that if Wichmann had a dysthymic disorder, it was not an occupational disease.

An occupational disease can be:

> Any disease . . . which is proved to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C.G.S. Sec. 97-53(13) (Nov. 1985).

Three conditions must be met for a disease to be occupational under Section 97-53(13). The disease must be:

> (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [employee's] employment."

Rutledge v. Tultex Corp., 308 N.C. 85, 93, 301 S.E. 2d 359, 365 (1983) (citations omitted). The first two elements are met "if, as a matter of fact, the employment exposed the worker to a greater

risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E. 2d at 365. The third is satisfied if the employment "significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors." *Id.* at 101, 301 S.E. 2d at 369-70.

Evidence before the Commission was that stress, or stressors, caused dysthymic disorders. The Commission found that "[m]any occupations expose one to stressors, including the occupation of a law enforcement officer . . . . Stressors are not unique to the occupation of a law enforcement officer." Defendant interprets this finding to mean that dysthymic disorders are not unique to law enforcement employment. Then, from this interpretation, defendant argues the Commission found dysthymic disorders are not characteristic of police work but an ordinary disease of life to which the public is equally exposed outside of police work. Even if we were to accept defendant's interpretation of the finding, it does not support the conclusion that Wichmann's death was not due to a compensable occupational disease.

A disease need not be unique to the employee's occupation in order to qualify as an occupational disease. *See Booker v. Duke Medical Center*, 297 N.C. 458, 474, 256 S.E. 2d 189, 199 (1979). The Commission only found that stressors are not unique to police work. It did not find that Wichmann's employment did not expose him to a greater risk of developing a dysthymic disorder than the public generally. Therefore, the Commission failed to find the absence of the first two elements set forth in *Rutledge*.

Neither did the Commission find that Wichmann's occupation was not a significant causal factor in the development of his alleged dysthymic disorder. Therefore, the Commission failed to find the absence of the third element set out in *Rutledge*.

Since the Commission failed to find the absence of any of the three elements required under *Rutledge*, its first conclusion is not supported by the findings of fact.

II

[2] 2. *The cause of the employee's suicide was not his occupation.*

The Commission erred in concluding Wichmann's suicide was not caused by his occupation because the Commission failed to properly address the issues of causation.

There are two issues of causation in this case: 1) whether Wichmann's employment caused the dysthymic disorder and 2) whether the dysthymic disorder was the cause of his suicide. The Commission must determine each issue of causation. The first issue of causation is part of the determination of whether the employee's disease is an occupational disease. It is discussed above in section I. The second issue of causation, if reached, may require a determination of whether the employee willfully intended to kill or injure himself, was intoxicated or was under the influence of a controlled substance. If the employer produces evidence to that effect, a determination of these questions is required. The second issue of causation is discussed below in section III. The Commission's second conclusion answers neither of the two issues of causation. Thus, the conclusion cannot support the Commission's decision.

III

[3] 3. *The deceased came to his death by reason of his willful intention to injure or kill himself.*

N.C.G.S. Sec. 97-12 states in pertinent part:

> No compensation shall be payable if the injury or death to the employee was proximately caused by:
>
> (1) His intoxication, provided the intoxicant was not supplied by the employer . . .; or
>
> (2) His being under the influence of any controlled substance . . . where such controlled substance was not by prescription by a practitioner; or
>
> (3) His willful intention to injure or kill himself or another.

Intoxication, willful intention and being under the influence of a controlled substance are affirmative defenses which place the burden of proof on the employer in a claim for workers' compensation. Any of these will be a proximate cause of the employee's death or injury if it is a cause in fact. *See Rorie v. Holly Farms*

Poultry Co., 306 N.C. 706, 710-11, 295 S.E. 2d 458, 461-62 (1982); *Anderson v. Century Data Systems, Inc.*, 71 N.C. App. 540, 545, 322 S.E. 2d 638, 641 (1984).

Plaintiff contends there are no findings sufficient to support the Commission's third conclusion. Defendant contends, by its cross-assignment of error, that the Commission erred in failing to determine whether Wichmann was voluntarily intoxicated at the time he committed suicide. We first address defendant's cross-assignment of error.

There was evidence that Wichmann had been drinking alcohol prior to his death. However, since the Commission did not find Wichmann suffered from an occupational disease, it did not need to address the issue of the cause of Wichmann's suicide. Therefore, the Commission did not err by not determining whether Wichmann was voluntarily intoxicated. Should the issue of the cause of Wichmann's suicide be reached on remand, defendant's contention should be properly resolved.

We next address plaintiff's contention that there are no findings sufficient to support the conclusion that Wichmann came to his death by reason of his willful intention to kill or injure himself.

Our Supreme Court held in *Petty v. Associated Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970) that "an employee who becomes mentally deranged and deprived of normal judgment as the result of a compensable accident and commits suicide in consequence does not act wilfully within the meaning of G.S. 97-12." *Id.* at 428, 173 S.E. 2d at 329.

> To say, as a matter of law, that one who intentionally takes his own life acts willfully is to ignore "the role which pain or despair may play in breaking down a rational, mental process." "If the sole motivation controlling the will of the employee when he knowingly decides to kill himself is the pain and despair caused by the injury, and if the will itself is deranged and disordered by these consequences of the injury, then it seems wrong to say that this exercise of will is 'independent,' or that it breaks the chain of causation. Rather, it seems to be in the direct line of causation."

Id. at 426, 173 S.E. 2d at 328 (citations omitted). This is known as the chain-of-causation test.

[4] While *Petty* concerned an employee who had suffered a compensable accident rather than an occupational disease, we hold that an employee's suicide caused by an occupational disease is also compensable under the Workers' Compensation Act. This is so because N.C.G.S. Sec. 97-52 makes it clear that the death of an employee resulting from an occupational disease shall be treated as the "happening of an injury by accident." Therefore, if Wichmann became mentally deranged and deprived of normal judgment as a result of an occupational disease and committed suicide in consequence, he did not willfully intend to kill or injure himself.

The Commission's conclusion that Wichmann came to his death by reason of his willful intention to injure or kill himself is not supported by any finding that Wichmann was not mentally deranged and deprived of normal judgment as a result of his alleged occupational disease or that he did not commit suicide in consequence. Thus, the Commission's third conclusion is not supported by the findings and cannot be upheld.

IV

[5] As the Commission did not refer to any testimony by Dr. Danto, it appears it may have disregarded the evidence of the psychological autopsy. Since the issue must arise upon reconsideration by the Commission, we hold here that the evidence was competent and properly admitted for the purpose of determining the mental state of the deceased at the time of his suicide.

The question of admissibility of such testimony has not been before our courts, but we note that Rule 702 of the North Carolina Rules of Evidence provides for expert opinion testimony to a fact in issue if the expert's specialized knowledge will assist the trier of fact. N.C.G.S. Sec. 8C-1, Rule 702 (Oct. 1986).

In this case, Dr. Danto's testimony was properly admitted into evidence. Undoubtedly it would have been helpful if, as a psychiatrist, Dr. Danto had interviewed the decedent before his death. The fact that he did not does not render his testimony inadmissible or incompetent.

We hold that Dr. Danto's testimony would assist the Commission in determining whether Wichmann had a dysthymic disorder. Dr. Danto was tendered as an expert in psychiatry, suicidology and police stress. In compiling his psychological autopsy, he reviewed exhibits submitted to the Commission. These exhibits included police department records and evaluation reports, a workbook completed by Wichmann during a stress workshop, the sheriff's investigation report of Wichmann's death, and the results of the battery of psychological tests given Wichmann early in his employment. Dr. Danto had also spoken to the plaintiff, Wichmann's widow, by phone.

In addition, we note that other jurisdictions have held psychological autopsies to be admissible as competent evidence for the determination of the decedent's state of mind at his death. *See Campbell v. Young Motor Co.*, --- Mont. ---, 684 P. 2d 1101 (1984). *Cf. Thompson v. Mayes*, 707 S.W. 2d 951 (Tx. App. 1986) (the evidence was not admissible to show decedent's state of mind two years before death).

Since Dr. Danto's testimony is admissible and competent, the Commission must consider it upon remand in determining whether Wichmann had a dysthymic disorder. *See Harrell v. J. P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E. 2d 830, 835, *disc. rev. denied*, 300 N.C. 196, 269 S.E. 2d 623 (1980).

V

By its cross-assignment of error, defendant contends the Commission abused its discretion by ordering defendant to pay the costs of Dr. Danto's deposition.

Plaintiff asked Dr. Danto to perform the psychological autopsy and also requested Dr. Danto's deposition be taken pursuant to N.C.G.S. Sec. 97-80(a).

In addition to providing the procedure for requesting depositions, Section 97-80(a) also empowers the Industrial Commission to tax costs of the deposition as it taxes other costs. There is no restriction in either the Workers' Compensation Act or the Rules of the Industrial Commission on the Commission's discretion to tax costs of the deposition when the plaintiff requests the deposition of its own medical expert. Therefore, we affirm that part of

the Industrial Commission's order requiring defendant to pay the costs of Dr. Danto's deposition.

VI

For the reasons stated herein, the Opinion and Award of the Commission filed 22 May 1986 is affirmed in part, reversed in part and remanded to the Commission for further consideration consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. J. T. TAYLOR, JR., J. H. SIMPSON AND HARRELL M. CARPENTER

No. 863SC880

(Filed 5 May 1987)

1. State § 4; Betterments § 1— betterments claim—no sovereign immunity

Defendant's claim for betterments against the State was not barred by sovereign immunity where defendant had asserted in the principal action by the State against defendant that he owned the land in fee simple. Since a claim for betterments can only arise by virtue of a claim of title, a claim for betterments is a claim of title under N.C.G.S. § 41-10.1.

2. Betterments § 2— betterments claim—filed after injunction restraining entrance to land—timely

Defendant's betterments petition was timely filed even though it was filed after an injunction had been obtained restraining defendant from going on the land. An injunction does not serve as a writ of execution under the betterments statute. N.C.G.S. § 1-340.

3. Betterments § 1; Judgments § 35.1— color of title—prior decision on ownership—not res judicata

The trial court erred by dismissing a betterments claim on the grounds that the claimant did not have color of title where a prior appellate decision in the trial which determined that the State held title did not hold that the description in defendant's deed was defective, but that defendant had not overcome the presumption of title in the State and defendant's deed was not *a fortiori* defective because the description in an earlier deed was defective.

4. Betterments § 1.1; Judgments § 37.5— collateral estoppel—earlier decision on ownership—no identity of issues

An action for betterments was remanded for a determination of whether defendant held land under color of title where an earlier action to determine the rightful ownership of the land was not *res judicata* since the causes of action were not the same and collateral estoppel by judgment was inapplicable because there was not an identity of issues.

5. Betterments § 1— permanency of improvements—claim sufficiently stated

The trial court did not err by not dismissing a claim for betterments for failure to state a cause of action.

Judge EAGLES dissenting.

APPEAL by defendant Taylor from *Phillips, Herbert O., III, Judge.* Order entered 14 April 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 2 February 1987.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General T. Buie Costen and Assistant Attorney General R. Bryant Wall, for the State.

Nelson W. Taylor, III, for defendant-appellant.

GREENE, Judge.

This appeal involves a claim for betterments pursuant to N.C.G.S. Sec. 1-340 against the State for improvements made to certain timberland in Craven County, North Carolina.

On 20 January 1971, the Brandenburg Land Co. [hereinafter Brandenburg] sold defendant J. T. Taylor, Jr., a tract of timberland it purported to own in Craven County. Soon after receiving and recording his deed, Taylor acquired a right-of-way and built an access road, cleared a large portion of the land and sold the timber. He then constructed roads and a canal on the property, converted 157 acres to farmland and planted 12.5 acres with pine seedlings.

On 1 May 1978, the State of North Carolina filed suit against Taylor and others alleging it owned the land. The State also alleged the defendants were trespassing on the land and requested the court eject the defendants and require them to pay damages to the State.

The trial court separated the issues of ownership and damages for trial. On 12 November 1981, the court entered judgment

for the State on the issue of ownership and permanently enjoined Taylor from going on the land. Taylor appealed. The decision was affirmed by this Court and the Supreme Court denied discretionary review. Taylor then petitioned the Supreme Court for reconsideration which was also denied. *State v. Taylor*, 63 N.C. App. 364, 304 S.E. 2d 767 (1983), *disc. rev. denied*, 310 N.C. 311, 312 S.E. 2d 655 (1984), *reconsideration denied*, 313 S.E. 2d 160 (N.C. 1984) [hereinafter referred to as *Taylor I*]. The denial was entered 6 March 1984. The determination of damages is still pending.

On 14 January 1985, Taylor filed a petition for betterments praying he be allowed $300,000 for improvements he made to the State's land. Taylor brought his petition under N.C.G.S. Sec. 1-340 which in pertinent part reads:

> A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises *under a color of title* believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land. [Emphasis added.]

The State filed a response claiming sovereign immunity as a complete defense, contending the petition for betterments was not timely filed and contending Taylor's claim should fail because he did not have color of title to the land when he made the improvements. The trial court dismissed the State's defenses of sovereign immunity and untimeliness of the petition on 1 July 1985. On 16 April 1986, the trial court dismissed Taylor's claim on the basis that the Brandenburg-Taylor deed did not constitute color of title as a matter of law.

Taylor appeals from the entry of the judgment. The State cross-assigns error to the order dismissing its defenses of sovereign immunity and untimely filing.

The issues before us are: 1) whether Taylor's action for betterments is barred by sovereign immunity, 2) whether the action was timely filed, and 3) whether Taylor held the property under color of title when he made the alleged improvements.

I

[1] The State of North Carolina is immune from suit unless and until it expressly consents to be sued. Absent consent or waiver, this immunity is absolute and unqualified. *General Electric Co. v. Turner*, 275 N.C. 493, 498, 168 S.E. 2d 385, 389 (1969).

The State of North Carolina has waived sovereign immunity to suits involving "claims of title" to land.

> Whenever the State of North Carolina . . . *asserts a claim of title* to land which has not been taken by condemnation and any individual . . . *likewise asserts a claim of title* to the said land, such individual . . . may bring an action in the superior court . . . against the State . . . for the purpose of determining such adverse claims.

N.C.G.S. Sec. 41-10.1 (Dec. 1984) (emphasis added).

In the original action, brought by the State, Taylor asserted he owned the land in fee simple. If his claim for betterments is part of his original "claim of title," then it is not barred by sovereign immunity.

"Claims of title" under Section 41-10.1 encompass actions for easements across state property, *Shingleton v. State*, 260 N.C. 451, 133 S.E. 2d 183 (1963), and, if brought in connection with an action for possession, actions for damages. *Mattox v. State*, 21 N.C. App. 677, 205 S.E. 2d 364 (1974).

An action for betterments is a defensive right and not an independent cause of action. *Commissioners of Roxboro v. Bumpass*, 237 N.C. 143, 146, 74 S.E. 2d 436, 439 (1953). *Rumbough v. Young*, 119 N.C. 567, 26 S.E. 143 (1896). It accrues only after someone with better title seeks and obtains the aid of the court to enforce their right of possession. *Commissioners of Roxboro*, at 147, 74 S.E. 2d at 439.

Since a claim for betterments can arise only by virtue of a "claim of title," we hold that a claim for betterments is a "claim of title" as that term is used in N.C.G.S. Sec. 41-10.1. Therefore, Taylor's claim for betterments is not barred by sovereign immunity.

II

We must now determine if the action for betterments was timely filed.

[2] The betterments statute, N.C.G.S. Sec. 1-340, states that the defendant "against whom a judgment is rendered for land may, *at any time before execution*, present a petition to the court" for betterments. (Emphasis added.) The State contends the injunction in the order of 12 November 1981 restraining Taylor from going on the land is the equivalent of an execution. If so, Taylor's betterments claim, filed 14 January 1985, is untimely and must be dismissed.

The Supreme Court discussed the history of the betterments statute in *Commissioners of Roxboro v. Bumpass*, 237 N.C. 143, 74 S.E. 2d 436 (1953):

> [G]enerally speaking, one who establishes a superior title to land is *not permitted to recover possession thereof until and unless he pays the occupant his claim*, properly and promptly presented, for just compensation for improvements of a permanent nature placed thereon when obvious equity and principles of fair play demand it, on the conception that no man should be unjustly enriched at the expense of another who has acted in good faith.

Id. at 145-46, 74 S.E. 2d at 438 (emphasis added).

The issue of whether a betterments claim was timely filed arose in *Boyer v. Garner*, 116 N.C. 125, 21 S.E. 180 (1895). The action for betterments was filed after a writ of possession and execution had been served by the sheriff. The Court stated "the sheriff's return of the writ with the indorsement thereon was such an execution of the judgment as is contemplated" by the betterments statute. *Id.* at 130, 21 S.E. at 181. In *Boyer*, the sheriff had actually gone on the property and placed the defendant out of possession of the land.

Here, the State has not caused a writ of possession to be executed. Because the principle behind the betterments statute is equity, we follow the Court in *Boyer* in its strict construction of the meaning of "execution" in the betterments statute. An injunction does not serve as a writ of execution under the betterments statute. Taylor's betterments petition was timely filed.

III

The next question presented is whether Taylor made the alleged improvements on the land "while holding the premises under a color of title believed to be good . . . ." N.C.G.S. Sec. 1-340.

"Color of title is a paper writing which purports to convey land but fails to do so." *Carrow v. Davis*, 248 N.C. 740, 741, 105 S.E. 2d 60, 61 (1958). A deed is color of title only for the land designated and described in it. The description of the deed is sufficient when it furnishes means of identifying the land intended to be conveyed. *Powell v. Mills*, 237 N.C. 582, 588, 75 S.E. 2d 759, 764-65 (1953). If a surveyor can find the property from the description, the description is sufficient for color of title. *Oxford v. White*, 95 N.C. 525, 527 (1886).

On this issue, both the State and Taylor base their primary arguments on the doctrines of *res judicata* and collateral estoppel by judgment: Each claims the doctrines act in their favor against the other party. We will first address the State's contentions.

A

[3] The State argues that the trial court did not err in dismissing Taylor's betterments claim because this Court has already determined the Brandenburg-Taylor deed did not constitute color of title in *Taylor I*.

When the State's claim of title was originally tried, the trial court determined Taylor had not proven a valid chain of title to the land. The trial court in *Taylor I* did not find as a matter of fact or conclude as a matter of law that the Brandenburg-Taylor deed did not contain an adequate description. In *Taylor I*, we held that Taylor had not pulled the "laboring oar" necessary to overcome the presumption of title in the State. 63 N.C. App. at 368, 304 S.E. 2d at 770. The fatal defect in Taylor's chain of title through Brandenburg was an inadequate description in a deed pre-dating the Brandenburg-Taylor deed.

The doctrines of *res judicata* and collateral estoppel by judgment are, by definition, inapplicable if the issue now litigated has not been decided. There being no prior decision that the description in the Brandenburg-Taylor deed was defective, Taylor may still prove the description in his betterments claim.

Even so, the State contends that because the description in the earlier deed is defective, the Brandenburg-Taylor deed is *a fortiori* defective since both deeds begin at the same undeterminable point. The State contends there is no way in which the description of the Brandenburg-Taylor deed could be cured. Therefore, the State contends, the trial court's order dismissing Taylor's betterments claim was not in error and should be affirmed. We do not agree.

We note the two deeds differ in their descriptions; the Brandenburg-Taylor deed purportedly conveying only part of the greater tract of the earlier deed. A description is not defective merely because the beginning point is unascertainable; for instance, the deed may be cured by reversing the calls. *See, e.g., Young v. Young*, 76 N.C. App. 93, 331 S.E. 2d 769 (1985). Thus, we cannot rule as a matter of law that the Brandenburg-Taylor deed does not constitute color of title to the land in question. Therefore, the order of the court below that Taylor did not have color of title in the land was error.

B

[4] We now turn to address defendant's contentions. Taylor contends the trial court in *Taylor I* found that the Brandenburg-Taylor deed "specifically described the land in controversy," thus finding that the deed constituted color of title. He contends the matter should not be relitigated but that we should enter summary judgment for him on the issue under the doctrine of *res judicata*.

The cause of action in *Taylor I* was whether Taylor was the rightful owner of the land. Here, the cause of action is Taylor's claim for betterments. Since the causes of action are not the same, the doctrine of *res judicata* is inapplicable. *King v. Grindstaff*, 284 N.C. 348, 355-56, 200 S.E. 2d 799, 804-05 (1973).

Collateral estoppel by judgment is also inapplicable. Under the principle of collateral estoppel by judgment, "parties or parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King*, at 536, 200 S.E. 2d at 805. In order for collateral estoppel by judgment to be applicable:

> (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Id. at 358, 200 S.E. 2d at 806. Should any element fail, the doctrine of collateral estoppel by judgment cannot work to estop the plaintiff.

We find the issue of whether the Brandenburg-Taylor deed sufficiently described the land in controversy was not necessary and essential to the State's claim for possession. In *Taylor I*, the State would prevail if Taylor was unable to prove every link in his chain of title. He was unable to prove the adequacy of the description in an earlier deed and the State prevailed on the basis of that fact. Because the State did prevail on that basis, whether the description of the Brandenburg-Taylor deed described the land in controversy—thus, constituting color of title—was not necessary and essential for the determination of the action for possession. Therefore, the identity of issues between *Taylor I* and this case is not present and collateral estoppel by judgment does not estop the State from litigating the question of whether the Brandenburg-Taylor deed provided Taylor with color of title.

The order of the trial court below is reversed and remanded for determination of whether Taylor held the land under color of title.

IV

[5] The State has also raised the issue whether, as a matter of law, the changes defendant made to the land were permanent improvements. The Court in *Pamlico Co. v. Davis*, 249 N.C. 648, 107 S.E. 2d 306 (1959), held that evidence of improvements similar to those Taylor claims to have made was sufficient to go to the jury on the question of whether they were permanent improvements. *Id.* at 651-52, 107 S.E. 2d at 309. Consequently, the trial court did not err in refusing to dismiss Taylor's claim for betterments for failure to state a cause of action.

V

The trial court's order of 1 July 1985, overruling the State's defenses of sovereign immunity, untimely filing of the petition and failure to state a cause of action is affirmed. The trial court's order of 16 April 1986, dismissing Taylor's petition for betterments, is reversed and remanded.

Affirmed in part, reversed in part and remanded.

Judge WELLS concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent. The majority has broadened the scope of the waiver of sovereign immunity in G.S. 41-10.1 so as to permit a betterments action against the State. To do so, they have broadly defined "claim of title" to include a claim for betterments. The majority bases its holding on the logic that since a claim for betterments can arise only "by virtue of" a claim of title, it is included within the language of the waiver statute. I disagree with the majority's loose reading of the statute.

Though the majority cites *Mattox v. State*, 21 N.C. App. 677, 205 S.E. 2d 364 (1974), it is instructive to note in *Mattox* "[t]he title not being in issue, the question before us is whether the plaintiffs may bring an action for damages under the statutory provisions of 41-10.1." The court there held that, since title had already been settled, plaintiffs were *not* entitled to bring a separate action for damages. Similarly, here, title had been settled long before plaintiffs brought their action for betterments. This is not a case where, in the words of G.S. 41-10.1, "the State of North Carolina or any agency or department thereof asserts a claim of title to land."

It is a fundamental principle that: "The right to sue the State is a conditional right, and the statutory provisions must be strictly followed." *Mattox, supra* at 679. Here, the majority, in an effort to avoid an inequity, has interpreted the waiver statute too broadly and has winked at the admonition to strictly construe statutes which waive the benefits of the doctrine of sovereign im-

munity. Any broadening of the statutory waiver of sovereign immunity is properly a legislative function and ought not be undertaken through liberal statutory interpretation. I would vote to affirm the trial court's dismissal of this action but only on the grounds that the State has not waived, but has asserted, sovereign immunity from this claim.

STATE OF NORTH CAROLINA v. LEO HINSON

No. 863SC1001

(Filed 5 May 1987)

1. **Assault and Battery § 11.1— assault with deadly weapon—two and one-half ton truck as deadly weapon—sufficiency of indictment**

Indictments were sufficient to charge defendant with assault with a deadly weapon where they named a two and one-half ton truck as the weapon used by defendant in committing the assault and expressly alleged that the truck was a deadly weapon.

2. **Weapons and Firearms § 2— possession of firearm by convicted felon—defendant not on own premises**

In a prosecution of defendant for possession of a firearm by a convicted felon, defendant did not come within the exception of N.C.G.S. § 14-415.2(a) allowing possession of a firearm in one's own home or place of business where the evidence tended to show that his truck was in a neighbor's yard; he was "kind of at the back" of the truck when he fired the gun; and spent shells were found in the neighbor's yard.

3. **Assault and Battery § 14.3— assault with deadly weapon with intent to kill—two and one-half ton truck as deadly weapon—sufficiency of evidence**

Evidence was sufficient to show that defendant used a two and one-half ton truck as a deadly weapon and that he possessed the specific intent to kill each of five deputies where the evidence tended to show that, as defendant drove the truck toward the road where the deputies were located, he was waving one arm out the window and was screaming, "Stand right there, you son of a bitches. I'll kill you," and he drove the truck straight at the deputies before colliding with two automobiles and running into a ditch; furthermore there was no merit to defendant's contention that, because of his intoxication and mental and emotional state, there was insufficient evidence that he "willfully and wantonly" ran into the automobiles with the truck.

4. **Criminal Law § 112.6— no evidence of insanity—refusal to instruct proper**

The trial court did not err in denying defendant's request that the jury be instructed on temporary insanity where defendant offered no expert testimony tending to show that he was suffering from a mental disease or defect at the

time of the events giving rise to the charges; his evidence merely tended to show voluntary intoxication as a result of alcohol and drug abuse; and the court correctly instructed that defendant's intoxication could be considered in determining whether defendant had the ability to form the specific intent to kill necessary for conviction of assault with a deadly weapon with intent to kill.

5. **Criminal Law § 112.6— assault with deadly weapon—shots fired at defendant during assault—defendant's responsibility for actions—instructions proper**

In a prosecution of defendant for assault with a deadly weapon with intent to kill, the trial court did not err in refusing to instruct the jury that defendant would not be responsible if his operation of the truck "was affected by the firing of weapons at him" where there was no suggestion in the record that defendant was not in complete control of the truck at the time the alleged assaults and property damage took place.

APPEAL by defendant from *Stephens, Judge*. Judgment entered 23 November 1985 in Superior Court, PITT County. Heard in the Court of Appeals 12 February 1987.

A Pitt County grand jury returned true bills of indictment charging defendant Leo Hinson with assault with a deadly weapon with intent to kill inflicting serious injury, possession of a handgun by a convicted felon, two counts of willful and wanton injury to personal property causing damage in excess of $200.00, two counts of assault upon a law enforcement officer in violation of G.S. 14-33(b)(4), and five counts of assault with a deadly weapon with intent to kill. Upon defendant's pleas of not guilty, all of the charges were joined for trial.

The State's evidence at trial tended to show that on 24 June 1985 at approximately 2:00 p.m., defendant, his wife and their three children entered the yard of Grace Whitfield, defendant's aunt, in a pickup truck driven by defendant's wife. Mrs. Whitfield's property is located adjacent to, and west of, defendant's property which is situated on the north side of rural paved road 1200 near Farmville, North Carolina. After getting out of the truck, defendant began arguing with his wife about the keys to the vehicle. When she refused to give them to him, defendant grabbed Randy Whitfield, Grace Whitfield's sixteen-year-old son, by the front of his shirt. Randy broke free from defendant's grip, ran through his mother's house and hid in a cornfield in the backyard. From his position in the cornfield, he could hear gunshots and defendant yelling.

James Walston, who worked for defendant, saw defendant and his family enter Mrs. Whitfield's yard. He heard the Hinsons arguing about the keys to the truck and began walking toward defendant, who was obviously drunk, in order to keep him from driving. Walston saw defendant fire a pistol into the air, then unload it and throw it on the ground at Mrs. Whitfield's feet. Both Walston and Randy Whitfield testified that defendant was acting like he was "not in his right mind" or was "crazy drunk."

At approximately 3:00 p.m., Pitt County sheriff's deputies Ivan Harris and Neal Elks were dispatched to Mrs. Whitfield's home to investigate a report that a man was drunk and was firing a gun. As they drove up the Whitfield driveway, the deputies, wearing plain clothes and operating an unmarked patrol car, observed defendant standing behind a tree. Defendant was holding a board measuring one by four inches by approximately five feet long in his right hand; his left hand was clenched in a fist. Defendant approached the officers' car, cursing them and ordering them off the property. He reached through the open window, grabbed Deputy Elks by his necktie and tried to pull him out of the car. At about the same time, defendant began to hit the windshield of the car with the board, and continued to do so until the board broke. Deputy Elks drew his weapon and pointed it toward defendant as he struggled to free himself. Deputy Harris began to back the patrol car out of the driveway and defendant released Deputy Elks. Deputy Harris parked the car a short distance from the driveway on the north side of rural paved road 1200 and the officers radioed for assistance.

A short while later, uniformed deputy sheriffs Rick Fisher and Allen Edwards arrived in an unmarked patrol car and parked behind Deputy Harris' vehicle. Deputy Harvey Gardner also arrived and parked his unmarked patrol car in front of Deputy Harris' vehicle. The deputies were out of their vehicles and were awaiting a radio message concerning a warrant for defendant's arrest when a green car, driven by Mrs. Whitfield, stopped alongside Deputy Gardner's patrol car.

About that same time, the deputies heard the sound of an engine starting and saw defendant driving a white two and one-half ton truck toward them on a path leading to the road from an area where some bulk tobacco barns were located. The deputies

warned Mrs. Whitfield to move her car out of the way of the truck, so she moved it just off the northern shoulder of the road in front of Deputy Gardner's car.

As defendant approached the road, he was waving his left arm out the window of the truck and was screaming, "Stand right there, you son of a bitches. I'll kill you." The defendant made a left turn onto the roadway, then turned even more sharply left toward the deputies and Mrs. Whitfield, driving the truck into Mrs. Whitfield's car and then into Deputy Gardner's patrol car. Four of the deputies drew their weapons and opened fire as they ran from out of the path of the defendant's truck. The defendant then turned the truck back toward the right, dragging the Whitfield car, and ran into a ditch off the southern shoulder of the roadway. The defendant was found lying on the front seat of the truck, wounded and still screaming.

At the close of the State's evidence, the trial court dismissed the count which charged defendant with misdemeanor assault upon Deputy Harris. Defendant's motion to dismiss the remaining charges was denied.

Defendant offered evidence tending to show that he had taken prescription painkillers for kidney stones and had consumed a fifth of liquor during the morning and afternoon preceding these events. Taking the stand in his own behalf, defendant stated that after arguing with his wife about the keys to the truck, he got an automatic pistol out of the bolt bin in his workshop. He testified that, because he was drunk, he got a "little loud" and that when Mrs. Whitfield came out of her house, she saw the gun and told him to give it to her. Defendant stated that he couldn't get the gun unloaded so, while on his own property, he fired the gun into the air to empty it and then threw it, unloaded, on the ground at her feet. Defendant further testified that when he went back into his shop, everything started turning "around and upside down" and that he doesn't remember anything else until waking up in the emergency room of the Pitt County Memorial Hospital.

Defendant's motions to dismiss, renewed at the close of all the evidence, were denied. The jury returned verdicts convicting defendant of misdemeanor assault upon Deputy Elks while in the performance of his duties as a law enforcement officer, willful and

wanton injury to Mrs. Whitfield's automobile causing damage of more than $200.00, willful and wanton injury to the Pitt County patrol car driven by Deputy Gardner causing damage in excess of $200.00, possession of a firearm by a convicted felon, and five counts of felonious assault with a deadly weapon with intent to kill. He was acquitted of feloniously assaulting Mrs. Whitfield. Judgments were entered upon the verdicts sentencing defendant to active terms of imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Laura E. Crumpler, for the State.

Hulse & Hulse, by Herbert B. Hulse, and Braswell & Taylor, by Roland C. Braswell, for defendant.

MARTIN, Judge.

By his exceptions and assignments of error brought forward on appeal, defendant challenges the sufficiency of the bills of indictment in those cases in which he was charged with assault with a deadly weapon with intent to kill, the sufficiency of the evidence to support his convictions, and the denial of his requests for certain instructions to the jury. We have considered his contentions and find no error in his trial.

[1] In cases 85CRS13969, 85CRS13970, 85CRS13971, 85CRS13972 and 85CRS13973, each of the bills of indictment included the following language:

> . . . the defendant named above unlawfully, willfully and feloniously did assault [named victim], . . . with a 2½ ton truck, a deadly weapon. The assault was committed with the intent to kill.

Defendant moved to dismiss each of the indictments insofar as it purported to charge a felony on the grounds that the language was insufficient to allege the use of a deadly weapon. His first assignment of error is directed to the denial of the motions.

Defendant bases his argument upon the failure of the bills of indictment to allege the operation of the truck in any manner which would render it a "deadly weapon" within the meaning of G.S. 14-32(c). He asserts that, in order to properly allege the use of a motor vehicle as a deadly weapon, the indictment "must

allege the acts which constitute unlawful operation of the motor vehicle and must further allege injury to some person as the result of the unlawful operation." We disagree.

The requirements for an indictment charging the offense of assault with a deadly weapon were fully discussed and set out by our Supreme Court in *State v. Palmer*, 293 N.C. 633, 639-40, 239 S.E. 2d 406, 410-411 (1977).

> Specifically, with regard to an indictment or warrant charging the offense of assault with a deadly weapon, we said in *State v. Wiggs, supra*, 269 N.C. at 513, 153 S.E. 2d at 89:
>
> "The requisites of an indictment or warrant charging the criminal offense of assault with a deadly weapon are set forth in 6 C.J.S., Assault and Battery § 110g(2), as follows: 'In an indictment for an assault with a deadly or dangerous weapon, the dangerous or deadly character of the weapon must be averred, either in the language of the statute, or by a statement of facts from which the court can see that it necessarily was such. It is only necessary, however, to describe and charge the weapon to be deadly or dangerous where it is a weapon the ordinary name of which does not, *ex vi termini*, import its deadly or dangerous character; if it is a weapon the ordinary name of which imports its deadly or dangerous character, *ex vi termini*, it is sufficient to describe it by its name, without alleging that it was a deadly or dangerous weapon.' "
>
> Guided by the foregoing principles, we hold that it is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon. Whether the state can prove the allegation is, of course, a question of evidence which cannot be determined until trial. (Emphasis original.)

In *Palmer*, the Supreme Court held that an indictment which alleged that the defendant assaulted the victim "with a stick, a deadly weapon, by beating him about the body and head" was sufficient to allege the use of a deadly weapon.

Each of the indictments challenged by defendant names the two and one-half ton truck as the weapon used by defendant in committing the assault and expressly alleges that it was a "deadly weapon." The indictments were, therefore, sufficient to support the verdicts of guilty of felonious assault with a deadly weapon and the judgments based thereon.

By his second, third and fourth assignments of error, defendant challenges the sufficiency of the evidence to support his convictions of possession of a firearm by a convicted felon, felonious assault with a deadly weapon with intent to kill, and willful and wanton injury to personal property. He asserts error in the denial of his motions, made at the close of all the evidence, to dismiss each of those charges.

A motion for dismissal of criminal charges requires the trial court to determine whether there is substantial evidence of each essential element of the crime charged, or of a lesser included offense, and that the defendant is the person who committed the offense. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). In ruling on the motion, the court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference which may be drawn from the evidence and resolving all inconsistencies in the State's favor. *Id.* The defendant's evidence, unless favorable to the State, is not to be considered. *Id.*

[2] Defendant's second assignment of error is directed to the denial of his motion to dismiss the charge of possession of a firearm by a convicted felon. His argument is based upon the third paragraph of G.S. 14-415.1(a), which creates an exception to the offense defined by the subsection. The exception provides: "Nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business." Defendant contends that he brought himself within the exception by testifying that he was on his own property, which adjoins the Whitfield property, when he fired the pistol, and that the State failed to offer substantial evidence that he possessed the firearm while off his own premises. *See State v. McNeill*, 78 N.C. App. 514, 337 S.E. 2d 172 (1985), *disc. rev. denied*, 316 N.C. 383, 342 S.E. 2d 904 (1986). We reject his argument.

According to the State's evidence, Randy Whitfield saw defendant arrive at the Whitfield residence in a pickup truck which "turned into my yard" and that the truck "stopped in the yard." James Walston testified that when he saw defendant with the pistol, defendant was standing "kind of at the back of his truck." The pistol appeared to Walston to be a .25 caliber pistol. After defendant threw the pistol on the ground, Mrs. Whitfield took it into her house. An S.B.I. agent testified that a .25 caliber pistol was found in the Whitfield residence after the incident and that spent .25 caliber rounds were found in the Whitfield's yard.

Viewed in the light most favorable to the State, the evidence that defendant's truck was in the Whitfield yard, that he was "kind of at the back" of the truck when he fired and that spent shells were found in the Whitfield's yard is sufficient to support a reasonable inference that defendant was on the Whitfield property at the time he fired the pistol. This assignment of error is overruled.

[3] By his third assignment of error, defendant contends that each of the five charges of assault with a deadly weapon with intent to kill should have been dismissed. He argues that the State's evidence was insufficient to show that defendant used the two and one-half ton truck as a deadly weapon or that defendant possessed the specific intent to kill each of the five deputies who were named as victims in the five bills of indictment. We disagree.

The State's evidence tended to show that as defendant drove the truck toward the road where the deputies were located, he was waving one arm out the window and was screaming "Stand right there, you son of a bitches. I'll kill you." He drove the truck straight at the deputies before colliding with the two automobiles and running into the ditch. Viewed in the light most favorable to the State, the evidence raises reasonable inferences sufficient to take to the jury the issues of defendant's use of the truck as a deadly weapon and whether he acted with the requisite specific intent to kill the deputies.

For similar reasons, we overrule defendant's fourth assignment of error in which he contends that, because of his intoxication and his mental and emotional state, there was insufficient evidence that he "willfully and wantonly" ran into the two auto-

mobiles with the truck. The words "willful" and "wanton," when identifying the requisite state of mind for violation of a criminal statute, mean "the wrongful doing of an act without justification or excuse, or purposely and deliberately in violation of the law." *State v. Murchinson*, 39 N.C. App. 163, 170, 249 S.E. 2d 871, 876 (1978). We hold that the evidence which we have previously recited is sufficient, when tested by the standards applicable to motions for dismissal, for submission to the jury on the issue of whether defendant acted "willfully and wantonly" in damaging the two automobiles.

[4] Defendant's next assignment of error is directed to the denial of his oral request "that the jury be instructed on temporary insanity." We find no error in the court's ruling with respect to the request. Defendant offered no expert testimony tending to show that he was suffering from a mental disease or defect at the time of the events giving rise to the charges; his evidence merely tended to show voluntary intoxication as a result of alcohol and drug use. The trial court correctly instructed the jury that defendant's intoxication could be considered in determining whether defendant had the ability to form the specific intent to kill necessary for conviction of assault with a deadly weapon with intent to kill. This assignment of error is overruled.

[5] Finally, defendant contends that the trial court erred in denying his oral request that the jury be instructed that defendant would not be responsible if his operation of the truck "was affected by the firing of weapons at him. . . ." Again, we find no evidence to support such an instruction. There is no suggestion in the record that defendant was not in complete control of the truck at the time the alleged assaults and property damage took place. To the contrary, there was testimony tending to show that no shots were fired at defendant until after he had driven toward the officers and had struck Mrs. Whitfield's car and the patrol car. Even after shots were fired at defendant. Deputy Elks testified that defendant "was looking at me in the face and steering the truck in my direction" before running into the ditch. Defendant's evidence tended only to show that he could not remember the events. Absent any evidence to support the requested instruction, the trial court properly refused to give it. It would have been error for the court to instruct upon hypothetical facts not

supported by the evidence. *State v. Ferdinando*, 298 N.C. 737, 260 S.E. 2d 423 (1979).

No error.

Judges PARKER and COZORT concur.

THELMA H. HOLLAND, LINDA R. HOLLAND AND CONNIE H. DENTON, PLAINTIFFS v. E. CECIL EDGERTON, III, INDIVIDUALLY, AND D/B/A EDGERTON MEMORIAL COMPANY, AND E. CECIL EDGERTON, DEFENDANT AND THIRD PARTY PLAINTIFF v. REEVES-BULLA FUNERAL HOME, INC. AND CLARKSBURG CASKET CO., INC., THIRD PARTY DEFENDANTS

No. 8611SC1133

(Filed 5 May 1987)

1. **Dead Bodies § 2; Contribution § 1— improper interment—action in contract—no contribution**

The trial court did not err by dismissing a third party complaint against a casket company and funeral home for contribution where the original complaint was based on breach of the legal duty to construct a mausoleum pursuant to the terms of an express contract rather than on a failure to exercise any general legal duty of care. By the clear language of N.C.G.S. § 1B-1(a), a defendant is not entitled to contribution for a claim against him in contract.

2. **Contribution § 1; Dead Bodies § 2— improper interment—mental anguish—no contribution**

In an action for contribution from third parties arising from the construction of a mausoleum, the allegations in the original complaint seeking damages for mental anguish did not convert the cause of action from breach of contract, for which there may be no contribution, into a tort claim, for which there may be contribution, because damages for mental anguish may be recovered in an action for breach of contract involving treatment and burial of the remains of the dead.

3. **Dead Bodies § 2; Contribution § 1— improper interment—breach of implied warranty—no contribution**

A claim for relief based on breach of implied warranty arising from the construction of a mausoleum gives rise to no right of contribution because it sounds in contract and not in tort. N.C.G.S. § 25-2-314.

4. **Contribution § 1; Dead Bodies § 2— improper interment—reckless infliction of emotional distress—no contribution**

A claim for the intentional infliction of emotional distress excluded the possibility of contribution under N.C.G.S. § 1B-1(c) whether the claim alleged

that defendant intended to cause emotional anguish or that his actions were in reckless disregard as to the likelihood that such emotional distress would result.

APPEAL by third party plaintiff from *Barnette, Judge.* Judgment entered 6 and 7 August 1986 in Superior Court, HARNETT County. Heard in the Court of Appeals 6 April 1987.

Plaintiffs, the widow and two daughters of Samuel Elbert Holland, deceased, commenced this action on 7 March 1986 by filing a complaint naming as defendants E. Cecil Edgerton, III, individually and doing business as Edgerton Memorial Company, and E. Cecil Edgerton. The complaint alleged that the widow of the deceased contracted with defendants to build a mausoleum for the interment of the deceased. Plaintiffs' first claim for relief was that defendants breached this contract by various acts and omissions which resulted in leakage of deceased's body fluids through the base of the mausoleum, causing plaintiffs to incur expenses and entitling plaintiffs to compensatory and punitive damages. Plaintiffs' second claim for relief was that the named defendants' actions were done "with the intention to inflict mental distress upon plaintiffs and/or were done in reckless disregard of the probability of causing plaintiffs mental distress." In the second claim, plaintiffs sought both compensatory and punitive damages.

Defendants filed timely answers, denying the material allegations of the complaint and asserting various defenses and counterclaims. On 23 April 1986, defendant E. Cecil Edgerton, III (hereinafter, Edgerton), filed a third party complaint claiming that, relative to plaintiffs' claims, third party defendants Reeves-Bulla Funeral Home, Inc. (hereinafter, Funeral Home) and Clarksburg Casket Co., Inc. (hereinafter, Casket Co.) were negligent in various respects and that Casket Co. breached certain implied warranties. The third party complaint concluded that if Edgerton is found to have damaged plaintiffs, he would be entitled to contribution from Funeral Home and Casket Co. and prayed that judgment be entered against Funeral Home and Casket Co. for all sums adjudged against defendants.

In their answers, both Funeral Home and Casket Co. asserted as a first defense that Edgerton's third party complaint failed to state a claim for which relief could be granted and should be dismissed. The trial judge agreed and dismissed the

third party complaint against Funeral Home and Casket Co. on 6 and 7 August 1986, respectively. Third party plaintiff Edgerton appealed.

McLeod, McLeod and Hardison by Kenneth L. Hardison for third party plaintiff-appellant E. Cecil Edgerton, III, d/b/a Edgerton Memorial Company.

Anderson, Broadfoot, Johnson and Pittman by Lee B. Johnson for third party defendant-appellee Reeves-Bulla Funeral Home, Inc.

Patterson, Dilthey, Clay, Cranfill, Sumner and Hartzog by Paul L. Cranfill and Reid Russell for third party defendant-appellee Clarksburg Casket Company, Inc.

PARKER, Judge.

At the outset we note that the trial judge entered a final judgment on the third party claim and expressly determined in the judgment that there was "no just reason for delay" pursuant to G.S. 1A-1, Rule 54(b). *See Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

The primary issue presented by this appeal is whether third party plaintiff Edgerton is entitled to contribution under the North Carolina version of the Uniform Contribution among Tort-Feasors Act, Chapter 1B of the General Statutes, from third party defendants Funeral Home and Casket Co. for the claims asserted in plaintiffs' complaint. In our view third party plaintiff Edgerton is not entitled to contribution, and we affirm the trial court's dismissal of the third party complaint.

Rule 14(a) of the North Carolina Rules of Civil Procedure provides that a defendant may bring a third party into an action already commenced by service of a summons and a third party complaint where the third party "is or may be liable to him for all or part of the plaintiff's claim against him." The basis of Edgerton's third party complaint in this action is G.S. 1B-1(a), which states:

> Except as otherwise provided in this Article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrong-

ful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

The plaintiffs' complaint asserts two claims for relief: one for breach of contract, including breach of implied warranties under G.S. 25-2-314, and the other for intentional infliction of mental distress. However, as third party plaintiff Edgerton aptly points out in his brief, the nature of the case depends upon the issues that arise from the pleadings and the relief sought, not the titles used by the parties. *See Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). Therefore, we must carefully review the allegations of plaintiffs' complaint to determine if Funeral Home and Casket Co. could be held jointly and severally liable in tort with Edgerton for the claims asserted by plaintiffs.

[1] In their first claim for relief, plaintiffs allege that plaintiff Linda R. Holland on behalf of her mother, plaintiff Thelma H. Holland, contracted with Edgerton for the purchase, construction, and erection of a mausoleum and that Edgerton breached the contract in the following ways:

(a) by failing to install any drains therein;

(b) by failing to properly seal the joints thereof;

(c) by using stone walls which were not cut properly at the base so as to allow for proper sealing;

(d) by failing to assure that the walls were plumb all around;

(e) by placing the air vents to said mausoleum upside down as to allow moisture to build up inside the mausoleum rather than preventing same and failing to seal around the vents so as to allow insects to enter said mausoleum;

(f) by failing to construct a mausoleum with capacity to protect and preserve the remains of the deceased and the casket;

(g) by constructing a mausoleum which foreseeably was incapable of containing the body fluids of the deceased, which fluids escaped from the wooden casket and from the mausoleum itself;

(h) by failing and refusing to replace the mausoleum or otherwise properly correct the conditions created after being apprised of the same;

(i) by threatening to take the deceased's body and casket out of the mausoleum, set it out in the open on the ground, and take the mausoleum out of the cemetery if the mausoleum was not paid for;

(j) by making harassing and threatening telephone calls to plaintiffs concerning payment for said mausoleum in total disregard of the sensibilities of the plaintiffs;

(k) by failing to inspect the condition of the stone before it was assembled into the mausoleum and by failing to inspect the mausoleum after assembly to make sure it was marketable.

Plaintiffs also allege that defendants were aware of the relationship between plaintiffs and the deceased and knew that plaintiff Linda R. Holland was acting in a representative capacity. The complaint further alleges that plaintiffs Linda R. Holland and Connie H. Denton, daughters of the deceased, were third party beneficiaries of the contract.

The right to contribution is statutory; therefore, it must be enforced according to the terms of the statute. *See Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82 (1961) (decision under prior law). Under G.S. 1B-1(a), a defendant is entitled to contribution where he and one or more other persons are jointly or severally liable *in tort*. By the clear language of the statute, a defendant is not entitled to contribution for a claim against him in contract. There is no right to contribution from one who is not a joint tort-feasor. *Insurance Co. v. Motor Co.*, 18 N.C. App. 689, 198 S.E. 2d 88 (1973). Therefore, the allegations of plaintiffs' complaint that give rise to a claim sounding in contract, not in tort, give rise to no statutory right of contribution under Chapter 1B on the part of third party plaintiff Edgerton.

Edgerton argues, however, that plaintiffs' complaint alleges the unintentional tort of negligence arising from the performance of a contract. According to Edgerton, the complaint alleges injury to parties other than the promisee of the contract. This contention is without merit.

The complaint clearly alleges that the daughters of the deceased, plaintiffs Linda R. Holland and Connie H. Denton, are entitled to damages by reason of their status as third party beneficiaries of the contract between Edgerton and their mother, plaintiff Thelma H. Holland. Moreover, the cases cited by Edgerton to support his argument that plaintiffs' complaint asserts a claim for negligence arising from performance of a contract are inapposite. In *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551 (1951), and *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893 (1955), cited by Edgerton, the contracts at issue merely created the relationship out of which arose the common-law duty to exercise ordinary care; the contract merely created the state of things which furnished the occasion of the tort. *Pinnix*, 242 N.C. at 362, 87 S.E. 2d at 898. As this Court has stated,

> Under general principles of the law of torts, a breach of contract does not in and of itself provide the basis for liability in tort. Ordinarily, an action in tort must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties.

Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 342, 303 S.E. 2d 365, 373 (1983).

In the case before us, plaintiffs' first cause of action is clearly based on the alleged breach of the legal duty Edgerton owed plaintiffs pursuant to the terms of the express contract to construct and erect the mausoleum, not on Edgerton's failure to exercise any general legal duty of care. *See Lamm v. Shingleton*, 231 N.C. 10, 55 S.E. 2d 810 (1949). A tort action does not lie against a promisor "for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill." *Ports Authority v. Roofing Co.*, 294 N.C. 73, 83, 240 S.E. 2d 345, 351 (1978).

[2] Finally, the relief sought by plaintiff on account of the alleged breach of contract by Edgerton, does not convert the cause of action for breach of contract into a tort claim. In their complaint, plaintiffs allege that as a result of Edgerton's breach of contract they have suffered "severe mental anguish and disturbance of mental and emotional tranquillity." Although the general

rule is that damages for mental anguish suffered by reason of breach of contract are not recoverable, this rule is not absolute. *Lamm*, 231 N.C. at 14, 55 S.E. 2d at 813. Our courts have held that such damages may be recovered in an action for breach of contract where the contract involves treatment and burial of the remains of the dead. *See Lamm, supra. See also Smith v. Funeral Home*, 54 N.C. App. 124, 282 S.E. 2d 535 (1981). Plaintiffs' claim for damages attributable to mental suffering are permissible because of the nature of the contract, not the theory of the suit.

[3] Plaintiffs also allege in their first claim for relief that defendant breached the following implied warranties under G.S. 25-2-314:

> that the mausoleum would pass without objection in the trade, that the mausoleum was merchantable and fit for the ordinary purposes for which such goods are used, and that due and proper care would be used in the construction of the same.

North Carolina courts have consistently held that although the requirement of privity has been relaxed in some cases involving implied warranties, the basis of a claim based on an implied warranty is contractual. *See Tedder v. Bottling Co.*, 270 N.C. 301, 304, 154 S.E. 2d 337, 339 (1967); *Cooper Agency v. Marine Corp.*, 46 N.C. App. 248, 251, 264 S.E. 2d 768, 770 (1980); *Gillispie v. Bottling Co.*, 17 N.C. App. 545, 548, 195 S.E. 2d 45, 47, *cert. denied*, 283 N.C. 393, 196 S.E. 2d 275 (1973). A claim for relief, based on a breach of implied warranty, gives rise to no right of contribution on the part of third party plaintiff Edgerton because it sounds in contract and not in tort. Since plaintiffs' entire first claim for relief is based on contract, there can be no right of contribution under G.S. Chap. 1B, as to that claim.

[4] Plaintiffs' second claim for relief realleges the acts and omissions by defendants recited above and asserts the following:

> The acts of the defendants described herein were done willfully, maliciously, outrageously, deliberately and purposely with the intention to inflict mental distress upon plaintiffs and/or were done in reckless disregard of the probability of causing plaintiffs mental distress . . . .

These allegations form the basis of a claim for intentional infliction of mental distress, a tort. However, G.S. 1B-1(c) states:

> There is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death.

The language of the statute clearly excludes the possibility of contribution on any claim by plaintiffs for intentional infliction of mental distress.

Edgerton argues, however, that the language concerning acts "done in reckless disregard of the probability of causing plaintiffs mental distress" forms the basis for an unintentional tort, and does not fall within the exclusion of G.S. 1B-1(c). We disagree.

Our Supreme Court first recognized the tort of intentional infliction of mental distress in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). In reaffirming the *Stanback* decision in *Dickens v. Puryear*, then Justice, now Chief Justice, Exum, writing for the Court, stated:

> This tort [the intentional infliction of mental distress] . . . consists of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another. *The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress.*

Dickens, 302 N.C. at 452, 276 S.E. 2d at 335 (emphasis added). Based on this language in *Puryear* and on the statutory language of G.S. 1B-1(c), Edgerton is not entitled to contribution from any potential joint tort-feasors under G.S. Chapter 1B, for his liability on the tort of intentional infliction of emotional distress, whether the claim alleges that he intended to cause the emotional distress or that his actions were done in reckless disregard as to the likelihood that such mental distress would result.

In sum, third party plaintiff Edgerton is not entitled to contribution from Funeral Home and Casket Co. based on plaintiffs' first claim for relief because that claim is based in contract and G.S. 1B-1(a) clearly applies only to joint liability in tort. Similarly, third party plaintiff Edgerton is not entitled to contribution based on plaintiffs' second claim because that claim is based on the tort of intentional infliction of mental distress and G.S. 1B-1(c) clearly excludes contribution where the tort is intentional. Therefore, the

trial court's order granting the motions to dismiss the third party complaint are

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

MARY M. HARDY, INDIVIDUALLY; MARY M. HARDY, AS EXECUTRIX OF THE ESTATE OF PAUL HARRISON HARDY; AND THE ESTATE OF PAUL HARRISON HARDY v. INTEGON LIFE INSURANCE CORPORATION

No. 8617SC969

(Filed 5 May 1987)

1. **Insurance § 18.1— life insurance—misrepresentation as to health—written answers—materiality**

An insurer may avoid its obligations under an insurance contract by showing that the insured made false representations in his application and that the misrepresentations were material. Misrepresentations in the form of written answers to written questions relating to health are deemed material as a matter of law.

2. **Insurance § 18.1— life insurance—written misrepresentation as to health—instruction on materiality**

Where insured's answers were written for him on a life insurance application by a bank officer and insured looked over and signed the application, the trial court should have instructed the jury that if it found that insured falsely answered the application by failing to advise defendant insurer of a second operation for a squamous cell carcinoma, it should also find that such misrepresentation was material.

3. **Insurance § 19— life insurance—material misrepresentation—waiver of right to avoid policy—jury question**

In an action on a life insurance policy wherein the evidence tended to show that the insured made a material misrepresentation in the application by failing to advise defendant insurer that he had had a second operation for a squamous cell carcinoma, that defendant insurer learned from the insured's personal physician about the first operation for non-metastatic squamous cell carcinoma and about the large size of the lesion, and that the insurer knew that the insured did not reveal this condition in the application, a jury question was presented as to whether defendant insurer waived its right to avoid the policy for the misrepresentation by failing to make further inquiry by which it could have discovered the second operation and the pathologist's diagnosis of metastasis after such operation.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 6 May 1986 in SURRY County Superior Court. Heard in the Court of Appeals 2 March 1987.

Plaintiff filed this action on 10 April 1985, seeking payment for breach of contract by Integon of a life insurance policy on Paul Harrison Hardy, plaintiff's deceased husband. Plaintiff alleged also that defendant had tortiously breached the contract and sought recovery of general damages. In the alternative, plaintiff requested a return of payments actually made on the policy plus interest. Plaintiff also prayed for attorney's fees. Defendant denied any breach of contract, and counterclaimed for rescission, asserting that misrepresentations by plaintiff's decedent constituted a bar against recovery for any alleged breach of contract. In response to defendant's counterclaim, plaintiff denied allegations that plaintiff's decedent had misrepresented his health and, as a further defense, plaintiff asserted that any failure to disclose was harmless in view of defendant's constructive knowledge of Mr. Hardy's condition. The case went to trial before a jury.

Evidence at trial tended to show the following events and circumstances. In March of 1981, Mr. Hardy underwent an operation for removal of a silver-dollar sized lesion of the scalp. The area removed was so large that skin grafting was required. Dr. Ben Lawrence performed the procedure, and Dr. Smith, a pathologist, diagnosed the lesion as a "moderately differentiated squamous cell carcinoma." On 15 March 1983, Mr. Hardy's physician at N.C. Baptist Hospital reported Mr. Hardy to be free of cancer in his head and neck region. Dr. Lawrence testified that he probably advised Mr. Hardy after the March surgery that he had been successfully treated, although he would want to check him every 6 months or so. On or about 19 October 1981, during a follow-up visit, Dr. Lawrence found a small amount of tissue which required removal. In contrast to the original procedure, this second operation took place on an outpatient basis in the emergency room of the local hospital. The tissue was sent to Dr. Smith for diagnosis. In his pathology report, Dr. Smith wrote that the lesion was a "moderately differentiated squamous cell carcinoma, morphologically consistent with metastatic squamous cell carcinoma, skin and subcutaneous tissue of the lower scalp area."

Dr. Lawrence, however, disagreed with Dr. Smith's diagnosis. In his own opinion, there was no indication of metastasis, and he

felt that Dr. Smith's diagnosis was based primarily on his knowledge that there had been a previous growth. Dr. Lawrence did not treat Mr. Hardy as if he had metastatic carcinoma, and he never told Mr. Hardy of the pathology report. Nor did he ever inform Mr. Hardy that there was any cause for alarm.

On 25 November 1981, Mr. Hardy applied for a loan at the Bank of Pilot Mountain. A farmer with a ninth-grade education, Mr. Hardy was securing financing for his business for the next year. At the same time, he took out a life insurance policy. The bank officer, Mr. Badgett, took down his answers to the questions on the application and Mr. Hardy signed it. The answers to questions 1, 2, 3, 4 & 6 are as follows:

1. Question: Name of personal physician?
   Answer: Dr. Grymes—Mt. Airy.
   Question: Date last consulted?
   Answer: February—1981.
   Question: Reason?
   Answer: Checkup.

2. Question: Have you ever had high blood pressure, a cancer, a tumor, diabetes, back or spinal disorder, an ulcer, any nervous disorder, any disease or disorder of the kidneys, stomach, heart, lungs, intestines, or liver? (If "yes," circle applicable ones)
   Answer: No.

3. Question: Have you consulted any other physician for any other illness or disorder in the last five years?
   Answer: Yes.

4. Question: Do you know of any impairment, disease, or disorder now existing in your health or physical condition?
   Answer: No.

6. Question: If the answer to Questions 2, 3, or 4, is "yes," give particulars and include any hospital ad-

mission and/or name and address of any attending physician.

Answer: Mole Removed from Head March 1981—No Problems.

After Integon received the application, an Integon employee conducted a follow-up telephone interview. The employee, Kimberly H. Webber, spoke with Mrs. Hardy. Plaintiff and defendant differ on the substance of this conversation. Integon asserts that Mrs. Hardy stated that her husband had undergone no other operations than that in March 1981; Mrs. Hardy contends that she told Ms. Webber about the October 1981 procedure.

Another Integon employee, Dr. Burkhardt, wrote Dr. Grymes, Mr. Hardy's personal physician, and requested a summary and diagnosis of the March 1981 procedure. Dr. Grymes sent his office notes from May 1979 to March 1981; he also included Dr. Lawrence's notes of the March procedure and Dr. Smith's pathology report on the March tissue sample. These specified that the diagnosis was non-metastatic squamous-cell carcinoma. However, no reports of the October procedure were enclosed.

The carcinoma did in fact metastasize, and Mr. Hardy died on 22 October 1983. Only then, when a claim was filed, did Integon learn that Mr. Hardy's cancer had metastasized. Integon requested Dr. Lawrence's records and those of the hospital; after reviewing these records, Integon rescinded the policy and refunded the premiums.

The court submitted the following issues to the jury:

ISSUE 1:

Did Paul Harrison Hardy falsely answer the application by failing to advise the defendant of the October 26, 1981 operation?

ISSUE 2:

If so, was it material?

ISSUE 3:

Is Integon Life Insurance Corporation estopped from denying coverage?

The jury returned a verdict for plaintiff, answering the first issue "yes" but the second "no," not reaching the third issue. Judgment was entered, and defendant appealed.

Max D. Ballinger for plaintiff-appellee.

Frazier, Frazier and Mahler, by Harold C. Mahler and James D. McKinney, for defendant-appellant.

WELLS, Judge.

Defendant assigns error to the court's submission to the jury of the issue of materiality. We agree in principle.

[1, 2] It is settled in this State that an insurer may avoid his obligations under an insurance contract by showing that the insured made false representations in his application and that the misrepresentations were material. *Tolbert v. Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915 (1952); *Pittman v. First Protection Life Ins. Co.*, 72 N.C. App. 428, 325 S.E. 2d 287, *cert. denied*, 313 N.C. 509, 329 S.E. 2d 393 (1985). However, misrepresentations in the form of written answers to written questions relating to health are deemed material as a matter of law. *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962); *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 119 S.E. 2d 614 (1961); *Eubanks v. Insurance Co.*, 44 N.C. App. 224, 261 S.E. 2d 28 (1979), *rev. denied*, 299 N.C. 735, 267 S.E. 2d 661 (1980). Whether the misrepresentations were made intentionally is not material. *See Huffman v. State Capitol Life Ins. Co.*, 8 N.C. App. 186, 174 S.E. 2d 17 (1970). Here, the questions and answers were written; although Mr. Hardy did not himself fill out the application, he did look over it and sign it. Under the facts of this case, while it was appropriate to submit the issue of materiality, the trial court should have instructed the jury that if they answered the first issue "yes," they should also answer the second issue "yes." *Sims, supra; Eubanks, supra.* However, that error does not, as defendant suggests in its second assignment of error, mandate reversal of the judgment for plaintiff. As indicated in our discussion *infra*, under the facts of this case, the issue of waiver and estoppel still remains.

[3] Pursuant to Rule 10(d) of the N.C. Rules of Appellate Procedure, plaintiff cross-assigns error as alternative grounds for support of the judgment that, even if the court did err in submit-

ting the issue of materiality to the jury, such error was not prejudicial to defendant since Integon had actual or constructive knowledge of the October 1981 procedure and that defendant therefore waived the condition in its application or was estopped to deny coverage. Plaintiff submits that the evidence is undisputed that:

1. Integon knew that Doctor Lawrence, not Doctor Grymes, had performed the surgical procedure disclosed on the application;

2. Integon had before it Plaintiff's Exhibit 5 (App. pp. 118-127) which disclosed, among other findings:

a. The diagnosis of the "mole" removed in March, 1981, was "Squamous cell Carcinoma."

b. The "mole" and tissue removed was silver dollar size—too large to close—requiring skin grafting.

c. The "mole" or "lesion" extended to the margins of the tissue removed indicating incomplete excision of the tumor.

d. The "mole" or "lesion" was located on the scalp in an area where such tumors usually do not occur, thus indicating heightened probability of continuing problems.

e. The surgeon was of the opinion that Mr. Hardy would have "to be watched thoroughly."

f. That Mr. Hardy was to be followed by the surgeon for suture removal and *after care.*

Plaintiff also points out that Integon knew that Mr. Hardy had wrongly answered "no" to the question of whether he had ever had cancer; the reports received from Dr. Grymes clearly indicated that insured had squamous cell carcinoma. Because Integon—even with knowledge of these facts—never contacted Dr. Lawrence or the hospital until after Mr. Hardy's death, plaintiff contends that defendant has waived, as a matter of law, its right to avoid the contract. We disagree.

Although an insurance company may avoid liability where there has been a material misrepresentation on the part of insured, it cannot avoid liability on a policy on the basis of facts

known to it at the inception of the policy. *Cox v. Assurance Society*, 209 N.C. 778, 185 S.E. 12 (1936). Absent fraud or collusion, knowledge acquired by an agent while acting within the scope of his authority is imputed to the principal. *Thomas-Yelverton Co. v. State Cap. Life Ins. Co.*, 238 N.C. 278, 77 S.E. 2d 692 (1953).

In *Gouldin v. Ins. Co.*, 248 N.C. 161, 102 S.E. 2d 846 (1958), our Supreme Court further defined the law of waiver and estoppel as it applies to insurance contracts as follows:

> "In general, any act, declaration, or course of dealing by the insurer, with knowledge of the facts constituting a cause of forfeiture . . . which recognizes and treats the policy as still in force and leads the person insured to regard himself as still protected thereby will amount to a waiver of the forfeiture . . . and will estop the insurer from insisting on the forfeiture or setting up the same as a defense when sued for a subsequent loss. Such waiver may be inferred from acts as well as from words. Acts of an insurance company in recognizing a policy as a valid and subsisting contract, and inducing the insured to act in that belief and incur trouble or expense, is a waiver of the condition under which the forfeiture arose." 29 Am. Jur. Insurance, Sec. 832.

Id. In that case, the insured obtained policies of health and accident insurance without disclosing previous hospitalizations for barbiturate intoxication. After the policy was issued, insured was hospitalized again for reasons including barbiturate intoxication. Insured filed a claim, and in answer to the question whether he had had this disease before, stated, "Yes . . . 1952(?). Check claim records with your company." This claim was processed and paid. Plaintiff was later severely injured by a self-inflicted shotgun wound, and plaintiff's guardian filed a claim. The insurance company sought to avoid payment, first on grounds that plaintiff had attempted suicide and later on the basis that plaintiff had misrepresented the state of his health in his original application. Plaintiff brought suit, and the matter went to trial. The jury reached a verdict for defendant, finding that the shotgun wound was accidental, but that plaintiff misrepresented material facts in his application and that defendant did not waive its right of forfeiture.

On appeal, plaintiff argued the court should have allowed his motion for a peremptory instruction on the issue of waiver be-

cause the evidence showed as a matter of law that the company had knowledge of the misrepresentations before the gunshot incident took place and indeed had paid a claim, thus treating the policies as still in effect. Defendant contended that the answers were misleading and were not reasonably calculated to put defendant on notice as to the former hospitalization.

In its discussion of the notice aspects of waiver, the Court adopted the following rule:

> "Knowledge of facts which the insurer has or should have had constitutes notice of whatever an inquiry would have disclosed and is binding on the insurer. The rule applies to insurance companies that whatever puts a person on inquiry amounts in law to 'notice' of such facts as an inquiry pursued with ordinary diligence and understanding would have disclosed." 16 Appleman, Insurance Law and Practice, p. 817.

Id. The court did not, however, find plaintiff's argument persuasive:

> Upon consideration of the foregoing arguments of the parties, we are constrained to the view that the relevant evidence, if believed, is sufficient to justify, though not to require, an affirmative answer, favorable to the plaintiff, on the issue of waiver. This being so, we conclude that the presiding Judge properly denied the plaintiff's motion for a peremptory instruction and submitted the issue of waiver as being controlled by open issues of fact to be determined by the jury. The rule is that where the evidence bearing upon an issue is susceptible of diverse inferences, it is improper for the presiding judge to give the jury a peremptory instruction. (Citations omitted.)

Id. We now apply these principles to the case at bar. Defendant knew that Mr. Hardy had squamous cell carcinoma and that it was a very large lesion; defendant also knew that Mr. Hardy did not reveal that condition on his application. These facts "constitute notice of whatever an inquiry . . . pursued with ordinary diligence and understanding would have disclosed." However, whether defendant should have further pursued its inquiry and discovered the second operation and the pathologist's diagnosis of

metastasis, or whether the efforts it made constituted a reasonable inquiry, is a question for the jury.

Plaintiff's remaining "cross-assignments" of error do not present alternative bases in support of the judgment, but assert errors in the trial not properly brought forward under Rule 10(d) and we therefore do not address them.

For the reasons stated above, there must be a

New trial.

Chief Judge HEDRICK and Judge BECTON concur.

STATE OF NORTH CAROLINA v. MICHAEL TODD BROWN

No. 8615SC846

(Filed 5 May 1987)

1. **Receiving Stolen Goods § 6— possession of stolen property to sell—instruction on dishonest purpose**

In a prosecution for possession of stolen property, the trial court's instruction that possessing stolen chain saws for the purpose of selling them and keeping the money would be a dishonest purpose did not erroneously create a mandatory conclusive presumption and relieve the State of the burden of proving the element of the offense that defendant acted with a dishonest purpose.

2. **Indictment and Warrant § 3; Receiving Stolen Goods § 2— possession of stolen goods—theft in another county—indictment in county of theft**

The Orange County Grand Jury had authority under N.C.G.S. § 14-71.1 to indict defendant for possession of stolen property where the theft occurred in Orange County although defendant was seen in possession of the stolen property only in Alamance County. Furthermore, under N.C.G.S. § 14-71.1 the place for returning the indictment was a matter of venue, and defendant's objection to venue was waived by his failure to make a pretrial motion.

3. **Receiving Stolen Goods § 5.1— possession of stolen property—sufficient evidence**

The State's evidence was sufficient to support defendant's conviction of felonious possession of stolen chain saws where it tended to show that three saws seen in defendant's possession had been stolen from the back of a pickup truck; the three stolen saws had a value of $1,500.00 and defendant was prepared to sell two of them for $125.00; and defendant was willing to admit that he was selling the saws only after he recognized the party with whom he was dealing and commented, "He's all right."

State v. Brown

APPEAL by defendant from *Battle, Judge.* Judgment entered 27 March 1986 in Superior Court, ORANGE County. Heard in the Court of Appeals 9 February 1987.

Defendant was indicted in Orange County for felonious larceny and felonious possession of stolen property. At trial, the evidence tended to show the following. On 23 October 1985, three large, red and black, "Sachdomar," chain saws were stolen from John Kenon, who had used them in his logging business. One of the saws had an "A" scratched on it to identify the particular employee to whom Mr. Kenon had assigned the saw. Three days later, Darrien Kenon, one of John Kenon's sons, and Luther Brown, who is apparently unrelated to defendant, stopped at a convenience store in Alamance County where defendant, who was with two others, was parked. Kenon and Brown approached defendant and asked if he was selling any saws. At first, defendant said that he was not. Then, recognizing Brown, defendant stated "[h]e's all right," opened the trunk of the car, showed Kenon and Brown two chain saws, and offered to sell them for $125.00. Both described the saws as large, red and black, "Sachdomar," chain saws, one of which had "A" scratched on it. Darrien Kenon testified that he had used both saws numerous times and positively identified them as the saws which were stolen three days earlier.

At the close of the State's evidence, defendant moved for the dismissal of both charges on the grounds of insufficient evidence and, alternatively, to dismiss on the charge of felonious possession of stolen property for improper venue. The trial court denied defendant's motions and asked the State to elect offenses. After the State elected to pursue the charge of felonious possession, the defendant rested without offering any evidence and renewed his motions. The trial court again denied defendant's motions and instructed the jury on the elements of felonious possession of stolen property. The jury returned a verdict of guilty.

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

Appellate Defender, Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for the defendant-appellant.

EAGLES, Judge.

I

[1] The elements of felonious possession of stolen property are (1) possession of personal property, (2) having a value of over $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property was stolen, and (5) the possessor acting with a dishonest purpose. *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981); G.S. 14-71.1. On the last element of the offense, the trial court instructed as follows:

> And, fifth, that the defendant possessed these two chain saws with a dishonest purpose. Possession for the purpose of selling the saws and keeping the money would be a dishonest purpose.

Defendant contends that this amounts to a peremptory instruction on an essential element of the offense and is, therefore, violative of his constitutional rights to due process and trial by jury. We disagree.

It is well established that the State must prove beyond a reasonable doubt the existence of every essential element of the charged offense. *Patterson v. New York*, 432 U.S. 197, 53 L.Ed. 2d 28, 97 S.Ct. 2319 (1977); *State v. White*, 300 N.C. 494, 268 S.E. 2d 481, *reh'g denied*, 301 N.C. 107, 273 S.E. 2d 443 (1980). Therefore, the trial court may not give an instruction which creates a mandatory, conclusive presumption, thereby relieving the State of its burden of persuasion, on any element of the offense. *Id.; see also Francis v. Franklin*, 471 U.S. 307, 85 L.Ed. 2d 344, 105 S.Ct. 1965 (1985); *State v. Torain*, 316 N.C. 111, 340 S.E. 2d 465, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 77, 107 S.Ct. 133 (1986). The instruction complained of here, however, does not violate those principles.

In *State v. Torain, supra*, our Supreme Court held that the trial court, instructing on the elements of first degree rape where the defendant was charged with having employed or displayed "a dangerous or deadly weapon," did not err in instructing the jury that the utility knife used by the defendant was a dangerous or deadly weapon. Reaffirming prior cases, the court held that, where the alleged weapon and the manner of its use were of such a character as to admit to but one conclusion, the question of whether it was dangerous or deadly was one of law, not of fact. The court said that this did not relieve the State of its burden of persuasion on that element of the offense because, in such a case,

the nature of the weapon was not an element of the offense. Instead, the court held that the question of fact within the element of the offense was whether the defendant employed or displayed the weapon found to be dangerous or deadly as a matter of law. *Id.* at 122, 340 S.E. 2d at 471-472.

Similarly here, instructing that possessing the stolen property for the purpose of selling it and keeping the proceeds would be a dishonest purpose did not relieve the State of its burden of showing that defendant acted with a dishonest purpose. We agree with defendant that whether someone is acting with a dishonest purpose is a question of intent. *See State v. Parker*, 316 N.C. 295, 341 S.E. 2d 555 (1986). Consequently, the question is for the jury, not the court. *See State v. Ray*, 12 N.C. App. 646, 184 S.E. 2d 391 (1971), *cert. denied*, 281 N.C. 316, 188 S.E. 2d 900 (1972). We disagree, however, with defendant's characterization of the trial court's instruction as a peremptory instruction on the question of his intent. The effect of the trial court's instruction was to charge the jury that it was their duty to find that defendant acted with a dishonest purpose if, knowing or having reasonable grounds to believe the property was stolen, he possessed the saws with the intent to sell them and keep the proceeds. This instruction served only to define, not decide, the question of defendant's intent. Whether selling stolen property and keeping the proceeds is a dishonest purpose is a question of law. The question of fact within that element of the offense is whether defendant possessed the stolen property with the intent to sell it and keep the proceeds. The court's instruction properly left that question for the jury.

II

[2] Defendant next contends that we should arrest his conviction because the Orange County grand jury had no jurisdiction to indict him. All the evidence showed that, while the theft occurred in Orange County, defendant was seen in possession of the stolen property only in Alamance County. Citing the common law rule that only the county where the offense occurred had jurisdiction to indict, defendant argues that only Alamance County had jurisdiction. We disagree.

While defendant correctly states the common law rule, *see State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984), G.S. 14-71.1 provides differently. It states, in pertinent part, that a defendant charged with felonious possession of stolen property:

> May be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such possessor may be dealt with, indicted, tried and punished in the county where he actually possessed such chattel, money, security, or other thing; G.S. 14-71.1.

The statute was enacted to protect the state in cases when, at trial, it could not establish the elements of larceny or breaking and entering but could prove the defendant's possession of the stolen property. *State v. Perry,* 305 N.C. 225, 287 S.E. 2d 810 (1982). Therefore, while the legislature did not intend to convict and punish a defendant for both the larceny and possession of the stolen property, it did intend to allow indictment and trial on both charges. *Id.* G.S. 14-71.1 thus confers jurisdiction and venue on the county where defendant possessed the property or where it was stolen. *See State v. Gardner,* 84 N.C. App. 616, 353 S.E. 2d 662 (1987) (interpreting the similar provision contained in G.S. 14-71). Defendant was properly indicted and tried in Orange County.

Alternatively, we note that the enactment of G.S. 15A-631 has changed the common law rule regarding a county's jurisdiction to indict. G.S. 15A-631 states that "the place for returning a presentment or indictment is a matter of venue, not jurisdiction." Defendant cites *State v. Paige,* 316 N.C. 630, 343 S.E. 2d 848 (1986) and argues that G.S. 15A-631 does not apply where there is a variance between the county of indictment and the county which the proof at trial shows is the actual place of the offense. In *Paige,* the court applied the common law rule and held that a variance between the indictment and the proof at trial regarding the county of the offense rendered the indicting county without jurisdiction. Defendant's reliance on *Paige* is misplaced. Although *Paige* was decided after the effective date of G.S. 15A-631, its holding was specifically predicated on the fact that the indictment at issue was returned before that date. *See also State v. Flowers,* 318 N.C. 208, 347 S.E. 2d 773 (1986). *Paige* is, therefore, inapplicable.

Therefore, even if G.S. 14-71.1 were not dispositive here, under G.S. 15A-631 the variance was a problem of venue. Questions of venue however are waived by the failure to make a pretrial motion, even if the problem of venue arises from a variance

between the indictment and the proof at trial. *See State v. Paige, supra; State v. Haywood,* 297 N.C. 686, 256 S.E. 2d 715 (1979). *But see United States v. Melia,* 741 F. 2d 70 (4th Cir. 1984), *cert. denied,* 471 U.S. 1135, 86 L.Ed. 2d 693, 105 S.Ct. 2674 (1985) (applying federal law and stating that a pretrial motion for change of venue need be made only where defect is apparent on the face of the indictment).

Moreover, the variance asserted here does not make the indictment defective on due process grounds. Not every variance between an indictment and the proof at trial is fatal. *State v. Furr,* 292 N.C. 711, 235 S.E. 2d 193, *cert. denied,* 434 U.S. 924, 54 L.Ed. 2d 281, 98 S.Ct. 402 (1977). A variance regarding the place of the crime is not material where it is not descriptive of the offense, is not required to be proven as laid to show the court's jurisdiction, and does not mislead the defendant or expose him to double jeopardy. *State v. Martin,* 270 N.C. 286, 154 S.E. 2d 96 (1967). Therefore, where a defendant is charged with felonious possession of stolen property, is indicted in one county, and proof of the offense indicates that it occurred in another county, the variance is not material. *State v. Currie,* 47 N.C. App. 446, 267 S.E. 2d 390, *disc. review denied,* 301 N.C. 237, 283 S.E. 2d 134 (1980), *overruled on other grounds* in *State v. Randolph, supra.*

III

[3] Finally, defendant contends that the trial court erred in denying his motion to dismiss since the evidence was insufficient to show that the saws were stolen or that he knew or had reasonable grounds to know that they were stolen. We disagree. Upon a motion to dismiss, the trial court must decide, viewing the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference which might be drawn from the evidence, whether there is substantial evidence of each element of the offense. *State v. Brown,* 310 N.C. 563, 313 S.E. 2d 585 (1984). An examination of the record reveals substantial evidence on both elements.

The owner of the saws testified that he left the saws in the back of his pickup truck, which he parked in a shed at his mother's house; that when he returned the saws were missing; and that he had not authorized anyone to take them. Moreover, three witnesses testified that defendant was in possession of chain saws of the same description as the ones stolen. One of those witnesses established that he was familiar with the stolen

saws and positively identified the ones in defendant's possession as the ones stolen. That evidence is sufficient to establish that the saws seen in defendant's possession were stolen.

Whether the defendant knew or had reasonable grounds to believe that the saws were stolen must necessarily be proved through inferences drawn from the evidence. *State v. Allen*, 45 N.C. App. 417, 263 S.E. 2d 630 (1980). The evidence showed that the three stolen saws had an approximate value of $1,500.00 and that defendant was prepared to sell two of them for $125.00. The fact that a defendant is willing to sell property for a fraction of its value is sufficient to give rise to an inference that he knew, or had reasonable grounds to believe, that the property was stolen. *State v. Haywood, supra.* In addition, the evidence showed that defendant was willing to admit that he was selling the saws only after he recognized who he was dealing with and commented that "[h]e's all right." This is sufficient to enable the question of defendant's knowledge that the property was stolen to go to the jury.

No error.

Judges WELLS and GREENE concur.

JOHN P. LAWTON, II, EMPLOYEE/APPELLANT v. THE COUNTY OF DURHAM, EMPLOYER-APPELLEE (SELF-INSURED)

No. 8610IC1045

(Filed 5 May 1987)

1. **Master and Servant § 90— workers' compensation—notice to employer of accident**

A workers' compensation proceeding must be remanded for additional findings where the Commission made no findings as to whether plaintiff's failure immediately to realize the nature and seriousness of his injury constituted a reasonable excuse for failing to give notice of the accident to his employer within 30 days.

2. **Master and Servant § 90— workers' compensation—time for giving notice to employer of accident**

There was no merit to plaintiff's contention in a workers' compensation proceeding that the 30-day time period of N.C.G.S. § 97-22 requiring notice to

the employer of an accident does not begin to run until the employee realizes the nature, seriousness, and compensable character of the injury.

APPEAL by plaintiff-employee from the opinion and award of the North Carolina Industrial Commission, filed 5 June 1986. Heard in the Court of Appeals 3 March 1987.

This is a workers' compensation case in which plaintiff was denied benefits on the grounds that he failed to timely notify his employer of the accident. The evidence before the Industrial Commission showed that defendant employed plaintiff as a deputy sheriff. On 5 June 1984, while participating in an "agility course" for the county's sheriff's department, plaintiff felt a weakness and a burning sensation in his right knee. Plaintiff told his supervisor that his knee prevented him from continuing the course and he was excused from further participation. Plaintiff returned to work the following day, despite pain in the knee. On 31 August 1984 plaintiff first sought medical treatment for the injury. His physician, Dr. Richard F. Bruch, diagnosed the injury as a ruptured tendon. Dr. Bruch prescribed exercise for the knee and told plaintiff to return for further evaluation to discuss possible surgery. Previously plaintiff had had surgery on both knees, the left one in 1970 and the right one in 1972. Defendant was aware of plaintiff's preexisting knee problems.

In late October 1984, while plaintiff was being treated for a minor, unrelated accident, defendant told him that his knee injury was not compensable. On 6 November 1984, at defendant's request, plaintiff submitted a written report of his 5 June 1984 accident. Defendant denied his claim for workers' compensation benefits as untimely. During this time, plaintiff had continued to see Dr. Bruch, who by late October had recommended surgery. On 6 December 1984, plaintiff underwent surgery on the knee. He did not return to work until 17 June 1985.

The Industrial Commission found that plaintiff's knee injury was caused by an accident arising out of and in the course of his employment. The Commission also found, however, that plaintiff did not give his employer written notice of the accident within 30 days, that plaintiff did not have a reasonable excuse for failing to do so, and that defendant did not have actual notice of the accident. Therefore, the Commission concluded that plaintiff's claim was barred by G.S. 97-22. Claimant appeals.

Archie L. Smith, III, and William J. Riley, for the plaintiff-appellant.

Durham County Attorney Russell Odom, by Assistant County Attorney James W. Swindell, for the defendant-appellee.

EAGLES, Judge.

By failing to comply with the Rules of Appellate Procedure, plaintiff has subjected his appeal to dismissal. Provisions of Rules 9 and 10 require that exceptions be noted in the record immediately following the particular judicial action complained of, that those exceptions again be set out at the end of the record, and that they be made the subject of stated assignment(s) of error. Rule 28(b)(5) requires that the appropriate exceptions and assignments of error be referred to after each question submitted in the brief. Plaintiff failed to note any exceptions or make any assignments of error. While failure to follow the Rules of Appellate Procedure subjects an appeal to dismissal, *Wiseman v. Wiseman*, 68 N.C. App. 252, 314 S.E. 2d 566 (1984), in our discretion pursuant to Rule 2, we will, nevertheless, address the merits of plaintiff's appeal.

[1] G.S. 97-22 provides that an employee must give written notice to his employer "immediately on the occurrence of an accident, or as soon thereafter as practicable." The statute further provides that:

> [N]o compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby. G.S. 97-22.

Plaintiff argues that, because of his previous knee problems, he was unaware of the nature and seriousness of his 5 June 1984 injury. Consequently, plaintiff contends that the Commission should have found he had a reasonable excuse for failing to give notice within 30 days of the accident. We find that the Commission's findings of fact are insufficient for us to determine the rights of the parties. Therefore, this case must be remanded.

On the question of whether plaintiff had a reasonable excuse for failing to timely give notice of his accident, the Commission made the following finding of fact:

> 6. Plaintiff did not give written notice of his injury within 30 days thereafter, nor did his employer have actual notice of the injury. He did not have reasonable excuse for failing to report the injury. It was not reasonable under the circumstances for him to assume that his supervising officers saw him sustain an injury.

It appears that the Commission's conclusion that plaintiff lacked reasonable excuse was based on its finding that it was not reasonable for plaintiff to believe that defendant already had notice of the accident. The Commission's order did not address plaintiff's contention that he had a reasonable excuse because he did not recognize the nature and seriousness of his injury until he was informed that he would have to undergo surgery.

While the Industrial Commission is not required to make specific findings of fact on every issue raised by the evidence, it is required to make findings on crucial facts upon which the right to compensation depends. *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977). Specific findings on crucial issues are necessary if the reviewing court is to ascertain whether the findings of fact are supported by competent evidence and whether the findings support the conclusion of law. *Barnes v. O'Berry Center*, 55 N.C. App. 244, 284 S.E. 2d 716 (1981). Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). While a belief that one's employer is already cognizant of the accident may serve as "reasonable excuse" under G.S. 97-22, *see Key v. Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E. 2d 254 (1977), it is not the only basis for establishing reasonable excuse. The question of whether an employee has shown reasonable excuse depends on the reasonableness of his conduct under the circumstances. Where the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows, he has established "reasonable excuse" as that term is used in G.S. 97-22. *See generally* 3 Larson, *The Law of*

Workmen's Compensation, Section 78.40 (1983). Though plaintiff testified that he did not immediately realize the nature and seriousness of his injury, the Commission made no findings whether, under the circumstances, that constituted a reasonable excuse. Accordingly, this case must be remanded for additional findings.

[2] Alternatively, plaintiff has argued that the 30 day time period in the statute does not begin to run until the employee realizes the nature, seriousness, and compensable character of the injury. A plain reading of the statute requires us to reject that argument. The statute is unambiguous in stating that "no compensation shall be payable unless such written notice is given within 30 days after the *occurrence of the accident . . .*" [emphasis added]. Moreover, in *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 46 S.E. 2d 109 (1948), our Supreme Court rejected that very argument in interpreting the analogous time provision for making a claim under G.S. 97-24.

By cross-appeal pursuant to Rules 10(d) and 28(c) of our Rules of Appellate Procedure, defendant has attempted to challenge the Commission's finding that plaintiff sustained an injury by accident. Although defendant too has failed to set out the applicable exception and make the required assignment of error, since we addressed the merits of plaintiff's appeal, we will address defendant's argument.

Defendant contends that the evidence is inadequate to support the Commission's finding. We disagree. An examination of the record reveals competent evidence to support a finding that plaintiff's injury was the result of an accident arising out of and in the course of his employment. Since findings of fact are conclusive on appeal when supported by competent evidence, *Taylor v. Cone Mills*, 306 N.C. 314, 293 S.E. 2d 189 (1982), defendant's argument is without merit.

Remanded.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. JOHN MARSHALL GILBERT

No. 8610SC1030

(Filed 5 May 1987)

Arrest and Bail § 7; Automobiles and Other Vehicles § 125— arrest for driving while impaired—failure to inform defendant of pretrial release rights—no prejudicial error

There was no prejudicial error in a prosecution for driving while impaired from the failure to inform defendant of his rights to pretrial release under either the general provisions of N.C.G.S. § 15A-511 or the more specific provisions of N.C.G.S. § 15A-534.2 where there was no irreparable prejudice to the preparation of defendant's case and no prejudice *per se* in that under N.C.G.S. § 20-138.1(a)(2) an alcohol concentration of .10 is sufficient on its face to convict defendant. Defendant was advised of his rights under N.C.G.S. § 20-16.2(a), and there is nothing in the record to show that defendant requested or was denied access to anyone.

APPEAL by the State from *Farmer, Judge.* Order entered 29 September 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 3 March 1987.

Defendant was arrested and charged, pursuant to G.S. 20-138.1(a), with driving while impaired. Defendant was advised of his rights under G.S. 20-16.2(a) and administered a breathalyzer test. The test showed defendant's alcohol concentration to be 0.20. Shortly after the test was administered, defendant's brother arrived with a bondsman to secure his release. Defendant was then brought before the magistrate where he saw, and apparently talked with, his brother. The magistrate did not set conditions for defendant's pretrial release even though defendant's brother and the bondsman specifically asked that he do so. In addition, the magistrate failed to advise defendant of his rights to pretrial release and, in effect, told defendant he would not release him for four hours. Defendant was held in jail, without bail, from approximately 5:00 p.m. until 9:45 p.m., when he was released on bond.

Although the record does not disclose the proceedings in district court, it appears undisputed that defendant made a motion to dismiss based on the magistrate's violation of his statutory and constitutional rights, that the motion was denied, that defendant was subsequently convicted of the offense, and that he appealed for trial *de novo* in Superior Court. In Superior Court, defendant again moved for dismissal of the charges. After a hear-

ing, the court found that the magistrate's actions in failing to inform defendant of his rights for pretrial release and in refusing to set conditions for pretrial release were arbitrary, capricious, and violative of defendant's statutory and constitutional rights. The court concluded that the only effective remedy for those violations was to dismiss the charges. From the trial court's order granting defendant's motion to dismiss, the State appeals.

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

Ransdell, Ransdell & Cline, by William G. Ransdell, Jr., for the defendant-appellee.

EAGLES, Judge.

The trial court made findings that several of defendant's statutory rights were violated by the magistrate. Those findings must be affirmed on appeal if there is evidence to support them. *See State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980) (findings of fact supported by competent evidence are binding on appeal). While an examination of the record reveals ample evidence to support the finding that defendant's statutory rights were violated, on this record we see no basis for the court's conclusion that defendant's constitutional rights were violated. In addition, we hold that the statutory violations found do not justify dismissal of the charges against defendant. Accordingly, we reverse.

G.S. 15A-511 requires the magistrate, at the defendant's initial appearance, to inform the defendant, among other things, of the general circumstances under which he may secure pretrial release pursuant to Article 26 of Chapter 15A. G.S. 15A-534.2 provides additional procedures for the magistrate when a defendant has been charged with driving while impaired. G.S. 15A-534.2(b) requires that the magistrate determine pretrial conditions for a defendant's release pursuant to G.S. 15A-534 as well as inform the defendant of the provisions of G.S. 15A-534.2(c). G.S. 15A-534.2(c) states that a defendant has the right to pretrial release under G.S. 15A-534 when (1) he is no longer impaired, or (2) a sober, responsible adult is willing and able to assume responsibility for him until he is no longer impaired.

The uncontradicted evidence here was that defendant was not informed of his rights to pretrial release under either the general provisions of G.S. 15A-511 or the more specific provisions of G.S. 15A-534.2. Although defendant also claims violations of other rights granted him by statute, since we have already found statutory violations, we need not address the question of other possible errors made by the magistrate. Having found evidence to support the trial court's findings that defendant's statutory rights were violated, we nevertheless reverse its dismissal of the charges.

While charges pending against an accused may be dismissed for violations of his statutory rights, dismissal is a drastic remedy which should be granted sparingly. *See State v. Curmon*, 295 N.C. 453, 245 S.E. 2d 503 (1978). Before a motion to dismiss should be granted, this court has held that it must appear that the statutory violation caused irreparable prejudice to the preparation of defendant's case. *State v. Knoll*, 84 N.C. App. 228, 352 S.E. 2d 463 (1987). Here, the defendant has failed to show prejudice. Instead, defendant contends that, under *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971), the statutory violations here must be held prejudicial per se. Based on *Knoll, supra*, we disagree.

In *Hill*, the court held that where a defendant is denied his constitutional and statutory rights to communicate with counsel and friends immediately after his arrest for driving while impaired, the trial court must presume that defendant's preparation of his case was prejudiced and dismiss the charges against him. The court stated that a denial of access to others effectively deprives the defendant of his only opportunity to gather exculpatory evidence of his impairment. In such a case, to hold that the defendant was not prejudiced would be "to assume both the infallibility and credibility of the State's witnesses as well as the certitude of their tests." *Id.* at 555, 178 S.E. 2d at 467.

In *State v. Knoll, supra*, this court recently held that the per se rule of prejudice enunciated in *Hill* was inapplicable where a defendant charged with driving while impaired under G.S. 20-138.1(a)(2) was not informed of his statutory rights to pretrial release. Under G.S. 20-138.1(a)(2), a defendant may be convicted if his alcohol concentration, "at any relevant time after the driving," is 0.10 or more. G.S. 20-138.1(a)(2). When the *Hill* case was decid-

ed, the statute provided that a 0.10 alcohol concentration merely created an inference of intoxication. Therefore, under the modified statute, "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" since an alcohol concentration of 0.10 is sufficient, on its face, to convict the defendant. *Id.* at 233, 352 S.E. 2d at 466.

We note that a different result will follow if the defendant is not advised of his rights under G.S. 20-16.2(a), including, under G.S. 20-16.2(a)(5), the right to have another alcohol concentration test performed by a qualified person of his own choosing. Where the defendant is not advised of those rights, the State's test is inadmissible in evidence. *State v. Knoll, supra; State v. Fuller*, 24 N.C. App. 38, 209 S.E. 2d 805 (1974); *State v. Shadding*, 17 N.C. App. 279, 194 S.E. 2d 55, *cert. denied*, 283 N.C. 108, 194 S.E. 2d 636 (1973). With the results of its chemical analysis test inadmissible, the State would then be unable to convict the defendant for driving with an alcohol concentration of 0.10. Instead, the State would be relegated to proving, as it was in *Hill*, that the defendant was otherwise under the influence of an impairing substance, pursuant to G.S. 20-138.1(a)(1). Here, however, the record shows that defendant was advised of his rights under G.S. 20-16.2(a). The fact that defendant did not avail himself of his right to a second, independent alcohol concentration test does not affect the admissibility of the State's test. *State v. Fuller, supra.*

Although the trial court found that defendant's constitutional rights were also violated, we see no basis for that finding. While the denial of access to friends, family, and counsel is a violation of the defendant's statutory and constitutional rights, *see, State v. Hill, supra*; G.S. 15A-501(5), there is nothing in the record to show that defendant requested, or was denied, access to anyone. In fact, defendant saw his brother shortly after he was administered the breathalyzer test. Moreover, constitutional violations of the kind complained of here must be shown to have caused irreparable prejudice to the defendant, *see, State v. Curmon, supra; State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978), and, as already noted, defendant has failed to show any prejudice.

Reversed.

Judges JOHNSON and ORR concur.

KNOTVILLE VOLUNTEER FIRE DEPARTMENT, INC. v. WILKES COUNTY AND BROADWAY FIRE DEPARTMENT, INCORPORATED

No. 8623DC1175

(Filed 5 May 1987)

Municipal Corporations § 5.1— fire district—disputed boundaries—referendum controlling

The trial court correctly concluded that a disputed area was part of the fire district served by plaintiff rather than defendant and that plaintiff was entitled to all of the tax receipts collected within the district, since the referendum which created the district contained a very exact and detailed description of the district, and the precise wording of the referendum controlled, not an accompanying map which excluded the disputed portion. Moreover, none of the procedures listed in N.C.G.S. § 69-25.11 for altering established boundaries were followed in this case; the court properly researched the applicable statutes and current case law by consulting with an expert in the field of fire protection law; and plaintiff was not prevented from bringing the action by the defense of laches because defendant made no showing that it was prejudiced by plaintiff's inaction.

APPEAL by defendant Broadway Fire Department from *Osborne, Judge.* Judgment entered 16 June 1986 and order entered 30 July 1986 in District Court, WILKES County. Heard in the Court of Appeals 1 April 1987.

Plaintiff instituted this action on 3 July 1985 seeking a declaratory judgment establishing the Yadkin River as the boundary line between the Knotville and Broadway Fire Districts in Wilkes County. Plaintiff also sought to establish that it is entitled to the receipt of special fire taxes for the area as stated in the notice of special election held on 26 July 1975.

The Knotville Fire District was formed in 1975 as the result of a petition filed with the Wilkes County Board of Elections requesting a special election for the formation of the district and the assessment of fire taxes therein. The boundaries, as set forth in the petition, included the segment now in dispute but the map

accompanying the petition did not. The election for the creation of the district passed by a vote of 93 to 2.

On 14 June 1977, the Knotville Fire Department, Inc. entered into a contract with the Wilkes County Board of Commissioners to provide adequate fire protection for all property located within the Knotville Fire District. In return, the fire department was to receive the fire taxes collected for that area. This contract provided for fire protection until the year 2008.

On 3 January 1978, the Wilkes County Board of Commissioners met and addressed matters concerning the description of the Knotville Fire District for the purpose of establishing the proper insurance rating. The Commission determined that for insurance rating purposes, the disputed area was not a part of the Knotville Fire District.

In 1985 Knotville registered a complaint with the Wilkes County Board of Commissioners claiming the disputed area to be a part of the Knotville Fire District. The commissioners referred the matter to the Wilkes County Fire Commission who resolved the dispute in favor of the Broadway Fire Department by holding the questioned area to be within that district. The Wilkes County Board of Commissioners accepted the recommendation of the fire commission. Knotville, thereafter, filed this action.

After all parties had filed separate motions for summary judgment, the trial court entered a declaratory judgment holding that the disputed segment came within the Knotville fire protection area, the boundaries having been established by proper notice and referendum as provided by law. The court also ordered all of the tax receipts collected within the Knotville Fire District to be paid to the Knotville Volunteer Fire Department, Inc. The court stated that before rendering judgment, it consulted with Ben F. Loeb, Jr. of the Institute of Government in Chapel Hill, an expert in the field of North Carolina fire protection law.

Wilkes County filed a motion for an order staying implementation of the declaratory judgment and a motion asking the court to reconsider its judgment.

The trial court denied the motions on 30 July 1986. From the judgment and order above, defendant Broadway Fire Department appeals.

Vannoy, Moore, Colvard, Triplett & Freeman, by Howard C. Colvard, Jr. and Anthony R. Triplett, for defendant appellant, Broadway Fire Department.

Ferree, Cunningham & Gray, by George G. Cunningham, for plaintiff appellee.

ARNOLD, Judge.

Defendant Broadway Fire Department, Inc. contends that the trial court erred in denying its motion for summary judgment and in granting plaintiff's motion for summary judgment. We disagree.

In reviewing an order of summary judgment it must be determined that there is no genuine issue of material fact and that judgment was appropriate as a matter of law. G.S. 1A-1, Rule 56; *Oliver v. Roberts*, 49 N.C. App. 311, 271 S.E. 2d 399 (1980), *cert. denied* (1981, N.C.), 276 S.E. 2d 283 (1981). In the present case, there were no material issues of fact in dispute. All that remained was a resolution of the law involved. We hold that the trial court correctly concluded that the disputed area was a part of the Knotville Fire District.

The referendum which created the Knotville Fire District contained a very exact and detailed description of the district. Also filed with the referendum was a map of Wilkes County on which the new district supposedly had been outlined, but this map excluded the disputed portion from the hand-drawn boundaries. It is, however, the precise wording of the referendum that controls, not the accompanying map.

After a district has been created, the only ways to alter the established boundaries are listed in G.S. 69-25.11. None of the statutory procedures were followed here. The area of the Knotville Fire District remains the same as when it was established by referendum in 1975.

Shortly after the Knotville Fire District was created, the Wilkes County Board of Commissioners entered into a contract with the Knotville Fire Department in which the latter was to provide fire protection for the Knotville Fire District until the year 2008. Defendant attempts to attack this contract, but G.S. 69-25.5 specifically allows county commissioners to contract with

an incorporated nonprofit volunteer fire department to provide fire protection. The contract between Wilkes County and the Knotville Fire Department is valid and binding. The trial court correctly concluded that the action of the Wilkes County Board of Commissioners on 18 June 1985 which authorized the Broadway Fire Department to serve the disputed area was a violation of the contract with the Knotville Fire Department. The trial court appropriately granted plaintiff's motion for summary judgment.

Defendant also contends that the trial court erred in considering a publication from the Institute of Government in Chapel Hill, entitled *Fire Protection Law in North Carolina*, and in consulting with its author Ben F. Loeb, Jr. before rendering judgment. We disagree.

The trial court was perfectly within its limits to research the applicable statutes and current case law by consulting with Mr. Loeb, an expert in the field of fire protection law. Defendant's contention is without merit.

We are also unpersuaded by defendant's final contention that the equitable defense of laches prevents plaintiff from bringing this action because the Knotville Fire Department waited approximately ten years from the creation of the district before filing to seek payment of the special fire taxes being levied and collected by Wilkes County in the disputed area.

The defense of laches may be available to a defendant if the plaintiff has delayed in bringing the action for an unreasonable amount of time and the defendant has been prejudiced thereby. *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E. 2d 527 (1978). Laches is available only when the defendant has been prejudiced by the delay. *McRorie v. Query*, 32 N.C. App. 311, 232 S.E. 2d 312, *disc. rev. denied*, 292 N.C. 641, 235 S.E. 2d 62 (1977).

Assuming *arguendo* that there was an unreasonable delay in the instant case, defendant has made no showing that it was in any way prejudiced by such inaction. In fact, the Broadway Fire Department has done nothing but benefit from any delay because it has been receiving the special fire taxes for the disputed area during that time. Defendant's contention is totally without merit.

Affirmed.

Judges MARTIN and GREENE concur.

JOANN BROWN, PLAINTIFF v. D. T. BROWN, JR., ORIGINAL DEFENDANT v. PAUL G. BROWN AND GLADYS BROWN, ADDITIONAL DEFENDANTS

No. 8624DC1217

(Filed 5 May 1987)

1. **Divorce and Alimony § 18.19— order relieving obligation to pay alimony pendente lite—substantial right affected—appealability**

The trial court's order relieving defendant of any further obligation to pay alimony pendente lite affected a "substantial right" of plaintiff and was therefore immediately appealable.

2. **Divorce and Alimony § 19.4— wife's adultery—no changed circumstances—modification of alimony pendente lite order improper**

The mere discovery of plaintiff's adultery was insufficient for a finding of changed circumstances necessary for a modification of an order of alimony pendente lite since the adultery occurred before the parties' separation and before plaintiff filed her complaint for divorce; defendant suspected plaintiff's adultery and alleged adultery as a bar to plaintiff's claim for alimony under N.C.G.S. § 50-16.6(a); and despite defendant's suspicions, he did not challenge plaintiff's claim for temporary alimony by proceeding to a hearing but instead entered into a consent judgment, agreeing to pay her $1,200 per month in alimony pendente lite.

APPEAL by plaintiff from *Lyerly, Judge.* Order entered 8 July 1986 in District Court, WATAUGA County. Heard in the Court of Appeals 8 April 1987.

Plaintiff and defendant were married on 30 July 1949. There were three children born of the marriage, all of whom had attained their majority as of the time this action was filed. On 13 January 1982, plaintiff filed a complaint seeking an absolute divorce, temporary and permanent alimony, equitable distribution and attorney's fees. In her complaint, plaintiff alleged adultery and indignities to the person as grounds for alimony. Defendant answered, denying the allegations of the complaint and pleading adultery on the part of plaintiff as a bar to alimony. Plaintiff denied the allegations of her adultery.

The parties entered into a consent judgment, filed 3 March 1982, awarding plaintiff $1,200 per month in alimony *pendente lite* and a writ of possession for the marital home. The consent judgment required plaintiff to deliver to defendant certain items of personal property remaining in the marital home and to dismiss criminal charges of harassment and assault she had filed against defendant.

Plaintiff was deposed by defendant's counsel on 21 March 1985. During that deposition, she was questioned about an alleged extramarital affair which defendant contended had occurred prior to the parties' separation. Plaintiff first denied the allegations then refused to answer any more questions, asserting her constitutional privilege against self-incrimination. Defendant's counsel then obtained a promise of immunity from prosecution for plaintiff with respect to any criminal charges of adultery or fornication which might arise out of any alleged extramarital affairs she may have had. On the strength of this guarantee of immunity, Judge Lyerly entered an order compelling plaintiff to answer questions related to her alleged adultery.

Plaintiff was again deposed on 28 March 1986, during which she admitted an adulterous relationship which had lasted some two and a half years, until the summer of 1983. Defendant, upon learning of this, immediately terminated the alimony *pendente lite* payments. Plaintiff filed a motion in the cause on 25 April 1986 seeking to have defendant held in contempt of court for failing to make the payments. Defendant countered by filing a motion under G.S. 50-16.9(a) to have the award of alimony *pendente lite* vacated, alleging that the discovery of his wife's extramarital affair constituted a change in circumstances justifying termination of the payments. Although not contained in the record before this Court, defendant purportedly also filed a motion for summary judgment on the still-pending issue of permanent alimony.

By order entered 8 July 1986, Judge Lyerly relieved defendant of any further obligation to pay alimony *pendente lite*, and continued the summary judgment hearing. Plaintiff appeals.

Petree Stockton and Robinson by Robert J. Lawing and Kevin L. Miller; and McElwee, McElwee, Cannon and Warden by William H. McElwee, III, for plaintiff-appellant.

Howell and Peterson, P.A., by Allen J. Peterson for defendant-appellee.

PARKER, Judge.

[1] At the outset, we must determine whether this appeal is premature and therefore should be dismissed. Defendant has filed a motion to dismiss the appeal with this Court, contending it is interlocutory as the order related only to temporary alimony and thus there has not been a final judgment entered below. While we agree with defendant that the appeal is interlocutory, the order entered below affects a "substantial right" within the meaning of G.S. 1-277(a) and G.S. 7A-27(d)(1) and is, therefore, immediately appealable.

Normally, appeals from orders granting a dependent spouse alimony *pendente lite* are not allowed, as such appeals are too often undertaken for the sole purpose of delaying compliance with the order. *See Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E. 2d 281 (1981). However, an appeal from an order denying temporary alimony to a dependent spouse does not raise the same concerns about unjust delays. *See 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). Similarly, this case involves an order terminating a dependent spouse's right to receive temporary alimony and an appeal from such an order by the dependent spouse does not implicate the policy underlying the *Stephenson* decision of preventing the supporting spouse from frustrating the temporary alimony order by pursuing fragmentary appeals.

In our view, the question of plaintiff's continued entitlement to the previously ordered alimony *pendente lite* until such time as her prayer for permanent alimony can be heard affects a "substantial right" of the dependent spouse. Therefore, the motion to dismiss the appeal as interlocutory is denied.

[2] Turning to the merits of the appeal, plaintiff contends that the mere discovery of her adultery is not sufficient for a finding of "changed circumstances" necessary for a modification of an or-

der of alimony *pendente lite* under G.S. 50-16.9(a). We agree. The record discloses that the adultery occurred before the parties' separation and before plaintiff filed her complaint for divorce. Moreover, the pleadings reveal that defendant suspected his wife's adultery and alleged adultery as a bar to plaintiff's claim for alimony under G.S. 50-16.6(a). Yet, despite his suspicions, defendant did not challenge his wife's claim for temporary alimony by proceeding to a hearing. Instead, he entered into a consent judgment, agreeing to pay her $1,200 a month in alimony *pendente lite*.

To modify an order of the court for alimony *pendente lite*, including one entered by consent, the party seeking the modification bears the burden of proving a material change in the circumstances justifying the modification. G.S. 50-16.9(a); *Britt v. Britt*, 49 N.C. App. 463, 271 S.E. 2d 921 (1980). The determination of changed circumstances must be made by comparing the circumstances existing at the time of the original order with the circumstances as they exist at the time the modification is sought. *Broughton v. Broughton*, 58 N.C. App. 778, 294 S.E. 2d 772, *disc. rev. denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982).

When dealing with modification of orders for permanent alimony, "the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E. 2d 840, 846 (1982). *See also Stallings v. Stallings*, 36 N.C. App. 643, 244 S.E. 2d 494, *disc. rev. denied*, 295 N.C. 648, 248 S.E. 2d 249 (1978). This limitation is imposed because the issues of the spouses' respective roles as dependent and supporting spouse, and the dependent spouse's entitlement to alimony are permanently adjudicated by the original order. *Rowe, supra.* An order for alimony *pendente lite* is, however, by nature a temporary order. Changes in circumstances, including sexual misconduct not condoned, which occur after the entry of an order for alimony *pendente lite* may, therefore, affect the dependent spouse's entitlement to support, as there has been no permanent adjudication of that entitlement.

In this case, plaintiff had committed adultery prior to the entry of the consent judgment. By entering into the consent judgment, defendant agreed that, as of that date, his wife was entitled

to alimony *pendente lite*. There was no evidence to support and the court did not find a material change in circumstances subsequent to the entry of the consent order.

Defendant failed to meet his burden of showing changed circumstances under G.S. 50-16.9(a). The order appealed from is vacated and the cause remanded for entry of an order requiring defendant to pay the accrued arrearages.

Vacated and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

IRA EARL JOYNER, EMPLOYEE, PLAINTIFF v. ROCKY MOUNT MILLS, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANTS

No. 8610IC1053

(Filed 5 May 1987)

Master and Servant § 96.1— workers' compensation—failure to order payment of medical expenses—scope of appeal

Where the record in a workers' compensation case indicated that the Deputy Commissioner never awarded medical expenses, that plaintiff did not appeal from the Deputy Commissioner's opinion and award, and that the sole issue on appeal before the full Commission was the propriety of the amounts awarded for loss of lung function and attorney fees, plaintiff failed properly to preserve his right to appeal the failure of the Deputy Commissioner to order payment of future medical expenses under N.C.G.S. § 97-59.

Judge ORR concurs in the result.

Judge JOHNSON joins in the concurring opinion.

APPEAL by plaintiff from the opinion and award of the Industrial Commission filed 22 April 1986. Heard in the Court of Appeals 10 March 1987.

On 30 July 1981 plaintiff filed a claim pursuant to G.S. 97-53 (13) for workers' compensation benefits for an occupationally related lung disease. Following a hearing and the taking of medical testimony the Deputy Commissioner found as fact that plaintiff suffered from severe chronic obstructive pulmonary

disease with probable byssinosis; that plaintiff's employment placed him at a greater risk of contracting the disease; that cigarette smoking contributed to plaintiff's lung disease but that the greater part of plaintiff's permanent lung impairment was caused by exposure to cotton dust during employment; that plaintiff would benefit from a continuing program of medical treatment for his lung disease; but that plaintiff is not, however, either partially or totally disabled from work as a result of his lung disease.

The Deputy Commissioner concluded as a matter of law that plaintiff suffers from a 25 to 30 percent permanent loss of function in both lungs, and awarded compensation for loss of lung function in the amount of $8,000.00 per lung. G.S. 97-31(24); *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E. 2d 47 (1985).

Defendants appealed to the full Commission assigning as error the Deputy Commissioner's award of $8,000.00 per lung as improper and inequitable. The plaintiff did not appeal. The Commission affirmed the opinion and award of the Deputy Commissioner but modified the amount payable for loss of lung function to $4,000.00 per lung and reduced the Deputy Commissioner's award of attorney fees from $4,000.00 to $2,000.00. From the order and award of the Commission, plaintiff appeals.

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

Maupin Taylor Ellis & Adams by Richard M. Lewis and Steven M. Rudisill for defendant-appellees.

EAGLES, Judge.

By his only assignment of error plaintiff contends that he is entitled to future medical expenses under G.S. 97-59 and that the full Commission erred in failing to address that issue in its opinion and award. The full Commission affirmed the opinion and award of the Deputy Commissioner, modifying it only to reduce by one-half the award for loss of function to each lung and attorney fees. The Deputy Commissioner found as fact that "plaintiff would benefit from a continuing program of medical treatment for his lung disease." However, the Deputy Commissioner made no award for medical expenses pursuant to G.S. 97-59 and plaintiff never appealed from that opinion and award. Only the defendants

appealed to the full Commission and the record before us states that the sole issue on appeal was whether the commissioner "erred in awarding plaintiff compensation in the amount of $8,000 per lung pursuant to G.S. 97-31(24)." Rule 701(c) of the Rules of the Industrial Commission states that:

> Particular grounds for appeal not set forth in the application for review shall be deemed to be abandoned and argument thereon shall not be heard before the Full Commission. *The non-appealing party is not required to file conditional assignments of error in order to preserve his rights for possible further appeals.* [Emphasis added.]

Plaintiff's assignment of error that the Deputy Commissioner erred in failing to award medical expenses under G.S. 97-59 is not a "conditional assignment of error." The record does not support plaintiff's assertion in his brief that the issue was properly brought to the attention of the full Commission. There is nothing in the record or in the full Commission's opinion and award about medical expenses pursuant to G.S. 97-59. Plaintiff has excepted to the full Commission's modification of the amounts awarded for loss of lung function and attorney fees. However, plaintiff has not challenged the Commission's reduction of the amounts awarded.

Plaintiff has failed to properly preserve his right to appeal the failure of the Deputy Commissioner to order payment of medical expenses under G.S. 97-59. The *record* must in some way reflect that the matter was before the full Commission. There is no evidence *in the record* that the matter was ever addressed by the full Commission. All that is clear from this record is that the Deputy Commissioner never awarded medical expenses; that the plaintiff did not appeal from the Deputy Commissioner's opinion and award; and that the sole issue on appeal before the full Commission was the propriety of the amounts awarded for loss of lung function and attorney fees. Accordingly, the appeal is dismissed.

Dismissed.

Judges JOHNSON and ORR concur in the result.

Judge ORR concurs in the result, with this concurring opinion.

N.C.G.S. § 97-59 extends medical benefits if treatment is "required to . . . provide needed relief . . . ." Such a finding, supported by competent evidence, mandates an award of medical expenses for so long as the treatment provides needed relief. *Smith v. American & Efird Mills*, 305 N.C. 507, 290 S.E. 2d 634 (1982).

N.C.G.S. § 97-59 further provides by a literal interpretation of its language that payment for such treatment *shall* be paid by the employer in cases (1) "in which awards are made for . . . damage to organs as a result of an occupational disease" and (2) "after bills for same have been approved by the Industrial Commission."

In the case *sub judice*, the Full Commission adopted the finding of the Deputy Commissioner "that the plaintiff would benefit from a continuing program of medical treatment for his lung disease." No appeal from this finding has been taken.

Secondly, this is a case in which a final award has been made for damage to plaintiff's lungs as a result of an occupational disease.

Finally, however, at this point there is nothing in the record evidencing that any medical bills for the extended medical benefits applicable under N.C.G.S. § 97-59 have been submitted to or approved by the Industrial Commission, nor approved and not paid by the employer. In light of that fact, I concur in the conclusion of the majority opinion that the issue of medical benefits is not now before us and the appeal should be dismissed.

Judge JOHNSON joins in this concurring opinion.

SUSIE HALL v. ROSE POST AND THE POST PUBLISHING COMPANY, INC. D/B/A THE SALISBURY POST AND MARY H. HALL v. ROSE POST AND THE POST PUBLISHING COMPANY, INC. D/B/A THE SALISBURY POST

Nos. 8627SC1011 and 8627SC1012

(Filed 19 May 1987)

1. **Privacy § 1— publication of details of adoption—intrusion into private affairs—not alleged**

In an action for invasion of privacy against a newspaper which printed the details of an adoption which occurred in 1967, plaintiffs did not allege an invasion of privacy based on intrusion into private affairs where plaintiffs did not allege that the information was wrongfully obtained or produce evidence otherwise suggesting that defendants committed the kind of intrusion intrinsic to the tort.

2. **Privacy § 1— publication of details of adoption—publication of private facts—sufficiently alleged**

Plaintiffs sufficiently alleged a claim for tortious invasion of privacy based on an unwarranted and offensive publication of private facts which were not newsworthy where defendants published the details of the 1967 adoption of plaintiff Susie Hall by plaintiff Mary Hall and the efforts of Susie's natural mother to find her in 1984. There are private matters so intimate or personal that the obvious bounds of propriety and decency require their protection from public scrutiny in the absence of any compelling justification for the revelation, and a truthful publication of such facts is constitutionally privileged under the First Amendment only if the matter is of legitimate public concern.

3. **Privacy § 1— publication of details of adoption—not privileged as newsworthy**

In an action for invasion of privacy arising from the publication of the details of a 1967 adoption and plaintiffs' undesired reunion with the natural mother and her husband in 1984, summary judgment for defendants was not proper on the grounds that the publications were privileged as newsworthy because reasonable minds could differ on the newsworthiness of the facts published; of particular importance in this case was the provision in N.C.G.S. § 48-25 that adoption records are closed to public inspection and that revelation of the information by any person having charge thereof is a misdemeanor.

4. **Privacy § 1— publication of details of adoption—whether facts disclosed were private—summary judgment for defendants improper**

In an action arising from the publication of the details of an adoption, the trial court should not have granted summary judgment for defendants on the issue of whether the facts disclosed were private where materials submitted by the parties raised an issue of fact regarding whether some or all of the facts published about the plaintiffs were publicly known or were in fact private prior to publication of the articles complained of by plaintiffs.

5. Privacy § 1— publication of details of adoption—whether facts disclosed were offensive—summary judgment for defendants improper

In an action for invasion of privacy, summary judgment for defendants was not proper on the grounds that the publications were not sufficiently offensive where a jury could properly find that ordinary reasonable people would find it highly offensive and distressing to have spread before the public gaze their identities, the fact that the child had been abandoned by carnival workers, or the sensational emotional details of their encounter with the natural mother.

APPEAL by plaintiffs from *Fountain, Judge.* Judgments entered 20 May 1986 in Superior Court, LINCOLN County. Heard in the Court of Appeals 10 February 1987.

Palmer, Miller, Campbell & Martin, P.A., by Joe T. Millsaps, for plaintiff appellants.

Woodson, Linn, Sayers, Lawther & Short, by Donald D. Sayers; and Adams, McCullough & Beard, by Steven J. Levitas and H. Hugh Stevens, Jr., for defendant appellees.

BECTON, Judge.

Plaintiffs, Susie Hall and her mother, Mary Hall, filed separate civil actions for damages for alleged invasion of privacy based upon two articles published by the media defendant, The Salisbury Post, and written by the Post's Special Assignment Reporter, defendant Rose Post. In their Answers, the defendants denied the material allegations of the Complaints and asserted by way of defense the Complaints' failure to state a claim upon which relief could be granted. Defendants filed motions for summary judgment in both actions, and a consolidated hearing was held. From judgments entered 20 May 1986 granting summary judgment for the defendants, plaintiffs appeal.

The two cases have been consolidated for purposes of this appeal. We conclude that summary judgment was improperly granted, and therefore we reverse.

I

On 18 July 1984, defendant, The Salisbury Post, published a story by defendant, Rose Post, headlined "Ex-Carny Seeks Baby Abandoned 17 Years Ago," concerning the search by Lee and Aledith Gottschalk for the daughter of Mrs. Gottschalk whom she

and her first husband had abandoned in Rowan County, North Carolina in September 1967. The Gottschalks had arrived in Salisbury from Wisconsin to seek the lost child a few days before the article was published.

The Post article related the story of Mrs. Gottschalk's 1966 marriage to a carnival barker named Clarence Maxson, the birth of their daughter in June 1967, the child's subsequent abandonment at the age of four months, the progression of the mother's life after that time, and her return to Rowan County after seventeen years to look for her child. The story explained that when the carnival arrived in Rowan County in the fall of 1967, someone recommended to the parents a babysitter named Mary Hall, that Clarence made arrangements for the babysitter to keep the child for a few weeks, that the couple moved on with the carnival to Georgia and Florida, and that Clarence eventually told Aledith he had signed papers authorizing the baby's adoption.

Following Aledith's marriage to Lee Gottschalk in 1984, the Gottschalks decided to travel to Rowan County to look for the child. A search for information through old newspapers on microfilm at the public library and through the telephone directory and Salisbury High School annuals proved fruitless. Although someone at the Department of Social Services remembered that the case had been labeled an abandonment, the Gottschalks were told that adoption records are sealed. The newspaper article related the details of this unsuccessful search and focused on their grief and frustration, concluding with the following:

> If anyone, they say, knows anything about a little blond baby left here when the county fair closed and the carnies moved on in September 1967, Lee and Aledith Gottschalk can be reached in Room 173 at the Econo Motel.

Immediately following the article's publication, the Gottschalks were called at their motel by people with information regarding the child's identity and location. Meanwhile, Mary Hall had been shown a copy of the Post article and had learned that Aledith Gottschalk was looking for her daughter. Within hours of the publication, the Gottschalks went to the Halls' home but eventually communicated with Mary Hall that day only by telephone.

A follow-up story published by the Post on 20 July 1984 reported how the Gottschalks had located the child, aided by the responses to the earlier story. The article identified the child as Susie Hall and her parents as Earle and Mary Hall, and also reported the location of their home in Mooresville. In addition to relating details of the emotional telephone encounter between the Gottschalks and Mrs. Hall, the story dwelt heavily upon the emotions of both families—the Gottschalks' joy and desire to see Susie, and the distress, shock, and fear of the Halls.

According to allegations in their verified Complaints, plaintiffs fled their home in Iredell County in order to avoid the public attention drawn to them by the article, and both have sought and received psychiatric care for the emotional and mental distress caused by the incident and by their subsequent receipt of numerous cards and letters from the Gottschalks.

II

On appeal, the plaintiffs assign as error (1) the trial court's failure to grant their motion to strike portions of the affidavits submitted by defendants in support of the summary judgment motion, on the grounds that the challenged portions fail to comport with Rule 56(e), and (2) the trial court's order granting summary judgment for defendants. We need not address the first assignment of error since we conclude that, even if the challenged portions of the defendant's affidavits were properly considered by the trial court, the affidavits, pleadings, and other materials before the court established genuine issues of material fact so that summary judgment for defendants was improper.

Summary judgment is designed to "eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim . . . of a party is exposed." *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 642, 281 S.E. 2d 36, 40 (1981). The burden is on the party moving for summary judgment to establish the lack of any triable issue of fact. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh. denied*, 281 N.C. 516 (1972).

The judgments entered in this case do not state the precise grounds upon which the trial court deemed summary judgment to be appropriate. However, the records and briefs submitted by the parties suggest several possible grounds, which we address.

A

[1] We first consider whether the facts alleged by plaintiffs give rise to a cognizable claim for relief for invasion of privacy.

A majority of American jurisdictions have recognized, in one form or another, a cause of action for tortious invasion of privacy. *See generally* W. Keeton, *Prosser and Keeton On The Law of Torts* Sec. 117 (5th ed. 1984). At least four distinct types of actionable invasion of privacy are identifiable from the current case law: (1) appropriation, for the defendant's advantage, of plaintiff's name or likeness, (2) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs, (3) publicity which places the plaintiff in a false light in the public eye, and (4) public disclosure of private facts about the plaintiff. *Id. See also Renwick v. News and Observer Publishing Co.*, 310 N.C. 312, 322, 312 S.E. 2d 405, 411, *cert. denied*, 469 U.S. 858, 83 L.Ed. 2d 121 (1984); Restatement (Second) of Torts Secs. 652A-I (1977). Although these four categories are not necessarily all inclusive, we make use of the classification for convenience in discussing the issues presented.

The North Carolina Supreme Court first acknowledged a common law right to privacy which is protected by civil action for damages in *Flake v. Greensboro News Company*, 212 N.C. 780, 195 S.E. 55 (1938), a case involving the "appropriation" form of the tort. *See also Barr v. Southern Bell Telephone & Telegraph Co.*, 13 N.C. App. 388, 185 S.E. 2d 714 (1972). However, in *Renwick*, the Court refused to recognize a separate cause of action for "false light" invasion of privacy due to concern that recognition of that form of the tort would "add to the tension already existing between the First Amendment and the law of torts in cases of this nature," and because the action would often overlap or duplicate the existing right of recovery for libel or slander. 310 N.C. at 323, 312 S.E. 2d at 412. North Carolina courts have not yet expressly considered the viability of the remaining "intrusion" and "publication of private facts" varieties of invasion of privacy. (In *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E. 2d 617, *disc. rev. denied*, 316 N.C. 557, 344 S.E. 2d 18 (1986), this Court held that plaintiff failed to state a claim for the "private facts" version of the tort as developed in other jurisdictions without expressly deciding whether such a cause of action exists. Similarly, in *Morrow v. Kings Department Stores, Inc.*, 57 N.C.

App. 13, 290 S.E. 2d 732, *disc. rev. denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982), this Court upheld dismissal of plaintiff's complaint without deciding whether an illegal search by a private individual constituted a tort.)

Plaintiffs contend that the publications by defendants constitute both an intrusion into their private affairs and solitude, and an unwarranted public disclosure of private facts. In our opinion, "intrusion" as an invasion of privacy is not involved in this case, and we express no opinion regarding the viability of such a claim. That tort does not depend upon any publicity given a plaintiff or his affairs but generally consists of an intentional physical or sensory interference with, or prying into, a person's solitude or seclusion or his private affairs. *See generally* Restatement (Second) of Torts Sec. 652B; *Prosser & Keeton* Sec. 117 at 854-56. Some examples of intrusion include physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another. *Id.* Plaintiffs have not alleged that the information published was wrongfully obtained or produced evidence otherwise suggesting that defendants have committed the kind of intrusion intrinsic to this tort. Therefore, if the plaintiffs have a claim for relief, it must be for an invasion of privacy by a public disclosure of private facts.

[2] The "private facts" claim asserted by plaintiffs is that identified in Section 652D of the Restatement (Second) of Torts, and consists of the truthful disclosure to the public of private facts about the plaintiffs, which disclosure would be highly offensive and objectionable to a person of ordinary sensibilities. *See Trought v. Richardson* at 761, 338 S.E. 2d at 619. According to the Restatement commentary and our understanding of the law as it has developed in other jurisdictions, a plaintiff's right to recover for this tort is limited by the following principles. First, the disclosure of private facts must be to the *public* or a large number of people. This element is generally satisfied by any media publication. Second, the facts published must be *private*, not generally known. Third, the disclosure must be one which would be *highly offensive* and objectionable to a reasonable person of ordinary sensibilities. Finally, the matter publicized must be of a kind which is not of legitimate concern to the public, *i.e.*,

not newsworthy. *See generally* Restatement (Second) of Torts Sec. 652D.

Defendants argue that the tort of invasion of privacy should not be expanded in North Carolina to include a "private facts" cause of action because the imposition of liability for the publication of true facts raises serious constitutional questions and because of the difficulty of administering the standards outlined above. *See Anderson v. Fisher Broadcasting Co.*, 300 Or. 452, 712 P. 2d 803 (1986) and authorities cited therein at 460-63, 712 P. 2d at 808-09. Indeed, in *Renwick*, our Supreme Court based its decision to reject a "false light" cause of action in part upon the potential conflict of such a claim with the First Amendment freedoms of speech and press.

However, the United States Supreme Court, although recognizing the tension between the publication forms of invasion of privacy and these constitutionally guaranteed freedoms, has thus far declined to decide the broad question "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491, 43 L.Ed. 2d 328, 347 (1975). *See also Time, Inc. v. Hill*, 385 U.S. 374, 17 L.Ed. 2d 456 (1967). Significantly, a number of courts and commentators have resolved the issue by application of a "newsworthiness" or "public interest" standard in determining what publications are constitutionally privileged and what publications are actionable. *See, e.g., Virgil v. Time, Inc.*, 527 F. 2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998, 48 L.Ed. 2d 823 (1976); *McCabe v. Village Voice, Inc.*, 550 F. Supp. 525 (E.D. Pa. 1982); *Beresley v. Teschner*, 64 Ill. App. 3d 848, 21 Ill. Dec. 532, 381 N.E. 2d 979 (1978); *Sutton v. Hearst Corp.*, 277 App. Div. 155, 98 N.Y.S. 2d 223, *appeal denied*, 277 App. Div. 873, 98 N.Y.S. 2d 589 (1950); Restatement (Second) of Torts Sec. 652D, comment h; Comment, *Privacy: The Search for a Standard*, 11 W.F.L. Rev. 659 (1975).

In determining that some publications of private facts should be actionable, we are also persuaded by the reasoning of the California Supreme Court in *Briscoe v. Reader's Digest Ass'n*:

> In a nation built upon the free dissemination of ideas, it is always difficult to declare that something may not be published. But the great general interest in an unfettered press

> may at times be outweighed by other great societal interests. As a people we have come to recognize that one of these societal interests is that of protecting an individual's right to privacy. The right to know and the right to have others *not* know are, simplistically considered, irreconcilable. But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other. (Footnotes omitted.)

4 Cal. 3d 529, 540-41, 93 Cal. Rptr. 866, 874, 483 P. 2d 34, 42 (1971). In our view, there are private matters so intimate or personal that "the obvious bounds of propriety and decency" require their protection from public scrutiny in the absence of any compelling justification for their revelation, *see* Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890), and a truthful publication of such facts is constitutionally privileged under the First Amendment only if the matter is of legitimate public concern. *See Virgil v. Time, Inc.*, at 1128; *Comment*, 11 W.F.L. Rev. at 678.

In so deciding, we note that the interests secured by the "false light" cause of action rejected by the *Renwick* Court remain protected, to some extent, by the availability of an action for libel or slander. In contrast, no alternate remedy is available to insure protection of the legitimate interest in keeping certain private matters private.

For the foregoing reasons, we conclude that, in an appropriate case, an unwarranted and offensive publication of private facts which are not newsworthy may give rise to a claim for relief for tortious invasion of privacy entitling the aggrieved party to at least nominal damages, and that plaintiffs have alleged sufficient facts to support this type of claim.

B

[3] Having determined that plaintiffs have stated a claim upon which relief can be granted, we next consider whether defendants have proved the nonexistence of any essential element of plaintiffs' claim. In support of their motion for summary judgment, defendants submitted the deposition of Mary Hall, answers to interrogatories by both Susie and Mary Hall, and affidavits of the

Gottschalks, the motel desk clerk at the Econo Lodge, and four acquaintances and co-workers of Mary Hall. Defendants contend that, based on these materials and the pleadings, they were entitled to summary judgment because the matter published concerning the plaintiffs was neither private nor highly offensive and was of legitimate concern to the public.

1. Newsworthiness

With regard to the newsworthiness element, the Restatement (Second) of Torts Sec. 652D, comment h, provides:

> In determining what is a matter of public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern.

This is the standard adopted by the Ninth Circuit in *Virgil v. Time, Inc.* and applied in *Virgil v. Sports Illustrated*, 424 F. Supp. 1286 (S.D. Cal. 1976). *See also Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984). Application of this standard requires a determination whether the publication at issue serves any legitimate purpose of disseminating news or information of public benefit, or merely constitutes the "pandering to idle curiosity which the right of privacy was designed to check." Comment, 11 W.F.L. Rev. at 681. We agree with the Ninth Circuit Court that "by the extreme limits [this standard] imposes in defining the tort, it avoids unduly limiting the breathing space needed by the press for the exercise of effective editorial judgment." *Virgil v. Time, Inc.* at 1129 (footnote omitted).

In addition to an assessment of the newsworthiness of the private facts published concerning the plaintiffs, there must be a further determination whether the *identity* of the plaintiffs as the ones to whom the facts apply is a matter in which the public has a legitimate interest. *See Virgil v. Time, Inc.* at 1131. Ordinarily, unless the persons involved are public figures or persons who

have otherwise become legitimate targets of public interest (*see* Restatement (Second) Torts Sec. 652D, comments e & f), names of persons involved in reported events are in large measure outside the scope of the public interest. *Comment*, 11 W.F.L. Rev. at 683-85. *See Briscoe; Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (revelation in film documentary of identity of former prostitute after seven years of ordinary life held actionable). *But see Beresley v. Teschner*. Again the test is whether the revelation of identity goes beyond the giving of information to which the public is entitled to become a morbid or sensational prying for its own sake. *Virgil v. Sports Illustrated* at 1290.

Some useful criteria for assessing newsworthiness include (1) the social value of the facts published, (2) the depth of the article's intrusion into private affairs, and (3) the extent to which the plaintiff has voluntarily acceded to a position of notoriety. *See Sipple*, 154 Cal. App. 3d at 1048, 201 Cal. Rptr. at 669-70. Another important factor is the existence of any law or public policy which may reflect upon the newsworthiness of the publication. *See, e.g., Briscoe* (State's interest in encouraging rehabilitative process was key factor when court found no legitimate public interest in publication of identity of past criminal offender). *But cf. Cox v. Broadcasting Co.* (statute prohibiting publication of truthful information contained in court records open to public inspection held unconstitutional).

Of particular significance in this case is the statutory provision, in N.C. Gen. Stat. Sec. 48-25 (1984), that adoption records are closed to public inspection and that revelation of the information contained therein by any person having charge of the file is a misdemeanor under most circumstances. Unquestionably, the topic of adoption and its related issues, including issues regarding natural parents and adopted children who attempt to find one another, are of legitimate interest, in a general way, to the public. However, as a society we have determined that the benefits of anonymity in adoption proceedings generally outweigh any right of the public or of an individual to know the facts about a particular adoption. In our opinion, the requirement that adoption records be sealed reflects, in part, a legislative recognition of the potential harm to adopted children and their adoptive families, and ultimately to society, which may arise from unwarranted revelation of private facts about adoptions, and suggests that the

circumstances surrounding a particular adoption and the identities of the parties involved are ordinarily not matters of public interest. Furthermore, the fact that defendants may have obtained innocently information not in the public domain does not necessarily license them to publish the information further. *Patterson v. Tribune Co.*, 146 So. 2d 623 (Fla. App. 1962). *See also Virgil v. Time, Inc.* at 1126.

Ultimately, the determination of newsworthiness requires a balancing of the individual's right to be free from unwarranted exposure against the public's right to uncensored dissemination of information, *see Comment*, 11 W.F.L. Rev. at 668, and the dividing line must be determined by the facts of each case. *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P. 2d 670 (1951). In some cases, a court may, upon review of the publication and the pleadings, conclude as a matter of law that the subject matter of an article, including references to a particular individual, is newsworthy. *Virgil v. Sports Illustrated* at 1288. However, the publication in question is constitutionally privileged, and summary judgment for defendants is proper, only if every reasonable person would have to conclude that the published facts were newsworthy. Because newsworthiness depends upon a standard of reasonableness in light of community mores, it is an issue particularly suited for jury determination. *Id.* at 1290. *See Dingee v. Philadelphia Daily News*, 328 F. 2d 641 (3rd Cir. 1964); *Briscoe v. Reader's Digest Ass'n; Sutton v. Hearst Corp.*

Having reviewed the record in light of the foregoing, we conclude that the newsworthiness of the facts published, including the identities of the plaintiffs, the facts surrounding Susie's adoption, and the details of plaintiffs' undesired reunion with the Gottschalks, is an issue on which reasonable minds could differ and thus is a question of fact for the jury. Because a jury could reasonably find that all or some of these facts were outside the scope of legitimate public concern and were included solely for any inherent morbid, sensational, or curiosity appeal they might have, summary judgment was not proper on the grounds that the publications were privileged as newsworthy.

2. Private Facts

[4] The essence of the tort with which we are concerned is the publicizing of that which is private in character. This simply

means that no liability attaches when the defendants merely give further publicity to information which is a matter of public record or otherwise already in the public domain. *See, e.g., Cox Broadcasting; Pierson v. News Group Publications, Inc.*, 549 F. Supp. 635 (S.D. Ga. 1982); *Sipple; Hollander v. Lubow*, 277 Md. 47, 351 A. 2d 421, *cert. denied*, 426 U.S. 936, 49 L.Ed. 2d 388 (1976). However, the protected interest is not so much the right to absolute secrecy as "the right to *define* one's circle of intimacy. . . ." *Briscoe*, 4 Cal. 3d at 534, 93 Cal. Rptr. at 869, 483 P. 2d at 37 (emphasis in original). As stated in the Restatement (Second) of Torts Sec. 652D, comment b:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself *or at most reveals only to his family or to close personal friends.* Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest. (Emphasis added.)

The fact that a plaintiff may have spoken freely to a small, select number of people about a private matter is not in itself a making public of the information disclosed. *See, e.g., Virgil v. Time, Inc.* at 1127. There is an "obvious and substantial difference" between this type of selective disclosure and "the disclosure of the same facts to the public at large." *Id.* "The former . . . does not constitute publicizing or public communication . . . and accordingly does not destroy the private character of the facts disclosed." *Id.* Furthermore, although ordinarily a lapse of time does not prevent renewed publicity about an event which was previously publicized, *see* Restatement (Second) Torts 652D, comment k, lapse of time may, in a rare case, when weighed along with other factors, serve to protect against renewed publication of facts that were once public knowledge when such publicity serves to unreasonably exploit the plaintiff. *Id. See, e.g., Briscoe; Melvin v. Reid.*

Defendants contend that the materials before the trial court prove conclusively that the facts surrounding Susie Hall's adoption were widely known in Rowan County prior to the publication of the articles in issue. Affidavits of two acquaintances of Mary Hall (Betty Deese and Kay Clark) state that the affiants had been told the circumstances of Susie's adoption by Mary Hall long before the publication by defendants. Two former co-workers of Mary Hall stated in their affidavits that they also knew, prior to July 1984, that Mary Hall had an adopted child that she had obtained from someone who worked at a fair or carnival, and that these facts were "discussed on a number of occasions" and were "common knowledge" among employees at the Cone Mills plant where Mary Hall worked at that time. The affidavit of the Gottschalks stated that, following publication of the first article, they received twenty to thirty calls from various people who stated that they knew Mary Hall and her adopted daughter, "many of whom knew the facts and circumstances surrounding the adoption" prior to the publication of the articles. Finally, the affidavit of the Econo Lodge desk clerk stated that, following publication of the first article, the motel received "an unusually large number of calls" and that "[s]ome of the people calling indicated that they had information concerning the child and the mother."

On the other hand, plaintiffs, in their verified Complaints, alleged that the defendants published "heretofore unknown personal facts" about their lives. In her answers to defendants' interrogatories, Mary Hall stated, in pertinent part, that she had told no one except Social Services about Susie's circumstances, that all the family members knew the facts about her adoption, that she never told anyone else about the adoption, and that none of Susie's friends knew about it. In her deposition, Mary Hall admitted only that two people (Patsy Letterman and Leda Swinger) aside from family members, knew the facts about Susie's adoption. She denied having discussed the situation with any of the affiants but admitted that Betty Deese and Kay Clark might know from other sources. She also stated that no one definitely knew Susie was adopted and that "everybody" thought her son, Herbert, and Susie were twins. None of the material before the court shed any light on whether the facts published in the second article, concerning the Gottschalks' location of and conversation with the Halls, were generally known prior to the story's publication.

We conclude that, taken in the light most favorable to plaintiffs, these materials raise an issue of fact regarding whether some or all of the facts published about the plaintiffs were publicly known or were, in fact, private prior to publication of the two articles complained of by the plaintiffs.

3. Offensiveness

[5] In order for plaintiffs to recover, the challenged publication must be of a type that would be highly offensive to a reasonable person of ordinary sensibilities. As in negligence cases, application of the reasonable person standard usually requires a jury determination. *See, e.g., Mashburn v. Hedrick*, 63 N.C. App. 454, 305 S.E. 2d 61, *disc. rev. denied*, 309 N.C. 821, 310 S.E. 2d 350 (1983). In our view, a jury could properly find that an ordinary reasonable person (adoptive mother or child) would find it highly offensive and distressing to have spread before the public gaze their identities, the fact that the child had been abandoned by carnival workers, or the sensational emotional details of their encounter with the natural mother. Consequently, summary judgment was not proper on the grounds that the publications were not sufficiently offensive.

III

In conclusion, we hold that, as pleaded, plaintiffs have stated a valid claim for relief, that the materials offered by defendants do not justify imposition of judgment against plaintiffs as a matter of law, and that, consequently, the judgment must be reversed.

Reversed.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. HAROLD TEETER

No. 8618SC984

(Filed 19 May 1987)

1. **Criminal Law § 89.1; Rape and Allied Offenses § 4— expert testimony—victim's ability to distinguish reality from fantasy—no evidence of emotional disorder**

In a prosecution for second degree rape of a mentally retarded adult, testimony by a clinical psychologist that the prosecutrix showed no evidence of an emotional disorder which would impair her ability to distinguish reality from fantasy did not amount to an impermissible opinion as to the prosecutrix's credibility or defendant's guilt and was properly admitted as being within the scope of the witness's expertise.

2. **Criminal Law § 50.1; Rape and Allied Offenses § 4— expert testimony—behavior consistent with sexual abuse**

A clinical psychologist's opinion testimony that the mentally retarded prosecutrix exhibited behavioral characteristics consistent with sexual abuse was based on adequate data within the purview of N.C.G.S. § 8C-1, Rule 703 where it was based upon the witness's experience in treating sexually abused mentally retarded persons, his familiarity with research and literature in that field, and his personal examination of the prosecutrix. Moreover, his opinion falls within the scope of expert testimony permitted by N.C.G.S. § 8C-1, Rule 702.

3. **Criminal Law § 89.1; Rape and Allied Offenses § 4— expert testimony—behavioral characteristics observed in victim**

A clinicial psychologist's testimony explaining the behavioral characteristics that he observed in the mentally retarded prosecutrix did not constitute an impermissible opinion that the prosecutrix was telling the truth and that defendant was guilty. Furthermore, defendant waived objection to any inadmissible information in the witness's testimony by failing to object to the question or to move to strike the answer.

4. **Criminal Law § 89.1; Rape and Allied Offenses § 4— credibility of victim—expert testimony inadmissible**

In a prosecution for second degree rape of a mentally retarded adult, testimony by an expert witness concerning her belief that the prosecutrix was telling the truth and the reason for her belief violated N.C.G.S. § 8C-1, Rules 405(a) and 608, which prohibit expert testimony on the issue of credibility of a witness. However, the admission of such testimony was harmless error under the facts of this case.

5. **Criminal Law § 34.8; Rape and Allied Offenses § 4.1— other sexual crimes by defendant—competency to show common plan**

In a prosecution for second degree rape of a mentally retarded employee of a sheltered workshop by a supervisor at the workshop, evidence of defendant's sexual abuse of five other mentally retarded female employees at the

workshop was admissible to show a common plan or scheme by defendant to take sexual advantage of his relationship of authority over these women. N.C.G.S. § 1C-1, Rule 404(b).

6. **Criminal Law § 89.2— corroborative evidence—additional information**

Testimony which tended to add weight or credibility to the prosecutrix's testimony was properly admitted for corrobative purposes even though in some minor respects it contained additional information not related by the prosecutrix in her testimony.

7. **Criminal Law § 86.8— rape victim's mother—contemplation of civil action—cross-examination to show bias**

In a prosecution for rape of a mentally retarded victim, defendant was entitled to cross-examine the victim's mother about whether she was contemplating or preparing to bring a civil action for damages arising out of the incident involved in the criminal case for the purpose of showing bias of the witness. However, the exclusion of such testimony was not prejudicial error in light of the relatively insubstantial testimony given by the mother, the natural bias which the jury might expect of the mother of an alleged rape victim, and the fact that defense counsel cross-examined the mother concerning her employment of an attorney before an objection was sustained.

8. **Constitutional Law § 4; Rape and Allied Offenses § 2— rape of mentally defective person—constitutionality of statute—intrusion on rights of handicapped persons—no standing by defendant to challenge**

A defendant charged with second degree rape of a mentally defective person under N.C.G.S. § 14-27.3(a)(2) did not have standing to challenge the constitutionality of that statute on the ground that it intrudes upon the right of a physically handicapped or mentally disabled person to engage in consensual vaginal intercourse since defendant is not a member of the class whose rights he alleged are violated by the statute.

9. **Rape and Allied Offenses § 5— rape of mentally defective person—sufficiency of evidence**

The State's evidence was sufficient to sustain defendant's conviction of second degree rape of a mentally defective person in violation of N.C.G.S. § 14-27.3(a)(2) where it tended to show that defendant engaged in vaginal intercourse with the alleged victim, that the victim was mentally defective, and that defendant knew of her mental deficiency.

10. **Criminal Law § 138.15— aggravating factor—evidence supporting joinable offense which was dismissed**

In imposing a sentence for second degree rape of a mentally defective person in violation of N.C.G.S. § 14-27.3(a)(2), the trial court could properly find as a factor in aggravation that defendant took advantage of a position of trust or confidence to commit the offense even if evidence used to support such factor was also evidence of an element of a joinable offense of custodial sexual offense in violation of N.C.G.S. § 14-27.7 where a charge against defendant for custodial sexual offense was dismissed at the close of the State's evidence in the present case.

11. Criminal Law § 138.14— single aggravating factor outweighing three mitigating factors

The trial court did not abuse its discretion in finding that the single aggravating factor found by the court outweighed the three mitigating factors found.

APPEAL by defendant from *John, Judge.* Judgment entered 25 April 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 3 March 1987.

The defendant was convicted by a jury of second degree rape in violation of G.S. 14-27.3(a)(2). The trial court dismissed a related charge at the close of the State's evidence. Following a sentencing hearing, the trial court entered judgment sentencing defendant to the maximum term of imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Charles H. Hobgood, for the State.

Robert S. Cahoon, for defendant-appellant.

MARTIN, Judge.

By forty-two assignments of error brought forward on appeal, defendant contends that the trial court made numerous errors at his trial. He presents a number of the court's evidentiary rulings for our review. In addition, he asserts error in the denial of his motions to dismiss the charge, challenging the sufficiency of the evidence to support his conviction. He also contends that G.S. 14-27.3(a)(2) is unconstitutional, both on its face and as applied to him. Finally, he asks us to find error in the sentence imposed by the trial court. We find no prejudicial error in defendant's trial and uphold his conviction and the sentence imposed thereon.

The State's evidence at trial tended to show that in May 1984, and for approximately fifteen years prior thereto, defendant was employed as the director of Industrial Services of High Point, also known as the Sheltered Workshop, an agency of the Guilford County Mental Health, Mental Retardation and Substance Abuse Program. The agency conducts vocationally oriented training programs for mentally retarded adults. Robin Fleming, a thirty year old mentally retarded woman with an I.Q. of 43 and a mental age of six years and eight months, was a client-employee at the Sheltered Workshop during 1984.

The State's evidence further tended to show that on or about 24 May 1984, defendant came to the area where Robin was working, called her from her work, and took her to the first aid room. Once there, he removed her clothing, put baby oil and Vaseline between her legs, got on top of her and had vaginal intercourse with her. While defendant and the prosecuting witness were in the first aid room, Annie Truesdale, a supervisor at the Sheltered Workshop, came to the door. She had seen defendant and Robin leave the work area and had been suspicious. Finding the door to the first aid room locked, Mrs. Truesdale knocked, but received no response. When she knocked again, defendant asked who was at the door and Mrs. Truesdale identified herself. About three or four minutes later, defendant opened the door. Robin ran out of the room; defendant was standing in the room breathing heavily. Mrs. Truesdale did not report the incident to anyone at that time, but made a notation of the incident on her calendar.

In early May 1985, Robin told one of the instructors at the Sheltered Workshop that she did not want to go to defendant's office because he "closes the door and touches private parts of my body." Robin was taken to the office of one of the program coordinators where she was told that such accusations could be embarrassing and damaging to a person's reputation. After talking to the coordinator for approximately fifteen minutes, Robin recanted her earlier story and told the coordinator that defendant had never touched her and that she had made up the story to avoid work. Robin later apologized to the instructor for "telling tales."

On 29 May 1985, Mrs. Truesdale reported the incident in which she had found defendant and Robin in the first aid room to her supervisor, to another instructor, and to defendant's supervisor. Robin's mother was informed that Robin had been sexually molested and she questioned Robin. Robin told her mother of three separate incidents, including the one in the first aid room, when defendant had had sexual contact with her.

The State also offered the testimony of two other mentally retarded women who had been employed at the Sheltered Workshop in 1984. Each testified as to incidents of sexual molestation by defendant.

Defendant offered evidence tending to show that on one occasion, he took Robin Fleming into the first aid room because she

was complaining of trouble with her feet. He did not lock the door to the room and did not realize that it was locked. After he heard Mrs. Truesdale knock, he finished looking at Robin's foot, found nothing wrong with it, and went and opened the door. This took only a few seconds. He denied ever having touched Robin in a sexually suggestive manner and denied having intercourse or any other sexual contact with her or any other employee of the Sheltered Workshop. He offered evidence tending to show that he was out of town at the time that one of the State's witnesses alleged that he had sexually abused her. He also offered numerous witnesses who testified that he was of good character and was truthful.

In rebuttal, the State offered evidence tending to show that at various times defendant had had sexual contact with three other retarded women who had worked at the Sheltered Workshop. In his further rebuttal, defendant denied that he had had sexual contact with any of the three women.

By his initial argument, defendant contends that the trial court erred in permitting certain opinion testimony to be given by three expert witnesses: Dr. Andrew Short, a clinical psychologist who examined Robin Fleming on 23 July 1985; Dr. Martha K. Sharpless, a physician and medical examiner for Guilford County in sexual abuse cases who examined Robin on 31 July 1985; and Sheila Cromer, a nurse with experience in dealing with sexually abused mentally retarded adults, who interviewed Robin on 30 May 1985. Defendant contends that each of these expert witnesses was improperly permitted to state an opinion concerning the credibility of the prosecuting witness and the guilt or innocence of defendant. We address his contentions with respect to each witness.

[1] Dr. Short, who was permitted to testify as an expert witness in the field of adult mental retardation and sexual abuse, was requested to examine Robin and to render an assessment of her mental retardation and a diagnosis for short-term treatment. Defendant excepts to the following question and answer given during Dr. Short's direct examination by the prosecutor:

> Q. Doctor, in your examination of Robin Fleming and your assessment of her cognitive functioning, did you find any evi-

dence of any emotional disorder or psychoses which would impair her ability to distinguish reality from fantasy?

Mr. Cahoon: Objection.

The Court: Objection overruled.

A. No, sir. She showed no evidence of an emotional disorder which would impair her ability to do so.

Citing *State v. Heath*, 316 N.C. 337, 341 S.E. 2d 565 (1986), defendant contends that this testimony amounted to an impermissible expert opinion concerning Robin's credibility. We disagree.

In *Heath*, a psychologist was asked whether or not the victim suffered from a mental condition that could have caused her to "make up a story about the sexual assault." Because the question referred to *the* sexual assault with which defendant was charged, the Court held that it was designed to elicit improper expert opinion testimony as to whether the victim had consciously lied, so as to be prohibited by G.S. 8C-1, Rules 405(a) and 608. Moreover, the question was held to have the ultimate effect of calling for the witness's opinion as to defendant's guilt. In so holding, however, the Court pointed out that had the witness been asked about the presence of a mental condition which might cause the victim to fantasize in general, the result would have been different.

In the present case, the question was limited to whether or not Robin had any mental condition which would *generally* affect "her ability to distinguish reality from fantasy." It did not call for an opinion as to her propensity for telling the truth. The answer was within the scope of Dr. Short's expertise and did not amount to an impermissible opinion with respect to defendant's guilt or innocence. *See State v. Raye*, 73 N.C. App. 273, 326 S.E. 2d 333, *disc. rev. denied*, 313 N.C. 609, 332 S.E. 2d 183 (1985).

[2] Dr. Short was also asked whether, in his opinion, Robin exhibited any behavioral characteristics consistent with sexual abuse. Defendant's objection was overruled and Dr. Short answered: "Yes, she did." Defendant contends that the opinion was not within the proper bounds of expert testimony as delineated by G.S. 8C-1, Rule 702, and was based on inadequate data, in violation of G.S. 8C-1, Rule 703. We disagree.

Dr. Short's opinion was based upon his experience in treating sexually abused mentally retarded persons, his familiarity with research and literature in that field, and his personal examination of Robin. We hold that these bases for his opinion were "of a type reasonably relied upon by experts" in the field in forming opinions upon the subject. G.S. 8C-1, Rule 703. Moreover, due to his specialized knowledge and expertise, Dr. Short was in a better position than the jurors to have an opinion on the subject and to assist the jurors in understanding the evidence and finding the facts therefrom. Thus, his opinion falls within the scope of permissible expert testimony. G.S. 8C-1, Rule 702; *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905, 98 A.L.R. 3d 285 (1978).

[3] Dr. Short was then asked, without objection, to explain the behavioral characteristics that he observed in Robin and found to be consistent with her having suffered sexual abuse. He testified that Robin was nervous and agitated, had nightmares about sexual abuse, and expressed fear of her alleged abuser. The manner in which she described the events was consistent with the manner in which other mentally retarded persons had described instances of sexual abuse. Finally, due to her limited knowledge and understanding of sexual matters, Dr. Short found it unlikely that Robin would be able to produce the descriptions she gave of sexual acts unless those acts had occurred with her. Defendant did not move to strike the answer. He contends on appeal, however, that Dr. Short's testimony should not have been admitted because it contained an opinion that Robin was telling the truth and, therefore, an opinion as to defendant's guilt.

Contrary to defendant's argument, Dr. Short never testified that the sexual acts related by Robin were committed by any particular person, nor did he purport to express an opinion as to defendant's guilt or innocence. *See Wilkerson, supra.* However, even assuming that the testimony was improper, defendant neither objected to the question nor moved to strike the answer. Error may not be asserted with regard to the admission of evidence in the absence of a timely objection or motion to strike. G.S. 8C-1, Rule 103(a). Failure to move to strike an answer, when its admissibility is not indicated by the question but becomes apparent by some aspect of the answer, waives any objection to the inadmissible information. *State v. Atkinson*, 309 N.C. 186, 305 S.E. 2d 700 (1983). The exceptions to Dr. Short's testimony are overruled.

Defendant advances similar arguments with respect to the testimony of Dr. Sharpless, who testified on the third day of defendant's trial, two days after Dr. Short's testimony. Dr. Sharpless was permitted to testify, over defendant's objection, that Robin "had a very classic limited knowledge of sex," "almost a rudimentary knowledge of sex" and that it "would have been impossible for her to make up" the details and chronology of events which she described. Since substantially the same evidence had already been admitted without objection through the testimony of Dr. Short, defendant has lost the benefit of his objection and cannot complain on appeal about Dr. Sharpless's testimony. *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982); *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971).

[4] Sheila Cromer, a nurse for the gynecologist who examined Robin on 30 May 1985, testified that she obtained a history from Robin. Although she was tendered by the prosecutor as an expert witness with respect to sexually abused mentally retarded adults, Ms. Cromer's direct testimony consisted solely of her recounting Robin's statement to her, and the jury was instructed to consider it only as it tended to corroborate Robin's testimony. Defendant's counsel then cross-examined Ms. Cromer about various things that Robin had told her and concluded his examination as follows:

> Q. Did it ever occur to you that she was telling something that wasn't true?
>
> A. No.

On redirect examination, the prosecutor asked:

> Q. Now, Ms. Cromer, did it ever occur to you that she was telling the truth—that Robin Fleming was telling the truth?
>
> A. Yes. I believed her.
>
> Q. And tell the members of the jury why you believed Robin Fleming was telling the truth.
>
> MR. CAHOON: Object to that.
>
> THE COURT: Overruled.

* * *

A. When I talk with children or adults who have been sexually abused, I typically try to get them to tell me the story from different angles. Every time I went to Robin to go back to the story, her story was always consistent no matter how I tried to take her off-track or if she took herself off-track, which was something that will commonly happen during the conversation. When she became concerned about what was being said, or upset, that she would change the subject totally to something different, whether it had to do with the Workshop shutting down or something that had happened on the way to the office, or whatever. Consistently, when I took her back to the story, Robin always told the story of what had happened to her consistently, never changing the basic facts of what had been occurring to her.

Defendant contends, and we agree, that the admission of Ms. Cromer's testimony that she believed Robin and the reason for her belief was error. G.S. 8C-1, Rules 405(a) and 608 prohibit the admission of expert testimony on the issue of credibility of a witness. *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986); *State v. Heath, supra.* The error, however, does not entitle defendant to a new trial. To warrant a new trial, a defendant must show not only error, but also that he was prejudiced by the erroneous admission of the evidence. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). In order to show prejudice, a defendant must show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." G.S. 15A-1443(a).

In the present case, defendant has failed to show prejudice. First, defendant did not object to the first question asked of Ms. Cromer on redirect examination, nor did he move to strike Ms. Cromer's inadmissible response. Thus, defendant not only waived his objection to the question and answer, *State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984), but he also failed to preserve the issue for review. App. R. 10(b)(1). Moreover, defendant had already established, on cross-examination, that Ms. Cromer had not considered Robin's story to be untrue, essentially the same evidence as her testimony that she believed Robin. We also observe that at the time of Ms. Cromer's testimony concerning Robin's statement to her, the jurors had already heard Robin testify and had heard the testimony of at least one other witness

as to what Robin had related to him about the incidents. Thus, the jurors were in a position to assess for themselves whether Robin's stories were consistent, and we do not believe that Ms. Cromer's testimony to the effect that she found them to be consistent had any significant influence on that assessment. Finally, we note that, unlike *Aguallo* and *Heath*, the State's case was not entirely dependent upon the testimony of the prosecuting witness. Therefore, we conclude that there is no reasonable possibility that, absent the erroneous admission of Ms. Cromer's testimony on redirect examination, a different result would have been reached by the jury.

[5] Defendant's next assignments of error are directed to the admission of testimony, during the State's case in chief and during the State's rebuttal, that defendant had sexually abused other client-employees of the Sheltered Workshop. He contends that such evidence was inadmissible because it had no logical relevance other than to show his bad character and predisposition to commit the offense for which he was being tried. We disagree.

G.S. 8C-1, Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Rule 404(b) is consistent with prior North Carolina decisional law. *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986). Our Supreme Court has characterized as very liberal its decisions admitting evidence of similar sex offenses. *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981); *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978). "This position has included allowing the admission of evidence showing sexual assaults by the defendant against people other than the victim in the crime for which he is on trial." *State v. Gordon*, 316 N.C. 497, 504, 342 S.E. 2d 509, 513 (1986).

In the present case, the State offered evidence that defendant had committed similar acts upon other women for the explicit purpose of showing a common plan or scheme. The testimony of the five witnesses shows striking similarities in the circumstances

of the assaults allegedly committed by defendant against them and the one allegedly committed upon Robin Fleming. Each of the witnesses who testified that she had been sexually molested by defendant was a mentally retarded female employee of a sheltered workshop where defendant had been in a position of authority. All were close in chronological age to Robin. All of them testified that the sexual incidents had occurred on the premises of the workshop during working hours. Two of them claimed to have been molested in the first aid room, the same place where defendant allegedly had intercourse with Robin. Most of the incidents about which the women testified happened within two years of the incident for which defendant was on trial. Other similar circumstances were shown by their testimony. We conclude that the testimony of these witnesses tended to prove a continuing and ongoing course of sexual molestation by defendant of mentally retarded young women employed under his supervision, and a common plan or scheme to take sexual advantage of his relationship of authority over these women. The evidence was therefore relevant and admissible under Rule 404(b).

We also reject defendant's argument that even though relevant, the evidence should have been excluded under G.S. 8C-1, Rule 403 because its probative value was substantially outweighed by its prejudicial effect. Although the evidence was certainly damaging to defendant, we do not find that the danger of unfair prejudice to him outweighed the probative value of the testimony.

Moreover, we note that the testimony of three of the five witnesses was offered by the State in rebuttal of defendant's testimony that he had never had any sexual contact with any employee of the Greensboro or High Point Sheltered Workshops. By his testimony, defendant "opened the door," and the State was entitled to rebut it by offering evidence to the contrary. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984). These assignments of error are overruled.

[6] Defendant assigns error to the rulings of the trial court which permitted several of the State's witnesses to testify in corroboration of Robin Fleming. He contends that the testimony of these witnesses went beyond that given by Robin. We have reviewed defendant's contentions with respect to each of his ex-

ceptions to the admission of corroborating testimony and find no error in the trial court's rulings.

With respect to corroborative testimony, our Supreme Court has recently stated:

> In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. [Citations omitted.] Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence. [Citations omitted.]

State v. Ramey, 318 N.C. 457, 469, 349 S.E. 2d 566, 573-74 (1986). It is the province of the jury to determine if such evidence is actually corroborative. *State v. Higginbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985).

All of the corroborating testimony offered by the State in the present case tended to add weight or credibility to Robin's testimony, even though in some minor respects it contained additional information not related by Robin in her testimony. In each instance, the trial court properly instructed the jurors as to the limited purpose for which such corroborating testimony might be considered. These assignments of error are overruled.

[7] Defendant also assigns error to a ruling of the trial court which he contends amounted to a prejudicial restriction upon right to cross-examine Frances Fleming, Robin's mother. During his cross-examination of Mrs. Fleming, defendant's counsel established that she had employed an attorney and that the attorney was in the courtroom observing defendant's trial. Defendant's assignment of error is based upon the following exchange:

> Q. Well, isn't it true that all that testimony about nightmares and fear and afraid to go to work and afraid of Mr. Teeter is part of a lawsuit that you're fixing to launch against everybody involved in this matter?
>
> A. I beg your pardon.

Q. Are you not fixing to launch a lawsuit?

A. I have not filed any lawsuit or anything else. I am trying to tell the truth.

Q. But that's what you have in mind, isn't it—bringing a lawsuit?

MR. KIMEL: We object.

THE COURT: Objection sustained.

Defendant contends, and we agree, that he was entitled to cross-examine Mrs. Fleming concerning any possible bias which might discredit her testimony, including the fact that she was contemplating or preparing to bring a civil action for damages arising out of the incident involved in the criminal case. *State v. Hart*, 239 N.C. 709, 80 S.E. 2d 901, 41 A.L.R. 2d 1199 (1954). We conclude that the question asked by defense counsel was proper; we do not, however, find that the trial court's error in sustaining the State's objection entitles defendant to a new trial.

A trial judge's rulings with respect to the scope of cross-examination will not be disturbed unless the defendant can show that the verdict was improperly influenced thereby. *State v. Wilson*, 311 N.C. 117, 316 S.E. 2d 46 (1984). This rule is consistent with the requirement of G.S. 15A-1443(a) that a defendant has the burden of showing prejudice. Considering the relatively insubstantial testimony given by Mrs. Fleming, who was mainly a corroborating witness, the natural bias which the jury might expect of the mother of an alleged rape victim, and the extent to which defendant's counsel cross-examined Mrs. Fleming concerning her employment of an attorney before the objection was sustained, we are convinced that the trial judge's ruling did not influence the verdict in this case. Thus, the error was not prejudicial.

[8] By the next assignments of error argued in his brief, defendant challenges the constitutionality of G.S. 14-27.3(a)(2). The statute provides, in pertinent part:

(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

. . .

(2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless.

Definitions of the terms "mentally defective," "mentally incapacitated," and "physically helpless" are contained in G.S. 15-27.1(1)(2) and (3). Defendant contends that the statute is so overbroad as to unconstitutionally infringe upon a physically handicapped or mentally disabled person's "fundamental right to personal privacy" by intruding upon such a person's right to engage in consensual vaginal intercourse.

Unquestionably, the protection of persons who, by reason of mental or physical incapacity, are unable to protect themselves from sexual abuse, is a legitimate governmental objective, recognized by the Legislature in the passage of the statute. We need not, however, decide the question posed by defendant because a decision is unnecessary to the resolution of this appeal. Courts will not consider an attack upon the constitutionality of a statute when the attack is made by a party whose own rights are not discriminated against by the statute. *State v. Trantham*, 230 N.C. 641, 55 S.E. 2d 198 (1949). Defendant is neither "mentally defective," "mentally incapacitated," nor "physically helpless." Thus, he is not a member of the class whose rights he alleges are violated by G.S. 14-27.3(a)(2) and he has no standing to challenge its constitutionality. *See In re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974); *State v. Trantham, supra.*

[9] By assigning error to the denial of his motions to dismiss made at the close of all the evidence and again after return of the verdict of guilty, defendant challenges the sufficiency of the evidence to sustain his conviction. It is well established that a defendant's motion to dismiss criminal charges will be denied where there is substantial evidence of each essential element of the crime charged. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Substantial evidence is such as allows a reasonable inference to be drawn as to the defendant's guilt of the crime charged. *Id.* In making the determination, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving all incon-

sistencies in the State's favor; the defendant's evidence is not taken into consideration unless favorable to the State or explicative of the evidence offered by the State. *Id.*

Applying the foregoing principles to the evidence in the present case, we conclude that there was substantial evidence presented at defendant's trial that he engaged in vaginal intercourse with Robin Fleming, that Robin Fleming was mentally defective as defined by G.S. 14-27.1(1), and that defendant knew of her mental deficiency. Because there was substantial evidence of each essential element necessary for defendant's conviction of second degree rape in violation of G.S. 14-27.3(a)(2), as charged in the bill of indictment, defendant's motions to dismiss were properly denied.

Finally, defendant requests that we vacate the sentence imposed by the trial court and grant him a new sentencing hearing. He bases his request upon two contentions, neither of which have merit.

[10] Defendant first asserts that the trial court erred in finding, as the sole factor in aggravation, that "defendant took advantage of a position of trust or confidence to commit the offense." He contends that the evidence used to support the factor, i.e., his position as director of the Sheltered Workshop, was also evidence of an element of the joinable offense of vaginal intercourse by a person having custody of the victim, in violation of G.S. 14-27.7. Defendant cites *State v. Puckett*, 66 N.C. App. 600, 312 S.E. 2d 207 (1984), in which a panel of this Court held that evidence of an element of a joinable offense with which a defendant has not been charged may not be used to support a finding of an aggravating factor.

Our Supreme Court has held that a trial court may properly consider evidence in support of an aggravating factor even though the same evidence might also prove an element of an offense joinable with the offense for which defendant is being sentenced, if the joinable offense has been dismissed. *State v. Mann*, 317 N.C. 164, 345 S.E. 2d 365 (1986). In the present case, defendant was charged with violating G.S. 14-27.7 and that charge was joined with the second degree rape charge for trial. However, the indictment charging a violation of G.S. 14-27.7 was dismissed at the close of the State's evidence. Therefore, under *Mann*, it was

proper for the trial court to consider defendant's position as a factor in aggravation of sentence. Moreover, the evidence showed that Robin Fleming was a client-employee of the Sheltered Workshop, who went to work from her home each day. There was no evidence that either the Sheltered Workshop or defendant was vested with custody of Robin. Defendant's contention with respect to the aggravating factor is overruled.

[11] Defendant's second contention is that the trial court erred in determining that the single aggravating factor found by the court outweighed the three mitigating factors found. The weight to be given aggravating and mitigating factors is clearly within the sound discretion of the trial judge, whose decision will not be disturbed absent an abuse of that discretion. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983); *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). Defendant has failed to show an abuse of discretion on this appeal. This assignment of error is overruled.

In summary, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges ARNOLD and GREENE concur.

IN RE THE APPEAL FROM THE APPROVAL OF THE APPLICATION OF WAKE KIDNEY CLINIC, P.A. TO ESTABLISH A HEMODIALYSIS FACILITY IN RALEIGH, NORTH CAROLINA (PROJECT I.D. #J-1945-83)

No. 8610DHR908

(Filed 19 May 1987)

1. **Hospitals § 2.1— certificate of need—dialysis facility—evidence available but not considered in original decision—properly considered by hearing officer**

The hearing officer in a contested certificate of need case for a dialysis facility did not err by receiving evidence of the financial status of two of the investors in the facility after the application was deemed closed where both investors had been named in the application; all parties were on notice that the financial records of each could be considered; and the information was available at the time of the agency's original decision.

2. **Hospitals § 2.1— certificate of need—dialysis facility—evidence of need sufficient**

There was substantial evidence to support the conclusion that a need existed for a proposed dialysis facility where appellants operated a competing facility and had expansion plans; the Department of Human Resources properly considered only six of appellants' planned eight new stations as existing because only six had been approved for medicaid/medicare reimbursement; the director of the dialysis facility in Chapel Hill testified that his facility had a waiting list, that he knew of at least eighteen patients he could refer to the proposed facility, and that he was informed that there was a waiting list at appellants' clinic as well; a doctor proposing the new facility testified that he was denied referral privileges by appellants' clinic and that his patients were forced to change doctors if they wished to utilize the Raleigh facility; evidence by appellants that their existing facility was underutilized conflicted with statements made when applying to the federal government for medicare approval for expanding their facility; appellants' clinic had recently completed an expansion; and utilization rates always went down when new stations were first added.

3. **Hospitals § 2.1— certificate of need—dialysis facility—no less costly or more effective alternatives**

In a contested certificate of need case for additional kidney dialysis units, there was sufficient evidence to support the conclusion that there were no less costly or more effective alternatives to the proposed facility where the owner of a competing clinic testified that it would be less costly and more effective to allow his clinic to expand again, but such an expansion would not solve the problem caused by that clinic's refusal to accept referrals from other doctors, and there was substantial evidence to conclude that the proposed facility would be the most effective method of providing home dialysis training services.

4. **Hospitals § 2.1— certificate of need—dialysis facility—proposal financially feasible**

The conclusion of the Department of Human Resources that a proposed dialysis facility was financially feasible was supported by substantial evidence in the whole record where the budget of the facility appeared to be reasonable, viewed in light of other factors including the need for the proposed service, the utilization projections, and the availability of funds for the project.

APPEAL by petitioners from the North Carolina Department of Human Resources Division of Facility Services. Decision entered 21 February 1986. Heard in the Court of Appeals 6 April 1987.

Wake Kidney Clinic, P.A., applied to the respondent Certificate of Need Section (the Section) of the Department of Human Resources (DHR) for a certificate of need to establish an End Stage Renal Disease (ESRD) facility for kidney dialysis in Raleigh.

The Section recommended approval of the application for a seven-station facility. Petitioners, Raleigh Clinic, P.A., and George A. Glaubiger, M.D., as affected persons under the relevant statute, petitioned the Section for a reconsideration of its decision.

Upon reconsideration, the Section again recommended issuance of the certificate of need, but limited to a six-station facility. Petitioners requested a hearing which was conducted on 11 March 1985. The Hearing Officer affirmed the recommendation of the Section and petitioners appealed to the designee of the Secretary of Human Resources. The designee also affirmed the decision and ordered the issuance of the certificate of need. This decision is the "final agency decision" under G.S. 131E-186 and petitioners appeal directly to this Court pursuant to G.S. 7A-29(a) and G.S. 131E-188(b).

Bode, Call and Green, by Robert V. Bode; and Ross and Hardies, by James B. Riley, Jr., of the State Bar of Illinois, for petitioner-appellants.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Gayl M. Manthei, for respondent-appellee North Carolina Department of Human Resources.

Jordan, Price, Wall, Gray and Jones, by William R. Shenton and Stephen R. Dolan, for intervenor-appellee Wake Kidney Clinic, P.A.

PARKER, Judge.

The two main issues raised by petitioners on this appeal are whether DHR erred in considering evidence petitioners contend constituted an improper amendment to the application and whether the criteria necessary to DHR's decision were supported by substantial evidence. We conclude that the challenged evidence was properly before DHR and that the decision has substantial support in the record. Therefore, we affirm the decision to grant the certificate of need to Wake Kidney Clinic, P.A.

Wake Kidney Clinic, P.A., submitted its application for a certificate of need on 15 November 1983. At that time, the Health Services Area (HSA) to be served by the proposed facility had 65 kidney dialysis stations and a projected need of 72. There were three existing facilities serving that need: North Carolina Memo-

rial Hospital in Chapel Hill had 25 stations, Duke University Medical Center in Durham had 18, and Raleigh Kidney Clinic, P.A., in Raleigh had recently expanded from 16 to 22 stations.

Under North Carolina's Certificate of Need statute, G.S. 131E-175, *et seq.*, a certificate of need would be required to establish a new kidney dialysis facility, but one would not be required to expand an existing facility. However, the federal government must approve both a new facility or an expansion in order for the facility or expansion to receive medicare or medicaid funds. This approval is critical to the survival of a facility, as over eighty percent of dialysis patients are medicare or medicaid recipients. On 31 December 1983, petitioner George A. Glaubiger, M.D., notified the Section that petitioner Raleigh Kidney Clinic, P.A., had applied to the federal government for approval of an additional eight kidney dialysis stations. If the approval were to be granted, the expansion would fill the projected need of the HSA.

The federal government approved six additional stations at Raleigh Kidney Clinic on 26 March 1984. Unaware of that decision, the Section approved Wake's application for a certificate of need for a seven-station ESRD facility on 29 March. Petitioner filed a request for reconsideration of that decision pursuant to 10 N.C.A.C. § 3R.0314 (repealed effective 1 February 1986) on the grounds that the expansion of the Raleigh Kidney Clinic had obviated the need for an additional facility.

[1] Petitioners also presented evidence that at least two of the four initial investors planned for the Wake Kidney Clinic, P.A., could not participate as they were not licensed physicians. *See* G.S. 55B-4. A third listed shareholder was a licensed physician in several states and needed to meet only *pro forma* requirements in order to become licensed in North Carolina. However, the Section had not investigated or considered this doctor's assets in analyzing the financial feasibility of the project and petitioners contended that to do so on reconsideration would be improper. Further, petitioners contended that as the out-of-state doctor was not yet licensed in N.C., his assets could still not be considered in any event. The fourth shareholder is Dr. J. Keith Keener, M.D., the local Raleigh nephrologist who would operate the clinic. There is no dispute that his assets could be utilized as support for the

facility, but petitioners argue that his assets are insufficient standing alone to make the project financially feasible.

The out-of-state doctor, Dr. Alan Peabody, M.D., is involved in the operation of several dialysis facilities in other states. His assets, if properly considered, are more than adequate to guarantee the short-term financial feasibility of the Wake project. Dr. Peabody was listed on Wake's original application as a shareholder in the project, and he provided a bank reference. However, that reference was not checked in the initial review of the project as the Section, unaware of the statute limiting financial participation in professional associations to licensed professionals, considered the assets of the other three shareholders more than adequate and did not consider it necessary to check Dr. Peabody's financial status. Appellants contend that it was then improper to admit evidence of Dr. Peabody's financial records at the reconsideration hearing as that evidence was not before the Section before its original decision and that this change constituted an amendment to the application. This argument is without merit.

The rules adopted by the Department of Human Resources to govern contested certificates of need hearings prevent a party from amending his application once it is deemed completed by the Section. 10 N.C.A.C. § 3R.0306. Wake's application was declared complete by the Section on 30 November 1983. In our view, the evidence presented at the hearing in this case concerning Dr. Peabody's financial status did not constitute an amendment to the application, nor did the evidence concerning a bank line of credit made available to Dr. Keener on 13 March 1985. Both doctors were named as investors in the project on the application and both supplied bank references. All interested parties were on notice that the financial records of each could be considered. Thus, the information relied upon by the agency in its reconsideration decision was available to it at the time of the original decision. The hearing officer is properly limited to consideration of evidence which was before the Section when making its initial decision, but the hearing officer is not limited to that part of the evidence before it that the Section actually relied upon in making its decision. It is also permissible for the parties to add updated information concerning matters which were before the Section in making its original decision. *See In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 81 N.C. App. 628, 345 S.E. 2d 235

(1986). We conclude that the evidence of Dr. Peabody's financial status and of Dr. Keener's bank line of credit did not constitute improper amendments to the application. The evidence was properly considered and the assignment of error is overruled.

The remaining question before us is whether the decision of DHR to grant the certificate of need to Wake Kidney Clinic, P.A., is supported by the evidence. Our scope of review is the whole record test, under which the findings of fact made by the agency are conclusive on appeal if they are supported by substantial evidence in the record reviewed as a whole. *Hospital Group of Western N.C. v. N.C. Dept. of Human Resources*, 76 N.C. App. 265, 332 S.E. 2d 748 (1985). This Court is required to consider evidence which detracts from the decision, as well as evidence which supports it. *Id.* However, we are not to substitute our judgment for that of the agency. *Id.*

General Statute 131E-183 lists the criteria which DHR must apply when evaluating an application for a certificate of need. Appellants contend that there was insufficient evidence to support the agency's findings and conclusions concerning Wake's compliance with three of the applicable criteria. The disputed criteria are: (i) the need for the services, G.S. 131E-183(a)(3); (ii) the availability of less costly or more effective alternatives, G.S. 131E-183(a)(4); and (iii) the immediate and long-term financial feasibility of the project, G.S. 131E-183(a)(5).

[2] There was substantial evidence to support the conclusion that a need existed for the proposed facility. At the time of the original decision, there existed 65 dialysis stations in the area with a projected need of 72. Appellants, Dr. Glaubiger and his Raleigh Kidney Clinic, P.A., were approved by the federal government for an expansion of six stations, although Dr. Glaubiger testified at the hearing that eight additional stations were planned. New projections from the North Carolina Kidney Council, an independent organization, presented at the contested case hearing showed a need for 77 stations. The agency considered only six of appellants' new stations, arriving at a total of 71 existing stations and, therefore, approved the application of Wake Kidney Clinic, P.A., limited to six stations.

Appellants argue that it was improper for the agency to only consider six of the eight planned additional stations at the Ra-

leigh clinic. Only those six had been approved by the federal government for medicare/medicaid reimbursement. The evidence presented at the hearing showed that eighty to ninety percent of the dialysis patients in the area to be served relied on medicare or medicaid to pay for the dialysis treatment. The agency, therefore, was justified in concluding that only federally-approved stations should be considered when counting the number of existing stations.

Other evidence of need came from the testimony of Dr. William D. Mattern, the director of the ESRD facility at North Carolina Memorial Hospital in Chapel Hill. His facility had a waiting list and he knew of at least eighteen patients who he could refer to the proposed facility. Dr. Mattern also testified that he had been informed that there was a waiting list for the Raleigh Clinic as well and that no more transfers would be accepted there from NCMH. Further evidence of need was the testimony of Dr. Keener, the proponent of the proposed facility, that he was denied referral privileges by the Raleigh Kidney Clinic and that all of his ESRD patients were forced to change doctors if they wished to utilize the Raleigh Clinic for dialysis. As most of his ESRD patients lived closer to the Raleigh facility than to NCMH or Duke, this resulted in an undue burden on his patients.

Evidence of lack of need for the proposed facility came from Dr. Glaubiger who testified that his facility was experiencing only a seventy percent utilization rate. An eighty percent utilization rate is used as a threshold by state and federal regulations as being the point when additional facilities should be considered. However, the evidence was that utilization rates always went down when new stations first were added. The Raleigh Clinic had just added a total of twelve stations in the eighteen-month period preceding the hearing. The agency properly gave this evidence little weight, as the utilization rates cited by Dr. Glaubiger were depressed by the rapid expansion of the Raleigh Clinic. Prior to the expansion, the utilization rate had been over ninety percent. Duke and NCMH also reported utilization rates of over ninety percent. Further, the claim of low utilization rates conflicted with representations made by Dr. Glaubiger when applying to the federal government for medicare approval of additional dialysis stations. We conclude that there was substantial evidence in the

record as a whole supporting DHR's conclusion that a need existed for the facility.

[3] Appellants also contend that there was not sufficient evidence to support the conclusion that there were no less costly and more effective alternatives to the proposed facility. Naturally enough, Dr. Glaubiger testified that it would be less costly and more effective to simply allow his Raleigh Clinic to expand again. However, such an expansion would not solve the problem which confronted Dr. Keener's patients caused by the refusal of the Raleigh Clinic to allow Dr. Keener to refer patients there. Dr. Mattern testified that he, too, had experienced difficulty in referring patients to Dr. Glaubiger's clinic.

In addition, there was considerable testimony concerning the merits of home dialysis for ESRD patients. Apparently, Dr. Keener is a strong advocate of home dialysis, while Dr. Glaubiger is not. The director of the NCMH program testified that Dr. Glaubiger has "not been very cooperative" in statewide efforts to encourage home training. Nancy Martin, the staff person in the Section of the Division of Facility Services who evaluated the application of Wake Kidney Clinic, P.A., testified that she considered the home training issue in evaluating the application, as Dr. Keener included in the application a statement that his facility would "aggressively" attempt to train patients to dialyze at home. Encouraging home dialysis is the policy of both the state and federal governments as it is less costly and encourages dialysis patients to be more independent. The agency had substantial evidence before it to conclude that the proposed facility would be the most effective method of providing home dialysis training services. For all the above reasons, there was substantial evidence in the whole record to justify the conclusion that there were no less costly or more effective alternatives for providing the desired services.

[4] Finally, appellants contend that the agency erred in concluding that the Wake Kidney Clinic project was financially feasible. In support of this contention, appellants argue that the assets of Dr. Peabody should not have been considered; that the assets of Dr. Keener were insufficient standing alone to support the project; and that the proposed budget for Wake Kidney Clinic, P.A., was unreasonable.

We have already concluded that the agency did not act in an unfair or illegal manner in considering evidence of Dr. Peabody's financial status simply because it had not been utilized in the initial decision. Appellants also argue that Dr. Peabody's assets still could not have been considered as he was not yet a licensed physician in North Carolina and was, therefore, ineligible to financially participate in a professional association. This argument is without merit. Dr. Peabody testified that he had made all the necessary applications to the State Board of Medical Examiners to become a licensed physician. He was not required to take any tests and there were no anticipated hindrances to his obtaining his license to practice medicine in this state. Appellants presented no evidence to the contrary. The agency was justified in relying on Dr. Peabody's assets, as all the evidence indicated that he would be a licensed physician and thus eligible to participate in the project by the time the CON would be issued.

In light of our conclusion above, we need not address the contention of appellants that Dr. Keener's assets alone were insufficient to support the project. It is undisputed that the assets of Drs. Keener and Peabody together are more than sufficient to make the project financially feasible in the short term.

Long-term financial feasibility is also a relevant criterion and appellants contend that the proposed budget submitted by Wake Kidney Clinic, P.A., was unreasonable and that, in fact, the project is not feasible over the long term. Applicants for a certificate of need are required to submit a budget showing revenue and expense projections for the first three years of operation. Appellants contend that the budget submitted by Wake Kidney Clinic overestimated revenues while underestimating expenses and that, in any event, the submitted budget was for a proposed seven-station facility. Because the certificate of need was approved for a six-station facility, appellants contend the budget is even more unreasonable.

The evidence presented at the hearing showed that the budget had been prepared by Ms. Vicki Haas, a Charlotte-based health services consultant hired by Dr. Keener to prepare the CON application for Wake Kidney Clinic, P.A. Ms. Haas had been in the consulting business for about three years and she had prepared CON applications for dialysis facilities before preparing the ap-

plication in this case. Also participating in the preparation of the budget was Dr. Peabody, who owns dialysis facilities in Florence and Bennettsville, South Carolina. He testified to his familiarity with the costs and revenues of operating a dialysis facility. Both Ms. Haas and Dr. Peabody testified that the budget submitted by Wake Kidney Clinic, P.A., was reasonable and, in fact, overstated the "Expenses" column by including some items in the column which were not necessary to include there. For example, the proposed budget contained an allowance for $7,500 in interest payments over the year. This item was in the budget even though all capital financing was to be through the personal investing of Drs. Keener and Peabody. The interest was included as a contingency should the facility have to borrow money to meet its operating expenses prior to receiving its first medicare/medicaid reimbursements. Dr. Peabody did testify that the reduction in the number of approved stations from seven to six would decrease revenues more than it would expenses, but he still expected the Clinic to show a profit after the first year.

Nancy Martin, the staff person in the CON Section who reviewed the application, testified that in her analysis of the proposed budget, she calculated anticipated revenues using a lower utilization rate than that used by the applicant and she concluded that the project would still be financially feasible. She also stated that there were some items which were to be paid as part of the capital expenditures which the applicant had listed on the budget. Without these items, she believed the project would appear even more financially attractive.

Appellants contend that the revenue projections in the budget are unreasonable. However, this argument, in reality, merely repeats the argument that the need for the facility does not exist, as appellants argue that the proposed facility will not get as many patients as projected in the budget. This argument is without merit, as we have already concluded that substantial evidence supports the conclusion that a need exists for the proposed facility.

Appellants also contend that the applicants underestimated the project's expenses by failing to include a line item for administrative expenses. However, testimony from Vicki Haas and Dr. Peabody indicated that the estimated administrative costs

were mislabeled "Property" in the submitted budget. (The proposed facility would have no "property" costs as it would be in a leased facility and rent was included elsewhere in the budget.) The agency accepted this testimony and concluded that the estimated administrative costs were reasonable. There was no credible evidence to the contrary, as neither Dr. Glaubiger nor Dr. Peabody, the two doctors experienced in operating dialysis facilities, could give an estimate of the administrative costs at their facilities. Appellants introduced a medicare audit form for Dr. Peabody's Bennettsville, S.C. facility which showed administrative costs at over $40,000 for a four-month period, while Wake Kidney's budget showed administrative costs to be $23,188 for a year. The two cannot be accurately compared, though, as the figure for the Bennettsville facility includes physician compensation and the salaries of other employees, figures which are accounted for elsewhere in the Wake Kidney budget.

Appellants further contend that, in order to treat the same number of patients as set forth in the budget in a six-station facility, Wake Kidney would have to run a third shift, dramatically increasing the salary costs. This argument is based on the faulty premise that Wake Kidney is somehow bound to treat the number of patients indicated in the budget. This is not true. It is apparent from the evidence that the maximum number of patients a six-station facility can treat in a six-day work week, running two shifts, is twenty-four. The need data for the facility indicates that the facility could reach this maximum capacity in a matter of weeks. While the loss of one station does cut into the projected revenues somewhat, expenses are also reduced and the evidence establishes that the facility would be profitable even limited to six stations.

The perceived reasonableness of the budget is only one element used in evaluating the long-term financial feasibility of the project. Other factors include the need for the proposed service, the utilization projections and the availability of funds for the project. All of these factors weigh in favor of the financial feasibility of the project. When viewed in light of these other factors, the budget of the facility appears to be reasonable. The conclusion of the agency that the project is financially feasible is supported by substantial evidence in the whole record.

In light of our disposition of appellants' assignments of error, we need not address appellees' cross-assignments of error. We have carefully reviewed the lengthy record in this case and have considered the arguments presented by the parties. We conclude that the decision of the Department of Human Resources to grant the application of Wake Kidney Clinic, P.A., for a certificate of need to operate a six-station kidney dialysis center in Raleigh was supported by the evidence. The decision was reached in a fair, lawful and impartial manner. Therefore, that decision is hereby

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

JULIO MEDINA, JR. v. TOWN AND COUNTRY FORD, INC., AND NCNB NATIONAL BANK OF NORTH CAROLINA

No. 8626SC1103

(Filed 19 May 1987)

1. Evidence § 19— similar occurrence evidence—admissibility to show intent, absence of mistake and bad faith

In an action to recover compensatory and punitive damages for malicious prosecution and treble damages for unfair trade practices arising out of plaintiff's attempt to purchase a car from defendant dealer, a witness's testimony concerning problems she experienced in a prior transaction with defendant dealer was admissible under N.C.G.S. § 8C-1, Rule 404(b) for the limited purpose of showing defendant's motive, intent, absence of mistake and bad faith in its dealings with plaintiff. Also, it was within the court's discretion under N.C.G.S. § 8C-1, Rules 403 and 404 to permit the witness to refer to her participation as a witness at a DMV hearing arising out of her transaction with defendant as part of her explanation of the circumstances surrounding the return to her of a fee withheld by defendant for recovery of a car from her.

2. Witnesses § 8.3— knowledge of DMV order—cross-examination for impeachment purposes

In an action for malicious prosecution and unfair trade practices arising out of plaintiff's attempt to buy a car from defendant dealer, cross-examination of defendant's finance manager about his knowledge of an order entered by the DMV in a case involving another of defendant's customers was properly permitted for the purpose of impeaching the credibility of the witness. N.C.G.S. § 8C-1, Rule 611(b).

3. **Unfair Competition § 1— misrepresentations as unfair trade practice—submission to jury—harmless error**

The trial court's error in submitting to the jury the question of whether defendant's representations constituted an unfair and deceptive trade practice was rendered harmless by the trial court's independent determination that defendant's acts constituted an unfair and deceptive trade practice.

4. **Malicious Prosecution § 15; Unfair Competition § 1— punitive damages for malicious prosecution—treble damages for unfair trade practices**

Plaintiff could properly recover punitive damages for malicious prosecution and treble damages for unfair trade practices in the sale of a car to plaintiff where defendant's misrepresentations in the sale of the car were wholly separate from the conduct underlying plaintiff's claim for punitive damages.

Judge BECTON dissenting in part.

APPEAL by defendant Town and Country Ford, Inc. from *Friday, Judge*. Judgment entered 6 May 1986 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 11 March 1987.

Plaintiff brought this action against defendants Town and Country Ford and NCNB National Bank of North Carolina. As against the dealership, plaintiff alleged, *inter alia*, breach of contract, malicious prosecution, and unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1, and, based on those claims, he sought treble damages pursuant to G.S. § 75-16 and punitive damages. As against NCNB, plaintiff sought actual and punitive damages for negligence and treble damages for unfair and deceptive trade practices.

On 6 October 1982, plaintiff, the owner of a 1982 Ford Mustang, went to defendant Town and Country Ford, where he met with Tom Carano, a salesman. Plaintiff, Tom Carano and Terry Carano, sales manager of Town and Country Ford, discussed a trade for a 1978 Lincoln Continental. According to plaintiff, Terry Carano told him that he could purchase the Lincoln by trading his Mustang, paying $100 in cash, and financing the balance of the purchase price at $235 per month for thirty-six months. Plaintiff agreed to make the purchase approximately 10 to 15 minutes before closing time. Plaintiff gave Terry Carano a check for $100. Plaintiff then signed the sales contract and related papers "in blank" because there was not sufficient time before closing to prepare them on the dealership's computer typewriter.

Terry Carano told plaintiff to leave the dealership with the Lincoln he had just purchased. When plaintiff expressed concern over taking the car before having obtained financing Terry Carano told him that "we will take care of things . . . [a]ll we need now is $1,500.00 so we can make sure in good faith you are going to buy this car . . . ." Plaintiff responded that he did not have $1,500 in his account at the bank. Carano told plaintiff that he should sign the check "in blank" and that it would be returned to him as soon as financing on the car was complete. Plaintiff followed Carano's instructions and left with the Lincoln.

The following week plaintiff received a copy of the written sales contract. The terms included in this written contract did not correspond to the parties' alleged oral contract. Specifically, the sales contract contained an undiscussed $1,500 "Cash Due on Delivery" figure and a monthly payment of $265, instead of $235. Plaintiff immediately contacted the dealership about the discrepancy and one of the Caranos told him that "in order to go ahead with the financing on [this vehicle, plaintiff would] have to put in another $1,500.00 on top." Plaintiff did not agree to this request, and he returned the Lincoln to the dealership. Plaintiff then asked for his Mustang and was informed that it had been sold. Plaintiff left the Lincoln with the dealership and walked home.

Town and Country subsequently attempted to negotiate plaintiff's $1,500 check, and, when it was returned unpaid, it obtained a warrant for plaintiff's arrest. When the check case came on for trial, no one from the dealership was present and the case was dismissed. Again, after the initiation of this lawsuit, Town and Country obtained a second warrant for plaintiff's arrest for the issuance of the $1,500 check. This second case was also dismissed.

According to defendant Town and Country Ford, the parties did not enter into the oral contract claimed by plaintiff and plaintiff did not execute the sales contract and related papers "in blank." Rather, according to the dealership, the parties entered into a written contract for the purchase and sale of the Lincoln under the following terms: a $1,600 cash downpayment and a trade-in of the 1982 Mustang with the balance of the purchase price financed through defendant NCNB National Bank of North Carolina.

Two sets of issues were submitted to the jury regarding defendant Town and Country Ford. The first set was submitted and answered as follows:

1. Did the Plaintiff, Julio Medina, enter into a contract with Town and Country Ford, Inc., for the purchase of a 1978 Lincoln Continental automobile?

Answer: Yes

2. If so, did Defendant, Town and Country Ford, Inc., breach this agreement?

Answer: Yes

3. If so, what amount of damage, if any, has Plaintiff, Julio Medina, suffered as a result of said breach.

Answer: $1,334.50

4. Did Defendant's representations made to the Plaintiff in connection with the purchase of the 1978 Lincoln Continental automobile constitute unfair and deceptive acts or practices in commerce, contrary to the provisions in G.S. 75-1.1?

Answer: Yes

The second set was submitted and answered as follows:

1. Did the Defendant, Town and Country Ford, Inc., procure criminal process, a warrant, against the Plaintiff, Julio Medina, with malice and without probable cause?

Answer: Yes

2. If so, what amount of compensatory damages, if any, is Plaintiff, Julio Medina, entitled to recover from Defendant, Town and Country Ford, Inc.?

Answer: $2,250.00

3. What amount of punitive damages, if any, does the Jury in the sound discretion award the Plaintiff from the Defendant?

Answer: $62,500.00

A third set of issues was submitted against defendant NCNB and the jury returned a verdict in favor of NCNB.

The trial court entered judgment, in pertinent part, as follows:

> The Jury having found by their answer to Issue 4 of the first set of Issues that the acts of Defendant were committed, the court concludes that such acts were unfair and deceptive trade practices and trebles the amount of actual damages of $1,334.00 found by the Jury in answer 3 of the first set of Issues to $4,003.50 and adds to said sum of $4,003.50, the compensatory damages of $2,250.00 and the punitive damages of $62,500.00 in accordance with the answers to Issues 2 and 3, respectively of the second set of Issues . . . .

From the judgment entered on the verdict, defendant Town and Country Ford appealed.

Weinstein & Sturges, P.A., by Fenton T. Erwin, Jr., for plaintiff-appellee.

Bailey, Patterson, Caddell & Bailey, by Allen A. Bailey and H. Morris Caddell, Jr., for defendant-appellant Town and Country Ford, Inc.

WELLS, Judge.

[1] Defendant contends the court erred in admitting the testimony of Ms. Sheree King "as to (a) a prior transaction she had with Town and Country Ford; and (b) as to her knowledge of an investigation and hearing conducted by the North Carolina Department of Motor Vehicles of . . . Town and Country Ford arising out of Ms. King's transaction." We disagree.

After conducting a *voir dire* examination of Ms. King, the court admitted her testimony for the limited purpose of showing intent, plan, knowledge or absence of mistake and not as substantive evidence. The court further instructed the jury to consider her testimony for this limited purpose only.

Ms. King testified about a transaction she had with defendant in August 1981, approximately fourteen months prior to the events involving plaintiff. In this transaction, Ms. King purchased a car from defendant. After agreeing to the sales price, Ms. King made a $3,000 cash downpayment on the car, signed a buyer's order and invoice and executed other sales-related documents. She

then left the dealership with the car. Shortly thereafter on the same day, Ms. King received a telephone call from the dealership telling her to return the car as it had already been sold to another customer. Ms. King refused to return the car. The morning after the sale, Ms. King discovered that the car was missing. When she called the police to report the car as being stolen she was advised that it had been repossessed for nonpayment by defendant at 6:00 a.m. that morning. Ms. King never re-obtained the car. On 18 August, Ms. King received a check for $2,851.10 representing the balance of her downpayment less a recovery fee of $148.90 pocketed by defendant.

Ms. King further testified that she appeared as a witness for the State at a hearing conducted by the North Carolina Department of Motor Vehicles (DMV) concerning defendant's withholding of the $148.90 from the $3,000 downpayment. According to Ms. King, she received the $148.90 two days after she "received the summons to appear at the hearing in Raleigh."

We hold that Ms. King's testimony was admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b) of the North Carolina Rules of Evidence. Rule 404(b) provides:

> (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.

"Rule 404 is virtually identical to Federal Rule of Evidence 404, the legislative history of which tends to favor admissibility." *State v. Wortham*, 80 N.C. App. 54, 341 S.E. 2d 76, *disc. rev. allowed*, 317 N.C. 341, 346 S.E. 2d 148 (1986). Under the federal rule, similar occurrence evidence, like the kind offered here through the testimony of Ms. King, has generally been held admissible. *See Kerr v. First Commodity Corp. of Boston*, 735 F. 2d 281 (8th Cir. 1984) and *Jay Edwards, Inc. v. New England Toyota Distributor*, 708 F. 2d 814 (1st Cir.), *cert. denied*, 464 U.S. 894 (1983).

We hold that the similar occurrence evidence admitted here was probative of defendant's motive, intent, absence of mistake

and possible bad faith in its dealings with plaintiff and did not simply portray an unrelated "bad act" by defendant. *See id.* As such, the evidence was relevant to the issues of unfair and deceptive trade practices, malicious prosecution and punitive damages, and it thus was properly admitted under Rule 404(b). *See State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986). The court "was entitled to conclude, without abusing its discretion, that the permissible probative value of the evidence outweighed any prejudice [under Rule 403]." *Jay Edwards, Inc., supra. See also* Commentary to Rule 404(b). Further, the court gave the jury proper limiting instructions with the admission of this evidence, thereby limiting the potential for unfair prejudice. *Kerr, supra.* Accordingly, we hold that the court did not err in admitting the testimony of Ms. King regarding her prior transaction with defendant.

Defendant also contends that the court erred in permitting Ms. King to refer to her appearance as a witness at the DMV hearing. Ms. King simply testified that (1) she appeared as a witness at the hearing, (2) the hearing concerned defendant's withholding of a $148.90 recovery fee, and (3) two days after she was called to appear at the hearing she received the money. Ms. King did not testify about the actual hearing proceedings or its final disposition. We hold that it was well within the court's discretion under Rules 403 and 404 to permit Ms. King to refer to her participation as a witness at the DMV hearing as part of her explanation of the circumstances surrounding the return of the $148.90 recovery fee. *See* Commentary to Rule 404(b).

Defendant further contends that "the admission of the [DMV] Order . . . 'only to corroborate that Ms. King was present at the hearing . . .' " was error in that "the Order represented additional collateral material on a matter not in issue." However, after carefully reviewing the record, we hold that the events at trial do not support defendant's assertions regarding the admission and improper use of this evidence. These contentions are rejected. We also reject defendant's contention that a subsequent comment by the trial court about certain other evidence related to Ms. King's testimony constituted reversible error.

[2] Defendant contends the court erred in permitting counsel for plaintiff to cross-examine defendant's witness, William Hanna, Jr., about a 26 May 1982 Order entered by the DMV in the Sheree King case. We disagree.

In general, Rule 611(b) of the North Carolina Rules of Evidence provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Further,

> The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts of the case. . . . Any circumstance tending to show a defect in the witness's perception, memory, narration or veracity is relevant to this purpose.

State v. Looney, 294 N.C. 1, 240 S.E. 2d 612 (1978), *quoting* Stansbury, North Carolina Evidence, Brandis Rev. § 38.

Mr. Hanna testified on cross-examination that he was the finance manager of defendant and that he had knowledge of its practices and procedures. After conducting a *voir dire* examination, the court allowed counsel for plaintiff, over the objection of defendant, to impeach Mr. Hanna's credibility in this respect by asking him the following question:

> Q. Mr. Hanna, I will ask you to state whether or not you know of the Order that was entered by the North Carolina Commissioner of Motor Vehicles on the 26th day of May 1982 . . . [i]n which Order the Dealer License Number 4716 for Town and Country Ford, Incorporated, was revoked to engage in the business of a motor vehicle dealer under Article 12 of the North Carolina General Statutes effective thirty days after the service of this Order, and the revocation was suspended . . . and that Town and Country Ford and its dealer's license was placed on probation for one year upon certain conditions, that you not violate any of the motor vehicle laws in the State of North Carolina and that you not engage in any fraudulent or deceptive practices in advertising, selling or offering for sale vehicles that were owned by or that were on consignment to Town and Country, and did you know that that Order was entered in the Sheree King case?
>
> . . .
>
> A. No, I did not.

Just prior to this exchange, the court instructed the jury as follows:

> The Court wants to caution the jury that the Court will allow the evidence which is forthcoming solely for the purpose of impeaching the credibility of this witness and for no other purpose. You may not consider it for any other purpose than that of impeachment, if you find it does do so.

We hold that the foregoing cross-examination fits within the broad definition of " '[a]ny circumstance tending to show a defect in the witness's perception, memory, narration or veracity . . .,' " *State v. Looney, supra*, and that the court, after giving the jury an appropriate limiting instruction, properly allowed it in the exercise of its sound discretion pursuant to Rule 611(b). *See also Kerr, supra.* This contention is rejected.

[3] Defendant contends the court erred in submitting the unfair commercial practice issue to the jury. Specifically, defendant contends that the court improperly submitted the question of whether defendant's representations constituted an unfair and deceptive trade practice instead of deciding this issue itself as a matter of law after the jury returned its verdict. While we agree with defendant, we hold, for the reasons stated below, that the court's error in this regard was harmless.

"In cases under G.S. 75-1.1 and 75-16, it is ordinarily the province of the jury to find the facts, and based on the jury's findings the court must then determine as a matter of law whether the defendant's conduct violated G.S. 75-1.1." *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978), *citing Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). The court here, however, improperly submitted this question directly to the jury. *See Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 344 S.E. 2d 297, *disc. rev. denied*, 318 N.C. 283, 347 S.E. 2d 464 (1986).

After the jury returned its verdict, the court specifically concluded in the judgment entered: "The jury having found by their answer to Issue 4 of the first set of Issues that the acts of Defendant were committed, *the court concludes that such acts were unfair and deceptive trade practices* and trebles the amount of actual damages. . . ." (Emphasis added.) The court's error in submitting this question of law to the jury thus was "cured" or rendered harmless and non-prejudicial by the court's independent determination that defendant's acts constituted unfair and decep-

tive trade practices. *Ellison v. Rix*, 85 N.C. 77 (1881) (though trial court improperly submitted question of law to the jury, as the finding was in accordance with the ruling of the court, there was no prejudicial error). *See also Ipock v. Gaskins*, 161 N.C. 673, 77 S.E. 843 (1913). *See generally*, 5A CJS Appeal & Error § 1760. We also note that the trial court carefully instructed the jury that it was for them to determine whether the acts complained of by plaintiff were acts in trade or commerce. The additional requirement given by the trial court's instructions and included in issue number 4 that the acts complained of were also unfair and deceptive could only have benefited defendant. This contention is rejected.

[4] We note that we are not confronted here with the problem which arose in *Mapp, supra*, wherein plaintiff sought to recover both punitive damages and treble damages for the same conduct. In the instant case, separate conduct giving rise to independent claims provides the underlying basis for each type of damages. By submitting separate sets of issues and giving detailed instructions on each issue, the court clearly limited the jury in its deliberations on the punitive damages issue to consideration of the conduct giving rise to defendant's liability for malicious prosecution. Likewise, defendant's liability for treble damages under G.S. § 75-1.1 and G.S. § 75-16 is based on conduct, *viz.*, defendant's misrepresentations in connection with the sale of the Lincoln to plaintiff, which is wholly separate from the conduct underlying defendant's liability for malicious prosecution and the punitive damages awarded in connection with that claim.

We do not reach defendant's remaining argument as it is premised on defendant's earlier contentions.

No error.

Chief Judge HEDRICK concurs.

Judge BECTON concurs in part and dissents in part.

Judge BECTON dissenting in part.

Considering the long established rule, unchanged by our new Evidence Codes, that evidence of "other acts" will be permitted

only upon a showing of substantial similarity and identity of circumstances, *see, e.g., Martin v. Amusements of America, Inc.*, 38 N.C. App. 130, 134, 247 S.E. 2d 639, 642 (1978), *disc. rev. denied*, 296 N.C. 106, 249 S.E. 2d 804 (1978) and believing that Ms. King's testimony was not relevant to the issues of fact tried in this case, I dissent. In my view, the dissimilar occurrence evidence admitted was not probative of defendant's motive, intent, absence of mistake or possible bad faith in dealings with plaintiff. Rather, the challenged evidence simply portrayed an unrelated "bad act" by defendant. Because N.C. Gen. Stat. Sec. 8C-1, Rule 404(b) states that "[e]vidence 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," I vote for a new trial on the breach of contract claim. However, believing that the inadmissible "bad act" evidence did not affect the malicious prosecution claim, I concur in the majority's resolution of that claim.

MYRNA P. PERKINS v. CHARLES THOMAS PERKINS, JR.

No. 8617DC705

(Filed 19 May 1987)

1. **Divorce and Alimony § 7— stipulation of existence of grounds for alimony—no entitlement to divorce from bed and board**

Defendant husband's stipulation to the existence of grounds for awarding alimony to plaintiff wife did not entitle plaintiff to a divorce from bed and board where defendant did not specify which ground enumerated in N.C.G.S. § 50-16.2 existed to support an alimony award, since N.C.G.S. § 50-16.2 contains additional grounds for alimony not set forth in N.C.G.S. § 50-7 as grounds for divorce from bed and board. Therefore, the trial court properly denied plaintiff's motion for a divorce from bed and board where plaintiff failed to present evidence to prove her allegations.

2. **Divorce and Alimony § 16.9— alimony—monthly payments for a certain period—permissible lump sum**

Alimony awarded as monthly payments for a twenty-four month period constituted a permissible lump sum award.

3. **Divorce and Alimony § 16.8— alimony award—insufficient findings**

The trial court's conclusion that plaintiff is entitled to an award of permanent alimony was unsupported by findings of fact where the court made findings only as to the parties' estates and earnings but failed to make findings

as to the parties' expenses, their accustomed standard of living, and plaintiff's financial obligations.

4. **Divorce and Alimony § 16.9— alimony award—consideration of income tax consequences**

Consideration of the income tax consequences of an alimony award is proper under the "other facts of the particular case" factor set forth in N.C.G.S. § 50-16.5, but the trial court's failure to make a specific finding concerning the tax consequences would not constitute reversible error.

5. **Divorce and Alimony § 18.16— denial of additional attorney fees**

The trial court did not abuse its discretion in refusing to award plaintiff additional attorney fees after the permanent alimony hearing where the court found that attorney fees of $1,500 had been awarded to plaintiff at the *pendente lite* hearing and that plaintiff had been able to meet defendant on an equal basis considering the prior award of attorney fees and the customary fees charged by attorneys in the county.

APPEAL by plaintiff from *Blackwell, Judge*. Order entered 14 March 1986 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 16 December 1986.

Plaintiff-wife brought this action to obtain a divorce from bed and board, temporary and permanent alimony, and attorney's fees. Defendant-husband counterclaimed for a divorce from bed and board. Later, however, defendant dropped this claim and stipulated that plaintiff was a dependent spouse and that grounds existed entitling plaintiff to alimony. The trial court, by pendente lite order, directed defendant to pay seven hundred dollars a month alimony pendente lite and fifteen hundred dollars in attorney's fees.

A hearing on the issues of permanent alimony and additional attorney's fees was held in February 1986. Evidence presented at the hearing tended to show the following:

The parties were married approximately four years. No children were born to this marriage, and both parties had children from prior marriages.

Plaintiff's testimony at the hearing disclosed that she owned a small amount of real property, which was encumbered by debt, and that the main asset in her estate was her equity in the marital residence. She is employed as a salesperson in a jewelry store earning approximately ten thousand dollars a year. Plaintiff's expenses include the cost of traveling to and from work and main-

taining proper attire for work. In addition, plaintiff has several health problems requiring medication and treatment. Plaintiff also gave testimony to establish her standard of living while married to defendant; such testimony included descriptions of the marital residence, hobbies, entertainment, and the cost and duration of vacations she had shared with defendant. Finally, plaintiff submitted copies of both parties' 1984 income tax returns to the court. At the same time, she submitted projected tax returns and financial statements reflecting the tax consequences of an alimony award on the income of both parties.

Defendant testified that in addition to his equity in the marital residence, he owned thirty-three acres of undeveloped land in Virginia, two cars, stocks and bonds, and a retirement profit sharing account held with his employer. He is employed as an engineer, earning approximately fifty thousand a year. Defendant's testimony disclosed obligations for the support and the education of children from a prior marriage, as well as support obligations for an invalid parent. He also testified as to the long and short term debt he owed, and his living expenses. Finally, defendant gave testimony as to the costs and duration of vacations enjoyed by the parties during the marriage, which conflicted with plaintiff's testimony on this subject.

After considering this evidence the trial court entered an order on 14 March 1986 containing the following conclusions of law: (1) plaintiff is a dependent spouse; (2) defendant is a supporting spouse; (3) by stipulation, grounds for alimony exist; (4) plaintiff is entitled to an award of permanent alimony; and (5) plaintiff is not entitled to additional attorney's fees.

Based on these conclusions the trial court awarded plaintiff permanent alimony of seven hundred dollars a month for twenty-four months and denied plaintiff's request for a divorce from bed and board and her motion for additional attorney's fees. From this order plaintiff appeals.

Gwyn, Gwyn & Farver, by Julius J. Gwyn, attorney for plaintiff appellant.

Hatfield & Hatfield, by Kathryn K. Hatfield, attorney for defendant appellee.

ORR, Judge.

I.

[1] First, plaintiff contends that the trial court improperly denied her motion for a divorce from bed and board. We disagree.

Plaintiff must establish the existence of one of the five grounds listed in N.C.G.S. § 50-7 to obtain a divorce from bed and board. *Stanback v. Stanback*, 270 N.C. 497, 155 S.E. 2d 221 (1967). To establish the existence of such a ground the plaintiff must allege and prove acts of misconduct by the defendant and show that this misconduct was not provoked by plaintiff's actions. *Morris v. Morris*, 46 N.C. App. 701, 266 S.E. 2d 381, *aff'd*, 301 N.C. 525, 272 S.E. 2d 1 (1980).

Plaintiff alleged in her complaint that defendant's excessive use of alcohol, intentional infliction of indignities to her person, and constructive abandonment of their marital relationship were not provoked by her actions, had rendered her condition intolerable and life burdensome, and entitled her to a divorce from bed and board. Plaintiff's complaint clearly stated all the elements necessary for the relief requested. However, plaintiff presented *no* evidence with which to prove her allegations, failing entirely to meet her burden of proof on this issue. Plaintiff justified this failure by contending that defendant's stipulation to the existence of grounds for awarding alimony was also a stipulation that grounds for a divorce from bed and board existed; thus relieving her of her burden of proof as to this issue. This contention is erroneous.

To obtain an order for alimony the plaintiff must establish one of ten grounds enumerated in N.C.G.S. § 50-16.2. Five of the grounds listed in N.C.G.S. § 50-16.2 are identical to the five grounds listed in N.C.G.S. § 50-7, permitting divorces from bed and board. *Minor v. Minor*, 70 N.C. App. 76, 318 S.E. 2d 865, *disc. rev. denied*, 312 N.C. 495, 322 S.E. 2d 558 (1984). The remaining five grounds, while similar in theme, pertain to entirely different areas of judicial concern.

Under either N.C.G.S. § 50-7 or N.C.G.S. § 50-16.2 the plaintiff is relieved of the burden of establishing the facts necessary to prove the underlying ground, if the defendant stipulates that grounds for such relief exist. "A stipulation is a judicial admis-

sion. As such, '[i]t is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact.' " *Moore v. Humphrey*, 247 N.C. 423, 430, 101 S.E. 2d 460, 467 (1958) (citation omitted). However, the language of a stipulation "will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished . . . ." *Rickert v. Rickert*, 282 N.C. 373, 380, 193 S.E. 2d 79, 83 (1972).

In his stipulation defendant did not specify which ground, of the ten enumerated in N.C.G.S. § 50-16.2, existed to support an alimony award. Therefore, plaintiff may not automatically assume that the ground stipulated to in N.C.G.S. § 50-16.2 was one of the five grounds also listed in N.C.G.S. § 50-7. To adopt plaintiff's assumption would extend the perimeter of defendant's stipulation beyond the area it was clearly intended to cover and deprive defendant of a right he has not explicitly waived. This would be contrary to our established judicial policy of narrowly construing stipulations.

For this reason, we conclude that plaintiff failed to meet her burden of proof as to this issue. Thus, the trial court properly denied her request for a divorce from bed and board.

II.

Plaintiff next challenges the trial court's award of permanent alimony of seven hundred dollars a month for a twenty-four month period.

[2] Plaintiff contends this award was erroneous for two reasons. First she alleges that the limitation of alimony payments to a twenty-four month period, without a showing of fault on the plaintiff's part, was improper.

Alimony awarded as periodic payments for a specified period of time, as in the case at bar, is defined as a lump sum alimony award and is permissible. *Whitesell v. Whitesell*, 59 N.C. App. 552, 297 S.E. 2d 172 (1982), *disc. rev. denied*, 307 N.C. 583, 299 S.E. 2d 653 (1983). Consequently, the trial court's decision to award alimony in a lump sum, alone, is not sufficient to constitute reversible error.

[3] Plaintiff's second contention is that the trial court failed to make the necessary findings of fact and conclusions of law with which to support its alimony award.

In determining the amount of alimony to award, the trial court must consider the six factors enumerated in N.C.G.S. § 50-16.5: (1) the estates, (2) the earnings, (3) the earning capacity, (4) the condition, (5) the accustomed standard of living of the parties, and (6) any other facts particular to the case. Once these factors are considered, however, the actual amount awarded lies within the trial court's discretion and will not be disturbed on review absent a showing by the litigant that the challenged award is manifestly unsupported by reason. *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980).

Because an alimony award is determined by a trial court without a jury, N.C.G.S. § 1A-1, Rule 52(a) requires the trial court to find facts specifically and state conclusions of law separately. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). To comply with Rule 52(a) the trial court must "make conclusions of law to the effect that (a) the 'circumstances render necessary' a designated amount of alimony, (b) the supporting spouse has the ability to pay the designated amount, and (c) the designated amount is fair and just to all parties." *Davis v. Davis*, 62 N.C. App. 573, 576, 302 S.E. 2d 886, 887 (1983); *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E. 2d 653, 659. These conclusions must "be based upon factual findings sufficiently specific to indicate that the trial judge properly considered the six statutory factors enumerated [in G.S. 50-16.5,] and the rules [pertaining to such factors, evolving] from our case law. Without findings on the above-listed factors, an appellate court cannot review the amount of alimony awarded to determine whether the trial judge abused his discretion." *Quick v. Quick*, 305 N.C. at 454, 290 S.E. 2d at 659.

In the order awarding alimony the trial court stated as a conclusion of law that "plaintiff is entitled to an award of permanent alimony." To support this conclusion, the trial court made findings of fact as to the parties' estates and earnings. The trial court failed, however, to make any findings as to the parties' expenses, accustomed standard of living, or plaintiff's financial obligations.

This failure constitutes reversible error. The parties' expenses and financial obligations at the time the award is made

must be considered to insure that the alimony award is fair and just to both parties. Furthermore, the parties' standard of living during the marriage is a critical factor, which the trial court must consider to insure that the dependent spouse's alimony award will sustain her prior lifestyle. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653; *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980).

This Court notes that findings of fact pertaining to the parties' living expenses were made in the pendente lite order. These findings, however, are irrelevant in the present case. It is well established that the trial court's findings in an alimony pendente lite motion are solely for the purpose of that motion and are not competent evidence on the final hearing of the same issues. *Harris v. Harris*, 258 N.C. 121, 128 S.E. 2d 123 (1962); *Hall v. Hall*, 250 N.C. 275, 108 S.E. 2d 487 (1959); *Bumgarner v. Bumgarner*, 231 N.C. 600, 58 S.E. 2d 360 (1950).

The record disclosed considerable evidence presented by both parties as to their expenses, financial obligations, and accustomed standard of living, which would permit the trial court to make factual findings on these issues. Whether or not the evidence is sufficient to support the award given is not for this Court's consideration.

"What the evidence does *in fact* show is a matter for the trial court's determination, and its determination should be stated in appropriate and adequate findings of fact. Only when an appellate court knows what the facts are can it determine whether the amount awarded was within the trial court's discretion." *Quick v. Quick*, 305 N.C. at 457, 290 S.E. 2d at 661 (emphasis supplied).

Accordingly, this Court remands this case for further findings in compliance with our decision.

III.

[4] Plaintiff also assigns as error the trial court's failure to make any factual findings as to the tax consequences of the alimony award on the parties' income. Such failure, plaintiff argues, shows that the trial court neglected to consider this factor when awarding alimony.

Although not specifically listed as a factor for the trial court's consideration in N.C.G.S. § 50-16.5, consideration of the in-

come tax consequences is proper. Such consideration is authorized by the sixth enumerated factor in N.C.G.S. § 50-16.5, "other facts of the particular case." "To ignore the income tax consequences of an award of permanent alimony would be an unreasonable application of the mandate of the statute, as well as a violation of the principle . . . that the amount of alimony that is to be awarded is basically a question of fairness and justice to all parties." *Clark v. Clark*, 301 N.C. at 133, 271 S.E. 2d at 66.

The consideration of the tax consequences is not preeminent in determining an alimony award, since it is but one consideration among the many to be weighed by the trial court. However, "[i]t is clear that to disregard the effect of taxation on such an award would be to flirt with an unrealistic, and potentially unjust, result." *Clark v. Clark*, 301 N.C. at 133, 271 S.E. 2d at 66.

The failure to make a specific finding of fact as to the tax consequences, without more, is not sufficient evidence of an abuse of discretion, requiring reversal. Plaintiff submitted the 1984 tax returns for both parties, and also submitted projected financial statements and tax returns reflecting the tax consequences of the alimony award on the income of both parties. Nevertheless, the record does not indicate, nor has plaintiff demonstrated on appeal, that the tax consequences was not one of the factors the trial court considered when determining the amount of alimony to award to the plaintiff.

If the findings of fact in the order had been otherwise sufficient to support the conclusions of law as to the alimony award, a failure to make a specific finding concerning the tax consequences would not be reversible error. *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58. However, because the case at bar must be remanded for further factual findings, we recommend that the trial court consider the tax consequences and note such consideration in the further findings of fact made in this case.

IV.

[5] Finally, plaintiff contends that the trial court erred in denying her motion for additional attorney's fees.

Attorney's fees are awarded to allow the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by permitting the dependent spouse to employ

adequate legal representation. *Owensby v. Owensby*, 312 N.C. 473, 322 S.E. 2d 772 (1984). A trial court is authorized to award attorney's fees to a party who has shown that she is entitled to the relief demanded, is a dependent spouse, and lacks sufficient means upon which to live during the prosecution of the suit and to defray her necessary legal expenses. N.C.G.S. § 50-16.4 (1984); *Roberts v. Roberts*, 68 N.C. App. 163, 314 S.E. 2d 781 (1984). Once such fees are authorized, a trial court must consider several factors in determining the amount of the award, including but not limited to: each party's estate and ability to defray legal costs; the nature and scope of the legal services rendered the dependent spouse; and the skill, time, and labor expended during such representation. *Owensby v. Owensby*, 312 N.C. 473, 322 S.E. 2d 772. The amount of an award, however, rests within the discretion of the trial court and will not be disturbed on appellate review absent a clear abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58.

A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason, and that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985); *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58.

The trial court made two findings of fact in its consideration of plaintiff's motion for attorney's fees.

> 1. Plaintiff's attorney was awarded counsel fees of $1,500 at the pendente lite hearing. Said amount was just and reasonable under the circumstances.
>
> 2. Plaintiff has been able to meet defendant on an equal footing during the pendency of this action taking into consideration the prior award of counsel fees and the customary fees charged by members of the Rockingham County Bar Association.

The trial court used these findings to support its conclusion of law that:

> Plaintiff is not entitled to additional attorney fees.

After reviewing the trial court's findings, we conclude that they are sufficient to form a basis for determining a reasonable

award of attorney's fees. Accordingly, we find that the trial court did not err in denying plaintiff's request for additional attorney's fees.

For the above reasons, this Court remands this case for further findings in accordance with this opinion.

Remanded.

Judges ARNOLD and PHILLIPS concur.

DOUGLAS W. HARRIS v. NCNB NATIONAL BANK OF NORTH CAROLINA

No. 8615SC1134

(Filed 19 May 1987)

1. **Libel and Slander § 1— legal proceeding not yet begun—statements privileged**

Plaintiff did not state a claim for defamation where plaintiff alleged that defendant's attorney mailed to plaintiff's employer's attorney a letter and complaint which had not yet been filed alleging that plaintiff had obtained property by false pretense and demanding $20,500 plus interest if the complaint was not to be filed. An absolute privilege exists not only with respect to statements made in the course of a pending judicial proceeding but also with respect to communications relevant to proposed judicial proceedings.

2. **Extortion § 1— civil claim for attempted extortion—claim not stated**

Plaintiff's claim for attempted extortion was properly dismissed where defendant's attorney stated in a letter to plaintiff's employer's attorney that an attached complaint would be filed if plaintiff's employer did not pay by a specified date an amount to which defendant claimed it was entitled. A statement of intention to file a suit to enforce one's claimed legal rights is neither a threat nor the exercise of unlawful or wrongful coercion.

3. **Appeal and Error § 45.1— failure to state claims upon which relief could be granted—two claims not argued in brief—considered by court**

The Court of Appeals considered whether plaintiff's complaint stated claims for intentional infliction of mental distress and unfair trade practices, even though the brief addressed only plaintiff's defamation claim, because dismissal of plaintiff's complaint would not be appropriate if the complaint was sufficient to state a claim under any legal theory.

4. **Trespass § 2— intentional infliction of mental distress—threat of civil lawsuit—claim not sufficient**

The acts of defendant in sending a letter of demand to an adverse party in anticipation of litigation together with a proposed complaint setting forth the

basis of the claim may not be reasonably regarded as extreme and outrageous conduct sufficient to support a claim for intentional infliction of mental distress.

5. **Unfair Competition § 1— threat of civil lawsuit—not unfair and deceptive trade practice**

A communication from defendant's attorney to the attorney for plaintiff's employer concerning the subject matter of the disputed claim was neither unfair nor deceptive in view of the strong public policy favoring freedom of communication between parties and their attorneys with respect to anticipated or pending litigation.

APPEAL by plaintiff from *Lee, Judge.* Order entered 26 August 1986 in Superior Court, ORANGE County. Heard in the Court of Appeals 11 March 1987.

Cheshire & Parker, by Lucius M. Cheshire, for plaintiff appellant.

Bell, Davis & Pitt, P.A., by William Kearns Davis and Stephen M. Russell, for defendant appellee.

MARTIN, Judge.

Plaintiff filed this civil action claiming damages for defamation, "attempted extortion," intentional infliction of mental distress, and unfair and deceptive practices in commerce in violation of G.S. 75-1.1. Defendant moved, pursuant to G.S. 1A-1, Rule 12(b)(6), that the complaint be dismissed for its failure to state a claim for relief. The trial court granted defendant's motion and dismissed the action. Plaintiff appealed. We affirm the decision of the trial court.

A motion to dismiss made pursuant to G.S. 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim. *Hewes v. Johnston*, 61 N.C. App. 603, 301 S.E. 2d 120 (1983). The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). In general,

"a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Id.* at 185, 254 S.E. 2d at 615, *quoting* 2A Moore's Federal Practice, § 12.08, pp. 2271-74 (2d ed. 1975) (emphasis original). Such a lack of merit may consist of the disclosure of facts which will necessarily defeat the claim as well as where there is an absence of law or fact necessary to support a claim. *Sutton v. Duke, supra.*

In the present case, plaintiff alleged in his complaint that defendant had caused its attorney, M. Leann Nease, to prepare a document which accused plaintiff of obtaining property by false pretense and that the defamatory statement had been published by transmittal of the document, together with a letter from Ms. Nease, to Lawson Brown, an attorney representing plaintiff's employer, North Central Production Credit Association (NCPCA). A copy of Ms. Nease's letter to Mr. Brown, together with a copy of the document containing the alleged defamatory statement, was attached as an exhibit to plaintiff's complaint. The letter from Ms. Nease to Mr. Brown concerned defendant NCNB's legal position with respect to a dispute with NCPCA over the proceeds of a sale of certain farm equipment in which both NCNB and NCPCA claimed a security interest. The document referred to in plaintiff's complaint was an unfiled complaint which Ms. Nease had prepared captioned:

NCNB NATIONAL BANK OF NORTH CAROLINA

v

NORTH CENTRAL PRODUCTION CREDIT ASSOCIATION, THE UNITED STATES OF AMERICA Acting Through The FARMERS HOME ADMINISTRATION OF THE U.S. DEPARTMENT OF AGRICULTURE, and DOUG HARRIS, individually and as an employee and agent of NORTH CAROLINA CENTRAL PRODUCTION CREDIT ASSOCIATION

The unfiled complaint also alleged facts relating to the dispute existing between NCNB and NCPCA and alleged that plaintiff had made false statements to the debtor, the owner of the equipment,

and to NCNB concerning the sale of the equipment and the disbursement of the proceeds thereof, and had committed unfair or deceptive acts affecting commerce in violation of G.S. 75-1.1. The unfiled complaint alleged that NCPCA had engaged in unfair trade practices and had converted $20,500.00 to which NCNB was entitled from the sale of the equipment. The letter from Ms. Nease to Mr. Brown concluded with the following paragraph:

> I have enclosed for your review a copy of the complaint that NCNB plans to file in this matter. Unless it receives from Central, by March 26, 1986, the sum of $20,500.00 plus interest, at the legal rate, from September 6, 1985, NCNB will file this complaint.

[1] Plaintiff contends that the allegations of the unfiled complaint are defamatory as to him, and that defendant caused the defamatory material to be published by sending it to the attorney for NCPCA, his employer. He asserts that his complaint was, therefore, sufficient to state a claim for relief for defamation. We disagree.

It is now well-established that defamatory statements made in the course of a judicial proceeding are absolutely privileged and will not support a civil action for defamation, even if made with malice. *Scott v. Statesville Plywood & Veneer Co.*, 240 N.C. 73, 81 S.E. 2d 146 (1954); *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248 (1954). In determining whether or not a statement is made in the course of a judicial proceeding, the court must decide as a matter of law whether the alleged defamatory statements are sufficiently relevant to the issues involved in a proposed or ongoing judicial proceeding. Annot., 36 A.L.R. 3d 1328 (1971). With respect to the question of whether a communication or statement is relevant to litigation, our Supreme Court has stated:

> While statements in pleadings and other papers filed in a judicial proceeding are not privileged if they are not relevant or pertinent to the subject matter of the action, the question of relevancy or pertinency is a question of law for the courts, and *the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety. If it is so related to the subject matter of the controversy that it may become the subject of inquiry in the*

course of the trial, the rule of absolute privilege is controlling.

Scott v. Statesville Plywood & Veneer, supra, at 76, 81 S.E. 2d at 149 (emphasis added).

In North Carolina, the phrase "judicial proceeding" has been defined broadly, encompassing more than just trials in civil actions or criminal prosecutions. *Jarman v. Offutt, supra.* The scope of the accompanying absolute privilege has been held to include not only statements made by judge, counsel and witnesses at trial, *Ramsey v. Cheek,* 109 N.C. 270, 13 S.E. 775 (1891); but also statements made in pleadings and other papers filed in the proceeding, *Scott v. Statesville Plywood & Veneer Co., supra;* out-of-court affidavits or reports submitted to the court and pertinent to the proceedings, *Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860 (1957); *Williams v. Congdon,* 43 N.C. App. 53, 257 S.E. 2d 677 (1979); communications in administrative proceedings where the officer or agency involved is exercising a quasi-judicial function, *Angel v. Ward,* 43 N.C. App. 288, 258 S.E. 2d 788 (1979); and out-of-court statements between parties to a judicial proceeding, or their attorneys, relevant to the proceedings. *Burton v. NCNB National Bank of North Carolina,* 85 N.C. App. 702, 355 S.E. 2d 800 (1987). The question of whether the absolute privilege extends to out-of-court communications between attorneys preliminary to proposed or anticipated litigation, however, appears to be one of first impression in North Carolina.

Plaintiff argues that the statements made on defendant's behalf by its attorney, Ms. Nease, are not absolutely privileged because no judicial proceedings were pending at the time the statements were made and because the statements were not pertinent to any proposed judicial proceeding. Rather, plaintiff asserts that, at most, defendant is protected by a qualified privilege. A qualified privilege exists with respect to those communications which, even though defamatory, are made in good faith and without actual malice upon a subject in which the communicating party has an interest or with respect to which he has some duty. *R. H. Bouligny, Inc. v. United Steelworkers of America,* 270 N.C. 160, 154 S.E. 2d 344 (1967); *Alexander v. Vann,* 180 N.C. 187, 104 S.E. 360 (1920); *Alpar v. Weyerhaeuser Co.,* 20 N.C. App. 340, 201 S.E. 2d 503, *cert. denied,* 285 N.C. 85, 203 S.E.

2d 57 (1974). Plaintiff contends that if only a qualified privilege exists, his allegations that defendant acted in bad faith and with malice in causing the allegedly defamatory document to be published are sufficient to state a claim for relief. We hold, however, that an absolute privilege exists not only with respect to statements made in the course of a pending judicial proceeding but also with respect to communications relevant to proposed judicial proceedings.

We find support for our holding in the Restatement (Second) of the Law of Torts, Section 586, which states:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

The absolute privilege extends to parties to the litigation. Section 587 of the Restatement provides:

> A party to a private litigation . . . is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding . . . if the matter has some relation to the proceeding.

The comments to the above-cited sections indicate that the privilege is based upon the public interest of securing to all persons freedom of access to the courts to settle their private disputes, and of securing to attorneys, as officers of the court, the freedom to fully represent their clients. Both sections extend the absolute privilege to statements preliminary to proposed litigation when the statement is relevant to a proceeding which is seriously contemplated.

Our holding is in harmony with those of numerous other jurisdictions which have extended the protection of absolute privilege to relevant communications made preliminary to proposed litigation either by statute or by recognition of the Restatement view. *See, e.g., Lerette v. Dean Witter Organization, Inc.*, 60 Cal. App. 3d 573, 131 Cal. Rptr. 592 (2d Dist. 1976); *Club Valencia Homeowners Ass'n v. Valencia Assoc.*, 712 P. 2d 1024 (Colo. App. 1985); *Irwin v. Cohen*, 40 Conn. Supp. 259, 490 A. 2d 552 (1985);

Libco Corp. v. Adams, 100 Ill. App. 3d 314, 55 Ill. Dec. 805, 426 N.E. 2d 1130 (1981); *Sriberg v. Raymond*, 370 Mass. 105, 345 N.E. 2d 882 (1976); *Rodgers v. Wise*, 193 S.C. 5, 7 S.E. 2d 517 (1940); *Russell v. Clark*, 620 S.W. 2d 865, 23 A.L.R. 4th 924 (Tex. Civ. App. 1981); Annot., 23 A.L.R. 4th 932 (1983). *See also Johnston v. Cartwright*, 355 F. 2d 32 (8th Cir. 1966) (applying Iowa law); *Richeson v. Kessler*, 73 Idaho 548, 255 P. 2d 707 (1953); *Bull v. McCuskey*, 96 Nev. 706, 615 P. 2d 957 (1980); *Penny v. Sherman*, 101 N.M. 517, 684 P. 2d 1182, *cert. denied*, 101 N.M. 555, 685 P. 2d 963 (1984); *Cummings v. Kirby*, 216 Neb. 314, 343 N.W. 2d 747 (1974).

In the present case, the allegedly defamatory statements and the circumstances of their publication are fully set forth in plaintiff's complaint. The pleading and attachments affirmatively disclose that the statements were published by the attorney for one party to the proposed suit to an attorney for another named party which unquestionably had an interest in the controversy. The statements were clearly relevant to the issues and subject matter of the anticipated litigation, as disclosed by the unfiled complaint, in that the statements expressed the legal and factual reasons for NCNB's position with respect thereto. Thus, plaintiff's complaint discloses that the allegedly defamatory statements were absolutely privileged, necessarily defeating his claim for defamation. Plaintiff's claim for relief for defamation was properly dismissed.

[2] Plaintiff also argues that his complaint is sufficient to allege a claim against defendant for "the tort of attempted extortion." He contends that the "attempted extortion" consists of the statement in Ms. Nease's letter to Mr. Brown to the effect that defendant would file the attached complaint unless NCPCA paid, by a specified date, the amount to which defendant claimed it was entitled.

Extortion may be defined as wrongfully obtaining anything of value from another by threat, duress, or coercion. Black's Law Dictionary 696 (4th Rev. Ed. 1968). *See* G.S. 14-118.4 (1986). "Illegality is the foundation on which a claim of coercion or duress must exist." *Bell Bakeries, Inc. v. Jefferson Standard Life Ins. Co.*, 245 N.C. 408, 419, 96 S.E. 2d 408, 416 (1957). This Court has stated that "ordinarily the filing of a civil suit to establish a claim, whether the claim be ultimately determined to be well

founded or not, will not in itself be sufficient to show any wrongul [sic] duress imposed upon the defendant in such suit." *Austin v. Wilder*, 26 N.C. App. 229, 233, 215 S.E. 2d 794, 797 (1975). A statement of intention to file suit to enforce one's claimed legal rights is neither a threat nor the exercise of unlawful or wrongful coercion. Plaintiff's purported claim for relief for "attempted extortion" was properly dismissed.

[3] In his brief, plaintiff has not addressed by argument, citation of authority, or otherwise, the issues of whether the allegations of his complaint are sufficient to state claims for relief for intentional infliction of mental distress or for unfair and deceptive practices in commerce. As a result, he may be deemed to have abandoned his purported claims based upon those theories, as well as any contentions that the trial court erred by dismissing them. App. R. 28; *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 57, 330 S.E. 2d 622 (1985). Nevertheless, because dismissal of plaintiff's action would not be appropriate if the complaint is sufficient to state a claim under any legal theory, *Stanback v. Stanback, supra*, we must consider whether plaintiff has stated a claim for intentional infliction of mental distress or for a violation of G.S. 75-1.1. We conclude that he has not.

[4] The tort of intentional infliction of mental distress consists of (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe mental distress to the plaintiff. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). The "extreme and outrageous conduct" necessary for recovery has been characterized as conduct which "exceeds all bounds usually tolerated by decent society." *Stanback v. Stanback, supra*, at 196, 254 S.E. 2d at 622. Whether or not the conduct complained of may reasonably be regarded as "extreme and outrageous" is initially a question of law for the court. *Briggs v. Rosenthal*, 73 N.C. App. 672, 327 S.E. 2d 308, *cert. denied*, 314 N.C. 114, 332 S.E. 2d 479 (1985). We conclude that the acts of defendant in sending a letter of demand to an adverse party in anticipation of litigation together with a proposed complaint setting forth the basis of its claim may not be reasonably regarded as extreme and outrageous conduct sufficient to support a claim for intentional infliction of mental distress.

[5] Similarly, whether an alleged commercial act or practice is unfair or deceptive in violation of G.S. 75-1.1 is a question of law

for the court. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). A practice is unfair when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is deceptive when it has a tendency to deceive. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). In view of the strong public policy favoring freedom of communication between parties and their attorneys with respect to anticipated or pending litigation, we conclude as a matter of law that the communication from defendant's attorney to the attorney for plaintiff's employer, a party involved in the disputed claim, concerning the subject matter of the controversy was neither unfair nor deceptive.

The trial court's dismissal of plaintiff's complaint pursuant to G.S. 1A-1, Rule 12(b)(6) is

Affirmed.

Judges ARNOLD and GREENE concur.

AARON ARONOV v. SECRETARY OF REVENUE, DEPARTMENT OF REVENUE, STATE OF NORTH CAROLINA

No. 8610SC971

(Filed 19 May 1987)

Taxation § 1— income from another state—considered in disallowing N. C. loss carryover—unconstitutional

The trial court properly reversed an assessment of income tax for 1978 which was based on consideration of the taxpayer's Alabama income to conclude that he had not had net losses in 1975-1977 and so to disallow North Carolina losses which he had attempted to carry forward. The Secretary of Revenue's interpretation of N.C.G.S. § 105-147(9)d 2 and 3 results in the indirect taxation of the taxpayer's Alabama income in violation of the due process clause of the Fourteenth Amendment of the U. S. Constitution and North Carolina's law of the land clause and exceeds statutory authority as espoused in the statute's general purpose clause.

APPEAL by Secretary of Revenue from *Bailey, Judge*. Order entered 29 May 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 2 March 1987.

Kenneth G. Anderson, by Kenneth G. Anderson and James P. Stevens; and Hunter, Wharton & Howell, by John V. Hunter, III, for petitioner appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Newton G. Pritchett, Jr., for the Secretary of Revenue, Department of Revenue, State of North Carolina.

BECTON, Judge.

Taxpayer, Aaron Aronov, filed a protest to his 1978 income tax assessment of $17,839.09. The assessment was sustained in a hearing before the Assistant Secretary of Revenue. Aronov appealed to the Tax Review Board, and the Board affirmed the Assistant Secretary's decision. Aronov paid a bond in the amount of the taxes and then petitioned for review in Wake County Superior Court where the Secretary of Revenue became a party. The trial court reversed the Tax Review Board's decision. The Secretary now appeals to this Court. We affirm.

I

Aaron Aronov, a resident of Alabama, was one of three partners in an unsuccessful business venture in North Carolina. The partnership's chief asset in this State was a shopping center known as "Freedom Mall." During its three years of operation the cumulative partnership losses from the operation of the shopping center were $983,901.61. The property was sold in lieu of foreclosure in 1978 for $100.00 plus the outstanding mortgage. After interest and other expenses totalling $28,590.70, the partnership reported $955,507.50 as gain in 1978. Aronov calculated his 1978 North Carolina income taxes as follows. He reported one-third of $955,507.50, or $257,987.03 as his distributive share of the gain from the sale of the shopping center. He deducted from this income a carryover loss of $257,987.03, his cumulative distributive share of the partnership's net operating losses for 1975, 1976 and 1977. By offsetting the gain from the sale of the shopping center with the losses carried forward for those three years, Aronov reflected no North Carolina net income on his personal North Carolina tax return for 1978.

During the three years for which Aronov carried over his losses, he derived substantial income from sources outside North

Carolina. None of that income was subject to North Carolina taxes.

The Secretary, however, applied Aronov's Alabama net income to the years 1975-1977 and determined that Aronov could not carry forward his losses from those years because, when considering his other income, he did not have net losses for any of those years. The Secretary concluded that Aronov had income of $257,987.03 in 1978, subject to taxes of $17,839.09. This assessment was sustained by the Assistant Secretary and the Tax Review Board.

The trial court reversed the Board's decision, finding that the decision of the Board and the Assistant Secretary result in the income taxation by the State of North Carolina of income earned by Aronov in other states and which had no connection with this State in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, the commerce clause of the United States Constitution, and the law of the land clause of the North Carolina Constitution. Additionally, the trial court found that the Assistant Secretary's interpretation exceeded statutory authority and was arbitrary and capricious.

II

The Secretary's sole argument on appeal is that the trial court erred in reversing the Board because its conclusions of law were not supported by the evidence. Essentially, the Secretary contends that the trial court had no basis in law or fact for its finding that the Secretary's interpretation of N.C. Gen. Stat. Sections 105-147(9)d 2 and 3 (1985) resulted in the unlawful taxation of Aronov's Alabama income. We disagree.

A

N.C. Gen. Stat. Sections 105-147(9)d 2 and 3 provide in pertinent part that business "losses in the nature of net economic losses sustained in any or all of the five preceding income years . . ." may be carried forward. But "[t]he net economic loss for any year shall mean the amount by which allowable deductions for the year . . . and prior year losses *shall exceed income from all sources in the year including any income not taxable under this Division*" and "[a]ny net economic loss of a prior year or years brought forward and claimed as a deduction in any income year

may be deducted from taxable income of the year *only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable under this Division received in the same year in which the deduction is claimed. . . .*" (Emphasis added.) The Secretary maintains that the above language precludes Aronov from carrying forward his losses during 1975-1977 because his "income from all sources in [those years] including any income not taxable under [that] Division" exceeded his North Carolina losses. The income "from all sources" which prevented Aronov from having net losses in those years was income earned in Alabama.

North Carolina does not have the power to tax income of a nonresident earned outside North Carolina and which has no connection with this State. *See Frick v. Pennsylvania*, 268 U.S. 473, 69 L.Ed. 1058 (1925). Any attempt to do so offends the due process clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 488-89, 69 L.Ed. at 1062. The Secretary argues, however, that her interpretation of Sections 105-147(9)d 2 and 3 does not result in taxation of non-North Carolina income, and that Aronov's income from other sources is used only to limit his entitlement to a deduction. She contends that "deductions are in the nature of exemptions; they are privileges, not matters of right, and are allowed as a matter of legislative grace," *citing Ward v. Clayton*, 5 N.C. App. 53, 167 S.E. 2d 808 (1969), *affirmed*, 276 N.C. 411, 172 S.E. 2d 531 (1970). The Court is mindful of this and the other longstanding legal postulates regarding statutory interpretation to which the Secretary made reference including the following: A taxpayer claiming a deduction must bring himself within the statutory provisions authorizing the deductions. 85 C.J.S., Taxation Sec. 1099, at 772 (1954). A statute providing exemption from taxation is strictly construed against the taxpayer and in favor of the State. *See Food House, Inc. v. Coble*, 289 N.C. 123, 221 S.E. 2d 297 (1976). Indeed, "the underlying premise when courts interpret taxing statutes is: 'Taxation is the rule; exemption the exception' [citation omitted]." *Broadwell Realty Corp. v. Coble*, 291 N.C. 608, 611, 231 S.E. 2d 656, 658 (1977). And in all tax cases, the construction placed upon the statute by the Commissioner (now Secretary) of Revenue, although not binding, will be given due consideration by a reviewing court. *See Campbell v. Currie*, 251 N.C. 329, 111 S.E. 2d 319 (1959). Notwithstanding the

above guidelines, if the Secretary's interpretation of G.S. Sections 105-147(9)d 2 and 3 has the effect of taxing Aronov's Alabama income, it exceeds both statutory and constitutional authority and cannot stand.

B

Additionally, the Secretary contends that we are bound by the North Carolina Supreme Court's holding in *Dayton Rubber Co. v. Shaw*, 244 N.C. 170, 92 S.E. 2d 799 (1956) in which the court upheld the Commissioner's interpretation of N.C. Gen. Stat. Sec. 105-147(6) (the predecessor to Section 105-147(9)d 2). In *Dayton Rubber* the Supreme Court upheld the Commissioner's reduction of the foreign corporate taxpayer's carryover losses by applying royalty payments from out of state that were not connected with its North Carolina operations. However, contrary to the Secretary's assertion, the court did not address the question whether, by limiting the deduction, the Commissioner was in effect taxing non-North Carolina income. Indeed in a later case, *Dayco Corporation v. Clayton*, 269 N.C. 490, 153 S.E. 2d 28 (1967), the Supreme Court specifically left that question open, stating at the outset that "[t]he plaintiff does not contend that the assessment in question has the effect of the levy of a tax on income which is beyond the constitutional power of the State to tax." *Id.* at 494, 153 S.E. 2d at 30-31. Thus we must decide whether the use of non-North Carolina income to reduce the nonresident taxpayer's carryover losses is an indirect attempt to tax income not taxable by this State.

C

A number of United States Supreme Court and federal court cases have addressed the question of indirect taxation under analogous tax schemes. For example, the United States Supreme Court upheld a New Jersey tax statute that permitted the State to subject a nonresident decedent's estate to an inheritance tax at a rate which had the same ratio to the entire tax as the New Jersey property had to the entire estate. *Maxwell v. Bugbee*, 250 U.S. 525, 63 L.Ed. 1124 (1919). However, six years later in *Frick v. Pennsylvania*, 268 U.S. 473 (1925), the Court struck down a Pennsylvania tax statute that permitted the State to set the inheritance tax rate for the portion of the decedent's estate that was in Pennsylvania based on the entire estate, which included

property outside Pennsylvania. The Court reasoned that the plaintiff's tax liability was the same as if the State had taxed that which it did not have the power to tax.

The United States Court of Appeals for the Tenth Circuit upheld a Kansas statute which permitted the State to combine a nonresident service member's military income with his Kansas income to set the rate at which the Kansas income was to be taxed. *U.S. v. Kansas*, 810 F. 2d 935 (10th Cir. 1987). The court, applying the rationale of the Supreme Court in *Maxwell v. Bugbee*, stated that "the inclusion in a state taxing scheme of property not subject to direct taxation by the state, for the purpose of determining the rate of taxation to be applied to property that is subject to the state's taxing powers, does not violate the due process clause of the Fourteenth Amendment. [Citations omitted]."

The taxing schemes are varied and the results are difficult to reconcile. Some courts, like the Tenth Circuit in *United States v. Kansas*, have adapted the rationale of *Maxwell v. Bugbee* to various tax schemes which use out of state property to set the rate of taxation. *See Wheeler v. State*, 127 Vt. 361, 249 A. 2d 887, *appeal dismissed*, 396 U.S. 4, 24 L.Ed. 2d 4 (1969); *McCutchan v. Oklahoma Tax Commission*, 191 Okla. 578, 132 P. 2d 337 (1942). In the case *sub judice*, however, the rate of taxation does not vary. Instead, Aronov's Alabama income is used to determine whether he even has income subject to taxation in North Carolina. Thus, we are more persuaded by the Supreme Court's reasoning in *Frick*. There the *effect* of the State's taxing scheme is the primary concern.

When the effect of the statute is to make the taxpayer's tax liability the same as it would have been had the state included income it did not have the power to tax, then the scheme must fall. In the case at bar, Aronov would have no North Carolina tax liability in 1978 were it not for the fact that he had net income in Alabama during 1975, 1976 and 1977. Consequently, under the Secretary's interpretation of Sections 105-147(9)d 2 and 3, his 1978 tax liability is what it would have been had his Alabama gains during the three preceding years been North Carolina gains. The result is a sophisticated scheme which taxes, belatedly, the nonresident taxpayer's non-North Carolina income. The Secretary's interpretation of Sections 105-147(9)d 2 and 3 therefore violates

the due process clause of the Fourteenth Amendment and the law of the land clause of the North Carolina Constitution.

III

Additionally, the Secretary's imposition of an indirect tax on the nonresident taxpayer's Alabama income contravenes legislative intent to tax only the North Carolina income of nonresident taxpayers. The legislature's intent is specifically outlined in the "Purpose" section of Division II which provides:

> The general purpose of this Division is to impose a tax for the use of the State government upon the net income in excess of the exemptions herein allowed collectible annually:
>
> . . .
>
> (2) Of every nonresident individual deriving income from North Carolina sources attributable to the ownership of any interest in real or tangible personal property in this State or deriving income from a business, trade, profession or occupation carried on in this State. [Citation omitted.]

N.C. Gen. Stat. Sec. 105-134 (1985). This Court will not follow an administrative interpretation which is in direct conflict with the clear intent and purpose of the statute under consideration. *See Watson Industries v. Shaw*, 235 N.C. 203, 69 S.E. 2d 505 (1952).

IV

We hold that the Secretary's interpretation of Sections 105-147(9)d 2 and 3 results in the indirect taxation of Aronov's Alabama income in violation of the due process clause of the Fourteenth Amendment of the United States Constitution and North Carolina's law of the land clause and exceeds statutory authority as espoused in the statute's general purpose clause. We need not reach the question whether the Secretary's interpretation violates the commerce clause of the United States Constitution.

Judgment is affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

G. L. WILSON BUILDING COMPANY v. THORNEBURG HOSIERY CO., INC.

No. 8622SC1074

(Filed 19 May 1987)

1. **Arbitration and Award § 5— components of award—counsel fees improper**

In an arbitration proceeding to determine the amount due under a construction contract, the arbitrators had authority to award sums for costs of delays caused by the owner, certain fees and expenses of arbitration, and compensation for transferring the proprietary right to the design of the knitting and seaming vacuum system. However, the arbitrators had no authority to include counsel fees in the arbitration award since counsel fees are collectible only under N.C.G.S. § 6-21.2, and the amount of counsel fees is fixed by the statute and are not a subject of arbitration.

2. **Attorneys at Law § 7.4; Arbitration and Award § 5— attorney fees—notice requirement inapplicable for arbitration**

The requirement of N.C.G.S. § 6-21.2(5) for giving notice of an intent to claim counsel fees pursuant to a contract did not apply where the obligor refused to pay a construction contractor's claim and demanded arbitration pursuant to the terms of the contract.

APPEAL by defendant from *Mills, Judge.* Judgment entered 2 June 1986 in Superior Court, IREDELL County. Heard in the Court of Appeals 4 May 1987.

On 4 November 1982, Thorneburg Hosiery Co., Inc. (hereinafter Thorneburg), as owner, and G. L. Wilson Building Co. (hereinafter Wilson), as builder, entered into a contract for the design and construction of a hosiery manufacturing facility. On 24 February 1984, Thorneburg demanded arbitration, pursuant to the terms of the contract and the Uniform Arbitration Act, G.S. 1-567.1, *et seq.*, "of claim of contractor for the balance due, if any, on contract, in the amount of $235,338.58 and damages due by contractor and claimed by owner arising from deficiencies in design and construction of building." On 28 March 1984, Wilson filed a "response, answer and counterclaim," seeking to recover $416,944.58 for the balance due under the contract and "additional expenses and costs," and "legal fees spent by Wilson to collect the past due balance owed by Thorneburg under this Contract, an amount undetermined at this time." At the hearing before the arbitrators, Wilson introduced as an exhibit a document entitled "claims summary," requesting a total award of $893,412.45, including the balance due under the contract, other expenses and legal fees.

On 24 January 1986, the arbitrators filed an award directing Thorneburg to pay Wilson $656,050.93 and to pay the fees and expenses of arbitration as directed by the American Arbitration Association. On 17 February 1986, Wilson moved in the superior court to have the award confirmed and judgment entered thereon. On 21 April 1986, Thorneburg filed motions to vacate, modify or correct the award, or to remand the award to the arbitrators for modification or correction, pursuant to G.S. 1-567.10, G.S. 1-567.13 and G.S. 1-567.14. Thorneburg paid Wilson $235,238.58 on 18 April 1986.

Pursuant to a request by Thorneburg, subpoenas were served on the arbitrators, requiring them to give their depositions and to produce any materials which "reflect to any extent, or . . . may help you to recall, what elements of damages are included in the arbitration award." On 21 May 1986, the arbitrators moved to quash the subpoenas.

Following a hearing on all motions on 2 June 1986, Judge Mills made findings of fact, conclusions of law and entered a judgment denying Thorneburg's motions and confirming the award of the arbitrators. In the judgment, the trial judge ordered that Wilson recover of Thorneburg $656,050.93, with interest thereon from 24 January 1986 until paid, and arbitration costs in the sum of $17,636.33, subject to a credit in the amount of $235,238.58 for the payment made on 18 April 1986. On 4 June 1986, the trial judge entered an additional order, allowing the motions of the arbitrators to quash the subpoenas. Thorneburg appealed.

Avery, Crosswhite & Whittenton, by William E. Crosswhite, and Foster, Conner, Robson & Gumbiner, P.A., by C. Allen Foster, for appellee, G. L. Wilson Building Co.

Tucker, Hicks, Moon, Hodge and Cranford, P.A., by John E. Hodge, Jr. and Robert B. Tucker, Jr., for defendant, appellant, Thorneburg Hosiery Co., Inc.

HEDRICK, Chief Judge.

Appellant Thorneburg contends the trial court erred in confirming the arbitration award and denying its motions to vacate, modify, correct or remand the award. Thorneburg argues in support of this contention that the arbitrators exceeded their author-

ity in awarding Wilson $656,050.93, because this sum must include amounts for items which are not subject to arbitration.

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and the parties, who have agreed to abide by the decision of the arbitrators, will not generally be heard to attack the regularity or fairness of an award. *McNeal v. Black*, 61 N.C. App. 305, 300 S.E. 2d 575 (1983). In *Poe & Sons, Inc. v. University*, 248 N.C. 617, 625, 104 S.E. 2d 189, 195 (1958), our Supreme Court, citing *Patton v. Garrett*, 116 N.C. 848, 21 S.E. 679 (1895), stated,

> If an arbitrator makes a mistake, either as to law or fact, it is a misfortune of the party, and there is no help for it. There is no right of appeal, and the court has no power to revise the decisions of 'judges who are of the parties' own choosing' . . . . If a mistake be sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake of law or fact may be suggested by the dissatisfied party.

G.S. 1-567.13 and G.S. 1-567.14 provide the exclusive grounds for vacating, modifying or correcting an arbitration award. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E. 2d 793 (1982). An award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of these grounds exists. *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E. 2d 743 (1981).

[1] In the present case, Thorneburg filed numerous motions in the superior court seeking to vacate, modify, correct or remand the award. The trial court did not err in denying these motions, save and except for the motion to remand the award to the arbitrators for modification or clarification pursuant to G.S. 1-567.10. We hold that the arbitrators had the authority to make the award, with the exception of any award for counsel fees. Thorneburg's contentions that the arbitrators had no authority to award sums for costs of delays caused by Thorneburg, certain fees and expenses of arbitration, or compensation for "transferring the proprietary right to the design of the knitting & seaming vacuum system" are without merit. The arbitrators are authorized to include these items in the award under the provisions of the parties' contract and the Uniform Arbitration Act. Thorneburg's con-

tention that the arbitrators exceeded their authority in including counsel fees in the award, if such fees were included, however, has merit. This does not mean that Wilson is not entitled to recover attorney's fees under the contract, but only that the arbitrators had no authority to include such fees in the arbitration award.

G.S. 1-567.11 provides as follows:

> Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

We hold that counsel fees are not a subject of arbitration, even though the contract in this case provides that "[t]he Owner will pay reasonable attorney's fees incurred by the Contractor for the collection of any defaulted payment due to the Contractor by the Owner as a result of this contract." In North Carolina, such attorneys' fees are collectible only under G.S. 6-21.2 which provides as follows:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> . . . .
>
> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.
>
> . . . .
>
> (5) The holder of an unsecured note or other writing(s) evidencing an unsecured debt, . . . or his attorney at

> law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the "outstanding balance" shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the "outstanding balance" without the attorneys' fees. If such party shall pay the "outstanding balance" in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions.

The term "evidence of indebtedness" as used in this statute refers to "any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 294, 266 S.E. 2d 812, 817 (1980).

Since the amount of attorneys' fees is fixed by statute, there is no room for arbitration. In this case, the contract provides that the owner will pay "reasonable attorney's fees incurred by the Contractor for the collection of any defaulted payment." Thus, under the provisions of G.S. 6-21.2, Thorneburg may recover as attorney's fees fifteen percent of the "outstanding balance" due on the contract. The "outstanding balance" due on the contract in this case consists of the amount awarded by the arbitrator for any of the items requested by Wilson, with the exception of any award for "legal fees" or expenses arising out of arbitration. Although these fees and expenses of arbitration may be properly included by the arbitrators in an award pursuant to G.S. 1-567.11, they are not a part of the "outstanding balance" of the contract.

[2] In addition to arguing that the arbitrators lacked authority to award attorneys' fees, Thorneburg insists that attorneys' fees are not payable in this case because Wilson failed to comply with the provisions of G.S. 6-21.2(5) with respect to giving notice that it would claim attorneys' fees pursuant to the contract. We disagree.

The notice provision of G.S. 6-21.2(5) simply provides that the obligor will have five days notice to pay any outstanding balance

on the debt before the claimant goes to the expense of employing counsel to collect the balance due. In our opinion, the notice provision has no application in this situation where the obligor has refused to pay Wilson's claim and demanded arbitration pursuant to the terms of the contract. Wilson was forced into the position of having to employ counsel not only to collect its own claim, but also to protect it against Thorneburg's claim because of Thorneburg's demand of arbitration. When Wilson filed its response to Thorneburg's demand for arbitration, and its own claim for the balance due on the contract, it clearly notified Thorneburg it was demanding attorneys' fees under the terms of the contract.

Before the award can be vacated on the grounds that the arbitrators exceeded their authority, the record must objectively disclose that the arbitrators did exceed their authority in some respect. G.S. 1-567.13; *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E. 2d 743 (1981). We hold that an objective examination of the award discloses that the arbitrators did exceed their authority in awarding at least some attorney's fees. Wilson's claims totalled $893,412.45. Included in that total was $183,305.12 for counsel fees and $92,621.30 for fees of a "consultant to attorney." The total award was $656,050.93. Obviously, the award included some counsel fees.

The award and judgment entered on the award with respect to attorneys' fees must be reversed and the proceeding will be remanded to the superior court for further proceedings as follows: The superior court will remand the proceedings to the arbitrators to delete from the award any counsel fees including any fees for the "consultant to attorney" plus any interest awarded thereon. The arbitrators will then separate and designate any portion of the remaining award which includes "legal fees" arising out of arbitration as listed in Exhibit R-221. These fees, except for counsel fees or fees for "consultant to attorney," may be included in the award but must be listed separately in order that the superior court judge may be able to determine the "outstanding balance" due on the contract. Upon remand, the superior court judge will instruct the arbitrators they have no authority to change any part of the award except as herein designated.

Upon application for confirmation of the award after remand, pursuant to G.S. 1-567.12, the superior court judge shall award at-

torneys' fees under the contract and G.S. 6-21.2 in the amount of fifteen percent of the "outstanding balance" due on the contract, that is, the amount of the award excluding any portion designated as legal fees or expenses.

Thorneburg also contends the trial court erred in allowing the motion of the arbitrators to quash the subpoenas for their depositions. Thorneburg sought to take the depositions of the arbitrators only to determine "what elements of damages are included in the arbitration award." Our decision in the present case, as set out above, makes it unnecessary for us to address this assignment of error and the other remaining assignments of error brought forward and argued on appeal.

The award of the arbitrators and the judgment entered thereon is thus affirmed as to attorneys' fees, and the award of attorneys' fees and judgment entered thereon is reversed, and the proceeding is reversed for further proceedings in accordance with the instructions set out above.

Affirmed in part, reversed in part, and remanded.

Judges EAGLES and PARKER concur.

CALVIN ROSE AND WIFE, ESTHER M. ROSE v. TED LANG AND NML BOAT-BUILDERS, INC., D/B/A LANG YACHTS

No. 863SC773

(Filed 19 May 1987)

Frauds, Statute of § 7; Ejectment § 1.5— ejectment action—counterclaim for breach of contract—writing sufficient

In an action for summary ejectment in which defendants counterclaimed for breach of contract, the trial court erred by granting plaintiffs' motion for summary judgment as to the counterclaim where plaintiffs offered in support of their motion only an affidavit that there had been no written agreement and defendants' evidence was sufficient to establish that a written memorandum in compliance with N.C.G.S. § 22-2 was signed. The statute of frauds does not require all provisions of the contract to be set out in a single instrument, and the court's two other bases for summary judgment, that the plaintiff husband and his attorney were not agents for plaintiff wife and that the property to be conveyed could not be identified, were not relevant on appeal.

Judge ARNOLD concurs in the result.

Rose v. Lang

APPEAL by defendants from *Phillips, Herbert O., III, Judge.* Order entered 14 April 1986 in Superior Court, CARTERET County. Heard in the Court of Appeals 17 December 1986.

Nelson W. Taylor, III for plaintiff appellees.

John E. Way, Jr. for defendant appellants.

PHILLIPS, Judge.

Plaintiffs sued defendants in summary ejectment for wrongfully occupying two tracts of land on Harkers Island that they owned as tenants by the entireties. Defendants counterclaimed alleging that they were in lawful possession of the property under a written contract to buy it and that plaintiffs had breached the agreement. Several months after suit was filed and following a hearing at which affidavits, maps, letters, and checks were presented into evidence, the court dismissed defendants' counterclaim by an order of partial summary judgment. In effect the court's order is based upon three major findings—that the alleged contract to sell real estate is not evidenced by an executed written memorandum as required by the statute of frauds; that the writing relied upon, a check endorsed by Calvin Rose, but not Esther M. Rose, does not describe sufficiently the property to be conveyed and does not refer to anything extrinsic from which the description can be found; and that in the negotiations and transactions involved neither the male plaintiff nor attorney Nelson W. Taylor was the agent of the femme plaintiff, who signed no writing of any kind. Obviously, if either of these findings is valid defendants' counterclaim cannot possibly be won, and the court properly dismissed it; for one clear basis for dismissing a claim by summary judgment is the non-movant's inability to support an essential element of his claim with evidence, *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974), and it is elemental law that a contract for the sale of real estate in this state must be supported by a paper writing which complies with the statute of frauds and that when the property involved is owned by two people it must be shown that each owner either executed, authorized or approved the writing or writings relied upon. Even so, neither of the court's findings was validly made in our opinion, and we vacate the order.

The court's findings that Calvin Rose and Nelson W. Taylor were not agents for the femme plaintiff, and that the property to be conveyed cannot be identified, either from a writing or extrinsic evidence, require little discussion and no definitive evidentiary statement because they are based upon the defendants' failure to present evidence with respect thereto, an obligation defendants did not have under the circumstances recorded. The only evidence that plaintiffs offered in support of their motion consisted of Calvin Rose's affidavit, the relevant portion of which merely states in substance that neither of the defendants signed the written Offer to Purchase and Contract submitted to them "and therefore no written agreement has been reached by the parties to this action." In the affidavit nothing whatever is said about the femme plaintiff not authorizing the sale, or about Calvin Rose or Nelson W. Taylor not being her agent, or about it being impossible to identify the land that was to be sold. As non-movants at a hearing on a motion or summary judgment, defendants did not have to automatically present evidence as to all the elements of their claim as they will at trial; they only had to refute any showing by plaintiffs that the claim is fatally deficient. *Hall v. Funderburk*, 23 N.C. App. 214, 208 S.E. 2d 402 (1974). As the movants for summary judgment plaintiffs had the burden of clearly establishing by the record presented to the court that there was no triable issue of fact in regard to defendants' counterclaim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1978). Since plaintiffs' forecast of proof was silent as to defendants' inability to identify the property to be conveyed and as to Calvin Rose and Nelson Taylor not being the agent of the femme plaintiff their burden on these issues was not even approached much less sustained, and defendants were not required to contest or overcome either proposition. Thus, whether defendants' forecast of proof failed to indicate that Calvin Rose or Nelson W. Taylor was the agent of the femme plaintiff or that the property to be conveyed can be identified either from a writing or by evidence extrinsic to it, as the court found, is irrelevant to this appeal and will not be determined.

Though the court's other finding—that there was no executed written memorandum of the alleged contract to buy or sell real estate—was properly addressed by plaintiff's affidavit, it was adequately responded to by defendants' affidavits, checks, letters

and maps, which were to the following effect: Defendant Ted Lang, President of NML Boatbuilders, Inc., a Delaware corporation, came to Carteret County in the summer of 1984 and negotiated with plaintiff Calvin Rose about buying a complete boat works facility on Harkers Island from him and his wife. Rose showed the facility to Lang as consisting of two tracts of real estate as follows: One tract, on the south side of Bay View Drive consisting of Lots 1, 2, 3 and 4, according to a survey map of plaintiffs' property, on which certain buildings used in the boat works business were situated; the other tract, on the north side of the drive and adjacent to a boat basin that connects with West Mouth Bay, consisting of Lots 54, 55, 56 and 57, according to the same map. Rose and Lang agreed that defendants would buy and plaintiffs would sell the foregoing lots for $360,000 on terms stated below. They also discussed defendants buying three other lots behind the boatyard, identified on the map of plaintiffs' property as Lots 15, 16 and 17, and agreed that those lots would be bought and sold for an additional $30,000. After these discussions and negotiations plaintiffs had their lawyer Nelson W. Taylor to submit a writing entitled Offer to Purchase and Contract to defendants. This was done by Taylor's 6 September 1984 letter, which stated that upon the defendant corporation executing the agreement and otherwise complying with its terms he would have Mr. and Mrs. Rose sign the agreement also. The Offer to Purchase and Contract, a printed form with certain blanks filled in, did the following: It listed NML Boatbuilders, Inc. as buyer, Calvin Rose and wife, Esther Rose, as sellers; in the place for describing the real property involved it referred to an "Attached Exhibit A," a survey map of plaintiffs' property on Harkers Island; it stated the purchase price to be $360,000, $25,000 payable at closing, and a $335,000 promissory note at 9% interest payable in 180 monthly payments of $3,398.01 each, commencing thirty days after closing; it called for $5,000 in earnest money to be deposited with plaintiffs' attorney and for the transaction to be closed before 10 October 1984. But the writing did not state any terms for the purchase of the three lots situated behind the boatyard. On 24 September 1984 plaintiffs' lawyer wrote defendants another letter enclosing "an itemized list of tools which is to be a part of the sale." On 8 October 1984 Lang responded to the foregoing communications with a $5,000 check payable to the order of plaintiff Calvin Rose with the following notation written on the back:

> This $5K on account of Boat Works Complete $360K—and 3 Attached lots—$30K—seller financing $365K—15 years—$3,702.00 monthly (Boat Works) and $1,000.00 every 6 months 3 Lots—Closing A.S.A.P. for N.M.L. Boatbuilders, Inc.
>
> /s/ Calvin Rose

Plaintiff Calvin Rose scratched out the "and $1,000.00 every 6 months" notation, cashed the check, and permitted defendants to take possession of the two tracts of land allegedly comprising the boat works; and from time to time thereafter he also acquiesced in several requests to delay the closing. On 13 November 1984 Lang gave Rose a $3,000 check which he accepted, endorsed and cashed; it had the following notation typed on the back above the endorsement:

> This $3,000 on account of Boat Works complete—$360,000 with all tools except hand, and 3 attached rear lots—$30,000 —, Total $390,000 Seller financing $365,000 15 Years at 9%. Paid $5,000 8 Oct—Ck no 1948, & this no. 2131—31 Nov = $8,000 Balance ($25,000 total down required) $17,000—Closing ASAP for NML Boatbuilders
>
> /s/ Calvin Rose

Thereafter defendant company moved its boat building business to plaintiffs' property on Harkers Island and spent approximately $72,500 in improving the property. Defendants also delivered the following checks to Rose, each of which was endorsed and cashed: 16 January 1985 ($2,500); 5 February 1985 ($1,000); 28 February 1985 ($2,000); 18 March 1985 ($500); 26 March 1985 ($300); and 29 March 1985 ($700). By letter dated 5 April 1985 Lang notified plaintiffs' lawyer that defendants were ready to close the transaction upon receiving a certificate of title, but complained about a derelict boat named "Linda Gale" being left in the boat basin and about some tools, other than "hand tools," being removed by Mr. Rose. By letter to Mr. Lang dated 10 April 1985 Mr. Taylor made the following points or statements: The tools that were to go with the sale were only those on the list given him several months earlier, which did not mention hand tools; the Roses' patience with Lang unduly delaying the closing had reached its limit; an understanding needed to be reached about the three extra lots not covered by the original contract, and he proposed that defendants

buy them for $30,000 and pay for them over a five-year period; and that the "Linda Gale" would be removed before the closing. Taylor had all the property above described surveyed in anticipation of closing the transaction, but for reasons irrelevant to this appeal the transaction was not closed and suit followed.

Leaving aside the agency and property description issues not raised by plaintiffs' evidence in the court below, defendants' forecast of proof, when viewed in its most favorable light for them as the law requires, is sufficient in our opinion to establish that a written memorandum in compliance with G.S. 22-2 was signed by both the plaintiff Calvin Rose and the defendant Ted Lang. That neither signed the form contract prepared by Mr. Taylor is not decisive; for the statute of frauds does not require all the provisions of the contract to be set out in a single instrument. "The memorandum required by the statute is sufficient if the contract provisions can be determined from separate but related writings." *Hines v. Tripp*, 263 N.C. 470, 474, 139 S.E. 2d 545, 548 (1965). The necessary memorandum in this case can consist, if the jury so finds, of the several checks that both Rose and Lang signed, along with the unsigned contract, the maps and letters, which the checks obviously relate to. These writings and the other evidence support the inference that Calvin Rose agreed in writing to sell the two boat works tracts to the defendants for $360,000, and the three other lots behind the boat works for $30,000, with $25,000 being paid at closing and the remaining $365,000 being paid in monthly installments over a fifteen year period at 9% interest. The evidence supports the inference that the parties agreed as to the sale and purchase of the two boat works tracts when defendants' $5,000 check was accepted, as the same terms are stated for those lots in both the unsigned contract, prepared at plaintiffs' direction, and on defendants' check signed by both Lang and Rose, after which Calvin Rose permitted defendants to occupy those lots. The evidence also supports the inference that after rejecting defendants' offer to buy the three additional lots by paying $1,000 thereon every six months, made by their initial check, that plaintiffs accepted the offer made by the 13 November 1984 check to pay the $30,000 purchase price in monthly installments over a fifteen year period with 9% interest.

Since the record before us does not clearly establish that there is no genuine issue of material fact to try in regard to

defendants' counterclaim, we vacate the order appealed from and remand the case to the Superior Court for a trial on defendants' counterclaim as well as upon the claim stated in plaintiffs' complaint.

Vacated and remanded.

Judge ORR concurs.

Judge ARNOLD concurs in the result.

STATE OF NORTH CAROLINA v. BILL CARROLL, JR.

No. 8616SC1090

(Filed 19 May 1987)

1. **Homicide § 21.2— second degree murder—proof of corpus delicti**

The State's evidence was sufficient to support a finding by the jury that deceased was the victim of a murder rather than an accident where it tended to show that deceased was found barely alive on a country dirt road some 125 to 250 feet from the paved road; he suffered at least three separate blows to the head, with blows on each side of his head and one blow ripping his ear almost off; he had a "tear" on one of his arms; his money, knife and jewelry were missing; and defendant stated to his cellmate that "he'd like to do to that damn Keith Stone what he done to that damn hobo they got him accused of killing."

2. **Homicide § 21.7— second degree murder—proof of defendant's guilt as perpetrator**

The State's evidence was sufficient to show that defendant was the perpetrator of a second degree murder where it tended to show that the victim was last seen in the company of defendant in defendant's blue car; a blue or green car was seen on a deserted road early in the morning only a short time before the victim's body was found beside the road; a tire impression underneath a bloodstain on the road was similar to the tread on defendant's car; detectives discovered items in defendant's car with Type O blood on them which was consistent with the victim's blood type but inconsistent with that of defendant; defendant was in possession of a knife which had belonged to the victim; and defendant stated to a cellmate that "he'd like to do to that damn Keith Stone what he done to that damn hobo they got him accused of killing."

3. **Homicide § 21.7— malice—intent to kill—sufficiency of evidence**

Evidence tending to show that deceased received three strong blows to different parts of the head and that one blow was severe enough to tear

deceased's ear almost completely off was sufficient to establish malice and intent to kill in a second degree murder case.

4. **Criminal Law § 138.27— aggravating factor—position of trust or confidence—insufficient evidence**

Evidence was insufficient to support the trial court's finding as an aggravating factor for second degree murder that defendant took advantage of a position of trust or confidence where it showed that defendant and the victim had met only a day and a half before the victim was found dying by the side of a country road after the victim had decided to take a trip with defendant in defendant's car.

APPEAL by defendant from *Williams (Fred J.), Judge.* Judgment entered 5 June 1986 in ROBESON County Superior Court. Heard in the Court of Appeals 30 March 1987.

On 10 March 1986, defendant was indicted on a charge of second-degree murder. Defendant pleaded not guilty, and the matter was heard before a jury. Evidence for the State tended to show the following events and circumstances.

Glennie Tucker testified that she had been married to Wallace Tucker for approximately seven months at the time of his death. She was the manager of the Merry Inn Hotel in Monroe at the time these events occurred. On 11 April 1985, defendant rented a room at the hotel. Her husband talked with defendant during his stay. At 4:00 or 5:00 p.m. on 12 April, defendant and her husband left in defendant's car; her husband told her that he was going with defendant to the races in Darlington and would be back Sunday. When he left, Tucker had about $200 with him in a brown wallet. He was also wearing a white quartz watch and a necklace he had won in a fishing tournament.

The State introduced an exhibit which Ms. Tucker identified as defendant's hotel registration card; on it appeared defendant's name and a Florida address. It also gave the make of defendant's car as a Chevrolet and the tag number as Florida plate VBK-078. Defendant himself had filled out the registration card; Ms. Tucker had never actually seen the license plate. She had, however, seen the car which she first testified was a Chevrolet, then a Chrysler. She stated that the car was blue.

Early on the morning of 13 April, between 6:00 and 6:30, James R. McCullum was driving on Highway 301 south of Rowland. As he passed through the area near Reeves Livestock, a car

pulled out in front of him. He remembered that it was either a Dodge or a Plymouth and that it was blue or green. There were two men inside the car.

On that same morning, at about 6:30, Oscar Ratley was driving with his wife on Highway 301. As they passed a dirt road near Reeves Livestock, Mr. Ratley saw someone lying on the dirt road about 125 feet from the main highway. He backed up and stopped to take a look, flagging down a passing motorist who reported it to the police. Chief of Police Daniel Bradsher of the Rowland Police Department went to investigate. Perhaps 250 feet from the highway, a white male was lying on the dirt road with his feet partially in the ditch area. He had lost a considerable amount of blood from his head, but he was still alive. His pockets contained no wallet or ID, nor was he wearing a watch or jewelry. The rescue squad arrived and took the man to the hospital. Bradsher remained at the scene until Detective Jimmy Maynor of the Sheriff's Department arrived.

Dr. Raymond Satler, a neurosurgeon, treated the man at Southeastern General Hospital in Lumberton. The man was in a deep coma. There was evidence of trauma to both sides of the head; Dr. Satler declined to speculate as to the source of the trauma, only saying that it was some "very large force applied to the skull." One ear was almost entirely torn off. A CT scan revealed a very large blood clot on the right side of the brain. Dr. Satler opened up the skull in order to remove the clot and try to stop the bleeding. However, the next morning, the man was pronounced brain-dead and removed from the respirator.

Associate Chief Medical Examiner Dr. John Butts performed the autopsy. He testified that at least three blows had been given to the head, and there was one tear on his arm which had been sewn up. Dr. Butts testified that the blunt force traumas to the head caused the man's death, but he did not offer an opinion as to what might have caused the injuries.

Detective Jimmy Maynor conducted the investigation of the area in which the body was found. He saw a bloodstain on the left side of the road and a tire impression underneath the stain. He identified a photograph introduced by the State as a close-up of the stain and tire impression. After running a check on the man's fingerprints, he learned that the man was Wallace Tucker. He

made inquiries about the license plate number on the registration card he obtained from Ms. Tucker, and he and SBI Agent Lee Sampson flew to Crestview, Florida. Accompanied by Sgt. Barbry of the Okaloosa County Sheriff's Department, the officers went to a local residence where they conducted a consensual search of a 1968 blue Chrysler with the license plate matching that on the card. The officers removed soil, red scrapings, a metal screw and hair fiber from the floorboard. They also took a seatback cover, a seatbelt, a portion of carpet, some molded plastic and a white switchblade knife. Agent Brenda Dew of the SBI laboratory tested these items for the presence of blood. The soil contained no blood, but the metal screw, the scrapings from the floorboard, the carpet, the plastic molding and the seatbelt all had traces of Type O blood, the same as that of Wallace Tucker. Defendant has Type A blood. The State also introduced a photograph of the tread design on the left front tire of the Chrysler.

Bill Sipes testified that Wallace Tucker was his brother-in-law. He stated that the white switchblade knife had belonged to Tucker and that he could positively identify it because it was quite unusual and he had offered to buy it from Tucker.

Clarence Pruitt, an inmate of the Robeson County Jail on 30 January 1986, was allowed after *voir dire* to testify as to statements made to him by defendant. He related that defendant was upset about a jail-cell shakedown, and defendant said angrily that "he'd like to do to that damn Keith Stone what he done to that damn hobo they got him accused of killing."

The jury found defendant guilty as charged. From the judgment and sentence of 45 years imprisonment, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jeffrey P. Gray, for the State.

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

WELLS, Judge.

Defendant contends that, even taken in the light most favorable to the State, the evidence is insufficient to support a conviction of second-degree murder. Defendant argues several points, which we shall address in turn.

In order to withstand a motion to dismiss, the State must present substantial evidence of each of the elements of the offense charged. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Our courts have interpreted "substantial evidence" to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Evidence which raises merely suspicion or conjecture that the crime was committed or that defendant committed it is not sufficient, even if the suspicion is a strong one. *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971). However, a defendant may be convicted on purely circumstantial evidence; the question is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978); *State v. Head*, 79 N.C. App. 1, 338 S.E. 2d 908, *disc. rev. denied*, 316 N.C. 736, 345 S.E. 2d 395 (1986). Once this threshold is met, it is for the jury to decide whether "the acts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Head, supra.*

[1] Defendant first asserts that the State has not carried its burden of showing that Wallace Tucker is the victim of murder rather than, for example, the victim of an accident. We disagree.

In any criminal case, the State must show that a crime was committed and that the defendant committed the crime. *Earnhardt, supra; Head, supra.* The evidence that a crime was committed is often referred to as the *corpus delicti*, literally "the body of the transgression charged." *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971); *Head, supra.* This in turn consists of two requirements in homicide cases: (1) there must be a corpse or circumstantial evidence so strong and cogent that there can be no doubt of the death, and (2) the criminal agency must be shown. *Dawson, supra; Head, supra.* Here, defendant does not contest the identity of the body, but does question whether a reasonable inference that Wallace Tucker was murdered may be drawn from the circumstances in this case. Tucker was found—barely alive—on a country dirt road, his feet in the ditch area. He was between 125-250 feet from the main paved road. He suffered at least three separate blows to the head, with blows on each side of his head. One blow ripped his ear almost off. He also had what the doctors characterized as a "tear" on one of his arms. His money, jewelry, knife and watch were gone. These undisputed facts, coupled with

defendant's admission in the form of a statement to his cellmate that "he'd like to do to that damn Keith Stone what he done to that damn hobo they got him accused of killing," are sufficient to support a finding that the crime charged occurred. *See State v. Trexler*, 316 N.C. 528, 342 S.E. 2d 878 (1986).

[2] We now consider whether the evidence that defendant himself committed the crime is sufficient to take the case to the jury. Tucker was last seen in the company of defendant in defendant's blue car. A witness placed a blue or green Plymouth or Dodge at the scene on a deserted road early in the morning, perhaps half an hour before Tucker was found. The State's introduction of the tire tread at the bloodstain and of the tire tread of the left front tire of defendant's car strengthened this evidence. Detectives discovered items in defendant's car with Type O blood on them, consistent with Mr. Tucker's blood type but inconsistent with defendant's. Defendant was in possession of a knife which had belonged to the victim; Tucker's brother-in-law stated that he tried to buy the knife from him. Defendant's statement to his cellmate, although somewhat ambiguous, did indicate that he physically harmed Tucker. Accordingly, the evidence of the *corpus delicti* and the defendant's identity as the one committing the crime was sufficient to take the case to the jury.

[3] Defendant also argues that the State has failed to show the requisite malice with intent to kill. We disagree. Malice sufficient to support a conviction of second-degree murder may be proven by inference from circumstances surrounding the killing. *State v. Batts*, 303 N.C. 155, 277 S.E. 2d 385 (1981). Here, with evidence of three strong blows to different sides of the head, one severe enough to tear the victim's ear almost completely off, was sufficient to establish malice and intent to kill.

In his second assignment of error, defendant contends that the court erred in finding as a factor in aggravation that defendant violated a position of trust or confidence in murdering Wallace Tucker. We agree.

[4] The presumptive term for second-degree murder is fifteen years. The trial court sentenced defendant to a term of forty-five years as a result of two factors found in aggravation: first, that defendant had prior convictions, and second, that defendant took advantage of a position of trust and confidence. The State argues

that the finding in aggravation that defendant violated a position of trust is supported by the long history of the special duties owed by drivers to passengers in their cars. However, we find no support in the law of sentencing for this position. In the two cases in which our courts have upheld a finding of this aggravating factor, the defendant and the victim have been either relatives or two men who were "best friends." *See State v. Potts*, 65 N.C. App. 101, 308 S.E. 2d 754 (1983), *disc. rev. denied*, 311 N.C. 406, 319 S.E. 2d 278 (1984) (defendant and victim characterized as "best friends"); *see also State v. Goforth*, 59 N.C. App. 504, 297 S.E. 2d 128 (1982), *reversed and remanded on other grounds*, 307 N.C. 699, 397 S.E. 2d 162 (1983) (defendant charged with attempted rape of his 10-year-old stepdaughter). In the case at bar, defendant and Tucker had met only a day and a half before Tucker was found; the evidence shows only that the two men talked and that Tucker decided to ride down to Darlington with defendant in defendant's car. We therefore find that there is no evidence to support the trial court's finding as a factor in aggravation that defendant took advantage of a position of trust or confidence, and we remand this case for resentencing.

No error in the trial; remanded for resentencing.

Chief Judge HEDRICK and Judge BECTON concur.

ELVIN O. BURTON v. NCNB NATIONAL BANK OF NORTH CAROLINA AND B. ERVIN BROWN, II

No. 8621SC1039

(Filed 19 May 1987)

1. Appeal and Error § 24— summary judgment—no assignments of error—exception to requirement

Plaintiff's appeal was not dismissed despite his failure to set out any assignments of error because an appeal from entry of summary judgment presents the question of whether the judgment is supported by the conclusions of law and therefore constitutes an exception to the general requirement of Rule 10(a) of the Appellate Rules of Procedure.

2. **Rules of Civil Procedure § 56.7— denial of Rule 12(b)(6) motion—summary judgment not prohibited**

The denial of a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) did not prevent the trial court from granting a subsequent motion for summary judgment.

3. **Libel and Slander § 11— letter between attorneys—legal proceeding not formally begun—absolutely privileged**

Summary judgment in a libel action arising from a debt collection letter threatening criminal prosecution was proper because the letter, if defamatory, was protected by an absolute privilege in that the letter was between the parties' attorneys, involved a judicial proceeding, and the allegedly defamatory statements were relevant to the proceeding.

4. **Trespass § 2— intentional infliction of mental distress—letter threatening criminal prosecution—not sufficient**

Summary judgment for defendants was proper on plaintiff's claim for intentional infliction of mental distress in an action arising from a debt collection letter where the statement that defendant was considering criminal prosecution for the filing of an inaccurate financial statement was not extreme and outrageous conduct.

5. **Appeal and Error § 45.1— tort of threatening criminal prosecution—no argument concerning summary judgment on—abandoned**

Plaintiff was held to have abandoned a contention that the trial court erred by granting summary judgment for defendant on a cause of action for threatening criminal prosecution during a debt collection action by failing to point the court to authority which acknowledged the existence of such a tort or by supporting the contention with any reasoning or argument. Rule 28(b)(5) of the Rules of Appellate Procedure.

APPEAL by plaintiff from summary judgment entered by *Long, James M., Judge.* Judgment entered 5 May 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 3 March 1987.

James M. Hayes and Cahoon and Swisher, by Robert S. Cahoon, for plaintiff-appellant.

Smith Helms Mulliss & Moore, by Benjamin F. Davis, Jr., and Robert H. Slater, for defendant NCNB National Bank of North Carolina.

Bell, Davis & Pitt, P.A., by William Kearns Davis, for defendant B. Ervin Brown, II.

GREENE, Judge.

This is a civil action for alleged libel, intentional infliction of emotional distress, "threat of criminal prosecution" and "false light" invasion of privacy. The trial court dismissed plaintiff's cause of action for "false light" invasion of privacy and granted summary judgment for defendants on each of plaintiff's other actions. Plaintiff appeals from the summary judgment.

The issues are: (1) whether plaintiff's appeal should be dismissed for failure to comply with North Carolina Rules of Appellate Procedure, Rule 10(a) and (2) whether summary judgment for defendants was proper.

I

[1] Plaintiff failed to set out any assignments of error in the record. Defendants contend plaintiff's appeal should be dismissed under Rule 10(a) of the Appellate Rules of Procedure.

An appeal from entry of summary judgment presents the question of whether the judgment is supported by the conclusions of law and therefore constitutes an exception to the general requirement of Rule 10(a) that assignments of error must appear in the record. *Beaver v. Hancock*, 72 N.C. App. 306, 309-10, 324 S.E. 2d 294, 297-98 (1985). Therefore, plaintiff's appeal should not be dismissed under Rule 10(a) of the Appellate Rules of Procedure.

II

A

[2] Plaintiff first argues that summary judgment should not have been entered against him because the court had earlier denied defendants' motion to dismiss the actions for failure to state a claim under Rule 12(b)(6) of the Rules of Civil Procedure. N.C.G.S. Sec. 1A-1, Rule 12(b)(6) (Nov. 1983).

The denial of the motion to dismiss under Rule 12(b)(6) does not prevent the trial court from granting a subsequent motion for summary judgment. *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E. 2d 252, 255-56, *disc. rev. denied*, 295 N.C. 733, 248 S.E. 2d 862 (1978). Plaintiff's argument is without merit.

B

[3] Summary judgment is appropriate when there is no genuine issue as to any material fact and any party is entitled to judgment as a matter of law. N.C.G.S. Sec. 1A-1, Rule 56(c) (Nov. 1983).

It is undisputed that, at the time of the alleged libel, plaintiff was the defendant in a lawsuit initiated by defendant NCNB. The suit was for collection of a debt plaintiff had allegedly guaranteed. Defendant Brown, an attorney, represented NCNB in the matter and wrote a letter to plaintiff's attorney concerning the suit. It was the opinion of Brown and NCNB that a financial statement filed by plaintiff with the bank did not accurately reflect plaintiff's financial holdings at the time of its filing. Brown's letter set forth that opinion and further contained this sentence: "I write at the request of the bank to let you know that criminal prosecution under 18 U.S.C. Sec. 1014 as a result of the foregoing described discrepancies remains a viable option which is being given serious consideration." Copies of the letter were sent to two officers of defendant NCNB.

Plaintiff contends the letter libeled him in his business and the court erred in granting defendants' summary judgment on plaintiff's cause of action for libel. We hold that defendants are protected by an absolute privilege. Therefore, the court's summary judgment regarding the cause of action for libel must be affirmed.

The general rule in North Carolina is that a defamatory statement is absolutely privileged if it was "made in due course of a judicial proceeding," even if it was made with express malice. *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E. 2d 248, 251 (1954).

Our courts have held that statements are "made in due course of a judicial proceeding" if they are submitted to the court presiding over litigation or to the government agency presiding over an administrative hearing and are relevant or pertinent to the litigation or hearing. *See Scott v. Veneer Co.*, 240 N.C. 73, 81 S.E. 2d 146 (1954) (statement made in a judicial pleading); *Jarman v. Offutt*, 239 N.C. 468, 80 S.E. 2d 248 (1954) (a lunacy hearing is a judicial proceeding within the rule); *Williams v. Congdon*, 43 N.C. App. 53, 257 S.E. 2d 677 (1979) (psychiatrist's report submitted to court). *See also Ramsey v. Cheek*, 109 N.C. 270, 273, 13 S.E. 775,

775 (1891) (setting out the general rule and including statements of the judge from the bench and statements of a witness on the stand). If the defamatory statement is "so related to the subject matter of the controversy that it may become the subject of inquiry in the course of the trial," the statement is relevant to the judicial proceeding. Whether the statement is relevant is a matter of law for the courts. *Scott*, 240 N.C. at 76, 81 S.E. 2d at 149.

Our courts have not addressed the question of whether out-of-court communications between parties or their attorneys during the course of a judicial proceeding are "made in due course of a judicial proceeding" and, therefore, absolutely privileged.

Absolute privilege is restricted to cases in which the public has a strong interest in allowing the defendant to "speak out his mind fully and freely." *Ramsey*, 109 N.C. at 273, 13 S.E. at 775. If the privilege were extended to out-of-court communications between parties to a judicial proceeding or their attorneys, it would serve the same public interest it serves by making statements which are submitted to the court privileged. *See* Restatement (Second) of Torts Sec. 586, comment *a* at 247 (1977). To fail to extend the absolute privilege to out-of-court statements which are between parties to an action or their attorneys and which are relevant to the proceeding would hinder the disclosure of facts necessary to the disposition of the suit and, thus, discourage settlement. Therefore, if an out-of-court statement is (1) between parties to a judicial proceeding or their attorneys and (2) relevant to the proceeding, it is absolutely privileged and not actionable on grounds of defamation.

At the time Brown wrote the letter, NCNB and plaintiff were parties in an action brought by NCNB to recover a debt from plaintiff as its guarantor. Brown represented NCNB in the action and addressed the letter to plaintiff's counsel. Copies of the letter were sent only to NCNB officials intimately involved in the action to recover on the debt. The financial statement referred to in the allegedly defamatory letter was part of the bank's requirements in order to give a loan. Any discrepancies in it were relevant to the action on the debt. We do not find, in the words of *Scott v. Veneer Co.*, that the letter is "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." 240 N.C. at 76, 81 S.E. 2d at 149.

The letter here was between the parties' attorneys involved in a judicial proceeding and the allegedly defamatory statements were relevant to the proceeding. Therefore, the letter, if defamatory, is protected by an absolute privilege. Summary judgment on the cause of action for libel is affirmed.

C

[4] Plaintiff contends the trial court erred in granting summary judgment for defendants on the cause of action for intentional infliction of emotional distress.

The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause, (3) severe emotional distress. *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E. 2d 325, 335 (1981). Whether the statement is extreme and outrageous is initially a question of law for the court. If the court determines that the statement may be reasonably regarded as extreme and outrageous, then it is for the jury to determine whether, under the facts of a particular case, the defendant's conduct in making the statement was in fact extreme and outrageous. *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E. 2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E. 2d 479 (1985). A defendant's conduct is "extreme and outrageous" when it "exceeds all bounds usually tolerated by decent society." *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E. 2d 611, 622 (1979).

Plaintiff contends the statement by Brown that NCNB was considering criminal prosecution for the filing of an inaccurate financial statement was extreme and outrageous conduct, intending to cause and causing severe emotional distress. We find the statement does not, under the facts of this case, exceed "all bounds usually tolerated by decent society." We find as a matter of law that the statement was not extreme and outrageous conduct. Therefore, summary judgment on the cause of action for intentional infliction of emotional distress is affirmed.

D

[5] Lastly, plaintiff contends the trial court erred in granting summary judgment for defendants on the cause of action for "threat of criminal prosecution." Plaintiff suggests several bases for this cause of action in his brief but fails either to point the

Court to authority which acknowledges the existence of such a tort or to support his contention with any reasoning or argument. We, therefore, hold that plaintiff has abandoned this assignment of error under Rule 28(b)(5) of the Rules of Appellate Procedure.

III

The entry of summary judgment as to all of plaintiff's claims was appropriate and that judgment is

Affirmed.

Judges ARNOLD and MARTIN concur.

SAM WILLIS v. SARAH WILLIS

No. 8626DC1069

(Filed 19 May 1987)

1. **Divorce and Alimony § 30— equitable distribution—home purchased before marriage—separate and marital property**

Where the wife purchased a home before the marriage and the husband made all the mortgage payments after the marriage, the trial court properly made a dual classification of the home as part separate and part marital, but the court erred when it failed to determine what percentages of the total investment in the home were marital and separate and then to award each estate a proportionate part of the equity in the home.

2. **Divorce and Alimony § 30— equitable distribution—marital property—failure to value on date of separation—absence of prejudice**

Plaintiff wife was not prejudiced by failure of the trial court to value two joint bank accounts and a cafe as of the date of separation where defendant husband closed the joint accounts and sold the cafe after the date of separation, commingled the proceeds with his separate property in his own bank account, and wrongfully withdrew an amount from his bank account; plaintiff received the proper portion of funds in defendant's bank account; the marital estate was compensated for defendant's wrongful withdrawal; and values determined at the time of separation were used to determine the ultimate distribution of the marital assets.

APPEAL by defendant from *L. Stanley Brown, Judge*. Judgment entered 22 May 1986 in District Court, MECKLENBURG County. Heard in the Court of Appeals 4 March 1987.

Paul J. Williams for plaintiff appellee.

R. Lee Myers for defendant appellant.

BECTON, Judge.

Defendant, Sarah Willis, appeals from an equitable distribution judgment entered pursuant to N.C. Gen. Stat. Sec. 50-20 (1984). The trial judge concluded that the property should be divided equally. Plaintiff, Mr. Willis, was awarded property having a total value of $16,946.38, and Mrs. Willis received property valued at $18,331.38. Additionally, Mrs. Willis was ordered to pay Mr. Willis $1,385 to compensate for the difference between the values of their respective distributive awards. Mrs. Willis contends that the trial judge erred in his valuation and classification of some of the property. We agree and remand for further proceedings consistent with this opinion.

I

Plaintiff, Sam Willis, filed his Complaint on 28 March 1985, seeking divorce from bed and board, alimony, *pendente lite* and permanent, and an equitable distribution of the marital property. Mrs. Willis filed an Answer and Counterclaim seeking the same relief for herself. The following facts are not in dispute.

Mr. and Mrs. Willis were married in August 1981. Before their marriage, in December 1979, Mr. Willis sold Mrs. Willis a house and lot on Claremont Road. During three years of marriage the Willises lived at the Claremont Road house, and Mr. Willis made all of the mortgage payments which amounted to $9,900.00.

Mrs. Willis raises two issues on appeal: (1) whether the trial court erred in concluding that the Claremont Road property was marital and in finding that it had actively appreciated in the amount of $9,990; and (2) whether the trial court failed to evaluate all of the marital property as of the date of separation and therefore failed to equitably distribute the marital property. We address these in order.

II

[1] Mrs. Willis first argues that the Claremont Road property is her separate property because she purchased it before the marriage and it has remained in her name only. Mrs. Willis's reliance

on the inception of title to determine whether the property should have been classified as marital or separate is misguided. This Court recognized in *Wade v. Wade*, 72 N.C. App. 372, 380, 325 S.E. 2d 260, 268-69 (1985) that "acquisition is an ongoing process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to property is obtained." The approach adopted by our courts is commonly known as the "source of funds" approach. *See generally* Sharp, "The Partnership Ideal: The Development of Equitable Distribution in North Carolina," 65 N.C.L. Rev. 195 (1987). Its objective is to ensure that "both the separate and marital estates receive a proportionate and fair return on its investment." *Wade* at 382, 325 S.E. 2d at 269. *See also Lawrence v. Lawrence*, 75 N.C. App. 592, 331 S.E. 2d 186 (1985). When acquisition is ongoing, the property may have a dual classification. In the instant case, the trial judge applied a dual classification to the Claremont Road property, finding that it had a separate property value of $8,410 and a marital property value of $9,900.

Although the evidence supports the trial judge's dual classification of the property, in that the property was acquired in part by the separate estate and in part by the marital estate, we must still determine whether the trial judge erred in determining the proportions invested by the separate and marital estates. The sole factual finding regarding the Claremont Road property's increase in value during the marriage was that the property had a tax value of $23,410 at the time of the marriage and an estimated value of $40,000 at the time the couple separated. The property appreciated $16,990. The marital estate invested $9,900 into the home by way of mortgage payments during the marriage. The separate estate invested an amount not disclosed in the record. The equity is the net value of the property, i.e., its present value minus the outstanding mortgage. The trial judge must divide the equity based on the proportion invested by the marital and separate estates. However, the trial judge assigned a combined marital and separate property value of $18,310 when he distributed the property. The trial judge's characterization of $9,990 as active appreciation does nothing to clarify the award. Mortgage payments are acquisition, not appreciation. An active/passive distinction is of no utility when, as here, the property has a dual classification and each estate, marital and separate, is enti-

tled to a proportionate return on its investment whether appreciation is active or passive. We fail to see any relationship between the values the trial judge assigned to the marital and separate interest in the Claremont Road property and the investment by each estate. The trial judge must determine what percentage of the total investment in the property was marital and what was separate, then award each estate a proportionate return on its investment.

III

[2] Mrs. Willis next contends that the trial judge erred by failing to properly value all of the marital property as of the date of separation. She argues that the proceeds from two joint bank accounts and a jointly owned business known as "Sam's Cafe" were not listed among the marital assets, and that the trial judge listed a third of the proceeds from Mr. Willis's account with the United Carolina Bank (UCB account) as marital property, although that account did not come into existence until some time after the Willises separated. The problem faced by the trial judge was that between the date of separation and the date of the hearing, Mr. Willis closed the two joint bank accounts and sold "Sam's Cafe." He placed all the proceeds in his own UCB account, commingling the funds with his separate property. The trial judge found that the UCB account was one part marital and two parts separate property. Thus he included one-third of the balance from the UCB account as marital property. Mrs. Willis does not contest this apportionment by the trial judge. She does contest, however, the trial judge's failure to assign a value to the property as it existed on the date of separation which includes the entire proceeds from the two joint bank accounts and "Sam's Cafe."

The trial judge is required to conduct a three-stage analysis in order to equitably distribute the marital assets. *Little v. Little*, 74 N.C. App. 12, 327 S.E. 2d 283 (1985). He must first ascertain, upon appropriate findings of fact, what is marital property; then determine the net market value of the marital property as of the date of separation; and finally, make an equitable distribution between the parties. *Id.* The marital property is to be distributed equally, unless the court determines equal is not equitable. In the instant case the trial judge did not value all of the marital property as of the date of separation; instead, he used its value at the time of the hearing.

This Court was faced with a similar problem in *Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E. 2d 451 (1985). In *Dewey* the trial judge evaluated the property on the date of the hearing, and this Court found that the judge's failure to use the value on the date of separation was harmless. This Court reasoned that the parties were not prejudiced so long as values determined at the time of separation were used to determine the *ultimate* distributive shares of each party. In *Dewey* "the trial court ordered an equal division of marital property and there [was] no evidence of a wasting or depreciation of marital assets after the date of separation. Therefore defendant [was] entitled to 50% of the net value of the marital property at the time it [was] divided . . . [and] would receive the same amount of property regardless of whether the marital property [was] valued at the time of separation or at the times found by the trial court." *Id.* at 791, 336 S.E. 2d at 453-54.

In the case *sub judice* the marital assets diminished between the date of separation and the date of the hearing. The trial judge himself found that Mr. Willis "wrongfully withdrew $4,071.43" from the UCB account. However, the record also indicates that that amount was added to the marital assets before the 2:1 division. Thus, like *Dewey* we fail to see how Mrs. Willis was prejudiced by the trial judge's use of the wrong evaluation date. Mrs. Willis received the proper proportion of the funds from the UCB account, the marital estate was compensated for Mr. Willis's wrongful expenditures, and values determined at the time of separation were used to determine the ultimate distribution of the marital assets. This assignment of error is overruled.

Affirmed in part, reversed in part, and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. RICKY LEE CALDWELL

No. 8630SC961

(Filed 19 May 1987)

Criminal Law § 138.27— aggravating factor—position of trust or confidence

The trial judge did not err when sentencing defendant for taking indecent liberties with children by finding as an aggravating factor that defendant took advantage of a position of trust or confidence where the evidence tended to show that defendant had sexually molested his stepson and his stepson's cousin while the two boys were staying with defendant and his wife. A parental or familial relationship is not a necessary element of the crime of taking indecent liberties with children and the aggravating factor of position of trust and confidence is not precluded. N.C.G.S. § 15A-1340.4(a)(1)(n), N.C.G.S. § 14-202.1.

APPEAL by defendant from *Allen, C. Walter, Judge.* Judgment entered 29 April 1986 in Superior Court, HAYWOOD County. Heard in the Court of Appeals on 11 February 1987.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert E. Cansler, for the State.

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

GREENE, Judge.

Defendant pleaded guilty to three counts of taking indecent liberties with children. The trial judge imposed the maximum ten year prison terms for two of the convictions and required that the sentences run consecutively. A three year term was imposed for the third conviction to run concurrently with the other terms for a total sentence of twenty years. Defendant appealed.

At the sentencing hearing, the State offered evidence tending to show defendant had sexually molested defendant's stepson and his stepson's cousin. While the two boys were staying with defendant and his wife during the summer of 1983, defendant got into bed with and fondled each boy. Among other things, the trial court found as an aggravating sentencing factor that defendant had taken advantage of a "position of trust or confidence" to commit the offenses under N.C.G.S. Sec. 15A-1340.4(a)(1)(n) (1983).

The only issue for this Court's determination is whether the aggravating sentencing factor under N.C.G.S. Sec. 15A-1340.4 (a)(1)(n) requires the defendant abuse a position of *greater* "trust and confidence" than that inherent among family members whenever defendant is convicted of taking indecent liberties with such family members. In his brief, defendant admits "trust and confidence is inherent when an adult family member resides in the same home as the minors who are molested." He concedes the offense of indecent liberties with a child may legally occur between children and adult strangers. Defendant nevertheless asserts, without support, that the offense occurs most frequently in families.

From this jerry-built premise, defendant concludes that the "position of trust and confidence" inherent in a family context is a necessary element of this offense and is thus precluded as an aggravating factor pursuant to N.C.G.S. Sec. 15A-1340.4(a)(1) which provides that "evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation." *Cf. State v. Young*, 67 N.C. App. 139, 143-44, 312 S.E. 2d 665, 660 (1984) (since parental or custodial relationship deemed necessary element of child abuse offense, "trust and confidence" necessarily precluded as aggravating factor). Thus, defendant argues the "position of trust and confidence" required by Section 1340.4(a)(1)(n) must be *greater* than that trust and confidence "inherent when an adult family member resides" with the victimized minor as in defendant's case.

We reject any contention that a parental or familial relationship is a necessary element of the crime of taking indecent liberties with children. N.C.G.S. Sec. 14-202.1 (1986) provides:

> (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

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

We fail to see any implication, necessary or otherwise, that this offense requires a parental or familial relationship between the perpetrator and the victim. Nowhere is any such relationship mentioned or implied.

Instead, where defendant is convicted of taking indecent liberties with his stepson and stepson's overnight guest, we see no reason to distinguish this case from our earlier decisions. *E.g., State v. Goforth*, 67 N.C. App. 537, 538-39, 313 S.E. 2d 595, 596, *cert. denied*, 311 N.C. 765, 321 S.E. 2d 149 (1984) (as familial relationship not necessary element of attempted rape, court properly held putative stepfather abused position of trust and confidence to commit offense); *State v. Potts*, 65 N.C. App. 101, 104-105, 308 S.E. 2d 754, 757, *disc. rev. denied*, 311 N.C. 406, 319 S.E. 2d 278 (1984) (where murder victim was defendant's "best friend," defendant took advantage of position of trust and confidence). Accordingly, the trial judge committed no error in finding as an aggravating factor that defendant took advantage of a position of trust or confidence.

Affirmed.

Judges WELLS and EAGLES concur.

IN THE MATTER OF THE APPLICATION OF CHARLES STEVEN MELKONIAN, T/A BONZO'S, SLOCUM SHOPPING CENTER, HAVELOCK, NORTH CAROLINA

No. 863SC1223

(Filed 19 May 1987)

Administrative Law § 6; Intoxicating Liquor § 2.8— denial of malt beverage permit —review in Wake County Superior Court

Under N.C.G.S. § 18B-906, the ABC Commission's denial of an application for a malt beverage permit on 9 December 1985 was a Commission action on "issuance" of an ABC permit and became a contested case for purposes of the APA on that date. Therefore, a petition for judicial review of the final agency

decision which granted the permit on 5 May 1986 was governed by the former N.C.G.S. § 150A-45 requirement that it be filed in the Superior Court of Wake County rather than by N.C.G.S. § 150B-45, which permits review to be sought in the county of the petitioner's residence, since N.C.G.S. § 150B-45 does not apply to contested cases commenced before 1 January 1986.

APPEAL by petitioner from *Reid, Judge*. Order entered 24 September 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 6 May 1987.

Ward and Smith, P.A., by William Joseph Austin, Jr., for petitioner, appellant.

Marshall & Safran, by David S. Crump, for respondent, appellee, North Carolina Alcoholic Beverage Control Commission.

Ward, Ward, Willey & Ward, by A. D. Ward, Sr., for respondent, appellee, Charles Steven Melkonian.

HEDRICK, Chief Judge.

The record before us discloses the following: On 13 November 1985, Charles Steven Melkonian filed with the North Carolina Alcoholic Beverage Control Commission (hereinafter the Commission) an application for an on-premises malt beverage permit for a business to be known as Bonzo's located in Slocum Village Shopping Center in Havelock, North Carolina. In an "Official Notice of Rejection," dated 9 December 1985, the permit was denied because "[t]he applicant and location cannot be considered suitable to receive or hold said permit due to local government objections." Melkonian appealed the rejection and requested a hearing on the matter. A hearing was held before Ann S. Fulton, Chief Hearing Officer of the Commission, on 3 April 1986. Charles Satanski, Director of Inspections for the City of Havelock and Executive Secretary to the Board of Adjustment of the City of Havelock, appeared at the hearing in opposition to the issuance of the permit. The hearing officer recommended that a permit be issued and on 5 May 1986, the Commission issued a permit to Melkonian.

On 8 May 1986, the City of Havelock filed a petition in Craven County Superior Court seeking judicial review of the final agency decision issuing the permit. On 10 June 1986, the Commission and respondent Melkonian filed a motion to dismiss the peti-

tion pursuant to G.S. 1A-1, Rule 12(b)(1). Following a hearing, the trial judge entered an order dismissing the petition, declaring that the Superior Court of Craven County lacked jurisdiction over the subject matter of the petition, because G.S. 150A-45, which applies in this case, "vests exclusive subject matter jurisdiction over petitions for judicial review of an agency decision in the Superior Court of Wake County." Petitioner appealed.

G.S. 150A-45, prior to the recodification of Chapter 150A as Chapter 150B, provided in pertinent part, "[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." The foregoing statute was replaced by G.S. 150B-45 which now provides, in pertinent part, "[i]n order to obtain judicial review of a final decision under this Chapter, the party seeking review must file a petition in Superior Court of Wake County or in the superior court of the county where the petitioner resides." Section 19 of Chapter 746 of the 1985 Session Laws, which adopted Chapter 150B, provides that the act shall not affect contested cases commenced before 1 January 1986.

Petitioner contends the trial court erred in dismissing the petition for lack of jurisdiction over the subject matter. Petitioner argues that it properly filed the petition in the Superior Court of Craven County pursuant to the provisions of G.S. 150B-45, because it involves a contested case commenced after 1 January 1986. We disagree.

G.S. 18B-906 provides for the applicability of the Administrative Procedure Act to decisions by the Commission regarding the issuance of ABC permits. This statute provides, in pertinent part, as follows:

> (a) Act Applies.—An ABC permit is a "license" within the meaning of G.S. 150A-2, and a Commission action on issuance, suspension or revocation of an ABC permit, other than a temporary permit issued under G.S. 18B-905, is a "contested case" subject to the provisions of Chapter 150A except as provided in subsection (b).

The record before us in the present case affirmatively discloses that Melkonian's application for a permit was initially denied by the Commission on 9 December 1985. This denial was

clearly a Commission action on "issuance" of an ABC permit, and, pursuant to the provisions of G.S. 18B-906, the ruling on the application became a "contested case" for the purposes of the Administrative Procedure Act on 9 December 1985. We hold, therefore, that the trial court properly dismissed the petition for judicial review.

The order appealed from is

Affirmed.

Judges EAGLES and PARKER concur.

JAMES E. WELLS v. JAMES ARTHUR JACKSON AND AMERICAN MUTUAL FIRE INSURANCE COMPANY

No. 8626SC1208

(Filed 19 May 1987)

Attorneys at Law § 7.5— automobile accident case—amount of judgment—attorney fees as part of costs

Attorney fees could be allowed under N.C.G.S. § 6-21.1 in an automobile accident case where the jury's verdict for personal injuries and property damage was for more than $5,000 but the judgment was for less than $5,000 after the property damage verdict was credited for amounts received from a collision insurer and a salvage buyer.

APPEAL by defendant Jackson from *Burroughs, Judge*. Judgment entered 1 July 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 April 1987.

Plaintiff's suit is for personal injuries and property damage sustained in a motor vehicular collision. In the complaint he alleged that the collision was caused by the defendant Jackson; and in the alternative he also alleged that if the collision was caused by a phantom hit and run driver, as defendant Jackson had asserted, that his own uninsured motorist carrier, defendant American Mutual Fire Insurance Company, was liable for his damages. During the course of discovery when defendant Jackson failed to respond to the plaintiff's discovery inquiries concerning the alleged hit and run driver Judge Grist entered an order in ef-

fect eliminating the phantom driver issue from the case, and plaintiff then voluntarily dismissed his claim against defendant American Mutual Fire Insurance Company. When the trial began defendant Jackson stipulated to his negligence and agreed to try the case solely on the damages issue. The result of that trial was a verdict that plaintiff had been damaged in the amount of $4,365 because of personal injuries and $4,500 because of damage to his property. Before trial plaintiff received $4,200 from his collision carrier and a salvage buyer in partial satisfaction of his property damage claim and he stipulated that the property damage verdict would be credited with the $4,200 so received. The credit was made and judgment was entered for the plaintiff in the amount of $4,665, and as part of the costs plaintiff was allowed an attorney fee in the amount of $1,250, as authorized by G.S. 6-21.1. Later a supplemental judgment was entered explaining why judgment was entered for $4,665, rather than the total amount of the verdict. Defendant appealed from the part of the judgment allowing plaintiff a fee for his counsel.

Michael J. Bednarik for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Philip R. Hedrick, for defendant appellant.

PHILLIPS, Judge.

When this case was tried attorney fees could be allowed under G.S. 6-21.1 only "where the judgment for recovery of damages" was $5,000 or less, and defendant's sole assignment of error asserts that the trial court erred by awarding attorney fees in this case because the "principal amount of the judgment was in an amount greater than $5,000." Obviously, this assignment is without foundation, as the principal amount of the judgment was $4,665. His argument that G.S. 6-21.1 does not authorize the allowance of counsel fees because the *verdict* was for more than $5,000 is unavailing; the statute refers only to the amount of the judgment and we have no authority to enlarge it.

No error.

Judges COZORT and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 MAY 1987

BOWEN v. LAURENS-PIERCE GLASS No. 8610IC1129	Ind. Comm. (020698)	Affirmed
BROWN v. BROWN No. 8726SC16	Mecklenburg (82CVD1284)	Affirmed
CARROLL v. GUIN No. 8627SC1113	Cleveland (85CVS403)	No Error
COUNTY OF WAKE v. K & K DEVELOPMENT No. 8610SC957	Wake (85CVS1441)	Affirmed
GARNER v. H & H ELECTRICAL No. 8610IC1143	Ind. Comm. (069945)	Affirmed
GROSSHEUSCH v. BURNORE No. 8628DC1092	Buncombe (85CVD111)	Affirmed in part, vacated and remanded in part.
HARVEY v. HARVEY No. 8612DC1155	Cumberland (86CVD471)	Affirmed
MOORE v. NORTH CAROLINA DEPT. OF JUSTICE No. 8622SC564	Iredell (85CVS1321)	No Error
NCNB v. RICE No. 8621SC1283	Forsyth (86CVS2634)	Appeal Dismissed
PARKER v. PARKER No. 864DC1232	Onslow (84CVD1114)	Affirmed
RAINBOW INTERNATIONAL CARPET v. ISENHOUR No. 8626SC1207	Mecklenburg (86CVS9652)	Affirmed and Remanded
STATE v. ALSTON No. 879DC107	Warren (84CVD199)	Affirmed
STATE v. BURRIS No. 8621SC1296	Forsyth (86CRS30457)	Affirmed
STATE v. COBB No. 8615SC1286	Alamance (85CRS17551)	No Error
STATE v. COLEMAN No. 8622SC1315	Davie (85CRS1634)	Remanded for a new sentencing hearing.

STATE v. DAVENPORT No. 8629SC1316	Rutherford (86CRS3548)	No Error
STATE v. FRYE No. 8626SC1304	Mecklenburg (85CRS11135) (85CRS11935) (85CRS17334) (86CRS37651) (86CRS62553) (86CRS62554)	Affirmed
STATE v. GRIGG No. 8627SC1136	Gaston (85CRS8564)	Appeal Dismissed
STATE v. HUTCHINS No. 8629SC899	Rutherford (85CRS2188)	No Error
STATE v. JACKSON No. 8624SC1187	Avery (86CRS6)	No Error
STATE v. KNOX No. 8627SC1260	Cleveland (85CRS7447)	No Error
STATE v. LEA No. 8615SC1125	Alamance (85CRS17136)	No Error
STATE v. LOCKLEAR No. 8612SC1000	Cumberland (85CRS40729)	No Error
STATE v. LOCKLEAR No. 8612SC1222	Cumberland (85CRS40810)	No Error
STATE v. MASON No. 874SC17	Onslow (84CRS13295)	No Error
STATE v. MILLER No. 864SC1261	Onslow (86CRS4147)	Affirmed
STATE v. MOORE No. 867SC1325	Nash (84CRS12274)	No Error
STATE v. NASH No. 8621SC1272	Forsyth (86CRS10316)	No Error
STATE v. RAJELIO No. 8616SC1312	Robeson (86CRS11963)	Affirmed
STATE v. ROBINSON No. 8629SC1297	Henderson (84CRS3537)	Vacated & remanded for resentencing
STATE v. SANTANA No. 864SC1348	Onslow (86CRS11281)	No Error
STATE v. WARD No. 8613SC1167	Columbus (85CRS6568)	No Error

STATE v. WINSTEAD No. 8625SC1309	Catawba (86CRS6499)	Affirmed
STATE v. WOLFE No. 8621SC1306	Forsyth (85CRS57829) (85CRS57833) (85CRS57837)	No Error
SURTI v. CREECH No. 864SC1116	Onslow (85CVS697)	No Error
WILLIAMS v. McNAMARA No. 868SC1342	Lenoir (85CVS994)	Appeal Dismissed

APPENDIX

AMENDMENT OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

AMENDMENT OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

The ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS, adopted by this Court 21 September 1982, 306 N.C. 797, as amended 10 November 1982, 307 N.C. 741, is hereby amended as follows:

Rewrite subsection 2(a) to read as follows:

(a) The presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings, in the courtroom or the corridors immediately adjacent thereto.

Add a new subsection 3(c) to read as follows:

(c) The presiding judge may, however, exercise his or her discretion to permit the use of electronic media and still photography coverage without booths or other restrictions set out in 3(a) and 3(b) if the use can be made without disruption of the proceedings and without distraction to the jurors and other participants. Such permission may be withdrawn at any time.

Reletter present subsections (c) to read (d), (d) to read (e), and (e) to read (f).

Rewrite subsection 5(c) to read as follows:

(c) Not more than one wired audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility. Provided, however, hand-held audio tape recorders may be used upon prior notification to, and with the

approval of, the presiding judge; such approval may be withdrawn at any time.

As amended the Order adopted 21 September 1982 shall be in effect from 1 July 1987 to 30 June 1988 unless earlier amended, rescinded, or extended by order of the Court.

This order shall be published in the advance sheets of the Supreme Court and of the Court of Appeals.

ADOPTED BY THE COURT IN CONFERENCE this the 24th day of June 1987.

WHICHARD, J.
For the Court

HEDRICK, Chief Judge.

[1] Defendants first contend the trial court erred to their prejudice in finding as aggravating factors in their cases both that "[t]he defendant has State Court convictions for criminal offenses punishable by more than 60 days' confinement," and also that "[t]he defendant committed offense while under Federal parole for conviction of felonious breaking or entering." Defendants argue that the court has used the same item of evidence to prove more than one factor in aggravation, which is prohibited by G.S. 15A-1340.4(a)(1). We disagree. It is not error for a trial court to find as an aggravating factor that a defendant has prior criminal convictions, then to find as a separate aggravating factor that the defendant was on parole at the time of the present offense. *State v. McLean*, 74 N.C. App. 224, 328 S.E. 2d 451 (1985), *appeal dismissed*, 316 N.C. 199, 341 S.E. 2d 573 (1986).

[2] Defendants next contend the trial court erred to their prejudice in failing to consider them for committed youthful offender status and failing to make a "no benefit" finding when not sentencing them as committed youthful offenders. G.S. 148-49.14 (Supp. 1985) provides, in pertinent part,

> As an alternative to a sentence of imprisonment as is otherwise provided by law, when a person under 21 years of age is convicted of an offense punishable by imprisonment and the court does not suspend the imposition or execution of sentence and place him on probation, the court may sentence such person to the custody of the Secretary of Correction for treatment and supervision as a committed youthful offender. When a person under twenty-five (25) years of age is convicted of a crime punishable by imprisonment but which is not a Class A, B, C, D, E, F or G felony, or a violent crime, and the court does not suspend the imposition or execution of sentence and place him on probation, the court may sentence such a person to the custody of the Secretary of Correction as a committed youthful offender. . . . If the court shall find that a person under 21 years of age should not obtain the benefit of release under G.S. 148-49.15, it shall make such "no benefit" finding on the record.

While it is true that the court neither sentenced defendants as committed youthful offenders, nor made a "no benefit" finding,

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

§ 6. Availability of Review by Certiorari

Petitioner was not a "person aggrieved" by the DHR's denial of a petition for the adoption of a rule changing requirements concerning the information which social service workers must report into an information system in connection with the administration of protective services to disabled adults and thus had no standing to seek judicial review of the decision. *In re Rulemaking Petition of Wheeler*, 150.

An ABC Commission proceeding became a contested case when the Commission initially denied a malt beverage permit on 9 December 1985, and a petition for judicial review of the final agency decision which granted the permit on 5 May 1986 was required by former G.S. 150A-45 to be filed in Wake County since the statute permitting review in the county of petitioner's residence, G.S. 150B-45, does not apply to contested cases commenced before 1 January 1986. *In re Application of Melkonian*, 715.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

Plaintiff had a substantial right to have all of her claims for relief tried at the same time before the same judge and jury and her appeal was allowed even though judgment was not final. *Byrne v. Bordeaux*, 262.

The trial court's dismissal of plaintiff's claim against defendant professional corporation affects a substantial right of plaintiff to have determined in a single proceeding the issues of whether she has been damaged by the actions of one, some or all defendants and is thus immediately appealable. *Fox v. Wilson*, 292.

§ 16.1. Limitations on Powers of Trial Court after Appeal

The trial court was not divested of authority to make written findings in a motion in the cause to modify alimony where notice of appeal was given after entry of an oral order. *Hightower v. Hightower*, 333.

§ 18. Costs in Appellate Court and Bonds Therefor

The Court of Appeals refused to dismiss defendant's appeal for failure to post a secured performance bond of $7,000 where defendant did post the appeal bond of $250 required by G.S. 1-285. *Armstrong v. Armstrong*, 93.

§ 24. Necessity for Assignments of Error

Plaintiff's appeal was not dismissed despite his failure to set out any assignments of error because an appeal from entry of summary judgment presents the question of whether the judgment is supported by the conclusions of law. *Burton v. NCNB*, 702.

§ 31.1. Necessity for Objections to Jury Charge

The Court of Appeals in a negligence action would not review portions of a jury charge to which defendant failed to object. *Petty v. City of Charlotte*, 391.

Plaintiffs lost their right to contend on appeal that the trial court erred by not holding defendants jointly and severally liable where the issue of joint and several liability could have been submitted to the jury but was not. *Stone v. Martin*, 410.

§ 45.1. Effect of Failure to Discuss Assignments of Error in Brief

An assignment of error was deemed abandoned where plaintiff failed to cite authority in support of her argument. *Byrne v. Bordeaux*, 262.

ASSAULT AND BATTERY — Continued

§ 14.3. Sufficiency of Evidence of Assault with a Deadly Weapon with Intent to Kill

The evidence was sufficient to show that defendant used a two and one-half ton truck as a deadly weapon and that he possessed the specific intent to kill each of five deputy sheriffs. *S. v. Hinson*, 558.

§ 14.4. Sufficiency of Evidence of Assault with a Deadly Weapon with Intent to Kill where Weapon Is a Firearm

The State's evidence was sufficient to support defendant's conviction of five counts of assault with a deadly weapon with intent to kill inflicting serious injury which arose from a shootout between the gangs of two rival drug dealers. *S. v. Platt*, 220.

§ 15.7. Instruction on Self-Defense not Required

The evidence in a felonious assault case which arose from a shootout between two rival gangs did not require the trial court to instruct on self-defense. *S. v. Platt*, 220.

ATTORNEYS AT LAW

§ 3. Scope and Duration of Attorney's Authority Generally

The trial court did not abuse its discretion in an action to determine the value of respondent's interest in condemned land by denying petitioner's motion to require respondent's attorney to withdraw or to prohibit the use of certain evidence allegedly secured by the attorney while acting as attorney for all property owners in a former proceeding. *In re Condemnation of Lee*, 302.

§ 5.2. Duty to Represent Client; Liability for Fraud

The trial court erred in dismissing the second count of plaintiff's complaint since the allegations therein were relevant to plaintiff's claim against defendant attorney for constructive fraud in plaintiff's transfer of a newspaper to a corporation owned by defendant attorney and the other individual defendant and stated a claim for relief for legal malpractice against defendant attorney. *Fox v. Wilson*, 292.

Plaintiff's amended complaint stated a claim for relief against defendant professional corporation for acts committed by defendant attorney. *Ibid.*

§ 7.4. Fees Based on Provisions of Instruments

The statutory requirement for giving notice of intent to claim counsel fees pursuant to a contract did not apply where the obligor refused to pay a construction contractor's claim and demanded arbitration pursuant to the terms of the contract. *Wilson Building Co. v. Thorneburg Hosiery Co.*, 684.

§ 7.5. Allowance of Fees as Part of Costs

Attorney fees could be allowed under G.S. § 6-21.1 in an automobile accident case where the jury's verdict was for more than $5,000 but the judgment was for less than $5,000 after the property damage verdict was credited for amounts received from a collision insurer and a salvage buyer. *Wells v. Jackson*, 718.

AUTOMOBILES AND OTHER VEHICLES

§ 108. Family Purpose Doctrine

The trial court did not err by dismissing a claim for punitive damages against a husband arising from his wife's involvement in an automobile accident where the

CONSTITUTIONAL LAW

§ 4. Standing to Raise Constitutional Questions

A defendant charged with second degree rape of a mentally defective person under G.S. 14-27.3(a)(2) did not have standing to challenge the constitutionality of that statute on the ground that it intrudes upon the right of a physically handicapped or mentally disabled person to engage in consensual vaginal intercourse. *S. v. Teeter*, 624.

§ 30. Discovery

The trial court erred in a prosecution arising from the sale of narcotics in which evidence was obtained from an electronic device placed on defendant's telephone by failing to examine the records in camera or seal them for appellate review. *S. v. Jones*, 56.

The trial court did not err in a prosecution arising from the sale of hydromorphone by finding that the defense had violated a court order which allowed access to the seized substances for the purpose of conducting an independent analysis. *Ibid.*

§ 60. Racial Discrimination in Jury Selection Process

Defendant waived her right to contest the State's use of peremptory challenges to exclude blacks from the jury by failing to object until after the State had presented its evidence. *S. v. Clay*, 477.

§ 74. Self-Incrimination Generally

The trial court did not err in refusing to compel a witness to testify about taking nude photographs of the minor victim since the testimony could furnish a link in a chain of evidence which could lead to prosecution of the witness. *S. v. Singleton*, 123.

CONTEMPT OF COURT

§ 6.2. Hearings on Orders to Show Cause; Sufficiency of Evidence

The trial court's order holding defendant in contempt for her failure to be present in superior court at 9:30 a.m. on a given day during the trial of her husband was not supported by the evidence. *S. v. Chriscoe*, 155.

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors

Plaintiff's erection of a skylight assembly over the entrance to defendant's shopping mall constituted the construction of an "improvement" within the meaning of the general contractor licensing statute, but a genuine issue of material fact existed as to whether plaintiff exercised such a degree of control over the entire mall renovation project as to make plaintiff a general contractor and require that plaintiff be licensed in order to bring an action for breach of the construction contract. *Mill-Power Supply Co. v. CVM Associates*, 455.

§ 27.2. Sufficiency of Evidence of Breach of Contract

The evidence was sufficient to show that defendant breached his contract with plaintiff to set up a holding company in Luxembourg and execute an employment contract with the holding company. *Ward v. Zabady*, 130.

The trial court did not err by granting defendants' motion for summary judgment on plaintiffs' claims that defendants breached implied provisions of their in-

CRIMINAL LAW — Continued

§ 34.5. Evidence of Defendant's Guilt of Other Offenses Admissible to Show Identity of Defendant

The trial court properly permitted a witness to testify that defendant had telephoned him about a month or so before an attempted robbery about "a stolen TV set," though the testimony indicated that defendant had committed another crime, since the testimony tended to support the witness's claim that he recognized defendant's voice. *S. v. Harlee*, 159.

§ 34.8. Admissibility of Evidence of Defendant's Guilt of Other Offenses to Show Common Plan or Scheme

In a prosecution for rape of a mentally retarded employee of a sheltered workshop, evidence of defendant's sexual abuse of five other mentally retarded female employees at the workshop was admissible to show a common plan or scheme by defendant. *S. v. Teeter*, 624.

§ 50.1. Admissibility of Expert Opinion Testimony

The trial court in an obscenity prosecution erred in excluding opinion testimony by a sociologist based on an ethnological study that the average adult person in the community would tolerate magazines defendant allegedly sold and that the material was not patently offensive to the average person in the community. *S. v. Anderson*, 104.

A clinical psychologist's opinion testimony that the mentally retarded prosecutrix exhibited behavioral characteristics consistent with sexual abuse was based on adequate data and fell within the scope of expert testimony permitted by statute. *S. v. Teeter*, 624.

§ 51.1. Qualification of Experts; Showing Required; Sufficiency

The trial court erred in allowing the State's expert witnesses to testify that they had been found to be experts by other courts, but such error was harmless. *S. v. Oliver*, 1.

The trial court properly allowed a witness for the State to testify as an expert and to identify the substance seized at defendants' residence as marijuana. *S. v. Edwards and S. v. Jones*, 145.

§ 73.2. Statements not within Hearsay Rule

A witness's prior statement to the police was not admissible as substantive evidence under the "residual" hearsay exception of Rule 803(24) where the trial court failed to make the required inquiry for the admission of such evidence. *S. v. Platt*, 220.

§ 73.5. Statements not within Hearsay Rule; Medical Diagnosis and Treatment

A medical expert's interview of a sexual abuse victim was conducted for purposes of diagnosis and treatment, and statements made by the victim were admissible as an exception to the hearsay rule. *S. v. Oliver*, 1.

§ 75.14. Defendant's Mental Capacity to Confess or Waive Rights

Defendant's noncustodial, self-initiated inculpatory statements were admissible in defendant's murder trial without regard to defendant's mental competency at the time he made the statements. *S. v. Adams*, 200.

§ 77. Admissions and Declarations of Persons other than Defendant

A witness's statement to a police officer was not admissible as a statement against penal interest where the statement did not actually subject the witness to criminal liability. *S. v. Singleton*, 123.

CRIMINAL LAW — Continued

§ 78. Stipulations

The trial court properly admitted a stipulation signed by the defense attorney and the prosecutor establishing the penetration element of second degree rape without any showing that defendant himself had personally stipulated to this element. *S. v. Morrison*, 511.

§ 80. Books; Records; and other Writings

Literature upon which a medical expert witness relied was admissible under the Rule 803(18) exception to the hearsay rule. *S. v. Oliver*, 1.

The trial court properly permitted a telephone company employee to testify about the contents of the records of calls made on defendant's telephone. *S. v. Clay*, 477.

§ 85.1. Character Evidence; What Questions and Evidence Are Admissible

A character witness was properly permitted to testify about the child victim's reputation for truthfulness in her school community based on the witness's conversations with and about the victim. *S. v. Oliver*, 1.

§ 86.8. Credibility of Defendant and Interested Parties; State's Witnesses

Defendant was entitled to cross-examine an alleged rape victim's mother about whether she was contemplating or preparing to bring a civil action for damages arising out of the incident involved in this criminal case for the purpose of showing bias of the witness. *S. v. Teeter*, 624.

§ 87.1. Leading Questions

The trial court did not err in allowing certain leading questions to the mildly retarded victim in a prosecution for various sex related offenses. *S. v. Oliver*, 1.

§ 89.1. Evidence of Character Bearing on Credibility

Testimony by a clinical psychologist that a mentally retarded rape victim showed no evidence of an emotional disorder which would impair her ability to distinguish reality from fantasy did not amount to an impermissible opinion as to the victim's credibility or defendant's guilt and was properly admitted. *S. v. Teeter*, 624.

A clinical psychologist's testimony explaining the behavioral characteristics that he observed in the mentally retarded prosecutrix did not constitute an impermissible opinion that the prosecutrix was telling the truth and that defendant was guilty. *Ibid.*

Testimony by an expert witness concerning her belief that the prosecutrix was telling the truth and the reason for her belief violated Rules of Evidence 405(a) and 608, but the admission of such testimony was harmless error. *Ibid.*

§ 89.2. Corroboration

Testimony which tended to add weight or credibility to the prosecutrix's testimony was properly admitted for corroboration even though it contained additional information not related by the prosecutrix in her testimony. *S. v. Teeter*, 624.

§ 89.4. Prior Inconsistent Statements of Witness

A witness's prior statement to the police was not admissible as a prior inconsistent statement for impeachment purposes where the witness never testified to anything with which his prior statement was inconsistent. *S. v. Platt*, 220.

CRIMINAL LAW — Continued

§ 99.4. Court's Expression of Opinion; Remarks in Connection with Objections and Rulings Thereon

The trial court did not improperly express an opinion by explaining why the jury was being sent out of the courtroom after a defense objection and stating that this case was one of "hurry-and-wait." *S. v. Edwards and S. v. Jones*, 145.

§ 101.2. Exposure of Jurors to Publicity

The trial court did not commit reversible error when questioning the jurors about a newspaper article. *S. v. Hall*, 447.

§ 101.4. Conduct Affecting Jury Deliberation

The trial court committed prejudicial error in permitting the jury, over defendant's objection and without his consent, to take a witness's prior statement into the jury room during its deliberations. *S. v. Platt*, 220.

§ 109. Peremptory Instructions

In a prosecution arising from the sale of Dilaudid where an SBI chemist had been found before trial to have taken drugs from the SBI lab, the court did not err by failing to dismiss the indictments because the State refused to grant the chemist immunity or by failing to instruct the jury that the testimony of a missing witness within the State's power to produce would have been unfavorable to the State. *S. v. Jones*, 56.

§ 112.1. Instructions on Reasonable Doubt

An instruction concerning reasonable doubt was not erroneous because it omitted the phrase "convinced to a moral certainty." *S. v. Oliver*, 1.

§ 112.6. Instructions on Affirmative Defenses; Insanity

The trial court did not err in refusing to instruct on temporary insanity where defendant's evidence merely tended to show voluntary intoxication as a result of alcohol and drug abuse. *S. v. Hinson*, 558.

The trial court did not err in refusing to instruct the jury that defendant would not be responsible if his operation of a truck "was affected by the firing of weapons at him." *Ibid.*

§ 114.3. No Expression of Opinion in other Instructions

The trial court did not improperly imply that defendant was guilty of charges relating to accessory before the fact when it instructed that the last four counts in an indictment "refer to the allegation of acting as an accessory before the fact—or rather guilt of those crimes charged as an accessory before the fact." *S. v. Clay*, 477.

§ 116. Charge on Failure of Defendant to Testify

The trial court's unrequested instruction on defendant's failure to testify was not prejudicial error. *S. v. Clay*, 477.

§ 117.1. Charge on Credibility

The trial court did not err in refusing to give defendant's requested instruction that the guilt or conviction of a witness shall not be considered as evidence of defendant's guilt. *S. v. Clay*, 477.

§ 122.2. Additional Instructions upon Failure to Reach Verdict

The trial court did not abuse its discretion in giving the jury the "dynamite charge" prior to an afternoon break when the jury had been deliberating less than

CRIMINAL LAW — Continued

§ 138.34. Sentence; Mitigating Factors; Mental or Physical Condition

The sentencing judge did not err in refusing to find defendant's drug addiction as a factor in mitigation of his sentence. *S. v. Arnette*, 492.

§ 138.35. Sentence; Mitigating Factors; Limited Mental Capacity

The sentencing judge did not err in failing to find that defendant's limited mental capacity at the time of the commission of the crime significantly reduced his culpability for the crime. *S. v. Arnette*, 492.

The trial court was not required to find as mitigating factors that defendant suffered from a "mental condition" or from "limited mental capacity" which significantly reduced his culpability for the offense. *S. v. Hall*, 447.

§ 138.39. Sentence; Mitigating Factors; Exercise of Caution to Avoid Bodily Harm or Fear

The sentencing judge did not err in failing to find as a mitigating factor that defendant was exercising caution to avoid the possibility of serious bodily harm or fear because he broke into an unoccupied rather than an occupied car. *S. v. Arnette*, 492.

§ 138.40. Sentence; Mitigating Factors; Acknowledgment of Wrongdoing

The sentencing judge did not err in failing to find the voluntary acknowledgment of wrongdoing mitigating circumstance where there was no evidence to show the time of defendant's confession. *S. v. Arnette*, 492.

§ 142.4. Conditions of Probation Held Improper

The trial court erred when sentencing defendant for assault with a deadly weapon with intent to kill inflicting serious injury by recommending as a condition for work release that defendant pay restitution for pain and suffering. *S. v. Burkhead*, 535.

DAMAGES

§ 11.1. Circumstances where Punitive Damages Are Appropriate

Punitive damages are available for fraud and additional elements of aggravation are not necessary. *Stone v. Martin*, 410.

The jury did not abuse its discretion in awarding punitive damages in an action for malfeasance in conducting the affairs of a corporation even though the award of punitive damages significantly exceeded the award of compensatory damages. *Ibid.*

§ 13. Competency and Relevancy of Evidence Generally

The trial court did not err by admitting evidence of defendants' net worth in an action for malfeasance in conducting the affairs of a corporation where the evidence sufficiently raised an issue of punitive damages. *Stone v. Martin*, 410.

§ 13.2. Competency and Relevancy of Evidence as to Lost Earnings or Profits

Plaintiff's certified public accountant was properly permitted to state his expert opinion as to the loss of profits suffered by plaintiff's store as a result of defendant's breach of the lease agreement. *Liss of Carolina v. South Hills Shopping Center*, 258.

DEAD BODIES

§ 2. Contract to Inter and Interment

The trial court did not err by dismissing a third party complaint against a casket company and a funeral home for contribution where the original complaint was based on breach of the legal duty to construct a mausoleum pursuant to the terms of an express contract. *Holland v. Edgerton*, 567.

A claim for relief based on breach of an implied warranty arising from the construction of a mausoleum gives no rise to a right of contribution because it sounds in contract and not in tort. *Ibid.*

DEATH

§ 1. Proof of Cause of Death

Statements listing suicide as the cause of death on an insured's death certificate and in the medical examiner's report were inadmissible to show the cause of death in an action on a life insurance policy. *Drain v. United Services Life Ins. Co.*, 174.

DIVORCE AND ALIMONY

§ 7. Grounds for Divorce from Bed and Board Generally

Defendant husband's stipulation to the existence of grounds for awarding alimony to plaintiff wife did not entitle plaintiff to a divorce from bed and board. *Perkins v. Perkins*, 660.

§ 16.8. Alimony; Findings

The trial court's conclusion that plaintiff was entitled to an award of permanent alimony was unsupported by the findings of fact. *Perkins v. Perkins*, 660.

§ 16.9. Amount and Manner of Payment of Alimony

Alimony awarded as monthly payments for a twenty-four month period constituted a permissible lump sum award. *Perkins v. Perkins*, 660.

The trial court's failure to make a specific finding concerning the tax consequences of an alimony award is not reversible error. *Ibid.*

§ 18.16. Alimony Pendente Lite; Attorney's Fees

The trial court did not abuse its discretion in refusing to award plaintiff additional attorney fees after the permanent alimony hearing where fees of $2,500 had been awarded to plaintiff at the pendente lite hearing. *Perkins v. Perkins*, 660.

§ 18.19. Alimony Pendente Lite; Review

The trial court's order relieving defendant of any further obligation to pay alimony pendente lite was immediately appealable. *Brown v. Brown*, 602.

§ 19. Modification of Decree of Alimony Generally

There was sufficient evidence in an action to modify alimony to find that plaintiff wife was without means to defray expenses. *Hightower v. Hightower*, 333.

§ 19.4. Modification of Alimony Decree; Burden and Sufficiency of Showing Changed Circumstances

The trial court did not err in a motion in the cause to reduce alimony payments by failing to conclude that plaintiff wife's increase in income, coupled with defendant husband's plans to remarry, justified a decrease in the amount of alimony. *Hightower v. Hightower*, 333.

DIVORCE AND ALIMONY — Continued

The mere discovery of adultery committed by plaintiff prior to the parties' separation was insufficient for a finding of changed circumstances necessary for a modification of an order of alimony pendente lite. *Brown v. Brown*, 602.

§ 24.10. Termination of Child Support Obligation

The trial court had no authority to require defendant to pay the expenses of college educations for his children. *Bridges v. Bridges*, 524.

§ 29. Attack on Domestic Divorce Decrees

The death of defendant's wife was not a bar to his motion for relief from a judgment for divorce from bed and board. *Allred v. Tucci*, 138.

A judgment for divorce from bed and board was void where the court did not find facts as to the existence of any grounds for divorce from bed and board cognizable under G.S. 50-7. *Ibid.*

§ 30. Equitable Distribution

The Legislature's reclassification of defendant's military retirement pay as marital property did not violate constitutional guarantees of due process. *Armstrong v. Armstrong*, 93.

The trial court did not abuse its discretion in ordering an equal division of marital property, including defendant's military retirement pay, though the court made no findings of fact. *Ibid.*

There was no merit to defendant's contention that he was denied equal protection of the laws because N.C. Const. Art. X, § 4 protects the property, including military retirement pay, of a woman but not a man. *Ibid.*

The trial court erred in an equitable distribution action by concluding that a monetary settlement received by plaintiff for injuries sustained during the course of his employment and a personal injury settlement defendant received as a result of an injury she sustained at a Brendle's department store constituted marital property. *Dunlap v. Dunlap*, 324.

The trial court did not err in an equitable distribution action by permitting the plaintiff's father to testify that checks from plaintiff's dead grandmother to defendant were gifts to plaintiff. *Hunt v. Hunt*, 484.

The evidence in an equitable distribution action adequately supported the trial court's finding that checks written to defendant by plaintiff's grandmother were gifts to plaintiff only. *Ibid.*

The trial court erred in an equitable distribution action by holding that checks written by plaintiff's grandmother to plaintiff and to defendant remained plaintiff's separate property after plaintiff placed that money into property titled in the entireties. *Ibid.*

In an equitable distribution action, the trial court's error in the determination of the amount of separate property contributed by plaintiff was harmless. *Ibid.*

In an equitable distribution action, there was no prejudicial error from the trial court's denial of defendant's request for a voir dire to show what a CPA's opinion would have been concerning the grandmother's gift tax returns if such returns had been filed. *Ibid.*

The trial court did not err in an equitable distribution action by holding that the money received from the sale of the parties' 1982 Volvo was marital property. *Ibid.*

In an equitable distribution action, all of the money used for payment on the marital home up until the date of separation consisted of either marital funds or

EMINENT DOMAIN — Continued

§ 13. Actions by Owner for Compensation

The value of a sand and gravel company's unexercised right to mine sand and gravel from property condemned for an airport was the fair market value of the sand and gravel in place. *In re Condemnation of Lee*, 302.

§ 16. Persons Entitled to Compensation Paid

Petitioner sand and gravel company had a compensable interest in land which had been condemned for an airport under a lease granting the right to mine sand and gravel. *In re Condemnation of Lee*, 302.

EQUITY

§ 2. Laches

Plaintiffs were not barred by the doctrine of laches from asserting their easement rights in two alleyways closed by defendant. *Hatfield v. Jefferson Standard Life Ins. Co.*, 438.

ESTATES

§ 2.1. Application of Doctrine of Merger to Particular Cases

The mortgage estate on land held in trust by plaintiff first lienholder did not merge with the fee simple estate obtained by plaintiff lienholder when it accepted and recorded a deed from the mortgagor conveying the encumbered land, and a junior judgment lienholder thus did not obtain clear title to the land by purchasing it at a sheriff's sale but obtained title subject to plaintiff's deed of trust. *Branch Banking and Tr. Co. v. Home Fed. Sav. and Loan*, 187.

EVIDENCE

§ 13. Privileged Communications between Attorney and Client

Defendant's statements detailing his relationships with two other people involved in a break-in was not the privileged work product of his attorneys in an action to recover for injuries received when plaintiff was shot after breaking into defendant's house. *Hall v. Coplon*, 505.

§ 18. Experimental Evidence

The admission of evidence of an expert witness's experiment as to burn patterns on steps was not prejudicial in light of a strong disclaimer which the witness himself gave for the probative value of the experiment and in light of the other evidence regarding the cause and origin of the fire. *Wiles v. N.C. Farm Bureau Ins. Co.*, 162.

§ 19. Evidence of Similar Facts and Transactions in General

A witness's testimony concerning problems she experienced in a prior transaction with defendant automobile dealer was admissible under Rule of Evidence 404(b) for the limited purpose of showing defendant's motive, intent, absence of mistake and bad faith in its dealings with plaintiff. *Medina v. Town and Country Ford*, 650.

§ 28.3. Conclusiveness and Effect of Public Records and Documents

Statements listing suicide as the cause of death on an insured's death certificate and in the medical examiner's report were inadmissible to show the cause of

EVIDENCE — Continued

death in an action on a life insurance policy. *Drain v. United Services Life Ins. Co.*, 174.

§ 31. Best and Secondary Evidence Relating to Writings

Testimony by the beneficiary as to the amount of life insurance applied for by the insured did not violate the best evidence rule. *Drain v. United Services Life Ins. Co.*, 174.

§ 33.2. Examples of Hearsay Testimony

In an action arising from defendants' alleged failure to finish paying plaintiff for electrical installations, the trial court did not err by excluding testimony from the supervising architect that defendant had the reputation of scheming to take advantage of small unsophisticated contractors. *Booe v. Shadrick*, 230.

The trial court did not err in an action to recover for injuries received when plaintiff was shot after breaking into defendant's house by admitting testimony concerning the events leading up to the break-in and plaintiff's and defendant's relationships with two other people involved in the break-in. *Hall v. Coplon*, 505.

§ 34.3. Admissions by Conduct

A letter from a dairy nutrition counselor stating that fertilizer did not appear to be present in samples of feed corn sent to him for analysis did not qualify as an admission by adoption or by silence. *FCX, Inc. v. Caudill*, 272.

§ 48. Competency and Qualification of Experts in General

In an action to recover under a fire insurance policy, the trial court did not err in allowing a witness to testify as an expert on the cause and origin of the fire. *Wiles v. N.C. Farm Bureau Ins. Co.*, 162.

The trial court did not err in an action arising from a construction dispute by not allowing the supervising architect to express his opinion that cost plus ten percent would be a reasonable way to calculate the value of the services rendered by plaintiff. *Booe v. Shadrick*, 230.

EXTORTION

§ 1. Generally

Plaintiff's claim for attempted extortion was properly dismissed where defendant's attorney stated in a letter to plaintiff's attorney that an attached complaint would be filed if plaintiff did not pay by a specified date an amount to which defendant claimed it was entitled. *Harris v. NCNB*, 669.

FRAUDS, STATUTE OF

§ 7. Contracts to Convey

In an action for summary ejectment in which defendants counterclaimed for breach of contract, the trial court erred by granting plaintiffs' motion for summary judgment as to the counterclaim. *Rose v. Lang*, 690.

GRAND JURY

§ 2. Nature and Functions of Grand Jury

The trial judge did not err in a prosecution arising from the sale of Dilaudid tablets by denying defendant's motion to dismiss one of the sale and delivery indict-

INDICTMENT AND WARRANT — Continued

§ 9.11. Allegations as to Time

Indictments for various sexual offenses against a child were not fatally defective because they alleged that the offenses occurred during a specified period of time rather than on specific days. *S. v. Oliver*, 1.

INNKEEPERS

§ 5. Liability for Personal Injuries

In an action by a motel guest who was robbed and raped at the motel to recover damages from the motel owners for failure to provide her a safe place to stay, plaintiff's evidence that criminal activity at the interchange where defendants' motel was located and at another interchange two miles away where other motels were situated had been high for several years was relevant on the question of foreseeability. *Murrow v. Daniels*, 401.

The trial court erred in refusing to instruct the jury that they could find that plaintiff motel guest who was raped and robbed was contributorily negligent in failing to look out the bathroom window before she opened her motel door to men who had refused to identify themselves. *Ibid.*

In a motel guest's action to recover damages for failure to provide her a safe place to stay, the trial court properly allowed another motel operator to testify as to security measures which he took after plaintiff was raped and robbed at defendants' motel, but the court erred in permitting an expert witness on motel security to testify that defendants' lack of security precautions at the time of plaintiff's injuries was "gross negligence." *Ibid.*

INSURANCE

§ 13. Effective Date of Life Insurance Policy

Plaintiff's evidence was sufficient to go to the jury in an action to recover under a life insurance policy where the jury could find that an amendment to the policy had backdated its effective date to a time preceding the insured's death. *Drain v. United Services Life Ins. Co.*, 174.

§ 18.1. Life Insurance; Misrepresentations as to Health and Physical Condition

Where insured's answers were written for him on a life insurance application by a bank officer, the trial court should have instructed the jury that if it found that insured falsely answered the application by failing to advise defendant insurer of a second operation for a carcinoma, it should also find that such misrepresentation was material. *Hardy v. Integon Life Ins. Corp.*, 575.

§ 19. Life Insurance; Waiver of Right to Declare Forfeiture for Misrepresentations

A jury question was presented as to whether defendant insurer waived its right to avoid a life insurance policy for the insured's misrepresentation in failing to advise defendant that he had had a second operation for a carcinoma when the insurer failed to make further inquiry by which it could have discovered the second operation and the pathologist's diagnosis of metastasis after it had learned about insured's first operation for a non-metastatic carcinoma. *Hardy v. Integon Life Ins. Corp.*, 575.

§ 37. Actions on Life Insurance Policies

Evidence of the contents of insured's other life insurance policies and the circumstances under which their death benefits were paid was irrelevant in determin-

ing when effective coverage of insured was to begin under defendant's life insurance policy. *Drain v. United Services Life Ins. Co.*, 174.

§ 37.2. Life Insurance; Insurer's Burden of Proving Exceptions from and Limitations of Liability; Suicide

Prior separations between plaintiff life insurance beneficiary and the insured which occurred at least 18 months before insured's death were too remote to be of probative value in establishing insured's state of mind at the time of his death. *Drain v. United Services Life Ins. Co.*, 174.

Statements listing suicide as the cause of death on an insured's death certificate and in the medical examiner's report were inadmissible to show the cause of death in an action on a life insurance policy. *Ibid.*

INTOXICATING LIQUOR

§ 1.2. Local Regulation

The decision by the ABC Commission to grant petitioner a permit for the sale of malt beverages preempted and rendered unlawful a decision by respondent city board of adjustment to deny petitioner a special exception use permit to operate a tavern. *In re Application of Melkonian*, 351.

§ 2. Duties and Authority of ABC Board Generally

The ABC Commission had subject matter jurisdiction over a contract dispute involving distribution rights for respondent's wine. *Empire Distributors v. N.C. ABC Comm.*, 528.

§ 2.8. Renewal or Revocation of License; Procedure; Sufficiency of Evidence; Judicial Review

An ABC Commission proceeding became a contested case when the Commission initially denied a malt beverage permit on 9 December 1985, and a petition for judicial review of the final agency decision which granted the permit on 5 May 1986 was required by former G.S. 150A-45 to be filed in Wake County since the statute permitting review in the county of petitioner's residence, G.S. 150B-45, does not apply to contested cases commenced before 1 January 1986. *In re Application of Melkonian*, 715.

JURY

§ 7.14. Manner and Time of Exercising Peremptory Challenges

Defendant waived her right to contest the State's use of peremptory challenges to exclude blacks from the jury by failing to object until after the State had presented its evidence. *S. v. Clay*, 477.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

The evidence was sufficient to support a kidnapping verdict where it tended to show that defendant abducted a store employee for the purpose of facilitating an attempted armed robbery by coercing the store manager into turning store receipts over to him. *S. v. Harlee*, 159.

LABORERS' AND MATERIALMEN'S LIENS

§ 8.1. Enforcement of Lien Generally; Actions against Owner

Where funds in the amount of a claimed lien for labor and materials were deposited with the clerk pending a final determination of the amount owed by the owner to the builder and the lien was cancelled, but the funds were inadvertently released to the builder, the trial court properly required the builder to return the funds and properly denied the owner's motion that the funds be released to him, although no action to enforce the lien had been filed within the time required by G.S. § 44A-13A, since the funds were controlled by the agreement rather than by the statute, and the three-year statute of limitations applies to such an action. *In re Notice of Claim of Lien of Woodie*, 533.

LANDLORD AND TENANT

§ 8. Duty of Landlord to Repair Demised Premises

By the enactment of the Residential Rental Agreement Act, the legislature implicitly adopted the rule that a landlord impliedly warrants to the tenant that leased residential premises are fit for human habitation. *Miller v. C. W. Myers Trading Post, Inc.*, 362.

§ 8.5. Liability of Landlord for Damages in Making Repairs

The Industrial Commission's ultimate finding and conclusion that the State was negligent in maintaining leased premises was not supported by its findings in an action in which a child fell through a storm door. *Bolkhir v. N.C. State Univ.*, 521.

§ 19. Rent and Actions Therefor

A tenant may bring an action for recovery of rent paid based on the landlord's noncompliance with the Residential Rental Agreement Act. *Miller v. C. W. Myers Trading Post, Inc.*, 362.

A tenant may recover damages in the form of rent abatement calculated as the difference between the fair rental value of the premises if as warranted and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved, but may not recover punitive damages. *Ibid.*

LARCENY

§ 1. Definition

The trial court in a prosecution for armed robbery erred in refusing to instruct the jury on misdemeanor larceny. *S. v. White*, 81.

LIBEL AND SLANDER

§ 1. Generally

Plaintiff did not state a claim for defamation where plaintiff alleged that defendant's attorney mailed to plaintiff's attorney a letter and complaint which had not yet been filed alleging that plaintiff had obtained property by false pretense and demanding $20,500 plus interest if the complaint was not to be filed. *Harris v. NCNB*, 669.

§ 11. Absolute Privilege

Summary judgment in a libel action arising from a debt collection letter threatening criminal prosecution was proper. *Burton v. NCNB*, 702.

LIMITATION OF ACTIONS

§ 1. Nature and Characteristics of Limitation Statutes in General

Provisions in a construction bond which would reduce the limitation period allowed under G.S. 44A-28(b) will be disregarded. *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 114.

§ 4.3. Accrual of Cause of Action for Breach of Contract in General

The one year limitation on construction payment bonds set forth in G.S. 44A-28(b) constitutes a statute of repose, compliance with which is a condition precedent to the insurer's liability on the bond. *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 114.

Summary judgment was inappropriate in an action to recover on a construction payment bond where a genuine issue of material fact existed as to the date of final settlement between a contracting town and a contractor, and it therefore could not be determined when the period of repose commenced. *Ibid.*

§ 12.1. New Action after Failure of Original Suit

The N.C. "borrowing statute," G.S. 1-21, applied to plaintiff's action and required the use of the applicable California statute of limitations to bar plaintiff's action in the courts of N.C. *Glynn v. Stoneville Furniture Co., Inc.*, 166.

§ 12.4. Amendment of Pleadings

Where defendant's liability on a construction payment bond terminated under the statute of repose one year after all work under the contract ceased, plaintiff's subsequent motion to amend its complaint could not revive defendant's liability irrespective of any relation back under Rule of Civil Procedure 15(c). *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 114.

MALICIOUS PROSECUTION

§ 15. Damages

Plaintiff could properly recover both punitive damages for malicious prosecution and treble damages for unfair trade practices in the sale of a car to plaintiff. *Medina v. Town and Country Ford*, 650.

MASTER AND SERVANT

§ 8.1. Compensation of Employee

The trial court did not err by denying defendant's motion for a directed verdict and judgment n.o.v. in an action arising from defendant's failure to bridge plaintiff's prior AT&T service. *Welsh v. Northern Telecom, Inc.*, 281.

§ 10.2. Actions for Wrongful Discharge

Where a collective bargaining agreement between defendant power company and plaintiff's union called for arbitration of labor disputes, the arbitrator's decision that plaintiff was discharged for "just cause" barred his claim for wrongful or retaliatory discharge. *Shreve v. Duke Power Co.*, 253.

§ 49. Workers' Compensation; "Employees" within the Meaning of the Act

A father was an employee of his son in the son's roofing business at the time he fell from a roof to his death where deceased provided valuable roofing skills and services for his son from time to time when he was able and when he was needed, and in exchange for these services, the son provided his father three to four hundred dollars worth of necessities per month. *Dockery v. McMillan*, 469.

MASTER AND SERVANT — Continued

and that her claim for subsequently diagnosed permanent organic brain damage was barred by the statute of limitations. *Hand v. Fieldcrest Mills, Inc.*, 372.

§ 96.1. Workers' Compensation; Scope of Review

Plaintiff failed properly to preserve his right to appeal the failure of the Deputy Commissioner to order payment of future medical expenses under G.S. 97-59. *Joyner v. Rocky Mount Mills*, 606.

MORTGAGES AND DEEDS OF TRUST

§ 17.1. Particular Acts Constituting Payment and Satisfaction

The mortgage estate on land held in trust by plaintiff first lienholder did not merge with the fee simple estate obtained by plaintiff lienholder when it accepted and recorded a deed from the mortgagor conveying the encumbered land, and a junior judgment lienholder thus did not obtain clear title to the land by purchasing it at a sheriff's sale but obtained title subject to plaintiff's deed of trust. *Branch Banking and Tr. Co. v. Home Fed. Sav. and Loan*, 187.

MUNICIPAL CORPORATIONS

§ 2. Annexation

Eminent domain proceedings and annexation proceedings are not equivalent for the purpose of determining whether the prior jurisdiction rule applies. *Yandle v. Mecklenburg County and Mecklenburg County v. Town of Matthews*, 382.

When a county initiates condemnation of property for a sanitary landfill, and the property is being considered for voluntary annexation into a municipality, the county may proceed with the condemnation action and is entitled to an injunction enjoining the annexation proceeding, and the property owners and the municipality may raise the proposed annexation in the answer to the condemnation complaint for appropriate consideration by the court. *Ibid.*

§ 4.4. Public Utilities and Services

The City of High Point did not need to comply with Davidson County zoning ordinances in upgrading a sewage treatment facility and providing sewage service to newly-annexed areas of the city where the sewage treatment facility was located in the county and outside the city's boundaries. *Davidson County v. City of High Point*, 26.

§ 5.1. Governmental Functions

The trial court correctly concluded that a disputed area was part of the fire district served by plaintiff rather than by defendant and that plaintiff was entitled to all of the tax receipts collected within the district. *Knotville Volunteer Fire Dept. v. Wilkes County*, 598.

§ 10. Civil Liability of Municipal Officers and Agents

Plaintiffs' evidence was sufficient for the jury to find that defendant chief building inspector's demolition of plaintiffs' apartment house was malicious or outside and beyond the scope of his duties and that the building inspector and defendant city were thus liable for the building inspector's actions. *Wiggins v. City of Monroe*, 237.

§ 30.6. Zoning; Special Permits

The decision by the ABC Commission to grant petitioner a permit for the sale of malt beverages preempted and rendered unlawful a decision by respondent city

RAPE AND ALLIED OFFENSES — Continued

missible opinion that the prosecutrix was telling the truth and that defendant was guilty. *Ibid.*

Testimony by an expert witness concerning her belief that the prosecutrix was telling the truth and the reason for her belief violated Rules of Evidence 405(a) and 608, but the admission of such testimony was harmless error. *Ibid.*

§ 4.1. Proof of other Acts and Crimes

The victim's testimony regarding acts of sexual abuse other than those charged in the indictments was properly admitted to establish a common plan or scheme on the part of the female defendant to sexually abuse her child. *S. v. Oliver*, 1.

Evidence of defendant's 1977 conviction for assault with intent to rape was properly admitted in defendant's trial for attempted rape to show intent. *S. v. Hall*, 447.

Testimony by a witness in a rape case that defendant had also attempted to rape her was admissible to show a common plan or scheme. *S. v. Morrison*, 511.

In a prosecution for rape of a mentally retarded employee of a sheltered workshop, evidence of defendant's sexual abuse of five other mentally retarded female employees at the workshop was admissible to show a common plan or scheme by defendant. *S. v. Teeter*, 624.

§ 4.3. Evidence of Prosecutrix's Character or Reputation

A character witness was properly permitted to testify about the child victim's reputation for truthfulness in her school community based on the witness's conversations with and about the victim. *S. v. Oliver*, 1.

§ 5. Sufficiency of Evidence

In a prosecution for second degree sex offenses committed against one defendant's daughter, the evidence was sufficient to support a finding that the victim was "mentally defective" within the meaning of G.S. 14-27.1(1). *S. v. Oliver*, 1.

Testimony by the mentally retarded victim of sexual offenses that one defendant put her finger "where a tampon goes" was sufficient evidence of penetration to support such defendant's conviction of second degree sexual offense. *Ibid.*

The evidence was sufficient to convict the female defendant of aiding and abetting in the second degree rape of her child. *Ibid.*

The evidence in a prosecution for attempted rape was sufficient to allow the jury to infer that defendant intended to rape the victim. *S. v. Hall*, 447.

There was sufficient evidence of the element of force to convict defendant of second degree rape. *S. v. Morrison*, 511.

The State's evidence was sufficient to sustain defendant's conviction of second degree rape of a mentally defective person. *S. v. Teeter*, 624.

§ 19. Taking Indecent Liberties with Child

Indictments sufficiently charged offenses of taking indecent liberties although they did not specify the exact acts performed by defendant. *S. v. Singleton*, 123.

RECEIVERS

§ 12.1. Liens, Priorities, and Payment; Costs of Administration

The trial court did not err by allocating receivership fees and expenses among several corporations in the proportion that each corporation's net assets available

RULES OF CIVIL PROCEDURE — Continued

§ 15.1. Discretion of Court to Grant Amendment of Pleadings

The trial court did not abuse its discretion in an action to enforce easement rights in two alleyways by denying defendant's motion to amend its answer. *Hatfield v. Jefferson Standard Life Ins. Co.*, 438.

§ 56. Summary Judgment

The denial of a Rule 12(b)(6) motion does not prevent the court from allowing a motion for summary judgment. *Dull v. Mut. of Omaha Ins. Co.*, 310.

§ 56.7. Summary Judgment; Appeal

The denial of a motion to dismiss under G.S. 1A-1, Rule 12(b)(6) did not prevent the trial court from granting a subsequent motion for summary judgment. *Burton v. NCNB*, 702.

§ 59. Amendment of Judgments

The trial court properly denied defendant's motion for amended findings of fact or an amended or new judgment. *Branch Banking and Tr. Co. v. Home Fed. Sav. and Loan*, 187.

§ 60.1. Relief from Judgment; Timeliness of Motion

The death of defendant's wife was not a bar to his motion for relief from a judgment for divorce from bed and board. *Allred v. Tucci*, 138.

SEARCHES AND SEIZURES

§ 24. Application for Warrant; Sufficiency of Showing Probable Cause; Information from Informers

An officer's affidavit based on information from a confidential informant established probable cause for the issuance of a warrant to search defendants' home for marijuana. *S. v. Edwards and S. v. Jones*, 145.

§ 39. Execution of Search Warrant; Places which May Be Searched

Officers did not exceed the scope of a warrant authorizing a search of defendants' "premises, vehicle and person" when they searched defendants' bedroom and seized marijuana and other items found therein. *S. v. Edwards and S. v. Jones*, 145.

§ 41. Execution of Search Warrant; Knock and Announce Requirements

A warrant was not improperly served where defendants' own evidence substantiated that police knocked before entering defendants' premises. *S. v. Edwards and S. v. Jones*, 145.

STATE

§ 4. Actions against the State

Defendant's claim for betterments against the State was not barred by sovereign immunity where defendant had asserted in the principal action by the State against defendant that he owned the land in fee simple. *S. v. Taylor*, 549.

§ 8.3. Negligence of State Employee; Actions by Prisoners

The Industrial Commission erred by concluding that an inmate was not negligent in closing a window on the finger of another inmate. *Baker v. Dept. of Correction*, 345.

TAXATION

§ 1. Power to Tax

The trial court properly reversed an assessment of income tax for 1978 which was based on consideration of the taxpayer's Alabama income to conclude that he had not had net losses in 1975-1977 and so to disallow North Carolina losses which he had attempted to carry forward. *Aronov v. Sec. of Rev.*, 677.

TENANTS IN COMMON

§ 3. Mutual Rights and Liabilities

The trial court did not err in ordering reimbursement of defendant for payment of real property taxes on property owned jointly by the parties where defendant was in non-exclusive possession of the property. *Knotts v. Hall*, 463.

The trial court did not err in ordering that defendant be reimbursed for interest payments on a lien on the household goods owned jointly by the parties but possessed by defendant. *Ibid.*

TORTS

§ 1. Nature and Elements of Torts

Plaintiff sufficiently stated a claim for intentional infliction of emotional distress even though he did not allege specific acts. *Dixon v. Stuart*, 338.

Conduct alleged by plaintiff did not, as a matter of law, constitute extreme and outrageous conduct which would support a claim for intentional infliction of emotional distress. *Shreve v. Duke Power Co.*, 253.

TRESPASS

§ 2. Trespass to the Person

Plaintiff sufficiently stated a claim for intentional infliction of emotional distress even though he did not allege specific acts. *Dixon v. Stuart*, 338.

Conduct alleged by plaintiff did not, as a matter of law, constitute extreme and outrageous conduct which would support a claim for intentional infliction of emotional distress. *Shreve v. Duke Power Co.*, 253.

Summary judgment for defendants was proper on plaintiff's claim for intentional infliction of mental distress in an action arising from a debt collection letter. *Burton v. NCNB*, 702.

The act of defendant in sending a letter of demand to an adverse party in anticipation of litigation together with a proposed complaint was not extreme and outrageous conduct sufficient to support a claim for intentional infliction of mental distress. *Harris v. NCNB*, 669.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices Generally

A contract whereby plaintiff invested $75,000 and was to receive in exchange stock in a company to be formed by defendant was not within the scope of the unfair trade practice statutes. *Ward v. Zabady*, 130.

The trial court did not err by granting defendants' motion for summary judgment on unfair and deceptive trade practice claims in an action in which plaintiffs sought damages for the termination of their contracts as insurance agents. *Dull v. Mut. of Omaha Ins. Co.*, 310.

WORD AND PHRASE INDEX

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