# NORTH CAROLINA COURT OF APPEALS REPORTS

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# CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

# NORTH CAROLINA

AT

# RALEIGH

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WILLARD JOHNSON v. GRAYTON BOLLINGER AND CITY OF KINGS MOUNTAIN

No. 8627SC862

(Filed 2 June 1987)

1. **Assault and Battery § 3— sufficiency of evidence**

   The trial court erroneously dismissed plaintiff's claim of assault where defendant allegedly approached plaintiff in an angry and threatening manner while wearing a pistol, shook his hand in plaintiff's face, and said in a loud voice, "I will get you," and plaintiff could reasonably expect imminent offensive contact under these circumstances.

2. **Torts § 1; Trespass § 2— intentional infliction of emotional distress—sufficiency of complaint**

   Defendant's conduct in approaching plaintiff in an angry and threatening manner while wearing a pistol, in shaking his hand in plaintiff's face, and in threatening plaintiff was neither extreme nor outrageous, and plaintiff's complaint therefore was insufficient to support a claim of intentional infliction of emotional distress.

3. **Rules of Civil Procedure § 15— failure to amend complaint—no right to complain on appeal**

   Where plaintiff failed to take any action to amend his complaint either before or after its dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), he could not complain on appeal that he lacked adequate opportunity to amend his complaint under N.C.G.S. § 1A-1, Rule 15(a).

4. **Rules of Civil Procedure § 41.2— dismissal with prejudice—failure to move for dismissal without prejudice**

   Since a dismissal order operates as an adjudication on the merits unless the order specifically states to the contrary, the party whose claim is being

dismissed has the burden of convincing the court that the party deserves a second chance, and the party should thus move the trial court that the dismissal be without prejudice. Absent such a motion by plaintiff, the record was devoid of any facts from which the trial court or the Court of Appeals could determine why plaintiff should be given a chance to re-file his complaint, and the trial court was within its discretion in dismissing with prejudice plaintiff's claim for emotional distress.

5. **Libel and Slander § 14.1— no reference to trade or business—no slander per se alleged**

The trial court properly dismissed plaintiff's claim for slander *per se* since there was no direct or indirect reference in the pleadings to words or circumstances which connected the alleged slander with plaintiff's trade or business.

6. **Libel and Slander § 14.2— damage to trade or business—sufficiency of complaint to allege slander per quod**

Plaintiff's allegations that defendant called him a liar and that he suffered ridicule, humiliation, damage to his trade or business, and loss of business income, all amounting to $20,000, were sufficient to state a claim for slander *per quod.*

APPEAL by plaintiff from *Snepp, Judge.* Order entered 30 April 1986 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 2 February 1987.

*Lester H. Broussard for plaintiff-appellant.*

*Womble, Carlyle, Sandridge & Rice, by Tyrus V. Dahl, Jr., for defendant-appellees.*

GREENE, Judge.

Plaintiff brought this tort action alleging Bollinger (hereinafter, "defendant"), while acting in the course and scope of his employment by the City of Kings Mountain (hereinafter, the "City" or collectively as the "defendants"), intentionally assaulted, defamed and inflicted severe emotional distress upon plaintiff. Defendants moved to dismiss the complaint under N.C.R. Civ. P. 12(b)(6). The trial court orally granted defendants' motion to dismiss. A proposed Order dismissing plaintiff's claim with prejudice was signed by the trial judge and filed two days later. At no time did plaintiff request leave to amend his complaint or move that the trial court's dismissal be entered without prejudice. Instead, plaintiff appealed to this Court.

Briefly, plaintiff's complaint alleged plaintiff owned a gas station in the City. Defendant was employed by the City as an ani-

mal warden. The City permitted defendant to carry a pistol in the course of his employment despite city ordinances prohibiting animal wardens from carrying firearms. Plaintiff further alleged that defendant "approached plaintiff . . . in an angry, hostile and threatening manner" at the Cleveland County Law Enforcement Center, "shook his hand in the plaintiff's face and said in a loud, rude and offensive manner . . ., 'You are a stupid son-of-a-bitch,' and 'You are a liar,' and stated further 'I will get you.' " Defendant wore his City uniform and carried a pistol during the incident. Persons were present in the Law Enforcement Center during defendant's statements.

Plaintiff claimed defendant's actions and statements constituted assault, defamation and intentional infliction of emotional distress. With respect to his defamation claim, plaintiff specifically alleged:

> [T]he plaintiff has been . . . defamed by the aforesaid words which . . . caus[ed] him to suffer ridicule, humiliation, public contempt, loss of reputation, damage to his trade or business, and loss of business income, all to the plaintiff's damage in the sum of $20,000.00.

The issues before this Court are whether, under N.C.R. Civ. P. 12(b)(6), the trial court erred in dismissing with prejudice plaintiff's claims for: (1) assault; (2) intentional infliction of emotional distress; and (3) defamation, *per se* and *per quod*.

In *Sutton v. Duke*, 277 N.C. 94, 106, 176 S.E. 2d 161, 168 (1970), our Supreme Court summarized the transition from demurrer motions to motions to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure:

> The [Rule 12(b)(6)] motion to dismiss . . . will be allowed *only* when, under the former practice, a demurrer would have been sustained because the complaint affirmatively disclosed that the plaintiff had no cause of action against the defendant. . . . Thus, generally speaking, the motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action *but not to one which was formerly labeled a 'defective statement of a good cause of action.' For such complaint, . . ., other pro-*

*visions of Rule 12, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint.* [Citations omitted] [emphasis added].

By motion under Rule 12(b)(6), defendants may raise the defense that plaintiff's complaint fails to state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) is proper when one or more of the following three conditions is satisfied: (1) when on its face the complaint reveals no law supports plaintiff's claim; (2) when on its face the complaint reveals the absence of fact sufficient to make a good claim; and (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E. 2d 222, 224 (1985). Thus, 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. *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E. 2d 611, 613 (1979). More important, plaintiff's complaint should not be dismissed unless it affirmatively appears plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim. *Id.* As our Supreme Court stated in *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E. 2d 751, 755 (1985), "the system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." Pursuant to a Rule 12(b)(6) motion, well-pleaded allegations are treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E. 2d 282, 290 (1976). Under Rule 12(b)(6), unless matters outside the pleadings are presented such that the court treats the motion as one for summary judgment under N.C.R. Civ. P. 56, the motion does not present the merits of the action, but only whether the merits may be reached. *See Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 681, 340 S.E. 2d 755, 758, *cert. denied*, 317 N.C. 333, 346 S.E. 2d 137 (1986). Thus, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ).

Given these parameters of dismissal under Rule 12(b)(6), we examine the dismissal with prejudice of plaintiff's claims.

I

**[1]** The interest protected by the action for assault is freedom from apprehension of a harmful or offensive contact with one's person. *McCracken v. Sloan*, 40 N.C. App. 214, 216, 252 S.E. 2d 250, 252 (1979). In *Dickens v. Puryear*, 302 N.C. 437, 445, 276 S.E. 2d 325, 330 (1981), our Supreme Court stated assault requires the plaintiff's reasonable apprehension of an immediate harmful or offensive contact. The *Dickens* Court further quoted the Comment to Section 29(1) of Restatement (Second) of Torts (1965): "[T]he apprehension created must be one of imminent contact, as distinguished from any contact in the future. Imminent does not mean immediate, in the sense of instantaneous contact . . . it means rather that there will be no significant delay." 302 N.C. at 445-46, 276 S.E. 2d at 331. While words alone may not constitute assault, words may render the actor liable if, in combination "with other acts or circumstances, they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person." *Id.* (quoting Restatement (Second) of Torts Sec. 31).

In the instant case, defendant approached plaintiff in an angry and threatening manner while wearing a pistol. Defendant shook his hand in plaintiff's face and said in a loud voice, "I will get you." Plaintiff could reasonably expect imminent offensive contact under these circumstances. *See* Restatement (Second) of Torts Sec. 29, comment b (raised hand is example of act indicating imminent contact). Under the circumstances alleged in the complaint, we find no legal insufficiency or defect in plaintiff's allegation of assault. Plaintiff's allegations clearly give rise to certain facts which, if proved, would support plaintiff's claim. Given the *Oates* standards of dismissal under Rule 12(b)(6), the trial court erroneously dismissed plaintiff's claim of assault.

II

**[2]** North Carolina recognizes the tort of intentional infliction of emotional distress. In *Dickens*, our Supreme Court held the tort 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.

302 N.C. at 447, 276 S.E. 2d at 335.

We first determine if defendant's conduct represents extreme and outrageous conduct. In *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), this Court held the initial determination of whether conduct is extreme and outrageous is a question of law for the court: "*If the court determines that it may reasonably be so regarded*, then it is for the jury to decide whether, under the facts of a particular case, defendants' conduct . . . was in fact extreme and outrageous." (Emphasis added.) In *Briggs*, we further stated:

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion. . . .

73 N.C. App. at 677, 327 S.E. 2d at 311 (quoting Restatement (Second) of Torts Sec. 46, comment d). *Cf. Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E. 2d 757, 759 (1987) (extreme ridicule and harassment which was part of conspiracy to interfere with employment was actionable).

After reviewing defendant's alleged conduct, we find it is neither extreme nor outrageous under the standards set forth in *Dickens* and *Briggs*. Although we recognize the facts alleged are offensive, the facts alleged do not evidence the extreme conduct essential to this cause of action. In short, plaintiff's complaint on its face reveals the absence of facts sufficient to make a good claim of intentional infliction of emotional distress. *See Oates*, 314 N.C. at 278, 333 S.E. 2d at 224. Accordingly, the trial court appropriately dismissed this claim under Rule 12(b)(6).

[3] Plaintiff argues that, even if the emotional distress claim was properly dismissed under Rule 12(b)(6), the trial court should have granted plaintiff leave to amend on its own motion under N.C.R. Civ. P. 15(a). In *Harris v. Family Medical Center*, 38 N.C. App. 716, 718, 248 S.E. 2d 768, 770 (1978), this Court held that granting a dismissal under N.C.R. Civ. P. 12(c) forecloses plaintiff's right to amend a complaint under Rule 15(a). While the precise effect of Rule 12(b)(6) dismissals in this respect has not been decided by our courts, the question has been addressed by federal courts and collateral authorities discussing F.R. Civ. P. 12(b)(6) which is identical to our own rule.

A motion to dismiss under Rule 12(b)(6) is not a "responsive pleading" under Rule 15(a) and so does not itself terminate plaintiff's unconditional right to amend a complaint under Rule 15(a). *See Smith v. Blackledge*, 451 F. 2d 1201, 1203 n.2 (4th Cir. 1971); *see also* 6 Wright & Miller, Federal Practice and Procedure Sec. 1483 at 411-12 (1971); 3 J. Moore, Moore's Federal Practice par. 15.07[2] at 15-33 (2d ed. 1985). However, once the trial court enters its dismissal under Rule 12(b)(6), plaintiff's right to amend under Rule 15(a) is terminated. *Sachs v. Snider*, 631 F. 2d 350, 351 (4th Cir. 1980) (per curiam) (no right to amend after dismissal); *see generally*, 3 J. Moore, Moore's Federal Practice, par. 15.07[2] at 15-39 (2d ed. 1985). Under certain limited circumstances set forth in N.C.R. Civ. P. 59(e) and 60(b), a plaintiff may however seek to reopen the trial court's judgment and amend the complaint concurrently under Rule 15(a). *See Housing, Inc. v. Weaver*, 305 N.C. 428, 439-40, 290 S.E. 2d 642, 649 (1982); *see generally* 6 Wright & Miller, Federal Practice and Procedure Sec. 1489 at 445 (1971) (most courts hold that once judgment is entered, amendment not allowed until judgment set aside or vacated under Rule 59 or Rule 60).

As plaintiff failed to take any action to amend his complaint either before or after its dismissal, he cannot now complain he lacked adequate opportunity to amend his complaint. After dismissal of plaintiff's complaint under Rule 12(b)(6), the trial court was no longer empowered to grant plaintiff leave to amend under Rule 15(a): "To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the ex-

peditious termination of litigation." 6 Wright & Miller, Sec. 1489 at 445.

[4] Plaintiff has also assigned error to the trial court's dismissing his claims "with prejudice." The definition and implications of judgments with and without prejudice were discussed by this Court in *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E. 2d 203, 205 (1974):

> "A judgment of dismissal with prejudice gives the defending party the basic relief to which he is entitled as to the claims so dismissed." 5 Moore, Federal Practice, Sec. 41.05(2), p. 1066. A dismissal "with prejudice" is the converse of a dismissal "without prejudice" and indicates a disposition on the merits. It is said to preclude subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication adverse to the plaintiff. 46 Am. Jur. 2d, Judgments Sec. 482, p. 645. "Dismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of *res judicata* and is effective not only on the immediate parties but also on their privies." 9 Wright & Miller, Federal Practice & Procedure, Sec. 2367, p. 185-86.

With certain exceptions not relevant here, N.C.R. Civ. P. 41(b) provides that *all* dismissals, including those under Rule 12(b)(6), operate as an adjudication upon the merits unless the trial court specifies the dismissal is without prejudice. *See* N.C.R. Civ. P. 41(b), comment to 1969 amendment (court's power to dismiss on terms extends to almost all dismissals); *Whedon v. Whedon*, 313 N.C. 200, 210, 328 S.E. 2d 437, 443 (1985) (ordinarily, involuntary dismissal under Rule 41(b) operates as adjudication upon merits).

It is true that, by definition, defendant's motion under Rule 12(b)(6) did not reach the merits of any of plaintiff's claims. *Concrete Service Corp.*, 79 N.C. App. at 681, 340 S.E. 2d at 758. Nevertheless, Rule 41(b) grants the trial court discretion to determine whether or not its dismissal shall "*operate . . . as* an adjudication upon the merits." Plaintiff was not *entitled* to a dismissal without prejudice since the authority to determine in which cases it is appropriate to allow the non-movant to commence a new action has been vested by Rule 41(b) in the trial judge. *Whedon*, 313 N.C. at 213, 328 S.E. 2d at 445. The trial court's authority to order an involuntary dismissal with or with-

out prejudice is therefore exercised in the broad discretion of the trial court and its ruling will not be disturbed absent abuse of discretion. *Id.* Thus, appellate courts should not disturb the exercise of this discretion unless the challenged action is "manifestly unsupported by reason." *Miller v. Ferree*, 84 N.C. App. 135, ---, 351 S.E. 2d 845, 847 (1987) (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E. 2d 58, 63 (1980)); *see also White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985) (abuse of discretion found only upon showing decision so arbitrary that could not be the result of a reasoned decision).

Since the dismissal order operates as an adjudication on the merits unless the order specifically states to the contrary, the party whose claim is being dismissed has the burden to convince the court that the party deserves a second chance; thus, the party should move the trial court that the dismissal be without prejudice. *Whedon*, 313 N.C. at 212-13, 328 S.E. 2d at 444-45 (quoting W. Shuford, N.C. Civ. Prac. and Proc. Sec. 41-8). Plaintiff never moved that the court condition the terms of its dismissal. Absent such a motion as contemplated by the Supreme Court in *Whedon*, this record is devoid of any facts from which the trial court or this Court could determine why plaintiff should be given a chance to re-file his complaint.

Thus, we cannot say the trial court's dismissal of this claim with prejudice was "manifestly unsupported by reason." We conclude the trial court was well within its discretion in deciding plaintiff should not have another opportunity to re-file his claim for emotional distress.

III

A

Defamatory words may be actionable *per se* or actionable *per quod*. Where words are actionable *per se*, the law *prima facie* presumes malice and conclusively presumes damages, at least in a nominal amount, without specific proof of injury. *Badame v. Lampke*, 242 N.C. 755, 756, 89 S.E. 2d 466, 467 (1955); *Williams v. Rutherford Freight Lines, Inc.*, 10 N.C. App. 384, 387-88, 179 S.E. 2d 319, 322 (1971). However, if the words are not injurious as a matter of general acceptance, but are only injurious in consequence of extrinsic facts, the words are only actionable *per quod*;

in such situations, there must be specific allegations and proof of some special damage arising from the utterance. *Badame*, 242 N.C. at 757, 89 S.E. 2d at 467-68.

[5] We first determine whether defendant's accusations are actionable *per se*. Plaintiff is a merchant, the operator of a gasoline station. Defendant accused him of being a "liar" and "stupid." In *Badame*, the Court stated:

> [T]he better reasoned decisions seem to hold that in order to be actionable without proof of special damage, the false words (1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business. That is to say, it is not enough that the words used tend to injure a person in his business. To be actionable *per se*, they must be uttered of him in his business relation.

242 N.C. at 757, 89 S.E. 2d at 468 (citations omitted) (business rival told plaintiff's customer that plaintiff engaged in "shady deals"). *See also Matthews, Cremins, McLean, Inc. v. Nichter*, 42 N.C. App. 184, 256 S.E. 2d 261, *cert. denied*, 298 N.C. 569, 261 S.E. 2d 123 (1979) (libel *per se* when letters sent to television stations asserted plaintiff breached contracts and failed to pay bills). Additionally, the general rule is that an actionable defamatory statement must be false. *Parker v. Edwards*, 222 N.C. 75, 78, 21 S.E. 2d 876, 878-79 (1942).

In reviewing defendant's statements, we do not believe that under *Badame* the statements "touch" plaintiff in respect of his service station business. Plaintiff has not alleged the statements were made with respect to any aspect of the operation of his gas station. Plaintiff's allegations do not demonstrate circumstances which would cause listeners to believe defendant's statements were related to plaintiff's business. There must be some direct or indirect reference in the pleadings to words or circumstances which connect the alleged slander with plaintiff's trade or business. If the words only attribute to plaintiff a misconduct unconnected to his business, the words are not actionable without proof of special damages. Since plaintiff's complaint does not set forth any facts suggesting any connection between defendant's words and plaintiff's business, plaintiff's complaint completely fails to set forth a substantial element of slander *per se*. Dismissal of the

*per se* claim was therefore proper under Rule 12(b)(6). *See Hewes v. Johnston,* 61 N.C. App. 603, 604, 301 S.E. 2d 120, 121 (1983) (plaintiff must satisfy substantive elements of some legal claim). For the reasons discussed earlier, we furthermore conclude the trial court's dismissal with prejudice of plaintiff's slander *per se* claim was also properly within the trial court's discretion under Rule 41(b).

B

**[6]** While plaintiff's allegation of slander *per se* was properly dismissed, we must nevertheless determine whether the complaint properly alleged slander *per quod.* Defendant's alleged statements that the plaintiff was a "liar" may be actionable *per quod* if false. *See Stutts v. Duke Power Co.*, 47 N.C. App. 76, 82, 266 S.E. 2d 861, 865 (1980). When considered in connection with "innuendo, colloquium and explanatory circumstances," we hold that these words could be defamatory. *Flake v. Greensboro News Co.*, 212 N.C. 780, 785, 195 S.E. 55, 59 (1938). We believe defendant's words were more than "mere abusive epithets" and are thus actionable. *See Ringgold v. Land,* 212 N.C. 369, 371, 193 S.E. 267, 268 (1937).

Since defendant's statements are actionable *per quod,* special damages must be pleaded and proved. In order to prove special damages from defamation, plaintiff's allegations must evidence a pecuniary loss rather than simple humiliation. *Stutts,* 47 N.C. App. at 82, 266 S.E. 2d at 865. Emotional distress and mental suffering are not sufficient allegations to establish a basis for relief in cases which are only actionable *per quod. Williams,* 10 N.C. App. at 390, 179 S.E. 2d at 324. Plaintiff has here alleged the stated defamation caused him to "suffer ridicule, humiliation, public contempt, loss of reputation, *damage to his trade or business, and loss of business income, all to the plaintiff's damage in the sum of $20,000.*" (Emphasis added.) Of these allegations, only the purported business damages and loss of business income constitute the pecuniary losses necessary for special damages arising from defamation.

Since pecuniary and non-pecuniary losses are lumped together into the sum of $20,000, plaintiff's allegations are subject to charges of vagueness and ambiguity. Under N.C.R. Civ. P. 9(g), each claimed item of special damage must be averred. Special

damages must be specifically pleaded and proved and the facts giving rise to the special damages must be sufficient to inform the defendant of the scope of plaintiff's demand. *Gillespie v. Draughn*, 54 N.C. App. 413, 417, 283 S.E. 2d 548, 552, *disc. rev. denied*, 304 N.C. 726, 288 S.E. 2d 805 (1982); *see also Rodd v. W. H. King Drug Co.*, 30 N.C. App. 564, 228 S.E. 2d 35 (1976); *Stanford v. Owens*, 46 N.C. App. 388, 398, 265 S.E. 2d 617, 624, *disc. rev. denied*, 301 N.C. 95 (1980) (must plead special damages with sufficient particularity to put defendant on notice).

Had plaintiff omitted *any* allegation of damage to his trade or business, his defamation claim might be ripe for dismissal under Rule 12(b)(6). *Cf. Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979) (plaintiff's complaint made no reference whatsoever to special damages); *Stikeleather v. Willard*, 83 N.C. App. 50, 348 S.E. 2d 607 (1986) (dismissal upheld where no special damages pleaded). However, the policy behind the notice theory of the present Rules is to resolve controversies on the merits, following the opportunity for discovery, rather than resolving controversies on pleading technicalities. *Smith v. City of Charlotte*, 79 N.C. App. 517, 528, 339 S.E. 2d 844, 851 (1986). Since plaintiff did plead business losses, however vaguely and ambiguously, defendants' proper remedy was a motion for a more definite statement. N.C.R. Civ. P 12(e). *Smith*, 79 N.C. App. at 529, 339 S.E. 2d at 851; *Hull v. Pike*, 64 N.C. App. 379, 381, 307 S.E. 2d 404, 406 (1983). We note that motions for a more definite statement may frequently be interposed for delay and should be scrutinized with care. *Smith*, 79 N.C. App. at 529, 339 S.E. 2d at 852. However, such a motion would have been appropriate under the circumstances of this case.

There are no circumstances alleged which constitute an insurmountable bar to plaintiff's slander *per quod* claim nor is there any absolute failure to plead the necessary substantive special damages. As in *Deitz v. Jackson*, 57 N.C. App. 275, 281, 291 S.E. 2d 282, 286 (1982), "[w]e cannot say at this stage of the proceeding as a matter of law that appellants have not herein stated a claim." (Quoting *Orange Co. v. N.C. Dept. of Transportation*, 46 N.C. App. 350, 383, 265 S.E. 2d 890, 911, *disc. rev. denied*, 301 N.C. 94 (1980) ); *see also Sale v. Comm'r of Revenue*, 258 N.C. 749, 758, 129 S.E. 2d 465, 471 (1963) (not dismiss on pleadings where, not knowing facts, court cannot determine with certitude whether plain-

tiffs by amendment could state facts sufficient to constitute cause of action). We therefore hold that the special damages alleged, taken in the light most favorable to plaintiff, were sufficient to survive a motion to dismiss under Rule 12(b)(6). Accordingly, plaintiff's slander *per quod* claim was improperly dismissed.

IV

The trial court's dismissals with prejudice of plaintiff's claims for intentional infliction of emotional distress and slander *per se* are affirmed. The trial court's dismissals of plaintiff's claims for assault and slander *per quod* are reversed and remanded.

Affirmed in part and reversed and remanded in part.

Judges WELLS and EAGLES concur.

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HUYCK CORPORATION, ET AL. v. TOWN OF WAKE FOREST

No. 8610SC1088

(Filed 2 June 1987)

**1. Municipal Corporations § 2.1— annexation—coincidence of boundary—compliance with requirement**

There was no merit to petitioners' argument in an annexation proceeding that respondent improperly included two additional areas, neither of which would independently meet the "urban purposes" requirement of N.C.G.S. § 160A-36(c), within the proposed annexation area in order to comply with the coincidence of boundary requirement of N.C.G.S. § 160A-36(b)(2), since each of the three portions included in the proposed annexation area was contiguous to the existing town boundary, and, by using a particular strip of land as a connector, they were contiguous to each other.

**2. Municipal Corporations § 2.2— annexation—urban purposes—compliance with requirement**

Evidence was sufficient to support the trial court's finding that an area proposed for annexation complied with the "urban purposes" requirement of N.C.G.S. § 160A-36(c). The standard argued by petitioners which would permit only those specific portions of an industrial, commercial, institutional or governmental tract which were actually under roof or pavement to be considered as "used" for purposes of annexation was unreasonable, was beyond the requirement of the statute, and had been rejected by the N.C. Supreme Court.

3. **Municipal Corporations § 2.1— annexation—provision of police and fire protection—compliance with statutory requirement**

Respondent's plans for providing police and fire protection services were sufficient to satisfy the requirements of N.C.G.S. § 160A-35(3)a where the plans contained information with respect to the current level of services within the town, a commitment to provide substantially the same level of services in the annexation area, and information as to how the extension of services would be financed.

4. **Municipal Corporations § 2.6— annexation—extension of utilities—validity of ordinance not contingent upon specified date for bond referendum**

Contrary to petitioners' argument, the validity of an annexation ordinance was not contingent upon the passage of a bond referendum on a specified date, but was contingent only upon the town's having the necessary funds appropriated for extension of water and sewer services as of the effective date of the ordinance, and such contingency was met by passage of a bond proposal on 3 December 1985.

APPEAL by petitioners from *Farmer, Judge.* Judgment entered 14 July 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 11 March 1987.

On 1 February 1984, the Town of Wake Forest (the Town), acting through its Board of Commissioners, adopted Ordinance #84-2, entitled "An Ordinance To Extend The Corporate Limits Of The Town Of Wake Forest, Under the Authority Granted By Part 2, Article 4A, Chapter 160A of the General Statutes of North Carolina." The purpose of the ordinance was to annex an area, known as the Southside area, which is located south of the present corporate boundary of Wake Forest. The area includes several industrial plants and businesses as well as the unincorporated community of Forestville. The individual petitioners are residents of the area proposed for annexation; the corporate petitioners own industrial and commercial property within the area. On 1 March 1984, petitioners petitioned the Superior Court of Wake County for judicial review of the annexation proceeding pursuant to G.S. 160A-38. On 14 July 1986, judgment was entered affirming without change the adoption of the annexation ordinance. From the entry of this judgment, petitioners appeal.

*I. Beverly Lake and Jane P. Harris for petitioners-appellants.*

*Ellis Nassif and Manning, Fulton & Skinner, by Howard E. Manning and Charles E. Nichols, Jr., for respondent-appellee.*

MARTIN, Judge.

The petitioners contend that the annexation ordinance is invalid because the Town failed to comply with (1) the "coincidence of boundary" requirement of G.S. 160A-36(b)(2), (2) the "urban purposes" requirement of G.S. 160A-36(c), and (3) the "extension of services" requirements of G.S. 160A-35(3). In addition, petitioners argue that the ordinance must be held invalid due to the nonoccurrence of what they contend is a condition precedent to its validity. For the reasons stated, we affirm the judgment of the superior court upholding the annexation ordinance.

The scope of judicial review of an annexation ordinance adopted by the governing board of a municipality is prescribed and defined by statute. G.S. 160A-38(f) (Annexation by Cities of Less than 5,000); G.S. 160A-50(f) (Annexation by Cities of 5,000 or More). These statutes limit the court's inquiry to a determination of whether applicable annexation statutes have been substantially complied with. *In re Annexation Ordinance (Winston-Salem)*, 303 N.C. 220, 278 S.E. 2d 224 (1981). When the record submitted in superior court by the municipal corporation demonstrates, on its face, substantial compliance with the applicable annexation statutes, then the burden falls on the petitioners to show by competent and substantial evidence that the statutory requirements were in fact not met or that procedural irregularities occurred which materially prejudiced their substantive rights. *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 265 S.E. 2d 123 (1980).

> In determining the validity of an annexation ordinance, the court's review is limited to the following inquiries: (1) Did the municipality comply with the statutory procedures? (2) If not, will the petitioners suffer material injury thereby? (3) Does the area to be annexed meet the requirements of G.S. 160A-48 [G.S. 160A-36 with respect to annexation by cities with populations of less than 5,000]?

*Trask v. City of Wilmington*, 64 N.C. App. 17, 28, 306 S.E. 2d 832, 838 (1983), *disc. rev. denied*, 310 N.C. 630, 315 S.E. 2d 697 (1984). The findings of fact made by the trial court are binding on the appellate court if supported by competent evidence, even if there is evidence to the contrary; conclusions of law drawn from the findings of fact are, however, reviewable *de novo*. *Humphries v. City*

*of Jacksonville,* 300 N.C. 186, 265 S.E. 2d 189 (1980); *Food Town Stores v. City of Salisbury, supra.*

In the present case, petitioners have stipulated that the Town complied with all of the procedural requirements of G.S. 160A, Article 4A, Part 2 (Annexation by Cities of Less than 5,000) in adopting the annexation ordinance. They contend, however, that the proposed annexation does not meet the requirements of G.S. 160A-36(b) and (c) with respect to the character of the area to be annexed, and that the Town's plan for extending police and fire protection to the area does not satisfy the requirements of G.S. 160A-35(3)a.

[1] G.S. 160A-36(b)(1) and (2) provide:

> (b) The total area to be annexed must meet the following standards:
>
> (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.
>
> (2) At least one-eighth of the aggregate external boundaries of the area must coincide with the municipal boundaries.

The term "contiguous area" means

> any area which, at the time annexation procedures are initiated, either abuts directly on the municipal boundary or is separated from the municipal boundary by a street or street right-of-way, a creek or river, the right-of-way of a railroad or other public service corporation, lands owned by the municipality or some other political subdivision, or lands owned by the State of North Carolina.

G.S. 160A-41. The Southside Area Annexation Report and the annexation ordinance both recite that the annexation meets the one-eighth coincidence requirement of the statute in that the aggregate external boundary line of the total area to be annexed is 45,202.85 feet, of which 6,364.9 feet coincide with the existing Town boundary. Evidence at the hearing disclosed, however, that the distances contained in the report and ordinance had been incorrectly calculated by the surveyor employed by the Town. The actual aggregate external boundary of the total area to be annexed is 39,717.33 feet, of which 5,761.93 feet coincide with the ex-

isting Town boundary. The error in calculation is of no consequence because the corrected measurements yield a percentage of coincidence of 14.5%, clearly sufficient to meet the statutory requirement.

Petitioners argue, however, that the method used by the Town to meet the statutory requirement of coincidence was, in fact, a "sham and subterfuge" which was actually designed to evade the statutory standard. They argue that the Town's real objective in this annexation proceeding is the annexation of the "Forestville Area" which contains the industrial and commercial facilities of the four corporate petitioners and the residences of the individual petitioners. The "Forestville Area" is contiguous to the Town's pre-annexation southern boundary, but coincides with the Town's boundary for only 1,429.33 feet, an insufficient distance to meet the one-eighth coincidence requirement. Therefore, according to petitioners' argument, the Town included two additional areas, neither of which would independently meet the "urban purposes" requirement of G.S. 160A-36(c), within the proposed annexation area. The first of these areas is a strip of land 40 feet wide and 2,005.08 feet in length comprising the eastern half of a Seaboard Coastline Railroad right-of-way. This strip is connected to the northeast corner of the "Forestville Area" and coincides with the existing Town boundary for 2,005.08 feet, the western half of the railroad right-of-way having been previously annexed by the Town. The second area is an undeveloped wedge-shaped area of land at the northern end of the "railroad strip," which adjoins the southern boundary of the Town for a distance of 2,327.52 feet. It is connected to the "Forestville Area" only by the "railroad strip." Together, the areas have sufficient coincidence of boundary with the existing Town boundary to satisfy the one-eighth requirement of G.S. 160A-36(b)(2). The Town Administrator and the Town Planner both acknowledged that at least one of the purposes of including these areas in the area proposed for annexation was to meet the statutory requirement for coincidence of boundary.

Petitioners urge that the inclusion of these two areas with the "Forestville Area" in order to meet the coincidence of boundary requirement is contrary to the intent of the annexation statutes and is impermissible. Therefore, they contend that the

superior court erred in finding and concluding that the Town had complied with G.S. 160A-36(b)(2).

Petitioners cite us to cases from other jurisdictions which disapprove of "gerrymandered" or "shoestring" annexation. *See, e.g., Clarke v. Holt*, 218 Ark. 504, 237 S.W. 2d 483 (1951); *Ridings v. Owensboro*, 383 S.W. 2d 510 (Ky., 1964); *Mount Pleasant v. Racine*, 24 Wis. 2d 41, 127 N.W. 2d 757 (1964). However, those cases involve the use of narrow corridors of land to connect the proposed area for annexation to the municipality, resulting in a lack of contiguity. They are not applicable to the facts before us. In the present case, each of the three portions included in the proposed annexation area is contiguous to the existing Town boundary, and, by using the "railroad strip" as a connector, they are contiguous to each other. The connection of two portions of an annexation area through a "30-foot wide umbilical cord" has been implicitly held sufficient to be considered contiguous pursuant to G.S. 160A-36(b)(1). *See Hawks v. Town of Valdese*, 299 N.C. 1, 261 S.E. 2d 90 (1980). Moreover, the entire area proposed for annexation must be viewed as a whole, rather than as various component portions into which petitioners have sought to divide it. When so viewed as an entire area, it is apparent that the Southside area is contiguous to the boundaries of the Town as they existed at the commencement of the annexation proceedings and that the required coincidence of boundaries exists. When these statutory requirements have been satisfied, the intent of the legislature with respect to the sufficiency of contiguity for annexation has been achieved. *See Humphries v. City of Jacksonville, supra.* Petitioners have failed to carry their burden to show noncompliance with G.S. 160A-36(b).

[2] Petitioners next assign error to the superior court's finding that the area proposed for annexation complies with the "urban purposes" requirement contained in G.S. 160A-36(c). That section provides:

> (c) The area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is sub-

divided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

G.S. 160A-36(c). The "urban purpose" requirement contains two tests for determining whether an area is suitable for annexation:

(1) *the use test*—that not less than 60% of the lots and tracts in the area must be in actual use, other than for agriculture, and

(2) *the subdivision test*—not less than 60% of the acreage which is in residential use, if any, and is vacant must consist of lots and tracts of five acres or less in size. (Emphasis original.)

*Lithium Corp. v. Bessemer City,* 261 N.C. 532, 538, 135 S.E. 2d 574, 579 (1964). Both tests must be met in order to satisfy the requirements of the statute. *Id.*

The superior court found that the area proposed for annexation met both tests. With respect to compliance with the "subdivision test," the court found:

9. The Court finds that the Town of Wake Forest in making its computation for acreage use in the proposed annexation area as required by N.C. Gen. Stat. 160A-36(c) excluded the lots and tracts used for commercial, industrial, governmental or institutional purposes. The Court finds that the remaining land after such exclusion is subdivided into lots and tracts such that more than sixty percent (60%) of the total of the remaining acreage consists of lots and tracts five acres or less in size.

Petitioners except to the finding, contending that a number of the lots or tracts excluded as being used for the specified purposes were not, in fact, used for such purposes.

The area proposed for annexation contains a total of 402.36 acres. The Town calculated that 97.69 acres were used for industrial, commercial, institutional or governmental purposes, and that of the remaining acreage, 197.89 acres, or 64.9%, are in lots or tracts 5 acres or less in size. Citing *Southern Railway Co. v.*

*Hook*, 261 N.C. 517, 135 S.E. 2d 562 (1964), petitioners contend that portions of tracts owned by B F & F Associates, Huyck Corporation, Neuse Plastic Company, Athey Products Corporation, and Forestville Baptist Church, classified by the Town as "used" for the specified purposes, were not in actual use for those purposes. They argue that had these tracts been correctly classified, the area proposed for annexation would not comply with the "subdivision test" prescribed by G.S. 160A-36(c). We reject their argument.

The question of whether land has been properly classified as to use within the meaning of the annexation statute depends upon the particular facts of each case. *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 293 S.E. 2d 240, *disc. rev. denied*, 306 N.C. 559, 294 S.E. 2d 371 (1982). *Southern Railway Co. v. Hook*, *supra*, upon which petitioners rely, is factually distinguishable. In that case, the tract in question consisted of approximately 14 acres which was located across a highway from the primary industrial plant of Ideal Industries, Inc. A little more than one acre was used for employee parking; the balance of the tract had been graded but was otherwise unimproved and there was no evidence of its use, directly or indirectly, for industrial purposes. It was held by Ideal for possible future industrial use. The Court held that only the portion of the tract used for parking could be classified as an industrial lot; the remaining acreage was classified as unused. In the present case, however, the sub-tracts which petitioners contend should be classified as unused are contiguous to, and actually portions of, larger tracts used for commercial, industrial and institutional purposes.

The standard argued by petitioners in this case would permit only those specific portions of an industrial, commercial, institutional or governmental tract which are actually under roof or pavement to be considered as "used" for purposes of annexation. Such a standard is clearly unreasonable, is beyond the requirement of G.S. 160A-36(c), and has been rejected by our Supreme Court in *Food Town Stores v. City of Salisbury*, *supra*. *See Scovill Mfg. Co. v. Town of Wake Forest*, *supra*.

The Town utilized current Wake County tax maps and records, land use maps, and personal observations in estimating the degree of subdivision in the annexation area. These methods have

been approved as "methods calculated to provide reasonably accurate results" by the General Assembly, *see* G.S. 160A-42, and by this Court. *Tar Landing Villas v. Town of Atlantic Beach,* 64 N.C. App. 239, 307 S.E. 2d 181 (1983), *disc. rev. denied,* 310 N.C. 156, 311 S.E. 2d 296 (1984); *Scovill Mfg. Co. v. Town of Wake Forest, supra.* We deem it unnecessary to repeat the evidence presented to the superior court with respect to each of the tracts and subtracts which petitioners contend to have been improperly classified. Suffice it to say that, with four exceptions, each tract, as identified by the tax maps and records, contains improvements used by the industry, business, or institution occupying the land so that each tract, as a whole, may be said to be in use for the specified purpose. The four exceptions are lots belonging to the Wake Forest Fire Department, James T. Hoy, Jr. and wife, Luda E. Box and Horsecreek Associates. In our view, the evidence is not sufficient to show that these lots are in use for one of the specified purposes. However, the improper classification of these lots, comprised of 6.17 acres, is of no consequence to the validity of the annexation ordinance because, even if reclassified correctly as not in use, the "subdivision test" of G.S. 160A-36(c) would still be satisfied. We hold that there was sufficient competent evidence to support the superior court's finding that the area proposed for annexation was "developed for urban purposes" as required by G.S. 160A-36(c).

**[3]** Petitioners next argue that the Town has failed to meet the extension of municipal services requirement as found in G.S. 160A-35(3)a, as to police and fire protection services. The statute, at the time of the annexation proceedings, provided:

> A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall, prior to the public hearing provided for in G.S. 160A-37, prepare a report setting forth such plans to provide services to such area. The report shall include:
>
> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> a. Provide for extending police protection, fire protection, garbage collection and street maintenance

> services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. A contract with a rural fire department to provide fire protection shall be an acceptable method of providing fire protection. If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines.

G.S. 160A-35(3)a (1982), as amended by 1983 Sess. Laws, c. 636, s. 16. The purpose of these requirements

> is to assure that, in return for the added financial burden of municipal taxation, the residents receive the benefits of all the major services available to municipal residents. The minimum requirements of the statute are that the City provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services. (Citations omitted.)

*In re Annexation Ordinance (Charlotte)*, 304 N.C. 549, 554, 284 S.E. 2d 470, 474 (1981).

The Southside Area Annexation Report-Services Plan approved by the Wake Forest Board of Commissioners contained plans for extending police and fire protection to the area proposed for annexation. With respect to police protection services, the plan recited that the Town employs thirteen full time police personnel and will add three officers as a result of annexation. Additional costs will be paid by the Town's general fund. Twenty-four hour patrol protection is provided within the existing Town limits and will be extended to the area proposed for annexation. With respect to fire protection services, the plan recites that fire protection is currently provided to the Town and to the area proposed for annexation by the Wake Forest Volunteer Fire Department. The Town has contracted with the department to provide

fire protection services within the Town limits, so that the annexation area would continue to be served by the volunteer fire department. The additional costs will be paid from the Town's general fund.

Petitioners contend that the addition of three police officers, whose duties will extend to the existing Town as well as to the annexation area, will not provide substantially the same service to the annexed area as is currently provided the Town. However, they have offered no substantial evidence in support of that contention. On the other hand, the Town's evidence shows that the addition of three officers will improve the ratio of police officers to population from the current ratio of 1:424.2 to an after-annexation ratio of 1:377.08.

With respect to fire protection, petitioners argue that due to the location of the fire station, the department will not be able to respond to the annexed area as quickly as it can respond to a fire within the existing Town limits. However, the plan indicates that all of the area proposed for annexation is within a distance of not less than 0.9 road miles, nor more than 3.1 road miles, from the fire station. The plan indicates that *substantially* the same fire protection service will be provided to the Southside area as is currently provided to the Town.

We hold that the Town's plans for providing police and fire protection services are sufficient to satisfy the requirements of G.S. 160A-35(3)a. The plans contained (1) information with respect to the current level of services within the Town, (2) a commitment to provide substantially the same level of services in the annexation area, and (3) information as to how the extension of services will be financed; this information is sufficient to allow the public and the courts to determine that the Town has committed itself to provide a nondiscriminatory level of services to the annexed area and to establish compliance with G.S. 160A-35(3)a. *In re Annexation Ordinance (Charlotte), supra.* These assignments of error are overruled.

**[4]** Finally, petitioners contend that the annexation ordinance contained a condition precedent to its validity, the nonoccurrence of which renders the ordinance invalid and void. Section 4 of the ordinance provides:

> That the Board of Commissioners does hereby specifically find and declare that, on the effective date of annexation prescribed in Section 1 hereof, the Town of Wake Forest will have sufficient funds appropriated in the amount of $698,000.00, to finance the estimated cost of construction of water and sewer facilities found necessary in the report of plans for services to extend the basic sewer and water system of the Town of Wake Forest, into the area to be annexed under this ordinance. The foregoing is contingent upon the successful approval of a bond referendum in the amount stated above, which is scheduled for the 13th day of November, 1984.

The bond election referred to in the ordinance was actually held on 6 November 1984. Although the bond proposal for water extension costs passed, the bond proposal for sewer extension costs did not pass. However, a special bond referendum was held on 3 December 1985, resulting in the passage of water and sewer bonds in the total amount of $800,000.00, sufficient to fund the water and sewer extensions to the area to be annexed pursuant to the ordinance. Petitioners contend, however, that passage of the November 1984 bond referendum was expressly made a condition precedent to the validity of the ordinance. We disagree.

G.S. 160A-37(e)(3) requires that an annexation ordinance shall contain:

> A specific finding that on the effective date of annexation the municipality will have funds appropriated in sufficient amount to finance construction of any water and sewer lines found necessary in the report required by G.S. 160A-35 to extend the basic water and/or sewer system of the municipality into the area to be annexed, or that on the effective date of annexation the municipality will have authority to issue bonds in an amount sufficient to finance such construction. If authority to issue such bonds must be secured from the electorate of the municipality prior to the effective date of annexation, then the effective date of annexation shall be no earlier than the day following the statement of the successful result of the bond election.

Section 4 of the annexation ordinance in the present case was a specific finding that funds necessary for water and sewer con-

struction would be available as of the effective date of the ordinance. The finding was made contingent upon the passage of the bond referendum in the necessary amount. However, contrary to petitioners' argument, the validity of the ordinance was not contingent upon the passage of a referendum on the specified date, but was contingent only upon the Town's having the necessary funds appropriated as of the effective date of the ordinance. The ordinance was originally scheduled to take effect on 31 December 1984. However, the petition for review to the superior court and appeal to this Court have, by operation of law, amended the ordinance so as to make its effective date the date on which a final judgment in this case has been certified. G.S. 160A-38(i). Because a bond referendum has since permitted the Town to raise the requisite funds before the effective date of the ordinance, the contingency contained in Section 4 has been satisfied. This assignment of error is overruled.

In summary, we hold that the superior court properly found and concluded that respondent has complied with all statutory requirements for involuntary annexation by a municipality with a population of 5,000 or less. Its judgment is

Affirmed.

Judges ARNOLD and GREENE concur.

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STATE OF NORTH CAROLINA v. JOHN ANTHONY DAVIS

No. 8610SC1202

(Filed 2 June 1987)

**1. Property § 4.2— willful damage to real property—water damage to museum—sufficiency of evidence**

Evidence was sufficient to support defendant's conviction for willful damage to real property in violation of N.C.G.S. § 14-127 where it would permit the inference that defendant put paper towels in a toilet intending to create a serious water problem in the N.C. Art Museum, and damage to the toilet and water damage to the floor of the museum were natural and foreseeable consequences of clogging the constantly running toilet.

**2. Property § 4.2— damage to article in art museum—insufficiency of evidence of cause of damage**

Evidence was insufficient to support defendant's conviction for willful damage to an art object deposited in a museum where the amount of damage exceeds $50, since there was no evidence as to the condition of the tapestry allegedly damaged by defendant immediately prior to the date of the offense, and the mere fact that the tapestry was wet on the date in question was insufficient to support a finding beyond a reasonable doubt that defendant's act in putting paper towels in a toilet caused tideline damage to the tapestry. N.C.G.S. § 14-398.

**3. Criminal Law § 101.2— order permitting jury view—defendant not prejudiced**

There was no merit to defendant's contention that an order permitting a jury view was fatally defective because it failed to include an instruction to the officer escorting the jury that no one was to be allowed to communicate with the jury, since the order was drafted jointly by the district attorney and defense counsel, was entered with only a general objection to the jury view itself, and contained sufficient precautionary language to insure that defendant's right to an impartial jury was not impaired.

**4. Criminal Law § 101.3— method of conducting jury view—defendant not prejudiced**

Defendant was not unduly prejudiced by the conduct of the jury view because the press was allowed to be present, the members of the press were introduced to the jury, and jurors were allowed to ask questions.

Chief Judge HEDRICK concurring in the result in part and dissenting in part.

APPEAL by defendant from *Preston, Judge.* Judgment entered 22 April 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 4 May 1987.

Defendant was indicted in case number 85CRS47980 for a violation of G.S. 14-398, which makes it a Class H felony to "willfully or maliciously or wantonly write upon, cut, tear, deface, disfigure, soil, obliterate, break or destroy . . . any . . . object of art or curiosity deposited in a . . . museum . . ." where the amount of damage done exceeds $50.00. Defendant was also indicted, in case number 85CRS47981, for the misdemeanor of willful and wanton damage to real property, a violation of G.S. 14-127. The State contended that defendant, a security guard at the North Carolina Museum of Art, angered by a job demotion, deliberately stopped up a toilet in the women's rest room at the museum, causing it to overflow. According to the State, the water caused damage to floors and carpets in the museum, as well as leaving a tideline on

an Eighteenth Century French tapestry stored in the basement of the museum.

Defendant pleaded not guilty and was tried by a jury. During the trial the judge, over defendant's objection, allowed the State's motion for a jury view. The local press was allowed to attend the proceedings held at the museum and individual jurors were allowed to ask questions during the jury view.

Defendant's motion to dismiss the charges was denied and defendant was found guilty by the jury of both charges. Judge Preston consolidated the convictions for judgment and sentenced defendant to three years' imprisonment, suspended on condition of payment of $9,929.65 in restitution to the museum. Defendant appeals.

*Attorney General Lacy H. Thornburg by Assistant Attorney General Laura E. Crumpler for the State.*

*James R. Fullwood for defendant-appellant.*

PARKER, Judge.

Defendant's primary contention on this appeal is that the evidence presented by the State was insufficient to convince a rational trier of fact of defendant's guilt beyond a reasonable doubt and that his motion to dismiss the charges against him should, therefore, have been granted. The well-established test to be applied in ruling on a defendant's motion to dismiss is whether the State has produced substantial evidence of each and every element of the offense charged or a lesser included offense, and substantial evidence that the defendant committed the offense. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The evidence is to be viewed in the light most favorable to the State, giving the State the benefit of every reasonable inference which can be drawn from the evidence. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971).

When so viewed, the evidence presented at trial tended to show that on the date of the alleged offense, 25 May 1985, defendant was employed as a security guard at the N.C. Museum of Art. On that date, which was a Saturday, defendant came on duty at 3:30 p.m. The museum was open on Saturday, and was to be closed on Sunday and Monday for a holiday. At around 3:55 p.m.,

security guard Jeanette Stewart discovered that a toilet in the women's rest room on the entry level was continuously flushing. The water was just "going around, going down the drain," and was not overflowing onto the floor. Ms. Stewart reported the problem to her supervisor, who told her to periodically check the toilet to make sure it was not overflowing. She checked several times during the remainder of her shift and found the toilet was still flushing but not overflowing. The supervisor decided that, as the water was not overflowing, the toilet could wait until regular museum hours on Tuesday to be repaired. Defendant was informed of the problem with the toilet and of the decision to just let it run until Tuesday.

At 5:30 p.m., the museum closed. Ms. Stewart went off duty and security guard Sandra Roberson reported for duty. The museum building was secured and by 6:20 p.m. defendant and Ms. Roberson were the only people in the museum. At 7:25 p.m., defendant began a routine patrol of the museum. Ms. Roberson remained at the security desk and followed defendant's progress through the museum by monitoring the museum's sophisticated alarm system of motion and heat detectors. Defendant radioed Ms. Roberson from the women's rest room, asked her if she could hear the water running and commented on the amount of water being wasted. Ms. Roberson then noticed that it took a longer time than normal for defendant to get from the women's room to the next motion detector. When defendant returned from his round, he insisted that Ms. Roberson make the following entry in the log exactly as he dictated it:

> While on patrol Officer Davis discovered the water overflow in the ladies room. It was discussed earlier with Hann, and he said not to notify engineering staff until Tuesday morning. Per; Ms. Stewart.

At about 9:35 p.m., Ms. Roberson began her patrol. She heard a sound like running water and discovered "a whole lot of damn water coming down" from the balcony on the entry level overlooking the main gallery. Ms. Roberson called maintenance personnel who instructed her on how to turn off the water to the toilet. Museum employees were also called in to help clean up the water. The water had flowed onto several levels of the museum, staining carpets and shorting electrical outlets, which burned the

carpets and became inoperative. The water also flowed into a basement storage room and onto an Eighteenth Century French tapestry, which was rolled up on the floor. When employees began to arrive to help clean up, defendant signed out and left the museum before his shift was over. Defendant was later asked by his supervisor to fill out a report on the incident. He refused and was discharged.

A maintenance crew dismantling the toilet for repair discovered that the outflow pipe was blocked by an eight-inch stack of paper towels. According to the State's expert witness, the chief engineer at the museum, this stack of towels was sufficient to completely block the outflow pipe. The expert testified that the running toilet flowed at a rate of approximately thirty to sixty gallons of water per minute and that once the outflow pipe became clogged, the water probably began to overflow the toilet in a matter of seconds.

Defendant contended at trial that at the time he made his 7:25 p.m. rounds the toilet was overflowing and the floor drain was handling the water overflow adequately. The chief engineer testified that if the continuously flushing toilet were overflowing, the floor drain could not handle the volume of water.

Defendant was charged with violations of G.S. 14-127 and G.S. 14-398. These statutes read:

§ *14-127. Willful and wanton injury to real property.*

If any person shall willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a misdemeanor and shall be punished by fine or imprisonment or both, in the discretion of the court.

§ *14-398. Theft or destruction of property of public libraries, museums, etc.*

Any person who shall steal or unlawfully take or detain, or willfully or maliciously or wantonly write upon, cut, tear, deface, disfigure, soil, obliterate, break or destroy, or who shall sell or buy or receive, knowing the same to have been stolen, any book, document, newspaper, periodical, map, chart, picture, portrait, engraving, statue, coin, medal, ap-

paratus, specimen, or other work of literature or object of art or curiosity deposited in a public library, gallery, museum, collection, fair or exhibition, or in any department or office of State or local government, or in a library, gallery, museum, collection, or exhibition, belonging to any incorporated college or university, or any incorporated institution devoted to educational, scientific, literary, artistic, historical or charitable purposes, shall, if the value of the property stolen, detained, sold, bought or received knowing same to have been stolen, or if the damage done by writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, breaking or destroying any such property, shall not exceed fifty dollars ($50.00), be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. If the value of the property stolen, detained, sold or received knowing same to have been stolen, or the amount of damage done in any of the ways or manners hereinabove set out, shall exceed the sum of fifty dollars ($50.00), the person committing same shall be punished as a Class H felon.

Clearly, these statutes require, as an essential element of the offenses set forth, a showing that the person charged "willfully" or "wantonly" caused the damage to real property or an object of art. The words "willful" and "wanton" have substantially the same meaning when used in reference to the requisite state of mind for a violation of a criminal statute. *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973). "Willful" as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law. *State v. Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965). "Willfulness" is a state of mind which is seldom capable of direct proof, but which must be inferred from the circumstances of the particular case. *Id.*

[1] The evidence, when viewed in the light most favorable to the State, was sufficient to allow the jury to infer that defendant put the paper towels in the toilet intending to create a serious water problem. It is not necessary for a person to know that he is breaking the law for an act to be "willful." *State v. Coal Co.*, 210 N.C. 742, 188 S.E. 412 (1936). Further, a person is presumed to intend the natural and foreseeable consequences of his unlawful acts. *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964).

Damage to the toilet (as an attached fixture, part of the real property, *see generally* Annot., 52 A.L.R. 2d 222 (1957)) and water damage to the floor of the museum were natural and foreseeable consequences of clogging the constantly-running toilet. Therefore, we affirm the conviction for willful damage to real property in violation of G.S. 14-127.

[2] With respect to the conviction for violation of G.S. 14-398, the evidence was not in our view sufficient to support the necessary finding that defendant's act was the proximate cause of the damage to the tapestry. The State presented no evidence as to the condition of the tapestry immediately before 25 May 1985. A photograph showing the tapestry without the tideline was tendered into evidence, but no witness testified as to when the photograph was made. This photograph was an item in the conservation file containing information on each art object at the museum. The photograph does not depict the linen border which according to the evidence was sewn on in 1978. The most recent condition report in the file was dated January 1980. Further, the evidence was uncontradicted that the tapestry was lying on the floor rolled up in a storage room located directly under the rest room with the malfunctioning toilet. Other objects stored in this room did not get wet. The State's evidence showed that water ran into the room because the seal around the pipe for the floor drain in the rest room had not been properly caulked. This crack permitted water to seep down the outside of the pipe. The record is devoid of any evidence as to when the tapestry was stored in this room and when it was last unrolled prior to 25 May 1985. In our view, considering all the evidence in the light most favorable to the State, the mere fact that this tapestry was wet on 25 May 1985 is not sufficient to support a finding beyond a reasonable doubt that defendant's act in putting the towels in the toilet caused the tideline damage to the tapestry. Evidence as to the condition of the tapestry prior to the flooding was necessary to establish all material elements of the offense. In *In re Meaut*, 51 N.C. App. 153, 275 S.E. 2d 200 (1981), respondents were observed throwing rocks at a carload of motor vehicles on a train; when the train stopped two vehicles were damaged. This Court per Judge (now Justice) Whichard stated:

> The testimony of the State's witness tended to show that the train in question was en route from Rocky Mount to Hope

> Mills. The witness testified: "I did not personally inspect the cars in Rocky Mount. A member of our department told me that the cars were in good shape when they were in Rocky Mount." This testimony was properly stricken, upon respondents' motion, as hearsay. Without this testimony there was no evidence before the court as to the condition of the automobiles prior to their arrival at the *locus in quo*, and such evidence was an essential foundation to a permissible inference that the damage resulted from the acts of respondents rather than from some other cause.

51 N.C. App. at 155-56, 275 S.E. 2d at 202.

The trial court erred in denying defendant's motion to dismiss the felony charge against him. Our ruling on this issue makes discussion of defendant's assignments of error regarding the proper measure of damage to the tapestry unnecessary as those contentions relate to the felony only.

Defendant also assigns error to the trial court's order allowing a jury view at the art museum and to the court's conduct of the jury view itself. Under G.S. 15A-1229(a), the decision to permit a jury view is vested in the discretion of the trial judge. The decision will not be disturbed absent an abuse of discretion. *See State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). Defendant has shown no abuse of discretion by the trial judge in permitting the view.

[3] Defendant also contends that the order permitting the view was fatally defective as it failed to include an instruction to the officer escorting the jury that no one is to be allowed to communicate with the jury. *See* G.S. 15A-1229(a). This contention is without merit. The order was drafted jointly by the district attorney and defense counsel and was entered with only a general objection to the jury view itself. While not reciting the language of the statute verbatim, the order did contain sufficient precautionary language to insure that defendant's right to an impartial jury was not impaired, including orders that the jury be accompanied by two deputies, that the jurors not be allowed to talk among themselves and that no one be allowed to speak with the jury. This order was sufficient to comply with the requirements of G.S. 15A-1229(a) and the assignment of error is overruled.

[4] Defendant further contends that he was unduly prejudiced by the conduct of the jury view as the press was allowed to be present and the members of the press were introduced to the jury. Criminal trials in North Carolina are open to the press and the public. N.C. Const. art. I, § 24. Defendant argues that by allowing the press to attend the jury view and by introducing the members of the press to the jurors, the trial judge unduly prejudiced him by emphasizing the highly publicized nature of the trial and by detracting from the decorum of the proceedings. Although conditions were less than ideal for court proceedings, the trial judge kept the press quiet and away from the jury and gave adequate instructions to the jury concerning the publicity surrounding the trial.

Finally, defendant contends that by allowing individual jurors to ask questions at the jury view, the trial court committed prejudicial error. We disagree. The jurors were allowed to state their questions, which were duly recorded by the court reporter. The questioning was tightly controlled and conducted in such a way as to fully protect defendant's right to a fair trial. The trial judge asked each attorney if there were any objection to the question, and defense counsel never voiced an objection. Defendant has failed to demonstrate any prejudice resulting from the manner in which the jury view was conducted.

In summary, defendant's conviction in 85CRS47980, willful damage to an object of art, is vacated. We find no prejudicial error in defendant's conviction for willful damage to real property, and the case is remanded to the Superior Court for entry of judgment on the misdemeanor conviction.

No. 85CRS47980—reversed.

No. 85CRS47981—no error.

Remanded for entry of judgment.

Judge EAGLES concurs.

Chief Judge HEDRICK concurs in the result in part and dissents in part.

Chief Judge HEDRICK concurring in the result in part and dissenting in part.

I concur with the majority decision reversing the conviction in 85CRS47980 wherein defendant was convicted of willfully damaging an object of art in violation of G.S. 14-398, but I do not agree with the majority's reasoning. I dissent from the majority decision finding no error in the case wherein defendant was convicted in 85CRS47981 of willfully damaging real property in violation of G.S. 14-127. In this case, I do not agree with the majority's reasoning or result.

In my opinion, the majority overlooks the significance of the word "willful" as used in both statutes. "The word wilful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute." *In re Adoption of Hoose*, 243 N.C. 589, 594, 91 S.E. 2d 555, 558 (1956) (citation omitted). "Willful" as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law. *State v. Brackett*, 306 N.C. 138, 291 S.E. 2d 660 (1982).

The evidence in these cases shows nothing more than that defendant had the "intention to do a thing"; that is, that he intended to put the paper towels in the toilet. While the evidence is sufficient to raise an inference that defendant put the paper towels in the toilet "purposely and deliberately" it does not follow that this act was in violation of law. There is nothing in the evidence in these cases to show that defendant willfully or wantonly damaged the tapestry or the art museum. Although the jury could find from the evidence that defendant's act in putting the towels into the toilet proximately caused the damage to the art and the museum, the evidence falls short of showing any willfulness to do such damage and thus the record fails to disclose any criminal intent upon the part of defendant within the meaning of these criminal statutes.

In *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981), the defendant was tried and convicted of felonious breaking and en-

tering and felonious larceny. The defendant had been arrested after he was seen driving an automobile with the owner and two other people riding as passengers, wherein was found a blue coat, one of the items which had been stolen from the property broken into.

The defendant's conviction was based on the theory that since the evidence disclosed that the defendant was the driver of the vehicle it raised the inference that he was in constructive possession of recently stolen goods, and since he was in possession of recently stolen goods, he was the thief. In writing for the Supreme Court, Justice Huskins said, "We hold this criminal conviction cannot stand because it is based on stacked inferences. 'Inference may not be based on inference. Every inference must stand upon some clear or direct evidence, and not upon some other inference or presumption.' " *Id.* at 676, 273 S.E. 2d at 294 (citation omitted).

The convictions in these cases cannot stand, because they are based on stacked inferences, the first inference being that defendant willfully put the paper towels in the toilet and the second inference, stacked on the first, being that defendant thereby willfully or wantonly damaged the tapestry and the art museum. There is no direct evidence giving rise to an inference that defendant willfully or wantonly damaged an object of art or real property.

In its opinion the majority correctly states, "It is not necessary for a person to know that he is breaking the law for an act to be 'wilful.' *State v. Coal Co.*, 210 N.C. 742, 188 S.E. 412 (1936). Further, a person is presumed to intend the natural and foreseeable consequences of his *unlawful* acts. *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626 (1964)." (Emphasis mine.) While the foregoing statements are legally correct, they have no application whatsoever in the present cases, because it is not unlawful to put paper towels into a toilet. The problem in these cases, in my opinion, is simply that the State has failed to offer any evidence of criminal intent upon the part of defendant to damage the art or real property. Criminal intent is lacking in these cases because the State has failed to offer any direct evidence that defendant willfully damaged the tapestry or the real property. Had the act of putting the paper towels in the toilet been a criminal act, the

criminal intent embodied in the violation of that law would carry over and provide the criminal intent necessary to show a violation of the statutes making it a crime to willfully damage an object of art or real property. It is not a violation of law to put paper towels in a toilet, even if the intent is to cause the toilet to overflow. Such an act is or may be fatuous, negligent or wrongful, making the perpetrator of that act liable in damages proximately resulting from such act. Damage willfully done to the toilet would be a violation of G.S. 14-127, but, contrary to the majority's assertion, there is no evidence in this case that defendant willfully damaged the toilet by putting paper towels into it. The damage done resulted not to the toilet, but to the electrical fixtures in the museum and to the tapestry.

I vote to reverse both cases.

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STATE OF NORTH CAROLINA v. *LEONARD HICKS*

No. 8611SC1095

(Filed 2 June 1987)

1. **Burglary and Unlawful Breakings § 3— breaking and entering alleged—failure to use the disjunctive—indictment not fatally defective**

   An indictment which charged defendant with conspiracy "to commit Breaking, Entering and Larceny" was not fatally defective because it failed to allege conspiracy to break *or* enter.

2. **Conspiracy § 6— conspiracy to break or enter—conspiracy to commit larceny—evidence of only one agreement—two convictions improper**

   Defendant could not be convicted of both conspiracy to break or enter and conspiracy to commit larceny where there was evidence of only one agreement and therefore one conspiracy.

3. **Criminal Law § 124— verdict sheet—use of "guilty"—defendant not prejudiced**

   Although the verdict sheet used by the trial court was not preferred and the use of the words "not guilty" on the verdict sheet is preferred, defendant was not prejudiced in light of the verdict form itself, the trial court's instructions to the jury, and the poll of the jury after it returned its verdict.

APPEAL by defendant from *Bowen, Wiley F., Judge.* Judgment entered 13 March 1986 in Superior Court, HARNETT County. Heard in the Court of Appeals 5 March 1987.

On 3 February 1986, the Harnett County grand jury returned a two-count true bill against defendant, Leonard Hicks, as follows:

INDICTMENT—CONSPIRACY—85CRS10299

STATE OF NORTH CAROLINA
HARNETT COUNTY

In The General Court of Justice
Superior Court Division

STATE v. Leonard Hicks

The jurors for the State upon their oath present that on or about the 20th day of December, 1985, in the county named above the defendant named above unlawfully, willfully and feloniously did conspire with Richard Lee Elliott and Timothy Ray to commit the offense of felony Breaking, Entering and Larceny.

And the jurors for the State upon their oath present that on or about the 20 day of December, 1985, in the county named above the defendant named above unlawfully, willfully and feloniously did conspire with Richard Lee Elliott and Timothy Ray to commit the offense of felony Larceny.

On 11 March 1986, defendant was tried before a jury. The State presented evidence that tended to show the following:

At 1:30 in the afternoon of 20 December 1985, defendant, Leonard Hicks, along with Timothy Ray, rode in defendant's automobile to the home of Richard Lee Elliott. The trio proceeded to drive to the home of Kevin Thomas. Elliott testified that defendant passed by Kevin Thomas' home, stopped, parked his automobile, and told Ray and Elliott "to go in there and get what we could get." Defendant told Ray and Elliott that he would wait for them down the road. Elliott further testified that he and Ray proceeded to Kevin Thomas' house and knocked on the door, that they did not receive an answer, and that they went to the back door where they were met by Kevin Thomas.

Kevin Thomas testified that while home sick on the afternoon of 20 December 1985, he heard his dogs barking at something in his yard. He looked out the window to see what they were barking at and saw them take off chasing after a maroon Trans Am

automobile going down the road. After five or six minutes he saw two black males come down the edge of the woods toward his house, pass through his barking dogs, walk right up to his front door, and began pounding on the door. Thomas went to the rear of his home to get a twelve-gauge shotgun. Thomas saw that the two men had come from his front door to a deck at the back of his home where there is a sliding-glass door. Thomas confronted the men. One man, whom Thomas later identified as being Timothy Ray, stated that he was looking for gas for his car. Thomas told Ray there was no gas on his back porch and to back away from the sliding-glass door. Thomas telephoned the sheriff's office.

Elliott testified that he and Ray went down the road to wait for defendant. Two patrol cars arrived on the scene while Ray and Elliott were waiting for defendant. Ray and Elliott were questioned and were being transported to the sheriff's department when Elliott observed defendant driving back to the place where defendant had let them out of the automobile. The officers stopped defendant's automobile and instructed him to follow them to the sheriff's department. A deputy sheriff testified that defendant was driving a maroon Pontiac sports car.

Defendant's evidence tended to show the following: Defendant, testifying in his behalf, denied that on 20 December 1985, he had been with, or conspired with, Timothy Ray and Richard Lee Elliott. Defendant testified that when he was stopped by sheriff's deputies on 20 December 1985, he was driving a candy-apple red Firebird automobile, and that he was on his way home after having gone to Bruce West's shop located near Thomas' house. It was also defendant's testimony that Bruce West was not in when defendant went to Bruce West's shop. Timothy Ray testified that defendant did not conspire with him and Elliott and that defendant did not transport them to Thomas' home.

The jury found defendant guilty of count one, felonious conspiracy to commit felonious breaking and entering, and guilty of count two, felonious conspiracy to commit felonious larceny. The trial court sentenced defendant to three years imprisonment for felonious conspiracy to commit breaking and entering, and for felonious conspiracy to commit larceny, the trial court sentenced defendant to two years imprisonment to begin at the expiration of the sentence imposed on count one. Defendant appeals.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James B. Richmond, for the State.*

*Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender, Daniel R. Pollitt, for defendant.*

JOHNSON, Judge.

I

[1] Defendant, by his first Assignment of Error, argues that the allegations contained in the indictment returned against him were fatally insufficient to charge the alleged offenses. We disagree.

G.S. 15A-924(a)(5), prescribes the requirements for a criminal indictment, in pertinent part, as follows:

> (a) A criminal pleading must contain:
>
> . . .
>
> (5) 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.

G.S. 15-153 provides the following:

> sec. 153. Bill or warrant not quashed for informality.
>
> Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill of proceeding, sufficient matter appears to enable the court to proceed to judgment.

The purpose of an indictment "is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense and to 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 know what judgment

to pronounce in case of conviction." *E.g., State v. Burton,* 243 N.C. 277, 278, 90 S.E. 2d 390, 391 (1955). Bearing these principles in mind we turn to the sufficiency of the allegations of the indictment before us.

The indictment in the case *sub judice* charged defendant with two counts of conspiracy. "A criminal conspiracy is an agreement by two or more persons to perform an unlawful act or to perform a lawful act in an unlawful manner." *State v. Rozier,* 69 N.C. App. 38, 49, 316 S.E. 2d 893, 900 (1984). Defendant's challenge to the sufficiency of the true bill returned against him is that "the first count of the indictment is fatally defective because it does not allege the essential elements of the alleged conspiracy." Defendant argues that the allegation he conspired "to commit felony Breaking, Entering and Larceny" is fatally deficient because the operative language of G.S. 14-54(a) is worded differently, to wit: "breaking *or* entering." However, defendant's argument fails for an indictment which avers facts which constitute every element of an offense does not have to be couched in the language of the statute. *State v. Anderson,* 259 N.C. 499, 130 S.E. 2d 857 (1963). Moreover, the mere omission of the word "or" could hardly have affected defendant's notice of the crime charged, or his ability to prepare his defense. The deviation from the statutory language, if anything, would have to be construed as in defendant's favor since it was alleged that he conspired to "break, [and] enter" as opposed to "break *or* enter." The indictment returned against defendant alleges that defendant entered into an agreement with two or more persons to commit, on 20 December 1985, the unlawful act of breaking and entering to commit larceny. We deem that the foregoing are sufficient allegations to meet the requirements of G.S. 15A-924(a)(5).

II

**[2]** Defendant also argues that one of his two conspiracy convictions must be vacated because there was evidence of only one agreement. After careful consideration, we agree.

The applicable principles which we must rely upon to decide the question before us were summarized by this Court as follows:

> It is well established that the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive

> crime. *See e.g.*, *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978); *see also Braverman v. United States*, 317 U.S. 49, 87 L.Ed. 23, 63 S.Ct. 99 (1942). It is also clear that where a series of agreements or acts constitute a *single* conspiracy, a defendant cannot be subjected to multiple indictments consistently with the constitutional guarantee against double jeopardy. *United States v. Kissel*, 218 U.S. 601, 54 L.Ed. 1168, 31 S.Ct. 124 (1910). Defining the scope of a conspiracy or conspiracies remains a thorny problem for the courts. This Court has affirmed multiple conspiracy convictions arising from multiple substantive narcotics offenses involving a single amount of drugs found on a single occasion, *State v. Sanderson*, 60 N.C. App. 604, 300 S.E. 2d 9, *disc. rev. denied*, 308 N.C. 679, 304 S.E. 2d 759 (1983), apparently on the theory that each conspiracy involved separate elements of proof and represented a separate agreement. However, under North Carolina law multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies. *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1963), *appeal dismissed*, 375 U.S. 9, 84 S.Ct. 72, 11 L.Ed. 2d 40 (1963) (per curiam). There is no simple test for determining whether single or multiple conspiracies are involved: the essential question is the nature of the agreement or agreements, *Braverman v. United States, supra*, but factors such as time intervals, participants, objectives, and number of meetings all must be considered.

*State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E. 2d 893, 902 (emphasis in original), *cert. denied*, 312 N.C. 88, 321 S.E. 2d 907 (1984). This Court, in *Rozier, supra*, further stated "that the State, having elected to charge separate conspiracies, must prove not only the existence of at least two agreements but also that they were separate." *Id.* at 53, 316 S.E. 2d at 902.

The evidence in the case *sub judice* only established the existence of one agreement and only one conspiracy, to wit: that defendant conspired with Richard Lee Elliott and Timothy Ray to break into Thomas' house to steal property from within. Testimony by defendant's co-conspirators was that at 1:30 p.m. on 20 December 1985, defendant drove his red Trans Am automobile to Richard Elliott's home. Accompanying defendant was Timothy Ray. Richard Elliott testified that he entered defendant's automo-

bile and defendant drove the trio to a house located at Route 1, Bunn Level. Richard Elliott testified that upon their arrival "he [defendant] passed by the house and in a little ways he let us off and told us to go in there and get what we could get." Richard Elliott further testified that "[h]e [defendant] told us to get what we could get and put it in pillowcases and he would come back in fifteen minutes to pick us up." The whole objective of the agreement was to break into the house and "get what [they] could get." The agreement was entered into during one meeting with very little said and with one objective in mind. There was no evidence of two separate agreements or of any other meetings between the participants.

The State, in its brief, argues that "[f]elony breaking or entering as defined in G.S. 14-54(a) and felony larceny as defined in G.S. 14-72 are separate crimes, and conviction of either does not bar prosecution for the other even though the crimes arise out of the same transaction." However, the point missed by this argument is that the two convictions defendant appeals from are for *two agreements* to commit the substantive underlying offenses, not for the commission of offenses in violation of G.S. 14-52(a) and G.S. 14-72. We cannot allow both convictions to stand when there was evidence of only one agreement. *Rozier, supra.* Therefore, we vacate the judgment imposing a two year sentence for the conviction of defendant for the second count of the indictment charging him with conspiracy to commit felonious larceny. To rule otherwise would offend double jeopardy principles. *Rozier, supra.*

III

**[3]** By his final Assignment of Error defendant argues that he "is entitled to a new trial because the trial court failed to submit the verdict of not guilty to the jury in the verdict form, thereby improperly expressing its opinion and coercing the jury into returning a guilty verdict." After extensively reviewing the verdict form in question, the trial court's instructions to the jury and the poll of the jury after it returned its verdict, we find no prejudicial error.

G.S. 15A-1237 requires that the jury's verdict be in writing. The verdict form submitted to the jury with the answer returned by the jury is as follows:

VERDICT—NO. 85CRS10299

> We, the Jury, by unanimous verdict, find the defendant Leonard Hicks:
>
> (1) Guilty of felonious conspiracy to commit felonious Breaking and Entering.
>
> Answer:
>
> (2) Guilty of felonious Conspiracy to commit felonious Larceny.
>
> Answer:
>
> . . . .

(Exceptions omitted.) The trial court, in its instructions to the jury, assiduously instructed the jury on its duty to return verdicts of "not guilty" if the jury had a reasonable doubt as to defendant's guilt. With respect to the verdict sheet, the trial court specifically instructed the jury as follows:

> When all twelve members of the jury agree on a verdict, your foreperson should record *your verdict* on the verdict sheet. There are two counts and *the foreperson should write in 'guilty' or 'not guilty' where the word 'answer' is, and there is a line drawn there.*

(Emphasis supplied.)

The trial court's final mandate to the jury specifically instructs the jury with respect to the permissible verdicts that it could return. Moreover, the trial court specifically instructed the jury on how to enter the verdict on the sheet supplied to them by the trial court. When the jury was polled each juror answered that the verdict returned by the foreperson was his or her verdict and that each still assented thereto. Accordingly, although the verdict sheet utilized by the trial court is not preferred and the use of "not guilty" on the verdict sheet is preferred we conclude that there is no reasonable possibility that the outcome would have differed if the jury verdict sheet had been worded differently. *See* G.S. 15A-1443.

Case No. 1—85CRS10299; affirmed.

Case No. 2—85CRS10299; judgment vacated.

Judges EAGLES and ORR concur.

HOWARD N. ROBINSON, JR. v. NORTH CAROLINA FARM BUREAU INSURANCE COMPANY

No. 8627SC334

(Filed 2 June 1987)

**Insurance § 136— fire insurance—refusal of insurer to pay—eventual payment no bar to punitive damages**

An insurer's eventual payment of a claim is no bar to punitive damages if its earlier denial meets the requirements of tortious conduct accompanied by aggravating circumstances. Evidence that defendant's agent viewed plaintiff's building as a total loss immediately after the fire and indicated prompt payment of the full claim, that defendant delayed payment because plaintiff hired a property loss consultant, that defendant instructed a building contractor to produce a low estimate to do the repairs, and that defendant did not pay the $100,000 claim until seven months after the fire when an umpire set the loss at $170,000 was sufficient to establish a tortious bad faith refusal to settle in a timely manner, and evidence of defendant's instructions to the contractor to lower his estimate met the requirement of the accompanying aggravated conduct. N.C.G.S. § 58-54.4(11).

APPEAL by plaintiff from *Burroughs, Judge*. Judgment entered 12 February 1986 in Superior Court, GASTON County. Heard in the Court of Appeals 28 August 1986.

*Whitesides, Robinson, Blue & Wilson by Henry M. Whitesides for plaintiff appellant.*

*Caudle & Spears by Lloyd C. Caudle and Harold C. Spears for defendant appellee.*

COZORT, Judge.

In this case, plaintiff restaurant owner is the insured under a multi-peril policy issued by the defendant insurance company. After the restaurant was seriously damaged by fire, plaintiff filed proof of loss claims requesting payment of the full $100,000.00 pol-

icy limit on the loss of the building and payment of the full $125,000.00 policy limit on the loss of the building's contents. The defendant paid the $125,000.00 on the contents claim within the time specified in the policy. The defendant denied that the building was damaged in excess of $100,000.00, offering instead to pay plaintiff $88,451.00. The plaintiff exercised his option under the policy to have the claim reviewed by appraisers and an umpire. After the report of the umpire was received, defendant paid the $100,000.00 building loss claim within the time specified by the policy. Defendant's payment of $100,000.00 was made seven months after the fire, five months after the plaintiff's initial submission of its proof of loss claims. Plaintiff filed this action, alleging, *inter alia,* that defendant's delay in paying the building claim was unreasonable and done in bad faith. He requested damages for loss of business, the loss of the use of the money, and punitive damages. The trial court granted defendant's motion for partial summary judgment, dismissing the claim for punitive damages. We vacate, finding that the plaintiff has alleged a claim for tortious bad faith refusal to pay, and further finding that there is a factual dispute as to whether the delay in payment was in fact motivated by bad faith. A more detailed recitation of pertinent facts follows.

Certain facts are not in dispute: The restaurant owned by plaintiff was extensively damaged by fire on 21 October 1981. The restaurant and its contents were covered by a Special Multi-Peril Policy issued by defendant, with stated limits of $100,000.00 for damage to the building and $125,000.00 for damage to the personal property contents. On or about 14 December 1981 defendant received from Reynolds & Sons Construction Co., a Charlotte General Contractor, a one-page written estimate stating that Reynolds could rebuild the restaurant for $88,451.00. On or about 18 December 1984 plaintiff filed with defendant two proof of loss claims, one claiming building damages of $170,350.00, in excess of the face value ($100,000.00) of the policy, and one claiming damage to contents of $185,260.23, in excess of the face value ($125,000.00) of the policy. On or about 18 January 1982, Reynolds submitted to defendant a second written estimate, in slightly more detail, which quoted the same price, $88,451.00, to repair the restaurant. On 27 January 1982, plaintiff's attorney received from the Charles P. Beam Company, Inc., a local contractor, a six-page letter which

concluded that Reynolds could not repair the building for $88,451.00. The Beam letter estimated the cost of repair to be $111,131.00. On 8 February 1982, defendant paid to plaintiff $125,000.00 on the contents claim. Defendant offered plaintiff $88,451.00 on the building loss. Plaintiff did not accept defendant's offer and named a local architect as an appraiser, in accordance with provisions of the policy. The defendant named Reynolds as its appraiser; and on 26 April 1982, the two appraisers, being unable to agree, selected an umpire who would set the loss, again in accordance with the provisions of the policy. On 28 April 1982, the umpire set the loss of the building at $170,000.00. On 17 May 1982, defendant paid plaintiff $100,000.00 for the building, the full amount of the policy.

The forecast of the evidence presented by depositions taken by the parties shows other facts to be in dispute. By way of deposition testimony, evidence for the plaintiff tends to show the following:

Plaintiff Howard N. Robinson, Jr., the owner of the restaurant, testified that Wayne Stanley, the defendant's field claims adjuster, came to the site of the fire on 21 October 1981, examined the damages, and told plaintiff there would be no problem in getting the money to rebuild the building. Stanley indicated defendant would pay the full claim. When Reynolds came out to look at the fire damage a few days later, Reynolds told plaintiff that it would take considerably more than $100,000.00 to repair the building. Shortly after the fire occurred, plaintiff hired the Baldwin Company, Property Loss Consultants, to help prepare the proof of loss documents for the insurance claims. In December of 1981, plaintiff spoke on the telephone to Ed Guffy, an agent with defendant, about his claim being paid. Guffy told plaintiff that Dewey Ellis, Claims Supervisor with the defendant, was upset that plaintiff had hired Baldwin, and that defendant would review the claim "to work it down as close as they could." Reynolds came back to look at the building a second time. Reynolds told plaintiff the defendant wanted Reynolds to review his estimate and cut it every way he could to lower his estimate.

Johnny Reuben Sellers, who worked for plaintiff Robinson when the fire occurred, testified that he was with plaintiff when Reynolds came to look at the restaurant. According to Sellers,

Reynolds said, "The insurance company had called him to come back to relook the thing over, and [Reynolds] made the statement that he was certain that everything was a total loss; and the insurance company had called him back to look things over to get him to figure everything as close as he could and to get the price of what he gave down a considerable amount . . . ." Sellers was also present when Stanley talked to plaintiff shortly after the fire. He heard Stanley say "it was very apparent it was a total loss, and that [plaintiff] would have his money in two or three days . . . ." Sellers was also with plaintiff when plaintiff spoke to Guffy on the phone about his claim. Plaintiff was using a speaker phone which allowed Sellers to hear the conversation. Sellers heard Guffy tell plaintiff that plaintiff was responsible for the delay by bringing in the Baldwin Company. According to Sellers, Guffy said, "We could have had this thing settled had you not brought them into the picture."

William Wesley Baldwin, the owner of the Baldwin Company, testified that Stanley told him on or about 17 December 1981 that the defendant would not pay the total amount on the building. Baldwin had one of his employees, Ben Skinner, working on the restaurant claim. Skinner went with Reynolds on 12 January 1982, to go over the damages at the restaurant. Baldwin wanted Skinner to go over the $88,451.00 estimate with Reynolds because that estimate was not specific enough to ascertain what work would be done. In Baldwin's opinion, the Reynolds estimate was ludicrous. It was not a quality piece of workmanship because it did not specify what work needed to be done. The estimate submitted by Reynolds would not be sufficient to settle a claim with any insurance company. In Baldwin's opinion, the amount estimated by Beam, $111,000.00, would not have been adequate to repair the restaurant.

The evidence forecast by defendant through depositions disputes that forecast by plaintiff in several respects. Wayne Stanley, the field claimsman or adjuster for defendant, testified that he never told plaintiff that the defendant would pay the full $100,000.00 on the building. Stanley denied telling Reynolds to bring back a low estimate to repair the restaurant.

Dewey Ellis, a claims supervisor with defendant, testified that he was responsible for the final approval of claims made to defendant. He had asked Reynolds to revise his estimate to "have

it broken down a little more to what it would take to put it back just like it was before the fire happened." Reynolds assured him that the building could be repaired for the amount in his estimate.

Earl H. Reynolds, Sr., the president of Reynolds & Sons Construction Co., testified that he suggested to plaintiff tearing down the entire structure in order to get the floor on one level; additions to the building had caused it to have floors on different levels. His inspection of the building showed that about one-third of the building had only smoke damage. He estimated the loss of the building as a 70% loss. The estimate he gave to defendant on this building was the way he normally gave estimates, without a breakdown. The defendant told him to go back and redo the estimate, to make it more specific. Reynolds denied ever saying to anyone that the defendant sent him back to get a lower estimate. His intention was to make a bid which would get him the job and allow him to make a profit. He did not know how much insurance was involved. He could have rebuilt the building for the bid he submitted ($88,451.00).

The plaintiff's sole argument on appeal is that the trial court erred in granting summary judgment on the punitive damages claim because there was a genuine issue of material fact concerning whether the defendant's conduct constituted a bad faith refusal to settle a valid insurance claim.

> On a motion for summary judgment, the question before the Court is whether the pleadings, discovery documents and affidavits, viewed in the light most favorable to the non-movant, support a finding that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). (Citations omitted.)
>
> * * * *
>
> The moving party must show the lack of a genuine issue of material fact and that it is entitled to judgment as a matter of law, either by demonstrating the non-existence of an essential element of each claim or by presenting a defense to plaintiff's claims as a matter of law. (Citations omitted.) If the material before the court at the summary judgment hearing would require a directed verdict for defendant at trial, defendant is entitled to summary judgment.

*Frendlich v. Vaughan's Foods*, 64 N.C. App. 332, 334-35, 307 S.E. 2d 412, 414 (1983).

Plaintiff contends that defendant had a duty to deal in good faith; and, if it did not do so, it is not absolved from punitive damages because it later performed as it should. Plaintiff argues that eventual payment of the claim is no bar to punitive damages if its earlier denial met the requirements of tortious conduct accompanied by aggravating circumstances. Defendant counters that there can be no tortious conduct when the defendant paid its policy limits within the time frame of the policy. The defendant argues that a claim for bad faith refusal to settle cannot exist where coverage is not denied, settlement is not refused, and the policy limits are timely paid.

We agree with the plaintiff's argument, and we hold the court erred in granting summary judgment on the punitive damages claim. In *Dailey v. Integon Ins. Co.*, 75 N.C. App. 387, 331 S.E. 2d 148, *disc. rev. denied*, 314 N.C. 664, 336 S.E. 2d 399 (1985), we considered what evidence is sufficient to support a claim for tortious, bad faith refusal to settle a claim when the refusal to settle is *also* a breach of contract. In reviewing recent cases, we stated the following:

> "[W]hen there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort may itself give rise to a claim for punitive damages." . . . "Even when sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." [*Newton v. Standard Fire Insurance Co.*, 291 N.C. 105, 111-12, 229 S.E. 2d 297, 301 (1976).] In the sense used here, aggravated conduct has long been defined to include "fraud, malice, gross negligence, insult, . . . wilfully, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." *Baker v. Winslow*, 184 N.C. 1, 5, 113 S.E. 570, 572 (1922).

*Id.* at 394, 331 S.E. 2d at 153-54.

We find nothing in the case law which *requires* that the tortious conduct be accompanied by a breach of the contract, even

though most, if not all, of the cases have as a factual background the insurance company's refusal to pay. We do not believe an action for punitive damages from tortious conduct is precluded when the company eventually pays, if bad faith delay and aggravating conduct is present. An insurance company is expected to deal fairly and in good faith with its policyholders. The North Carolina General Assembly has acknowledged that principle by its adoption of N.C.G.S. § 58-54.4. Under N.C.G.S. § 58-54.4(11), the law defines the following acts as unfair and deceptive acts or practices, if committed or performed with such frequency as to indicate a general business practice:

> e. Failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed;
>
> f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
>
> * * * *
>
> h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled . . . .

Considering the forecast of evidence in the light most favorable to the plaintiff, as we are required to do on defendant's motion for summary judgment, we find that the defendant's agent viewed the building as a total loss immediately after the fire and indicated prompt payment of the full claim ($100,000.00). The defendant delayed payment because the plaintiff hired a property loss consultant, and the defendant further instructed a building contractor to produce a low estimate to do the repairs. The defendant did not pay the $100,000.00 until seven months after the fire, when the umpire set the loss at $170,000.00. This evidence is sufficient to establish a tortious bad faith refusal to settle in a timely manner. The evidence of the defendant's instructions to the contractor to lower his estimate meets the requirement of the accompanying aggravated conduct. The defendant's evidence to the contrary is not to be considered for summary judgment purposes. That evidence is to be considered by the jury. The evidence forecast by the plaintiff would be sufficient for the jury to

infer that the defendant should have paid the full claim promptly because it had no basis upon which to deny it, that the refusal was in bad faith, and that the defendant's actions were designed solely to force the plaintiff to go through the independent appraisal process to receive the full claim.

In finding that the defendant was not entitled to summary judgment in this case, we are not establishing a rule that an insurance company is liable for punitive damages in every case wherein the value of the damages is disputed and the claimant ultimately wins in the independent appraisal process. But where, as here, the claimant forecasts evidence that the company's delay has no good faith basis in fact and is accompanied by aggravated conduct, the claimant is entitled to take his case of punitive damages to the jury.

The order granting summary judgment for defendant is vacated and the cause remanded for further proceedings.

Vacated and remanded.

Judges BECTON and JOHNSON concur.

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PROGRESSIVE SALES, INC. AND LEASING ASSOCIATES, INC. (DEBTORS-IN-POSSESSION UNDER THE JURISDICTION OF THE UNITED STATES DISTRICT COURT—BANKRUPTCY DIVISION—MIDDLE DISTRICT OF NORTH CAROLINA) v. WILLIAMS, WILLEFORD, BOGER, GRADY & DAVIS, A NORTH CAROLINA LAW PARTNERSHIP CONSISTING OF JOHN HUGH WILLIAMS, JOHN R. BOGER, JR., SAMUEL F. DAVIS, JR., BRICE J. WILLEFORD, JR., THOMAS M. GRADY & M. SLATE TUTTLE, JR., AND WILLIAMS, BOGER, GRADY, DAVIS & TUTTLE, P.A. (A NORTH CAROLINA PROFESSIONAL CORPORATION), AND DAN ALAN BOONE

No. 8619SC1008

(Filed 2 June 1987)

**Attorneys at Law § 5.1— malpractice—no evidence of applicable standard of care for attorneys in same or similar community**

The trial court in an action for legal malpractice properly found that plaintiffs failed to put on any evidence of the applicable standard of care for attorneys in the same or similar community, and the court therefore did not err in allowing defendants' motion for involuntary dismissal with prejudice.

APPEAL by plaintiffs from *Davis, James C., Judge.* Order entered 28 April 1986 in Superior Court, CABARRUS County. Heard in the Court of Appeals 10 March 1987.

This is a legal malpractice action wherein plaintiffs alleged acts of negligence by defendant attorney, imputed to defendant law firm to wit; defendant attorney improperly filed Uniform Commercial Code (U.C.C.) financing statements evidencing plaintiffs' security interest in certain equipment. The trial court, after hearing plaintiffs' evidence, granted defendants' motion for involuntary dismissal under Rule 41(b), N.C. Rules Civ. P. Plaintiffs appeal from this Order.

Progressive Sales, Inc. (Progressive), sold and distributed printing equipment and related goods. Defendant law firm was retained by Progressive in 1981 and 1982 to represent the company upon request in commercial transactions. Defendant Dan Alan Boone, admitted to the North Carolina Bar in 1980, was employed as an associate in defendant law firm from 1980 until August 1982.

On 3 July 1981, Jim Pate, Progressive's president and sole shareholder, delivered to Boone at the law firm's Kannapolis, North Carolina office one original U.C.C. financing statement. This financing statement, prepared by Pate, listed Progressive as the secured party and Bason Associates, Inc. (Bason Associates), of Graham, North Carolina, as debtor. Tom Bason signed for debtor, Bason Associates, as president. The financing statement covered several pieces of printing equipment as collateral. Progressive sold the equipment to Bason Associates on 26 June 1981 pursuant to a financing agreement. Pate requested that Boone file the financing statement in order to perfect Progressive's purchase money security interest in the equipment. Boone told Pate that a second U.C.C. financing statement had to be filed with the Register of Deeds in Alamance County where, according to Pate, Bason Associates had its only place of business. When asked by plaintiffs' counsel at trial why he did not file a carbon copy or photocopy of the original financing statement with the Alamance County Register of Deeds, Boone said that Pate assured him that Bason would sign another original. Pate did not deliver to Boone a security agreement evidencing the conditional sale upon which the financing statement was based. Despite repeated requests

from Boone and the law firm, Pate never delivered such security agreement.

On the same day he received it, 3 July 1981, Boone mailed the financing statement to the North Carolina Secretary of State for filing. The financing statement was filed there on 7 July 1981. Boone wrote to Bason on 6 July 1981 enclosing a second financing statement covering the same equipment as the first financing statement, and requesting Bason to sign and return the second statement. Bason never responded to Boone's letter. Boone contacted Pate several times regarding the need for Bason to sign the second financing statement. A second financing statement was eventually filed on 4 November 1981 with the Alamance County Register of Deeds.

On 26 September 1981, plaintiff Leasing Associates, Inc. (Leasing), was formed with Pate as president and sole shareholder. Boone prepared the articles of incorporation and conducted the initial directors meeting. Neither Boone nor defendant law firm performed any other legal services for Leasing until January of 1982.

In early November of 1981, Leasing, with a loan from Piedmont Bank and Trust Company, paid Progressive in full the amount owed to it by Bason Associates for the equipment Progressive sold to Bason Associates on 26 July 1981, the same equipment covered by the financing statements. Defendants did not represent either Progressive or Leasing in this transaction. On 16 November 1981, Leasing leased this same equipment back to Bason Associates. Defendants did not represent Leasing in this transaction either. The record does not reflect that defendants were aware of the transactions between Leasing and Progressive or between Leasing and Bason Associates.

Prior to the lease of 16 November 1981, and unknown to any of the parties, Bason Associates borrowed a sum of money from the Bank of Alamance and pledged as security for the loan all the equipment it had purchased from Progressive, the same equipment covered by the financing statements filed by Boone on behalf of Progressive. The Bank of Alamance, prior to the filing of Progressive's second financing statement with the Alamance County Register of Deeds, duly filed financing statements cover-

ing the equipment with both the Secretary of State and the Alamance County Register of Deeds.

In December of 1981, Bason Associates defaulted on its payments to Leasing under the lease. From January until August of 1982, Boone was engaged periodically by Leasing to attempt collection from Bason Associates, including the institution of actions against Bason Associates to collect on the lease. In August of 1982, Boone left defendant law firm's employment and took a position with another employer.

On 12 July 1982, Bank of Alamance filed an action against, *inter alia*, Bason Associates, Progressive and Leasing for damages and to establish the priority of its lien. On 28 September 1982, the Alamance County Superior Court entered an Order adjudging Bank of Alamance as the first priority lien holder of all of Bason Associate's property, including the equipment leased from Leasing. In 1983, plaintiffs Progressive and Leasing filed voluntary bankruptcy proceedings, and are now being liquidated pursuant to Chapter 7 of the United States Bankruptcy Code.

Plaintiffs instituted this action on 4 September 1984 seeking damages from defendants in excess of $10,000.00 due to Boone's failure to timely file a second financing statement with the Alamance County Register of Deeds. The parties waived a jury trial, and the trial court heard evidence from plaintiffs. Plaintiffs put on defendant Dan Boone, Jim Pate and Norma Pate, the wife of Jim Pate, as witnesses. The trial court granted defendants' motion for involuntary dismissal at the close of plaintiffs' evidence. From this judgment, plaintiffs appeal.

*Mullins & Van Hoy, by Michael P. Mullins, for plaintiff appellants.*

*Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour, for defendant appellees.*

JOHNSON, Judge.

Plaintiffs' record on appeal presents twenty-nine Assignments of Error essentially alleging that most of the findings of fact below are contrary to the evidence presented. Plaintiffs' brief contains arguments based on two of those Assignments of Error. Our review is limited to those two Assignments of Error. The re-

maining twenty-seven Assignments of Error not raised in the brief are deemed abandoned on appeal. Rule 28(b)(5), N.C. Rules App. P.

In general, plaintiffs argue that the trial court erred by allowing defendants' motion for involuntary dismissal after plaintiffs' evidence and dismissing the action with prejudice. Specifically, they argue that the trial court erred by finding that plaintiffs failed to put on any evidence of the applicable standard of care for attorneys in the same or similar community, and that the evidence was insufficient to show that defendant Boone lacked the requisite skill necessary to practice that other attorneys similarly situated possess. After reviewing the evidence from the trial below, we agree with the trial court's finding that plaintiffs failed to put on proper evidence of an applicable standard of care for attorneys similarly situated, and properly granted an involuntary dismissal to defendants with prejudice.

"When a motion to dismiss pursuant to 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him." *Dealers Specialties, Inc. v. Neighborhood Housing Services, Inc.*, 305 N.C. 633, 640, 291 S.E. 2d 137, 141 (1982). The trial judge in a non-jury case does not weigh the evidence in the light most favorable to the plaintiff as he does on a motion for directed verdict in a jury trial. *Id.* at 638, 291 S.E. 2d at 13. Dismissal with prejudice pursuant to a Rule 41(b) motion is a judgment on the merits, subject to the usual rules of *res judicata*. *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E. 2d 203, 205 (1974).

A plaintiff in a legal malpractice action must prove by a preponderance of the evidence that the attorney breached the duties owed to his client as set forth in *Hodges v. Carter*, 239 N.C. 517, 519, 80 S.E. 2d 144, 145-46 (1954), was thereby negligent, and that this negligence proximately caused damage to the plaintiff. *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E. 2d 355, 365-66 (1985). The duties from *Hodges, supra,* at 519, 80 S.E. 2d at 145-46, are as follows:

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the

> prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause. (Citations omitted.)

Plaintiffs did not offer at trial the testimony or affidavits of attorneys practicing commercial law in defendants' legal community. Rather, defendants' counsel at one point during trial said that attorneys in Cabarrus County do not usually file security agreements as financing statements as allowed under G.S. 9-402. In their brief before this Court plaintiffs argue that expert testimony is not required in a legal malpractice action. Plaintiffs cite language from *Rorrer, supra,* at 356, 329 S.E. 2d at 366, which says that "[e]xpert testimony is helpful [in legal malpractice actions] to establish what the standard of care as applied in the investigation and preparation of medical malpractice lawsuits requires and to establish whether the defendant-attorney's performance lived up to such a standard." Plaintiffs' citation from *Rorrer* is incomplete. While this language does not mandate that expert testimony be introduced in a medical malpractice action, the Court in *Rorrer, supra,* also stated that:

> The third prong of *Hodges* requires an attorney to represent his client with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. *The standard is that of members of the profession in the same or similar locality under similar circumstances.*

(Emphasis supplied.) Although *Rorrer* does not mandate introducing expert testimony in a legal malpractice action, that case does stress the need to establish the standard of care in the same or similar legal community. Plaintiffs in the case *sub judice* argue that there was sufficient evidence that Boone lacked the requisite degree of learning, skill, and ability that other attorneys similarly situated possess. The evidence at trial is clear as to what Boone did and did not do. What is not clear is the standard by which Boone's acts and omissions are to be weighed. That is the purpose of putting on evidence as to the standard of care in a malpractice lawsuit; to see if this defendant's actions "lived up" to that standard. *Rorrer, supra.* In *Rorrer,* upon which plaintiffs rely, the Court held that the affidavit of an attorney offered by the plaintiff to show the applicable standard of care failed to state affirmatively what the standard of care required the defendant attorney

to do, but was merely an opinion as to the importance of having more than one medical witness in a medical malpractice action. In the case *sub judice*, there is not so much as an affidavit from another attorney. Without any evidence as to the standard of care, plaintiffs failed to get past the first prong of the *Rorrer* test. Accordingly, this Court need not address plaintiffs' other contentions. The judgment appealed from granting defendants' motion for involuntary dismissal with prejudice is

Affirmed.

Judges EAGLES and ORR concur.

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IN THE MATTER OF: JAMES MILTON DEVONE, JR., DOB 9/21/68 AND JAMES MILTONO DEVONE, DOB 4/7/71

No. 8614DC1182

(Filed 2 June 1987)

**1. Parent and Child § 2.3— neglected child—educable child not receiving remedial care through public school**

Evidence was sufficient to support the trial court's findings of fact and conclusions of law that a child was a neglected and dependent juvenile where it tended to show that the child was of limited intelligence but educable; it was in his best interest to receive the remedial care offered by the public school's special education classes; respondent father prevented the child from receiving it by keeping him out of public school and by insisting on teaching the child himself; and the father virtually isolated the child from the outside world, thus preventing him from developing normal social and independent living skills.

**2. Parent and Child § 2.3— neglected child—custody properly placed in DSS**

The trial court did not err in granting legal custody of a child to DSS where the court properly concluded that the child had not received proper care and supervision and that steps needed to be taken to obtain necessary benefits which the child was entitled to receive.

**3. Parent and Child § 2.3— neglected child—child's return to public school—order proper**

The trial court did not err in ordering that a child, whom it determined to be neglected and dependent, return to public school, since the child's special educational needs could not be met by respondent in his home school, though it met all the statutory criteria for non-public schools, but could be met in special education classes in the public school.

APPEAL by respondent from *Hudson, Judge.* Order entered 5 August 1986 in District Court, DURHAM County. Heard in the Court of Appeals 12 March 1987.

This is a juvenile proceeding in which respondent contests the finding that his two sons are neglected and dependent. We affirm the finding of the trial court.

Respondent, James Milton Devone, Sr., is the father of James Milton Devone, Jr. (Jimmy) and James Miltono Devone (Jamie).

On 3 December 1985, petitioner, Durham County Department of Social Services (DSS), filed a petition which alleged that the boys were neglected and dependent under N.C.G.S. § 7A-517. The district court found them neglected and dependent, ordered psychological and vocational evaluations of both boys, and ordered their father to cooperate with these evaluations.

The evaluations were conducted and established the following:

Jimmy, 17 at the time of the evaluation, had an IQ of 82, which placed him in the borderline range of intelligence. A psychologist found him extremely insecure socially and very dependent on his father. It was recommended that he receive vocational training outside the home.

Jamie, 15 at the time of the evaluation, had an IQ of 41, which placed him in the moderate range of mental retardation and classifies him as educable, but emotionally handicapped. A psychologist recommended a special educational program for him individualized to his strengths and weaknesses and recommended that he return to public school.

The evaluations found that both boys had extremely underdeveloped social skills, primarily because they lack contact with the outside world. One psychologist felt that they would develop major psychological disorders if they did not receive additional stimulation outside the home. He also felt that they did not have the necessary survival skills for life.

After the evaluations were completed, a full hearing on the merits was held and the boys were again found neglected and dependent. The court based its decisions on the psychological and vocational evaluations previously conducted and evidence in regard to the boys' living conditions. Testimony was given by the boys' grandmother that the father was overly protective and allowed them very little contact with the outside world. Further-

more, the father had taken them out of public school and since 1985 had taught them himself in the home at his School of Universal Studies and Understanding (SUSU).

The court granted legal custody of the boys to DSS, ordered that Jimmy be enrolled in a sheltered workshop program until his eighteenth birthday and ordered Jamie enrolled in emotionally handicapped and educably mentally handicapped classes in the public schools. From this order, respondent appeals.

*Daniel F. Read, attorney for James Milton Devone, Sr., respondent-appellant.*

*Assistant County Attorney James W. Swindell, for Durham County Department of Social Services, petitioner-appellee.*

*N. Joanne Foil, attorney for Chris Felder, guardian ad litem-appellee.*

ORR, Judge.

N.C.G.S. § 7A-524 provides that the jurisdiction of the district court over a juvenile continues until the juvenile reaches his eighteenth birthday. *In re Stedman*, 305 N.C. 92, 286 S.E. 2d 527 (1982). Jimmy Devone reached his eighteenth birthday on 21 September 1986, while this appeal was pending. Therefore, the court's order no longer applies to him and this opinion will only address respondent's arguments as they concern Jamie Devone.

I.

[1] Respondent first argues that the trial court erred in finding his son neglected and dependent. We disagree.

N.C.G.S. § 7A-517(21) defines "neglected juvenile" as:

> A juvenile who does not receive proper care, supervision, or discipline from his parent . . . or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare . . . .

N.C.G.S. § 7A-517(13) defines "dependent juvenile" as "A juvenile in need of assistance . . . whose parent . . . is unable to provide for his care or supervision."

There is substantial competent evidence in the record to support the trial court's findings of fact and conclusions of law that Jamie was a neglected and dependent juvenile under N.C.G.S. Chapter 7A.

Although Jamie is a child of limited intelligence, he is entitled to an education which will help him reach his fullest potential. "It is fundamental that a child who receives proper care and supervision in modern times is provided a basic education. A child does not receive 'proper care' and lives in an 'environment injurious to his welfare' when he is deliberately refused this education, and he is 'neglected' within the meaning of G.S. 7A-278(4) [revised and currently G.S. 7A-517(21)]." *In re McMillan*, 30 N.C. App. 235, 238, 226 S.E. 2d 693, 695 (1976).

Because of his special needs, it is in Jamie's best interest that he receive the remedial care offered by the public school's special education classes. Such instruction is critical if he is to receive a "basic education." Although this remedial care is readily available to Jamie, respondent has prevented him from receiving it by keeping him out of public school and by insisting on teaching Jamie himself. Evidence that Jamie is being denied the remedial care he needs is sufficient proof to constitute neglect and a lack of proper care. A parent's insistence on attempting to teach a mentally retarded child constitutes neglect, if it denies that child the right to attend special education classes critical to the child's development and welfare.

In *In re Huber*, 57 N.C. App. 453, 291 S.E. 2d 916, *appeal dismissed and disc. rev. denied*, 306 N.C. 557, 294 S.E. 2d 223 (1982), this Court found a child neglected within the meaning of N.C.G.S. § 7A-517(21), where he had a severe speech defect which was treatable, but his mother refused to allow him to receive the necessary medical and remedial care that would allow him to develop to his full educational and emotional potential. "To deprive a child of the opportunity for normal growth and development is perhaps the greatest neglect a parent can impose upon a child." *Id.* at 458, 291 S.E. 2d at 919.

Finally, the conclusion that Jamie is neglected is supported by findings showing the virtual isolation from the outside world imposed upon him by his father. This isolation has prevented Jamie from developing normal social and independent living

skills. The evidence shows that before his father withdrew him from public school, Jamie was beginning to make progress socially by interaction with his peers. It is, therefore, important to Jamie's welfare that he be in school and associate with his peers in order to improve his social and independent living skills.

II.

[2] Respondent argues that the trial court erred in granting legal custody of Jamie to DSS. We disagree.

Under N.C.G.S. § 7A-647(2)c., once a minor is adjudicated neglected, a judge has the authority to place the child in the custody of DSS. "[T]he natural and legal right of parents to the custody, companionship, control and bringing up of their children is not absolute. It may be interfered with or denied for substantial and sufficient reason, and it is subject to judicial control when the interest and welfare of the children require it." *In re McMillan*, 30 N.C. App. at 238, 226 S.E. 2d at 695. Judicial intervention is authorized because the welfare and best interest of the child is always treated as the paramount consideration. *In re Cusson*, 43 N.C. App. 333, 337, 258 S.E. 2d 858, 861 (1979).

In the case *sub judice*, the trial court concluded that Jamie had not received proper care and supervision and that steps needed to be taken to obtain necessary benefits that Jamie was entitled to receive. These conclusions and findings of fact were supported by the evidence and justify the trial court's conclusion that DSS should have legal custody of the child.

III.

[3] Respondent argues that the court erred in ordering Jamie to return to public school. We disagree.

Respondent contends that he has a fundamental right in determining how to educate Jamie and the State has no authority to interfere with that right. Since SUSU meets all the statutory criteria for non-public schools, he argues that he can provide Jamie with a basic education and that he can meet whatever special needs Jamie has.

The court's order, however, was designed only to meet Jamie's special needs and was not an attempt to interfere with respondent's right to educate his own child. Jamie's special educa-

tional needs cannot be met by respondent at SUSU. Although SUSU meets all the statutory criteria for non-public schools, only the public schools in this case have the special training in teaching educationally or emotionally handicapped children that Jamie needs.

The court's order required that Jamie return to public school and that he enroll in special education classes. The emotionally handicapped class was intended to meet his emotional problems, while the educably mentally handicapped class was to address his delusional association and social retardation problems. These classes are designed to address Jamie's psychological and social needs which have not been met by respondent, and which are beyond the reach of anything he can provide for him at SUSU. Jamie was enrolled in these classes and was making progress in both of them before his father removed him from public school.

IV.

Respondent's remaining arguments concern the trial court's other findings of fact. He argues that several of the findings were improper, while others were not supported by competent evidence in the record. Having reviewed the record, we find that all of the findings of fact were properly made and were adequately supported by competent evidence in the record.

For the reasons stated above, we affirm the decision of the trial court.

Affirmed.

Judges JOHNSON and EAGLES concur.

DONALD R. BROWN, D/B/A BROWN'S ROOFING & REMODELING v. BESSIE D. MIDDLETON

No. 8622DC1142

(Filed 2 June 1987)

**Laborers' and Materialmen's Liens § 6— date of last furnishing of materials—no amendment to allege later date**

Where plaintiff's claim of lien, which was filed on 11/27/85, stated that the date of first furnishing of labor and materials was 9/28/84 and the date of last furnishing was 7/16/85, there was no obvious error in the claim of lien, and the trial court was correct in refusing to allow plaintiff to amend his claim of lien to state 8/16/85 as the date of last furnishing.

APPEAL by plaintiff from *Cathey, Judge.* Judgment entered 28 August 1986 in District Court, DAVIDSON County. Heard in the Court of Appeals 12 March 1987.

This is a civil action instituted by plaintiff, Donald Brown, against defendant, Bessie Middleton, for money owed and to enforce a lien against defendant's real property.

Defendant employed plaintiff to do remodeling work to a building owned by plaintiff in Lexington, North Carolina. On 27 November 1985, plaintiff, pursuant to G.S. 44A-12, filed a Claim of Lien. The Claim of Lien filed by plaintiff stated that labor and materials were last furnished upon plaintiff's property on "7/16/85."

On 14 January 1986, plaintiff filed a complaint alleging, in pertinent part, the following:

> 4. The first materials and labor were furnished to the property on September 28, 1984, and the defendant [sic] thereafter from time to time furnished other labor and materials to the property, with the last material being furnished on August 16, 1985; and on November 27, 1985 the plaintiff filed a Claim of Lien in the Office of the Clerk of Superior Court of Davidson County, and this action is brought to recover the amount due the plaintiff and to enforce the lien created by G.S. 44A-7, et seq.

In his prayer for relief, plaintiff requested that he be granted judgment for $10,131.43; that said amount constitute a lien

against the real property of defendant; and that the property be sold to satisfy the judgment.

On 11 March 1986, defendant answered plaintiff's complaint. Defendant, in her answer, denied any indebtedness to plaintiff, made a motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted, and as a third defense alleged the following:

> THIRD DEFENSE
>
> The claim of lien filed by the plaintiff, in the Office of the Clerk of Superior Court of Davidson County against the property described in the complaint was not filed within 120 days after the last furnishing of labor or materials as required by N.C.G.S. 44A-12(b), and the lien is void.

On 20 June 1986, defendant filed a motion for cancellation of plaintiff's Claim of Lien. On 23 June 1986, defendant filed a notice that her motion would be heard by the trial court on 17 July 1986. Attached to defendant's Notice of Motion was a copy of plaintiff's Claim of Lien.

On the date set for defendant's motion to be heard, plaintiff filed a "Response to Motion" to correct error, wherein plaintiff stated that there was no legal authority for defendant's motion; and that plaintiff should be allowed to change the obvious scrivener's error in the 16 July 1985 date stated in his Claim of Lien to 16 August 1985, the alleged date materials and labor were last furnished. Plaintiff, also on 17 July 1986, filed an affidavit by him stating among other things that his Claim of Lien against defendant's property contained a typographical error.

In an order entered 28 August 1986, the trial court found as fact that "[t]he claim of lien was not filed by plaintiff within 120 days after the last furnishing of labor or materials stated in the Claim of Lien as required by N.C.G.S. 44A-12(b)." The trial court further found that there was no obvious scrivener's error in plaintiff's Claim of Lien. Based on its findings the trial court concluded as a matter of law that plaintiff was not entitled to amend or change his Claim of Lien; and that plaintiff's Claim of Lien was void. The trial court ordered the Clerk of Superior Court of Davidson County to cancel the Claim of Lien filed by plaintiff. Plaintiff appeals.

*Brinkley, Walser, McGirt, Miller, Smith & Coles by Charles H. McGirt and Stephen W. Coles, for plaintiff appellant.*

*Stoner, Bowers and Gray, P.A., by Carl W. Gray, for defendant appellee.*

JOHNSON, Judge.

The only question plaintiff presents to us for our review is whether the trial court erred in cancelling his Claim of Lien that was filed more than 120 days after the date stated as the last date materials were furnished. Plaintiff argues that the date, "7/16/85," stated in plaintiff's Claim of Lien was an obvious scrivener's error. We disagree.

Preliminarily, we dispose of plaintiff's clearly erroneous contention that G.S. 44A-12 "does not require that the claimant set forth the date materials or labor were last furnished." G.S. 44A-12(b) requires that all claims of lien be filed "not later than 120 days after the last furnishing of labor or materials at the site of improvement by the person claiming the lien." Moreover, contrary to plaintiff's contention, G.S. 44A-12(c)(5a) requires that included within the contents of a claim of lien must be the "[d]ate upon which labor or materials were last furnished upon said property by the claimant."

Plaintiff's Claim of Lien, in pertinent part, stated the following:

> 5. Date upon which labor or materials were first furnished upon said property by the claimant: 9/28/84
>
> 5(a). Date upon which labor or materials were last furnished upon said property by the claimant: 7/16/85. . . .
>
> Filed this 27th day of November, 1985.

The court surmised from plaintiff's Claim of Lien, as would any innocent third party, that plaintiff's Claim of Lien was filed more than 120 days after the "7/16/85" last date of furnishing labor and materials to the site of improvement. Therefore, plaintiff's Claim of Lien, on its face, would not be interpreted by any innocent third-party purchasers or title examiners as a valid claim of lien filed in accordance with G.S. 44A-12(b).

Plaintiff contends that the "7/16/85" date stated in his Claim of Lien is a typographical error and that "[t]he defendant-owner should not be allowed to take advantage of a typographical error in the claim of lien, especially since the information mistakenly provided is not even required by the statute." We hold that there was no obvious error in plaintiff's Claim of Lien and further hold that the trial court was correct in refusing to allow plaintiff to amend his Claim of Lien, G.S. 44A-12(d).

G.S. 44A-12(d) states unequivocally "[a] claim of lien may not be amended. . . ." This Court in *Strickland v. General Building & Masonry Contractors, Inc.*, 22 N.C. App. 729, 207 S.E. 2d 399 (1974), held as invalid a lien that revealed on its face that it was filed more than 120 days after stonework was last furnished by plaintiff to the site of improvement. In *Strickland*, the plaintiff filed his Claim of Lien on 27 July 1973. Plaintiff's Claim of Lien stated 28 March 1973 (121 days after the filing date, 27 July 1973) as the date of last furnishing materials to the site of improvement. On 4 October 1973 the plaintiff moved to amend his complaint to allege that the work was completed on 3 April 1973 rather than 28 March 1973. The defendant in *Strickland* moved the trial court to cancel and remove the plaintiff's Claim of Lien for plaintiff's failure to meet the 120 day requirement of G.S. 44A-12(b). The trial court allowed the plaintiff's motion to amend his complaint. This Court reversed the trial court's decision to allow plaintiff's motion to amend and stated the following:

> Thus all potential purchasers or lenders interested in the subject property and relying on the public record would be advised that the claim of lien had not been filed in accordance with the statute, and was not enforceable against the property. To require the title examiner to go outside the public record to discover that the stonework was in fact—as plaintiff claims—completed less than 120 days prior to the filing would in our opinion impose an undue burden on the title examiner and would damage the principle of reliance upon the public record.

*Strickland, supra,* at 732, 207 S.E. 2d at 400-01.

The law in this area was reviewed by the North Carolina Supreme Court in the case of *Canady v. Creech*, 288 N.C. 354, 218 S.E. 2d 383 (1975). In *Canady*, the Court determined that the

plaintiff's Claim of Lien was not defective because there was an *obvious* scrivener's error which could not mislead anyone. *Id.* at 358, 218 S.E. 2d at 385. The plaintiff in *Canady* filed his lien on 8 October 1973, but stated in his Claim of Lien that he first furnished his materials on or about 4 December 1973. The Court in *Canady* stated its basis for deciding that the error was obvious as follows:

> This is so because one whose interest in the property arose after the date this claim of lien was filed would be on notice not only that the stated date of first furnishing was obviously error but also that the first furnishing of labor and materials must have antedated the filing of the claim itself. The lien could then without prejudice be given effect at least as of the date of the first filing.

*Id.* at 356, 218 S.E. 2d at 385.

Subsequent to the *Canady* decision this Court in *Beach & Adams Builders, Inc. v. The Northwestern Bank*, 28 N.C. App. 80, 220 S.E. 2d 414 (1975), ruled that the plaintiff was bound by its statement in its Claim of Lien that materials and labor were last furnished on 16 November 1972 and could not amend that date to 12 December 1972 where there was nothing on the face of the Claim of Lien to indicate that the date in question was erroneous. This Court in *Beach & Adams Builders, Inc., supra,* reasoned and held as follows:

> Thus we hold that this case is governed by our previous decision in *Strickland v. Contractors, Inc.*, 22 N.C. App. 729, 207 S.E. 2d 399 (1974) and distinguishable from the recent Supreme Court decision in *Canady.* In *Strickland,* we wrote that '. . . a lien is lost if the steps required to perfect it are not taken in the same manner and within the time prescribed.' *Strickland,* at p. 731. We further held in *Strickland* that to force the examiner to go outside the record as filed would '. . . impose an undue burden on the title examiner, and would damage the principle of reliance upon the public record.' *Id.* at 732. *We believe these principles remain sound in North Carolina after Canady, but for those rare instances in which an examiner should be able to detect errors which on the face of the record seem incongruous, obvious, self-apparent and easily reconcilable.*

*Beach & Adams Builders, Inc., supra,* at 84, 220 S.E. 2d at 416 (emphasis supplied). We note that *Beach & Adams Builders, Inc., Canady,* and *Strickland,* were decided prior to the General Assembly's amendment to G.S. 44A-12, whereby subsection 5(c) was added to *require* that all claims of lien state the date upon which labor or materials were last furnished.

In the case *sub judice,* the discrepancy of one month between the stated date of last furnishing and the date plaintiff now alleges is almost exactly the same as the difference in the dates found in *Beach & Adams Builders, Inc., supra.* We find nothing incongruous, obvious, self-apparent, or easily reconcilable about the alleged "typographical error" in plaintiff's Claim of Lien. The "7/16/85" date stated in plaintiff's Claim of Lien is as realistic and as logical a date for an innocent third-party purchaser or title examiner to rely upon as the 16 August 1985 date of last furnishing which plaintiff seeks an amendment to.

The trial court was correct in concluding that plaintiff was not entitled to amend or change the date of last furnishing stated in his Claim of Lien. Plaintiff's Claim of Lien was filed more than 120 days after the last date of furnishing, was void, G.S. 44A-12(b), and should have been canceled. Accordingly, the trial court's judgment is

Affirmed.

Judges EAGLES and ORR concur.

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BRENDA STEWART AND LONNIE L. STEWART v. JAMES ALLISON AND HAROLD BRADLEY

No. *8630SC1205*

(Filed 2 June 1987)

**Negligence § 22— water falling from dump truck onto road—ice on road—damage to plaintiff driver—sufficiency of complaint to allege negligence**

Plaintiffs' complaint was sufficient to allege negligence by defendants and to withstand defendants' motion to dismiss where plaintiff alleged that defendants were negligent in allowing rainwater to collect in the bed of a dump truck, driving the truck on a highway, and allowing the water to be dumped or spilled on the highway where it soon turned to ice due to freezing tempera-

tures; plaintiff's car slid on the patch of ice and struck a tree, resulting in the total destruction of the car and great bodily injury to plaintiff; and defendants knew or should have known that the water was in the truck, that spillage would create an icy, dangerous condition, and that the dangerous condition could cause injury to any motorist.

APPEAL by plaintiffs from *Lamm, Judge.* Judgment signed on 20 August 1986 and filed 28 August 1986 in Superior Court, GRAHAM County. Heard in the Court of Appeals 7 April 1987.

*McKeever, Edwards, Davis & Hays by Zeyland G. McKinney, Jr., for plaintiff appellants.*

*Robert G. McClure, Jr.; and Roberts, Stevens & Cogburn by Glenn S. Gentry for defendant appellees.*

COZORT, Judge.

Plaintiffs brought this action alleging defendants were negligent in allowing rainwater to collect in the bed of a dump truck, driving the truck on a highway, and allowing the water to be dumped or spilled on the highway where it soon turned to ice due to freezing temperatures. The plaintiffs' auto slid on the patch of ice and struck a tree, resulting in the total destruction of the auto and great bodily injury to the driver. The trial court granted defendants' motion to dismiss for failure to state a claim upon which relief can be granted, and plaintiffs appeal. We reverse.

The sole issue on appeal is whether the complaint alleges such conduct by the defendants as to constitute negligence and withstand defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6).

> 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.

*Fox v. Wilson,* 85 N.C. App. 292, 298, 354 S.E. 2d 737, 741 (1987).

Plaintiffs' amended complaint sets out the following allegations:

3. On December 3, 1985 the temperature outside was below freezing and the roads in Graham County, including Rural Paved Road 1127, were dry—there having been no rain or snow during the previous 24 hours.

4. The Plaintiffs are advised, informed and believe that on December 3, 1985, at some time prior to 8:55 A.M., the Defendant, Harold Bradley, was the owner of a 1985 GMC dump truck bearing North Carolina License Plate No. AA-1005 which at the times hereinafter stated was being driven by the Defendant, James Allison, who was an agent or employee of Harold Bradley and who was operating the dump truck with the full authority, consent, knowledge and permission of said owner and within the course and scope of his employment.

5. The Plaintiffs are advised, informed and believe that at some time prior to 8:55 A.M. on the morning of December 3, 1985, the Defendants left the bed to the aforesaid dump truck down during a rainstorm, allowing water to collect in the bed of the dump truck; that the Defendants knew or should have known that the dump truck bed had water in it from the rainstorm; that in the early morning hours prior to 8:55 A.M. on December 3, 1985, the Defendant, James Allison, operated the dump truck along Rural Paved Road 1127 about two miles west of the Town of Robbinsville and dumped and spilled water from the dump truck onto the paved main-traveled portion of the roadway.

6. The Plaintiffs are advised, informed and believe that when the water from the dump truck hit the pavement it soon turned to ice due to the freezing temperatures on said date.

7. On the 3rd day of December, 1985 the Plaintiff, Brenda Stewart, was operating a 1978 Oldsmobile car owned by the Plaintiff, Lonnie L. Stewart, on Rural Paved Road 1127 about two miles west of the town limits of Robbinsville, North Carolina, within the posted speed limits in a careful and prudent manner, when her car slid on the patch of ice which had formed from the water dumped and spilled from the dump truck operated by the Defendant Allison and owned by the Defendant Bradley.

8. After the Oldsmobile car slid on the ice, it skidded a long distance and eventually struck a tree resulting in the total destruction of the car and resulting in great bodily injury to the Plaintiff, Brenda Stewart.

* * * *

12. On the occasions set out above the Defendants were negligent in that:

(1) They left the bed to the aforesaid dump truck down during a rainstorm and allowed water to collect in the bed and did not take proper precautions to dispose of the water during the freezing weather before again operating the truck on the roadway; that the Defendants knew or should have known that the dump truck had water in it at the time they pulled out onto Rural Paved Road 1127 on the morning of December 3, 1985.

(2) The Defendant Bradley's agent, James Allison, knew or reasonably should have known that the temperature outside on the morning of December 3, 1985 was below freezing and that dumping and spilling water from the dump truck onto the highway would create a dangerous icy condition which was not known to or readily discoverable by the Plaintiff, Brenda Stewart, and other people operating cars on Rural Paved Road 1127 on December 3, 1985.

(3) That the Defendant Bradley's agent, James Allison, knew or reasonably should have known that such dangerous icy condition would cause injury to the Plaintiff, Brenda Stewart, and to other people operating cars on Rural Paved Road 1127 on December 3, 1985.

13. The negligence of the Defendant, James Allison, is imputed to the Defendant, Harold Bradley pursuant to the law of agency and the doctrine of Respondeat Superior.

The law imposes on every person in an active course of conduct the positive duty to use ordinary care to protect others from harm; it is negligence to violate this duty. *Toone v. Adams*, 262 N.C. 403, 409, 137 S.E. 2d 132, 136 (1964). It is immaterial whether the person is acting on his own or in the employment or under contract with another. *Id.* The now-famous opinion in *Sutton v.*

*Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), describes negligence as follows:

> In this jurisdiction, to warrant a finding that negligence, not amounting to a wilful or wanton wrong, was a proximate cause of an injury, it must appear that the tort-feasor should have reasonably foreseen that injurious consequences were likely to follow from his negligent conduct. . . . It is not necessary that a defendant anticipate the particular consequences which ultimately result from his negligence. It is required only "that a person of ordinary prudence could have reasonably foreseen that such a result, *or some similar injurious result*, was probable under the facts as they existed." . . . However, we have also said that a defendant is liable for the consequences of his negligence if he "might have foreseen that some injury would result from his act or omission or that *consequences of a generally injurious nature* might have been expected." [Emphasis in original.]

*Id.* at 107, 176 S.E. 2d at 168-69 (citations omitted).

Upon review of the allegations in the plaintiffs' complaint, we hold that plaintiffs have alleged actionable negligence by defendants. Defendants have a duty in their operation of the dump truck to use ordinary care to protect others from harm. If plaintiffs offer evidence that defendants knew or should have known that water had collected in the truck, that defendants took no precautions to keep that water from spilling onto an otherwise dry road during subfreezing temperatures, and that the water created a patch of ice which was the proximate cause of plaintiff's injury, then the evidence would be sufficient to support a jury finding of negligence. It is foreseeable that the dumping of water on an otherwise dry pavement in subfreezing temperatures would cause a hazardous condition for an unsuspecting motorist. Plaintiffs' allegations sufficiently allege duty of ordinary care, violation of the duty of care, foreseeability of injurious consequences, and proximate cause of injuries. The face of the amended complaint shows no insurmountable bar to recovery.

The order to dismiss the complaint is reversed and the case remanded for further proceedings.

Reversed and remanded.

Judges PHILLIPS and GREENE concur.

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WILLIAM KELLY, EMPLOYEE-PLAINTIFF v. CAROLINA COMPONENTS, EMPLOYER-DEFENDANT, SELF-INSURED

No. 8610IC1247

(Filed 2 June 1987)

1. **Master and Servant § 93.3— workers' compensation—expert testimony—form of hypothetical question**

There was no merit to defendant's contention that a hypothetical question posed to a medical expert was improper because it did not include any reference to plaintiff's employment with another employer subsequent to plaintiff's employment with defendant but prior to the witness's treatment of plaintiff's back, though the question did not include a specific reference to plaintiff's subsequent employment, since it did cover or encompass the time span related to that employment and so contained sufficient elements of reliability so as to enable the witness to relate plaintiff's back problems to his injury which he suffered while working for defendant.

2. **Master and Servant § 55.1— workers' compensation—"specific traumatic incident"—immediate onset of pain not required**

It is not required that the plaintiff in a workers' compensation case offer evidence of an immediate onset of pain in order to support a finding of a "specific traumatic incident"; however, in this case plaintiff did testify that he experienced pain and pressure at the time of the incident, and such testimony was sufficient to support the Commission's finding that plaintiff suffered an injury to his back arising out of and in the course of his employment with defendant which was the direct result of a specific traumatic incident.

APPEAL by defendant from the North Carolina Industrial Commission. Opinion and award entered 28 July 1986. Heard in the Court of Appeals 6 May 1987.

Plaintiff, employed by defendant as an exterior door assembly man, was attempting to move a door from an overhead rack on 2 January 1985 when he felt pressure and pain in his neck. The next morning plaintiff could not turn his head from side to side and he later began to experience stiffness in his back. Plaintiff eventually sought medical treatment and was diagnosed as having a possible herniated disc, later undergoing a lumbar laminectomy and discentomy.

Following the filing of plaintiff's claim for workers' compensation, a hearing before Deputy Commissioner Becton resulted in an award of compensation for temporary total disability and permanent partial disability of the back. Upon appeal, the Full Commission adopted and confirmed the opinion and award. Defendant then appealed to this Court.

*Jernigan & Maxfield, by Leonard T. Jernigan, Jr., for plaintiff-appellee.*

*Hedrick, Eatman, Gardner & Kincheloe, by Thomas E. Williams and John Brem Smith, for defendant-appellant.*

WELLS, Judge.

Defendant raises questions as to admission of evidence, findings of fact, and conclusions of law. We overrule all of defendant's arguments and affirm the Commissioner's award.

[1] In one argument, defendant contends that the Commission erred in failing to sustain defendant's objections to a hypothetical question asked of plaintiff's medical witness, Dr. David Fajgenbaum, who treated plaintiff for his herniated disc. The objected-to question was as follows:

> Q. Doctor, if the Industrial Commission should find by the greater weight of the evidence that in early January 1985 Mr. Kelly was on a ladder and was attempting to slide a 80 to 100 pound door off a shelf and in so doing had the weight of the door on his head, and that he had his left leg below his right leg on a ladder, that he felt the door was too heavy for him to handle but could not put the door back because he had pulled it out too far; that he twisted as he moved the door down the steps and that he felt pressure in the neck area; that the next morning he had stiffness in his neck and eventually had pain in his lower back which progressively got worse until March of 1985 when he sought medical attention for his back pain; and that he had had no back problems prior to January of 1985 and sustained no injury to his back between January and March of 1985 other than this ladder door incident. Based on that hypothetical, do you have an opinion satisfactory to yourself and to a reasonable degree of medical probability as to whether or not the herniated disc you've

diagnosed was proximately caused by Mr. Kelly's activities in removing the door in early January of 1985?

Defendant contends its objection should have been sustained because the question, as stated, did not include any reference to plaintiff's employment with another employer subsequent to plaintiff's employment with defendant but prior to Dr. Fajgenbaum's treatment of plaintiff's back. The evidence before the Commission showed that plaintiff was injured while working for defendant on 2 January 1985, was terminated by defendant on 7 March 1985, began employment with another employer soon thereafter, and sought medical advice and treatment from Dr. Fajgenbaum on 22 March 1985. Relying on the opinion of our Supreme Court in *Dean v. Coach Co.*, 287 N.C. 515, 215 S.E. 2d 89 (1975), defendant contends that the objected-to question omitted references to plaintiff's subsequent employment, a fact which goes to the essence of plaintiff's claim, and therefore presented a state of facts so incomplete that an opinion based on it would be obviously unreliable and therefore inadmissible. We disagree. While the question as stated to Dr. Fajgenbaum did not include a specific reference to plaintiff's subsequent employment, it did cover or encompass the time span related to that employment and so contained sufficient elements of reliability in that respect so as to enable Dr. Fajgenbaum to relate plaintiff's back problems to his injury in January. This argument is rejected.

**[2]** In another argument, defendant contends that the Commission erred in finding and concluding that plaintiff suffered an injury to his back arising out of and in the course of his employment with defendant that was the direct result of a specific traumatic incident of the work assigned. The applicable statute is N.C. Gen. Stat. § 97-2(6) (1983), which provides in pertinent part that:

> '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 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.

In this respect, the Commission made the following pertinent findings of fact:

> 2. In January 1985 he was employed by the defendant-employer as an exterior door assembly man. During the first week following the plaintiff's return after the New Year Holiday, the plaintiff was attempting to get an exterior door down from the rack where it was stored some 18 to 20 feet from the ground. The plaintiff climbed a ladder, reached for the door, and placed it upon his head with his hands holding the sides. When he discovered that the door was heavier than he had anticipated, he tried to replace the door on the rack but could not do so. He then began to descend the ladder with the door balanced on his head. While climbing down the ladder, he felt pressure and pain in his neck as a result of the weight of the door balanced on his head.
>
> When he reached ground level, he took a brief break but continued to work the remainder of the day.
>
> 3. The pain the plaintiff experienced in his back was the result of a specific traumatic incident of the work assigned.
>
> 4. The next morning the plaintiff noticed that he could not turn his head from side to side. From then on his condition began to deteriorate. His back began to bother him and he noticed that he had trouble straightening up from a bent position. He tried over the counter medications in an attempt to alleviate his discomfort.

Based on these findings, the Commission concluded that:

> 1. During the first week of January, 1985, the plaintiff sustained an injury to his back that arose out of and occurred in the course of his employment and was the direct result of a specific traumatic incident of the work assigned. G.S. 97-2(6).

Defendant appears to contend that the statute requires evidence of an *immediate* onset of pain in order to support a finding of a "specific traumatic incident" and contends that the evidence shows that plaintiff began to experience pain after the incident. While we decline to give the statute so narrow a construction, plaintiff clearly testified at one point that he experienced pain

and pressure at the time of the incident, and we therefore reject this argument. *Compare Bradley v. Sportswear, Inc.*, 77 N.C. App. 450, 335 S.E. 2d 52 (1985) (distinguishing gradual development of injury to specific incident).

Defendant next argues that if plaintiff had a specific traumatic incident, it did not arise out of work assigned. The evidence adduced at the hearing clearly was sufficient to support the Commission's finding in this respect and we therefore reject this argument as being without merit.

Defendant also contends that plaintiff was not entitled to compensation based on his 2 January injury because he did not become disabled until March, following a period of employment with a subsequent employer. The evidence at the hearing was that plaintiff had experienced no other injury to his back intervening between the 2 January injury and the onset of his disability, and that the 2 January injury caused his disability; nor was there any evidence that plaintiff's subsequent work or activities aggravated his injury. This argument is therefore rejected.

For the reasons given, the opinion and award of the Commission is

Affirmed.

Judges ARNOLD and ORR concur.

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ROBERT HARRINGTON, EMPLOYEE, PLAINTIFF v. PAIT LOGGING COMPANY/ GEORGIA PACIFIC, EMPLOYER; SELF INSURER (HEWITT COLEMAN ASSOCIATES), DEFENDANT

No. 8610IC906

(Filed 2 June 1987)

**Master and Servant § 69— workers' compensation—back injury—partial or total disability**

The Industrial Commission erred in determining that plaintiff's disability resulting from a back injury was covered by N.C.G.S. § 97-31 and that plaintiff therefore could not be compensated pursuant to N.C.G.S. § 97-29 for permanent total disability.

APPEAL by plaintiff from the opinion and award of the Industrial Commission filed 21 April 1986. Heard in the Court of Appeals 6 April 1987.

This claim for workers' compensation benefits arises out of an accident that occurred on 2 April 1984. Plaintiff was employed by defendant Pait Logging Company to cut logs with a chain saw. While cutting logs, plaintiff sustained an injury by accident when a tree limb fell against his lower back, knocking him down, injuring his spine and fracturing his left ankle.

At the time of the hearing before the deputy commissioner plaintiff was 57 years old and the father of six children. The deputy commissioner found as fact that plaintiff could not read or write and signed his name with an "X." Plaintiff began working on a farm with his father when he was eight years old. He farmed until he was 18 years old and then began working in a sawmill handling lumber. Plaintiff's subsequent jobs included packing tobacco in a factory, cutting rights-of-way for power lines and farming. At approximately age 40 the plaintiff began working in the logging industry. As of 2 April 1984, the date of the accident, plaintiff had been working for defendant for approximately eight years.

Prior to the accident plaintiff's only physical problem was a cataract in his right eye. Dr. G. T. Hamilton surgically repaired plaintiff's left ankle (a badly displaced lateral malleolar fracture) and gave him a lumbar corset for his back injury. When the plaintiff demonstrated "profound right leg weakness and foot drop" on 27 July 1984, Dr. Hamilton ordered several diagnostic studies. Dr. E. C. Bartlett performed a "myelogram and a spinal stenosis involving nerve roots, practicularly [sic] L4 to the right side of his leg." When Dr. Bartlett saw plaintiff on 25 July 1985 plaintiff was experiencing occasional back pain, dorsiflexion weakness of the ankle and toes, loss of reflex and some numbness over the lateral part of the knee.

The deputy commissioner found that plaintiff reached maximum medical improvement on 25 July 1985. Further, the deputy commissioner found that plaintiff's accident on 2 April 1984 aggravated his pre-existing degenerative disease of the spine; that plaintiff cannot kneel, bend, climb, lift, sit or stand too long or walk very well; and that plaintiff sustained a 35% permanent par-

tial disability of the back and a 10% permanent partial disability of the left ankle [foot] as a result of an injury by accident arising out of and in the course of his employment. As a result of his injury by accident, the deputy commissioner concluded that plaintiff is entitled to compensation pursuant to G.S. 97-31(14) and (23).

The deputy commissioner awarded the sum of $93.34 per week for 119.4 weeks beginning 25 July 1985. The deputy commissioner also awarded medical and hospital expenses, attorneys fees and costs.

Plaintiff appealed to the full Commission arguing that he is entitled to permanent total disability pursuant to G.S. 97-29. The full Commission adopted as its own the opinion and award of the deputy commissioner and affirmed, in all respects, the result reached by him. Plaintiff appeals.

*Glover & Petersen by James R. Glover for plaintiff-appellant.*

*Gene Collinson Smith for defendant-appellee.*

EAGLES, Judge.

By his only assignment of error plaintiff argues that he is entitled to compensation for permanent total disability pursuant to G.S. 97-29.

The deputy commissioner made no findings or conclusions with respect to permanent total disability. However he did note, relying on *Perry v. Hibriten Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978), that:

> If by reason of any compensable injury an employee is unable to work and earn any wages he is totally disabled and entitled to compensation for permanent total disability under 97-29 unless all his injuries are included in the schedule set out in this section [G.S. 97-31]. In that event the injured employee is entitled to compensation exclusively under this section regardless of his ability or inability to earn wages in the same or any other employment; and such compensation is "in lieu of all other compensation, including disfigurement."

On appeal the full Commission stated that:

> A reading of the record in this case shows unequivocally that the only disability which plaintiff has relating to his injury is

> disability to the back and left foot. Admittedly, he has other problems completely unrelated to his accident and a combination of his specific disability and his unrelated problems render him totally disabled.

Further, the full Commission stated that "our courts have held that when all of a plaintiff's disability resulting from an injury are covered by G.S. 97-31 an employee is entitled to no compensation for permanent total disability." The full Commission relied on this Court's decision in *Whitley v. Columbia Lumber Mfg. Co.*, 78 N.C. App. 217, 336 S.E. 2d 642 (1985). However, our decision in *Whitley* was reversed in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986). There the Supreme Court overruled the interpretation previously given to the "in lieu of" language in G.S. 97-31 by *Perry v. Hibriten Furniture Co., supra.* The Court held that "the 'in lieu of' clause [of G.S. 97-31] does not prevent a worker who qualifies from recovering lifetime benefits under [G.S. 97-29] and *Perry*, to the extent it holds otherwise, should be overruled." 318 N.C. at 96, 348 S.E. 2d at 340. The Court in *Whitley* reinterpreted the "in lieu of" clause to permit an employee to receive compensation under either G.S. 97-31 or G.S. 97-29 in an appropriate situation but not under both. "Section 29 is an alternate source of compensation for an employee who suffers an injury which is also included under the schedule [under G.S. 97-31]. The injured worker is allowed to select the more favorable remedy, but he cannot recover compensation under both sections because section 31 is 'in lieu of all other compensation.'" *Id.* at 96, 348 S.E. 2d at 340.

The finder of fact in a workers' compensation case is the Industrial Commission which has the exclusive duty and authority to find facts related to a disputed claim. *Harrell v. Stevens & Co.*, 54 N.C. App. 582, 284 S.E. 2d 343 (1981), *disc. rev. denied*, 305 N.C. 152, 289 S.E. 2d 379 (1982). The jurisdiction of this court is limited to questions of law, whether there is competent evidence to support the Commission's findings and whether the findings justify its legal conclusions. *Carpenter v. Tony E. Hawley, Contractors*, 53 N.C. App. 715, 281 S.E. 2d 783, *disc. rev. denied*, 304 N.C. 587, 289 S.E. 2d 564 (1981). In order to support a conclusion of disability, the Commission must find that after his injury plaintiff was incapable of earning the same wages he earned before his injury in the same or any other employment and that plaintiff's

incapacity to earn was caused or significantly contributed to by his injury. *See Taylor v. Pardee Hospital,* 83 N.C. App. 385, 350 S.E. 2d 148 (1986). Total disability means that as a result of his injury, plaintiff is unable to work and earn any wages. *Id.* Here it is clear that the Commission felt it could not award benefits to the plaintiff under G.S. 97-29. Accordingly, the opinion and award is vacated and the cause remanded for the Commission to determine if plaintiff is entitled to recover benefits for total disability. On remand, if the Commission finds and concludes from the evidence in this record that plaintiff is totally disabled as a result of his compensable injuries, then it must award benefits under G.S. 97-29. *Whitley, supra,* 318 N.C. 89, 348 S.E. 2d 336. We note that the Commission in its opinion and award, previously stated, though without finding, that by the combination of pre-existing problems and his compensable injuries, plaintiff had been rendered "totally disabled"; however, the Commission did not comment or make the necessary findings regarding claimant's wage earning capability. Accordingly, the opinion and award is vacated and the cause is remanded for additional findings and conclusions consistent with the Supreme Court's holding in *Whitley.*

Vacated and remanded.

Chief Judge HEDRICK and Judge PARKER concur.

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JOHN RONEY AND NORTH STATE FINANCIAL CORPORATION v. MAX RAY JOYNER, FERRELL L. BLOUNT III, WILLIAM G. BLOUNT, CHARLES L. BROOM, R. E. DAVENPORT, JR., I. JACKSON EDWARDS, VANCE T. FORBES, R. E. KIRKLAND, JR., WILLIAM D. REAGAN, JR., DIRECTORS OF NORTH STATE FINANCIAL CORPORATION, PEAT, MARWICK AND MITCHELL & CO., CPAS, AND TRIDENT FINANCIAL SERVICES, INC.

No. 863SC1016

(Filed 2 June 1987)

**Corporations § 6— shareholder's action on behalf of other stockholders—no demand made on directors to recover damages—action properly dismissed**

Plaintiff's action brought on behalf of a corporation and other shareholders alleging that the corporation was damaged by the mismanagement and neglect of defendants was properly dismissed where plaintiff did not demand that the directors take steps to recover the damage allegedly sustained; in the

absence of circumstances indicating that such a step would be futile, a demand that the directors act is a prerequisite to a shareholder's suing on behalf of the corporation; and plaintiff did not allege with particularity facts indicating that such a demand would be futile but simply alleged a conclusion that the corporate directors would not act because they were in charge of the corporation at the time involved and committed some of the negligent acts complained of.

APPEAL by plaintiffs from *Barefoot, Judge.* Order entered 16 May 1986 in Superior Court, PITT County. Heard in the Court of Appeals 4 February 1987.

*Pritchett, Cooke & Burch, by W. W. Pritchett, Jr., for plaintiff appellants.*

*Adams, Kleemeier, Hagan, Hannah & Fouts, by Daniel W. Fouts and George W. Jarecke, for defendant appellees Joyner, F. L. Blount III, W. G. Blount, Broome, Edwards, Forbes and Kirkland.*

*Womble Carlyle Sandridge & Rice, by William C. Raper, Jim D. Cooley and Timothy G. Barber, for defendant appellee Reagan.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr. and Jim W. Phillips, for defendant appellee Peat, Marwick, Mitchell & Co.*

*Poyner & Spruill, by John R. Jolly, Jr. and Ernie K. Murray, for defendant appellee Trident Financial Services, Inc.*

PHILLIPS, Judge.

Plaintiff Roney, who owns 2,500 shares of stock in North State Financial Corporation, a North Carolina enterprise, brought this action upon behalf of the corporation and the other shareholders, alleging that the corporation was damaged by the mismanagement and neglect of the defendants in acquiring First Colony Savings and Loan Association's stock. The individual defendants were directors of North State Financial Corporation when the stock was acquired and the corporate defendants—Trident Financial Services, a private consulting firm, and defendant Peat, Marwick, Mitchell & Co., an accounting firm—advised the directors about the acquisition. In substance, the complaint alleges that the defendant directors did not exercise reasonable care in acquiring the First Colony Savings and Loan

Association stock at $17 per share and that the corporate defendants did not properly advise the directors in regard thereto. As to the defendant directors, the complaint alleges more specifically that in acquiring the stock at the price agreed to they failed to properly supervise management, failed to inform themselves of First Colony's situation, activities, and worth, and failed to follow proper business practices and procedures. The complaint does not allege either that the directors acted fraudulently, or in bad faith for their own interest, or that plaintiffs had demanded that the directors take steps to recover the damage allegedly sustained; instead, the complaint merely states that a demand for the directors to act would have been futile because the directors controlled the corporation and committed some of the acts plaintiffs complained of. Plaintiffs took a voluntary dismissal as to one director, R. E. Davenport, Jr., and pursuant to the motions of the remaining defendants under the provisions of Rule 12(b)(6) of the N.C. Rules of Civil Procedure the complaint was dismissed as to all the defendants.

While the order of dismissal is based on several grounds only one requires discussion—plaintiffs' failure to demand action by the corporation's governing board. It is fundamental everywhere that ordinarily the business affairs of a corporation are controlled by its board of directors, and that in the absence of circumstances indicating that the directors cannot or will not pursue the company's rights against others no shareholder can properly take on that task. Under our law a shareholder who brings a derivative action to enforce an alleged corporate right, as plaintiff Roney did here, must—

> allege with particularity the efforts, if any, made . . . to obtain the action he desires from the directors . . . and the reasons for his failure to obtain the action or for not making the effort.

G.S. 55-55(b). This provision has been construed to mean that in the absence of circumstances indicating that such a step would be futile, a demand that the directors act is a prerequisite to a shareholder suing upon behalf of the corporation. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *cert. denied, appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181 (1979). The demand requirement is fundamental and serves a good purpose; it promotes

continuity in the management of the company's business; it enables the directors to correct mistakes if any have been made; and by requiring stockholders to exhaust their intra-corporate remedies it helps prevent the filing of precipitate and unnecessary litigation. *Alford v. Shaw,* 318 N.C. 289, 349 S.E. 2d 41 (1986), *reh'g allowed,* 318 N.C. 703, 351 S.E. 2d 738 (1987); *Aronson v. Lewis,* 473 A. 2d 805 (Del. Supr. 1984). A demand for action by the directors is unnecessary only when the complaint alleges with particularity facts indicating that such a demand would be futile. Particular facts that excuse a shareholder from demanding action by the board of directors before suing to enforce a corporate right include, so our courts have held, those that indicate corruption or bad faith by the directors, such as self-dealing or self-interest, fraud, or conflict of interest. *Hill v. Erwin Mills, Inc.,* 239 N.C. 437, 80 S.E. 2d 358 (1954); *Loy v. Lorm Corp.,* 52 N.C. App. 428, 278 S.E. 2d 897 (1981); *Swenson v. Thibaut, supra.* Our courts have not held that the mere negligence of the directors in evaluating a purchase or in relying upon the advice of accounting and investment experts, all that plaintiffs' complaint alleges, is such a particular fact, and we do not believe that it is. For virtually every corporate derivative action is based upon some claimed default of the corporation's directors and their failure to correct it; and if that was all that a suing shareholder had to allege in suing for the corporation the statutory demand requirement would be a dead letter. Plaintiffs' allegation that the corporate directors would not act because they were in charge of the corporation at the time involved and committed some of the negligent acts complained of is thus but an unsupported conclusion. Since it cannot be soundly deduced from the facts stated in the complaint that it would be futile to ask the directors to seek redress from the corporate defendants the particularized statement of facts that our law requires has not been made, and plaintiffs' action was properly dismissed as to all defendants.

Affirmed.

Judges BECTON and JOHNSON concur.

NATHANIEL SYLVESTER DAY v. HELEN A. POWERS, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 864SC855

(Filed 2 June 1987)

**Taxation § 27; Trusts § 13.2— transfer of property in fee simple—no resulting trust—assessment of gift taxes proper**

The trial court erred in concluding that plaintiff's transfer of property constituted a parol trust in his behalf where there was no indication on the face of the deed that plaintiff intended to pass anything other than a fee simple to his son, and there were no allegations of fraud, mistake, or undue influence; therefore, respondent could properly assess gift taxes against plaintiff.

APPEAL by Secretary of Revenue from *Tillery, Judge.* Judgment entered 2 June 1986 in Superior Court, ONSLOW County. Heard in the Court of Appeals 13 January 1987.

*Attorney General Lacy H. Thornburg by Special Deputy Attorney General George W. Boylan for the appellant, Secretary of Revenue.*

*White & Allen by John C. Archie for plaintiff appellee.*

COZORT, Judge.

This appeal involves a civil action pursuant to N.C.G.S. § 105-267 for the refund of gift taxes brought by the plaintiff Nathaniel Sylvester Day against the Secretary of Revenue of the State of North Carolina. The plaintiff contended in his complaint that the deed in question constituted a trust arrangement and that the assessment of gift taxes was therefore improper. The trial court granted summary judgment for plaintiff. We reverse.

The forecast of evidence shows plaintiff Nathaniel Sylvester Day was a tenant in common with his brother Nere E. Day, Jr., in some Onslow County real property. In December 1978 plaintiff was considering marriage to Faye Darden Snow. Plaintiff approached his fiancee several times about releasing and waiving any rights she might acquire in his property as a result of marriage. Ms. Snow rejected this idea, refused to sign a contract waiving her rights to any marital property, and further indicated she would not sign any deeds after their marriage. Plaintiff and his brother became concerned that their ability to deal with their property might be restricted.

Plaintiff next talked with his son James Milton Day about transferring all his Onslow County real property to him in trust and consulted his attorney about a trust transaction. On 29 December 1978 plaintiff conveyed his real property in Onslow County to his son. Plaintiff took an executed promissory note and deed of trust for $250,000 from his son. The note and deed of trust were prepared only as protection for plaintiff until his attorney could draft a trust agreement for his son to sign. This deed of trust was never recorded. A trust agreement dated 29 June 1979 was prepared for plaintiff's son to sign, but it was never executed by plaintiff's son. Since the transfer of 29 December 1978 plaintiff has paid his share of the property taxes, paid for repairs and improvements on the property and received proceeds from sales of tracts of the property. Plaintiff has also received proceeds from the sale of timber off the land and the rental of the land. All of the proceeds received by plaintiff have been reported as income on his tax returns. Plaintiff has also continued to keep the financial records concerning the land and entered into all leases concerning the land.

On 10 December 1984 plaintiff and his son signed a Declaration of Trust with respect to the 1978 real property transfer from plaintiff to son. On 12 December 1984, defendant assessed gift taxes against plaintiff. As a result of plaintiff's objection to the assessment, a hearing was held on 14 December 1984 before the Secretary of Revenue. The assessment was sustained.

The Tax Review Board affirmed the decision of the Secretary of Revenue. Plaintiff timely paid the gift tax assessment. In a letter dated 10 January 1986 plaintiff requested a refund of the tax paid. This request was denied by the North Carolina Department of Revenue on 23 January 1986. On 6 March 1986 plaintiff instituted an action against the Secretary in the Superior Court of Onslow County for the recovery of the gift taxes paid. On 19 May 1986 plaintiff filed a motion for summary judgment, supported by affidavits. On 28 May 1986 defendant filed a motion for summary judgment, supported by affidavits. On 2 June 1986 the trial court awarded summary judgment for plaintiff.

Defendant alleges the trial court erred in granting summary judgment for plaintiff and thereby concluding that the plaintiff's transfer of property constituted a trust in his behalf. Defendant

argues that the general rule stated in *Gaylord v. Gaylord*, 150 N.C. 222, 63 S.E. 1028 (1909), should control in this case. The rule from *Gaylord* reads as follows:

> [E]xcept in cases of fraud, mistake or undue influence, a parol trust, to arise by reason of the *contract or agreement* of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass.

*Id.* at 227, 63 S.E. at 1031.

As a rule of evidence, parol evidence is admissible in appropriate cases to establish a trust because the seventh section of the English Statute of Frauds (Stat. 29, Car. II, c. 3, s. 7) concerning the creation of parol trusts has not been enacted in North Carolina. *Thompson v. Davis*, 223 N.C. 792, 794, 28 S.E. 2d 556, 557 (1944). Plaintiff contends that the instant case is an appropriate case for the engrafting of a parol trust because the grantee, plaintiff's son, does not contest the trust and is not trying to assert a fee simple. Citing *Strange v. Sink*, 27 N.C. App. 113, 116, 218 S.E. 2d 196, 198, *disc. rev. denied*, 288 N.C. 733, 220 S.E. 2d 353 (1975), plaintiff contends that a trust arises where a person makes or causes to be made a conveyance of property under circumstances which raise an inference that he does not intend the person taking or holding the property should have the beneficial interest in the property, and the beneficial interest is not otherwise effectively disposed of. Plaintiff's reliance on *Strange* is misplaced. In *Strange*, this Court found the engrafting of a parol trust to be appropriate where the grantee refused to convey the property to a third party in accordance with an agreement between the grantor and the grantee. In the instant case, the engrafting of a parol trust is for the benefit of the grantor only. We find no fraud, mistake, or undue influence, and thus find no reason for deviating from the rule stated in *Gaylord*. We find the trial court erred in granting summary judgment for the plaintiff.

The order granting summary judgment for the plaintiff is reversed and the case is remanded for entry of judgment for the defendant.

Judges MARTIN and PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES BUFORD CALLAHAN

No. 8616SC1235

(Filed 2 June 1987)

1. **Rape and Allied Offenses § 6.1— first degree sex offense—no instruction on attempt required**

In a prosecution for first degree sex offense, defendant was not entitled to an instruction on attempt where the victim testified that defendant inserted his penis into her anus and then into her vagina.

2. **Rape and Allied Offenses § 6— first degree sex offense—instruction given in the disjunctive—error**

Defendant was deprived of his right to be convicted by the unanimous verdict of a jury in open court where the trial court erroneously instructed the jury that it could convict defendant of first degree sex offense if it found that he forced the victim to perform either fellatio or anal intercourse.

APPEAL by defendant from *Bowen, Judge.* Judgment entered 23 July 1986 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 11 May 1987.

Defendant was indicted for first degree rape, first degree sex offense and first degree kidnapping. The jury found defendant guilty of second degree rape, second degree sex offense and second degree kidnapping.

The State presented evidence at trial which showed the following: On 10 November 1985, the victim stopped at a service station to purchase some gasoline. When she returned to her car, defendant got in and told her to take him home. Defendant then grabbed the victim's hair and forced her to drive to an isolated dirt road. Defendant hit the victim several times and then forced her to perform fellatio on him. The victim also testified that defendant put his penis in her anal opening and then in her vagina.

After the incident, the victim told a doctor in the emergency room that there had been oral insertion and vaginal insertion of defendant's penis and also attempted anal insertion. The victim did not mention the anal insertion to police when she reported the rape.

From the judgment of the trial court, defendant appeals.

*Attorney General Lacy H. Thornburg, by Associate Attorney General Lorinzo L. Joyner, for the State.*

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

ARNOLD, Judge.

Defendant makes no assignments of error with respect to the rape and kidnapping convictions (case Nos. 85CRS6757 and 85 CRS6759 respectively). Therefore, we find no error concerning these convictions. In regard to his conviction for second degree sex offense (case No. 85CRS6758), defendant presents two assignments of error.

**[1]** Defendant first contends that he is "entitled to a new trial because the trial court refused to instruct the jury on attempt, where the evidence was equivocal on the sex offense charge." A review of the evidence shows this contention to be without merit.

The victim testified at trial that when defendant was attempting to have vaginal intercourse with her, he "missed the spot" and inserted his penis into her anal opening. The victim further testified that defendant then admitted his mistake, cleaned himself off and inserted his penis into the victim's vagina.

In order to be entitled to an attempt instruction, the evidence must show that defendant, with the requisite intent, committed an act that went beyond mere preparation but fell short of actual completion of the offense. *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982). An attempt instruction is not warranted merely because there is no medical evidence of penetration or other physical symptoms, as long as there is sufficient evidence of completed acts of fellatio and anal intercourse. *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). The mere possibility that the jury might believe part but not all of the victim's testimony is not sufficient to require a court to submit to the jury the issue of a defendant's guilt or innocence of a lesser included offense than that which the victim testified was committed. *State v. Lampkins*, 286 N.C. 497, 212 S.E. 2d 106 (1975), *cert. denied*, 428 U.S. 909 (1976).

After examining the evidence in the present case, we hold that defendant was not entitled to an instruction on attempt. The trial court correctly denied defendant's request.

[2] Defendant also contends that the trial court committed reversible error in instructing the jury that it could convict defendant of first degree sex offense if it found that he forced the victim to perform either fellatio or anal intercourse. We agree.

It is necessary to first point out that defendant did not object to this instruction at trial. However, when the error by the trial court violates a defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the issue on appeal. *State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652 (1985). In the present case, defendant argues that the jury instructions charging crimes in the disjunctive affected his right to a unanimous verdict by a jury of twelve. Thus, defendant may present this issue on appeal.

The trial court instructed the jury that they could find defendant guilty of sexual offense if they found that he engaged in either "fellatio or anal intercourse." In *State v. Diaz*, 317 N.C. 545, 346 S.E. 2d 488 (1986), defendant Diaz was convicted of trafficking in marijuana on the basis of a jury instruction permitting conviction upon a finding that Diaz knowingly "possessed or transported" the 10,000 pounds or more of marijuana. The Court stated:

> [t]here is no way for this Court to determine whether the jurors unanimously found that defendant possessed 10,000 pounds or more of marijuana, transported 10,000 pounds of marijuana, both possessed and transported 10,000 pounds or more of marijuana, or whether some jurors found that defendant possessed the marijuana and some found that he transported it. Therefore, we hold that defendant has been deprived of his constitutional right to be convicted by a unanimous jury and is entitled to a new trial. (Citations omitted.)

*Id.* at 555, 346 S.E. 2d at 494.

In the present case, there is no way for this Court to tell whether defendant was convicted of second degree sexual offense because the jury unanimously agreed that defendant engaged in

fellatio, anal intercourse, both fellatio and anal intercourse, or whether some members of the jury found that he engaged in fellatio but not anal intercourse and some found that he engaged in anal intercourse but not fellatio. Defendant has a constitutional right to be convicted by the unanimous verdict of a jury in open court. N.C. Const. art. 1 § 24; G.S. 15A-1237(b). Defendant was deprived of that right in the case *sub judice*. Accordingly, defendant's conviction of second degree sexual offense is reversed and remanded for a new trial.

Case No. 85CRS6757—no error.

Case No. 85CRS6758—new trial.

Case No. 85CRS6759—no error.

Judges EAGLES and PARKER concur.

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IN THE MATTER OF: WILLIAM H. MILLER, PETITIONER v. NORTH CAROLINA STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS, RESPONDENT

No. 8610SC1230

(Filed 2 June 1987)

**Professions and Occupations § 1— professional engineer—suspension of license without notice**

Respondent's suspension of petitioner's license as a professional engineer did not comply with procedures mandated in N.C.G.S. § 150A-3(b) where petitioner was not given notice that a proceeding could result in the suspension of his license and was not given the opportunity to show that he had complied with the requirements for retaining his license.

APPEAL by petitioner from *Brannon, Judge*. Judgment entered 21 July 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 8 April 1987.

In February 1985, the North Carolina State Board of Registration For Professional Engineers and Land Surveyors received a complaint which alleged that petitioner, a Professional Engineer licensed by the Board, had affixed his seal and signature to design

plans that were grossly incompetent and unprofessional. After investigating the complaint, the Board sent petitioner a Notice of Action Without Hearing which stated that the Board had sufficient evidence which supported the charge of gross negligence, incompetence or misconduct. The Board informed petitioner that it would issue a letter of reprimand and fine him $500.00 unless he requested a hearing. Petitioner requested a hearing which was held on 12 December 1985.

On 19 December 1985, the Board issued a Decision and Right of Appeal. The Board concluded that petitioner was guilty of gross negligence and incompetence, reprimanded him and suspended his license "until such time as William H. Miller has demonstrated his competency by successfully passing the eight hour written Principles and Practice of Engineering examination. . . ."

Petitioner appealed the Board's decision and the trial court affirmed the Board's action. From the judgment of the trial court, petitioner appeals.

*Maupin, Taylor, Ellis & Adams, by John C. Cooke and Ronald R. Rogers, for petitioner appellant.*

*Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by Wright T. Dixon, Jr. and Dorothy V. Kibler, for respondent appellee.*

ARNOLD, Judge.

The provisions of Chapter 89C of the General Statutes provide respondent with the authority to supervise engineering in North Carolina. G.S. 89C-21 states:

> (a) The Board may suspend, refuse to renew, or revoke the certificate of registration, require reexamination, or levy a fine not in excess of five hundred dollars ($500.00) for any engineer or land surveyor, who is found:
>
> * * * *
>
> (2) Guilty of any gross negligence, incompetence or misconduct, in the practice of his profession. In the event the Board finds that a certificate holder is incompetent the Board may, in its discretion, require oral or written examinations,

> or other indication of the certificate holder's fitness to practice his profession and to suspend his license during any such period.

G.S. 89C-21(a)(2).

G.S. 89C-22(b) provides that all charges shall be heard by the Board as provided under the requirements of Chapter 150A of the General Statutes.

G.S. 150A-3(b) provides:

> Before the commencement of proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license, an agency shall give notice to the licensee, pursuant to the provisions of G.S. 15A-23(c), of alleged facts or alleged conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license.

In the case *sub judice*, the Notice of Action Without Hearing informed petitioner that the Board's "intended action" was a reprimand and fine. At no time did the Board inform petitioner that it intended to suspend his license.

Although petitioner was given notice of the alleged facts supporting the reprimand and fine, he had no notice that the same facts would warrant suspension of his license. Additionally, petitioner did not have an opportunity at the hearing to show compliance with the requirements for retaining his license since he was unaware that the proceeding could result in the suspension.

We hold that the Board's suspension of petitioner's license did not comply with the procedures mandated in G.S. 150A-3(b). Petitioner was entitled to notice that the proceeding could result in the suspension of his license and given the opportunity to show that he had complied with the requirements for retaining his license. Accordingly, the judgment of the trial court is reversed and the Board's decision is vacated.

Reversed.

Judges WELLS and ORR concur.

DEBBIE GAIL FRYE v. LLOYD ANDERSON

No. 8620DC1170

(Filed 2 June 1987)

1. **Automobiles and Other Vehicles § 55.2— driving without lights—insufficiency of evidence of contributory negligence**

In an action involving allegedly negligent operation of an automobile, the trial court did not err in denying plaintiff's motion for a directed verdict on defendant's counterclaim based on defendant's contributory negligence, where plaintiff pointed to testimony by defendant's eyewitness that he could see plaintiff's car approaching even though the headlights were not on, but this was not conclusive evidence that defendant was contributorily negligent because the witness was standing 25 yards away from defendant's vehicle and therefore did not have the same vantage point as defendant.

2. **Witnesses § 8.2— negligent operation of vehicle—cross-examination of driver as to unrelated misconduct**

In a negligence action arising from an automobile accident, the trial court erred in allowing defendant's attorney to cross-examine plaintiff about her alleged possession of a stolen VCR. N.C.G.S. § 8C-1, Rules 608 and 609.

APPEAL by defendant from *Beale, Judge.* Order entered 22 May 1986 in District Court, ANSON County. Heard in the Court of Appeals 7 April 1987.

Plaintiff and defendant were involved in an automobile collision. Plaintiff filed this action against defendant and defendant filed a counterclaim. The case was tried before a jury which returned a verdict for defendant. Plaintiff moved for a new trial. The trial judge set aside the verdict and granted plaintiff's motion. From the order of the trial court, defendant appeals and plaintiff cross-appeals.

*Leath, Bynum, Kitchin & Neal, by Stephan R. Futrell, for plaintiff appellee.*

*Henry T. Drake for defendant appellant.*

ARNOLD, Judge.

In the order setting aside the verdict and granting a new trial, the trial court concluded "as a matter of law that the plaintiff should receive a new trial pursuant to Rule 50 [sic] (a)(1)(2)(6) and (7) of the North Carolina Rules of Civil Procedure." The refer-

ence to Rule 50 is a typographical error and the trial court meant to refer to Rule 59 since the latter deals with new trials. Rule 59(a) states in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> . . . .
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law.

G.S. 1A-1, Rule 59(a).

Defendant contends (1) that the trial court erred in making findings of fact that are not supported by evidence in the record and (2) that the trial court erred in setting aside the verdict and granting a new trial.

A motion under section (a) of Rule 59 is addressed to the sound discretion of the trial judge. *Hamlin v. Austin,* 49 N.C. App. 196, 270 S.E. 2d 558 (1980). A ruling in the discretion of the trial judge raises no question of law. *Bryant v. Nationwide Mut. Ins. Co.,* 313 N.C. 362, 329 S.E. 2d 333 (1985). Although the order in the case *sub judice* states that plaintiff should receive a new trial "as a matter of law," the order was in fact an exercise of the trial judge's discretion under Rule 59(a).

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.

*Worthington v. Bynum,* 305 N.C. 478, 482, 290 S.E. 2d 599, 602 (1982). "The standard for review of a trial court's discretionary

ruling either granting or denying a motion to set aside a verdict and order a new trial is virtually prohibitive of appellate intervention." *Pearce v. Fletcher*, 74 N.C. App. 543, 544, 328 S.E. 2d 889, 890 (1985). "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington*, 305 N.C. at 487, 290 S.E. 2d at 605.

A review of the record in the present case indicates no abuse of discretion by the trial judge. Additionally, the trial court's findings of fact in the order are amply supported by evidence in the record. Therefore, the order of the trial court which sets aside the verdict and grants a new trial is affirmed.

**[1]** Plaintiff assigns error on cross-appeal to the trial court's refusal to grant her motion for a directed verdict on defendant's counterclaim. She argues that the evidence established that defendant was contributorily negligent.

A trial court should grant a directed verdict on the ground of contributory negligence when the evidence establishes the nonmovant's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. *See Brown v. Hale*, 263 N.C. 176, 139 S.E. 2d 210 (1964).

Plaintiff points to evidence that defendant entered the highway from a private driveway and testimony from defendant's witness, George Rising, that he could see plaintiff's car approaching even though the headlights were not on. This evidence is not conclusive that defendant was contributorily negligent. Rising did not have the same vantage point as defendant since he was standing about 25 yards away from defendant's vehicle. The police officer who investigated the accident testified that it was dark and that headlights "would have been required." The trial court did not err in denying plaintiff's motion for a directed verdict.

**[2]** Plaintiff also contends that the trial court erred in permitting defendant's attorney to cross-examine her about alleged possession of a stolen video cassette recorder (VCR).

In response to questions regarding a stolen VCR, plaintiff stated that she did not know if it was stolen or not. Since plaintiff

was not convicted of possessing stolen property, these questions were not admissible under G.S. 8C-1, Rule 609. Likewise, these questions were not admissible under G.S. 8C-1, Rule 608 since the possession of a VCR that plaintiff did not know to be stolen is not a "bad act" probative of truthfulness or untruthfulness. *See* 1 H. Brandis, *Brandis on North Carolina Evidence*, § 111 (2d rev. ed. 1982). Thus, the trial court erred in allowing defendant's attorney to cross-examine plaintiff about the VCR.

We are not persuaded by plaintiff's remaining assignments of error. The order of the trial court is

Affirmed.

Judges WELLS and ORR concur.

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LILLIE J. GILLESPIE v. TOMMY RAY COFFEY, G. LEWIS BERNHARDT, AND THE CITY OF LENOIR, A MUNICIPAL CORPORATION

No. 8625SC1257

(Filed 2 June 1987)

1. **Limitation of Actions § 4.2— remodeling of restaurant entryway—applicability of six-year statute of limitations**

The statute of limitations of N.C.G.S. § 1-50(5)a prohibited plaintiff from bringing a personal injury action against defendant city because more than six years had passed from the time that defendant's building inspector approved the remodeling of a restaurant entryway to the time plaintiff filed this action seeking damages for the injuries suffered due to a fall at the restaurant.

2. **Negligence § 48— condition of restaurant entryway—failure to comply with building code—no showing of proximate cause**

In an action to recover for personal injuries sustained by plaintiff when she fell in a restaurant, the trial court properly entered summary judgment for defendants where plaintiff alleged that remodeling of the restaurant entryway did not meet requirements as set forth in the N. C. State Building Code, but she presented no evidence that the alleged noncompliance proximately caused her injuries.

APPEAL by plaintiff from *Hyatt, Judge*. Orders entered 5 September 1986 in Superior Court, CALDWELL County. Heard in the Court of Appeals 6 May 1987.

Plaintiff instituted this action on 24 September 1985 seeking damages for the injuries suffered due to a fall at Crossroads Restaurant in Lenoir, North Carolina. Plaintiff claimed that the remodeling of the restaurant entryway in May of 1979 did not meet requirements as set forth in the North Carolina State Building Code. Plaintiff claimed that the City of Lenoir was responsible because it inspected and approved the entryway after its completion and continually failed to enforce the building code requirements. Plaintiff claimed that all defendants were liable because of faulty design, construction and maintenance and because there were no signs warning of the "dangerous condition there existing." All defendants filed for summary judgment and their motions were granted on 5 September 1986. From these orders of the trial court, plaintiff appeals.

*Donald T. Robbins for plaintiff appellant.*

*Whisnant, Simmons, Groome, Tuttle and Pike, by Houston Groome, Jr., for defendant appellee, Tommy Ray Coffey.*

*Todd, Vanderbloemen, Respess and Brady, by Bruce W. Vanderbloemen, for defendant appellee, G. Lewis Bernhardt.*

*Mitchell, Blackwell, Mitchell and Smith, by Thomas G. Smith, for defendant appellee, City of Lenoir.*

ARNOLD, Judge.

Plaintiff contends that the trial court erred in granting summary judgment to all of the defendants. We do not agree.

[1] Concerning the granting of summary judgment to the City of Lenoir, we note the following statute. G.S. 1-50(5)a states:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

The City of Lenoir claims that this statute of limitations prohibits plaintiff from bringing this action against the defendant City because more than six years have passed from the time that the

building inspector approved the remodeling to the time plaintiff filed this action.

Plaintiff, however, claims that the City of Lenoir may not assert the statute of limitations defense due to G.S. 1-50(5)d. This statute states:

> The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.

Plaintiff argues that the City of Lenoir was in "control" as set forth in the statute because it was in charge of all construction within its territorial boundaries and had the responsibility for enforcement of the North Carolina State Building Code pursuant to Section 105.2 which states:

> Local Inspection Departments shall receive applications for permits, issue or deny permits, make necessary inspections, issue or deny certificates of compliance, issue orders to correct violations, revoke permits, bring judicial actions against actual or threatened violations, keep adequate records, and take any other actions that may be required in order adequately to enforce the Code.

We are not persuaded by plaintiff's argument.

The exception in G.S. 1-50(5)d for owners and tenants is based on a continued duty to inspect and maintain the premises. The City of Lenoir had no duty to continually inspect the remodeled entryway. The last act of the defendant City occurred in May 1979 when the building inspector approved the remodeling of Crossroads and concluded that the alterations to the restaurant complied with the building code. Thus, by waiting more than six years from that last act, plaintiff is barred by G.S. 1-50(5) from bringing this action against the City of Lenoir.

**[2]** Even without the benefit of the statute of limitations set forth in G.S. 1-50(5), summary judgment was appropriately grant-

ed to the City of Lenoir and also to the remaining defendants because plaintiff presented no evidence that the alleged noncompliance with the building code proximately caused her injuries.

Plaintiff makes brief mention of the provision of the North Carolina State Building Code concerning handicapped facilities in construction. No mention, however, is made of what plaintiff believed the code to require in the present case and just how the entryway did not conform to such requirements.

In her brief, plaintiff correctly points out that violation of the building code is negligence per se. *Lindstrom v. Chesnutt*, 15 N.C. App. 15, 189 S.E. 2d 749, *cert. denied*, 281 N.C. 757, 191 S.E. 2d 361 (1972). However, even assuming *arguendo* that the entryway did not meet the requirements of the code, plaintiff's action still fails. Plaintiff has made no showing that such negligent noncompliance was a cause in fact of her injury, much less a proximate cause. In order for plaintiff to show that there was a genuine issue of material fact in this respect, it was necessary for plaintiff to forecast evidence which is "sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts." *Parker v. Wilson*, 247 N.C. 47, 53, 100 S.E. 2d 258, 262 (1957). This, plaintiff has not done. The trial court did not err in granting defendants' motions for summary judgment.

Affirmed.

Judges WELLS and ORR concur.

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ALFRED L. LEVAN AND WIFE, MAXINE S. LEVAN v. BEULAH L. EIDSON

No. 8622SC1305

(Filed 2 June 1987)

**Deeds § 21 — right of first refusal — no price provision — contract unenforceable**

In an action for specific performance of a contract to give plaintiffs first right of refusal for certain described real property owned by defendant, the trial court properly entered summary judgment for defendant where the contract did not link the right of first refusal to the fair market value of the land nor to the price grantors would be willing to accept from third parties, and the contract was therefore unenforceable.

APPEAL by plaintiffs from *Collier, Judge.* Judgment entered 27 October 1986 in IREDELL County Superior Court. Heard in the Court of Appeals 12 May 1987.

Plaintiffs brought this action seeking specific performance of a contract. Plaintiffs alleged in their complaint that defendant (and her deceased husband) entered into a contract with plaintiffs in which defendant promised to give plaintiffs the first right of refusal for certain described real property owned by defendant, but that defendant had refused to honor the contract. Plaintiffs attached a copy of the contract to the complaint as an exhibit. Defendant answered and moved to dismiss under G.S. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure for failure of plaintiffs to state a claim from which relief could be granted. When defendant's motion came on for hearing, the trial court considered the pleadings, contract, affidavits and interrogatories. The trial court granted defendant's Rule 12(b)(6) motion, but the parties have properly stipulated that the trial court's order should be treated as one for summary judgment under Rule 56 of the Rules of Civil Procedure.

The materials before the trial court reveal the following forecast of evidence. In September of 1975, plaintiffs and defendant (and defendant's deceased husband) entered into a written contract which contained, *inter alia*, the following pertinent language:

> That for and in consideration of the parties of the second part [plaintiffs] having purchased property from the parties of the first part [defendant and her deceased husband], the said parties of the first part do hereby agree and grant unto the parties of the second part the following:
>
> That if at any time the parties of the first part decide to sell their property located on the Southeast corner of U. S. Highway No. 21 and N.C. Road No. 2171, that they will first offer the same for sale to the parties of the second part.

Defendant had agreed to sell the property to another person for $80,000.00. In his affidavit, plaintiff Alfred Levan stated that defendant did so without first offering to sell the property to plaintiffs, that plaintiffs offered to buy the property for $80,000.00, but that defendant had refused to sell to them. In

answers to interrogatories, defendant indicated that she had offered to sell the property to plaintiffs, informed plaintiffs that she had received an offer of $80,000.00 from another person, but received no further response from plaintiffs.

*Eisele & Ashburn, P.A., by Douglas G. Eisele, for plaintiff-appellants.*

*Homesley, Jones, Gaines & Fields, by Edmund L. Gaines and Clifton W. Homesley, for defendant-appellee.*

WELLS, Judge.

The sole issue in this appeal is whether the trial court erred in granting summary judgment for defendant.

So-called "rights of first refusal" or "preemptive rights" in real property contracts have been the subject of a number of decisions of our appellate courts. In the leading case of *Smith v. Mitchell,* 301 N.C. 58, 269 S.E. 2d 608 (1980), our Supreme Court analogized such contracts to options to purchase and discussed at length the principles of law pertaining to and controlling such contracts. The Court initially noted that "[c]ertain such restrictions on alienability, if defined as preemptive rights and if carefully limited in duration and price, are not void *per se* and will be enforced if reasonable." Relying on *Hardy v. Galloway,* 111 N.C. 519, 15 S.E. 890 (1892), the seminal case in this aspect of real property law, the court in *Smith* stated that two primary considerations dictate the reasonableness or unreasonableness of such preemptive rights: "the duration of the right and the provisions it makes for determining the price of exercising the right." The court then adopted the following generally applicable rules:

> We believe the better rule is to limit the duration of the right to a period within the rule against perpetuities and thus avoid lengthy litigation over what is or is not a reasonable time within the facts of any given case. We further agree with the authorities that a reasonable price provision in a preemptive right is one which somehow links the price to the fair market value of the land, or to the price the seller is willing to accept from third parties.

We first note that the contract at issue in this case meets the first requirement as it purports to bind only the grantors. It is

clear, however, that the contract does not meet the second requirement, as it neither links the preemptive right (right of first refusal) to the fair market value of the land nor to the price the grantors would be willing to accept from third parties.

The forecast of evidence before the trial court showed that there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law. *See* G.S. § 1A-1, Rule 56(c) of the Rules of Civil Procedure.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judges ARNOLD and ORR concur.

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CLARA H. LEWIS v. VAN J. STITT

No. 8626DC953

(Filed 2 June 1987)

**Appeal and Error § 6.8— denial of summary judgment—trial on the merits—no appeal from denial of summary judgment**

*The trial court's denial of defendant's motion for summary judgment was not reviewable where there was a final judgment rendered in a trial on the merits.*

APPEAL by defendant from *Elkins, Judge.* Judgment entered 1 July 1986 in District Court, MECKLENBURG County. Heard in the Court of Appeals 4 February 1987.

*Calvin L. Brown, for plaintiff-appellee.*

*Hamel, Helms, Cannon, Hamel & Pearce, P.A., by Thomas R. Cannon and A. Elizabeth Green, for defendant-appellant.*

GREENE, Judge.

This is an action to establish paternity and receive child support. The female child for whom plaintiff seeks support was born to plaintiff out of wedlock in 1971.

Plaintiff brought this action in 1985 alleging defendant, Van Stitt, is the biological father of the child and must provide for her support. In his answer, defendant denied he was the father and further replied that plaintiff had married Richard Lewis, Jr., in 1973 and the two had legitimated the child pursuant to G.S. 49-12 and had requested the child's surname be changed to Lewis on the birth certificate pursuant to G.S. 49-13. Defendant also alleged that as a result of plaintiff's and Lewis' request the change had been made.

Defendant then filed a motion for summary judgment and attached a copy of plaintiff's and Lewis' marriage certificate and a certified copy of their affidavits regarding the child's parentage and their written request for the name change. The trial court denied defendant's motion for summary judgment. The case was heard by a jury which found defendant to be the child's father, and the trial court ordered him to pay child support. Defendant appealed from the order denying summary judgment.

Plaintiff's civil action to determine paternity is governed by G.S. 49-14, which appears under Article 3 of Chapter 49 entitled Civil Actions Regarding Illegitimate Children:

> (a) The paternity of a child born out of wedlock may be established by civil action. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation.

G.S. 49-14(a) (Dec. 1984).

Defendant argued at the summary judgment hearing that the child was legitimated under G.S. 49-12:

> When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall, in all respects after such intermarriage be deemed and held to be legitimate . . . .

In addition, G.S. 49-13 provides in pertinent part:

> When a child is legitimated under the provisions of G.S. 49-12, the State Registrar of Vital Statistics shall make a new birth certificate bearing the full name of the father upon

presentation of a certified copy of the certificate of marriage of the father and mother and change the surname of the child so that it will be the same as the surname of the father.

We note first that if plaintiff's child was legitimate by virtue of G.S. 49-12, plaintiff's action under G.S. 49-14 could not be maintained. We stated in *Wright v. Gann*, 27 N.C. App. 45, 47, 217 S.E. 2d 761, 763, *cert. denied*, 288 N.C. 513, 219 S.E. 2d 348 (1975), that G.S. 49-14 establishes a means of support for illegitimate children. However, the only basis for defendant's appeal is the denial of summary judgment, and on this basis, his appeal must fail.

The Supreme Court held in *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E. 2d 254, 256 (1985), that "the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits." The trial court's denial of defendant's motion for summary judgment is not reviewable.

Affirmed.

Judges WELLS and EAGLES concur.

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EDNA LEE HILTON COLLAR v. JOHN HOWARD COLLAR, JR.

No. 8610DC717

(Filed 2 June 1987)

**Divorce and Alimony § 30— no equitable distribution before absolute divorce— written agreement no exception**

Where the parties reduced their agreement for distribution of marital property to writing and orally acknowledged it before a certifying officer, but defendant refused to sign the agreement, it was not duly executed as required by N.C.G.S. § 50-20(d) and therefore could not be an exception to N.C.G.S. § 50-21(a), which provides that the equitable distribution of marital property may not precede a decree of absolute divorce except where there is a duly executed and acknowledged written agreement.

APPEAL by defendant from *Payne, Judge*. Order entered 30 May 1986 in District Court, WAKE County. Heard in the Court of Appeals 11 December 1986.

Plaintiff-wife brought this action to obtain a divorce from bed and board, temporary and permanent alimony, custody of and support for the minor child, exclusive possession of the marital residence and its contents, and attorney's fees.

At the hearing on the issues, held 12 December 1984, counsel for both parties requested that the matter be held open for settlement discussion. The trial court agreed to this request, and subsequently both parties, accompanied by counsel, appeared before the trial court with an agreement purporting to settle all matters in controversy, including the division of marital property.

Plaintiff's attorney prepared a consent judgment incorporating the terms of the in-court settlement agreement. When presented with the consent judgment, defendant refused to sign it. However, plaintiff signed the judgment and submitted it to the trial court. On 3 April 1985, the trial court signed plaintiff's consent judgment and incorporated it into the trial court's judgment rendered in this case.

Defendant did not appeal the entry of the judgment until 8 November 1985. At that time defendant filed a motion to set aside part of the judgment as void pursuant to N.C.G.S. § 1A-1, Rule 60. The trial court denied defendant's motion, and in the order arising out of the hearing of the motion, the trial court found, in pertinent part, the following facts:

> 1. This case was first set for hearing before the undersigned [judge] on December 12, 1984 at which time counsel for both parties asked that the matter be held open to allow settlement discussions; thereafter, the parties and their attorneys appeared in open court, announced that a full settlement had been reached and stated the terms of the settlement; both parties were asked in open Court if the terms of the agreement had been fully and accurately stated and if they consented to the said agreement; both parties answered in the affirmative; a written transcript of these proceedings was later prepared and is part of the file herein;
>
> 2. Thereafter counsel for plaintiff prepared a Consent Order reflecting the in-Court agreement of December 12, 1984; this Order was submitted to the defendant who refused to sign it; the Order was thereafter submitted to the under-

signed [judge] and was signed by the undersigned [judge] on April 3, 1985;

3. At the time of the December 12, 1984 hearing and the April 3, 1985 Order the parties were still lawfully married to each other;

Based on these facts the trial court concluded as a matter of law that:

1. The December 12, 1984 in-court proceedings between the parties, both being represented by competent legal counsel, constitute a valid and enforceable contract or separation agreement as provided by G.S. 50-20(d), G.S. 52-10(c) and G.S. 52-10.1;

Defendant appeals the denial of this motion.

*White and Crumpler, by G. Edgar Parker, Robin J. Stinson and Christopher L. Beal, attorneys for plaintiff appellee Edna Lee Hilton Collar.*

*Ragsdale & Kirschbaum, P.A., by William L. Ragsdale, attorney for defendant appellant John Howard Collar, Jr.*

ORR, Judge.

Defendant contends on appeal that the portion of the 3 April 1985 judgment addressing distribution of marital property is void because it violates the prohibition in N.C.G.S. § 50-21 against court-ordered equitable distribution before the granting of absolute divorce.

Defendant's appeal is brought pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4), which authorizes a court, on a motion and upon such terms as are just, to relieve a party from a final judgment, order, or proceeding if the judgment is void. N.C.G.S. § 1A-1, Rule 60(b)(4) (1983).

Findings of fact made by a trial judge upon a Rule 60(b) motion are binding on appeal if supported by any competent evidence. *Doxol Gas v. Barefoot,* 10 N.C. App. 703, 179 S.E. 2d 890 (1971). Whereas, "[t]he conclusions of law made by the judge upon the facts found by him are reviewable on appeal." *Norton v. Sawyer,* 30 N.C. App. 420, 422, 227 S.E. 2d 148, 151, *disc. rev. denied,*

291 N.C. 176, 229 S.E. 2d 689 (1976); *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507 (1954).

After reviewing the record we are convinced that the judge's findings of fact are supported by competent evidence. We are not convinced, however, that these facts support the judge's conclusion of law that the agreement negotiated by the parties was a N.C.G.S. § 50-20(d) agreement, and, thus, excepted from the N.C.G.S. § 50-21 strictures.

N.C.G.S. § 50-21(a) specifically states that the equitable distribution of marital property may not precede a decree of absolute divorce. N.C.G.S. § 50-21 (1984). *McKenzie v. McKenzie,* 75 N.C. App. 188, 330 S.E. 2d 270 (1985). N.C.G.S. § 50-20(d) provides an exception to this rule, permitting distribution of marital property before absolute divorce, but only: "[1] by [a] written agreement, [2] duly executed and [3] acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1 . . . ." N.C.G.S. § 50-20(d) (1984).

As the trial court's findings of fact note, the parties reduced their agreement to writing and orally acknowledged it before a certifying officer. However, as these facts further disclose, defendant refused to sign the agreement. This refusal prevented the agreement from being "duly executed." The legal definition of "execute" is ". . . to *sign* . . . . To perform all necessary formalities, as to make and *sign* a contract, or *sign* and deliver a note." Black's Law Dictionary 509 (rev. 5th ed. 1979) (emphasis added). Consequently, without the signature of both the husband and the wife, an agreement may not conform to the requirements of N.C.G.S. § 50-20(d).

For this reason, the 3 April 1985 judgment, which effectuated a distribution of the parties' marital property, must be described as a court-ordered equitable distribution before absolute divorce. Such an action is expressly prohibited by N.C.G.S. § 50-21(a). Accordingly, a judgment ordering such action is without authority, null, and void. *McKenzie v. McKenzie,* 75 N.C. App. 188, 330 S.E. 2d 270.

This Court concludes, therefore, that the trial court erred in denying defendant's motion and finds that the portion of the 3

April 1985 judgment pertaining to the distribution of marital property is a nullity and must be vacated.

Vacated.

Judges ARNOLD and PHILLIPS concur.

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JOHN HOWARD COLLAR, JR. v. EDNA LEE HILTON COLLAR

No. 8610DC718

(Filed 2 June 1987)

APPEAL by plaintiff from *Payne, Judge.* Order entered 30 May 1986 in District Court, WAKE County. Heard in the Court of Appeals 11 December 1986.

Defendant Edna Collar brought an action to obtain a divorce from bed and board, temporary and permanent alimony, custody of and support for the minor child, exclusive possession of the marital residence and its contents, and attorney's fees from plaintiff John Collar.

At the hearing on these issues, held 12 December 1984, counsel for both parties requested that the matter be held open for settlement discussion. The trial court agreed to this request, and subsequently both parties, accompanied by counsel, appeared before the trial court with an agreement purporting to settle all matters in controversy.

Defendant's attorney prepared a consent judgment incorporating the terms of the in-court settlement agreement. When presented with the consent judgment, plaintiff refused to sign it. However, defendant signed the judgment and submitted it to the trial court. On 3 April 1985, the trial court signed defendant's consent judgment and incorporated it into the trial court's judgment rendered in the case.

On 9 May 1985 plaintiff filed a complaint seeking absolute divorce from defendant and equitable distribution of their marital property. The trial court severed the two issues and granted plaintiff's request for absolute divorce without a jury trial. De-

fendant then moved for summary judgment on the issue of equitable distribution, contending that the 3 April 1985 judgment prohibited further litigation of this matter. The trial court granted defendant's motion. From this decision, plaintiff appeals.

*Ragsdale & Kirschbaum, P.A., by William L. Ragsdale, attorney for plaintiff appellant John Howard Collar, Jr.*

*White and Crumpler, by G. Edgar Parker, Robin J. Stinson and Christopher L. Beal, attorneys for defendant appellee Edna Lee Hilton Collar.*

ORR, Judge.

This is plaintiff's second appeal to this Court challenging the validity of the 3 April 1985 consent judgment. In the companion case, *Collar v. Collar*, 86 N.C. App. 105, 356 S.E. 2d 405 (1987), plaintiff moved to set aside that portion of the trial court's judgment addressing distribution of marital property on the grounds that it violated the prohibition in N.C.G.S. § 50-21 against court-ordered equitable distribution before the granting of absolute divorce. Defendant responded in that case by contending that the 3 April 1985 judgment was a N.C.G.S. § 50-20(d) agreement, which is excepted from the N.C.G.S. § 50-21 restriction.

Plaintiff correctly acknowledges that our decision in the above mentioned case determines the present appeal. In that prior appeal, we held that the 3 April 1985 judgment did not comply with the requirements of N.C.G.S. § 50-20(d), was in violation of the N.C.G.S. § 50-21 prohibition, and, thus, was null and void. It is unnecessary to repeat in this case the original discussion of that holding. Instead we incorporate by reference our prior opinion.

Therefore, the trial court's granting of defendant's motion for summary judgment in the present case, based on the validity of the trial court's judgment, was an error. We vacate the trial court's decision, and remand this case to the trial court for the equitable distribution of the parties' marital property in conformity with N.C.G.S. § 50-20.

Vacated and remanded.

Judges ARNOLD and PHILLIPS concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

### FILED 2 JUNE 1987

| | | |
|---|---|---|
| BAGWELL v. VIRGINIA DARE TRANSPORTATION<br>No. 8610DC1268 | Wake<br>(85CVD8971) | Affirmed in part; new trial in part. |
| BAUER-YOCUM v. BAUER-YOCUM<br>No. 8614DC1056 | Durham<br>(85CVD1669<br>(85CVD2022) | Affirmed in part, reversed in part and remanded. |
| BLACK v. HIATT<br>No. 8727SC36 | Gaston<br>(86CVS1505) | Affirmed |
| BLUE BELL, INC. v. FEDERAL EXPRESS<br>No. 8618SC1161 | Guilford<br>(84CVS2644) | Reversed in part and remanded. |
| BLOOM v. SCHAUBLE<br>No. 8625DC1302 | Caldwell<br>(85CVD1141) | Dismissed |
| BUCKNER v. BUCKNER<br>No. 8615DC1104 | Alamance<br>(85CVD1352) | Affirmed |
| DAVIS v. HOVIS<br>No. 8618SC1220 | Guilford<br>(85CVS8575) | Affirmed in part; reversed in part and remanded. |
| EVANS v. N. C. FARM BUREAU MUT. INS.<br>No. 8616SC1183 | Scotland<br>(85CVS104) | Affirmed |
| HARRIS v. WEBB<br>No. 8626SC1195 | Mecklenburg<br>(84CVS9499) | Affirmed |
| IN RE FORECLOSURE OF BROOKS<br>No. 8629SC1102 | McDowell<br>(86SP33) | Vacated and remanded. |
| LYNCH v. SHERRILL PAVING CO.<br>No. 8721DC59 | Forsyth<br>(86CVD813) | Affirmed |
| MAYES v. TABOR<br>No. 8629SC1044 | Transylvania<br>(82CVS347 | Affirmed in part and vacated in part. |
| MORGAN v. POOLE<br>No. 863SC1147 | Carteret<br>(83CVS638) | No Error |
| STATE v. ALLEN<br>No. 8629SC1340 | McDowell<br>(86CRS498) | No Error |
| STATE v. ATKINSON<br>No. 878SC28 | Wayne<br>(86CRS495) | No Error |

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| STATE v. BARROW<br>No. 864SC1310 | Onslow<br>(86CRS365)<br>(86CRS568) | No Error |
| STATE v. COLEY<br>No. 868SC996 | Wayne<br>(86CRS1236) | New Trial |
| STATE v. CULBRETH<br>No. 8710SC9 | Wake<br>(85CRS64002) | Affirmed |
| STATE v. FREEMAN<br>No. 8712SC87 | Cumberland<br>(85CRS54512) | No Error |
| STATE v. GARRISON<br>No. 8627SC1353 | Gaston<br>(86CRS7566)<br>(86CRS7567)<br>(86CRS7568)<br>(86CRS7569) | No Error |
| STATE v. HOWIE<br>No. 8626SC1338 | Mecklenburg<br>(85CRS033935)<br>(85CRS033937) | No Error |
| STATE v. JONES<br>No. 873SC8 | Pitt<br>(86CRS14369) | Remanded for a new sentencing hearing. |
| STATE v. McKENZIE<br>No. 8721SC23 | Forsyth<br>(84CRS34116) | No Error |
| STATE v. McLAUGHLIN<br>No. 8620SC1226 | Moore<br>(86CRS1078) | No Error |
| STATE v. MASON<br>No. 874SC117 | Onslow<br>(84CRS13297) | Affirmed |
| STATE v. MILLER<br>No. 8619SC1242 | Montgomery<br>(86CRS121)<br>(86CRS122) | No Error (Miller)<br>No Error (Lundburg) |
| STATE v. MOUNT<br>No. 8612SC1228 | Cumberland<br>(86CRS1963) | No Error |
| STATE v. OAKLEY<br>No. 8615SC1341 | Alamance<br>(85CRS18803) | No Error |
| STATE v. PRATT<br>No. 8620SC1007 | Anson<br>(85CRS1038) | No Error |
| STATE v. RIDDLE<br>No. 8628SC1227 | Buncombe<br>(85CRS22307)<br>(85CRS22308) | No Error |
| STATE v. SMITH<br>No. 8612SC1356 | Cumberland<br>(86CRS1968) | No Error |

| | | |
|---|---|---|
| STATE v. SWANSON<br>No. 8628SC992 | Buncombe<br>(85CRS28996) | No Error |
| STATE v. WILES<br>No. 8723SC3 | Wilkes<br>(85CRS3617) | No Error |
| THOMAS v. N. C. DEPT. OF HUMAN RESOURCES<br>No. 8630SC1156 | Swain<br>(86CVS78) | Affirmed |
| WARNER v. DUPEA<br>No. 8615SC935 | Orange<br>(86CVS99) | Affirmed as to defendant Craft. Summary judgment as to Dupea is reversed. |
| WRIGHT v. COUNTY OF MACON<br>No. 8630SC1132 | Macon<br>(83CVS107) | Affirmed |

STATE OF NORTH CAROLINA v. BOB MEDLIN

No. 8614SC883

(Filed 16 June 1987)

1. **Conspiracy § 6— conspiracy to commit breakings or enterings—seven judgments vacated—single plan to commit ongoing series of breakings or enterings**

Three judgments on seven conspiracy to break and enter convictions were vacated and remanded for entry of one judgment where the charges arose out of ten break-ins at several related stores; all of the break-ins occurred within four months, and some within ten days of each other; the participants remained the same; the participants pursued the same objective throughout; meetings generally took place after break-ins to divide the spoils and to discuss the next break-in; and the gist of the meetings was to plan subsequent break-ins in furtherance of the original unlawful agreement.

2. **Conspiracy § 8— conspiracy to commit felonious breakings or enterings—Class J felony**

The trial court erred when sentencing defendant on convictions for conspiracy to commit felonious breaking or entering by sentencing defendant as a Class H rather than a Class J felon.

3. **Receiving Stolen Goods § 2; Indictment and Warrant §§ 17.4, 11.1— indictment for criminal possession of personal property—allegation of ownership—not fatally defective**

An indictment for criminal possession of personal property of "Norman's T.V." was not fatally defective for failure to allege ownership of property in a natural person capable of holding title to the property and there was not a fatal variance between the indictment and the evidence where the evidence at trial showed an ownership interest in the stolen property in Norman Shultz. The name of the person from whom goods were stolen is not an essential element of an indictment alleging possession of stolen goods, nor is a variance between the indictment's allegations of ownership of property and proof of ownership fatal.

4. **Burglary and Unlawful Breakings § 5.9— breaking or entering—defendant not physically inside buildings—evidence sufficient**

The evidence was sufficient to support three breaking or entering convictions even though defendant did not physically enter the buildings where defendant drove his truck to one store after an accomplice telephoned him, he gave the accomplice tools to break the lock on the rear door, received merchandise through a hole in the store window, and loaded the goods into his truck; defendant agreed beforehand to drive his truck to another store, indicated when he arrived that he did not want radios, and the accomplice passed television sets through a broken window for defendant to load on his truck; and, during the third break-in, defendant parked his truck in an adjacent parking lot, gave the accomplice a hammer with which to dismantle the store's alarm, waited outside, and drove away when the accomplice awakened a sleeping employee and ran away.

APPEAL by defendant from *Lee, Judge.* Order entered 17 February 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 February 1987.

This case arises out of ten break-ins at several retail stores in Durham, North Carolina, that occurred during the summer of 1985. On 4 November 1985, defendant was indicted on ten counts of felonious breaking or entering, nine counts of felonious larceny, nine counts of felonious possession of stolen property, and ten counts of conspiracy to break or enter. Over defendant's objection, the cases were consolidated for trial upon motion by the State. At the close of the evidence the trial court dismissed two counts of felonious larceny, two counts of felonious breaking or entering, and two counts of conspiracy to break or enter. On 14 February 1986, the jury returned guilty verdicts on six counts of felonious breaking or entering, six counts of felonious larceny, six counts of felonious possession of stolen property, and seven counts of conspiracy to break or enter. At sentencing on 17 February 1986, the trial court arrested judgment on six counts of felonious larceny. The remaining nineteen counts were consolidated into seven judgments. The trial court sentenced defendant to consecutive three-year prison sentences on each judgment for a total term of twenty-one years.

## NATURE OF THE CHARGES

Seven retail stores in Durham were broken into between 4 May and 24 August 1985, with some stores being broken into more than once. Ten break-ins in all were charged. The stores broken into included Center Furniture, Bargain Furniture, Norman's T.V., Deluxe Products, Books-Do-Furnish-A-Room, Penny Furniture, and Wright Furniture. Property was taken from each store during each break-in except for Wright Furniture. For each break-in, except at Wright Furniture, defendant was charged with felonious breaking or entering, felonious larceny, possession of stolen property, and conspiracy to break or enter. For the break-in at Wright Furniture, defendant was charged with felonious breaking or entering and conspiracy to break or enter.

The following chart chronologically arranges the charges and dispositions of the cases:

| Case No. | Count | Date | Offense Charged | Victim Alleged | Verdict |
|---|---|---|---|---|---|
| 32364 | 1 | 5/4/85 | B & E | Center | Guilty |
| | 2 | | Larceny | | Guilty |
| | 3 | | Possession | | Guilty |
| 32366 | | 5/4/85 | Conspiracy | Center | Guilty |
| 32367 | 1 | 6/1/85 | B & E | Bargain | Guilty |
| | 2 | | Larceny | | Guilty |
| | 3 | | Possession | | Guilty |
| 32365 | | 6/1/85 | Conspiracy | Bargain | Guilty |
| 32369 | 1 | 6/10/85 | B & E | Bargain | Guilty |
| | 2 | | Larceny | | Guilty |
| | 3 | | Possession | | Guilty |
| 32368 | | 6/10/85 | Conspiracy | Bargain | Guilty |
| 32613 | 1 | 6/16/85 | B & E | Penny | Not Guilty |
| | 2 | | Larceny | | Not Guilty |
| | 3 | | Possession | | Not Guilty |
| 32615 | | 6/16/85 | Conspiracy | Penny | Guilty |
| 32371 | 1 | 7/4/85 | B & E | Bargain | Guilty |
| | 2 | | Larceny | | Guilty |
| | 3 | | Possession | | Guilty |
| 32370 | | 7/4/85 | Conspiracy | Bargain | Guilty |
| 32618 | | 7/27/85 | B & E | W.B. Wright | Guilty |
| 32619 | | 7/27/85 | Conspiracy | W.B. Wright | Guilty |
| 32373 | 1 | 8/12/85 | B & E | Norman's | Not Guilty |
| | 2 | | Larceny | | Guilty |
| | 3 | | Possession | | Guilty |
| 32372 | | 8/12/85 | Conspiracy | Norman's | Not Guilty |
| 32375 | 1 | 8/22/85 | B & E | Deluxe | Dismissed |
| | 2 | | Larceny | | Dismissed |
| | 3 | | Possession | | Not Guilty |
| 32374 | | 8/22/85 | Conspiracy | Deluxe | Dismissed |

| CASE NO. | COUNT | DATE | OFFENSE CHARGED | VICTIM ALLEGED | VERDICT |
|---|---|---|---|---|---|
| 32377 | 1 | 8/22/85 | B & E | Books | Dismissed |
| | 2 | | Larceny | | Dismissed |
| | 3 | | Possession | | Not Guilty |
| 32376 | | 8/22/85 | Conspiracy | Books | Dismissed |
| 32612 | 1 | 8/24/85 | B & E | Penny | Guilty |
| | 2 | | Larceny | | Guilty |
| | 3 | | Possession | | Guilty |
| 32616 | | 8/24/85 | Conspiracy | Penny | Guilty |

All of the charges relating to the break-ins at Deluxe Products and Books-Do-Furnish-A-Room on August 22, 1985 were either dismissed by the trial court at the close of the evidence or resulted in a not guilty verdict by the jury. The description of the facts that follows is limited to the other eight break-ins.

STATE'S EVIDENCE AS TO BREAKING OR ENTERING AND LARCENY

The State's evidence tended to show the following:

Mr. Wade Penny, president of three companies operating as Penny Furniture, Center Furniture, and Bargain Furniture Stores in Durham, North Carolina, testified for the State that he received a phone call at about 3:00 a.m. on Sunday, 5 May 1985, reporting a break-in at Center Furniture. When he got to the store, he found that a glass panel on the right side of the entrance had been broken. An inventory conducted on Monday by the store manager, Marvin Barber, showed that seven Hitachi radio/cassette players, one 12″ color television set, and some money from a change drawer were missing.

Mr. Penny received a telephone call at about 4:00 a.m. on 2 June 1985, reporting another break-in at Bargain Furniture. When he arrived at the store, he found a lower glass panel in the entrance had been broken with a concrete block. The store manager, Tom Davis, did an inventory later that morning. Three 12″ black-and-white television sets with AM/FM radios, one Hitachi radio/cassette player, and some cash were missing.

When Tom Davis arrived at Bargain Furniture on 10 June 1985, he found one of the glass panels in the entrance had been

broken. Davis entered the store and called the police. A number of items of merchandise were found on a hand truck in the basement. An inventory of the store showed that three Hitachi radio/cassette players were missing from the store.

On Sunday, 16 June 1985, Mr. Penny received a call reporting a break-in at Penny Furniture. Mr. Penny called Fred Baker, the store manager, and met him at the store. The lower left third of the plate glass window had been broken out. The inventory conducted by the store manager showed that four Hitachi radio/cassette players and seven television sets were missing.

Shortly after midnight on 4 July 1985, Mr. Penny got a call reporting a third break-in at Bargain Furniture. He called the store manager. When Mr. Penny and the manager arrived at the store, they found that the bottom portion of a window in the entrance had been broken with a piece of concrete. An inventory of the store conducted by the manager showed that four General Electric televisions, three Hitachi radio/cassette players, one Sanyo radio, and one Aria radio were missing.

Larry Madden, manager of Wright Furniture, was working late at the store on the night of 27 July 1985. After finishing work he turned out the lights and went to sleep in the office. He was awakened by the sound of glass breaking. He jumped up and tried to turn on the lights, but the lights would not come on. He saw a man in the store. Madden yelled, and the man jumped out of a hole in the store window and fled. Madden called the police.

Madden testified that after the police arrived at the store, they received a call about a man at the Yellow Cab Company in Durham, who had sustained some cuts on his body. The police took Madden with them to the cab company. Madden said he identified the man at the cab company as the man he had seen inside the store. The man Madden identified at the cab company was Walter Cox, whom Madden also identified at trial as the man who had broken into Wright Furniture the night of 27 July 1985.

At the time these break-ins were occurring, Norman Shultz owned Norman's T.V. When he went to the store on Monday, 12 August 1985, he found a hole in the bottom half of the front door. He entered the store and called the police. Mr. Shultz found that two radio/cassette players, one 5″ Sony television set, some clothes, and a bottle of pills were missing.

At about 5:30 a.m. on 24 August 1985, Wade Penny got a telephone call reporting a second break-in at Penny Furniture. He called the store manager, Fred Baker, and met him at the store. The glass on the right side of the entrance had been broken. An inventory of the store showed that one 13″ color television set, one 19″ color television set, one used color television set, and five Hitachi radio/cassette players were missing.

STATE'S EVIDENCE LINKING DEFENDANT TO BREAKING OR ENTERING, LARCENY AND CONSPIRACY

Cox testified that on 24 August 1985, he contacted Detective Hester of the Durham Public Safety Department and told the detective that he had been involved in several break-ins with defendant and another individual named Leslie Williams. Cox admitted to having pled guilty to breaking or entering into DeShazor's Beauty Salon with Williams in Durham earlier that month, and to having entered into a plea agreement to testify against defendant in exchange for a "lighter sentence" on the other charges.

Cox and Williams testified at trial for the State as to their involvement with defendant in the charged break-ins as follows:

In addition to his employment at IBM, defendant operated a business called Bob's Thrifty Shop at 526 East Main Street in Durham. Cox and Williams both spent time "hanging around" defendant's store. Cox testified that at the beginning of the summer he was selling cameras and watches to defendant. Cox testified that defendant suggested that Cox look around for some "good stuff" like televisions; that defendant was able to sell televisions and good radios; and that Cox could make some more money and not have to "hang around with winos." Cox testified that he told defendant that he had seen some places he could break into and asked defendant to go with him. Defendant said he would not commit any break-ins. Cox testified that defendant offered to let him have some tools. Cox further testified that defendant said to call him if Cox needed some help "getting the stuff," and gave Cox his telephone number.

Cox then testified as to a series of break-ins executed in essentially the same manner; late at night Cox alone or Cox and

Williams would throw a heavy object through the window of a retail store in downtown Durham and crawl through the hole into the store; Cox would locate televisions, radios and other merchandise inside and then call defendant from a telephone in the store; defendant would drive a truck to the store and either enter the building and carry out the merchandise with the others, or wait outside for the others to carry the merchandise out of the store; defendant would then help the others load the merchandise onto his truck and drive away.

On 31 August 1985, Cox telephoned the Durham Public Safety Department and told police when and where he was going to deliver two stolen televisions to defendant. Police watched the area. At about 4:30 a.m., police saw defendant's truck pull up to the area where Cox hid the televisions. A man got out of the truck and placed the televisions onto the back of the truck. The police moved in. The truck immediately drove off. The man who got out of the truck fled on foot. None of the officers could identify defendant as either the driver of the truck or the man who fled on foot.

Detectives called defendant at his home a half an hour later and said they had watched him take the two televisions. Defendant denied any knowledge of this. Later that morning police obtained a search warrant and searched defendant's residence. They did not find the televisions in defendant's house.

Defendant did not present any evidence. From the convictions and prison sentences totaling twenty-one years, defendant appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General R. Bryant Wall, for the State.*

*Glover & Peterson, P.A., by James R. Glover, for defendant appellant.*

JOHNSON, Judge.

Defendant raises four of his original twelve Assignments of Error on appeal, as well as an additional Assignment of Error number thirteen upon our granting of defendant's motion to amend the record. All other Assignments of Error not raised on appeal are deemed abandoned. Rule 28(b)(5), N.C. Rules App. P.

I

A

[1] Defendant's fifth Assignment of Error raises the issue of whether he could be lawfully convicted of seven counts of conspiracy to break or enter on these facts. He argues that the evidence does not show seven separate and distinct transactions, but rather shows a single scheme or plan to commit an ongoing series of felonious breakings or enterings. Based on this argument, defendant asks this Court to vacate the three judgments for multiple conspiracies and remand for entry of a single judgment on one count of conspiracy. The State argues on appeal that the evidence is sufficient to sustain defendant's convictions on seven counts of conspiracy to break or enter, and asks us to affirm these convictions and not to disturb the judgments.

The charges against defendant arise out of ten break-ins committed at several retail stores in Durham between 4 May 1985 and 24 August 1985. The evidence tends to show that all the break-ins occurred in essentially the same manner: Walter Cox, alone or with Leslie Williams, would break a store window and climb through the hole into the store. Once inside, Cox would telephone defendant. Defendant then drove his truck to the store to help carry away televisions and radios from the premises. For each of the break-ins, defendant was charged in separate indictments for conspiring with Cox (and in three indictments with Leslie Williams) to commit felonious breaking or entering. Defendant was eventually convicted of seven of these conspiracy charges, which were consolidated into three judgments of three years to be served consecutively.

The essence of the crime of conspiracy is the agreement to commit a substantive crime. *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E. 2d 893, 902, *cert. denied*, 312 N.C. 88, 321 S.E. 2d 907 (1984). No overt act is required in furtherance of the conspiracy. *State v. Nicholson*, 78 N.C. App. 398, 401, 337 S.E. 2d 654, 657 (1985). When the evidence shows a series of agreements or acts constituting a *single* conspiracy, a defendant cannot be prosecuted on multiple conspiracy indictments consistent with the constitutional prohibition against double jeopardy. *United States v. Kissel*, 218 U.S. 601, 54 L.Ed. 1168, 31 S.Ct. 124 (1910).

Although the offense of conspiracy is complete upon formation of the unlawful agreement, the offense continues until the conspiracy comes to fruition or is abandoned. *State v. Conrad*, 275 N.C. 342, 347, 168 S.E. 2d 39, 43 (1969). A single conspiracy may, and often does, consist of a series of different offenses. *State v. Brewer*, 258 N.C. 533, 540, 129 S.E. 2d 262, 267 (1963).

Although we have previously said that there is "no simple test for determining whether single or multiple conspiracies are involved" in a particular case, *Rozier*, *supra*, at 52, 316 S.E. 2d at 902, factors such as time intervals, participants, objectives, and number of meetings must be considered. *Id.*

Applying the four factors from *Rozier*, *supra*, to the facts in the case *sub judice*, we find ample evidence of a single conspiracy to feloniously break or enter the various Durham retail stores. All of the break-ins occurred within four months, and some within ten days of each other. The participants—defendant, Cox, and Williams in three instances—remained the same. The participants pursued the same objective throughout; to steal televisions and radios from local Durham retail stores. Meetings generally took place after break-ins to divide the spoils and discuss the next break-in. For example, on 1 June 1985, the night of the first break-in at Bargain Furniture, Cox testified that he and defendant discussed breaking into "*another* furniture store located across from *the same one I had been in* [Center Furniture] . . . This is Bargain Furniture I'm talking about now." The gist of the meetings was to plan subsequent break-ins in furtherance of the original unlawful agreement made sometime before the first break-in. We are hard pressed to find facts more clearly telling of an ongoing series of acts in furtherance of a single conspiracy to break or enter. Rather than show ten separate conspiracies to break or enter on ten separate occasions as the State contends, these facts show one unlawful agreement to break or enter as many times as the participants could get away with. But for Cox's cooperation with Durham police, defendant and Cox would have presumably kept on breaking into and stealing from the same or similar stores. The State's argument that each conversation that Cox and defendant had between break-ins constituted a separate agreement to break or enter is not supported by the evidence. Even the prosecutor said at trial during the hearing on defendant's motion to dismiss the charges as to the Deluxe Prod-

ucts break-in that "the date on this one [Deluxe Products] *is getting late in the conspiracy, August 22.*" (Emphasis supplied.)

We find that the evidence supports defendant's Assignment of Error as to the judgments and sentencing on multiple conspiracies, and hereby vacate the three judgments on the seven conspiracy convictions (Case Nos. 85CRS32365, 32366, 32368, 32615, 32616, 32619, 32370), and remand with instructions to the trial court to enter judgment on conspiracy to commit felonious breaking or entering in Case No. 85CRS32366.

B

[2] Defendant's thirteenth Assignment of Error, raised in his motion to this Court to amend the record, raises the issue of whether the trial court properly entered judgment on the conspiracy convictions as Class H Felonies with a maximum term of ten years and a presumptive term of three years. Defendant contends that conspiracy to commit felonious breaking or entering is punishable as a Class J Felony. We agree.

The trial court sentenced defendant to three years on each judgment as to the conspiracy convictions. The judgment and commitment forms in the record show the trial court delineated each "Conspiracy to commit B & E" conviction as a Class H Felony, which class of felony is punishable by a maximum ten-year prison term with a presumptive three-year prison term. As noted in the State's brief and defendant's motion to amend the record on appeal, G.S. 14-2.401 provides that a *conspiracy* to commit a Class H Felony, such as felonious breaking or entering under G.S. 14-54(a), is punishable as a Class J Felony by a maximum term of three years with a presumptive term of one year. We find that the trial court erred by sentencing defendant as a Class H Felon on the conspiracy counts. Upon remand defendant shall be resentenced as a Class J Felon on one count of conspiracy to commit felonious breaking or entering.

II

[3] Defendant's tenth and eleventh Assignments of Error raise the issue of whether the indictment for criminal possession of personal property of "Norman's T.V." (No. 32373) is fatally defective for failure to allege ownership of the property in a natural person

or entity capable of holding title to the property. We find no merit to defendant's Assignments of Error.

Counts two and three of the indictment in case No. 85CRS32373 charged defendant with larceny and possession of stolen televisions and radios which were the property of "Norman's T.V." Evidence at trial showed an ownership interest in the stolen property in Norman Shultz. The jury convicted defendant of the larceny and criminal possession charges, and the trial court arrested judgment on the larceny charge. Defendant contends that the variance between the indictment and the evidence is fatal. We disagree.

While the parties have not found a case involving an indictment under our criminal possession statute G.S. 14-71.1, we have recognized the similarity between that statute and the receiving stolen goods statute. We held in *State v. Taylor*, 64 N.C. App. 165, 169, 307 S.E. 2d 173, 176 (1983), *rev'd in part*, 311 N.C. 380, 317 S.E. 2d 369 (1984), that, as to knowledge or belief that goods were stolen, "the standard of proof established in cases of receiving stolen goods is equally applicable in cases involving possessing stolen goods." In cases of receiving stolen goods, it has never been necessary to allege the names of the persons from whom the goods were stolen, *State v. Truesdale*, 13 N.C. App. 622, 625, 186 S.E. 2d 604, 606 (1972), nor has a variance between an allegation of ownership in the receiving indictment and proof of ownership been held to be fatal. *State v. Golden*, 20 N.C. App. 451, 453, 201 S.E. 2d 546, 548, *cert. denied*, 285 N.C. 88, 203 S.E. 2d 60 (1974). We now hold that the name of the person from whom goods were stolen is not an essential element of an indictment alleging possession of stolen goods, nor is a variance between the indictments' allegations of ownership of property and the proof of ownership fatal.

Applying our holding to the case *sub judice*, we find the indictment alleging that defendant unlawfully possessed the personal property of Norman's T.V. sufficient to withstand defendant's Assignments of Error, and find further that the variance between the indictment above and the evidence at trial showing that the property was owned by Norman Shultz is not fatally defective. Defendant's Assignments of Error in this regard are overruled.

III

[4] Defendant's ninth Assignment of Error raises the issue of whether the State's evidence at trial was sufficient to prove defendant guilty of breaking or entering into Bargain Furniture on 10 June 1985 (85CRS32369), and on 4 July 1985 (85CRS32371), and Wright Furniture on 27 July 1985 (85CRS32618). We find the State's evidence sufficient to establish defendant's guilt in all three charges and overrule his Assignment of Error.

The State did not offer any evidence that defendant actually entered the buildings during the commission of these three crimes, but instead alleged that defendant aided and abetted the breaking or entering by Walter Cox. The evidence required to convict an aider and abettor of a specific crime was well summarized by our Supreme Court in *State v. Sanders:*

> The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense. To support a conviction, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrators. The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators.

288 N.C. 285, 290-91, 218 S.E. 2d 352, 357 (1975) (citations omitted); *cert. denied*, 423 U.S. 1091, 47 L.Ed. 2d 102, 96 S.Ct. 886 (1976).

With respect to the 10 June 1985 break-in at Bargain Furniture, defendant drove his truck to the store after Cox telephoned him, gave Cox tools to break the lock on the rear door of the store, then received merchandise through the hole in the store window, and loaded the goods onto his truck. During the 4 July 1985 break-in at Bargain, defendant agreed beforehand to drive his truck to the store. When defendant arrived at the store, Cox told defendant the store contained some televisions and "some Hitachi radios again." Defendant said, "I don't want no radios," whereupon Cox entered the store through a broken win-

dow and passed television sets out to defendant to load them onto his truck. During the 27 July 1985 break-in at Wright Furniture, defendant parked his truck in an adjacent parking lot, gave Cox a hammer with which to disarm the store's alarm, and waited outside. While inside, Cox awakened a sleeping employee. Cox fled the building. Defendant got into his truck and drove away. We find that this evidence clearly shows that defendant was actually present at the scene in each of the three break-ins at issue, and clearly communicated his intent to aid Cox and Williams in breaking or entering the stores. We find that the evidence unequivocally supports defendant's convictions on each of these three breaking or entering charges since the evidence shows he aided and abetted the principal perpetrators and is, therefore, equally culpable even though he did not physically enter the buildings.

In summary, cases:

85CRS32364, 32367, 32369, 32371, 32612, 32373, 32618—No error.

85CRS32365, 32366, 32368, 32615, 32616, 32619, 32370—Judgments vacated.

85CRS32366—Remanded for resentencing.

Judges BECTON and PHILLIPS concur.

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ROSEMARY HUDSON ROBERTS, WIDOW; ROSEMARY HUDSON ROBERTS, GUARDIAN AD LITEM OF JESSICA GAY ROBERTS, MINOR DAUGHTER OF TIMOTHY LEE ROBERTS, DECEASED, EMPLOYEE, PLAINTIFFS v. BURLINGTON INDUSTRIES, INC., EMPLOYER, AND LUMBERMEN'S MUTUAL CASUALTY CO., CARRIER, DEFENDANTS

No. 8610IC1160

(Filed 16 June 1987)

**Master and Servant § 55.5— workers' compensation—death during emergency assistance to stranger—injury arising out of employment**

The death of a furniture designer who was struck by a vehicle while rendering emergency assistance to a stranger on the highway while in the

course of his employment arose out of his employment since his actions benefited the employer by increasing its good will; his employment placed him in the position of increased risk; and the hazards to an employee who offers assistance to strangers in an emergency situation are not hazards to which the general public is equally exposed.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award of the Full Commission entered 5 August 1986. Heard in the Court of Appeals 12 March 1986.

This is a civil action to recover workers' compensation death benefits brought by the widow of defendant's employee, now deceased. On 8 April 1986, Deputy Commissioner Lawrence B. Shuping, Jr., denied plaintiff's claim for death benefits by finding that, although deceased died as a result of an accident in the course of his employment, such accident did not arise out of his employment with defendant. The Full Commission adopted and affirmed Deputy Commissioner Shuping's Opinion and Award, with one dissent. Plaintiff appeals from this Opinion and Award.

The deceased, Timothy Lee Roberts, was employed by defendant, Burlington Industries, as a furniture designer from 21 July 1982 until his death. Roberts worked at the Furniture Division of Burlington Industries in Lexington, North Carolina. He lived with his family in Thomasville, North Carolina, and drove his own car to work. His job did not require any contact with the general public since Burlington sold furniture directly to retailers.

On 18 November 1982, Roberts went on a business trip with some other Burlington employees to a Burlington plant in Asheville, North Carolina. Later that day at about 5:30 p.m., he and the other employees returned by plane to the Greensboro Regional Airport. They left the airport separately in their own cars at about 5:45 p.m. Roberts' whereabouts between 5:45 p.m. and a few minutes before his death at approximately 7:30 p.m. that same evening are uncertain.

At about 7:30 p.m. on 18 November 1982, a man named William Desmond Winters, Jr., was hit by a car as he was walking down the entrance ramp onto Interstate 85-South at the Holden Road Exit in Greensboro, North Carolina. Winters, a transient from Tennessee, had just been told by sheriffs to leave a nearby Howard Johnson's Restaurant for not paying his bill. It had been raining for about an hour and the road was wet. The first person

on the scene was David G. Smith of Greensboro, who was driving down the ramp onto Interstate 85 when he stopped to offer Winters assistance. Timothy Roberts drove his car onto the ramp heading toward the Interstate. From the Holden Road Exit, Interstate 85 runs southeast connecting Greensboro to Thomasville. Roberts stopped his car and asked Smith if Winters needed assistance. Smith said yes. Roberts pulled his car over to the right shoulder of the ramp, got out, and walked back up the ramp to where Winters was lying. Roberts asked Smith if the authorities had been notified yet, to which Smith replied that they had not. Roberts walked up the ramp toward the main road. Smith estimated that Roberts was gone about five to eight minutes before returning to say that he had notified the Highway Patrol. Roberts told Smith that the latter should move farther up the ramp to wave off traffic, and that he, Roberts, would stand by Winters and wave cars off. While standing on the ramp near Winters' body, Roberts was struck and killed by two cars driving down the ramp. An autopsy revealed that Roberts most likely died at the scene.

The parties stipulated that Burlington sold furniture for resale to two retailers with showrooms located near the scene of the accident adjacent to Interstate 85; that both retailers were currently displaying particular lines of Burlington's furniture, the acceptance and marketing of which by both retailers was significant to Burlington; that both retailers were open to the public and conducting business between 5:45 p.m. and 7:35 p.m. on 18 November 1982.

On 17 February 1983, Mrs. Roberts filed a claim for all benefits due under the North Carolina Workers' Compensation Act on behalf of herself and the Roberts' daughter as dependents. On 8 April 1986, Deputy Commissioner Shuping entered an Opinion and Award denying plaintiff's claim. In his Opinion the Deputy Commissioner concluded that, although Mr. Roberts died as a result of an injury by accident which occurred in the course of his employment, Mr. Roberts' injury by accident did not arise out of his employment. On 28 July 1986 the Full Commission adopted Deputy Commissioner Shuping's Opinion and Award as its own. From that Opinion and Award, plaintiff appeals.

*McNairy, Clifford, Clendenin & Parks, by Harry H. Clendenin, III, for plaintiff appellant.*

*Smith, Helms, Mulliss & Moore, by J. Donald Cowan, Jr., and Caroline H. Wyatt, for defendant appellee.*

JOHNSON, Judge.

The sole issue raised by plaintiff's Assignments of Error is whether the Full Commission erred in adopting and affirming the Deputy Commissioner's Opinion and Award denying plaintiff's claim and finding that plaintiff's husband died as a result of an injury by accident which occurred in the course of, but did not arise out of, his employment with defendant Burlington. Plaintiff urges this Court on appeal to reverse the Full Commission's decision based on case law from other jurisdictions holding as compensable injuries suffered by employees while rendering emergency assistance to strangers. In accepting plaintiff's argument, we now hold that injuries sustained by employees while rendering emergency assistance to strangers while in the course of employment may also arise out of that employment and be compensable. This Court will discuss below how today's holding, new to workers' compensation law in North Carolina, fosters the sound public policy of encouraging humanitarian acts by employees which directly or indirectly benefit employers, and is in line with present North Carolina law.

I

On appeal from an award of the Industrial Commission, this Court is limited in inquiry to two questions: (1) whether there was any competent evidence before the Commission to support its findings of fact, and (2) whether the findings of fact of the Commission justify the Commission's conclusions of law and decision. *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E. 2d 101, 104 (1981). The Full Commission adopted the Deputy Commissioner's Opinion and Award, including the findings of fact. The Full Commission made no separate findings. Deputy Commissioner Shuping found as fact the following: from the evidence one can speculate that Mr. Roberts' approximate two hour delay in returning home from the Greensboro Airport following his trip to Burlington's Asheville plant was from stopping at the retail stores in Greensboro to examine items of furniture, and that such was a necessary

part of his employment duties as furniture designer; that, even assuming his delay was for entirely personal reasons, Mr. Roberts had returned to the normal route home from the airport; thus, his death occurred in the course of his employment. Plaintiff does not except to these findings. Defendant does not take issue with the finding and conclusion that Mr. Roberts' death occurred in the course of his employment.

The Deputy Commissioner went on to find that Mr. Roberts' untimely death did not arise out of his employment, but instead arose from the voluntary, albeit indisputably commendable, humanitarian act of a good citizen and "good Samaritan" in stopping to render assistance to an apparent total stranger; that such act was unrelated to his duties as furniture designer for defendant; that defendant did not sell furniture directly to the public and was not directly or indirectly benefited by Mr. Roberts' humanitarianism in the course of his employment; that Mr. Winters was financially destitute when Roberts assisted him, was not a customer of Burlington, and was unlikely ever to become a Burlington customer; that no evidence exists that Burlington even encouraged such humanitarianism by its employees to foster the good will of the company; that Mr. Roberts was driving his own vehicle rather than a company car which would have identified him as a Burlington employee; that Mr. Roberts was identified in some, but not all, local newspapers as a Burlington employee who died a good Samaritan; that any good will flowing to Burlington as a result of Mr. Roberts' actions is too remote to be considered a benefit to Burlington for purposes of compensation. The commissioner concluded, as a matter of law, whether plaintiff should recover as a matter of public policy in order to foster similar humanitarian acts is beyond the Industrial Commission's authority to grant. Plaintiff excepted to these findings of fact and conclusions of law. The Deputy Commissioner concluded as a matter of law that Mr. Roberts died as a result of an injury by accident which occurred in the course of, but did not arise out of, his employment, to which plaintiff excepted.

The Full Commission concluded that the activity in which Mr. Roberts was engaged when he was killed was a risk to which the general public is equally exposed outside of employment; that the risk was not created by nor was it a natural part of his employment as furniture designer; and that the findings of fact of the

hearing commissioner below were supported by the evidence, and adopted and affirmed that Opinion and Award as its own. Plaintiff excepted to each conclusion and the decision.

Although we find that the evidence in the record supports the findings of fact, we find that the Full Commission erred by concluding as a matter of law that Mr. Roberts' injury did not arise out of his employment. We must look at the applicable case law in light of our stated public policy to ascertain our finding that the Commission's conclusion is erroneous.

II

A

For an injury to be compensable under the North Carolina Workers' Compensation Act, the injury must be the result of an accident arising out of and in the course of the employment. G.S. 97-2(6). Neither party challenges, nor do we find error with, the Commission's conclusion that Mr. Roberts' injury by accident occurred in the course of his employment. At issue here is whether his injury arose out of his employment. The phrase "arising out of the employment" refers to the origin of or cause of the accidental injury. *Robbins v. Nicholson,* 281 N.C. 234, 238-39, 188 S.E. 2d 350, 353 (1972). There must be some causal connection between the employment and the injury. *Perry v. American Bakeries Co.*, 262 N.C. 272, 274, 136 S.E. 2d 643, 645 (1964). Further, some risk inherent to the employment must be a contributing cause of the injury, and the risk must be one to which the general public would not have been equally exposed apart from the employment. *Pittman v. Twin City Laundry & Cleaners,* 61 N.C. App. 468, 472, 300 S.E. 2d 899, 902 (1983); *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 454, 85 S.E. 2d 596, 600-01 (1955). In other words, the employment must have increased the risk of such injury occurring.

North Carolina law also says that an injury arises out of the employment when it occurs while the employee is engaged in some activity that he is authorized to undertake and that benefits, directly or indirectly, the employer's business. *Long v. Asphalt Paving Co.*, 47 N.C. App. 564, 566, 268 S.E. 2d 1, 3 (1980).

B

"This decision . . . suggests the further question as to whether an injury is compensable when an employee, a motorist, then in the course of his employment, renders 'a courtesy of the road' to another motorist then in need of aid. Consideration of that question must await an appropriate fact situation." *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 454, 85 S.E. 2d 596, 601 (1955). In that opinion discussing a case from another jurisdiction with facts similar to those *sub judice*, our Supreme Court left open the question of whether, in North Carolina, injuries sustained while rendering emergency aid to strangers in the course of one's employment arise out of that employment. Today's case offers a most appropriate, compelling fact situation for answering this question.

In *Guest, supra*, the Court upheld compensation to an employee who was found to have been injured in the course of, and which injuries arose out of, his employment. Guest was hired by Brenner to fix flat tires. Guest was fixing a tire at Brenner's instruction when Guest asked a gas station operator if he could use the station's air hose to get some "free air" to inflate the tire. The station operator complied. Just then, a customer at the gas station was unable to start his car. The station operator asked Guest to help push the customer's car onto the highway. Guest was struck by a passing car and was injured while rendering the requested assistance.

The Court in *Guest, supra*, at 452, 85 S.E. 2d at 600, phrased this issue; "whether plaintiff's claim is compensable turns upon whether the employee acts for the benefit of his employer to *any appreciable extent* or whether the employee acts solely for his own benefit or purpose or that of a third person." (Emphasis supplied.) In holding that Guest's assistance to the gas station customer did benefit the employer, the Court reasoned that Guest's permission to use the gas station's air pump was contingent upon his helping the station attendant push the customer's stalled car. In essence, reciprocal assistance was extended. *Id.* at 453, 85 S.E. 2d at 600. Brenner's benefiting by receiving "free air" from the gas station was contingent upon Guest, its employee, assisting the gas station's operator. *Id.* The Court reasoned that Guest's assistance was requested in return for the gas station's assistance, and

therefore Guest's assistance was related to his employment. Such assistance is distinguished from unconditional assistance, or "the act of a good Samaritan," which the Court stated was unrelated to the employment. *Id.* at 455, 85 S.E. 2d at 601.

In the case *sub judice*, Mr. Roberts' assistance to Mr. Winters was undoubtedly the act of a very good Samaritan. We do not find, however, that his act was the kind of unconditional assistance that the Court in *Guest, supra*, reasoned to be unrelated to the employment. As stated in *Guest, supra*, whether the employee's injury is compensable depends on whether his assistance to the third party benefited his employer *to any appreciable extent*. We find that Mr. Roberts' humanitarian actions while driving home from work, wherein he tried to save the life of a stranger injured on the highway, benefited defendant Burlington Industries by increasing the employer's good will. Several local newspapers carried the story and noted that Mr. Roberts worked for Burlington, a major employer and manufacturer in the Greensboro area. A trade publication called "Furniture Today" ran an article on Mr. Roberts calling him a furniture designer for Burlington who died "in the act of being a good Samaritan." Although the record does not show any direct benefit to Burlington from Mr. Roberts' action, such as increased sales in the Greensboro area right after reports of his death, the record does show that the good will of Burlington can only have been benefited by having Mr. Roberts in its employment. The Deputy Commissioner's characterization of the difficulty in assessing the good will of an employer as a function that is too remote and immeasurable is correct in many instances; however, we find that the facts in this case compel us to conclude that Burlington's good will benefited *to some appreciable extent, see Guest, supra*, at 452, 85 S.E. 2d at 600, by the heroism of its employee, Mr. Roberts. Although the extent to which Burlington benefited is uncertain, that benefit need not be direct to show that the employee's injuries arose out of his employment. *Long, supra*, at 566, 268 S.E. 2d at 3.

North Carolina joins other jurisdictions which hold that injuries sustained in the course of employment while rendering emergency assistance to strangers are compensable under workers' compensation legislation. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483 (1951); *Food Products*

*Corp. v. Industrial Comm.*, 129 Ariz. 208, 630 P. 2d 31 (1981); *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888 (Miss. 1980); *In re D'Angeli's Case*, 369 Mass. 812, 343 N.E. 2d 368 (1976); *see* 1A Larson, Workmen's Compensation Law sec. 28.23 (1985). According to Professor Larson, the United States Supreme Court in *Brown-Pacific-Maxon, supra,* adopted a view shared by many jurisdictions whereby injuries sustained during acts in emergency are compensable if the employment places the employee in the emergency:

> The *Brown-Pacific-Maxon* case adopts the positional risk theory in its purest form, by finding work-connection if the employment merely brings the employee to the place where he encounters a moral obligation to rescue a stranger. Presumably it would follow that an office worker who observed a street accident from a third-floor window would remain in the course of employment when rushing to aid the victims, since the employment would have provided the contact between the employee and the rescue opportunity.

1 Larson, *supra,* sec. 28.23 at 5-423-24. Although the quote hereinabove relates to the positional-risk doctrine "in the course of" employment, Professor Larson goes on to note the application of positional-risk "arising out of" employment:

> An important and growing number of courts are accepting the full implications of the positional-risk test: An injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he was injured.

Larson, *supra,* sec. 6.50 at 3-6 (emphasis supplied). We have cited the positional-risk test hereinabove with approval as it relates to injuries arising out of the employment in *Felton v. Hospital Guild of Thomasville*, 57 N.C. App. 33, 38, 291 S.E. 2d 158, 160 (1982).

Applying the positional-risk test to the facts *sub judice,* we find that the conditions and obligations of Mr. Roberts' employment put him in the position where he was killed. He was required by his employment with Burlington to visit a furniture plant in Asheville. This business trip necessitated flying from Greensboro Regional Airport. Mr. Roberts therefore had to drive

himself to and from the airport. It was while on his way home that night when he encountered a stranger in need on the highway and offered assistance. The evidence clearly shows that an emergency existed, and that Mr. Roberts reasonably believed that such an emergency existed. *See Food Products, supra,* at 211, 630 P. 2d at 32. Under the circumstances, it was reasonable to expect an employee to stop and render assistance. We hold that Mr. Roberts' employment placed him in the position of increased risk, considering that his actions were reasonable, and that by being placed at such risk by his employment, his injuries arose out of that employment.

Defendant argues that Mr. Roberts' injury should not be compensated because the public is equally exposed to the hazard of being hit by a car on the highway while rendering emergency aid, and that nothing about being a furniture designer increased Mr. Roberts' risk of being placed in such an emergency. As noted in *Pittman, supra,* at 472, 300 S.E. 2d at 902, for an accident to arise out of employment in North Carolina, the risk must not have been one to which the employee would have been equally exposed apart from the employment. The risk must not be common to the general public. *Harless v. Flynn,* 1 N.C. App. 448, 458, 162 S.E. 2d 47, 52 (1968).

Defendant cites a number of cases holding that injuries sustained by employees did not arise out of the employment because the hazards were ones to which the general public was equally exposed. *Plemmons v. White's Service, Inc.,* 213 N.C. 148, 195 S.E. 370 (1938) (station attendant died of complications from dog bite); *Gallimore v. Marilyn's Shoes,* 292 N.C. 399, 233 S.E. 2d 529 (1977) (shoe store employee killed by armed robber in mall parking lot); *Sandy v. Stackhouse, Inc.,* 258 N.C. 194, 128 S.E. 2d 218 (1962) (repairman killed in car crash while returning to hotel from store during business trip); *Perry v. American Bakeries Co.,* 262 N.C. 272, 136 S.E. 2d 643 (1964) (salesman injured when diving into pool at hotel where business meeting was being held); *Bartlett v. Duke University,* 284 N.C. 230, 200 S.E. 2d 193 (1973) (employee choked to death during dinner while on business trip); *Snyder v. General Paper Co.,* 277 Minn. 376, 152 N.W. 2d 743 (1967) (employee choked to death during business dinner).

The case *sub judice* is distinguishable from the cases above in at least one important respect; Mr. Roberts was killed while rendering assistance to a stranger during an emergency. All of

the employees in the cases above cited by defendant were injured or killed by hazards common to the public. Mr. Roberts' affirmative act of humanitarianism was, by its selfless nature, not something generally done by all. Hazards such as crime, dog bites, or choking are subjected upon all citizens. We do not willingly encounter such hazards. Offering assistance in an emergency, however, is an *affirmative* act, one which takes any hazards that may be encountered during such assistance out of the category of hazards subjected upon the general public. In this respect, we find that the hazards bearing upon employees who offer assistance to strangers in emergency situations are not hazards to which the general public is equally exposed. Therefore, in line with *Pittman, supra,* we hold that, as a matter of law, Mr. Roberts' death arose out of a risk that he would not have been exposed to but for his employment.

III

We note that our holding in this case is based on a sound policy that seeks to foster in employees acts of humanitarianism such as those displayed by Mr. Roberts in his last few moments alive. Furthermore, we emphasize the benefit to the employer of such a policy; if this Court were to hold that the tragic death of an employee while selflessly trying to help a stranger in need did not arise out of his employment, we would discourage some of the very characteristics that an employer no doubt looks for when hiring employees to impress upon customers the quality of its work force. It is hard to see how the good will of Burlington Industries could not have benefited from the publicity in the Greensboro area surrounding Mr. Roberts' tragic death.

We are mindful, however, of the great risk we run in fashioning a holding that sweeps too broadly to encompass behavior less of the caliber of Mr. Roberts, and more of the individual who seeks personal gain in his seemingly altruistic endeavors. The rendering of emergency assistance to strangers by employees that, if injury occurs, falls within the course of employment must be of a truly selfless nature. Such a limit on today's holding necessarily requires a case-by-case analysis.

The Opinion and Award of the Full Commission is

Reversed.

Judges EAGLES and ORR concur.

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POOR RICHARD'S, INC. D/B/A POOR RICHARD'S v. HERMAN STONE, POLICE CHIEF CHAPEL HILL, NORTH CAROLINA AND LINDY PENDERGRASS, SHERIFF, ORANGE COUNTY, NORTH CAROLINA

No. 8615SC1149

(Filed 16 June 1987)

**1. Declaratory Judgment Act § 9— sufficiency of judgment**

The trial court's order granting summary judgment for plaintiff in a declaratory judgment action was sufficient even though it did not explicitly state that the statute in question was unconstitutional or the grounds for the judgment where the constitutionality of the statute was the only issue before the court and its unconstitutionality could be the only basis for the court's judgment, and the judgment declared the rights of the parties and effectively disposed of the dispute.

**2. Injunctions § 12.3; Rules of Civil Procedure § 65— injunctive order—failure to state reason for issuance**

An injunctive order which does not state the reason for its issuance is merely irregular and not void; it is properly corrected by a motion made before the trial court and will not be corrected on appeal. N.C.G.S. § 1A-1, Rule 65(d).

**3. Constitutional Law § 12.1— regulation of businesses purchasing military property—unconstitutionality of statute**

Art. I of G.S. Ch. 127B, which requires businesses purchasing or selling military property to obtain a license, post a $1,000 bond, provide certain personal information about the owners, and maintain certain records concerning acquisitions of military property, is an unreasonable exercise of the police power and violates the law of the land clause of Art. I, § 19 of the N.C. Constitution.

Judge JOHNSON dissenting.

APPEAL by the State from *Battle, Judge.* Judgment entered 17 March 1986 in Superior Court, ORANGE County. Heard in the Court of Appeals 31 March 1987.

This is a declaratory judgment action brought to have Article 1 of Chapter 127B of the General Statutes (hereafter "the statute") declared unconstitutional. Plaintiff is a North Carolina

corporation engaged in the business of retail sales. A portion of the merchandise which plaintiff buys and sells is "military property" as defined in G.S. 127B-2. The statute requires businesses which purchase or sell "military property" to obtain a license from the appropriate local governing body, present certain personal information about the owner(s), and post a $1,000 bond. It also requires those businesses to maintain certain records regarding its acquisitions of military property and to keep those records open for inspection by law enforcement officers. Violation of the statute, which became effective on 1 October 1985, constitutes a misdemeanor.

Plaintiff filed this action on 23 October 1985, challenging the constitutionality of the statute on eight separate grounds. Plaintiff's complaint also contained a motion for an order temporarily restraining the statute's enforcement. The trial court immediately granted plaintiff's motion for a temporary restraining order. The temporary restraining order was later converted to a preliminary injunction by consent of the parties. On 7 March 1986, plaintiff moved for summary judgment, submitting affidavits from four different owners of retail stores which buy and sell "military property." Each of the affiants stated that compliance with the statute would cause them substantial and irreparable economic loss. Plaintiff and one other affiant said that they would be forced to abandon that part of their business dealing with military property if they were required to comply with the statute's provisions. On 17 March 1986, the trial court issued an order granting plaintiff's motion for summary judgment and permanently enjoining defendants from enforcing the statute. By consent of the parties and approval of the trial court, the State was made a party defendant to the action and the judgment was extended to all law enforcement agencies in the State. The State, as intervenor-defendant, appeals.

*Poyner & Spruill, by J. Phil Carlton and Susanne F. Hayes, for the plaintiff-appellee.*

*Attorney General Thornburg, by Special Deputy Attorney General David S. Crump, for the State.*

EAGLES, Judge.

I

[1] The State's first two assignments of error concern the sufficiency of the trial court's order. The State argues that the order (1) does not adequately declare the rights of the parties, and (2) fails to state the reasons for issuing the permanent injunction. Consequently, the State contends that this case must be remanded for entry of a more specific order. We disagree.

A declaratory judgment action is a proper means of challenging the constitutionality of a statute which adversely affects the plaintiff. *Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971). The trial court's declaratory judgment need not be in any particular form so long as it actually decides the issues in controversy. *See* 26 C.J.S. Declaratory Judgments, sections 158, 161 (1956). Although the trial court's judgment here does not explicitly state that the statute is unconstitutional, or the grounds for its judgment, it clearly declares the rights of the parties and effectively disposes of the dispute.

Plaintiff's complaint alleged eight separate theories under which it claimed the statute was unconstitutional. Plaintiff sought no declaration other than that the statute was unconstitutional. Since the only issue before the trial court was the constitutionality of the statute, its unconstitutionality could be the only basis for the trial court's judgment. Therefore, the order granting summary judgment for plaintiff, even without an explicit recitation that the statute was unconstitutional, disposed of the controversy, declaring, in effect, that plaintiff was not obligated to comply with the statute and that defendant had no right to enforce it. It was unnecessary for the trial court to go further and state the ground or grounds upon which it concluded the statute was unconstitutional.

[2] The State's second contention that the case must be remanded because the order fails to state the reason for issuing the injunction, is also without merit. While Rule 65(d) of our Rules of Civil Procedure states, in pertinent part, that "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance . . .", an injunctive order which does not state the reasons for its issuance is merely irregular, not void,

and must be obeyed by the parties until corrected. *Manufacturing Co. v. Union*, 20 N.C. App. 544, 202 S.E. 2d 309, *cert. denied*, 285 N.C. 234, 204 S.E. 2d 24 (1974). Irregular orders of this kind are properly corrected by a motion made before the trial court and will not be corrected on appeal. *Schultz and Assoc. v. Ingram*, 38 N.C. App. 422, 248 S.E. 2d 345 (1978).

II

[3] By its last assignment of error, the State argues that the trial court erred in granting summary judgment for plaintiff. In reviewing an order granting summary judgment, we must determine whether the trial court correctly found that there was no genuine issue of material fact for trial and that the prevailing party was entitled to judgment as a matter of law. *Hall v. Kemp Jewelry*, 71 N.C. App. 101, 322 S.E. 2d 7 (1984). The State does not dispute that summary judgment is appropriate where, as here, the case involves only a question of law. Instead, it argues that the statute is not unconstitutional and, consequently, that summary judgment for plaintiff should have been denied. We disagree and hold that Article 1 of Chapter 127B of the General Statutes violates Article I, section 19 of the North Carolina Constitution.

Article I, section 19 of our Constitution provides in part, that "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land." N.C. Const., art. I, section 19. The term "law of the land" is synonymous with "due process of law," *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979), and serves to limit the State's police power to actions which have a rational, real, or substantial relation to the public health, morals, order, safety or general welfare. *In re Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1973). In its brief, the State argues that the statute is a reasonable exercise of the police power because it (1) deters theft of property from military bases located in North Carolina, and (2) limits the places where criminals may easily dispose of such property. Assuming *arguendo* that the State's police power extends to aiding the federal government in preventing theft from U.S. military bases, *but cf.*, *Treants Enterprises, Inc. v. Onslow County*, 83 N.C. App. 345, 350 S.E. 2d 365 (1986), *disc. rev. denied*, 319 N.C. 411, 354 S.E. 2d 730 (1987) (county had no legitimate interest in assisting the enforcement of U.S.

Marine Corps regulations), we nevertheless hold that the statute is an unreasonable, and therefore unconstitutional, means of achieving that purpose.

The right to work and earn a livelihood is a property right, considered "fundamental" under the North Carolina Constitution. *Roller v. Allen*, 245 N.C. 516, 96 S.E. 2d 851 (1957); N.C. Const. art. I, section 1. Consequently, our law requires that regulation of otherwise lawful occupations and businesses be "based on some distinguishing feature in the business itself or in the manner in which it is ordinarily conducted, the natural and probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare." *State v. Harris*, 216 N.C. 746, 758-759, 6 S.E. 2d 854, 863 (1940). We do not find the required distinguishing feature in plaintiff's business.

When determining whether the State may constitutionally regulate a particular business or occupation, our courts have distinguished those businesses which require special skill or knowledge, or threaten harm to the public, and those which do not. *Treants Enterprises, Inc. v. Onslow County, supra.* The State may, for instance, regulate the practice of medicine, *State v. Van Doran*, 109 N.C. 864, 14 S.E. 32 (1891), and pharmacy, *Board of Pharmacy v. Lane*, 248 N.C. 134, 102 S.E. 2d 832 (1958), the practices of which require special skill and knowledge. Regulation is also permitted where necessary to protect the public from conflicts of interest arising from employment in two occupations. *See Gardner v. N.C. State Bar*, 316 N.C. 285, 341 S.E. 2d 517 (1986) (State may constitutionally discipline an attorney employed by insurance company from representing the company's insureds in court); *Assoc. of Licensed Detectives v. Morgan, Attorney General*, 17 N.C. App. 701, 195 S.E. 2d 357 (1973) (State may prevent those who hold commissions as "special" police officers from obtaining license to be a private detective). Likewise, the State may exercise its police power to prevent a danger inherent in the operation of the business. In *State v. Warren*, 252 N.C. 690, 114 S.E. 2d 660 (1960), for example, the court held that the State may constitutionally license and regulate real estate brokers. In *Warren*, the court found it significant that real estate brokers stand in a position of trust in relation to their clients and that the business itself could "be conducted in such manner as to promote an undesirable state of local, economic excitement and unrest, which

may easily result in a degree of public distress analogous to that produced by mismanagement of a banking institution." *Id.* at 695, 114 S.E. 2d at 665. *See also D & W, Inc. v. Charlotte,* 268 N.C. 577, 151 S.E. 2d 241 (1966) (State may regulate sale of alcoholic beverages in restaurants); *State v. McCleary,* 65 N.C. App. 174, 308 S.E. 2d 883 (1983), *affirmed,* 311 N.C 397, 316 S.E. 2d 870 (1984) (State's police power extends to prohibition or regulation of gambling).

Without a showing of some danger to the public, however, our courts have refused to uphold the kind of substantial regulations found here. Regulations licensing such professions as dry cleaners, *State v. Harris, supra;* tile contractors, *Roller v. Allen, supra;* professional photographers, *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731 (1949); and those who duplicate lenses for eyeglasses, *Palmer v. Smith,* 229 N.C. 612, 51 S.E. 2d 8 (1948), have been held unconstitutional. Other regulations of business have also been held invalid as unreasonable exercises of the police power. In *Indemnity Co. v. Ingram, Comr. of Insurance,* 290 N.C. 457, 226 S.E. 2d 498 (1976), the court held that the State may not require insurance companies to provide certain kinds of policies even if the State allowed for a reasonable profit and despite the fact that the insurance business affects the public health, an area where the police power is inherently favored. Similarly, in *In re Hospital, supra,* the court held the State could not require private hospitals to obtain a "certificate of need" before opening a medical facility, stating that every regulation of hospitals is not within the police power merely because hospitals are related to public health. (Decided under former G.S. 90-289 to 291, now G.S. 131E-175 to 191.) *See also Real Estate Licensing Board v. Aikens,* 31 N.C. App. 8, 228 S.E. 2d 493 (1976) (no reasonable basis for including persons who sell lists of property for rent in definition of real estate broker).

The State does not contend that the business of buying and selling military surplus property presents a danger to the public health, safety, or welfare. Nor does the State dispute that the statute represents a substantial obstacle to freely engage in that business. Instead, the State claims that the statute is necessary to prevent stores such as plaintiff's from serving as "fences" for stolen military property. Indeed, many of the statute's regulatory requirements are directly aimed at allowing law enforcement of-

ficials to trace the sources of the acquired property. If the State's primary purpose in this regulatory statute is to prevent the owners of military property sales businesses from illegally purchasing property they believe may be stolen, the statute cannot stand. The State may not undertake "by regulation to rid ordinary occupations and callings of the dishonest. . . . Resort in that area must be had to the criminal laws." *State v. Warren*, 252 N.C. at 693, 114 S.E. 2d at 664. *See also State v. Ballance, supra.* Likewise, if the State, by this regulatory statute, is seeking to enlist plaintiff's aid in enforcing already existing criminal laws, either by allowing the State to trace the property to its criminal source, or to deter its disposition, and, therefore, its theft, it is also unconstitutional. Those who buy and sell military surplus property may not be required to incur additional expense, or abandon that part of their business, to assist in enforcing our criminal laws. By reason of the "law of the land" clause of Article I, section 19, "the simple statement 'I don't want to' is still a sufficient answer to some governmental demands of this State." *Indemnity Co. v. Ingram, Comr. of Insurance*, 290 N.C. at 469-470, 226 S.E. 2d at 506.

The State fails to articulate a reasonable basis for the statute, but relies heavily on the presumption of validity accorded legislative acts. *See A-S-P Associates v. City of Raleigh, supra.* Whether a particular legislative act is reasonable, however, is a question for the court. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983). Although our courts will give a certain deference to the Legislature, any burden on the party challenging the statute is satisfied when the facts are "laid bare to the Court and the situation is found to be wanting in those conditions and those circumstances upon which alone the power of the Legislature in its exercise of the police power must depend." *State v. Harris*, 216 N.C. at 764, 6 S.E. 2d at 866. By challenging the statute and arguing its unconstitutionality, plaintiff has satisfied any burden it may have had. *See Treants Enterprises, Inc. v. Onslow County, supra.*

Whether a particular regulation is a valid exercise of the police power is a question of degree and reasonableness, measured in relation to the public good likely to result from it. *In re Hospital, supra.* While a plausible argument can be made that any regulation provides some benefit to the public, our courts have re-

quired more: that the regulation have, in fact, "a reasonable and substantial relation to the evil it purports to remedy." *Id.* at 551, 193 S.E. 2d at 735 (quoting *State v. Harris, supra,* at 759, 6 S.E. 2d at 863). The statute challenged here creates substantial obstacles to the free carrying on of plaintiff's chosen business, while its benefit to the public is disproportionately minimal. Consequently, we hold that Article 1 of Chapter 127B of the General Statutes is an unreasonable means of achieving its purported end, violates Article I, section 19 of the Constitution of North Carolina, and was properly declared unconstitutional.

We need not discuss plaintiff's other arguments. We note, however, that G.S. 127B-2 defines "military property" as: "property originally manufactured for the United States or State of North Carolina which is a type and kind issued for use in, or furnished and intended for, the military service of the United States or the militia of the State of North Carolina." This definition would seem to include weapons and other dangerous instrumentalities, regulation of which is found elsewhere, *see* G.S. 14-381 to 415; 18 U.S.C. sections 921-928 (1982 & Supp. III 1985).

Affirmed.

Judge ORR concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent from the majority opinion. The majority fails to find a "distinguishing feature" in plaintiff's business, "the material and probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare." *State v. Harris,* 216 N.C. 756, 758-59, 6 S.E. 2d 854, 863 (1940). I do find such a distinguishing feature.

The statutes under consideration attempt to regulate the sale of military property originally manufactured for "military service of the United States or the militia of the State of North Carolina." G.S. 127B-3. I see a legitimate purpose for the State to exercise its police power by regulating any sales of military equipment, particularly sales of tools of destruction such as weapons and paraphernalia used in conjunction with the use of

weapons. The State has sought to protect the general welfare of the citizens of this State and it is my opinion that the statutes in question constitutionally serve that purpose. Moreover, the probable consequence of allowing military property sales facilities to go unregulated is that stolen military property is likely to be bought and sold at said facilities. The statutorily required maintenance of a log of persons selling or buying property intended for military service may disclose the identities of persons or organizations illegally operating as paramilitary organizations or dealing in stolen goods.

G.S. chap. 127B, Art. 1 tracks the language of G.S. chap. 91. G.S. chap. 91 regulates pawnbrokers. Although G.S. chap. 91 has been in effect since 1983 it has not been declared as unconstitutional. The record keeping and licensing requirements of G.S. chap. 91 and G.S. chap. 127B, Art. 1 are similar. In my opinion the purposes for the State's exercise of police power, by enactment of G.S. 91-4 and G.S. 127B-4, are basically the same.

I find as persuasive the following reasoning relied upon by the State:

> The business of pawnbrokers, because of the facility that it furnishes for the commission of crime and for its concealment, is one which clearly comes within the control of the police power of the state and is properly subject to regulation for the benefit of the public and for the prevention of frauds upon it, and it is unlawful if not conducted under the provisions, restrictions, and requirements of the law. The business is a privilege, not a right, and he who avails himself of it and derives its benefits must bear its burdens and conform to the laws in force regulating the occupation, if it is not illegal. Police regulation of the business of pawnbroking is peculiarly needed because thieves frequently attempt to dispose of stolen goods at places where such business is carried on, and the keepers not infrequently become 'fences' for such goods. Under the police power, it is properly within the province of a state, or of a municipality by authority of the state, to designate on what terms and conditions it will permit a pawnbroker to carry on his business, and a very clear abuse of this power must be shown to justify the court in declaring the regulations to be unreasonable and void.

54 Am. Jur. 2d Moneylenders and Pawnbrokers sec. 3 (footnotes omitted).

Faced with the extent of illegal activity of a paramilitary nature in this State and the theft of military property from the military bases in this State, I conclude that the legitimate exercise of the State's police power, by enactment of G.S. 127B, bears a rational and substantial relation to the public order, safety, and general welfare. *See In Re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E. 2d 729 (1973). In light of the public's interest I do not find the provisions of Article I of G.S. 127B to be unduly burdensome. Therefore, I would hold that Article 1 of Chapter 127B of the General Statutes does not violate Article I, section 19 of the North Carolina Constitution.

Finally, I am not convinced of the appropriateness of the summary fashion in which the trial court permanently enjoined the enforcement of an entire statutory scheme enacted by the General Assembly without articulating what, if any, basis it had for declaring as unconstitutional any of the various sections of Article I of G.S. chap. 127B. There is nothing in the trial court's order which addresses the propriety of severing those sections, if any, which the trial court deemed to be unconstitutional. The trial court's decision does not, in any way, evidence that "[t]here is a presumption that a particular exercise of the police power is valid and constitutional." *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 226, 258 S.E. 2d 444, 456 (1979). In my opinion it is entirely appropriate for the State to rely upon the presumption of the constitutionality of the statute in question. Moreover, plaintiff has failed to rebut that presumption. Accordingly, for reasons stated hereinabove, I respectfully dissent.

THOMAS M. SHELTON, III, ALAN CRAIG SHELTON AND GEORGE C. COLLIE, SUCCESSOR TRUSTEE OF THE TRUST OF THOMAS M. SHELTON, DECEASED, PLAINTIFFS v. FRANCIS H. FAIRLEY, INDIVIDUALLY AND AS EXECUTOR OF THOMAS M. SHELTON, DECEASED; FRANCIS H. FAIRLEY, S. DEAN HAMRICK, JAMES D. MONTEITH AND LAURANCE A. COBB, INDIVIDUALLY AND AS FAIRLEY, HAMRICK, MONTEITH & COBB, A NORTH CAROLINA PARTNERSHIP, DEFENDANTS, AND LOIS HOLT SHELTON WILSON AND CATHERINE NORELL SHELTON EINHAUS, ADDITIONAL DEFENDANTS

No. 8626SC1225

(Filed 16 June 1987)

1. **Appeal and Error § 6.2— partial summary judgment—immediately appealable**

In an action for negligence and malpractice against the executor of an estate and attorneys for the executor, the trial court's judgment dismissing plaintiffs' claims of punitive damages against all defendants and dismissing claims against the former law partners of Francis Fairley for acts in his capacity as executor of the estate were immediately appealable where plaintiffs had a substantial right to have all of their claims for relief tried at the same time before the same judge and jury. N.C.G.S. § 1A-1, Rule 54(b).

2. **Partnership § 5— liability of law partners for acts of one partner as executor of estate**

The trial court did not err by granting summary judgment for defendants on the issue of their liability as law partners for the acts of Francis Fairley as executor of an estate where the evidence did not show that the partnership engaged in the administration of the estate or ratified Fairley's activities as executor. Although the firm had a pecuniary interest in the executor's fees, the interest was indirect and the fact that it would be difficult for a jury to distinguish Fairley's decisions as executor from those as attorney for the estate does not support the argument that defendants should be held derivatively liable for their partner's acts. Juries have long performed the duty of unraveling difficult issues of fact. N.C.G.S. § 84-2.1.

3. **Damages § 11.2— derivative liability—dismissal of punitive damages claim—proper**

The trial court did not err by dismissing plaintiffs' claims for punitive damages against the law partners of the executor of an estate where the evidence showed that any liability on the part of those three defendants was derivative. The purpose of punitive damages would not be achieved by allowing recovery against those derivatively liable.

APPEAL by plaintiffs from *Kirby, Judge.* Judgment entered 27 August 1986 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 8 April 1987.

Plaintiffs filed this action on 30 July 1982. Plaintiffs Thomas M. Shelton, III and Alan Craig Shelton are beneficiaries of the

estate of Thomas M. Shelton, who died on 7 August 1974. George W. Collie is successor trustee under a testamentary trust. The suit was originally brought against Francis H. Fairley, individually and as executor of the Shelton estate, his law firm, and the law firm partners individually. Fairley died on 12 December 1983, and his executrix was substituted as a party defendant.

In their claims for relief, plaintiffs sought compensatory and punitive damages for breach of fiduciary duties, negligence in management of the estate and malpractice against the executor and attorneys for the executor arising from the administration of the estate of Thomas M. Shelton and from legal work performed for the estate.

On 11 February, defendants filed an answer and a motion to dismiss for insufficiency of service of process, res judicata and collateral estoppel. The Honorable Kenneth A. Griffin granted defendants' motions and dismissed with prejudice each of plaintiffs' claims. Plaintiffs appealed, and on 18 December 1984, the Court of Appeals affirmed in part, reversed in part and remanded. *Shelton v. Fairley*, 72 N.C. App. 1, 323 S.E. 2d 410 (1984), *disc. rev. denied*, 313 N.C. 509, 329 S.E. 2d 394 (1985).

The parties engaged in discovery, and on 30 July 1986, defendants filed a motion for summary judgment. On 27 August 1986, Judge Kirby allowed partial summary judgment for the defendants, dismissing all claims of punitive damages against all defendants and dismissing the claims against the former law partners for the acts of Fairley in his capacity as the executor of the estate. Plaintiffs appealed.

*George C. Collie and Charles M. Welling, for plaintiffs-appellants.*

*Golding, Crews, Meekins & Gordon, by John G. Golding and Rodney Dean, for defendants-appellees Hamrick, Monteith & Cobb.*

*Horack, Talley, Pharr & Lowndes, by Robert C. Stephens and Robert B. McNeill, for defendant-appellee Estate of Francis H. Fairley.*

WELLS, Judge.

[1] As the judgment below is not final as to all claims and all parties, *see* N.C. Gen. Stat. § 1A-1, Rule 54(b) of the Rules of Civil Procedure, our first question is whether the trial court's judgment dismissing plaintiffs' claims of punitive damages against all defendants and dismissing claims against the former law partners for the acts of Mr. Fairley in his capacity as executor of the estate are immediately appealable. Pursuant to the rule established in *Oestreicher v. Stores,* 290 N.C. 118, 225 S.E. 2d 797 (1976), we find that plaintiffs have a substantial right to have all of their claims for relief tried at the same time before the same judge and jury, and therefore allow this appeal.

[2] Plaintiffs first contend that the court erred in granting summary judgment for defendants on the issue of the partners' liability for the acts of Mr. Fairley in his capacity as executor. Plaintiffs argue that those activities were within the course and scope of the practice of law, that Fairley was the agent of the law firm in his activities as executor, and that Fairley's partners are liable for such acts. We disagree.

Upon motion of summary judgment, a trial court must consider pleadings, affidavits and depositions in order to determine whether the movant has met his burden of proof, as set out in establishing the absence of any triable issue. N.C. Gen. Stat. § 1A-1, Rule 56 of the Rules of Civil Procedure. The evidence must be viewed in the light most favorable to the non-movant in determining whether movant has (1) proved that an essential element of the opposing party's claim is nonexistent, or (2) shown through discovery that the opposing party cannot produce evidence to support an essential element of his claim. If the moving party satisfies his burden of proof, then the burden shifts to the non-moving party to show that there is a genuine issue of material fact. An issue is "genuine" if there is substantial evidence to support it. *Lowe v. Bradford,* 305 N.C. 366, 289 S.E. 2d 363 (1982); *Zimmerman v. Hogg & Allen,* 286 N.C. 24, 209 S.E. 2d 795 (1974).

The general rule regarding derivative liability of a partnership is set out in G.S. § 59-43:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partner-

> ship or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

These rules regarding partnership tort liability are fully applicable to law partnerships. *Jackson v. Jackson*, 20 N.C. App. 406, 201 S.E. 2d 722 (1974). The question we must decide in this case is whether acting as executor for an estate falls within the scope of the practice of law, and therefore within the scope of the authority of Fairley as a member of the law firm. *See Zimmerman v. Hogg and Allen, supra.*

The partners in the case at bar apparently did not draw up a partnership agreement. However, the pleadings establish the fact that the partnership exists for the primary purpose of carrying on the practice of law within the State of North Carolina. The practice of law is itself defined in N.C.G.S. § 84-2.1:

> The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, or assisting by advice, counsel, or otherwise in any such legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of such term, but shall be construed to include the foregoing particular acts, as well as all other acts within said general definition.

As this definition neither includes nor excludes acting as executor for an estate, we turn to the decisions of our appellate courts for guidance.

In *Jackson v. Jackson, supra*, this Court considered the question of whether all partners in a law firm were liable for a malicious prosecution instituted on the advice of one of the partners. We found that, although criminal prosecution was "clearly within the normal range of activities for a typical law partnership," such action taken maliciously was beyond the scope of the partnership business. Since the other partners did not further authorize, participate in or even know about his actions, this Court upheld summary judgment for defendants. *See also Investors Title Ins. Co. v. Herzig*, 83 N.C. App. 392, 350 S.E. 2d 160 (1986).

Two North Carolina cases address the liability of members of an incorporated law firm. In *Zimmerman v. Hogg & Allen, supra*, Mr. Greene, the president of his incorporated law firm, did considerable legal work for Holly Farms, Inc. Zimmerman, an officer of Holly Farms, had given Greene money with the understanding that it would be invested in a certain stock. Zimmerman never received his stock, and he sued for delivery of the stock or its value. The trial court granted summary judgment for defendant law firm, and our Supreme Court reversed:

> It is reasonable to infer from this evidence that the investment services rendered by Greene to the employees of Holly Farms might have been for the purpose of obtaining the good will of the corporation to insure the continuance of a profitable association between the corporate client and the Professional Association. This inference would suggest a striking analogy to the practice of receiving funds for investment in order to generate fees for drawing legal instruments, a practice which has been recognized by both our courts and the English courts as being within the scope of the usual practice of law.
>
> The evidence in this case, when construed most indulgently in plaintiff's favor, as Rule 56 requires, tends to show that the powers granted to the Professional Association by its charter were very broad powers, the exercise of which was principally in the hands of Greene; that defendant Greene, while he was on business trips to attend to the legal business of Holly Farms accepted funds for investment purposes from employees of the corporate client; that these cor-

> porate employees were assured that such moneys would be handled through the Professional Association; that such activities by Greene, the president and principal stockholder of the Professional Association, had occurred over a period of several years; and that other employees of the Professional Association had knowledge of such dealings.
>
> Under these particular circumstances, we are of the opinion that plaintiff's evidence was sufficient to justify a reasonable and prudent belief by plaintiff Sam Zimmerman that the Professional Association had conferred authority upon Greene to receive the funds from him for investment while acting as its agent. Thus plaintiff's evidence raised a genuine material issue for trial as to whether Greene acted within the scope of his authority and as agent for the Professional Association at the times complained of. The issue so raised was material because without establishing agency, plaintiff could not recover, and the issue was genuine because it could be supported by substantial evidence.

*Id.*

In *McGarity v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 83 N.C. App. 106, 349 S.E. 2d 311 (1986), *disc. rev. denied*, 319 N.C. 105, 353 S.E. 2d 112 (1987), this Court distinguished *Zimmerman* from the case before it. In *McGarity*, plaintiffs sued an incorporated law firm for damages for two acts of conversion by Mr. Clarkson, a former member of the firm. Plaintiffs alleged that Clarkson was an agent of the firm, and was acting within the apparent scope of his authority when he solicited and accepted the loans, thus making the firm liable for his conversion of the loans. This Court disagreed, holding that:

> In the present case, plaintiffs have not presented enough evidence to raise a genuine issue of material fact as to whether Mr. Clarkson was acting within the scope of his apparent authority when he solicited and accepted the money from the McGaritys. The firm was not in the business of soliciting or accepting money for investment purposes, and there is no evidence that it had ever done so. The firm was not authorized to do so by its articles of incorporation. There is no evidence that Mr. Clarkson's acts could have benefitted the firm in any way. There is no evidence that any other

member of the firm knew or should have known about Mr. Clarkson's soliciting and accepting the money. Thus the firm could not have committed any acts to hold Mr. Clarkson out as having the authority to do so. Therefore, there was no such authority, under the principle that the scope of an agent's apparent authority is determined by the acts of the principal, not the agent.

Although such cases, as the Court in *Zimmerman* noted, turn largely on the facts, the basic principles may be summarized as follows. In order to determine whether members of a firm should be held liable for the activities of one of its partners, the court should consider (1) the provisions of the instrument empowering the firm to practice law, such as partnership agreements and articles of incorporation, as well as statutory provisions; (2) the construction which our courts have historically given the questioned activity or related ones; (3) whether the partner has acted, or seemed to act, with the firm's authority; this includes his position in the firm, the participation—if any—by the rest of the firm in the disputed activities, and any assurances given the client that this transaction would be handled through the firm. Finally, (4) we must consider whether the other members of the firm have assented to or ratified the acts.

In order to apply these principles to the case at bar, we must review the forecast of evidence presented at the summary judgment hearing. Defendants first offered affidavits in support of their motion:

The affidavits of S. Dean Hamrick, James D. Monteith, and Laurence A. Cobb show:

1. All Executor's fees paid to Francis H. Fairley as Executor of the Estate of Thomas M. Shelton were retained by Mr. Fairley, individually, and none of the Executor's fees were received as legal fees by the law firm of Fairley, Hamrick, Monteith & Cobb.

2. A portion of the Executor's fees paid at the time the final award of fees was made was used to reimburse the law firm for legal fees advanced by it for Mr. Fairley, but no part of the fees paid to the Executor in any way was for the benefit of the law firm of Fairley, Hamrick, Monteith & Cobb.

3. The law firm of Fairley, Hamrick, Monteith & Cobb never undertook to act as Executor of the Shelton Estate and the acts by Mr. Fairley as Executor of the Estate were performed by him individually and not as a member of the law firm.

Defendants also offered part of the deposition of George W. Collie, which established that plaintiffs did not intend to offer any evidence that the partners were in any way liable except derivatively. This evidence shows that Fairley was acting only in his individual capacity in his role as executor and was sufficient to show the absence of one of the essential elements of plaintiffs' claim.

Plaintiffs, attempting to rebut this evidence, offered part of the deposition testimony of S. Dean Hamrick. That testimony, in pertinent part, is as follows:

Q. In your partnership arrangement as it relates to Mr. Francis H. Fairley, the executor in this estate, you've already told me that you share in the profits of what Mr. Fairley generates, according to some percentage which I'm not interested in, and you indicated a moment ago that you personally have no financial or pecuniary interest in Mr. Fairley's commissions as executor in this Thomas Shelton Estate. Is that correct?

A. Under the arrangement, I have no direct interest in the commissions. There would be an indirect interest—

Q. Would you explain that?

A. I think in the overall division the amount of commissions would be taken into consideration but not on a direct basis, only the legal fees.

Q. Would you explain to me what you mean by that? I don't understand.

A. Well, if there is a substantial commission received, we would take that into consideration in determining the amount of the way the legal fees would be divided up. But, it's not a direct relationship.

Q. Well, let's suppose for purposes of trying—bear with me; help me understand what you're saying. If there's $1.00

of commissions received by Mr. Fairley and $1.00 of attorney's fees, are you saying that you might receive some of the commissions if it were $1,000,000.00 executor's commissions and $1,000,000.00 attorney's fees as opposed to $1.00?

A. Yes—Well, I think you could say that we would have an interest in commissions.

Q. We being you, Hamrick, and the other partners?

A. Right.

Q. So, then your answer is you have a pecuniary interest, in the amount of executor's fees that Mr. Fairley might receive in this estate?

A. Yes, I think that would be a fair statement.

Even taking this evidence, together with plaintiffs' verified complaint, in the light most favorable to plaintiffs, we find that it does not show that the partnership engaged in the administration of the estate or authorized or ratified Fairley's activities as executor. We find no precedent for bringing a law partner's activities as executor within the purview of the practice of law. Although Mr. Hamrick's deposition did tend to show that the firm had a pecuniary interest in the executor's fees, it is clear that the interest was indirect. We find persuasive defendants' argument that, if Mr. Fairley received a large amount of executor's fees in a given period of time, the other partners would get a bigger share of the firm's income because of the time Mr. Fairley took from his legal work in order to fulfill his function as executor. "The mere fact that partnership ultimately benefits from a contract made by a partner in his own name does not create a partnership obligation," *Brewer v. Elks*, 260 N.C. 470, 133 S.E. 2d 159 (1963), and where, as here, a firm benefitted indirectly from a partner's position as executor undertaken in his individual capacity, that benefit alone is not sufficient to establish partnership liability for those activities.

Plaintiffs present an ancillary argument in support of their position that defendants should be held derivatively liable for their partner's acts in his capacity as executor: Plaintiffs contend that the difficulty in distinguishing Fairley's decisions made as executor from those made as attorney for the estate present an

intolerable burden for both plaintiffs and jury. However, juries have long performed the duty of unraveling difficult issues of fact, and we find no reason to prevent them from performing that duty here. Also, as defendants concede, the jury should be instructed to find that Fairley acted as attorney if it finds that the functions were mixed in a particular instance.

Before we turn to plaintiffs' next argument, we note that they chose not to pursue on this appeal the following assignment of error:

> 1. To the court's granting the defendants' motion for summary judgement [sic] that all claims for punitive damages against Doris M. Fairley, Executrix of the estate of Francis H. Fairley, be dismissed with prejudice.

In accordance with Rule 28(a) of the N.C. Rules of Appellate Procedure, we deem this assignment to be abandoned. *See Baker v. Log Systems, Inc.,* 75 N.C. App. 347, 330 S.E. 2d 632 (1985).

**[3]** In their second and final argument, plaintiffs contend that the court erred in dismissing all claims for punitive damages against defendants Hamrick, Monteith and Cobb. We disagree. The deposition of George C. Collie established that no evidence would be offered at trial to show that Hamrick, Monteith or Cobb committed any acts which would subject them to a personal claim for punitive damages. Thus, any liability on the part of these three defendants, individually and as a firm, must be derivative. This Court has ruled that punitive damages may not be recovered from the estate of a deceased tort-feasor, no matter how aggravated the circumstances. *Thorpe v. Wilson,* 58 N.C. App. 292, 293 S.E. 2d 675 (1972). The rationale of such a rule is that "the sole purpose for allowance of punitive damages is to punish the wrongdoer," *id.*; there, as here, such purpose could not be achieved by allowing recovery against those derivatively liable. The punitive damage claim was properly dismissed, and this assignment is overruled.

The judgment appealed from is

Affirmed.

Judges ARNOLD and ORR concur.

WALLACE V. NEAL v. CRAIG BROWN, INC., AND CRAIG BROWN, JR., INDIVIDUALLY, AND AS AGENT FOR CRAIG BROWN, INC.

No. 8626SC1073

(Filed 16 June 1987)

1. **Landlord and Tenant § 13.2— option to renew lease—no right by sublessee to exercise**

Where the original lease was for a period of fifteen years with options to renew for successive five-year periods, and the original lessee never exercised its option to renew, plaintiff sublessee could not exercise the option to renew granted in the original lease or demand performance of the renewal option contained in the sublease. Plaintiff failed to show that a direct landlord-tenant relationship was created between plaintiff and the landlord because of the original lessee's bankruptcy where there was no evidence that the original lease was terminated by the bankruptcy. Furthermore, the instrument by which plaintiff's sublessor acquired possession was a sublease rather than an assignment of the original lease so that plaintiff did not become the landlord's tenant under terms of the original lease.

2. **Estoppel § 4.2— sublease—no estoppel to deny right to continue possession**

Defendant lessors were not estopped to deny plaintiff sublessee's right to continue in possession of the premises after termination of the original lease by failing to inform plaintiff that his occupancy was on a month-to-month basis and by permitting plaintiff to make capital improvements to the leased property where there was no evidence that defendants misrepresented any fact or that plaintiff was without means to ascertain his status as defendants' tenant; there was no indication that defendants induced plaintiff to make improvements to the property; and any action taken by plaintiff was apparently based upon his own assessment of his status with respect to the premises.

APPEAL by plaintiff from *Saunders, Judge.* Order entered 5 June 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 31 March 1987.

In this civil action, plaintiff alleges that he is in possession of premises located at 6315 South Boulevard in Charlotte pursuant to certain fixed-term lease agreements which include, *inter alia,* options to renew the lease for two additional five-year periods. He alleges that he gave proper notice of his intent to exercise his option to renew for the first additional five-year term, but that defendants have refused to recognize his rights pursuant to the option and have notified him to vacate the premises. He seeks specific performance of the alleged lease or, in the alternative, damages for its breach.

In their answer, defendants deny the existence of any written lease agreement with plaintiff and allege that he has occupied the premises as a month-to-month tenant under an oral agreement. By counterclaim, defendants seek an order requiring plaintiff to vacate the premises and damages allegedly occasioned by his refusal to do so.

Defendants moved, pursuant to G.S. 1A-1, Rule 56, for summary judgment dismissing plaintiff's action. Plaintiff moved for partial summary judgment establishing his status as a "long-term tenant" under the alleged lease agreements. The trial court granted defendants' motion, denied plaintiff's motion, and dismissed plaintiff's action. Plaintiff appeals.

*Kenneth P. Andresen for plaintiff appellant.*

*Hamel, Helms, Cannon, Hamel & Pearce, by H. Parks Helms, for defendants appellees.*

MARTIN, Judge.

Plaintiff assigns error to the entry of summary judgment dismissing his claims against defendants. He contends that genuine issues of material fact exist with respect to the nature of his tenancy in defendants' property. We affirm the judgment of the trial court.

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The burden of establishing the lack of any triable issue of material fact is on the party moving for summary judgment. *Texaco, Inc. v. Creel*, 310 N.C. 695, 314 S.E. 2d 506 (1984). A defending party may satisfy this burden by showing that claimant cannot prove the existence of an essential element of the claim. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). 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). The existence of questions of fact which are immaterial to the legal issues involved, however, is insufficient to defeat a motion for summary judgment. *Kessing v. National Mortgage Corp.*, *supra.*

The record filed in this Court reflects that the evidentiary materials presented to the trial court at the summary judgment hearing consisted of the pleadings and attachments thereto as well as affidavits. These materials establish that, in 1967, Craig T. Brown, Sr. and his wife Gaynell H. Brown owned real property located at 6315 South Boulevard in Charlotte. On 25 October 1967, they entered into a written lease agreement leasing the property to 60 Minute Systems, Inc. (60 Minutes), a Florida corporation engaged in a national dry-cleaning franchise business. The term of the lease was for fifteen years, beginning upon completion of a building which the lessors were obligated to erect as a part of the lease. According to the lease, the building was to be completed no later than 15 April 1968. The lease provided for monthly rental payments of $585.00 and contained options to extend for two successive five-year periods upon written notice of intent to exercise the option given at least 90 days prior to the expiration of the preceding term.

On 30 November 1967, 60 Minutes entered into a sublease agreement with William J. Hutchison. The sublease was to commence 1 March 1968 and run through 28 February 1983 at a monthly rental of $592.00. The sublease provided for options to renew at increased rentals for two additional five-year periods commencing 1 March 1983 and 1 March 1988. Hutchison opened a retail dry-cleaning and laundry business on the premises in the spring of 1968.

Sometime during 1970, 60 Minutes filed a petition for bankruptcy with the United States Bankruptcy Court, Middle Division of Florida. 60 Minutes was subsequently adjudicated bankrupt and a trustee in bankruptcy was appointed. The record properly before us contains no further information concerning the bankruptcy proceeding.

On 7 December 1970, Hutchison assigned "all of his right, title and interest" in the sublease to plaintiff, who began operating a laundry and dry-cleaning business on the premises. Plaintiff was thereafter directed by the bankruptcy trustee for 60 Minutes to pay rent "directly to the owners of the premises." In his affidavit, plaintiff stated that he paid monthly rent of $592.00 directly to Craig Brown, Sr. and that he and Craig Brown, Sr. considered the sublease from 60 Minutes to Hutchison to be the contract governing his use of the premises.

Upon the death of Craig T. Brown, Sr. in 1974, plaintiff paid the monthly rental payments to Gaynell H. Brown. In 1975, Gaynell Brown conveyed the subject property to defendant Craig Brown, Jr., who conveyed it to defendant Craig Brown, Inc. Since 1975, plaintiff has made all monthly rental payments to defendants.

Plaintiff offered evidence tending to show that on 20 December 1982 he gave written notice to defendants that he intended to exercise the option to extend the lease for five years and that, since that time, he has paid an increased monthly rental. He also made improvements to the property, including installation of a new boiler in 1983 at a cost of approximately $6,100.00. Defendants were aware of these improvements and never intimated to plaintiff that he was anything "other than a long-term tenant" under the terms and provisions of the Hutchison lease agreement.

By affidavit, Craig Brown, Jr. stated that he has never received a notice of renewal from plaintiff, has never discussed an extension of any term with plaintiff, and has always considered plaintiff to be a tenant at will. According to the affidavit, the increase in rent from $592.00 to $630.00 per month came about as a result of negotiations with plaintiff, during which the existence of a lease was not mentioned.

On 19 August 1985, defendants notified plaintiff to vacate the premises by 1 October 1985. Plaintiff remains in possession of the premises.

[1] Plaintiff first contends that genuine issues of fact exist with respect to the intentions of the parties and that those factual issues are material to a determination of whether the parties are obligated to each other as direct lessor and lessee pursuant to the terms and conditions of the sublease between 60 Minutes and Hutchison. In support of his contention, plaintiff asserts that 60 Minutes' adjudication in bankruptcy constituted a surrender of its lease to Brown, Sr. by operation of law and that, by his attornment to Brown, Sr. under the terms of the Hutchison sublease, he became Brown, Sr.'s direct tenant. Plaintiff further argues that the parties' "acts, acknowledgments and receipts" over the fifteen-year period of his tenancy—evidenced by his regular monthly rent payments made pursuant to the terms of the lease,

his addition of capital inprovements to the premises and his delivery of written notice of his intent to renew the lease—clearly indicate that the parties considered themselves direct lessor and lessee pursuant to the terms of the sublease.

In addressing plaintiff's contentions with respect to his status as a long-term tenant under the Hutchison sublease, it is important to note that plaintiff has presented no evidence from which one could conclude that the original lease agreement entered between 60 Minutes and Brown, Sr. was terminated by reason of 60 Minutes' bankruptcy. From the evidence properly before us, we are able to ascertain only that 60 Minutes filed a petition in bankruptcy in 1970, was adjudicated bankrupt, and that a trustee was appointed. By letter dated 9 December 1970, the trustee notified the landlords of 60 Minutes' franchisees that the franchisees were to pay rent directly to the landlords. The letter further advised the landlords that in the event of default, the trustee for 60 Minutes intended to proceed against the defaulting franchisee. The letter indicates neither a surrender nor a termination of 60 Minutes' lease by its trustee.

Plaintiff has submitted to this court, by mail and apparently in response to questions raised at oral argument, copies of certain orders, dated 26 January 1973 and signed by a referee in bankruptcy for the United States District Court, Middle District of Florida, Orlando Division, purporting to disaffirm certain executory contracts of 60 Minutes, including the lease agreement with Craig Brown, Sr. and a franchise agreement with plaintiff. These orders, however, were not made a part of the record on appeal, and plaintiff has not moved that the record be amended to include them. Moreover, there is no indication that the orders were ever placed in evidence before the trial court or otherwise presented for its consideration in ruling on the parties' motions. *See* App.R. 9(b)(5). This Court may not consider documents which have not properly been made a part of the record on appeal. *Elliott v. Goss*, 254 N.C. 508, 119 S.E. 2d 192 (1961); App.R. 9(a). We will not go outside the record. Plaintiff has failed to forecast evidence of a surrender of 60 Minutes' original lease, a necessary element in order for plaintiff to show that a direct landlord-tenant relationship under the terms of the Hutchison sublease was created between plaintiff and Brown.

At oral argument, plaintiff contended that we should find that he is defendants' tenant under the terms of the original lease from Craig Brown, Sr. to 60 Minutes. The basis for this argument is plaintiff's contention that, although labeled a sublease, the instrument by which Hutchison acquired the property from 60 Minutes was, in fact, an assignment of 60 Minutes' original lease. We disagree.

> An "assignment" is a conveyance of the lessee's entire interest in the demised premises, without retaining any reversionary interest in the term in himself. A "sublease" . . . is a conveyance of only a part of the term of the lessee, the lessee retaining a reversion of some portion of the term.

Hetrick, Webster's Real Estate Law in North Carolina, § 241 at 251 (Rev. ed. 1981). In the instrument by which 60 Minutes conveyed to Hutchison an interest in the premises, 60 Minutes retained a reversion of a brief portion of the lease term—from 28 February 1983 until the expiration of 60 Minutes' lease—and a right to reenter the premises upon default. Thus, the conveyance between 60 Minutes and Hutchison was a sublease. Hutchison, on the other hand, conveyed to plaintiff "all of his right, title, and interest" in the sublease, without retaining any reversionary interest in the term or in the premises. As Hutchison's assignee, plaintiff succeeded only to those rights which Hutchison, as sublessee, held pursuant to the sublease from 60 Minutes.

In general:

> "[P]rivity of estate" is not established between the original landlord and the sublessee and the landlord has no direct action with respect to the covenants in the original lease as against the sublessee; there is neither privity of estate nor privity of contract as between the original landlord and a sublessee, and the sublessee can sue only his immediate lessor . . . with respect to the lease.

*Hetrick, supra,* at 252. As a result, a sublessee may not exercise an option to renew granted to his sublessor in the original lease or demand such a renewal from the original landlord. 50 Am. Jur. 2d, *Landlord and Tenant,* § 1195 (1970).

In the present case, the original lease agreement provided for a lease term of fifteen years, beginning no later than 15 April

1968, and granted to 60 Minutes options to extend for two additional five-year periods upon 90 days written notice. Hutchison's sublease agreement expired 28 February 1983 and included options to renew on 1 March 1983 and 1 March 1988. 60 Minutes never exercised its option to renew the original lease at any time prior to the expiration of its fifteen-year lease term. As a general rule, the rights of a sublessee are measured by the rights of his sublessor, *Nybor Corp. v. Ray's Restaurants, Inc.*, 29 N.C. App. 642, 225 S.E. 2d 609, *disc. rev. denied*, 290 N.C. 662, 228 S.E. 2d 453 (1976), and termination of the original lease terminates any dependent sublease. 51C C.J.S., *Landlord & Tenant*, § 48(1)(a) (1968). This is true notwithstanding the fact that the sublease agreement contains options to renew. 50 Am. Jur. 2d, *Landlord and Tenant*, § 1195 (1970). As sublessee, plaintiff could neither exercise the option to extend contained in 60 Minutes' lease nor demand from defendants performance of the renewal option contained in the sublease.

In light of the foregoing discussion, the conflicting evidence with respect to whether or not plaintiff gave notice of his intent to extend the term of the lease for an additional five years is immaterial to our decision in this case, and thus, does not defeat summary judgment. *Kessing v. National Mortgage Corp., supra; Little v. National Service Industries, Inc.*, 79 N.C. App. 688, 340 S.E. 2d 510 (1986).

**[2]** By his final argument, plaintiff contends that defendants had an affirmative duty "to advise plaintiff that [they] did not consider plaintiff a tenant for a term of years when plaintiff relied on that relationship to his own detriment by making capital improvements to the leased property" and that they breached that duty by failing to object to the increase in plaintiff's monthly rent payments and by failing to inform plaintiff that his occupancy of the premises was on a month-to-month basis. Therefore, plaintiff contends, defendants are estopped to deny that he is a tenant for a term of years. We disagree.

In order to raise the question of equitable estoppel, the pleadings and the evidence generally must show that the party sought to be estopped: (1) misrepresented or concealed material facts; (2) intended that such misrepresentation or concealment be acted upon by the other party; and (3) had knowledge, actual or

constructive, of the true facts. *Blizzard Building Supply, Inc. v. Smith*, 77 N.C. App. 594, 335 S.E. 2d 762 (1985), *cert. denied*, 315 N.C. 389, 339 S.E. 2d 410 (1986). The party asserting the estoppel must have: (1) a lack of knowledge and the means to acquire knowledge as to the real facts in question; and (2) relied to his prejudice upon the conduct of the party sought to be estopped. *Id.* Generally, mere silence will not operate to create an estoppel. *Barnhardt v. Morrison*, 178 N.C. 563, 101 S.E. 218 (1919). "[I]n order to work an estoppel the silence must be under such circumstances that there are both a specific opportunity, and a real or apparent duty, to speak." *Id.* at 565, 101 S.E. at 220.

In support of his claim based on equitable estoppel, plaintiff presented evidence contained in two affidavits. In his own affidavit, plaintiff stated that he made improvements to the premises, including the installation of a new boiler in 1983, with the knowledge of Craig Brown, Jr. By affidavit of a prospective purchaser of plaintiff's business, plaintiff offered evidence that the affiant had met with plaintiff and Craig Brown, Jr. in 1983 to discuss the purchase of plaintiff's business. The affiant states that it was his understanding that plaintiff had a five to seven year lease, and that, in some unspecified manner, Craig T. Brown, Jr. "assisted in your affiant's perception that there was other than a month-to-month lease arrangement between Wallace Neal and Craig Brown." This evidence is insufficient to support a claim based on equitable estoppel as it does not support an inference that defendants misrepresented any fact or that plaintiff was without means to ascertain his status as defendants' tenant. There is no indication that defendants induced plaintiff to make improvements to the property. Any action taken by plaintiff was apparently based upon his own assessment of his status with respect to the premises, rather than anything which defendants did or said or failed to do or say. Thus, there is no basis for holding that defendants are estopped to deny plaintiff's right to continue in possession of the premises.

The entry of summary judgment for defendants is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge GREENE concur.

HERBERT DEAN BOUDREAU v. MILO BAUGHMAN AND MILO BAUGHMAN DESIGN, INC.

No. 8721SC42

(Filed 16 June 1987)

**1. Rules of Civil Procedure § 15.1— amendment of answer to assert statute of limitations—no abuse of discretion**

In an action in North Carolina arising from a cut suffered by plaintiff in Florida on an allegedly defective chair designed and manufactured in North Carolina, the trial court did not abuse its discretion by allowing defendant to amend its answer to add the defense of the statute of limitations where plaintiff chose the forum and was charged with knowledge of the N.C. statutes that could or would bar his action; plaintiff had access to information about the time and place of the purchase of the chair; defendant had no knowledge of the time or place of the purchase until plaintiff's deposition on 18 June 1986; and defendant filed the motion to amend on 30 July 1986. It could not be said that plaintiff was unfairly surprised by defendant's amendment or that there was bad faith or dilatory tactics by defendant.

**2. Courts §§ 21.1, 21.3— products liability action—design and manufacture in North Carolina—injury in Florida—North Carolina statute of repose**

The trial court correctly concluded that North Carolina's statutes of repose barred plaintiff's products liability claim arising from an injury to plaintiff's foot suffered on a sharp metal surface on the bottom of a chair designed and manufactured in North Carolina where the last act in the design of the chair was in 1967; the chair was purchased in Florida in 1979; the injury occurred in Florida in 1982; and the action was filed in North Carolina in 1985. Although the substantive law of Florida controls the claim, the Florida statute relied upon by plaintiff has been amended to eliminate the twelve year statute of repose; both the defendants and the events giving rise to the cause of action have a significant relationship to North Carolina; plaintiff brought his action in North Carolina; and the public policy of North Carolina is to protect North Carolina manufacturers and designers as well as the North Carolina courts from stale claims based on injuries occurring long after the purchase of the allegedly defective product. N.C.G.S. § 1-50(6), N.C.G.S. § 1-52(16).

APPEAL by plaintiff from *DeRamus, Judge.* Order entered 8 September 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 3 June 1987.

On 5 March 1985, plaintiff filed a complaint naming as defendant, in both an individual and corporate capacity, the designer of an upholstered swivel-tilt "tub" chair, the back and sides of which were made of chrome-plated veneer bonded to a bent plywood frame. The complaint alleged that plaintiff was a guest in a friend's condominium in West Palm Beach, Florida, on 7 March

1982 and that during his stay in the condominium, plaintiff injured his foot on a sharp metal surface on the bottom of the chair. In four separate counts, plaintiff claimed that defendant was liable for the negligent design of the chair, for breach of the implied warranty of merchantability, for breach of the implied warranty of fitness for a particular purpose, and strictly liable for designing and injecting into the stream of commerce an inherently dangerous, defective chair. Plaintiff claimed damages in the amount of two hundred thousand dollars plus punitive damages in the amount of two hundred thousand dollars. In a timely-filed answer, defendant denied the material allegations of the complaint and asserted various defenses. Thereafter, on 24 June 1986, defendant moved the court for summary judgment.

On 3 July 1986, eleven days before trial was scheduled to commence, defendant filed a motion to amend the answer in order to add the defense that plaintiff's claim was barred by the applicable statute of limitations. On 14 July 1986, the trial court allowed defendant's motion to amend and plaintiff's oral motion to continue the case. The court subsequently denied plaintiff's motion asking the court to reconsider its order allowing defendant's motion to amend the answer. On 8 September 1986, the trial court granted defendant's motion for summary judgment, dismissing with prejudice all counts of plaintiff's complaint. Plaintiff appealed.

*Faison, Brown, Fletcher and Brough, by O. William Faison, Timothy C. Barber, and Jane T. Friedensen, for plaintiff-appellant.*

*Hutchins, Tyndall, Doughton and Moore, by Richard Tyndall, H. Lee Davis, Jr., and Catherine C. Williamson, for defendant-appellees.*

PARKER, Judge.

In this appeal, plaintiff assigns as error the trial court's order allowing defendant's motion to amend the answer as well as the court's denial of plaintiff's motion to reconsider this order. Plaintiff also assigns as error the trial court's order granting summary judgment for defendant. For the reasons that follow, we find no error, and therefore, affirm.

A threshold issue as to each of plaintiff's assignments of error is what law should govern the trial court's determination. The record reveals the following facts: the individual defendant is a resident of North Carolina; the corporate defendant is a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina; defendant designed the allegedly defective chair in North Carolina; the chair was manufactured in North Carolina by a High Point furniture manufacturer; an individual named Howard Berg purchased the allegedly defective chair in North Palm Beach, Florida; plaintiff, a resident of Massachusetts, alleges he was injured by the chair in Berg's condominium in West Palm Beach, Florida.

The general rule in North Carolina for cases involving a conflict of laws is that the *lex loci*, or law of the situs of the claim, determines the substantive rights of the parties, while the *lex fori* governs matters of remedy and procedure. *Charnock v. Taylor*, 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126 (1943). However, it is well established that " 'foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum.' " *Davis v. Davis*, 269 N.C. 120, 125, 152 S.E. 2d 306, 310 (1967) (citations omitted).

[1] Plaintiff's first two assignments of error are based on the trial court's order allowing defendant to amend the answer. In considering these contentions, we apply North Carolina law because the *lex fori* governs the rules of pleading. *Motor Co. v. Wood*, 237 N.C. 318, 75 S.E. 2d 312 (1953).

Rule 15(a) of the North Carolina Rules of Civil Procedure provides the following in relevant part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

A ruling on a party's motion to amend a pleading, where leave of court is required, is addressed to the sound discretion of the trial

judge. *Mauney v. Morris*, 316 N.C. 67, 340 S.E. 2d 397 (1986). Such leave should be freely given unless the opposing party can establish it will be materially prejudiced by the amendment. *Id.* The ruling of the trial judge allowing leave to amend will not be reversed on appeal absent a showing of abuse of discretion. *Id.*

Although at the time defendant moved to amend the answer, plaintiff's claim may have been barred by the Florida four-year statute of limitations, Fla. Stat. Ann. § 95.11(3) (West 1982), plaintiff, not defendant, chose the forum. Plaintiff had access to information about the time and place of the purchase of the chair, and was charged with knowledge of the North Carolina statutes that could or would bar his action against defendant in North Carolina. According to defendant's brief, defendant had no knowledge concerning the time or place of the purchase of the allegedly defective chair until plaintiff's deposition on 18 June 1986. Thereafter, on 3 July 1986, defendant filed the motion to amend the answer in order to plead the bar of the statute of limitations.

Based on the facts as they appear in the record, we cannot say that plaintiff was unfairly surprised by defendant's amendment nor that there was bad faith or dilatory tactics on the part of defendant. Therefore, we cannot say that the trial court judge abused his discretion in allowing defendant leave to amend the answer. For the same reasons, the trial court did not err in denying plaintiff's motion to reconsider the order allowing leave to amend. These assignments of error are overruled.

[2] In his final assignment of error, plaintiff contends that the trial court erred in granting summary judgment for defendant. This contention is without merit.

The North Carolina Rules of Civil Procedure, which govern the procedural aspects of plaintiff's claim, *see Charnock, supra,* provide that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). A fact is material if it constitutes a legal defense, such as the bar of an applicable statute of limitations. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.,* 313 N.C. 488, 491, 329 S.E. 2d 350, 353 (1985).

In the case before us, defendant has raised the defense that plaintiff's claims are barred by the statute of limitations. Once the statute of limitations is properly pleaded by a defendant, the burden falls upon plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action. *Pembee Mfg. Corp.*, 313 N.C. at 491, 329 S.E. 2d at 353. Where the statute of limitations is properly pleaded and the relevant facts are not in conflict, whether plaintiff's action is barred becomes a question of law, and summary judgment may be appropriate. *Id.*

The record shows, and it is undisputed, that the allegedly defective chair was purchased on 26 January 1979 and delivered to Howard Berg on 31 January 1979. Plaintiff alleges in his complaint that he was injured by the chair on or about 7 March 1982. Plaintiff filed his complaint on 5 March 1985.

Statutes of limitations are considered procedural, affecting only the remedy and not the right to recover; therefore, the statute of limitations of the forum state will govern actions filed in the courts of that state. *Sayer v. Henderson*, 225 N.C. 642, 35 S.E. 2d 875 (1945). Plaintiff in the case before us filed within the three-year limitations period applicable in North Carolina to actions for personal injury, G.S. 1-52(16). However, defendant contends that plaintiff's claim is barred by G.S. 1-50(6), which provides the following:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

The record also contains unrefuted evidence that defendant's last act or omission relating to the design of the allegedly defective chair occurred in 1967. Therefore, defendant argues that plaintiff's claim is also barred by G.S. 1-52(16), which provides that "no cause of action [for personal injury] shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." In response to these arguments, plaintiff contends that G.S. 1-50(6) and 1-52(16) are not procedural statutes of limitations, which run from the time the claim accrued, but are substantive statutes of repose that run from a time unrelated to

the accrual of the claim and may potentially extinguish the right itself, and not merely the remedy. Plaintiff argues that since the substantive law of Florida controls his action for personal injury, the North Carolina statutes of repose are inapplicable. We do not agree.

We first note that because of questions as to its constitutionality, *see, e.g., E. R. Squibb and Sons, Inc.*, 397 So. 2d 671 (Fla. 1981), Fla. Stat. Ann. § 95.031(2) has been amended to eliminate the Florida twelve-year statute of repose that plaintiff contends is applicable to his claim. *See* Fla. Stat. Ann. § 95.031(2) (West Supp. 1987). Moreover, although the courts in this State have recognized the substantive aspect of our statutes of repose, *see Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982); *Smith v. Sanitary Corp.*, 38 N.C. App. 457, 248 S.E. 2d 462 (1978), *disc. rev. denied*, 296 N.C. 586, 254 S.E. 2d 33 (1979), *overruled on other grounds*, *Love v. Moore*, 305 N.C. 575, 291 S.E. 2d 141 (1982), application of these statutes has not been decided in the choice of laws context. In *Bernick*, *supra*, relied on by plaintiff, the decision whether to apply North Carolina or Massachusetts substantive law pertained to the application of G.S. 25-1-105 and 25-2-318; the discussion of G.S. 1-50(6) related only to the retroactive application of the statute. In our view, neither *Bolick*, *supra*, nor *Bernick*, *supra*, is determinative of this case.

The issue of whether a claim for personal injury, not barred by the statute of limitations in the situs state, may be brought in a state where the plaintiff's right is barred by a statute of repose is not settled. *See* 68 A.L.R. 217 (1930); 146 A.L.R. 1356 (1943). *See also* Restatement (Second) of Conflict of Laws § 143 comment c (1971). As noted in *Smith*, *supra*, statutes of repose are " 'hybrid' statutes of limitations, having potentially both a substantive and a procedural effect." 38 N.C. App. at 461, 248 S.E. 2d at 465. The modern approach to choice of law problems, where there is no clear statutory directive, is to apply the law of the state with the most significant relationship to the law choice. Factors to be considered by the courts in making such determinations include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6(2) (1971).

In *Tieffenbrun v. Flannery*, 198 N.C. 397, 151 S.E. 857, 68 A.L.R. 210 (1930), our Supreme Court addressed the issue of what law governs when a limitations statute bars the right, not merely the remedy. There, plaintiff's husband had been struck and killed in Miami, Florida, by an automobile owned and operated by defendant, a North Carolina resident. More than one year but less than two years after the incident, plaintiff filed a wrongful death claim against defendant in North Carolina. The Florida statute of limitations for wrongful death actions was two years; the North Carolina wrongful death statute, C.S., 160, required that a wrongful death action be brought within one year of the death or the right of action would be lost. After carefully reviewing the decisions on this issue in other states, our Supreme Court concluded:

> All statutes of limitations are essentially time clocks, and while C.S., 160, has been construed as a condition annexed to the cause of action, it is also a time limit to the procedure. At all events, it is a legislative declaration of the policy of this State, providing in express and mandatory language that no action for wrongful death shall be asserted in the courts of this State after the expiration of one year from the time of death. Certainly, it is not to be supposed that the legislative department intended to confer upon nonresidents more extensive rights in the courts than accorded to citizens of this State.

*Tieffenbrun*, 198 N.C. at 404, 151 S.E. at 861, 68 A.L.R. at 217.

In light of the factors listed in the Restatement, *supra,* and the policy considerations enunciated by our Supreme Court in *Tieffenbrun, supra,* we hold that the North Carolina statutes of repose, G.S. 1-50(6) and G.S. 1-52(16), apply in this case. In the instant case, both defendants and the events giving rise to the cause of action have a significant relationship to North Carolina, and plaintiff has brought his action in North Carolina. Filing within the time limit prescribed by a statute of repose is a condition precedent to bringing the action, and plaintiff's failure to file within the prescribed time gives defendant a vested right not to be sued. *Colony Hill Condominium I Assoc. v. Colony Co.,* 70 N.C. App. 390, 394, 320 S.E. 2d 273, 276 (1984), *disc. rev. denied,* 312 N.C. 796, 325 S.E. 2d 485 (1985). Once the time limit has expired, defendant is effectively "cleared" of his wrongdoing. *Id.* In finding constitutional a statute of repose similar to the ones here at issue, our Supreme Court has recognized the authority of the legislature to enact such limitations, stating, " '[T]he General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter.' " *Lamb v. Wedgewood South Corp.,* 308 N.C. 419, 444, 302 S.E. 2d 868, 882 (1983) (citations omitted). As G.S. 1-50(6) and 1-52(16) make clear, the public policy of this State is to protect North Carolina manufacturers and designers as well as the North Carolina courts from stale claims based on injuries occurring long after the purchase of the allegedly defective product and long after a defendant participated in its manufacture or design. Therefore, the trial court correctly concluded that plaintiff's claim was barred by North Carolina's statutes of repose.

For the reasons stated above, the order of the trial court granting defendant's motion for summary judgment is

Affirmed.

Judges ARNOLD and JOHNSON concur.

SAMPSON-BLADEN OIL CO., INC. v. GERALD WALTERS AND JOYCE WALTERS

No. 8613DC893

(Filed 16 June 1987)

1. **Rules of Civil Procedure § 56— summary judgment order—construed as partial summary judgment**

In an action for the balance due on an open account for fuel oil supplied during 1983 where defendants counterclaimed for overcharges and treble damages under N.C.G.S. § 75-1, *et seq.* for fuel oil supplied in 1982, an order of summary judgment entered the day before trial was for partial summary judgment affecting only the issue of defendants' debt for oil received during 1983.

2. **Rules of Civil Procedure § 15.1— amendment to counterclaim—no abuse of discretion**

In an action for the balance due on an open account for fuel oil supplied during 1983 where defendants counterclaimed for overcharges and treble damages under N.C.G.S. § 75-1 for fuel oil supplied in 1982, the trial court did not abuse its discretion by permitting defendants to amend their counterclaim to include overcharges made in 1981 where plaintiff had been notified more than a year earlier, when defendants answered the complaint, that the 1981 charges were an important factor in the case and it was unlikely that plaintiff was surprised or prejudiced by the amendment.

3. **Unfair Competition § 1— systematically overcharging customer—unfair trade practice**

Systematically overcharging a customer for fuel oil for two years in the amount of $2,795.30 is an unfair trade practice squarely within the purview of N.C.G.S. § 75-1.1.

4. **Judgments § 55— claim for overcharges—interest proper on overcharge—not on treble damages**

In an action for amounts due under an open account for fuel oil in which defendants counterclaimed for overcharges and won a judgment for unfair and deceptive trade practices, the trial court did not err by awarding defendants interest on the amount of the overpayments based on an implied contract to refund the overcharges, but should not have trebled the damages before calculating the interest.

APPEAL by plaintiff from *Jolly, Judge.* Judgment entered 28 February 1986 in District Court, BLADEN County. Heard in the Court of Appeals 4 February 1987.

Plaintiff sued defendants for the balance allegedly due on an open account for fuel oil supplied to them during 1983, and attached to the complaint an itemized, certified statement of the

account indicating that the amount owed was $4,080.22. In answering the complaint defendants in effect admitted making the purchases listed on plaintiff's itemized statement, but they asserted as a defense, setoff and counterclaim that plaintiff overcharged them for oil in 1982, and that as a consequence defendants were entitled to a credit and damages, trebled under G.S. 75-1, *et seq.* More specifically, defendants alleged that: For several years before 1983 the tobacco raised on their Bladen County farm was cured with oil obtained from plaintiff; during the 1981 crop year it began to appear that plaintiff was charging them for more oil than was delivered, but defendants then had no records to verify that fact; during the 1982 crop year they kept records and plaintiff charged them for approximately 2,600 more gallons of oil than they received; when confronted about the overcharge plaintiff agreed to adjust the 1982 bill according to the amount of oil used in curing defendants' 1983 tobacco crop; in curing their 1983 crop, 2,599 fewer gallons of fuel oil were used than plaintiff billed defendants for in 1982, and under the agreement defendants were entitled to a credit of $3,462.52; with that credit, considering the payments defendants had made on both the 1981 and 1982 bills, plaintiff had been overpaid in the amount of $170.13, which defendants were entitled to recover, and because plaintiff's practice of overcharging them was an unfair trade practice under the provisions of G.S. 75-1.1 they were also entitled to have the overpayment trebled under G.S. 75-16. Plaintiff denied all these allegations. After discovery was completed plaintiff moved for summary judgment in its favor, and following a hearing thereon an order of summary judgment was entered on 25 February 1986 holding that plaintiff was entitled to recover of defendants the $4,080.22 sued for in the complaint, together with interest thereon at the annual rate of 18%. The next day trial began on defendants' counterclaim and at that time defendants moved to amend their counterclaim to allege, as an unfair trade practice under Chapter 75 of the General Statutes, that plaintiff overcharged them for oil during 1981 in the amount of $2,400. Over plaintiff's objection the amendment was allowed and the trial on defendants' amended counterclaim concluded in defendants' favor. Evidence tending to show that plaintiff overcharged defendants in both 1981 and 1982 included the following: Defendants' oil tanks did not leak and no oil was stolen from them during the years plaintiff was their supplier. Plaintiff's truck driver

delivered oil to defendants' tanks only on certain days and left an invoice with each delivery; but the bill sent defendants for oil delivered to them in 1982 included deliveries that were purportedly made on irregular, nonscheduled days for which they received no invoices; in 1983, the procedure was adopted of having each invoice signed by both plaintiff's truck driver and one of the defendants, and in that year, with no other differences in the circumstances, the same barns being used each year and the amount of tobacco cured being substantially the same, about 2,500 less gallons of oil were used in curing their tobacco than plaintiff billed defendants for both in 1981 and 1982.

But defendants' evidence fell short of supporting the allegation that plaintiff agreed to adjust the 1982 bill according to the amount of oil used in 1983 and the judge declined to submit an issue about that to the jury. The only issues submitted were whether plaintiff charged defendants for more oil than was delivered in either 1981 or 1982, or both, and, if so, what the amount of the overcharge was. Upon the jury answering these issues "yes" and "$2,795.30," the court ruled as a matter of law that plaintiff's practice of overcharging defendants, as established by the verdict, was an unfair or deceptive trade practice under G.S. 75-1.1 and trebled the $2,795.30 overcharge under G.S. 75-16. Then after adding to defendants' recovery the interest deemed to be due thereon the court reduced it by the amount of plaintiff's recovery under the order of summary judgment, and entered final judgment in favor of defendants for the $5,465.94 difference.

*Young, Moore, Henderson & Alvis, by Edward B. Clark and David M. Duke, for plaintiff appellant.*

*Lee, Meekins & Viets, by Fred C. Meekins, Jr. and Junius B. Lee, III, for defendant appellees.*

PHILLIPS, Judge.

Other than a contention about the interest allowed on defendants' recovery, the assignments of error brought forward in plaintiff's brief support only these three contentions: (1) the order of summary judgment in plaintiff's favor the day before trial began disposed of the entire case, and thus deprived the court of jurisdiction to try defendants' counterclaim; (2) the court abused its discretion in permitting defendants to amend their counterclaim

the day trial began; (3) the court erred in ruling as a matter of law that overcharging defendants under the circumstances recorded was an unfair or deceptive trade practice under G.S. 75-1, *et seq.* None of these contentions has merit and we overrule them. In doing so we will not discuss plaintiff's other contentions that are not duly supported by an exception or assignment of error, as such matters are not properly before us. It is appropriate to note that plaintiff's appellate counsel did not participate in either the trial or preparation of the case.

[1] So far as the record indicates the contention that the order of summary judgment entered the day before trial disposed of the entire case was first made in a post trial motion a week later. Nothing in the order requires that interpretation; for it does not mention defendants' counterclaim and merely recites that during 1983 defendants received the merchandise listed on plaintiff's verified statement and owed plaintiff $4,080.22 therefor. Neither the record, the transcript, nor the conduct of the parties and counsel indicates that the order was intended to dispose of the entire case, or that anyone connected with the case so thought or maintained when it was entered. Though the complaint, answer, counterclaim and reply raised several issues of fact only one of those issues—the amount defendants owed plaintiff for oil supplied to them during 1983 raised by the complaint—was addressed by plaintiff's motion for summary judgment; and that motion was supported only by a verified statement of plaintiff's account with defendants for 1983. The verified statement merely lists the deliveries of oil made to defendants during 1983 and the charges made for them and does not mention defendants' *verified* counterclaim for a setoff and treble damages based on plaintiff's overcharges during 1982. Since the court had before it only the pleadings and a verified statement showing that defendants owed plaintiff $4,080.22 for oil supplied them in 1983 it was proper to enter an order of summary judgment disposing of that issue; but the court had no basis for disposing of any other issue in the case and did not undertake to do so. The recorded facts indicate that the court, parties and trial counsel all regarded the order as being one for partial summary judgment that affected only the issue of defendants' debt for oil received during 1983; for almost immediately after the order was entered the trial of defendants' counterclaim was begun without any objection from the plaintiff.

Only by regarding the order as being for partial summary judgment does the course followed by the court and counsel make sense; and only by regarding the order as being for partial summary judgment can the validity of both the order and judgment be upheld. But if the order is construed as attempting to dispose of the entire case it is a self-evident nullity, since plaintiff's evidence at the hearing did not even address, much less support, the dismissal of defendants' counterclaim.

**[2]** Nor did the court err in permitting defendants to amend their counterclaim to include overcharges made in 1981. Though the motion to amend was not made until the trial was ready to begin, plaintiff was notified more than a year earlier when defendants answered the complaint that its 1981 charges were an important factor in the case. For at that time defendants alleged that because the 1981 charges appeared to be excessive they kept up with the 1982 deliveries and ascertained that plaintiff was overcharging them. Under the circumstances it seems unlikely that plaintiff was either surprised or prejudiced by the amendment. In any event allowing the motion to amend was within the broad discretion that Rule 15, N.C. Rules of Civil Procedure, gives to our trial judges and was certainly no abuse of it. *Willow Mountain Corp. v. Parker*, 37 N.C. App. 718, 247 S.E. 2d 11, *disc. rev. denied*, 295 N.C. 738, 248 S.E. 2d 867 (1978).

**[3]** In discussing its contention that no unfair trade practice was established plaintiff argues, *inter alia*, that the evidence is not sufficient to support the jury's finding that plaintiff overcharged defendants. Since this contention is based upon assignments of error and exceptions that relate only to the court ruling as a matter of law that the overcharges the jury found plaintiff made constituted an unfair or deceptive trade practice under G.S. 75-1, *et seq.*, the sufficiency of the evidence is not before us and will not be decided. Though plaintiff strenuously argues otherwise it seems plain to us, and we so hold, that systematically overcharging a customer for two years, as the jury found was done here in the amount of $2,795.30, is an unfair trade practice squarely within the purview of G.S. 75-1.1, as our Supreme Court has interpreted it in several cases, including *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981).

**[4]** Plaintiff's final contention—that the court erred in awarding interest on defendants' recovery from 15 September 1982 until the date of the judgment—has some merit, but not for the reason or to the extent argued. Plaintiff labels the interest allowed as "prejudgment" interest, and correctly argues that prejudgment interest is not allowable in this case because no statute authorizes it. The only statutory provisions authorizing prejudgment interest in recent years are those formerly contained in G.S. 24-5, which only applied to claims covered by liability insurance, and the provisions now contained in G.S. 24-5(b), which apply to compensatory damages in all actions other than contract, but do not apply to cases pending when the 1985 General Assembly enacted them, and this case has been pending since October 1984. But it does not appear to us either that the interest awarded defendants was prejudgment interest, as that term is generally understood, or that it was awarded under either the old or new version of G.S. 24-5(b). Apparently the court allowed interest under the provisions now contained in G.S. 24-5(a) and did so on the premise that defendants' counterclaim is based on contract; for these provisions, which have been in our statutes since 1786, authorize interest from the date of the breach in actions based on contract, and interest was allowed here not from 1 November 1984 when defendants' counterclaim was filed, but from 15 September 1982 when defendants' last overpayment was made. In awarding interest under that statute the court acted correctly up to a point; for under G.S. 24-5(a) amounts due by contract normally draw interest at the legal rate if not otherwise provided, and defendants' claim for money they overpaid plaintiff is based upon an implied promise by plaintiff to refund the overcharge. 70 C.J.S. *Payment* Sec. 114 (1987); *Allgood v. The Wilmington Savings & Trust Co.*, 242 N.C. 506, 88 S.E. 2d 825 (1955). Despite the implication in G.S. 24-5(a) that the fact finder must determine the amount of interest due in actions based on contract, it is immaterial that the jury did not compute the interest due in this instance; for, as our Supreme Court has held in many cases, whenever a recovery is had for breach of contract and the amount of damages is ascertained either from the contract or from evidence relevant to the inquiry interest, which any clerk can compute, should be added thereto as a matter of law. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E. 2d 521 (1973); *Hunt v. Hunt*, 261 N.C. 437, 135 S.E. 2d 195 (1964); *General Metals, Inc. v. Truitt Mfg. Co.*, 259 N.C. 709, 131

S.E. 2d 360 (1963); *Harris and Harris Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962); *Bond v. Pickett Cotton Mills, Inc.*, 166 N.C. 20, 81 S.E. 936 (1914). In this case a breach of implied contract occurred each time during 1981 and 1982 defendants overpaid plaintiff and the latter failed to immediately return the overpayment, and the amount of the overpayments having been ascertained from the evidence interest thereon immediately attached. But it attached only to the overcharges, the only money of defendants that plaintiff had the use of; it did not attach to the statutory penalty that was added to the overcharges. Allowing interest on the overpayments from the last breach until judgment was entered does not duplicate to any extent the recovery authorized by Chapter 75; as interest on the money plaintiff had the use of stopped when it was established that the Chapter had been violated.

In arriving at $5,465.94 as the amount finally due defendants from plaintiff the court followed this course: It trebled the $2,795.30 overcharges to $8,385.90, added interest on that amount at 8% from 15 September 1982 to the day judgment was entered ($2,320.24) for a gross recovery of $10,706.14; and then subtracted plaintiff's $4,080.22 recovery plus interest thereon of $1,159.98. The only error in this procedure was in allowing defendants interest at 8% on $8,385.90 for the period stated, rather than on $2,795.30. This error improperly increased defendants' net recovery by $1,551.03 and the judgment must be modified accordingly. To expedite matters, we herewith modify the judgment in defendants' favor to provide for their recovery from plaintiff of *$3,914.91*, rather than *$5,465.94*, and direct the District Court to correct its records accordingly.

Affirmed and modified.

Judges BECTON and JOHNSON concur.

CLYDE WILLIAM WHITLEY, JR. v. LARRY MICHAEL OWENS

No. 8622SC1344

(Filed 16 June 1987)

**Automobiles and Other Vehicles § 83.2— garbage collector struck by a vehicle—contributory negligence**

The evidence was sufficient to support a jury finding that plaintiff garbage collector was contributorily negligent in failing to keep a proper lookout or to see what he ought to have seen when he was struck by defendant's van while walking alongside his truck to reenter the cab where it tended to show that the garbage truck was parked on the right side of the highway at an angle so that the rear left corner overhung the pavement approximately two feet; in the direction from which defendant's van approached, the road was straight and downhill to where the garbage truck was parked and plaintiff could see up the road for a quarter of a mile; and, at the time of his injury, plaintiff was not carrying or dumping garbage or engaged in other employment duties which would divert his attention and confer upon him a status different from an ordinary pedestrian on the roadway.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 25 August 1986 in Superior Court, DAVIE County. Heard in the Court of Appeals 2 June 1987.

*Hall & Vogler, by William E. Hall, for plaintiff appellant.*

*Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, for defendant appellee.*

BECTON, Judge.

Clyde William Whitley, Jr., driver of a garbage truck, brought this action seeking to recover damages for personal injuries he sustained when he was struck by a van driven by defendant, Larry Michael Owens. At the time of the accident, Whitley was walking alongside the garbage truck during a regular stop on his garbage pick-up route. In his Answer, Owens denied that he was negligent and alleged that plaintiff's own negligence contributed to the injuries. The case was tried before a jury which found that both parties were negligent and thus denied recovery to plaintiff. From judgment entered 25 August 1986 in accordance with the verdict, plaintiff appeals. We find no error.

On appeal, plaintiff assigns as error the trial judge's (1) failure to give a limiting instruction after sustaining objections to *opinion* testimony of defendant's witness, Nadine Howell, (2) admission of hearsay testimony of defendant's wife as corroborative of defendant's testimony, and (3) denial of plaintiff's motions for directed verdict at the close of all the evidence, for judgment notwithstanding the verdict, and for a new trial on the issue of contributory negligence.

I

The accident occurred on U.S. Highway 158 in Davie County at approximately 8:15 a.m. on 18 December 1984. The plaintiff's evidence tended to show the following facts. Whitley, and his coworker, Kenneth Head, who rode in the passenger side of the garbage truck, stopped at a certain spot along their regular route heading in an easterly direction. They were unable to pull the truck completely off the road but parked on the right side at an angle so that the rear left corner overhung the pavement approximately two feet, and turned on the truck's hazard flashers.

The two men alighted, walked to the back of the truck, and emptied the trash cans which were a few feet away. They then looked for traffic, but neither remembered seeing a vehicle approaching although visibility was good and they could see approximately a quarter of a mile. Each began to walk from the back of the truck to his respective door (a distance of ten to twelve feet), Head along the passenger (right) side and Whitley along the driver's (left) side. Whitley was nearly abreast of the driver's door and about to reach for the handle when he looked back and became aware of Owens' vehicle coming toward the truck. He attempted to jump into the space between the bed and cab of the truck, but the van skidded into him, crushing him between the vehicles and seriously injuring his leg. The van continued travelling for a distance and then stopped.

The defendant's evidence tended to show the following. Owens turned onto Highway 158 in the middle of a curve approximately one-half to three-quarters of a mile from the accident site and headed in an easterly direction. He followed the road uphill and around the curve (approximately one-fourth of the total distance). From that point, the road was straight and downhill to where the garbage truck was parked.

Owens first saw the truck as he was about halfway down the hill and recognized it as a garbage truck, but he did not recall seeing any lights flashing and did not see anyone around the truck. He was "right on top" of the truck when he first saw Whitley coming from the front of the truck toward the back, walking out in the road. At that time, Owens' van was travelling between 45 and 50 m.p.h. Because of the angle at which the truck was parked, Owens could not see around the left side toward the front until he was right up to it. When he saw Whitley, he slammed on the brakes, the rear wheels locked, and the rear end of the van slid to the right, striking the garbage truck and its driver. Owens then pulled ahead a short distance to the fire station across the road and walked back to where the accident occurred.

II

Whitley contends that the evidence of contributory negligence was insufficent to take that issue to the jury and that the trial court thus erred in denying his motions for directed verdict, for judgment notwithstanding the verdict, and for a new trial. We disagree.

On a motion for a directed verdict, the court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor, and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor. *West v. Slick*, 313 N.C. 33, 326 S.E. 2d 601 (1985). The same standard of sufficiency of the evidence applies to a motion for judgment notwithstanding the verdict. *Northern National Life Insurance Co. v. Lacy J. Miller Machine Co.*, 311 N.C. 62, 316 S.E. 2d 256 (1984).

A pedestrian crossing the road at any point other than a marked crosswalk, or walking along or upon a highway, has a statutory duty to yield the right of way to all vehicles on the roadway. *See* N.C. Gen. Stat. Sec. 20-174 (1983); *Garman v. Thomas*, 241 N.C. 412, 85 S.E. 2d 589 (1955). Such a pedestrian also has a common law duty to exercise reasonable care for his own safety by keeping a proper lookout for approaching traffic before entering the road and while on the roadway. *See, e.g., Blake v. Mallard*, 262 N.C. 62, 136 S.E. 2d 214 (1964); *Rosser v. Smith*, 260 N.C. 647, 133 S.E. 2d 499 (1963); *Brooks v. Boucher*, 22

N.C. App. 676, 207 S.E. 2d 282, *cert. denied*, 286 N.C. 211, 209 S.E. 2d 319 (1974). Failure to yield the right of way to traffic pursuant to G.S. Sec. 20-174 does not constitute negligence *per se* but is some evidence of negligence. *E.g., Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976); *Blake; Troy v. Todd*, 68 N.C. App. 63, 313 S.E. 2d 896 (1984).

In *Kellogg v. Thomas*, 244 N.C. 722, 94 S.E. 2d 903 (1956), our Supreme Court outlined the standard of care applicable to highway workers whose duties of employment require their presence on a street or highway. Such a person working in an area marked by warning signs occupies a different status from an ordinary pedestrian crossing a street and is not required to keep a constant lookout for traffic while working. This fact must be considered in determining the degree of care he must exercise for his own safety and in deciding whether he is contributorily negligent. However,

> [t]he sound general rule that a workman laboring at his job on a highway is not required to exercise the same degree of care for his own safety required of an ordinary pedestrian does not apply where the worker is at a place where his work does not require him to be or is not actually engaged in work at the time of his injury which requires the diversion of his attention from approaching traffic. . . .

*Id.* at 729, 94 S.E. 2d at 909. Thus, an important factor is whether the worker's activity at the time of injury is one which leaves him free to take precautions for his own safety, and a worker merely engaged in crossing the street in his work may be expected to exercise the same degree of care for his own safety that is required of an ordinary person under the same circumstances. *Id.* In our view, the same principles apply to the case at bar since the duties of garbage collectors often require them to stand and walk upon or near streets and highways while working.

The uncontroverted evidence in this case shows that, at the time of his injury, Whitley was not engaged in carrying or dumping garbage or any other duties of employment which would divert his attention and thus confer upon him a different status from an ordinary pedestrian on the roadway. He was merely walking alongside the truck in order to reenter the cab and was free to keep a proper lookout and otherwise take precautions for

his own safety. Under these circumstances, Whitley was under a duty not only to look, but to *keep a lookout*, to see traffic that could be seen, and to yield the right of way. *See, e.g., Blake; Rosser; Garman; Brooks.*

Whitley contends, based upon N.C. Gen. Stat. Sec. 20-149 (1983), which requires a driver overtaking another vehicle proceeding in the same direction to pass at least two feet to the left thereof, that he was entitled to assume that the van would pass the garbage truck with at least a two-foot clearance. However, the existence of this statutory requirement does not resolve the issue of Whitley's contributory negligence. While a pedestrian (or motorist) has a right to assume that other motorists will use due care and obey the rules of the road, that right does not relieve him of the legal duty to maintain a proper lookout and otherwise exercise a reasonable degree of care for his own safety. *See Kellogg; Weavil v. C. W. Myers Trading Post, Inc.*, 245 N.C. 106, 95 S.E. 2d 533 (1956); *Cox v. Hennis Freight Lines, Inc.*, 236 N.C. 72, 72 S.E. 2d 25 (1952).

Whitley testified that he looked for traffic but did not see any approaching vehicles; that he then walked around the truck to the driver's door, a distance of ten to twelve feet, without looking back; and that only as he reached for the door did he see the van coming toward him. Owens' uncontroverted testimony established that the van's speed was 45 to 50 m.p.h. in a 55 m.p.h. zone. Evidence presented by both parties tended to show that the road was straight and that Whitley had a clear and unobstructed view in the direction of Owens' oncoming vehicle for at least a quarter of a mile. Nevertheless, by his own admission, Whitley never saw the van until it was too late.

We conclude that this evidence is sufficient to support a finding that Whitley failed to keep a timely lookout, or if he looked, that he failed to see what he ought to have seen. *See, e.g., Blake* (pedestrian struck by vehicle held contributorily negligent as matter of law because evidence showed she walked into path of vehicle at place where its lights were visible for a mile); *Rosser* (pedestrian held contributorily negligent as matter of law who walked into path of vehicle at point where road was straight and level with clear visibility for 500 to 600 feet); *Kellogg* (issue of contributory negligence properly submitted to jury when plaintiff

highway worker testified he looked both ways before entering highway but failed to see defendant's approaching vehicle until it was too late although his view in both directions was unobstructed); *Garman* (highway contractor's employee injured while placing flares along the highway who testified that he looked both ways before crossing road, and that he could see clearly 700 to 1000 feet in the direction from which defendant's truck came but did not see it until it was within five feet of him held contributorily negligent as a matter of law). However, there is some evidence that Whitley's view may have become obstructed after he rounded the truck due to the angle at which it was parked. Consequently, the question of whether Whitley exercised reasonable care for his own safety in view of his work and surrounding circumstances was properly presented to the jury.

A trial judge's discretionary decision to deny a new trial may be reversed on appeal only in those exceptional cases in which the record reveals a manifest abuse of discretion. *Worthington v. Bynum,* 305 N.C. 478, 290 S.E. 2d 599 (1982). Having concluded that the evidence of contributory negligence was sufficient to withstand plaintiff's motions for directed verdict and judgment notwithstanding the verdict, we find no abuse of discretion by the trial court in denying the motion for a new trial.

III

For the foregoing reasons, we hold that the trial court properly denied the plaintiff's motions for directed verdict, judgment notwithstanding the verdict, and new trial. We have also carefully reviewed plaintiff's two remaining assignments of error and conclude that they are without merit.

No error.

Judges MARTIN and COZORT concur.

PHILLIPS & JORDAN INVESTMENT CORPORATION v. ASHBLUE COMPANY

No. 8630SC1144

(Filed 16 June 1987)

1. **Limitation of Actions § 4.3— action to collect advances—oral agreement with no stated time for repayment—reasonable time a jury question**

In an action to collect advances made to defendant by Piney Mountain Properties, Inc., the trial court did not err by denying defendant's motions to dismiss and for judgment n.o.v. where the loan agreement did not specify a time for repayment. Money lent pursuant to a verbal agreement which does not specify a time for repayment is payable within a reasonable time, and the determination of what constitutes a reasonable time is a material issue of fact to be answered by the jury.

2. **Contracts § 16.1; Limitation of Actions § 4.3— action to collect advances—no time for repayment specified—instructions on limitation of actions**

There was no prejudicial error in an action to collect advances made pursuant to an oral agreement which did not specify a time for repayment where the court instructed the jury that plaintiff had the burden of satisfying the jury that the time period between the making of the loan and the filing of the lawsuit was a reasonable length of time. Assuming that the court erred by not instructing the jury on the three-year statute of limitations, the error benefited defendant since plaintiff had a reasonable time plus three years in which to bring the action.

3. **Evidence § 15.2— motion to collect advances by corporation—appraisal of the corporation's property excluded—no error**

In an action to collect advances made by Piney Mountain Properties, Inc. to defendant, the trial court did not err by refusing to admit an appraisal of property owned by Piney Mountain because the appraisal was of questionable relevance and because defendant's witness offered an expert opinion as to the value of Piney Mountain's land.

4. **Evidence § 33— conversation with deceased person—excluded—procedure—no prejudicial error**

There was no prejudicial error in an action to collect advances made to defendant by Piney Mountain Properties from the trial court's failure to make findings on all six parts of the inquiry set out in *State v. Smith*, 315 N.C. 76, before excluding testimony regarding a conversation with the deceased controller of defendant and Piney Mountain. The trial court essentially determined that the proffered testimony did not meet the requirements of step (5) of the inquiry; common sense dictates that if proffered evidence fails to meet the requirements of one of the inquiry steps, the trial judge's findings concerning the preceding steps are unnecessary.

APPEAL by defendant from *Allen (C. Walter), Judge*. Judgment entered 31 May 1986 in Superior Court, GRAHAM County. Heard in the Court of Appeals 5 May 1987.

Defendant owned fifty percent (50%) of the stock of Piney Mountain Properties, Inc. (Piney Mountain). The remaining Piney Mountain stock was owned either by plaintiff or by Ted Phillips and Ted Jordan in their individual capacities.

Between 10 December 1975 and 14 June 1978, Piney Mountain made monetary "advances" to plaintiff and defendant. Defendant received advances totalling $70,650.00. In 1977, defendant repaid $1,500.00 to Piney Mountain which left the net amount of its advances at $69,150.00. The advances totalling $69,150.00 were carried on the Piney Mountain corporate books as receivables.

On 22 February 1980, plaintiff purchased all of defendant's Piney Mountain stock. Subsequently, Piney Mountain was merged into plaintiff, and plaintiff acquired all debts due Piney Mountain. The Piney Mountain corporate books indicated that the advances had not been written off prior to the acquisition.

On 4 May 1984, plaintiff commenced this action to collect the advances previously made by Piney Mountain to defendant. Defendant moved for summary judgment alleging that the statute of limitations barred plaintiff's action. Defendant's motion was denied. The case was tried before Judge Allen sitting with a jury. The jury returned a verdict for plaintiff finding 1) that Piney Mountain made a loan to defendant, 2) that plaintiff began the lawsuit for the recovery of the loan within a reasonable length of time, and 3) that plaintiff was entitled to recover $69,150.00 from defendant. From judgment entered on the verdict, defendant appeals.

*Adams, Hendon, Carson, Crow & Saenger, by George Ward Hendon, for defendant appellant.*

*McKeever, Edwards, Davis & Hays, by Fred H. Moody, Jr., for plaintiff appellee.*

ARNOLD, Judge.

[1] Defendant contends that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the

verdict because the statute of limitations barred plaintiff's claim as a matter of law. We disagree.

In general, the statute of limitations for a breach of contract is three years. G.S. 1-52. However, money lent pursuant to a verbal agreement, which fails to specify a time for repayment, is payable within a reasonable time. *Helms v. Prikopa*, 51 N.C. App. 50, 275 S.E. 2d 516 (1981). The statute of limitations does not begin to run until a reasonable time for repayment has passed. *Rawls v. Lampert*, 58 N.C. App. 399, 293 S.E. 2d 620 (1982). The determination of what constitutes a reasonable time is a material issue of fact to be answered by the jury. *Id.*

Evidence at trial showed that defendant received advances totalling $70,650.00 and that the advances were carried on the corporate books as receivables. The advances had not been written off prior to the acquisition and the jury determined that Piney Mountain did in fact make a loan to defendant. Since the loan agreement did not specify a time for repayment, the trial judge left to the jury the determination of whether plaintiff began the lawsuit within a reasonable length of time. We hold that the trial court did not err in denying defendant's motions.

**[2]** Defendant also contends that the trial court erred in its instructions to the jury regarding the statute of limitations.

As stated earlier, the statute of limitations for contract actions is three years. In cases such as the present, where money is lent pursuant to an oral agreement which fails to specify a time for repayment, the repayment is due within a reasonable time. A party must bring an action to recover the repayment within three years after the reasonable time period has passed. In essence, a party has a reasonable time period plus three years in which to bring the action before it is barred by the statute of limitations.

The trial court instructed the jury that plaintiff had the burden of satisfying the jury that the time period between the making of the loan and the filing of the lawsuit was a reasonable length of time. However, defendant contends that the trial court erred in failing to mention the three-year statute of limitations on contract actions. In effect, defendant argues that the trial court failed to instruct the jury that the action must have been com-

menced within three years following the lapse of a reasonable time for repayment of the loan.

Assuming *arguendo* that it was error for the court not to instruct the jury on the three-year limitations period, the error benefited defendant since it shortened by three years the time plaintiff had for filing the action. *Cf. State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). Thus, defendant was in no way prejudiced by the trial court's failure to instruct on the three-year limitations period.

**[3]** Defendant next contends that the trial court erred in refusing to admit an appraisal report into evidence. We do not agree.

The report valued real property owned by Piney Mountain in 1979 and was written by Jack Ochsenreiter, who died prior to the trial in this case. Defendant's witness Baxter Taylor offered an expert opinion as to the value of Piney Mountain's land in 1979. Defendant asserts that Taylor's opinion was based in part on the appraisal report and that the report should have been admitted into evidence.

The appraisal report was of questionable relevance to the issue of whether plaintiff made a loan to defendant. Even assuming *arguendo* that the report was somehow relevant, its exclusion did not prejudice defendant since Taylor was able to offer an opinion on the value of Piney Mountain's land in 1979.

**[4]** Defendant also contends that "the trial court erred in refusing to admit into evidence defendant's witness Taylor's testimony of his conversation with a deceased person, under Evidence Rule 804."

Defendant offered Taylor's testimony concerning a conversation Taylor had with Harry Browning, now deceased, who had been the controller of both defendant and Piney Mountain. Defendant argues that the trial court erred in refusing to admit the testimony without making findings of fact consistent with Evidence Rule 804(b)(5).

Before hearsay testimony can be admitted under Rule 804 (b)(5), the trial judge must first find that the declarant is unavailable and then engage in a six-part inquiry set out in *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). *State v. Triplett*, 316

N.C. 1, 340 S.E. 2d 736 (1986). The trial judge must engage in this inquiry prior to admitting or denying proffered hearsay evidence pursuant to the "residual" hearsay exceptions. *Smith*, 315 N.C. at 76, 337 S.E. 2d at 833. Defendant asserts that the trial court committed prejudicial error because it failed to conduct the six-part inquiry. We are not persuaded by defendant's argument.

The six-part inquiry is as follows:

(1) Has proper notice been given?

(2) Is the hearsay not specifically covered elsewhere?

(3) Is the statement trustworthy?

(4) Is the statement material?

(5) Is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts?

(6) Will the interests of justice be best served by admission?

*Smith*, 315 N.C. at 92-96, 337 S.E. 2d at 844-46.

In response to defendant's request that the court make the six-part inquiry, Judge Allen replied that he could do that quickly because the proffered testimony related to the corporate records which would be the best evidence of "all these things." Thus, the trial court essentially determined that the proffered testimony did not meet the requirements of step (5) of the inquiry.

In *Smith*, our Supreme Court set out the purpose of the inquiry as follows:

> By setting out in the record his analysis of the admissibility of hearsay testimony pursuant to the requirements of [the inquiry], the trial judge will necessarily undertake the serious consideration and careful determination contemplated by the drafters of the Evidence Code. This thoughtful analysis will greatly aid in assuring that only necessary, probative, material, and trustworthy hearsay evidence will be admitted under this residual exception and will provide a sound framework for meaningful appellate review.

*Id.* at 96-97, 337 S.E. 2d at 847.

The six-part inquiry is very useful when an appellate court reviews the admission of hearsay under Rule 804(b)(5) or 803(24). However, its utility is diminished when an appellate court reviews the exclusion of hearsay. Common sense dictates that if proffered evidence fails to meet the requirements of one of the inquiry steps, the trial judge's findings concerning the preceding steps are unnecessary.

Although we are compelled to hold that the trial court erred by not making specific findings for each step in the six-part inquiry, the error did not prejudice defendant because the evidence would still have been excluded.

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

No error.

Judges WELLS and ORR concur.

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DEVELOPMENT ENTERPRISES OF RALEIGH, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFF v. BETTY FAYE HOWARD BLAND ORTIZ; ESTATE OF DONALD E. BLAND; NORTH CAROLINA NATIONAL BANK AS ADMINISTRATOR, C.T.A. OF THE ESTATE OF DONALD E. BLAND; JEFFREY EDWIN BLAND, DONNA HELENE BLAND; SUMER NICOLE BLAND; MEGAN ELIZABETH BLAND; ELIZABETH A. MCCUISTON WARREN; ELIZABETH A. MCCUISTON WARREN, ADMINISTRATRIX OF THE ESTATE OF WILLIAM T. MCCUISTON; ESTATE OF WILLIAM T. MCCUISTON; STEPHANIE ANNE MCCUISTON; WILLIAM T. MCCUISTON, JR. AND WILLIAM TYLER MCCUISTON, DEFENDANTS AND THIRD-PARTY PLAINTIFF v. JAMES L. MCMILLAN, JR., CURTIS WESTBROOK, RONNIE W. SNOTHERLY AND JERRY A. COOK, THIRD-PARTY DEFENDANTS

No. 8610SC1218

(Filed 16 June 1987)

**1. Partnership § 8— death of partner—net value of interest—jury question**

A section of a partnership agreement providing that a deceased partner is a defaulting partner and that a defaulting partner is entitled to the net value of his interest in the partnership should have been applied in an action by a partnership to acquire the partnership interest of two deceased partners; however, since the term "net value" is ambiguous, a jury question was presented as to whether "net value" means net book value or market value.

**2. Pleadings § 33.3— denial of motion to amend answer and counterclaim**

The trial court did not err in denying defendants' motion to amend their answer and counterclaim to deny an earlier admission.

APPEAL by defendants from *Stephens, Judge.* Judgment and Order entered 26 June 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 8 April 1987.

Plaintiff alleged that its principal business is the ownership and operation of the Walker Street Apartments in Cary, North Carolina. In 1970, a partnership agreement was entered into between Ronnie Snotherly, Donald Bland, Jerry Cook, William McCuiston, James McMillan, Curtis Westbrook, Carl Broaddus and Randolph Brunson. In 1971, Brunson withdrew from the partnership and sold his interest to the remaining partners. At that time a second partnership agreement was drafted and signed by the seven remaining partners.

Section 7 of the 1971 Partnership Agreement states in part:

> Should any partner become a defaulting partner in this partnership, the partnership shall have the election to defer payment of the net value of said defaulting partner's interest in said partnership up to and including one year after notice by the defaulting partner that he desires to withdraw from the partnership. A defaulting partner shall include one or more of the following:
>
> 1. A partner who desires to withdraw as a participating partner in said partnership;
>
> 2. A partner who shall die; and
>
> 3. A partner who is declared by a majority vote of the partnership that said partner is a defaulting partner as a result of inattendance at partnership meetings or a partner who fails to assume partnership responsibilities deligated [sic] to him by a majority vote of said partnership.
>
> The net value shall be determined quarterly by a majority vote of the partnership.

Section 19 of the Agreement states:

> At no time while this contract is in effect shall any of the partners sell, assign, pledge or hypothecate his interest in the partnership without the consent of a majority vote of the partners.
>
> If, notwithstanding this provision, any stranger to this contract should in any manner whatsoever acquire legal title to the interest of any partner, or any part of such interest, the remaining partners may at their option collectively purchase such transferred interest at a price to be determined by a majority vote of the partnership.

William McCuiston died in 1972 and Donald Bland died in 1980. In 1983, Carl Broaddus sold his interest to the partnership.

The remaining partners (Snotherly, Cook, McMillan and Westbrook) attempted to acquire the partnership interests of Bland and McCuiston but were unable to reach an agreement with defendants.

Plaintiff then brought this action for a declaratory judgment and requested that the court determine 1) the rights and obligations of the parties as to the terms of the partnership agreement and 2) the value of the partnership interests of Donald Bland and William McCuiston. Defendants filed a counterclaim and a third-party complaint alleging such claims as fraud, wrongful attempt to expel partners and conversion of partnership assets.

The matter came on for jury trial before Judge Stephens. After plaintiff presented some of its evidence, the trial court applied Section 19 of the Partnership Agreement and determined that there was no factual question to be submitted to the jury. The trial court entered judgment for plaintiff. The Judgment and Order states in pertinent part that

> as a matter of law, Development Enterprises of Raleigh . . . has the right to purchase the outstanding partnership interest of any deceased partner for an amount determined by a majority vote of the partnership; and that a majority of partners of Development Enterprises of Raleigh voted in late 1981, effective January 1, 1982, to purchase the outstanding partnership interest of all persons claiming under Donald E. Bland, deceased, and to purchase the outstanding partnership interest of all persons claiming under William T. McCuiston,

deceased, for the sum of the net book value, or capital account, . . . .

The Judgment and Order further states "[t]hat the defendants have failed to produce any evidence or proof in support of their counterclaims against the plaintiff or in support of their claims against the third-party defendants." From the Judgment and Order of the trial court, defendants appeal.

*James L. Blackburn; and Stephen T. Daniel & Associates, by Stephen T. Daniel and Thomas C. Grella, for defendant appellants.*

*Boxley, Bolton & Garber, by Ronald H. Garber, for plaintiff and third-party defendant appellees.*

ARNOLD, Judge.

[1] A contract must be considered as a whole, considering each clause and word with reference to other provisions and giving effect to each if possible by any reasonable construction. *State v. Corl*, 58 N.C. App. 107, 293 S.E. 2d 264 (1982); *see also* 4 Williston on Contracts § 619 (3d ed. 1961). When general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics. *Wood-Hopkins Contracting Co. v. N.C. State Ports Auth.*, 284 N.C. 732, 202 S.E. 2d 473 (1974); *see also* 3 Corbin on Contracts § 547 (1960).

Section 7 of the Partnership Agreement specifically deals with the death of a partner. Section 19 prohibits the partners from transferring their interests and provides that the remaining partners may purchase such transferred interest at a price determined by a majority vote. The trial court applied section 19 and concluded that defendants were strangers to the partnership agreement. The court further determined that section 19 enabled the remaining partners to purchase Bland's and McCuiston's interests from defendants for net book value.

The trial court inappropriately applied section 19 to the interests of the deceased partners. While section 19 deals generally with transferred partnership interests, it is section 7 that defines a deceased partner as a defaulting partner and provides that a defaulting partner is entitled to the net value of his interest in

the partnership. Therefore, section 7 must be used to determine the value of defendants' interests.

However, section 7 is ambiguous with respect to the term "net value." When an agreement is ambiguous, it is for the jury to determine the parties' intent. *Asheville Mall, Inc. v. F. W. Woolworth Co.*, 76 N.C. App. 130, 331 S.E. 2d 772 (1985). Whether "net value" as used in the partnership agreement means net book value or market value is a question for the jury. Thus, we remand the case for a new trial for a jury determination of the meaning of "net value" as used in section 7 of the Partnership Agreement.

Defendants contend that they were denied the opportunity to present their claims against plaintiff and the third-party defendants. We disagree.

The trial judge asked defendants what evidence they had to support their claims and allowed them to offer proof of their claims for the record. After reviewing the record, we find no evidence in support of defendants' claims. The trial court did not err in dismissing defendants' claims against plaintiff and the third-party defendants.

**[2]** Defendants also contend that the trial court erred in denying their motion to amend their answer and counterclaim. We disagree.

A motion to amend is directed to the discretion of the trial court. *Smith v. McRary*, 306 N.C. 664, 295 S.E. 2d 444 (1982). The exercise of the court's discretion is not reviewable absent a clear showing of abuse. *Id.* Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments. *Martin v. Hare*, 78 N.C. App. 358, 337 S.E. 2d 632 (1985).

Defendants sought to amend their answer and counterclaim in order to deny an earlier admission that plaintiff owned the Walker Street Apartments. The motion was made shortly before trial and approximately two years after the admission had been made. Defendants have not carried their burden of proving that the trial court abused its discretion in denying their motion to amend.

We have reviewed defendants' remaining assignments of error and find them to be without merit. Accordingly, the judgment of the trial court is affirmed with respect to the dismissal of defendants' claims but remanded for a new trial for a determination of the meaning of "net value" in section 7 of the Partnership Agreement.

Affirmed in part, reversed in part and remanded.

Judges WELLS and ORR concur.

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STATE OF NORTH CAROLINA v. ROGER VIKRE

No. 872SC35

(Filed 16 June 1987)

**Arrest and Bail § 11.4— forfeiture of bail bond—petition to remit judgment—no extraordinary cause shown**

The trial court did not err by denying a petition to remit judgment upon forfeiture of bail bonds where the applicable statute was N.C.G.S. § 15A-544(h), which requires extraordinary cause shown; all of the sureties were professional bondsmen; the sureties were aware that Vikre was a resident of Texas, employed as a pilot, and sometimes traveled outside the U.S.; it was entirely foreseeable and not necessarily extraordinary that they incurred expenses to locate Vikre; their efforts did not lead to his appearance in Beaufort County; and the fact that Vikre was confined in a Mexican prison at the time of his scheduled appearance was not extraordinary cause providing a legal basis for the remission of judgments because Vikre was prevented from appearing by his own criminal acts rendering him subject to imprisonment pursuant to the criminal laws of another jurisdiction.

APPEAL by sureties from *Phillips, Judge.* Judgment entered 12 September 1986 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 2 June 1987.

On 5 November 1984, the Beaufort County Grand Jury returned a true bill of indictment charging defendant-obligor, Roger Vikre, with one count of conspiracy to traffic in excess of 10,000 pounds of marijuana and one count of trafficking in marijuana by possessing, transporting and delivering in excess of 10,000 pounds of that substance. On 15 January 1985, Vikre executed, as principal, an appearance bond in the amount of $100,000.00 which was

secured by the following sureties who executed bonds in the following amounts:

| | |
|---|---|
| Sherrill David Beasley | $15,000.00 |
| Linda Chasten | 13,000.00 |
| Walter Cline | 15,000.00 |
| William A. Glenn | 37,000.00 |
| William Riddick | 5,000.00 |
| James C. Ridoutt | 10,000.00 |
| Curt Robinson | 5,000.00 |

Defendant was released from custody pending his trial.

Vikre's case was set for trial in Beaufort County Superior Court on 24 June 1985. He failed to appear in court on that date and, as a consequence, Judge John B. Lewis, Jr. ordered forfeiture of the appearance bonds executed by Vikre and by the above-named sureties. The order of forfeiture was served upon each surety.

The sureties subsequently moved to set aside the orders of forfeiture. After a hearing, Judge Herbert Small denied the motions and, on 10 April 1986, entered judgment against each surety for the full amount of the bond executed by that surety. No appeal was taken from that judgment.

On 9 July 1986, the sureties filed a "Petition to Remit Judgment upon Forfeiture." The matter was heard at the 25 August 1986 Session of the Beaufort County Superior Court by Judge Herbert O. Phillips, III. The sureties offered evidence tending to show that on 24 June 1985, when his case was called for trial, Vikre was incarcerated at the State Penitentiary Center in San Luis Potosi, Mexico, having been sentenced to a term of five and one-half years for an offense committed after his pretrial release in Beaufort County. The sureties also offered evidence that one surety and an agent for another had traveled to Texas and Mexico in order to locate Vikre, incurring substantial expenses, and that all of the sureties were willing to reimburse the State for the costs of Vikre's extradition upon his release from Mexican custody. At the conclusion of the hearing, Judge Phillips found facts and concluded that the sureties had not shown extraordinary cause justifying remission of the judgments of forfeiture. From an order denying their petition, the sureties appeal.

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

*Purser, Cheshire, Parker & Hughes, by Joseph B. Cheshire V and Gordon Widenhouse, for sureties-appellants.*

MARTIN, Judge.

The judgments of forfeiture entered by Judge Small on 10 April 1986 were not remitted within the time period prescribed by G.S. 15A-544(e) and executions were issued as required by G.S. 15A-544(f). Therefore, the statute applicable to the sureties' petition for remission of the judgments is G.S. 15A-544(h). *State v. Rakina and State v. Zofira,* 49 N.C. App. 537, 272 S.E. 2d 3 (1980), *disc. rev. denied,* 302 N.C. 221, 277 S.E. 2d 70 (1981). G.S. 15A-544(h), in pertinent part, provides:

> For extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate.

The statute authorizes the court to exercise its discretion to remit a judgment of forfeiture, either in whole or in part, only upon a showing of "extraordinary cause." *State v. Rakina and State v. Zofira, supra.* Appellant sureties initially contend that, in light of the evidence of their considerable efforts to locate defendant Vikre and the impossibility of his immediate return to this State because of his incarceration in Mexico, the trial court erred as a matter of law in its conclusion that they had failed to demonstrate extraordinary cause. We disagree.

The term "extraordinary cause," as used in G.S. 15A-544(h), is not defined by the statute. In the absence of some indication to the contrary, we must presume that the Legislature intended the words to be given their usual meaning. *Lafayette Transportation Service v. County of Robeson,* 283 N.C. 494, 196 S.E. 2d 770 (1973). "Extraordinary" is defined as "going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee." Webster's Third New International Dictionary (1968).

From the record and transcript of the hearings, it appears that all of the sureties are professional bondsmen, licensed pursuant to Chapter 85C of the General Statutes. It also appears that defendant Vikre was a resident of Texas and was employed as a pilot, sometimes traveling outside the United States in connection with his employment, and that these facts were known to the sureties at the time they executed the bonds securing Vikre's appearance in court. It was entirely foreseeable, then, that the sureties would be required to expend considerable efforts and money to locate Vikre in the event he failed to appear. The fact that the sureties incurred expenses in connection with the forfeiture does not necessarily constitute extraordinary cause. *See State v. Rakina and State v. Zofira, supra.* Moreover, the efforts made by the sureties in the present case did not lead to Vikre's appearance in Beaufort County Superior Court, the primary goal of the bonds. *See State v. Locklear*, 42 N.C. App. 486, 256 S.E. 2d 830, *appeal dismissed*, 298 N.C. 302, 259 S.E. 2d 303 (1979). Thus, we cannot say, as a matter of law, that the sureties' evidence conclusively demonstrates extraordinary cause justifying remission of the bonds or that the trial court's determination to the contrary was error.

Appellant sureties also contend that the fact that defendant Vikre was confined in a Mexican prison at the time of his scheduled court appearance was extraordinary cause excusing their failure to produce Vikre and providing a legal basis for the remission of the judgments of forfeiture. We find no merit in this contention.

The purpose of a bail bond is to secure the appearance of the principal in court as required. G.S. 15A-531(1); *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978). A surety on a bail bond is primarily liable with the principal for the amount of the bond upon forfeiture. G.S. 15A-531(4); *Tar Heel Bond Company v. Krider*, 218 N.C. 361, 11 S.E. 2d 291 (1940). The sureties become custodians of the principal and are responsible for the bond if the principal fails to appear in court when required. "The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge." *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371-72, 21 L.Ed. 287, 290 (1873), quoting Anonymous, 6 Mod., 231. "By recognizance of bail in a criminal action the principal is, in the theory of the law, committed to the custody of the

surety." *State v. Eller*, 218 N.C. 365, 367, 11 S.E. 2d 295, 296 (1940). Thus, when the sureties entered into the conditions of the bail bonds on behalf of defendant Vikre, he was released into their custody and they became responsible for his appearance in Beaufort County Superior Court as required. *See State v. Pelley*, 222 N.C. 684, 24 S.E. 2d 635 (1943).

In *Pelley*, our Supreme Court held that a defendant's imprisonment in another jurisdiction for offenses committed after he and his sureties executed a bond securing his appearance in a court of this State did not release the sureties from liability on the bond.

> It matters not whether Pelley left the jurisdiction of this State with or without the permission of his sureties, he was entrusted to their custody. His conduct while in their custody set in motion the machinery of the law in other jurisdictions which made his appearance in Buncombe County, N.C., on 27 July, 1942, impossible. Had Pelley not committed the offenses for which he was tried and convicted in Indiana, and for which he is now imprisoned, he doubtless could have answered to the call of the Superior Court in Buncombe County, N.C., at the proper time. He alone is responsible for his inability to appear in the North Carolina court at the time required in his bail bond. He cannot avail himself of his own wrong and thereby escape the penalty of his bond; and, as stated in *Taylor v. Taintor*, *supra*, "What will not avail him, cannot avail his sureties."
>
> . . . .
>
> It is indeed unfortunate for the appealing surety herein, but, when she executed the bail bond for Pelley, she undertook to answer for one who by his own conduct prevented the fulfillment of his obligation. For his default she obligated herself to pay the penalty in the bond.

*Id.* at 692-93, 24 S.E. 2d at 640-41.

As was the case in *Pelley*, the facts shown by the sureties in the present case establish that Vikre was prevented from appearing in Beaufort County Superior Court by reason of his own criminal acts rendering him subject to imprisonment pursuant to the criminal laws of another jurisdiction. These facts would not ex-

cuse Vikre from appearing and, the liability of the sureties being correspondent with that of their principal, will afford no excuse to the sureties for his failure to appear. The Order of the Superior Court denying the Petition to Remit Judgment upon Forfeiture is affirmed.

Affirmed.

Judges BECTON and COZORT concur.

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CORNELIA W. BAIRD v. HARRY HAYNES BAIRD

No. 8626SC1295

(Filed 16 June 1987)

1. **Husband and Wife § 11.2— separation agreement—meaning of "net professional income"**

   There was sufficient evidence to support the trial court's finding that the parties to a separation agreement intended the term "net professional income" to mean gross medical income less ordinary and necessary expenses incurred in producing such income and less state and federal taxes on such income.

2. **Husband and Wife § 11.2— separation agreement—cap on amount of support**

   A provision in a separation agreement stating that if the required support payment for a certain year exceeds 25% of defendant's "net professional income and/or retirement income" the payment required for the following year will not exceed that 25% figure merely set a cap on what defendant will have to pay and did not require that income deductions mentioned in another provision of the separation agreement be deducted from the 25% cap.

3. **Husband and Wife § 13; Attorneys at Law § 7.4— construction of separation agreement—no right to attorney fees**

   Where this matter was disposed of by a construction of the parties' separation agreement, plaintiff wife was not entitled to attorney fees under a provision of the agreement requiring a party thereto to pay the attorney fees of the other party if it should become necessary for the other party to initiate legal proceedings to enforce the provisions of the agreement.

APPEAL by plaintiff from *Gaines, Judge.* Judgment entered 28 July 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 May 1987.

Plaintiff and defendant were married on or about 15 August 1938 and separated on or about 8 November 1981. Defendant is a

medical doctor and receives twenty-five percent of the income of a partnership that he formed with three other physicians. Plaintiff, primarily having been a housewife and mother, had no separate income at the time of separation.

Plaintiff instituted an action seeking alimony from defendant on 8 March 1982. The parties reached an oral agreement whereby defendant was required to pay plaintiff $2,300 per month. A written separation agreement was drawn up on 25 January 1983. The following provision was inserted in the agreement concerning the amount of support defendant would be required to pay plaintiff if defendant's income from the practice of medicine decreased from year to year:

> In consideration for the Wife's relinquishment of all rights to be supported by the Husband, the Husband agrees to pay the Wife the following amounts:
>
> 1. On the 30th of each calendar month from June 30, 1982 up through and including December 30, 1982, the Husband shall pay to the Wife the sum of $2,300. Beginning in the calendar year 1983, the Husband shall pay to the Wife each year the sum of $27,600 in twelve equal monthly installments due on the 30th day of each month, reduced as hereinafter provided. Beginning the calendar year 1983, and each year thereafter, the annual payment and monthly installment payments shall be reduced by the amount paid to the Wife from that trust dated October 15, 1982 and by any rental or other income of the Wife.
>
> On March 30, June 30, September 30 and December 30 of each year the monthly installment payments of support for the insuing [sic] quarter shall be adjusted and reduced by the amounts received by the Wife from the aforesaid trust or other income in the preceding quarter. In addition, on December 30 of each year there shall be a final accounting for the preceding year to the end that the Husband shall be given full credit or offset for the annual support payments that year for all amounts paid to the Wife by the aforesaid trust and *any other income of the Wife.*
>
> 2. In the event the support payment required by the husband to the wife under this agreement exceeds 25% of his

> net professional income (exclusive of any retirement deductions, whether individually or corporate) and/or retirement income, then the payment required the following calendar year by the husband shall be 25% of the husband's net professional income and/or retirement income for the preceding year. The parties realize that the husband is practicing his profession as a one man professional association under the Internal Revenue Code and agree that for the purpose of the aforesaid provision, the parties shall disregard the corporate entity.

Plaintiff instituted this action seeking enforcement of the provisions of the separation agreement pertaining to the payment of support and medical insurance, and reimbursement for state and federal income tax payments. The parties agreed to waive a jury trial and permit the trial judge to make findings of fact.

The trial court made the following pertinent findings of fact.

> 34. Reviewing the evidence presented on the situation of the parties at the time of execution of the Separation Agreement; the purpose of this net professional income term; the end in view for such term; the subject matter it addresses; and the expressions used, the Court finds that the parties intended that the plaintiff be supported by the defendant in the same manner as if they had not become separated, that is, by after-expense, after-tax dollars, and that the parties intended the term "net professional income and/or retirement income" to mean gross medical income and/or retirement income less ordinary and necessary expenses incurred in producing such income less North Carolina and federal income taxes on such income.
>
> * * * *
>
> 40. Paragraph C-2 of the Separation Agreement (quoted in full in Finding No. 30) provides in pertinent part "[i]n the event the support payment required . . . under this agreement exceeds 25% of his net professional income—and/or retirement income." Plaintiff contends that this clause means that the 25% limitation only sets an upper limit on the amount of support the defendant will actually have to pay in the following year after income credits have been deducted

from the $27,600.00 support obligation. Defendant contends that this clause means that the 25% limitation sets the maximum support obligation required by the agreement for the following year from which income credits are deducted. The Court finds this clause to be ambiguous and turns to the intent of the parties to determine its meaning.

* * * *

42. Reviewing the evidence of the situation of the parties at the time of execution of the Separation Agreement; the purpose sought by this clause; the end in view from this clause; the subject matter of this clause; and the expressions used in this clause, the Court finds the parties intended to provide defendant some support protection should he semi-retire or retire because of the effect of this on his income, just as there would be if the parties had remained married, and that the parties intended this clause to mean that the 25% limitation would establish the maximum support obligation required by the agreement for the following year from which income credits would be deducted.

The trial court made the following pertinent conclusions of law:

10. A declaratory judgment should issue construing Paragraph C-2 of the Separation Agreement to mean that defendant's support obligation ceiling of 25% of his net professional income and/or retirement income is to be determined after deducting expenses and federal and state income taxes from such income.

11. A declaratory judgment should issue construing Paragraph C-2 of the Separation Agreement to mean that the 25% limitation establishes the maximum support obligation required by the agreement for the following year from which income credits will be deducted.

From this judgment, plaintiff appeals to this Court.

*DeLaney and Sellers, by Ernest S. DeLaney, for plaintiff appellant.*

*R. Cartwright Carmichael, Jr. for defendant appellee.*

ARNOLD, Judge.

[1] Plaintiff contends that the trial court erred in construing the term "net professional income" as meaning gross medical income less ordinary and necessary expenses incurred in producing such income less the state and federal income taxes on such income. We disagree.

The term "net professional income" is susceptible to more than one reasonable interpretation. It can be read as meaning medical income minus ordinary and necessary expenses or medical income less expenses and taxes on such income. No definition or explanation of the term is found in the separation agreement. Since this phrase is ambiguous, the parties' intent as to its meaning becomes a question of fact to be resolved by the trier of fact. *Harris-Teeter Supermarkets, Inc. v. Hampton*, 76 N.C. App. 649, 334 S.E. 2d 81 (1985), *disc. rev. denied*, 315 N.C. 183, 337 S.E. 2d 857 (1985).

A trial court's findings of fact are binding on this Court if they are supported by competent evidence. *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E. 2d 450 (1971). Defendant testified at trial, "I read the dictionary definition of the term 'net income' before entering into the Separation Agreement—it meant after deducting expenses and taxes." Supported findings of fact will not be disturbed on appeal since the weight and credibility of the evidence are matters for the trial judge. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976). There is ample evidence to support the trial court's finding that the parties intended "net professional income" to mean medical income less expenses and taxes. Plaintiff's contention is therefore rejected.

[2] Plaintiff next contends that the trial court "erred in determining that the defendant was entitled to credit for income received by the plaintiff in determining his support obligation in the event his income decreased and the alternative provision for support payments contained in the agreement became effective."

The trial court incorrectly held that the portion of paragraph C-2 dealing with the twenty-five percent limitation was ambiguous. This paragraph states that if the support payment required under the separation agreement for a certain year exceeds twenty-five percent of defendant's "net professional income and/or

retirement income" then the payment required by the agreement for the following year will not exceed that twenty-five percent figure. This provision merely sets a cap on what defendant will have to pay. It does not remotely suggest that the income deductions mentioned in paragraph 1 should be deducted from this twenty-five percent cap.

In the event defendant's payment for a certain year exceeds twenty-five percent of his "net professional income and/or retirement income" then, according to the agreement, the following calculations would be proper for the next year. Any income received by plaintiff for that year should be deducted from the $27,600 figure that the agreement requires defendant to pay. If the amount remaining is more than the twenty-five percent limit, then all defendant will be required to pay is the twenty-five percent figure. The trial court was incorrect in concluding otherwise.

**[3]** Plaintiff finally contends that the trial court erred in not awarding her reasonable attorneys' fees.

The separation agreement states:

> *Enforcement.* If it should become necessary for either party to initiate legal proceedings or secure the aid of a court to enforce the provisions of this agreement and the party initiating such action prevails, the other party shall be responsible for paying the reasonable attorneys fees and expresses (sic) of such party as determined by the court.

Concerning this matter, the trial court held:

> Each party should bear their own costs and be responsible for payment of their own attorney fees since disposition of this matter was resolved by construction of the agreement, not enforcement of the agreement prior to construction and since there is not a "prevailing party" within the meaning of the Separation Agreement.

The trial court was correct in holding each party responsible for his own attorneys' fees.

The portions of the judgment concerning attorneys' fees and the interpretation of "net professional income" are affirmed. The portion holding that paragraph C-2 is ambiguous is reversed and

the cause is remanded for proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges EAGLES and PARKER concur.

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LARRY E. LEONARD, AND WIFE, BRENDA LEONARD (PLAINTIFFS-APPELLANTS) v. JAMES L. PUGH, AND WIFE, CONNIE W. PUGH: AND DENNIS W. MCNAMES (TRUSTEE); AND WACHOVIA BANK & TRUST CO., N.A. (CO-TRUSTEE); AND MEREDITH S. FINCH (CO-TRUSTEE); AND THOMAS AUSTIN FINCH FOUNDATION; AND JAMES L. TENNANT (TRUSTEE); AND CHARLES W. WARDELL, AND WIFE, MARY M. WARDELL (DEFENDANTS-APPELLEES)

No. 8722SC15

(Filed 16 June 1987)

1. **Easements § 8.1— action to extinguish easement—language of contract ambiguous—12(b)(6) dismissal improper**

The trial court erred by granting a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) by some of the defendants in an action to have an easement extinguished where plaintiffs allege that the easement was restricted to residential purposes and that defendants had violated that restriction, but the language of the easement was ambiguous. Ambiguous contracts must be interpreted by a jury under proper instructions of the law.

2. **Rules of Civil Procedure § 55— default judgment against less than all defendants—not entered before adjudication as to all defendants**

The trial court did not err by not entering judgment by default against the non-answering defendants in an action to have an easement extinguished. A default judgment in an action alleging a joint claim against more than one defendant should not be entered until all defendants have defaulted; if one or more do not default, then entry of default should await an adjudication as to liability of the nondefaulting defendants. N.C.G.S. § 1A-1, Rule 55.

APPEAL by plaintiffs from *Freeman, Judge.* Orders entered 28 August 1986 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 3 June 1987.

This is a civil action wherein plaintiffs seek 1) to have an easement on their property located on East Main Street in Thomasville, North Carolina, "stricken from the public records" and 2) to recover damages from defendants James and Connie Pugh for

trespass. In their complaint filed 28 February 1986, plaintiffs alleged that their predecessors in interest to the tract had executed an instrument dated 22 April 1920 granting to T. A. and Ernestine Finch, the owners of the adjoining tract, and their heirs and assigns, "[t]he use of a passage along a certain alley or driveway, . . . extending from South Main Street in the town of Thomasville along the East side of the lot of T. A. Finch and Ernestine Finch which is to be used as a dwelling lot together with the right of free ingress, egress and regress, . . ." and a second instrument, dated 30 June 1937 extending the easement, granting "an additional one hundred ten (110) feet depth, . . . along the east side of the lot of T. A. Finch and Ernestine L. Finch in the town of Thomasville, which is used as a dwelling lot, . . " Plaintiffs further alleged that the grantors intended to limit the use of the easement to "residential purposes" and that their successors in interest, defendants James and Connie Pugh, had ceased to use the tract as a "dwelling lot" and were using it for commercial purposes. On 4 April 1986, defendants Dennis McNames, trustee of a deed of trust from the Pughs, Wachovia Bank & Trust Co. and Meredith S. Finch, co-executors of the estate of T. A. Finch, and the Thomas Austin Finch Foundation filed an answer and a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). Defendants James and Connie Pugh, James Tennant, trustee of a second deed of trust executed by the Pughs, and Charles and Mary Wardell, the named beneficiaries in the second deed of trust, did not file an answer to plaintiffs' complaint, and the clerk entered default as to each of these defendants. On 16 May 1986, plaintiffs filed a motion in the superior court for judgment by default against the non-answering defendants.

On 11 August 1986, following a hearing on the issue of damages, the trial judge entered an order allowing plaintiffs' motion for judgment by default against defendants Pugh on the second claim alleged in the complaint, trespass, and awarding plaintiffs $237.50 in damages. On 28 August 1986, the trial judge entered orders granting the motion to dismiss of the answering defendants and denying plaintiffs' motion for default judgment against the non-answering defendants on its first claim alleged in the complaint, seeking to have the easement "stricken from the public records." From the orders entered on 28 August 1986, plaintiffs appealed.

*Ned A. Beeker for plaintiffs, appellants.*

*Womble Carlyle Sandridge & Rice, by Robert H. Sasser, III, for defendants, appellees Dennis W. McNames, Wachovia Bank and Trust Co., Meredith S. Finch and Thomas Austin Finch Foundation.*

*No brief for defendants, appellees James Pugh, Connie Pugh, James L. Tennant, Charles Wardell and Mary M. Wardell.*

HEDRICK, Chief Judge.

**[1]** Plaintiffs first contend the trial court erred in granting the answering defendants' motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). Plaintiffs argue in support of this contention that the allegations in the complaint are sufficient to state a claim to have the easement across their tract extinguished. We agree.

A complaint is deemed sufficient to withstand a motion to dismiss pursuant to G.S. 1A-1, 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. *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 and Property Owners Assoc. v. Williams,* 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 the present case, defendants Pugh hold an easement across plaintiffs' property pursuant to instruments executed by J. W. and Daisy Lambeth granting "the use of a passage along a certain alley or driveway, . . . along the East side of the lot of T. A. Finch and Ernestine Finch which is [used/to be used] as a dwelling lot. . . ." Plaintiffs argue that this language in the instruments restricts the use of the easement to residential purposes. Plaintiffs alleged in their complaint that defendants Pugh had ceased using the easement and lot for residential purposes and are now using it for commercial purposes, and that such use overburdens the easement across their property. Assuming *arguendo* that plaintiffs' interpretation of the language in the instruments is correct, plaintiffs' complaint has stated a claim to have

the easement extinguished. *See*, *Sparrow v. Tobacco Co.*, 232 N.C. 589, 61 S.E. 2d 700 (1950); 2 G. Thompson, REAL PROPERTY Sec. 444 (repl. ed. 1961). We find this language in the instruments so ambiguous, however, that we are unable to hold as a matter of law that it creates an easement which is restricted to use for residential purposes.

An easement is an interest in land and is generally created by deed; an easement created by deed is a contract. *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962). The controlling purpose of the court in construing such contracts, is to determine the intent of the parties at the time it was made. *Id.* Where the language of a contract granting an easement is clear and unambiguous, the construction of the agreement is a matter for the court and reference to matters outside the contract itself is not required for a correct construction. *Price v. Bunn*, 13 N.C. App. 652, 187 S.E. 2d 423 (1972). However, if the language is uncertain or ambiguous, the court may consider all the surrounding circumstances, including those existing when the document was drawn, those existing during the term of the instrument, and the construction which the parties have placed on the language, so that the intention of the parties may be ascertained and given effect. *Century Communications v. Housing Authority of City of Wilson*, 313 N.C. 143, 326 S.E. 2d 261 (1985). Extrinsic evidence is admissible in such cases to explain the terms of a written agreement, but not to add to, distract from, or vary the terms. *Id.* Ambiguous contracts must be interpreted by a jury under proper instructions of the law. *Id.*; *Hanner v. Power Co.*, 34 N.C. App. 737, 239 S.E. 2d 594 (1977).

Since the nature of the easement granted in the instruments in the present case is unclear, the trial court erred in granting defendant's motion to dismiss.

[2] Plaintiffs further contend the trial court erred by not entering judgment by default on their claim to have the easement extinguished against the non-answering defendants. We disagree.

Where a complaint alleges a joint claim against more than one defendant, default judgment pursuant to G.S. 1A-1, Rule 55 should not be entered against a defaulting defendant until all defendants have defaulted; or if one or more do not default then, generally, entry of default judgment should await an adjudication

as to the liability of the non-defaulting defendants. *Harris v. Carter*, 33 N.C. App. 179, 234 S.E. 2d 472 (1977). If joint liability is decided against the defending party in favor of the plaintiff, the plaintiff is entitled to judgment against all defendants. *Id.* If, however, joint liability is decided against the plaintiff, the complaint should be dismissed as to all defendants. *Id.* In the present case, therefore, judgment on this claim against the non-answering defendants may be properly entered only if judgment is entered in favor of plaintiff against the answering defendants after further proceedings upon remand.

For the foregoing reasons, the orders dismissing plaintiffs' claim to have the easement extinguished are reversed and the cause is remanded to the Superior Court for further proceedings as to this claim.

Reversed and remanded.

Judges PHILLIPS and ORR concur.

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TOWN OF LAKE WACCAMAW v. ADRIAN SAVAGE AND WIFE, ESTHER SAVAGE

No. 8613DC1100

(Filed 16 June 1987)

1. **Municipal Corporations § 30— extraterritorial jurisdiction—local act—description requirements for ordinance**

An act authorizing the Town of Lake Waccamaw to exercise extraterritorial jurisdiction within one mile of the town limits and within 2,000 feet of Lake Waccamaw's high water mark did not exempt the town from the description requirements of N.C.G.S. § 160A-360(b).

2. **Municipal Corporations § 30— extraterritorial jurisdiction ordinance—insufficient description**

A town ordinance describing the territory over which it seeks to exercise extraterritorial jurisdiction by reference to a map which shows some sweeping lines located around a lake and around what appear to be the town limits does not comply with the description requirements of N.C.G.S. § 160A-360(b).

APPEAL by plaintiff from summary judgment entered by *Hooks, Judge.* Judgment entered 18 July 1986 in District Court, COLUMBUS County. Heard in the Court of Appeals 4 March 1987.

*Williamson & Walton, by C. Greg Williamson, for plaintiff-appellant.*

*W. Lewis Sauls, for defendant-appellee.*

GREENE, Judge.

This is a civil action instituted by the Town of Lake Waccamaw. The town seeks a mandatory injunction requiring defendants to remove a sign from their property. It contends defendants' sign violates its sign ordinance. Defendants contend their property is located outside the town limits and that the town's attempt to exercise extraterritorial jurisdiction over them is invalid.

G.S. 160A-360 authorizes towns of Lake Waccamaw's size to exercise certain powers within their town limits and "within a defined area extending not more than one mile beyond [their] limits." G.S. 160A-360(a). Subsection (b) of the statute provides that any town

> wishing to exercise extraterritorial jurisdiction under this Article shall adopt . . . an ordinance specifying the areas to be included . . . . Boundaries shall be defined, to the extent feasible, in terms of geographical features identifiable on the ground. . . . The boundaries specified in the ordinance shall at all times be drawn on a map, set forth in a written description, or shown by a combination of these techniques.

Lake Waccamaw is a fairly large body of water extending several miles from shore to shore. The Town of Lake Waccamaw is located on its northern shore. In 1973, the General Assembly of North Carolina enacted House Bill 686. 1973 N.C. Sess. Laws Ch. 131. It reads in part:

> The boundaries of the territory within which the Governing Board of the Town of Lake Waccamaw *may exercise* the powers set forth in Article 19 of Chapter 160A [G.S. 160A-360 *et seq.*] of the General Statutes shall include the territory described as follows:

> "All lands within one mile of the town limits and those lands within 2,000 feet of the high water mark around the entire body of Lake Waccamaw." [Emphasis added.]

In 1975, the Town of Lake Waccamaw enacted an ordinance entitled Extraterritorial Jurisdiction Ordinance. The ordinance defined the extraterritorial boundaries by reference to a map. The map shows the boundaries drawn in sweeping curves around the town limits and the lake. Thereafter, the town enacted a sign ordinance regulating signs within the town limits and the extraterritorial areas.

Upon defendants' motion to dismiss for failure to state a claim upon which relief could be granted, the trial court heard oral arguments and considered exhibits offered by both parties under G.S. 1A-1, Rule 12(b). It then granted summary judgment for defendants. The town appeals.

The issues before us are whether H.B. 686 exempts the Town of Lake Waccamaw from the description requirements set out in G.S. 160A-360(b) and, if the town is not exempt, whether its extraterritorial ordinance complies with those requirements.

I

**[1]** In H.B. 686, the Legislature provided that the Town of Lake Waccamaw "may exercise the powers set forth" in G.S. 160A-360 *et seq.* within one mile of the town limits and within 2,000 feet of Lake Waccamaw's high water mark. The Legislature's intent can be ascertained from the bill's phraseology. *See In re Hardy,* 294 N.C. 90, 240 S.E. 2d 367 (1978). The Legislature used the language "may exercise." It did not exercise extraterritorial jurisdiction on behalf of Lake Waccamaw but merely permitted it to be done. In other words, by enacting H.B. 686, the Legislature merely intended to expand the possible authority of the Town of Lake Waccamaw under G.S. 160A-360(a).

While too much weight should not be put on the particular wording of the statute or bill, the additional rules of statutory construction brought forth by plaintiff only further confirm our interpretation of the bill. Therefore, to permit the Town of Lake Waccamaw to avoid the description requirements of G.S. 160A-360(b) would not be in keeping with the Legislature's intent. We

hold that the town is not exempt from the description requirements of G.S. 160A-360(b).

II

[2] "A city has power to zone only as delegated to it by enabling statutes, and 'a zoning ordinance or an amendment thereto which is not adopted in accordance with the enabling statutes is invalid and ineffective.'" *Sellers v. City of Asheville*, 33 N.C. App. 544, 547, 236 S.E. 2d 283, 285 (1977) (quoting *Heaton v. City of Charlotte*, 277 N.C. 506, 513, 178 S.E. 2d 352, 356 (1971)). In light of our holding above, when the Town of Lake Waccamaw enacted its extraterritorial ordinance, it was required by G.S. 160A-360(b) to include either a valid written description of the extraterritorial area, a map with an adequate description or an adequate combination of the two. If it did not, then its extraterritorial ordinance is invalid and it cannot require defendants, who live outside its town limits, to comply with its sign ordinance.

Lake Waccamaw's ordinance describes the territory over which it seeks extraterritorial jurisdiction by reference to a map. The map shows some sweeping and curving lines located around Lake Waccamaw and around what appear to be the town limits. There is no written description of the area over which the town attempts to exercise its extraterritorial jurisdiction; we must determine if the map is an adequate description.

We find the case of *Sellers v. City of Asheville*, 33 N.C. App. 544, 236 S.E. 2d 283 (1977) dispositive. In *Sellers*, the City of Asheville attempted to extend its extraterritorial jurisdiction. The ordinance adopted by the city described the property as the territory "beyond the corporate limits for a distance of one mile in all directions . . . ." *Id.* at 546, 236 S.E. 2d at 285. The city adopted a zoning map which showed the approximate location of the extraterritorial one mile boundary with "sweeping curves, except where the city bordered upon adjacent municipalities." *Id.* at 549-50, 236 S.E. 2d at 287. Sellers owned property within one mile of the city limits, *id.* at 546, 236 S.E. 2d at 285, and brought the action to declare certain sections of the ordinance invalid and to enjoin its enforcement outside the city limits. *Id.* at 545, 236 S.E. 2d at 284.

We found that Asheville's description of its extraterritorial properties did not comply with the description requirements of G.S. 160A-360(b):

> The obvious purpose of this statutory mandate is that boundaries be defined, to the extent feasible, so that owners of property outside the city can easily and accurately ascertain whether their property is within the area over which the city exercises its extraterritorial zoning authority. . . . It is not a sufficient answer that, from an engineering point of view, it would be possible for a competent surveyor to measure on the ground a distance of exactly one mile beyond the city limits and thereby ascertain with certainty whether a particular lot is, or is not, within the area over which the City exercises its extraterritorial zoning authority. It was precisely to avoid the necessity of such a costly remedy that the statute requires that the boundaries be defined, to the extent feasible, in terms of geographical features identifiable on the ground.

*Sellers*, 33 N.C. App. at 550, 236 S.E. 2d at 287.

In reviewing the map submitted as an exhibit in the case before us, the sweeping curves drawn around the lake and the town limits are in no way definable. No distances are shown on the map and the lines themselves do not coincide with any geographical feature on the ground. By looking at the map, even in conjunction with H.B. 686, owners of property outside the town limits cannot easily and accurately ascertain whether their property is within the area over which the Town of Lake Waccamaw attempts to exercise extraterritorial jurisdiction. Therefore, the ordinance does not comply with the description requirements of G.S. 160A-360(b).

Accordingly, summary judgment for defendants is

Affirmed.

Judges ARNOLD and MARTIN concur.

DESIGN ASSOCIATES, INC. v. WILLIAM J. POWERS

No. 8722DC94

(Filed 16 June 1987)

**1. Architects § 2— action to recover fees—no error in evidence**

The trial court did not err in an action to collect a fee for architectural services by allowing a member of plaintiff architectural firm to testify that plaintiff's rate of $35 per hour was "on the low side"; by excluding evidence of how much other architects and builders had told defendant that plaintiff's plans were worth; or by admitting evidence relating to defendant's income and the cost of his house and land. Even assuming that some of the evidence was erroneously admitted or excluded, defendant failed to show any prejudice since the amount awarded was clearly supported by the unchallenged evidence admitted at trial.

**2. Architects § 2; Laborers' and Materialmen's Liens § 1— architect's lien—valid**

The trial court did not err in an action to recover a fee for architectural services by not dissolving a lien placed on defendant's home. Plaintiff furnished professional design services pursuant to a contract and there is no requirement in N.C.G.S. § 44A-8 that the lienholder's work actually improve the property.

APPEAL by defendant from *Johnson (Robert W.), Judge.* Judgment entered 8 July 1986 in District Court, IREDELL County. Heard in the Court of Appeals 10 June 1987.

This is a civil action wherein plaintiff seeks judgment against defendant in the amount of $8,861.00 plus interest and costs, and an order directing the sale of a piece of property to satisfy plaintiff's lien on that property. Defendant, in his answer, moved for an order dissolving the lien.

At trial, evidence was introduced tending to show the following: Plaintiff is an architectural firm. Defendant came to the office of William Leonard, the owner of plaintiff firm and asked about designing a house on defendant's lakefront property. According to Leonard, he quoted defendant a fee of 5% of the cost of the house or $35.00 per hour of work, whichever was lower, and defendant told plaintiff to proceed. According to defendant, "there was a 3%, a 5% and a 7% fee mentioned."

Plaintiff drew up the plans expending 337.5 hours on the project. Plaintiff sent defendant a bill for $9,361.00 based on the estimated cost of the house. Defendant told plaintiff he thought it

was too high and he did not intend to pay, but would get estimates from other sources as to the value of the plans. Defendant did send plaintiff a check for $500.00. Defendant never used the plans plaintiff drew up.

The trial judge submitted the following issue to the jury: "What amount of damages, if any, has the plaintiff, Design Associates, Inc., sustained?" The jury answered: "$6000." The court entered judgment on this verdict but did not rule on defendant's motion to dissolve the lien on his property. From judgment entered on the verdict, defendant appealed.

*Albert F. Walser for plaintiff, appellee.*

*Pope, McMillan, Gourley, Kutteh & Parker, by William H. McMillan, and Nancy S. Davenport, for defendant, appellant.*

HEDRICK, Chief Judge.

**[1]** Defendant's first three assignments of error relate to the admission and exclusion of evidence. Defendant argues that the court erred in 1) allowing a member of plaintiff architectural firm to testify that plaintiff's rate of $35.00 per hour was "on the low side," 2) excluding evidence of how much other architects and builders told defendant that plaintiff's plans were worth, 3) admitting evidence relating to defendant's income and the cost of his house and land.

Plaintiff's claim is for breach of contract. Plaintiff alleged in its complaint and offered evidence tending to show that it had an express contract with defendant to perform architectural services, and that defendant had failed and refused to pay the balance due for services rendered. In its complaint, plaintiff sought $8,861.00. Plaintiff's evidence tended to show that the agreed-upon contract price was the lesser of 1) 5% of the cost of the house and 2) $35.00 per hour of work spent on the plans. Plaintiff's evidence also tended to show that 337.5 hours were spent on the plans. Three hundred thirty-seven and a half hours multiplied by $35.00 per hour yields a sum of $11,812.50. The cost of the house was estimated by plaintiff to be $187,000.00. Five per cent of $187,000.00 is $9,350.00. Plaintiff's bill was for $9,361.00, which is approximately the lesser of the two figures. Defendant paid plaintiff $500.00, leaving a balance of $8,861.00, the amount plain-

tiff sought in its complaint. In his answer, defendant denied having entered into a contract with plaintiff. At trial, defendant's evidence was equivocal as to whether the parties had entered into a contract and to the terms of any such contract.

No question is raised on appeal regarding the failure of the court to submit an issue to the jury with respect to whether the parties entered into a contract or the terms thereof. As pointed out before, the only issue submitted to the jury related to damages.

In a suit for damages arising out of a breach of contract, the injured party is to be placed as near the position he would have occupied had the breach not occurred. *Coble v. Richardson Corp.*, 71 N.C. App. 511, 322 S.E. 2d 817 (1984). In the present case payment of the unpaid balance of the contract price would put plaintiff, the injured party, in the position he would have occupied absent the breach.

We find no error in the admission or exclusion of any of the evidence challenged by defendant's first three assignments of error. Assuming arguendo, however, that some of this evidence was erroneously admitted or excluded, defendant has failed to show any prejudice in its admission or exclusion, since the jury's award of $6,000.00 is clearly supported by the unchallenged evidence admitted at trial.

[2] Defendant finally contends the trial court erred in failing to dissolve the lien placed on his home by plaintiff. Defendant argues that there can be no lien because plaintiff's work was not used to improve defendant's real property. We disagree. G.S. 44A-8 provides as follows:

> Any person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished pursuant to such contract.

There is no requirement in G.S. 44A-8 that the lienholder's work actually improve the property. Plaintiff in the present case furnished professional design services pursuant to a contract. This was sufficient to entitle plaintiff to a lien to secure payment for those services. This assignment of error is without merit.

No error.

Judges PHILLIPS and ORR concur.

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STATE OF NORTH CAROLINA v. JOHN DAVIS MCCLAIN

No. 865SC1115

(Filed 16 June 1987)

**Kidnapping § 1.3— purpose of kidnapping—instruction on theory not alleged—plain error**

The trial court committed plain error in instructing the jury on a theory of kidnapping not charged in the indictment where the indictment alleged that the purposes of the kidnapping were facilitating rape and terrorizing the victim and the trial court permitted the jury to convict defendant if it found defendant had restrained or removed the victim with the intent of "doing serious bodily injury" to her.

APPEAL by defendant from *Stevens, Judge*. Judgment entered 27 March 1986 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 March 1987.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General David R. Minges, for the State.*

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

GREENE, Judge.

After indictment for first degree rape and first degree kidnapping, defendant was found guilty of misdemeanor assault on a female and first degree kidnapping. The trial judge sentenced defendant to 40 years' imprisonment for the kidnapping conviction and two years' imprisonment for the assault conviction. Defend-

ant asserts error in the jury instructions and appeals his conviction of first degree kidnapping.

The State's evidence at trial tended to show that, after the prosecuting witness drove defendant home, defendant asked her to take him to another location. When she refused, defendant removed the keys from her car, pulled her behind a house, ordered her to undress and forced her to have sexual intercourse. During that time, defendant allegedly struck the prosecuting witness and threatened to harm her if she did not cooperate. Defendant later forced her to accompany him to another location where he again forced her to have sexual intercourse. Testifying on his own behalf, defendant only admitted slapping the prosecuting witness after an argument over the prosecuting witness's drug use. The prosecuting witness did not initially identify defendant as the man who allegedly raped her. The jury returned verdicts for first degree kidnapping and misdemeanor assault on a female.

The sole issue for this Court's determination is whether the trial court committed plain error in instructing the jury on a theory of kidnapping not charged in the indictment. The indictment for kidnapping provided in pertinent part:

> The defendant . . . unlawfully, willfully and feloniously did kidnap, confine, restrain and remove from one place to another Mary E. Grant, a person who had attained the age of 16 years, *for the purpose of facilitating the commission of the felony of Rape and for the purpose of terrorizing the said Mary E. Grant, and further did sexually assault her.* [Emphasis added.]

The indictment for rape provided in part:

> The defendant . . . unlawfully, willfully and feloniously did ravish and carnally know Mary E. Grant, a female person, by force and against her will, *and inflicted serious personal injury upon the person of Mary E. Grant.* [Emphasis added.]

In its charge to the jury, the trial court instructed that the defendant could be convicted of kidnapping if the jury found:

> That the defendant restrained and/or removed Mary Grant for the purpose and with the specific intent of facilitating his commission of the felony of rape *and/or doing serious bodily injury to Mary Grant.* [Emphasis added.]

Our courts have consistently held that it is error, generally prejudicial, for the trial court to permit a jury to convict upon some theory not supported by the bill of indictment. *E.g.*, *State v. Taylor*, 301 N.C. 164, 170, 270 S.E. 2d 409, 413 (1980). Here, the trial judge permitted the jury to convict defendant of kidnapping if it found defendant had restrained and/or removed the prosecuting witness with the "intent of doing serious bodily injury." However, the State's indictment alleged the purpose of the kidnapping was "facilitating" rape and "terrorizing" the prosecuting witness. In a kidnapping case, the indictment must allege the specific purposes on which the State intends to rely; the State is furthermore restricted to proving those purposes alleged in the indictment. *State v. Moore*, 315 N.C. 738, 743, 340 S.E. 2d 401, 404 (1986) (evidence supported theory of terrorizing victim, but insufficient to support theory that defendant confined or removed victim for purpose of doing serious bodily harm). The State's kidnapping indictment clearly did not allege the same kidnapping purpose the trial judge submitted to the jury.

Since the indictment for rape alleged "serious personal injury," the State argues the kidnapping and rape indictments give defendant proper notice of the charges when construed together. We find no merit to the State's contention and conclude the trial court's instructions were in error.

The State further contends that, even if we find the jury instructions erroneous, defendant waived appellate review of the issue by failing to interpose a timely objection. We note that defendant did not object to the judge's instructions to the jury. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides:

> No party may assign as error any portion of the jury charge or omissions therefrom unless he objects thereto before the jury retires to consider its verdict . . . .

However, our Supreme Court has mitigated the harshness of Rule 10(b)(2) by adopting the "plain error" rule by which an appellate court may notice plain errors or defects affecting substantial rights although such errors or defects were not brought to the trial court's attention. *State v. Odom*, 307 N.C. 655, 660, 300 S.E. 2d 375, 378-79 (1983). In two cases of similar variance between a kidnapping indictment and jury instructions, our Supreme Court

held the error was plain and ordered new trials for the defendants. *State v. Tucker*, 317 N.C. 532, 536-40, 346 S.E. 2d 417, 420-22 (1986); *State v. Brown*, 312 N.C. 237, 246-49, 321 S.E. 2d 856, 861-63 (1984). We see no relevant factors distinguishing the instant case from *Brown* and *Tucker* and therefore grant a new trial of the kidnapping charge in this case.

New trial on first degree kidnapping.

Judges ARNOLD and MARTIN concur.

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ROBERT L. BROWN AND LINDA A. HOLT v. ROWE CHEVROLET-BUICK, INC. AND JAMES RIVENBARK

No. 8610SC1354

(Filed 16 June 1987)

**Trial § 3.2— removal of attorney on day before trial—denial of continuance**

The trial court did not err in denying the corporate defendant's motion at the beginning of trial for a continuance made on the ground that defendant was not afforded a reasonable opportunity to retain another attorney after defendant's counsel of record was disqualified and removed by the trial court on the day before trial where the evidence showed that defendant's counsel of record made efforts to secure other counsel for defendant some four months before trial because of a conflict but defendant failed to execute documents sent to it for that purpose and never responded to counsel's inquiries.

APPEAL by plaintiff from *McLelland, Judge*. Judgment entered 3 September 1986 in WAKE County Superior Court. Heard in the Court of Appeals 13 May 1987.

This cause of action arose out of a written asset purchase agreement between plaintiffs Robert L. Brown and Linda A. Holt and defendant Rowe Chevrolet-Buick (Rowe). Under the terms of that agreement, plaintiffs were to purchase certain assets of the Rowe dealership on the condition precedent that plaintiff Brown be approved by certain car manufacturers as a dealer for their automobiles. Pending the closing of this transaction, plaintiffs placed $50,000 in escrow with defendant Rivenbark serving as escrow agent. However, Brown was not approved as successor dealer by the date specified in the agreement, and plaintiffs notified Rowe of their withdrawal from the contract in accordance with its

terms. Plaintiffs also made demand upon Rivenbark for the return of the escrow funds. Rivenbark refused to return the deposit on the grounds that Rowe also claimed the funds. Plaintiffs sued for the return of the deposit with interest and also filed a motion to have defendant Rivenbark removed as escrow agent and as counsel of record for Rowe. Rivenbark's law partner, John W. Kirkman, Jr., filed a response to the motion on behalf of the firm, recognizing the potential conflicts and informing the court that he had made arrangements with other counsel to represent defendant Rowe until Rivenbark transferred the escrow funds to the Clerk of Court. The response further stated that defendant Rowe had not executed the documents or responded to any of Rivenbark and Kirkman's efforts to retain it other counsel.

The case was called for trial during the 2 September session. On 3 September, the court heard argument on the motion and upon Rowe's oral motion for a continuance. Still his client's attorney of record, John W. Kirkman, Jr., appeared for Rowe and Rivenbark. The court removed Rivenbark as escrow agent, disqualified and removed him and his firm as counsel of record for Rowe, denied Rowe's oral motion to continue and ordered the case to be tried at 9:30 the next morning, 4 September 1986.

When the case was called that morning, Brown and Holt appeared with their attorneys of record. Mr. B. T. Rowe, Jr., president of Rowe, was present on behalf of the corporation. He orally moved for a continuance on the grounds that he had no attorney, asserting that he only received notice of the trial at 4:00 the afternoon before and that he also had not known until that time that the corporate defendant would be without an attorney. The court denied Rowe's motion and the case was tried without a jury. The court awarded plaintiffs the relief requested, and defendant Rowe appealed.

*Underwood, Kinsey & Warren, P.A., by C. Ralph Kinsey, Jr.; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Nigle B. Barrow, Jr., for plaintiffs-appellees.*

*Larry E. Norman for defendant-appellant.*

WELLS, Judge.

Defendant's sole argument on appeal is that the court erred in denying defendant's request at the beginning of the trial for a

continuance. Rowe contends that it was not afforded a reasonable opportunity to retain the services of another attorney, having only been notified the afternoon before that its attorney was removed. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 40(b) of the N.C. Rules of Civil Procedure provides:

> (b) No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly.

Whether to grant a motion to continue is within the sound discretion of the trial court. *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1985); *Doby v. Lowder*, 72 N.C. App. 22, 324 S.E. 2d 26 (1984). Where the attorney has given the movant no prior notice of intent to withdraw, the court has no discretion but must grant a reasonable continuance or deny motion to withdraw. *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 321 S.E. 2d 514 (1984). The general rule, however, is that the withdrawal of counsel on the eve of trial is not *ipso facto* grounds for continuance. *Shankle v. Shankle, supra.*

In the case at bar, the record contradicts Rowe's contention that it had no notice of withdrawal of its counsel. Rivenbark and Kirkman's response to plaintiffs' motion establishes that the firm made efforts on Rowe's behalf to secure other counsel as early as May 1986 but that Rowe never signed the documents or even responded to the firm's inquiries. The trial court's denial of a continuance was therefore a proper exercise of its discretion, and the judgment appealed from is

Affirmed.

Judges ARNOLD and ORR concur.

JORETTA C. CALDWELL v. CARMEL F. CALDWELL

No. 8630DC1288

(Filed 16 June 1987)

**Divorce and Alimony § 16.6— dependent spouse—insufficient evidence**

The trial court erred in finding that plaintiff wife was a dependent spouse where the evidence showed that the year the parties separated plaintiff's income was $19,301.46 and defendant's income was $24,447.26, and that during the last year the parties lived together, they maintained separate bank accounts and divided household expenses.

APPEAL by defendant from *Snow, Judge.* Judgment entered 10 July 1986 in District Court, HAYWOOD County. Heard in the Court of Appeals 8 June 1987.

This is a civil action wherein plaintiff seeks alimony without divorce, a writ of possession to a 1970 automobile titled in defendant's name and reasonable counsel fees. Following a trial on the issue of whether grounds for alimony exist, the jury found that defendant had willfully abandoned plaintiff without just cause or provocation and had committed adultery.

At a hearing before the trial judge without a jury to determine the issues of whether plaintiff is a dependent spouse and the amount of alimony to which she is entitled, if any, evidence was presented tending to show the following: Plaintiff and defendant were married on 7 July 1974 and separated on 11 May 1984. They have no children. At the time of the hearing defendant was employed by Dayco Corporation. His gross earnings at Dayco from 1983 until the date of the hearing were as follows: In 1983, he earned $20,475.11; in 1984, he earned $24,447.26; in 1985, he earned $19,048.05; and from 1 January 1986 through 4 May 1986, he earned $5,450.64. Plaintiff began working for Dayco on 7 January 1963 and was still a full-time employee there when the parties separated. In 1983 she earned $18,339.97 and in 1984 she earned $19,301.46. During the last year of the marriage, plaintiff and defendant maintained separate checking accounts and divided the household bills. Following the parties' separation, plaintiff left her job at Dayco and began managing a restaurant for a salary of $200 per week. She also works for a real estate company and receives a free apartment, valued at $250 per month, rather than a

salary. Plaintiff testified that she currently has monthly expenses of $1,248.22 in order to maintain her accustomed standard of living.

Following the hearing, the trial judge made findings of fact and conclusions of law, including a finding and conclusion that plaintiff is a dependent spouse, and entered an order directing defendant to pay $225.00 per month in alimony and $1,000 in attorney's fees and granting plaintiff a writ of possession in the 1970 Lincoln automobile titled in defendant's name. Defendant appealed.

*Alley, Hyler, Kersten, Killian, Davis and Smathers, P.A., by George B. Hyler, Jr., for plaintiff, appellee.*

*McLean & Dickson, P.A., by Russell L. McLean, III, for defendant, appellant.*

HEDRICK, Chief Judge.

Defendant contends the trial judge's finding that "Plaintiff was substantially and materially dependent upon the Defendant for her support and maintenance" is not supported by the evidence. We agree.

G.S. 50-16.1(3) defines "dependent spouse" as a spouse, "whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." The trial court in this case did not find that plaintiff was "substantially in need of maintenance and support" from defendant. The term "actually substantially dependent" as used in the first portion of the definition means that the spouse seeking alimony must have actual dependence on the other "in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E. 2d 849, 854 (1980). Thus to qualify as a dependent spouse under that portion of G.S. 50-16.1(3) the spouse seeking alimony must be actually without means for providing for his or her accustomed standard of living. *Id.*

The uncontradicted evidence in the record discloses that the year before the parties separated, plaintiff had an income of

$18,339.97 and defendant had an income of $20,475.11. The year they separated, plaintiff's income was $19,301.46 and defendant's income was $24,447.26. During the last year that they lived together, they maintained separate bank accounts and divided household expenses. There is no evidence in the record to support the ultimate finding that plaintiff was "substantially and materially dependent upon the Defendant for her support and maintenance." We hold, therefore, that the trial court erred in awarding plaintiff alimony.

The trial court also erred in awarding plaintiff attorney's fees. To recover attorney's fees pursuant to G.S. 50-16.4 in an action for alimony, the spouse must be entitled to the relief demanded, must be a dependent spouse, and must have insufficient means to subsist during the prosecution of the suit and to defray the expenses thereof. *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972). Since plaintiff is not a dependent spouse and is not entitled to an award of alimony, she is not entitled to recover attorney's fees.

The order awarding alimony and attorney's fees to plaintiff is reversed.

Reversed.

Judges PHILLIPS and ORR concur.

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ROBERT E. PEOPLES, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, SELF INSURER, DEFENDANT

No. 8610IC1323

(Filed 16 June 1987)

**Master and Servant § 78— workers' compensation—initial award in 1980—no interest**

The Industrial Commission correctly concluded in a workers' compensation case that an initial award entered on 14 January 1980 was controlling in the application of N.C.G.S. § 97-86.2 and that plaintiff was not entitled to interest on the award.

APPEAL by plaintiff from the North Carolina Industrial Commission. Order entered 25 July 1986. Heard in the Court of Appeals 13 May 1987.

On 14 January 1980, Deputy Commissioner Dianne Sellers entered an Opinion and Award finding that plaintiff had contracted byssinosis as a result of exposure to cotton dust at defendant Cone Mills. She further concluded that plaintiff had sustained a 66⅔% permanent partial disability. Both parties appealed to the Full Commission.

On 28 October 1982, the Full Commission adopted most of the Deputy Commissioner's Findings of Fact but vacated and set aside the remainder of the Opinion and Award. The Full Commission's Opinion and Award concluded that plaintiff is totally and permanently disabled as a result of byssinosis.

Defendant appealed to this Court, which affirmed the Commission's decision with respect to plaintiff's total and permanent disability. *Peoples v. Cone Mills Corp.*, 69 N.C. App. 263, 317 S.E. 2d 120 (1984). Our Supreme Court granted defendant's petition for discretionary review and modified and affirmed this Court's decision. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E. 2d 798 (1986).

Thereafter, on 8 July 1986, plaintiff moved for attorneys' fees, costs and interest pursuant to G.S. 97-88 and G.S. 97-86.2. The Commission allowed plaintiff's motion for attorneys' fees but denied the motion for interest stating:

> G.S. 97-86.2 did not become effective until its ratification on 23 April 1981. The initial award in the case was filed on 14 January 1980. Therefore, the Commission holds that the plaintiff is not entitled to interest on the award since the date of the initial award is controlling in the application of G.S. 97-86.2.

From the Order of the Industrial Commission, plaintiff appeals.

*Kirby, Wallace, Creech, Sarda, Zaytoun & Cashwell, by John R. Wallace, for plaintiff appellant.*

*Smith, Helms, Mulliss & Moore, by J. Donald Cowan, Jr. and Caroline H. Wyatt, for defendant appellee.*

ARNOLD, Judge.

Plaintiff contends that the Industrial Commission erred in holding that he is not entitled to interest on his award. We are not persuaded by plaintiff's argument.

As initially adopted in 1981, G.S. 97-86.2 read:

> When, in a worker's compensation case, a hearing or hearings have been held and an award made pursuant thereto, if there is an appeal from that award by the employer or carrier which results in the affirmance of that award or any part thereof which remains unpaid pending appeal, the insurance carrier or employer shall pay interest on the final award from the date the initial award was filed at the Industrial Commission until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant.

1981 N.C. Sess. Laws, ch. 242, s. 1.

Section 2 to Chapter 242 of the 1981 Session Laws made the above section effective upon ratification and applicable to awards made on or after that date. The Act was ratified on 23 April 1981.

The General Assembly amended G.S. 97-86.2 in 1985, rewriting the first sentence to provide as follows:

> In any worker's compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the original order, which granted or denied the award, until paid at the legal rate of interest provided in G.S. 24-1.

G.S. 97-86.2.

The Industrial Commission was correct in concluding that the initial award entered on 14 January 1980 by Deputy Commissioner Sellers is controlling in the application of G.S. 97-86.2. *Cf. Hicks v. Brown Shoe Co.*, 64 N.C. App. 144, 306 S.E. 2d 543 (1983), *disc. rev. denied*, 311 N.C. 304, 317 S.E. 2d 680 (1984). The award

was entered prior to the effective date of G.S. 97-86.2. Therefore, plaintiff is not entitled to interest on the award.

The Order of the Industrial Commission is

Affirmed.

Judges WELLS and ORR concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

### FILED 16 JUNE 1987

| Case | County | Disposition |
|---|---|---|
| ANDREWS v. ANDREWS<br>No. 8718DC166 | Guilford<br>(82CVD4834) | Affirmed |
| BUFFKIN v. SOLES<br>No. 8713SC135 | Columbus<br>(86CVS744) | Affirmed |
| CLARK v. ASHEVILLE CONTRACTING<br>No. 8728SC172 | Buncombe<br>(80CVS1904)<br>(80CVS1460)<br>(80CVS1459)<br>(80CVS1458)<br>(80CVS1457)<br>(80CVS1455)<br>(80CVS1454)<br>(80CVS1453)<br>(80CVS1452)<br>(80CVS1451)<br>(80CVS1450)<br>(80CVS1449)<br>(80CVS1448)<br>(80CVS1447)<br>(80CVS1446)<br>(80CVS1445) | Appeal Dismissed |
| CINTAS v. JOHNSON<br>No. 8626SC1117 | Mecklenburg<br>(86CVS7077) | Affirmed |
| DALY GROUP v. MANNING CORPORATION<br>No. 8621SC1352 | Forsyth<br>(86CVS892) | Affirmed |
| DRISCKELL v. BYNUM<br>No. 867SC1214 | Wilson<br>(85CVS620) | No Error |
| EDWARDS v. ADVO SYSTEMS, INC.<br>No. 8626SC1238 | Mecklenburg<br>(84CVS10451) | No Error |
| GAMBLE v. WOOTEN<br>No. 8618SC1298 | Guilford<br>(85CVS4149) | Affirmed |
| IN RE APPLICATION OF WATSON v. WATSON<br>No. 8710SC70 | Wake<br>(84CVS660) | Vacated and Remanded |
| IN RE FISHER<br>No. 8725DC212 | Burke<br>(86SPC240NR) | Affirmed |
| IN RE FORECLOSURE OF BURNETTE<br>No. 874SC89 | Onslow<br>(86SP105) | Affirmed |

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|---|---|---|
| IN RE FORECLOSURE OF WADE<br>No. 8718SC143 | Guilford<br>(85SP1806) | Affirmed |
| IN RE GREEN<br>No. 8727DC97 | Gaston<br>(86J146) | Vacated and Remanded |
| IN RE VANDERLOOP<br>No. 8727DC160 | Gaston<br>(86J153) | Vacated and Remanded |
| IN RE WHITE<br>No. 8621DC1350 | Forsyth<br>(86SP470) | Appeal Dismissed |
| JONES v. LIBERTY FINANCIAL PLANNING<br>No. 8629SC1308 | Rutherford<br>(85CVS632) | Affirmed |
| KEMBLE & MILLS v. HARWELL<br>No. 8622DC1303 | Iredell<br>(84CVD400) | Affirmed |
| SOUTHERN AUTO AUCTION v. DOT<br>No. 8718SC58 | Guilford<br>(86CVS5851) | Affirmed |
| STATE v. BASNIGHT<br>No. 8712DC214 | Cumberland<br>(86CVD1081) | Reversed and Remanded |
| STATE v. BELL<br>No. 8726SC85 | Mecklenburg<br>(86CRS16716) | No Error |
| STATE v. BROOKS<br>No. 872SC181 | Beaufort<br>(83CRS7188)<br>(83CRS5819) | No Error |
| STATE v. BROWN<br>No. 873SC114 | Craven<br>(85CRS9705)<br>(85CRS10437)<br>(85CRS10439) | Affirmed |
| STATE v. CARPENTER<br>No. 8724SC102 | Mitchell<br>(86CRS420) | Reversed and remanded; new trial |
| STATE v. DAVIS<br>No. 862SC1327 | Beaufort<br>(85CRS6458) | No Error |
| STATE v. HINES<br>No. 8710SC169 | Wake<br>(85CRS10792) | No Error |
| STATE v. HINES<br>No. 8720SC200 | Moore<br>(86CRS4167) | No Error |
| STATE v. HOLSTON<br>No. 8712SC168 | Cumberland<br>(86CRS6664)<br>(86CRS6665) | No Error |
| STATE v. LILLEY<br>No. 876SC103 | Bertie<br>(86CRS1272) | Appeal Dismissed |

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|---|---|---|
| STATE v. McDOWELL<br>No. 8712SC158 | Cumberland<br>(86CRS24724) | Remanded for<br>resentencing |
| STATE v. McLEAN<br>No. 8726SC92 | Mecklenburg<br>(86CRS2882) | Reversed |
| STATE v. McRAE<br>No. 8720SC100 | Moore<br>(86CRS5118) | No Error |
| STATE v. MILLER<br>No. 8618SC1332 | Guilford<br>(85CRS73891)<br>(86CRS25297)<br>(86CRS25409)<br>(86CRS25298) | No Error |
| STATE v. PERRY<br>No. 8624SC1253 | Watauga<br>(85CRS3689)<br>(85CRS3691)<br>(85CRS3693) | No Error |
| STATE v. POWERS<br>No. 8711SC124 | Lee<br>(86CRS3014)<br>(86CRS3724) | Remanded |
| STATE v. RICH<br>No. 8722SC83 | Davie<br>(86CRS1394)<br>(86CRS1395)<br>(86CRS1424) | No Error |
| STATE v. SHUFORD<br>No. 8725SC129 | Catawba<br>(86CRS3387) | No Error |
| STATE v. SMITH<br>No. 8713SC57 | Columbus<br>(86CRS1624) | Remanded for a new<br>sentencing hearing |
| STATE v. TURRENTINE<br>No. 8711SC151 | Johnston<br>(86CRS10292) | No Error |
| STATE v. WOMACK<br>No. 8718SC211 | Guilford<br>(86CRS57336)<br>(86CRS57337) | No Error |
| STATE v. WOODRUFF<br>No. 8722SC108 | Davidson<br>(80CRS15759)<br>(80CRS15760)<br>(80CRS15762)<br>(80CRS15763)<br>(80CRS15764)<br>(80CRS15776) | No Error |
| STATE v. WOODS<br>No. 8719SC130 | Rowan<br>(86CRS8287)<br>(86CRS8288) | Remanded for a<br>new sentencing<br>hearing |
| TWINE v. FARMERS BANK<br>No. 871SC52 | Gates<br>(83CVS80) | Affirmed |

| | | |
|---|---|---|
| VANDOOREN v. STROUD<br>No. 863SC428 | Carteret<br>(84CVS125) | Reversed and remanded for new trial |
| W. W. ENTERPRISES, INC. v. VAUGHN<br>No. 8618SC1278 | Guilford<br>(83CVS3440) | Affirmed in part; reversed in part and remanded |

STATE OF NORTH CAROLINA v. ALLEN EDWARD WASHINGTON

No. 863SC877

(Filed 7 July 1987)

1. **Searches and Seizures § 16— defendant residing with mother—search of mother's house—search of outbuildings not protected**

Defendant's possessory interest conferred standing to challenge the search of his mother's house where he regularly resided, and his protected expectation of privacy extended to the curtilage of the house as well; however, a tobacco barn, packhouse, and hog shelter which were 50 to 75 feet from defendant's residence were not so intimately associated with domestic life and the privacies of home as to be within the curtilage of defendant's residence.

2. **Searches and Seizures § 16— outbuildings—no exclusive control or privacy interest of defendant**

Defendant had no privacy interest in outbuildings by virtue of his alleged exclusive control, since defendant never used any of the outbuildings; the outbuildings were never locked or secured; and the outbuildings were in the "open fields" outside the curtilage of defendant's house.

3. **Searches and Seizures § 16— defendant residing with mother—outbuildings—no exclusive control by defendant—mother's consent to search proper**

There was no merit to defendant's argument that he had such "exclusive" control over outbuildings that his co-occupant mother was not empowered to consent to their search, since the mother never relinquished her right of access or control in the outbuildings and could permit the search in her own right, and defendant assumed the risk that his mother might at some time permit a search.

4. **Searches and Seizures § 16— defendant residing with mother—areas controlled by both—mother's consent in presence of defendant proper**

Defendant could not complain that his mother could consent to a search of premises over which they had common authority only in his absence, since defendant was either outside the house or inside a patrol car outside the house throughout the search, but defendant did not refuse consent to the officers or communicate any refusal to his mother.

5. **Searches and Seizures § 14— consent to search—voluntariness**

Consent to search outbuildings and a car was voluntarily given by defendant's mother, though a coercive threat of arrest was made, where the threat occurred after the consent searches of the car and outbuildings, and where the mother testified that she was not intimidated by the deputy's threat and would have let the officer search in any event.

6. **Searches and Seizures § 18— search of vehicle—consent by defendant's mother as owner proper**

Defendant was not the proper person to consent to the search of an automobile where his mother was the registered owner of the vehicle, and he was

not in apparent control of the car's operation and contents at the time the consent was given.

7. **Larceny § 7.10— nine days between taking and discovery of goods—unique goods—application of doctrine of possession of recently stolen property proper**

Unique tools and metal work found on premises shared by defendant and his mother were not of a type normally found or traded in lawful channels so that the lapse of nine days between their taking and their discovery did not defeat the inference of defendant's guilt arising from his possession of recently stolen property. This evidence of recent possession together with evidence of tire impressions connecting defendant to the breaking or entering and larceny was sufficient to support the charge of breaking or entering and larceny.

8. **Criminal Law § 138.14— aggravating and mitigating factors—separate findings as to separate offenses**

There was no merit to defendant's contention that the trial court did not separately consider the aggravating and mitigating sentencing factors as to each of defendant's convictions where the court held one sentencing hearing but completed two sentencing forms.

APPEAL by defendant from *Griffin, Jr., William C., Judge.* Judgment entered 28 January 1986 in Superior Court, PITT County. Heard in the Court of Appeals 9 February 1987.

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

*Assistant Public Defender Robert E. Dillow, Jr., for defendant-appellant.*

GREENE, Judge.

Defendant was found guilty of felonious breaking or entering, felonious larceny and felonious possession of stolen goods. The trial judge arrested the conviction for felonious possession of stolen goods and sentenced defendant to 20 years in prison. Defendant appeals, assigning error to the denial of his motions to suppress evidence and dismiss certain charges and to the trial court's sentencing procedure.

At a suppression hearing conducted by Judge Watts, defendant argued for suppression of certain evidence obtained without a warrant from defendant's residence. Judge Watts found that defendant, his wife and child resided with Mrs. Washington, defend-

ant's mother, and lived in one bedroom of the house she leased. Defendant did not contribute to the support or maintenance of the house: his mother paid all rent, utilities and other household expenses. Although defendant had actually purchased the car, Mrs. Washington also paid the insurance for and was the registered owner of a 1971 Ford automobile parked in the front yard of the residence. Mrs. Washington never drove the car but had a set of keys to it. Acting on an informer's tip concerning a break-in at the W. A. Gaskins, Inc. garage, sheriff's deputies arrived at Mrs. Washington's home with a warrant for defendant's arrest, but no search warrant. When the officers announced their intention to arrest defendant, Mrs. Washington told them where her son's bedroom was located. Defendant was escorted from the house to a police car in the front yard where he remained throughout the incident. Believing Mrs. Washington to be in control of the premises, the deputies requested her permission to search the premises. At some point, Mrs. Washington executed a consent-to-search form.

Judge Watts found defendant's mother was in charge of the premises and that she freely, voluntarily and knowingly consented to the search of certain outbuildings next to her house. The court also found Mrs. Washington consented to the search of the 1971 Ford automobile. Although the court found that certain coercive police statements vitiated Mrs. Washington's consent to later portions of the search, the court nevertheless found Mrs. Washington's express consent to search the outbuildings and Ford automobile was given prior to such statements. Furthermore, the court found defendant was a guest-invitee at his mother's residence and therefore lacked standing to contest the search of the outbuildings since the court found he had no reasonable expectation of privacy in such structures. Similarly, the court ruled defendant lacked standing to raise the issue of his mother's allegedly coerced consent. Finally, while the court found defendant had standing to contest the search of the 1971 Ford automobile, it also found that, pursuant to N.C.G.S. Sec. 15A-222(2) (1983), defendant's mother had authority as registered owner to permit the search of the car. At no time did defendant himself ever protest these searches. For these reasons, Judge Watts denied defendant's motion to suppress except as to a cooler taken from defendant's house after the allegedly coercive statements. The court

ordered that all other items seized as a result of the search be admitted at trial against defendant.

At trial, the State introduced the items seized from the outbuildings and automobile. Several of the tools and items recovered were painted red and yellow and etched with the initial "G." The State also offered testimony which tended to show the tire treads on defendant's automobile appeared to be the same as certain tire impressions taken at the scene of the crime. Defendant testified he had never been to the Gaskins property, did not break into the garage and was at his mother-in-law's house at the time of the break-in. At the close of all the evidence, the trial court denied defendant's motion to dismiss the felonious breaking or entering charge.

The issues for this Court's determination are: (1) whether defendant had standing to question his mother's alleged consent to search of the outbuildings by virtue of (a) his interest in the curtilage; or (b) his allegedly exclusive control of the outbuildings; (2) irrespective of defendant's standing, whether defendant's mother's consent to search of the outbuildings was valid despite defendant's arguments that (a) he exclusively controlled the outbuildings; (b) his joint consent to the searches was necessary since he was present; (c) his mother's consent to the search of the outbuildings was coerced; (3) whether the mother's consent authorized a warrantless search of the automobile, purchased and generally driven by defendant, but registered in her name; (4) whether the trial court properly denied defendant's motion to dismiss the breaking or entering charge; and (5), in sentencing defendant, whether the trial court properly evaluated the aggravating and mitigating factors pertaining to defendant's separate convictions.

I

Defendant first argues that the evidence at the suppression hearing did not support the court's findings and therefore defendant's motion to suppress should have been allowed. If the trial court's findings of fact are supported by competent evidence, the evidence seized during the search was properly admitted. *State v. Thompson*, 287 N.C. 303, 317, 214 S.E. 2d 742, 751 (1975), *death penalty vacated*, 428 U.S. 908 (1976). Those findings, so supported, are binding on this Court even though there is evidence to the

contrary. *State v. Davis*, 290 N.C. 511, 541, 227 S.E. 2d 97, 115-16 (1976). In determining whether the trial court's findings are supported by the evidence, we look to the entire record, not merely to the evidence presented on *voir dire*. *State v. Moore*, 316 N.C. 328, 333, 341 S.E. 2d 733, 737 (1986) (determining validity of consent searches).

Judge Watts found that Mrs. Washington was "in charge of the premises" and that defendant was a "guest invitee" of his mother. The court therefore concluded Mrs. Washington alone had the authority to consent to the search of "her premises, *including the curtilage thereof, tending to be a tobacco barn and a packhouse, and a hog pen . . . situate on her leased premises.*" (Emphasis added.) The court further concluded defendant had no standing to object to the search of these outbuildings, regardless of his mother's consent, since defendant had no reasonable expectation of privacy in such buildings and structures.

A

We disagree with the court's apparent conclusion that defendant had no reasonable expectation of privacy in the outbuildings even if they were situated in the curtilage of the house in which he resided with his mother; however, as we find these outbuildings were not within the curtilage proper, defendant nevertheless lacked standing on that basis to challenge the search of these outbuildings.

First, as to the house itself, an individual can show the requisite privacy interest in residential premises by showing either that he owned or leased the premises or that he had an unrestricted right of occupancy, custody or control over them. *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978). Though the lease to the house and premises was in Mrs. Washington's name, "it is clear that 'capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion . . . .'" *State v. Boone*, 293 N.C. 702, 708, 239 S.E. 2d 459, 463 (1977) (quoting *Mancusi v. De Forte*, 392 U.S. 364, 368 (1968)).

**[1]** While defendant concededly neither owned nor leased his mother's house, he certainly had a right of occupancy therein. Defendant, his wife and child had resided in the leased house

since November 1984, some four months prior to the searches. Mrs. Washington testified defendant and his family had originally resided alone in the house while Mrs. Washington cared for her own ill mother. There was no evidence that defendant's use of the house or surrounding premises was ever restricted by his mother. Defendant's possessory interest therefore conferred standing to challenge the search of his mother's house where he regularly resided. *See Bumper v. North Carolina*, 391 U.S. 543, 548 n.11 (1968) (no question of defendant's standing to challenge search of grandmother's house where he regularly resided); *Rakas*, 439 U.S. at 136 (defendant in *Bumper* had standing because of "substantial possessory interest" in house searched); *cf. State v. Jones*, 299 N.C. 298, 306, 261 S.E. 2d 860, 865 (1980) (citing *Rakas*, court held defendant failed his burden of proving standing where he did not actually assert possessory interest or other expectation of privacy in parents' garage).

As defendant therefore had a protected expectation of privacy in the house, that protection extended to the curtilage of the house as well: the Fourth Amendment "speaks of the 'houses' of persons, which word has been enlarged by the courts to include the 'curtilage' or ground and buildings immediately surrounding a dwelling . . . ." *Boone*, 293 N.C. at 709, 239 S.E. 2d at 463 (quoting *Rosencranz v. United States*, 356 F. 2d 310, 313 (1st Cir. 1966)). In *Oliver v. United States*, 466 U.S. 170, 180 (1984), the United States Supreme Court identified the central component of the inquiry as whether the alleged curtilage harbors "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). The Court has more recently stated the question of curtilage should be resolved with particular reference to four factors: (1) the proximity of the area claimed as curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *United States v. Dunn*, 480 U.S. ---, 94 L.Ed. 2d 326, 334-35 (1987); *cf. State v. Fields*, 315 N.C. 191, 194-96, 337 S.E. 2d 518, 521 (1985) (defendant burglarizes curtilage building only if function of building and proximity to home evidence use for comfort and convenience of dweller). We recognize the *Fields* analysis of a

burglar's alleged intrusion onto "curtilage" may technically be distinguished from our analysis of an officer's alleged intrusion onto constitutionally protected "curtilage"; however, we note that, like our Supreme Court, in *Fields*, the *Dunn* Court rejected the notion that any particular outbuilding, such as a barn, is by definition part of the curtilage. *Cf. Dunn*, 480 U.S. at ---, 94 L.Ed. 2d at 339 (Brennan, J., dissenting) (collecting earlier state cases holding barns and outbuildings were within curtilage, including *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E. 2d 725, 726 (1955)).

In the instant case, the tobacco barn, packhouse, and hog shelter were 50 to 75 feet from defendant's residence. *Cf. Dunn*, 480 U.S. at ---, 94 L.Ed. 2d at 335 (where no exclusionary fence surrounded barn and residence, fact barn was 60 yards from house did not support inference that barn was part of curtilage); *United States v. Van Dyke*, 643 F. 2d 992, 994 (4th Cir. 1981) (where exclusionary fence surrounded residence, curtilage extended 150 feet from house to fence); *but see Fields*, 315 N.C. at 196 n.2, 337 S.E. 2d at 521 n.2 (shed's distance of 45 feet from home was not close enough to show structure was indispensable to comfort and convenience of dwelling). The outbuildings were put to little or sporadic domestic use: Mrs. Washington testified she kept a few hogs in the hog pen, nothing in the barn, and an old mattress, some car parts and a car battery in the packhouse. *Cf. Fields*, 315 N.C. at 196 n.2, 337 S.E. 2d at 521 n.2 (freezer and nonperishable food items in shed not sufficient to show function of comfort and convenience). Mrs. Washington further testified that neither the barn nor the packhouse was locked; nor was there any evidence those structures were in any way fenced with the house.

The proximity of the outbuildings to defendant's house is some evidence these structures should be treated as adjuncts of the house; however, proximity is only one factor demonstrating curtilage under *Dunn* and *Fields*. The instant case demonstrates none of the other curtilage factors cited in those decisions. While such factors do not mechanically delineate the extent of curtilage, they do bear on the "primary focus . . . whether the area in question harbors the intimate activities associated with domestic life and the privacies of the home." *Dunn*, 480 U.S. at ---, 94 L.Ed. 2d at 335 n.4. In light of the factors enumerated in *Dunn* and *Fields*, we must conclude the outbuildings searched in this case were not so intimately associated with "domestic life and the privacies of

home" as to be within the curtilage of defendant's residence. On this basis, defendant has failed to carry his burden of proving any reasonable expectation of privacy in the buildings searched. *See Jones*, 299 N.C. at 306, 261 S.E. 2d at 865 (defendant has burden to prove standing).

B

**[2]** Defendant also asserts a privacy basis in the tobacco barn and packhouse independent of the curtilage: defendant argues he acquired "exclusive control" of these structures since his mother testified she never went into them. Since defendant's mother had stored some items in the packhouse, we note defendant's alleged control over that structure could not have been absolutely exclusive. In any event, the exclusiveness of defendant's alleged control *vis a vis* his mother is only relevant to the issue of her consent to any search, not to defendant's standing. *See* 1 W. LaFave and J. Israel, Criminal Procedure Sec. 3.10(e) at 356 (1984) (joint tenant may not consent to search of place under exclusive control of other occupant).

However, defendant's alleged "exclusive control" of the outbuildings is relevant to his standing insofar as it may signify his right to control the outbuildings to the exclusion of all persons *but* his mother. As this Court stated in *State v. Casey*, 59 N.C. App. 99, 113, 296 S.E. 2d 473, 482 (1982), "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude." (quoting *Rakas*, 439 U.S. at 143 n.12). The expectation of privacy afforded by such right to exclude is not defeated by the fact defendant shares control with and could not lawfully exclude a co-occupant of the premises. *See Rakas*, 439 U.S. at 149 (explaining *Jones v. United States*, 362 U.S. 257 (1960) on basis defendant had such dominion and control that could exclude all but person who gave defendant permission to use apartment and apartment key).

However, we find defendant did not here have any ownership or possessory interests such that he had the right to exclude persons other than his mother from the outbuildings. While we above found defendant had a possessory interest in Mrs. Washington's home and curtilage by virtue of his residence there, we see nothing in the record supporting defendant's possessory rights in these outbuildings. Mrs. Washington testified without contradic-

tion that defendant never used any of the outbuildings, nor were any of these structures locked or secured. Without constructive possession by virtue of some legal title, defendant failed to exercise that actual possession essential to excluding trespassers from the outbuildings: "actual possession of land consists in exercising acts of dominion over it, and in making the ordinary use of it to which it is adapted . . . ." *State v. Baker*, 231 N.C. 136, 139, 56 S.E. 2d 424, 426-27 (1949). *See also* N.C.G.S. Secs. 14-126, 14-134 (1986) (in absence of title, actual possession needed to prosecute trespass to land and fixtures).

Even if we assume *arguendo* defendant's possessory right to exclude others from the outbuildings, the question remains whether defendant had a reasonable expectation of privacy. In *United States v. Ramapuram*, 632 F. 2d 1149 (4th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981), the car which defendant had used exclusively, but did not own, was stored in an open field on a farm owned by defendant's family. Defendant did not actually reside on the farm. Police found dynamite in the unsecured trunk of the junk car. Conceding defendant's ownership and possessory rights to exclude others, the *Ramapuram* Court nevertheless held "neither interest was sufficient to raise defendant's actual expectation of privacy to a level of constitutional legitimacy." *Id.* at 1156.

In the instant case, the outbuildings were in the "open fields" outside the curtilage of the house. Governmental intrusion upon the "open fields" is not an unreasonable search proscribed by the Fourth Amendment. *Dunn*, 480 U.S. at ---, 94 L.Ed. 2d at 336. "[T]he term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage [and] . . . need be neither 'open' nor a 'field' as those terms are used in common speech." *Oliver*, 466 U.S. at 180 n.11. (Aside from the location of these outbuildings in the "open field," we note a piece of vending machine metal work from the Gaskins garage was also found on the ground in the constitutionally unprotected "open field" fifteen feet from the tobacco barn.) Futhermore, defendant in no way attempted to lock or secure the outbuildings or otherwise take those "precautions customarily taken by those seeking privacy." *Ramapuram*, 632 F. 2d at 1156 (quoting *Rakas*, 439 U.S. at 152-53). The hog shelter was open to exposure and Mrs. Washington testified the packhouse had boards missing and was "open." Even if we assume defendant's right to exclude others from the outbuildings, we find, as in *Ramapuram*, that defendant's "possessory

interest in the [outbuildings] was sufficiently lessened to compel the judgment that he could not legitimately expect that the contents of the unlocked [structures] . . . in an open field would remain secure from prying eyes, irrespective of whether those eyes were private or governmental." *Id.* In light of these considerations, we find defendant had no privacy interest in these outbuildings by virtue of his alleged exclusive control.

II

While we have concluded defendant lacked standing to challenge the search of the outbuildings, we also conclude that, regardless of defendant's standing, the search was sanctioned by Mrs. Washington's valid consent as co-occupant of the home. We note at the outset that the court found Mrs. Washington consented to the search of her "premises, including the curtilage thereof." Although the outbuildings were outside the curtilage, we nevertheless agree with the court that the scope of Mrs. Washington's consent to search included the outbuildings.

A

**[3]** Even if we assume defendant's legitimate privacy interest in the outbuildings by virtue of his possession or control to the exclusion of third parties, we still reject defendant's argument that he had such "exclusive" control over the outbuildings that his co-occupant mother was not empowered to consent to their search. Since Mrs. Washington testified she never went into the packhouse or tobacco barn, defendant contends she had "relinquished" her control of those buildings to him. Rather than revealing defendant's acquisition of "exclusive" control over the outbuildings, the record instead discloses that defendant and his mother shared joint access to, if not control of, the outbuildings. Mrs. Washington's subjective assessment was that "we all had control." Such circumstances reveal common authority to consent. In *U.S. v. Matlock,* 415 U.S. 164 (1974), the U. S. Supreme Court observed that:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third party consent does not rest upon the law of property, with its attendant historical and legal refinements [citations omitted] but rests rather on mutual use of the property by persons generally having *joint access or control for most purposes,* so that it is reasonable to recognize that *any of the cohabitants has the right to per-*

> mit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

*Id.* at 171 n.7 (emphasis added).

There are thus two bases of "common authority" supporting the right of persons having joint access or control to consent under *Matlock*: (1) that the consenting party could permit the search "in his own right"; and (2) that the defendant had "assumed the risk" that a co-occupant might permit a search. 1 W. LaFave & J. Israel, Criminal Procedure Sec. 3.10(d) at 350 (1984). Mrs. Washington never relinquished her right of access or control in the outbuildings. Defendant cannot demonstrate his exclusive control of the premises simply by evidence that his mother did not actually use part of the leased premises: her actual use is irrelevant where she retained sufficient control over the premises that defendant assumed the risk that she might at some time exercise her right to enter upon and inspect the premises and permit others to do so. *United States v. Cook*, 530 F. 2d 145, 149 (7th Cir. 1976), *cert. denied*, 426 U.S. 909 (1976); *see also Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (although only gave actual permission to use part of bag, defendant assumed risk other would allow search of whole bag). Since Mrs. Washington retained common authority over the outbuildings under *Matlock*, defendant by definition lacked such exclusive control that he alone could consent to any search.

The instant case is clearly distinguishable from those circumstances where items of personal property are brought into joint living situations without a defendant waiving his Fourth Amendment expectations in such property. *E.g., United States v. Gilley*, 608 F. Supp. 1065, 1068 (D. Ga. 1985) (guests and co-residents may have privacy interests in articles such as travel bags which are not waived by a third-party consent search); *see also United States v. Block*, 590 F. 2d 535, 542 (4th Cir. 1978) (suitcases, footlockers and brief cases are objects of privacy; common authority does not automatically extend to interiors of every enclosed space capable of being searched within common area).

B

[4] Since defendant shares common authority with his mother, defendant next argues that under *Matlock* his mother could consent to a search only in his absence. Defendant notes that the

*Matlock* Court stated "the consent of one who possesses common authority over premises or effects is valid as against the *absent, non-consenting* person with whom that authority is shared." 415 U.S. at 170 (emphasis added). In the instant case, defendant was either inside the house or inside a patrol car outside the house throughout the incident. Defendant argues his mother's authority to consent could not override his own since he was not "absent."

However, the record reveals no instance where defendant either refused consent to the officers or communicated any refusal to his mother; thus, defendant, though present, was not "non-consenting" under *Matlock*. Similarly, in *State v. McNeill*, 33 N.C. App. 317, 319, 235 S.E. 2d 274, 275 (1977), we upheld a lessee's consent to search despite the fact the co-habitant defendant was present, though apparently non-objecting, throughout the search. We specifically held the lessee was authorized to give consent to a search under N.C.G.S. Sec. 15A-222(3), which states, "the consent . . . must be given . . . by a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises." *Id.* We have held Section 15A-222(3) is "consistent with the language in *Matlock* . . . that permission may be 'obtained from a third party who possessed *common authority or other sufficient relationship to the premises* or effects sought to be inspected.'" *State v. Kellam*, 48 N.C. App. 391, 397, 269 S.E. 2d 197, 200 (1980) (quoting *Matlock*, 415 U.S. at 171) (emphasis in original).

However, while we have held *either* occupant can consent to a search where two occupants have equal rights to the use or occupation of the premises, *e.g., State v. Carter*, 56 N.C. App. 435, 437, 289 S.E. 2d 46, 47, *disc. rev. denied*, 305 N.C. 761, 292 S.E. 2d 576 (1982), we have not yet addressed the precise issue of *which* occupant's consent controls if both occupants are present and one refuses consent. Since defendant did not object at the time of the search, the issue has not been properly raised under these facts; however, even if defendant had objected to the search, we question whether defendant's presence and objection would vitiate his mother's consent even under *Matlock*. His mother certainly retained "joint access and control" sufficient to enable her to consent "in her own right" to a search of the premises. Since Mrs. Washington could consent to the searches in her own right under

*Matlock*, we question how defendant's refusal could have invalidated her consent that did not depend on his authority in the first place. Furthermore, it can be argued defendant likewise assumed the risk under *Matlock* that his mother might not comply with his wishes. *See generally*, 1 W. LaFave & J. Israel, Criminal Procedure Sec. 3.10(d) at 350 (1984). For these reasons, we conclude there was no error in the court's conclusion that Mrs. Washington had sufficient authority to authorize a warrantless search of the outbuildings on her leased premises.

C

[5] Defendant asserts his mother's consent to search was invalid for the additional reason that it was the result of coercive statements by a sheriff's deputy. As our Supreme Court stated in *State v. Brown*, 306 N.C. 151, 170, 293 S.E. 2d 569, 582, *cert. denied*, 459 U.S. 1080 (1982):

> When the validity of a consent to search is challenged, the trial court must conduct a *voir dire* to determine whether the consent was in fact given voluntarily and without compulsion [citation omitted]. "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 [1973] [citations omitted].

There was competent evidence introduced during the suppression hearing and subsequent trial supporting the trial court's conclusion that Mrs. Washington's consent was valid. A sheriff's deputy testified the coercive threat of arrest occurred after the consent searches of the Ford automobile and the outbuildings. Mrs. Washington testified that defendant's mother-in-law produced a stolen cooler from defendant's room immediately after hearing the coercive threat; this clearly occurred *after* the search outdoors. Furthermore, Mrs. Washington testified she was not intimidated by the deputy's threat and would have let the officers search in any event. Considering the totality of these circumstances, there was ample, competent evidence supporting the court's determination Mrs. Washington's consent to search the outbuildings and car was given voluntarily.

III

[6] Defendant next contends that the items taken from the 1971 Ford automobile should have been suppressed. The court found defendant's mother validly consented to a search of the vehicle under N.C.G.S. 15A-222(2) (1983) which provides, "the consent must be given . . . by the registered owner of a vehicle to be searched or by the person in apparent control of its operation and contents at the time the consent is given." Defendant's mother was the registered owner of the car. Defendant apparently contends that, as the "actual" owner/purchaser of the car, his consent was necessary as long as he was present. Defendant was clearly not the registered owner; nor was he "in apparent control of [the car's] operation and contents at the time the consent [was] given." Thus, defendant was not in either instance the proper party to consent to a search of the automobile under N.C.G.S. Sec. 15A-222(2). *Cf. State v. Jefferies*, 41 N.C. App. 95, 100, 254 S.E. 2d 550, 554, *further rev. denied*, 297 N.C. 614, 257 S.E. 2d 438 (1979) (driver of automobile was deemed in apparent control of the vehicle at time of search); *State v. McMillen*, 59 N.C. App. 396, 403, 297 S.E. 2d 164, 168 (1982) (driver deemed in possession and control); *see also State v. Faison*, 17 N.C. App. 200, 201-02, 193 S.E. 2d 334, 336, *cert. denied*, 283 N.C. 258, 195 S.E. 2d 690 (1973) (unregistered owner/passenger properly gave consent to search). Since Mrs. Washington's consent was valid under the statute, we conclude Judge Watts committed no error in denying defendant's motion to suppress the evidence obtained from the 1971 Ford automobile.

IV

[7] In his motion to dismiss, defendant argued the trial court should not have submitted the charge of felonious breaking or entering to the jury. Defendant contended he could have come into possession of the stolen property by some means other than breaking or entering.

A motion to dismiss requires that the trial court consider the evidence in the light most favorable to the State with every reasonable inference drawn from the evidence in the State's favor. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975). As long as there is substantial evidence, direct or circumstantial, to support finding the defendant committed the offense,

a case for the jury is made. *Id.* The State introduced photographs of automobile tire impressions appearing at the scene of the break-in. The State also offered evidence that the tread of the rear tires of defendant's automobile appeared to be the same as the tire impressions at the scene of the crime. An SBI expert testified the tires on defendant's automobile could have made the impressions at the scene.

Furthermore, the State argued the application of the doctrine of recent possession of stolen property was strong evidence of defendant's commission of the crimes of breaking or entering and larceny. Only nine days elapsed between the break-in and the night sheriff's deputies discovered many of the stolen items at defendant's residence. As stated in *State v. Lewis*, 281 N.C. 564, 568, 189 S.E. 2d 216, 219, *cert. denied*, 409 U.S. 1046 (1972):

> When it is established that a store or warehouse has been broken into and entered and that merchandise has been stolen therefrom, the discovery, soon after such theft of articles, so stolen, in the possession of the defendant raises a presumption that *he is guilty both of the breaking and entering and of the larceny.* [Emphasis added.]

The State's evidence must establish the following facts in order to invoke the doctrine of recent possession: (1) the goods were stolen; (2) the goods were in defendant's custody and control to the exclusion of others; and (3) defendant possessed the property recently after the larceny. *State v. Maines*, 301 N.C. 669, 674, 273 S.E. 2d 289, 293 (1981). Defendant only challenges the State's proof of the last requirement.

In *State v. Jackson*, 274 N.C. 594, 597, 164 S.E. 2d 369, 370 (1968), our Supreme Court stated:

> Evidence or inference of guilt arising from the unexplained possession of recently stolen property is strong, weak, or fades out entirely, on the basis of the time interval between the theft and possession . . . . The possession, in point of time, should be so close to the theft as to render it unlikely that the possessor could have acquired the property honestly. [Citations omitted.]

In *State v. Callahan*, 83 N.C. App. 323, 326, 350 S.E. 2d 128, 130, *disc. rev. denied*, 319 N.C. 225, 353 S.E. 2d 409 (1987), we stated

the significance of the time elapsed between the larceny and the time of possession depends on the facts and circumstances of each case. We also noted the inference of defendant's guilt survives longer where the items stolen are not of a type normally or frequently traded in lawful channels. In such cases, it is more likely the defendant acquired the property by his own acts to the exclusion of any intervening agency. We therefore held in *Callahan* that the doctrine of recent possession was applicable where ten to eleven days had elapsed after the theft of commercial restaurant equipment. *Id. See also State v. Blackmon*, 6 N.C. App. 66, 77, 169 S.E. 2d 472, 479 (1969) (doctrine applicable where 27 days elapsed after theft of unique hand-made and rarely used mechanic's tool); *cf. State v. Hamlet*, 316 N.C. 41, 45, 340 S.E. 2d 418, 421 (1986) (doctrine rejected where 30 days elapsed after theft of television, towels and fan).

In the instant case, a large number of the stolen tools were painted red or yellow by the W. A. Gaskins Company and etched with the identifying initial "G." We have already noted the vending machine metal work which was found by the tobacco barn. Such unique tools and metal work are not of a type normally found or traded in lawful channels; therefore, we believe the lapse of nine days does not defeat the inference of defendant's guilt arising from his possession of recently stolen property. While not all of the stolen property was recovered, defendant's possession of part of the property under these circumstances warrants the inference that defendant stole all of it. *State v. Boomer*, 33 N.C. App. 324, 328, 235 S.E. 2d 284, 287, *cert. denied*, 293 N.C. 254, 237 S.E. 2d 536 (1977).

In light of defendant's recent possession of the stolen items as well as evidence of tire impressions connecting him to the breaking or entering and larceny, we hold the motion to dismiss the State's charge of breaking or entering was properly denied. The test is not whether the evidence is circumstantial, but whether it is substantial. *McKinney*, 288 N.C. at 117, 215 S.E. 2d at 582. Taken as a whole, the State's evidence was substantial.

V

**[8]** Finally, defendant argues the trial court did not separately "consider" the aggravating and mitigating sentencing factors as to each of defendant's convictions. Specifically, the transcript of

defendant's sentencing hearing reveals the trial court heard evidence of aggravating sentencing factors, then heard defendant's presentation of certain non-statutory mitigating evidence. The court then found the aggravating factors outweighed the mitigating factors and separately listed the factors for each conviction.

Defendant asserts this procedure does not comport with our Supreme Court's holding in *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E. 2d 689, 698 (1983):

> Separate findings as to the aggravating and mitigating factors for each offense will facilitate appellate review. Further, in the interest of judicial economy, separate treatment of offenses, even those consolidated for hearing, will offer our appellate courts the option of affirming judgment for one offense while remanding for resentencing the offense in which error is found. . . . We therefore hold that in every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense.

In *Ahearn*, defendant was found guilty of felonious child abuse and manslaughter. In imposing sentences on each count greater than the presumptive sentence, the trial judge completed only one sentencing form, "thus treating both offenses alike for purposes of listing the findings in aggravation and mitigation." *Id.* at 592, 300 S.E. 2d at 694. Conversely, the trial court in the instant case held one sentencing hearing but completed two sentencing forms entitled "Felony Judgment—Findings of Factors in Aggravation and Mitigation of Punishment." Thus, unlike *Ahearn*, it cannot be said the court here "treat[ed] both offenses alike for purposes of listing the findings in aggravation and mitigation."

Defendant concedes the trial court's written findings meet part of the *Ahearn* standard, but argues the transcript of the sentencing hearing does not reveal the offenses and sentencing factors were themselves "considered" separately. In *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (1985), defendant argued the trial court "mechanically recited" the same aggravating factors

for each conviction without giving "consideration" to the specific offenses being punished. The Supreme Court found no error, stating simply, "the record reveals the trial court made a separate finding for each crime in accordance with the rule stated in [*Ahearn*]." *Id.* at 34, 337 S.E. 2d at 805. Under *Ahearn* and *Avery*, we likewise find no error in the trial court's sentencing.

VI

Having found defendant's assignments of error without merit, we conclude there is

No error.

Judges WELLS and EAGLES concur.

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D. ELAINE SURGEON, PERSONAL REPRESENTATIVE FOR OPHELIA A. KNOTTS v. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 8622SC1326

(Filed 7 July 1987)

1. **Social Security and Public Welfare § 1— medicaid benefits—life insurance policies not designated for burial expense—denial of benefits proper**

Respondent's decision to deny petitioner medicaid benefits retroactive to three months was supported by substantial evidence where such evidence tended to show that the cash value of petitioner's life insurance policies was not designated for burial expenses at the time of application as the eligibility manual required nor was there a designation during the three-month period for which petitioner sought medical assistance benefits.

2. **Social Security and Public Welfare § 1— retroactive medicaid benefits—denial in conflict with federal regulations—unlawful procedure**

A provision of respondent's medicaid eligibility requirements which required that certain funds be designated for burial expenses before they could be excluded from allowable reserves and which provided that the funds could be excluded as of the first day of the month in which the individual signed a statement of designation limited the retroactive coverage petitioner was entitled to pursuant to federal regulations, and respondent's decision denying petitioner retroactive medicaid benefits was therefore based upon unlawful procedure.

APPEAL by petitioner from *Freeman, Judge.* Judgment entered 15 September 1986 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 2 June 1987.

This is a proceeding to judicially review a Final Order by respondent, Department of Human Resources, Division of Social Services, that denied petitioner, Ophelia A. Knott's, application for medical assistance benefits retroactive to March of 1984. G.S. 108A-79(k).

Prior to the trial court hearing this matter, the parties stipulated to the following:

(1) It is stipulated that all parties are properly before the Court, and that the Court has jurisdiction of the parties and of the subject matter.

(2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.

(3) In addition to other stipulations contained herein the parties hereby stipulate and agree with respect to the following undisputed facts:

(a) On June 14, 1984, D. Elaine Surgeon, daughter of Ophelia A. Knotts, applied for Medical Assistance (Medicaid) benefits for Ophelia A. Knotts through the Davidson County Department of Social Services, seeking Medicaid assistance retroactive to March, 1984.

(b) A Medicaid application was not processed by the Davidson County Department of Social Services in connection with the June 14, 1984 application.

(c) The 'budget unit' for Ophelia A. Knotts consisted of herself and her husband, George Knotts, Jr. The maximum allowable 'reserve' assets for Medicaid eligibility purposes, for a budget unit of two people was $1,100.00.

(d) During the period from March 1, 1984 through and including June 14, 1984, Mr. and Mrs. Knotts each owned a life insurance policy with Metropolitan Life Insurance Company, the combined cash value of the two life insurance policies was $1,158.63.

(e) In connection with the June 14, 1984 application, the Davidson County Department of Social Services was advised of the existence of the two burial policies.

(f) The Davidson County Department of Social Services formally initiated a Medicaid application on or about December 31, 1984. On that date, Mrs. Surgeon was provided and signed a copy of the 'Statement of Intent' form relative to use of the two life insurance policies for burial purposes.

(g) On or about January 25, 1985, Mr. and Mrs. Knotts completed a Change of Beneficiary process whereby Gilmore's Funeral Home was designated as the beneficiary of both policies, for purposes of payment of the burial expenses of Mr. and Mrs. Knotts.

(h) The Medicaid application was denied by Notice from the County agency dated February 25, 1985 on the basis of 'excess reserve.'

(i) A local hearing was timely requested, and held at the County agency on April 26, 1985. By its local appeal decision, the County agency offered to re-open the application to ascertain Medicaid eligibility from 12/1/84 and thereafter, based on its conclusion that the cash value of the two life insurance policies plus the $400.00 value of a non-essential vehicle also included in reserve, exceeded the Medicaid eligibility reserve limitation for the period from 3/1/84 through 11/30/84, (the applicant had no need for Medicaid benefits on or after 12-1-84), (WHO CMc) and timely requested a state appeal hearing.

(j) The state appeal hearing was conducted by Hearing Officer John H. Dunroe on June 5, 1985. The Hearing Officer's tentative decision dated July 10, 1985 instructed the County agency to process the Medicaid application as of June 14, 1984.

(k) The Hearing Officer also concluded as a matter of law:

'3. That, had the application been taken and processed beginning June 14, 1984, the notice of intent regarding the life insurance policies would have been executed permitting the

exclusion of their cash values from the reserve, effective June 1, 1984.'

(l) The Hearing Officer's tentative decision was upheld by Final Decision of the Respondent's Chief Hearing Officer by decision dated October 31, 1985.

(m) On or about September 11, 1985, the Davidson County Department of Social Services approved the applicant's Medicaid application for the period from 6/1/84 through 11/30/84.

(n) The Petitioner timely filed a Petition for Judicial Review, for the sole purpose of challenging the Hearing Officer's Conclusion of Law that the cash value of the two life insurance policies in question was properly included in the Medicaid eligibility 'reserve' for the period from 3/1/84 through 5/31/84.

(4) The only exhibit to be offered by either Petitioner or Respondent is the 'CERTIFIED RECORD OF ADMINISTRATIVE HEARING' heretofore filed with the Court by the Respondent. All parties have been provided a copy of the Certified Record.

(5) It is stipulated and agreed that all of the documents included in the Certified Record are genuine and, if relevant and material, may be received in evidence without further identification or proof except that petitioner contends that the following documents should not be admitted:

(a) Letter from counsel for Petitioner to Hearing Officer dated June 26, 1985.

(b) Letter dated July 5, 1985 from Davidson County Department of Social Services to the Hearing Officer.

(c) Letter dated July 17, 1985 from counsel for Petitioner to Hearing Officer.

(6) Neither party will offer testimonial evidence at trial.

(7) There are no pending motions, and neither party desires further amendments to the pleadings, except that petitioner will move the court that the documents enumerated (a), (b) and (c) in paragraph 5 be excluded from the record; said mo-

tion to be heard directly before the hearing for judicial review on the date specified for the hearing.

(8) Additional consideration has been given to a separation of the triable issues, and counsel for all parties are of the opinion that a separation of issues in this particular case would not be feasible.

(9) The Petitioner contends that the contested issues to be tried by the Court are as follows:

(a) Whether or not the two life insurance policies owned by the Petitioner and her husband as of June 14, 1984, had been adequately 'designated' for burial purposes, pursuant to applicable law and regulation, as of March 1, 1984;

(b) Whether or not the Petitioner is legally entitled to the benefit of a burial exclusion of the cash value of the two life insurance policies retroactive to March 1, 1984, pursuant to applicable law and regulation.

(10) The Respondent contends that the contested issue to be tried by the Court is:

(a) Whether or not the Hearing Officer's decision comports with all applicable state and federal statutes, regulations and constitutional provisions and is supported by substantial evidence of record.

(11) Counsel for both parties announce that the case is in all respects ready for trial. The probable length of the trial is estimated to be from one to two hours.

(12) Counsel for the parties represent to the Court that, in advance of the preparation of this Order, there was a full and frank discussion of settlement possibilities. Counsel for the plaintiff will immediately notify the Clerk in the event of material change in settlement prospects.

This matter was heard during the 11 August 1986 civil session of Davidson County Superior Court. On 15 September 1986 a judgment was entered in Superior Court that affirmed respondent's final order. Petitioner appeals.

*Turner, Enochs, Sparrow & Boone, P.A., by Wendell H. Ott and S. Mark Payne, for petitioner appellant.*

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Catherine C. McLamb, for respondent appellee.*

JOHNSON, Judge.

I

Petitioner argues on appeal that (1) respondent's decision to deny petitioner's medicaid benefits retroactive to 1 March 1984, was affected by error of law, (2) respondent's decision was unsupported by substantial evidence, and (3) respondent's decision was based upon unlawful procedure.

Since this is a contested case instituted prior to 1 January 1986, the effective date of G.S. Chap. 150B, the applicable scope of review of an agency decision is stated in G.S. 150A-51 as follows:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

We find that pursuant to G.S. 108A-79, petitioner is authorized to seek judicial review of respondent's final agency decision; and we further find that the questions presented by petitioner properly fall within our scope of review.

II

[1] Our first line of inquiry is whether respondent's decision was supported by substantial evidence. After a review of the record we conclude that respondent's decision was supported by substantial evidence.

The standard for judicial review stated in G.S. 150A-51(5) is commonly referred to as the "whole record" test. *Thompson v. Wake County Bd. of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The function of a court applying the whole record test is to determine whether an administrative decision has a rational basis in the evidence. *Id.* A reviewing court is required to determine if there is substantial evidence in the record to support the administrative tribunal's findings and conclusions. *In re Community Savings & Loan Assn. v. North Carolina Savings & Loan Assn.*, 43 N.C. App. 493, 259 S.E. 2d 373 (1979). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Lackey v. North Carolina Department of Human Resources*, 306 N.C. 231, 293 S.E. 2d 171 (1982). When applying the "whole record" test a reviewing court may not replace an administrative tribunal's judgment as between two reasonably conflicting views, even though the court could have reached a different result had the matter been before it *de novo*. *See Thompson, supra.*

It is clear that federal law mandates that a state plan for medical assistance benefits must provide benefits retroactive to three months prior to the month in which an individual makes application "if such individual was (*or upon application would have been*) *eligible for such assistance at the time such care and services were furnished*." 42 U.S.C. sec. 1396a(a)(34) (emphasis supplied). *See* also 42 CFR sec. 435.914. It is equally clear that North Carolina's plan has such a provision in 10 NCAC 50B.0204 as follows:

10NCAC 50B.0204 Effective Date of Assistance

(a) Medicaid coverage is effective as follows:

(1) As much as three months prior to the month of application when medical services covered by the program were received and the client was eligible during the month(s) of medical need.

Based upon a provision in a manual promulgated by respondent, the Chief Hearing Officer concluded that petitioner was not eligible for medical assistance benefits, retroactive to three months, as follows:

> The regulations at section 2460 cited in the hearing officer's decision address the exclusion of the burial funds. The regulation is very clear in the limitations of the burial exclusion and permits exclusion only as early as the first day of the month in which an individual signs the statement of intent if the total funds are subsequently designated for burial exclusions within 30 days of signing the statement. There is no provision for exclusion in months for which retroactive coverage is requested. Accordingly, the hearing officer's conclusion that the life insurance policies could be excluded from reserve effective June 1, 1984 is correct and based upon existing regulation.

The pertinent section of the eligibility manual referred to by the Chief Hearing Officer is as follows:

> 4. Only the following resources are allowed for the burial exclusion: irrevocable burial trusts, irrevocable burial contracts, any other irrevocable arrangement established for burial expenses, revocable burial trusts, revocable burial contracts, and life insurance that accrues cash value, *if it is designated for burial expenses.*
>
> 5. Funds specifically set aside for burial expense may be excluded from countable reserve if the money is designated for burial expenses as follows:
>
> a. For applications,
>
> (1) The funds must be separately identifiable at time of application;
>
> (2) The funds cannot be commingled with other funds or assets which are not set aside for burial;
>
> (3) *The funds must be clearly designated as set aside for burial expenses. (This includes life insurance policies.) If the funds are not so designated at time of application, the funds can be excluded if the individual states in writing that he/she intends to use the funds for his/her burial* and agrees to sub-

mit within 30 days of signing the statement evidence that the total funds have been designated as set aside for burial as one of the allowable resources.

(4) *The funds subject to the $1,500 limit, may be excluded as of the first day of the month in which the individual signed the statement if the total funds are designated as set aside for burial within 30 days of signing the statement. . . .*

DHR Medical Assistance Eligibility Manual, Part I, MA-2460VA (emphasis supplied).

Testimony and exhibits in the Record on Appeal establish that the cash value of petitioner's life insurance policies was not "designated" at the time of application as the eligibility manual requires. Moreover, during the three month period that petitioner seeks medical assistance benefits for there was no designation of burial expenses or written statement of intent to designate the cash value of the life insurance policies as burial expenses. There is substantial evidence that petitioner would have signed a written statement of intent and designated the cash value of the policies at the time of her application on 14 June 1984. However, as the Chief Hearing Officer concluded in the final decision, the manual only allows the burial expenses to be excluded as of the first day of the month which the applicant signs the written statement of intent. Therefore, after an exhaustive review of the whole record, we conclude that the Chief Hearing Officer's decision, based upon the eligibility manual, that petitioner was not eligible for medical assistance benefits retroactive to March of 1984, was supported by substantial evidence. Having established that but for the eligibility requirements of the manual petitioner would have been entitled to retroactive medical assistance benefits pursuant to 42 USC sec. 1396a(a)(34), 42 C.F.R. sec. 435.914 (a)(2), and 10 NCAC 50B.0204(a)(1), we next address petitioner's first and third arguments.

III

**[2]** The ultimate issue raised by petitioner's first and third arguments is whether MA-2460 V.A.5 (4) of respondent's eligibility manual deprives petitioner of three months of retroactive medical assistance benefits to which she was entitled pursuant to 42 USC sec. 1396a(a)(34) and 10 NCAC 50B.0204(a)(1). If so respond-

ent's decision was based upon unlawful procedure because it promulgated a "rule," within the meaning of G.S. 150A-10, that was not promulgated pursuant to the North Carolina Administrative Procedure Act, G.S. 150A-9. We hold that MA-2460 V.A. 5(4) is a rule within the meaning of G.S. 150A-10 which conflicts with applicable state and federal regulation; we further hold that respondent's promulgation of MA-2460 V.A.5(4) does not meet the minimum procedural requirements of Article 2 of the North Carolina Administrative Procedure Act.

Initially, we dispose of respondent's contention, stated in its brief, as follows:

> The Superior Court was without jurisdiction to consider the construction and validity of the administrative rules, because appellant has failed to exhaust her administrative remedies in respect of such construction and validity of administrative rules. The General Assembly has provided and appellant must follow the procedures prescribed in G.S. 150B-17 (sic) before the superior court may consider the issue of the applicability of the validity of administrative rules.

(Citations omitted.)

G.S. 150A-17 states the following:

> On request of a person aggrieved an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling but nothing in this section prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case. Failure of the agency to issue a declaratory ruling on the merits within 60 days of the request for such ruling shall constitute denial of the requests

> as well as a denial of the merits of the request and shall be subject to judicial review.

G.S. 150A-17.

Everything in the Record on Appeal, including a request by petitioner for an interpretive ruling by respondent, indicates that the validity of MA-2460 V.A.5(4) has been questioned and ruled upon. Petitioner argued throughout the administrative hearings on this matter that she was entitled to three months retroactive medical assistance benefits. After receiving a tentative decision, but before entry of a final order, the following was requested by petitioner in a letter fo the Chief Hearing Officer:

> The tentative decision in effect remands the application to the Davidson County Department of Social Services for processing the applicant's June 14, 1984 application. However, conclusion of Law No. 3, on page 3 of the decision, implies that the cash value of life insurance policies owned by the applicant and her husband would be excluded from reserve as of June 1, 1984. For the reasons set forth by our brief dated June 26, 1985 (see issue No. 3, pages 6-8), we contend that the cash value of the insurance policies should be excluded retroactive to March 1, 1984.
>
> If the tentative decision is affirmed, it appears likely that the applicant's application will be approved as of June 1, 1984. At that point, a second appeal hearing would be necessary to address the burial exclusion-retroactive coverage issue. *It would seen more efficient to address that issue directly at this point,* in the context of the current contested case, to a definitive resolution of that issue without the necessity of a second round of administrative appeals. (Emphasis supplied.)

Petitioner's letter goes on to state that federal law dictates that she is entitled to retroactive medical assistance.

We find it anamolous that respondent would contend that the issue was not before the superior court when respondent stipulated that the following issue was to be decided in superior court:

> (a) Whether or not the hearing officer's decision comports with all applicable state and federal statutes, regulations and

constitutional provisions and is supported by substantial evidence of record.

Since the hearing officer's decision was based upon MA-2460 V.A.5 it was implicit that the superior court would have to determine if the decision and MA-2460V.A.5(4) comported with 42 USC sec. 1396a(a)(34), 42 C.F.R. sec. 435.914(a)(2), and 10 NCAC 50B.0204(a)(1). Moreover, G.S. 150A-51(3) has been construed to allow judicial review of procedures employed by an agency discharging its statutorily authorized acts. *State of North Carolina ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980). Therefore, it was within the superior court's jurisdiction to enter its judgment stating that "the Hearing Officer's decision comports with all applicable state and federal statutes, regulations and constitutional provisions; is supported by substantial evidence of record and has a rational basis in the record." We now focus our inquiry on the validity of MA-2460 V.A.5.

G.S. 108A-79(1) states: "in the event of conflict between federal law or regulations and state law or regulations, the federal law or regulations shall control." As stated, hereinabove, North Carolina's plan, through 10 NCAC 50B.0204(a)(1), seeks to comply with 42 USC sec. 1396a(a)(34). The mandate in 42 USC sec. 1396a(a)(34) is emphasized in 42 C.F.R. sec. 435.914(a)(2), which states that an individual is entitled to retroactive coverage if an individual "would have been eligible for Medicaid at the time he received the services if he had applied. . . ." Legislative history of 42 USC sec. 1396a(a)(34) indicates that it was enacted for "persons who are eligible for medicaid but do not apply for assistance until after they have received care, either because they did not know about the medicaid eligibility requirements, or because the sudden nature of their illness prevented their applying." H.R. Rep. No. 92-231, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4989, 5099.

There are no federal regulations with respect to the burial exclusion allowed by North Carolina in 10 NCAC 50B.0403(o)(4). We do not find a conflict between our state plan and federal regulations because of the exclusion. Moreover, it is permissible for respondent to promulgate interpretive rules as contained in the manual to define what is a sufficient designation of the cash value

of an insurance policy for burial expenses. G.S. 150A-10(b). However, we do find a conflict between MA-2460 V.A.5(4) and 42 USC sec. 1396a(a)(34) to the extent that it limits the retroactive coverage petitioner is entitled to pursuant to 42 USC sec. 1396a (a)(34). Since MA-2460 V.A.5(4) is contrary to federal law, we cannot allow it to stand. G.S. 108A-79(1). Furthermore, respondent's decision was based upon unlawful procedure since the decision was based upon a rule which was in conflict with state and federal regulations and was not adopted in substantial compliance with the procedures outlined in G.S. 150A-12.

The facts found by respondent establish that but for MA-2460 V.A.5(4) petitioner is entitled to medical assistance benefits retroactive to March 1984. Respondent erred as a matter of law in denying petitioner retroactive coverage. The trial court erred in adjudging that respondent's decision comports with all applicable state and federal statutes. Accordingly, we reverse the trial court's judgment and respondent's final order.

Reversed.

Judges ARNOLD and PARKER concur.

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CALVIN B. GIBSON v. PHILIP D. LAMBETH, INDIVIDUALLY AND AS COMMISSIONER IN CIVIL ACTION NO. 82CVD3834, AND VERSAILLES CONDOMINIUM ASSOCIATION, A NORTH CAROLINA CORPORATION

No. 8726SC39

(Filed 7 July 1987)

**1. Judicial Sales § 4— commissioner's sale—liens against property—application of caveat emptor**

There was no merit to plaintiff's contention that the rule of *caveat emptor* did not apply to a court ordered commissioner's sale, since plaintiff was on notice before and during the sale that the condominium was being sold subject to a particular deed of trust and "any unpaid deeds of trust"; plaintiff was familiar with sales of real property and the need to search titles, but failed to inquire of defendant commissioner as to whether title to the condominium had been searched; despite this knowledge, plaintiff voluntarily entered into the contract to purchase; and plaintiff therefore was not an innocent purchaser and was subject to *caveat emptor.*

**2. Fraud § 4; Judicial Sales § 4— commissioner's sale—liens against property—no knowledge of misrepresentation—no showing of fraud**

Plaintiff's claim of fraud in a court ordered commissioner's sale must fail where plaintiff conceded that defendant did not have any actual knowledge that his representations about the number of liens against a condominium were false, and false representation of a material fact is an essential element in a claim for fraud; furthermore, defendant never represented to plaintiff that a particular deed of trust was the only lien against the property, but rather notified plaintiff that the property was being sold subject to the named deed of trust and "any unpaid deeds of trust."

**3. Judicial Sales § 2— compliance with notice requirements**

Defendant fully complied with N.C.G.S. § 1-339.15 regarding the notice requirements for the public sale of a condominium.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 25 September 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 June 1987.

This is a civil action to recover alleged damages from plaintiff's purchase of a condominium at a commissioner's foreclosure sale. The trial court granted defendant Commissioner Lambeth's motion for summary judgment, and plaintiff appealed from that order to this Court. By an Opinion filed 17 June 1986, this Court dismissed plaintiff's appeal as interlocutory since the order appealed from was not final as to plaintiff's claim against defendant Versailles Condominium Association (Association). A consent judgment was entered dismissing all claims against defendant Association. Plaintiff now appeals from the initial order denying his motion for summary judgment and granting defendant Lambeth's motion for summary judgment.

On 20 January 1982, defendant Association filed a claim of lien against Versailles Condominium Unit #2610-G owned by David M. McKinnon for unpaid monthly assessments. On 22 April 1982, defendant Lambeth, representing defendant Association as attorney, filed an action in the Mecklenburg County District Court against David M. McKinnon to foreclose on the lien due to unpaid monthly assessments, and for an order directing the sale of the condominium to satisfy the indebtedness. On 1 July 1982, the Mecklenburg County District Court entered a default judgment and order of sale granting judgment in favor of defendant Association, appointing defendant Lambeth as commissioner to sell the condominium at public auction, and directing the property

to be sold subject to "any unpaid deeds of trusts" predating defendant Association's lien.

On 12 July 1982, defendant Lambeth, pursuant to the court order, posted a "Notice of Sale of Real Property" on the bulletin board at the Mecklenburg County Courthouse. As directed by the court, the notice stated that the sale was to be made "subject to the lien of that certain deed of trust in favor of North Carolina Federal Savings and Loan Association" listed in the Mecklenburg County Register of Deeds. Notices of sale for the condominium were also published four times in the Mecklenburg Times from 16 July to 6 August 1982. No notices were posted or published stating that the condominium was being sold subject only to the above mentioned lien.

A few days prior to the sale, plaintiff telephoned defendant Lambeth inquiring about the condominium. Plaintiff was experienced with purchasing real estate, and was familiar with title searches. Plaintiff did not inquire of defendant during that call whether the title had been searched, but, in his deposition, admitted assuming that it had been done. Neither plaintiff nor defendant Lambeth searched the title. Defendant Lambeth did not tell plaintiff that he had searched the title, nor that he had had the title searched by someone in his law office prior to the sale. In his deposition, defendant Lambeth stated that "I do not know how I came to know the book and page of the deed of trust from North Carolina Federal. I could either have done that by going to the Register of Deeds and checking the grantor/grantee index or I could have been told that by David Douglas [the realtor for whom defendant Lambeth began collection proceedings against the owner of the condominium]. I do not recall which."

On 16 August 1982, defendant Lambeth conducted the public sale of the condominium. Plaintiff was the sole bidder with a bid of $2,900.00. Defendant Lambeth stated that immediately prior to the sale he again told plaintiff that the condominium was being sold pursuant to the North Carolina Federal Deed of Trust. Plaintiff stated in his deposition that he assumed the $2,900.00 included the cost for a title search by defendant Lambeth, and that "I didn't ask him, and he didn't say, that the legal cost included certification of title."

Following the sale, defendant executed and delivered to plaintiff a deed for the condominium which deed noted that the sale was subject to "an outstanding deed of trust in favor of North Carolina Federal Savings and Loan Association."

On 25 October 1982, defendant Lambeth notified plaintiff that an outstanding deed of trust against the condominium was discovered that predated the North Carolina Federal Deed of Trust, as well as a federal tax lien for several thousand dollars. The prior deed of trust was dated 28 January 1981 and filed 5 February 1981 in favor of Virginia Mortgage Corporation for $5,134.00. In December of 1982, Virginia Mortgage Corporation foreclosed on its deed of trust resulting in a sale of the condominium to the corporation, and extinguishing plaintiff's interest in the property. On 9 September 1983, plaintiff filed his complaint for judgment in the amount of $8,869.00 against defendants Lambeth and Association, claiming, *inter alia,* damages based on defendant Lambeth's alleged gross negligence and oral and written misrepresentations. From an order granting summary judgment for defendant Lambeth subsequent to a consent judgment dismissing all claims against defendant Association, plaintiff appeals.

*Parker Whedon, for plaintiff appellant.*

*Golding, Crews, Meekins & Gordon, by John C. Golding and Andrew W. Lax, for defendant appellee.*

JOHNSON, Judge.

Plaintiff's Assignment of Error raises the issue of whether the trial court erred by concluding as a matter of law that no issue exists as to any material fact to support plaintiff's motion for summary judgment, and that defendant is entitled to summary judgment. We find no merit to plaintiff's Assignment of Error.

The trial 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 properly granted summary judgment in defendant's favor.

Plaintiff's complaint alleged, *inter alia*, that defendant was negligent in failing to comply with the court order to sell the property subject to "any unpaid deeds of trust" predating defendant Association's lien filed 20 January 1981 and by not searching the title to the condominium. That search, argues plaintiff, would have revealed that Virginia Mortgage Corporation's lien was filed prior to North Carolina Federal's lien. Plaintiff further alleged that defendant Lambeth misrepresented to plaintiff that the property would be subject only to the North Carolina Federal lien, that such misrepresentation induced plaintiff to purchase the condominium to his detriment, and that such misrepresentation was grossly negligent.

**[1]** Plaintiff argues that the rule of *caveat emptor*, whereby the purchaser buys property at his own risk, does not apply to a court ordered commissioner's sale. He argues that a commissioner's sale is distinguishable from an execution sale, to which *caveat emptor* applies. If, as plaintiff urges, *caveat emptor* does not apply to the case *sub judice*, then he is entitled to an order to rescind the contract and receive his purchase price. We must decide whether *caveat emptor* applies and, if so, what are the consequences.

In *Shields v. Allen*, 77 N.C. 375 (1877), cited by plaintiff as controlling, the North Carolina Supreme Court stated the following:

> The plaintiff, however, contends that the purchaser took the risk of getting a title, and must pay his bid, although it happens that he gets no title, just as a purchaser at an execution sale must.
>
> There is no doubt but that such is the law of execution sales. It is equally clear that when a court orders a sale of a particular piece of land for partition or any other purpose, it offers to sell a good title, and will not compel a purchaser to complete his purchase by payment of the price if it appears that a good title cannot be made, except when the sale is expressly or by implication stated to be merely of the *estate* of

> a person named, as on the foreclosure of a mortgage, or of some other certain and definite estate or right.
>
> . . . .
>
> The test whether a good title or merely the estate of a named person, whatever it may turn out to be, is offered for sale, must be found in the decree itself; and where that is not clear, in the nature of the proceedings in which it is made. In a proceeding for partition, the court first determines that the title to the property is in the parties, and between the parties the adjudication is conclusive. It then decrees that the land or other property be sold. Consequently it offers for sale a good title, and cannot insist upon payment by a purchaser unless such a title can be made. So it is in cases where a court decrees a sale by an executor or other trustee, and other analogous cases. The nature of the proceeding implies that a good title is offered, and it will be so deemed unless there be something in the decree for sale which forbids such an implication. A court may, of course, always describe in its decree what estate its commissioner is to sell, and it ought always to do so; and especially is it needful to do so when it means that the purchaser is to take the risk of title. Generally, it would unduly disparage the value of property to order a sale at the risk of the purchaser as to the title, and it would be unjust to the owners. It suggests that the title is doubtful. Hence, a court will never order a sale on such terms except in exceptional cases.
>
> . . . .
>
> The distinction between such cases and a sale by a sheriff under execution is obvious. In the case of execution sales the order of the court, that is, the *fi.fa.*, commands the sheriff to sell any property of the defendant. Nothing in particular is directed to be sold. The nature and form of the proceedings show that there has been no inquiry as to the property or estate of the defendant in the thing sold.

*Shields, supra,* at 376-78. (Emphasis in original.)

There is little question in the case *sub judice* that the trial court ordered the sale of property and not merely of the estate of a named person. Therefore, under *Shields, supra,* it would seem

that the court in the case *sub judice* offered to sell good title, and should not compel plaintiff to complete the purchase where good title was not conveyed.

However, the North Carolina Supreme Court in *Ellis v. Adderton*, 88 N.C. 472 (1883), limited the holding in *Shields*, *supra*, to innocent purchasers, and questioned the distinction between court ordered sales of land and of an estate in land:

> In *Shields v. Allen*, 77 N.C. 375, it is declared that when a commissioner acting under a judicial order sells the land and the purchaser acquires no title; he may have the contract rescinded, and any money he may have paid restored, because of his confidence in the results of a supposed judicial inquiry and determination; but that it is otherwise when the sale is of the estate of the persons named, and then the purchaser takes at his own risk.
>
> Assuming the propriety of this nice distinction between a sale of *land* and *estate* in the land in their consequences, questionable at least, the ruling in the case has reference to an innocent purchaser, who bids for and buys the land under the impression that he thereby will acquire the title, a mistake into which he is led without the means of prompt correction. *But it cannot be applicable to a case where the purchaser is in possession of full information of the facts, and is in express terms told that he will get only the interest . . . [in the property for sale] and voluntarily, with this knowledge, bids, enters into the contract, and executes his several notes for the different sums of purchase money.*

*Ellis*, *supra*, at 476 (emphasis supplied).

The facts in the case *sub judice* are in line with the limitation placed on *Shields*, *supra*, by *Ellis*, *supra*; plaintiff in this case was on notice, before and during the sale, that the condominium was being sold subject to the North Carolina Federal deed of trust and "*any* unpaid deeds of trust"; plaintiff was familiar with sales of real property and the need to search titles, but failed to inquire of defendant commissioner as to whether title to the condominium had been searched; despite this knowledge, plaintiff voluntarily entered into the contract to purchase. Considering the holding in *Shields*, *supra*, in light of the limitation placed on it by *Ellis*,

*supra*, we now hold that plaintiff was not an innocent purchaser of the kind contemplated in *Shields* and *Ellis*, and was therefore subject to *caveat emptor*, and is bound by the purchase as entered into.

**[2]** Plaintiff next argues that defendant is liable to plaintiff for recklessly misrepresenting the number of liens against the condominium, inducing plaintiff's reliance to his detriment. We find no merit to defendant's argument.

Plaintiff claims essentially that defendant's representation that the condominium was subject to only one deed of trust, although admittedly made without actual knowledge of "falsity," was made with reckless disregard for the truth. He cites *Brickell v. Collins*, 44 N.C. App. 707, 262 S.E. 2d 387, *disc. rev. denied*, 300 N.C. 194, 269 S.E. 2d 622 (1980), as controlling. Plaintiff's reliance on *Brickell, supra*, is misplaced. That case dealt with a claim of fraud on the part of a vendor of real property. Plaintiff in the case *sub judice* concedes in his brief that defendant Lambeth did not have any actual knowledge that his representations about the sale of the condominium were false. False representation or concealment of a material fact is an essential element in a claim for fraud. *Brickell, supra*, at 710, 262 S.E. 2d at 389. Plaintiff quotes the following language from *Brickell, supra*: "[g]uilty knowledge will be implied from a statement made by a vendor who affirms a material fact which he does not know to be true." *Id.* at 711, 262 S.E. 2d at 390. Plaintiff implies from this language that defendant Lambeth is liable for fraud since he told plaintiff that the property was subject only to the North Carolina Federal deed of trust and not to the earlier Virginia Mortgage Corporation deed of trust. We disagree. The record before this Court tends to show that defendant Lambeth never represented to plaintiff that the North Carolina Federal deed of trust was the *only* lien against the property, but rather notified the plaintiff that the property was being sold subject to the North Carolina Federal deed of trust and "any unpaid deeds of trust." We find no misrepresentation, either express or implied, by defendant Lambeth on the facts before us in his role as commissioner during the sale of the condominium.

In addition, plaintiff makes the following arguments. First, that he reasonably relied on defendant Lambeth's alleged misrep-

resentations to his detriment, and that defendant is thereby liable for plaintiff's damages. Because we find that defendant did not misrepresent any material facts to plaintiff, we find plaintiff's argument as to his alleged reliance meritless. Secondly, plaintiff argues that defendant Lambeth did not fully comply with the court order of sale because the amount of the acceptable minimum bid allegedly included an amount to pay a lien filed subsequent to the defendant Association's dues assessment lien. No authority is cited in plaintiff's argument in violation of Rule 28(b)(5), N.C. Rules App. P., and addresses an issue beyond plaintiff's claims of misrepresentation and negligence raised in his complaint. We find plaintiff's argument meritless. Thirdly, plaintiff argues that defendant Lambeth is liable on the basis of "ordinary negligence." Plaintiff's argument in his brief consists of a statement that the basis of liability for ordinary negligence is supported by *Restatement (Second) of Torts* s. 522 (1965), and then cites the section. No argument is made in support of plaintiff's claim. We find no merit to plaintiff's contention.

**[3]** Lastly, plaintiff argues that defendant Lambeth failed to comply with G.S. 1-339.15 and the court order of sale. We disagree.

G.S. 1-339.15, which directs the public sale of land, states that:

The notice of public sale shall

(1) Refer to the order authorizing the sale;

(2) Designate the date, hour and place of sale;

(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;

(4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property;

(5) State the terms of the sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale; and

(6) Include any other provisions required by the order of sale to be included therein.

The trial court's order of sale, as alleged by plaintiff in his complaint, states that the order:

(a) granted judgment in favor of Versailles for the sum of $378.55 and court costs including an attorney fee for the Defendant Lambeth;

(b) appointed the Defendant Lambeth as commissioner to sell Unit 2610-B at public auction after due notice as required by Statute;

(c) directed that the property, as a part of the terms of sale, be sold subject to 'any unpaid deeds of trust predating' the Versailles lien.

The record before this Court shows that defendant Lambeth published notice of the public sale of the condominium four separate times, and included in those notices that the sale was subject to the North Carolina Federal deed of trust. Notice was posted on the bulletin board in the Mecklenburg County Courthouse. No notice was posted or published stating that the condominium was being sold subject *only* to the North Carolina Federal deed of trust. Defendant Lambeth made the same representations to plaintiff by telephone and during conversation immediately before the public sale. The evidence does not show that he ever represented to plaintiff that the sale was subject only to the North Carolina Federal deed of trust. We find that defendant Lambeth fully complied with G.S. 1-339.15 and the court order of sale. We hold that based on the forecast of evidence from the record before this Court, the trial court properly granted summary judgment in favor of defendant Lambeth.

Affirmed.

Judges ARNOLD and PARKER concur.

SANDYE LEE HAYMAN v. RAMADA INN, INC.

No. 8721SC45

(Filed 7 July 1987)

1. **Principal and Agent § 4— injury in motel—failure to show principal-agent relationship**

In an action to recover damages against a motel franchisor for personal injuries sustained by plaintiff when she was assaulted while a patron of a Ramada Inn, plaintiff could not recover on the basis of a principal-agent relationship where defendant did not retain or exercise detailed control over the daily operation of the motel in question; apart from the imposition of a general duty upon the franchisee to maintain its accommodations "in a clean, attractive, safe and orderly manner," the contract imposed no standards and made no other provision with respect to security of the premises; and though defendant retained the right to conduct regular inspections of the accommodations to insure compliance with the contract and rules of operation, defendant's actual control was limited to a right to terminate the franchise agreement and collect damages for any noncompliance by the franchisee.

2. **Estoppel § 4.1; Principal and Agent § 4— defendant's control over motel—no apparent authority—no equitable estoppel**

There was no merit to plaintiff's contention that defendant franchisor had held itself out to the public as having apparent authority and control over a motel and it should therefore be equitably estopped from denying ownership or responsibility, since there was no false representation or concealment of material fact by defendant regarding its relationship to the motel in question; plaintiff failed to demonstrate that she relied or acted upon any representation of defendant; and by requiring the franchisee to maintain liability insurance naming defendant as an additional insured and to indemnify defendant for plaintiff's type of claim, defendant did not implicitly accept responsibility and acknowledge liability for injuries on the premises.

3. **Rules of Civil Procedure § 17— service upon franchisor—franchisee not party to action**

There was no merit to plaintiff's contention that, by suing and serving defendant franchisor, she effectively made the franchisee a party to the lawsuit by suing that entity under its trade name.

Judge COZORT dissents.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 20 August 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 4 June 1987.

*James J. Booker for plaintiff appellant.*

*Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and Robert H. Sasser, III, for defendant appellee.*

BECTON, Judge.

Plaintiff, Sandye Lee Hayman, brought this action against defendant, Ramada Inn, Inc., to recover damages for personal injuries sustained on 10 April 1983 when she was allegedly assaulted on the premises of the Ramada Inn on Akron Drive in Winston-Salem, North Carolina. Her Complaint, filed 2 April 1986, charged that defendant was negligent in failing to provide adequate security for its patrons and failing to inform her of the crime rate in the motel's vicinity and on its grounds.

Defendant answered, denying the material allegations of the Complaint. Subsequently, defendant filed a motion for summary judgment, which the trial court granted after considering the pleadings, affidavits, and arguments of counsel. Plaintiff appeals. We affirm.

This appeal primarily involves the vicarious liability of a franchisor for the negligent acts or omissions of its franchisee, and includes questions specifically relating to actual control by the franchisor, apparent agency, and equitable estoppel. A second issue on appeal concerns whether the franchisee was properly made a party to this action.

I

At the time she was assaulted, plaintiff was a flight attendant trainee for Piedmont Airlines. She and her classmates were housed at the Akron Drive Ramada Inn during their training period pursuant to a long-standing arrangement between the airline and the motel. The facility was chosen by Piedmont for housing airline personnel because of its proximity to the airport and the special room rates offered by the motel to Piedmont.

At the hearing on its motion for summary judgment, defendant sought to establish that plaintiff had sued the wrong party. In support of the motion, defendant presented affidavits of Dean Davis, Director of Operations for Turnpike Properties, Inc. (Turnpike), and John G. Drumm, Secretary of Ramada Inn, Inc. These affidavits stated, in part, that the Akron Drive Ramada Inn was owned by Turnpike, not by the defendant; that the facility was operated by Turnpike under the name Ramada Inn pursuant to a license agreement with the defendant; that pursuant to the terms of that agreement, Turnpike was solely responsible for providing

and maintaining security on the premises; and that defendant had no control over, or authority to direct, the provision of security or other aspects of the facility's daily operation. The affidavits were accompanied by a copy of the license agreement.

In opposition to defendant's motion, plaintiff filed an affidavit describing the circumstances of her assault. She further asserted, in part, that the motel was identified on signs and advertisements as "Ramada Inn," and that during the several weeks she stayed there, she never saw any sign or other indication about the premises, or was otherwise made aware, that anyone other than Ramada Inn, Inc. owned, operated or bore responsibility for the facility.

Plaintiff also offered the affidavit of Juanita Robinson, an assistant manager in the Orlando, Florida Reservations Office of Piedmont Airlines, describing an incident in December of 1982 which involved the break-in of a room Ms. Robinson occupied at the same Ramada Inn facility. Ms. Robinson further asserted, in relevant part, that she had never heard of Turnpike Properties, Inc. and that she had never heard any name other than Ramada Inn used in connection with the Akron Drive motel.

II

Pursuant to Rule 56 of the Rules of Civil Procedure, summary judgment is appropriate whenever the pleadings, affidavits, and other materials on file show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *E.g., Hall v. T. L. Kemp Jewelry, Inc.*, 71 N.C. App. 101, 322 S.E. 2d 7 (1984). Plaintiff contends that the materials before the trial court in this case presented genuine issues of fact concerning equitable estoppel, actual control by defendant, apparent authority, and implicit acceptance of liability, thus precluding summary judgment for defendant.

The essence of plaintiff's position is that defendant should be held vicariously liable for the alleged negligence of its licensee, Turnpike. The Complaint does not allege vicarious liability, nor is it clear from the record whether the issue was raised in the court below. In any event, from our review of the record, and for the reasons discussed hereafter, we conclude that there is no genuine issue of fact, based on any of the theories suggested by plaintiff,

regarding the liability of defendant as franchisor for the failure of the franchisee to provide safe premises.

A

**[1]** We first consider plaintiff's "principal-agent" contention that defendant had actual authority and control over the operation of the motel, making it jointly responsible with Turnpike for the plaintiff's injuries.

Agency has been defined by this Court as the relationship which arises from "the manifestation of consent by one person to another that the other shall act *on his behalf and subject to his control,* and consent by the other so to act." *Colony Associates v. Fred L. Clapp & Co.,* 60 N.C. App. 634, 637-8, 300 S.E. 2d 37, 39 (1983) (quoting Restatement (Second) of Agency Sec. 1 (1957) ) (emphasis added). Furthermore,

> a principal's vicarious liability for the torts of his agent depends on the degree of control retained by the principal *over the details of the work as it is being performed.* The controlling principal is that vicarious liability arises from the right of *supervision and control.*

*Vaughn v. North Carolina Dept. of Human Resources,* 296 N.C. 683, 686, 252 S.E. 2d 792, 795 (1979) (emphasis added).

Consistently with these principles, courts of other jurisdictions which have addressed the specific issue of the vicarious liability of a franchisor for the acts of its franchisee have concluded that liability depends upon the existence of an agency relationship, which is determined by the nature and extent of control and supervision retained and exercised by the franchisor over the methods or details of conducting the day-to-day operation. *See Fernander v. Thigpen,* 278 S.C. 140, 293 S.E. 2d 424 (1982); *Holiday Inns, Inc. v. Newton,* 157 Ga. App. 436, 278 S.E. 2d 85 (1981); *Coty v. United States Slicing Machine Co.,* 58 Ill. App. 3d 237, 373 N.E. 2d 1371 (1978); *Harwell v. Sheraton Gardens Inn,* 1982 Bus. Franch. Guide (CCH) 7626 (N.D. Ga. July 29, 1977); *Murphy v. Holiday Inns, Inc.,* 216 Va. 490, 219 S.E. 2d 874 (1975).

Having carefully reviewed the License Agreement between defendant and Turnpike, we find no evidence that defendant retained or exercised the kind of detailed control over the daily

operation of the Akron Drive Ramada Inn that would establish a principal-agent relationship. The general purpose of the contract is the maintenance of uniform service within, and public good will toward, the Ramada Inn system. Otherwise, Turnpike operates the facility on its own behalf. The agreement primarily requires Turnpike to comply with certain standards in the construction, furnishing, and advertising of the facility. Apart from the imposition of a general duty upon Turnpike to maintain its accommodations "in a clean, attractive, safe and orderly manner," the twenty-page contract imposes no standards nor makes any other provision with respect to security of the premises. Under the agreement, defendant neither retained authority over, nor established standards for, the hiring, firing, supervision, or discipline of personnel or myriad other details of the day-to-day operation. Moreover, although defendant retained the right to conduct regular inspections of the accommodations to insure compliance with the contract and rules of operation, defendant's actual control is limited to a right to terminate the franchise agreement and collect damages for any noncompliance by Turnpike. Under these circumstances, we conclude that no actual agency relationship existed that would justify holding defendant responsible for Turnpike's security arrangements.

B

[2] Plaintiff contends, in the alternative, that defendant has held itself out to the public as having apparent authority and control over the Akron Drive facility, and should be equitably estopped from denying ownership or responsibility. We disagree.

The legal theory under which an agency relationship may be deemed to exist for purposes of vicarious liability in the absence of an actual agency is known alternatively as "apparent agency" or "agency by estoppel" and has been stated as follows:

> Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact.

*Fike v. Board of Trustees*, 53 N.C. App. 78, 80, 279 S.E. 2d 910, 912, *disc. rev. denied*, 304 N.C. 194, 285 S.E. 2d 98 (1981) (*quoting*

*Daniel Boone Complex, Inc. v. Furst,* 43 N.C. App. 95, 107, 258 S.E. 2d 379, 388 (1979), *disc. rev. denied,* 299 N.C. 120, 261 S.E. 2d 923 (1980)). The same rule applies to a corporation which holds out or permits a person (or another corporation) to be held out as its agent. *See Daniel Boone Complex; Moore v. WOOW, Inc.,* 253 N.C. 1, 116 S.E. 2d 186 (1960).

Plaintiff argues that by allowing Turnpike to use its name, trademarks, and service marks, defendant has misrepresented to the public or allowed Turnpike to misrepresent that the facility in question is part of a national chain of "Ramada Inns" with a high standard of quality and reliability, that the motel is not locally or independently owned, and that defendant is responsible for its operation. Plaintiff further asserts that she relied upon that representation to her prejudice.

In our view, plaintiff has failed to forecast sufficient evidence of circumstances supporting an apparent agency or agency by estoppel to withstand summary judgment. First, we fail to ascertain any false representation or concealment of material fact by defendants regarding its relationship to the facility. To the contrary, defendant required Turnpike, pursuant to the license agreement, to identify itself as owner and operator of the facility and to expressly indicate its licensee relationship to defendant in all advertising, business stationery, and a "clearly visible sign" to be displayed "prominently at the front desk." Apart from plaintiff's assertions that she never observed any indication of the motel's true ownership, no evidence suggests that Turnpike failed to comply with this requirement or, more significantly, that defendant was aware of or acquiesced in any such noncompliance.

Second, plaintiff has failed to demonstrate that she relied or acted upon any representation of defendant. The uncontradicted evidence shows that she was a guest at the facility pursuant to arrangements made by her employer. There is no allegation in the Complaint or other evidence in the record that she would have chosen to stay elsewhere or done anything differently had she known that the facility was not owned and operated by defendant.

C

We summarily reject plaintiff's further contention that by requiring Turnpike to maintain liability insurance naming defendant

as an additional insured, and to indemnify defendant for this type of claim, defendant implicitly accepted responsibility and acknowledged liability for injuries on the premises. This type of indemnity contract concerns only the two parties thereto, is not germane to plaintiff's cause of action, and may not be used to establish defendant's liability. *See Greene v. Charlotte Chemical Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82 (1961).

III

**[3]** Plaintiff also contends that, even if the trial court properly dismissed the action as to Ramada Inn, Inc., the suit nevertheless should have proceeded with Turnpike Properties, Inc. as defendant. Specifically, plaintiff maintains that, by suing and serving Ramada Inn, Inc., she effectively made Turnpike a party to the lawsuit by suing that entity under its trade name. This argument is without merit.

It is an elementary rule of civil procedure that a person or entity may not be made a party to a lawsuit without having been properly served with process in a manner prescribed by statute. *See, e.g., Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E. 2d 355 (1982); N.C. Gen. Stat. Sec. 1A-1, Rule 4 (1983). In this case, the Complaint and Summons named as defendant "Ramada Inn, Inc.," not "Ramada Inn" (the trade name used by Turnpike). Service of process was accomplished upon the registered agent of Ramada Inn, Inc., and may not be deemed to constitute service upon Turnpike, a separate corporate entity. Under these circumstances, Turnpike was clearly never made a party to this action.

IV

For the foregoing reasons, we hold that the trial court did not err in granting summary judgment for the defendant and dismissing the action, and, accordingly, we affirm.

Affirmed.

Judge MARTIN concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I respectfully dissent because I disagree with the majority's conclusion that "plaintiff has failed to forecast sufficient evidence of circumstances supporting an apparent agency or agency by estoppel to withstand summary judgment." I simply believe that summary judgment was granted too soon; the facts on the issue of apparent agency have not been developed at this point in the case.

The plaintiff's affidavit raises the issue of apparent agency:

> 16. That during the entire program of several weeks training while your affiant stayed at Ramada Inn, Akron Drive, she never saw any sign, poster, advertisement, or other indication of responsibility by anyone for or about the premises of Ramada Inn except Ramada Inn itself. References to that institution were always made as to Ramada Inn.

The plaintiff also submitted the affidavit of Juanita Robinson, a Piedmont employee. Robinson's affidavit supports plaintiff's assertion that defendant did not require Turnpike to identify itself as the owner and operator of the facility:

> 16. The entire time that I am aware of Piedmont employees using Ramada Inn, Akron Drive, Winston-Salem, North Carolina, for housing for their temporarily [*sic*] stopovers or during the training period, this facility has been known as Ramada Inn. I have never heard the term Turnpike Properties, Inc. and know absolutely nothing about any interest that Turnpike Properties, Inc. may or may not have in Ramada Inn or any of its connections with Ramada Inn. No other name was ever used in connection with Ramada Inn with me in referring to Ramada Inn, Akron Drive, Winston-Salem, North Carolina.

The majority's reliance on the license agreement as factual disposition of this issue is, in my opinion, misplaced. There is no evidence that the requirement of the agreement that Turnpike identify itself as owner/operator was ever followed. The affidavits of both Dean Davis, the Director of Operations for Turnpike, and John G. Drumm, the Secretary of defendant, are silent on this issue.

I further believe the majority erred in finding no factual issue as to whether the plaintiff relied on her belief that she was staying in a facility owned and operated by Ramada Inn. Plaintiff's affidavit raises the inference that she relied on the name "Ramada Inn." The majority's statement that plaintiff failed to allege reliance in her complaint is true. I do not believe, however, that plaintiff's failure to allege reliance should be construed as an admission that she did not rely on the "Ramada Inn" name. It is an issue of material fact not yet resolved.

I vote to reverse.

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RONALD BRITT, ET AL. v. NORTH CAROLINA STATE BOARD OF EDUCATION, ET AL.

No. 8716SC63

(Filed 7 July 1987)

**Schools § 1; Constitutional Law § 20.2— "equal educational opportunities" defined —method of financing schools proper—multiple school units in same county proper**

By mandating equal educational opportunities for all students, the framers of the North Carolina Constitution and the voters who adopted it were emphasizing that the days of "separate but equal" education in North Carolina were over, and that the people of this State were committed to providing all students with equal access to full participation in our public schools, regardless of race or other classification. The Constitution does not guarantee to each student in the State a fundamental right to an education substantially equal to that enjoyed by every other student in the State; therefore, plaintiffs could not assail the method prescribed by the Legislature for financing the operation of the public schools which resulted in greater opportunities in counties with a larger tax base, nor could they challenge the operation of five separate administrative school units in their county. Art. IX, § 2(1) and Art. I, §§ 1, 15 and 19 of the N. C. Constitution.

APPEAL by plaintiffs from *Bowen, Judge.* Order entered 27 August 1986 in Superior Court, ROBESON County. Heard in the Court of Appeals 9 June 1987.

This is an action for declaratory and injunctive relief. Plaintiffs are minors who are now, or will be in the future, enrolled in public schools in Robeson County, and the parents or legal guardians of said minors. Defendants are the North Carolina State

Board of Education, its members, the Superintendent of Public Instruction for the State of North Carolina, the five Boards of Education which operate and administer the five separate public school units in Robeson County, the individual members of those boards, and the superintendents for the respective school systems.

In their complaint, plaintiffs allege, in summary, that the present statutory system of financing public schools in North Carolina results in inequities in educational programs and facilities between the public schools within Robeson County, which has a relatively low tax base from which to draw funds, and those in other counties with relatively high tax bases. Plaintiffs further allege that the operation of five separate school systems in Robeson County prohibits effective use of facilities and staff and promotes inequitable use of State and local funds. Plaintiffs allege that, as a result of these situations, they are "being deprived of equal opportunity to a free public school education in violation of Article IX, Section 2(1), and Article I, Sections 1, 15 and 19, of the Constitution of the State of North Carolina." Plaintiffs do not allege discrimination on the part of defendants, nor do they allege that they are a suspect class. They seek as relief declaratory judgments holding "that the system of financing public education in this state, at least as it affects the County of Robeson, violates the Constitution of the State of North Carolina," and that the "administration of five separate administrative school units in Robeson County violates the Constitution of the State of North Carolina. . . ." Plaintiffs also pray for permanent injunctions ordering defendants to cease implementing the current system of financing schools, prohibiting the administration and operation of five separate school systems in Robeson County, and ordering defendants to proceed immediately with consolidation of the separate systems into one administrative unit.

All defendants except the Robeson County School Board, its members and superintendent, moved to dismiss the complaint pursuant to G.S. 1A-1, Rules 12(b)(1) and (6). The trial court dismissed the complaint as to the moving defendants and, pursuant to Rule 54(b), found no just reason for delay and entered a final judgment as to those defendants. Plaintiffs appeal.

*Lumbee River Legal Services, Inc., by Julian T. Pierce and T. Diane Phillips; and Locklear, Brooks, Jacobs & Sutton, by Dexter Brooks, for plaintiff-appellants.*

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Edwin M. Speas, Jr., and Assistant Attorney General Laura E. Crumpler, for defendant-appellees North Carolina State Board of Education, its members and Superintendent.*

*Hal Kinlaw, Jr., for defendant-appellees St. Pauls City Board of Education, its members and Superintendent.*

*J. M. McManus, for defendant-appellees Red Springs City Board of Education, its members and Superintendent.*

*John Wishart Campbell for defendant-appellees Lumberton City Board of Education, its members and Superintendent.*

*Frank Floyd, Jr., for defendant-appellees Fairmont City Schools, its members and Superintendent.*

MARTIN, Judge.

This appeal is taken from the order granting the motion of most, but not all, defendants to dismiss the complaint for lack of subject matter jurisdiction, pursuant to G.S. 1A-1, Rule 12(b)(1), and for failure to state a claim upon which relief can be granted, pursuant to G.S. 1A-1, Rule 12(b)(6). Because the Robeson County Board of Education, its members and Superintendent, did not join in the motion, the order appealed from does not finally dispose of all issues in the case as to all parties. Normally, appeals taken from such an order are interlocutory and are properly dismissed. G.S. 1A-1, Rule 54(b); *Tridyn Industries, Inc. v. American Mutual Ins. Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). The trial court, however, found no just reason for delay and entered final judgment as to the moving defendants, releasing the case for immediate appeal before completion of all the litigation. G.S. 1A-1, Rule 54(b); *Tridyn Industries, supra.*

For the purposes of defendants' motion to dismiss for failure of plaintiffs' complaint to state a claim for relief, the material allegations of the complaint must be treated as true. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Conclusions of law or unwarranted deductions of fact, however, are not so treated. *Id.*

Where it is clear from the complaint that, under any set of facts which could be proved in support of their claim, plaintiffs are not entitled to any relief, the motion to dismiss is properly granted. *Id.*

Plaintiffs attempt to assert two distinct claims for relief in this action: the first assails the method prescribed by the Legislature for financing the operation of the public schools in this State; the second challenges the operation of five separate administrative school units in Robeson County. Both claims are predicated upon what plaintiffs contend is a denial of a fundamental right to equal educational opportunity guaranteed them by Article I, § 15 and Article IX, § 2(1) of the North Carolina Constitution. Article I, § 15 provides:

> The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

Article IX, § 2(1) provides:

> The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

Plaintiffs argue that the foregoing provisions confer upon them a "fundamental right to equal educational opportunity," that is to say that each student in the State has a fundamental right to an education substantially equal to that enjoyed by every other student in the State, and that the present statutory scheme for financing public education violates that right. According to their argument, the present system is constitutionally impermissible because it requires the State to provide flat rate grants to local school administrative units based solely upon the average number of pupils in attendance, without taking into account other factors affecting the units' needs for financial assistance. Responsibility for building, maintaining and improving facilities, as well as the responsibility for other costs involved in providing educational resources and services, is placed upon the local school boards, resulting in disparities in the educational opportunities which might be offered by counties with a large tax base, as opposed to those offered in counties such as Robeson which may not have an

adequate tax base to adequately fund the facilities required by the statute. They also contend that the multiple school systems in Robeson County fragment the pupil population to such an extent that educational programs available to some students in the county are not available to others who are in a different school system.

The outcome of this appeal depends entirely upon the interpretation to be given the constitutional provisions relied upon by plaintiffs. If we interpret them as urged by plaintiffs, the complaint would adequately allege justiciable violations of the asserted right; otherwise the facts alleged by plaintiff do not give rise to a claim for which the courts may afford redress. For the reasons which follow, we affirm the judgment of the trial court.

The standards of constitutional interpretation are well established. It is elementary that the Constitution is a limitation, not grant, of power. *Mitchell v. N.C. Indus. Dev. Financing Auth.*, 273 N.C. 137, 159 S.E. 2d 745 (1968). Fundamental to the interpretation of provisions of the Constitution is the principle that effect be given to the intent of the framers of the document and of the people adopting it. *Perry v. Stancil*, 237 N.C. 442, 75 S.E. 2d 512 (1953). More importance is to be placed upon the intent and purpose of a provision than upon the actual language used. *Id.* "Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation." *Sneed v. Board of Education*, 299 N.C. 609, 613, 264 S.E. 2d 106, 110 (1980). "The meaning of a constitution is to be found, not in a slavish adherence to the letter, which sometimes killeth, but in the discovery of its spirit, which giveth life." *Opinions of the Justices*, 204 N.C. 806, 813, 172 S.E. 474, 478 (1933).

Article IX, § 2(1) of our present constitution, which was adopted by the voters of this State on 3 November 1970, is similar to Article IX, § 2 of the Constitution of 1868, which read as follows:

> *General Assembly shall provide for schools; separation of the races.*—The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the

> State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race.

"Separate but equal" education, such as mandated by the 1868 Constitution was, of course, declared violative of the federal Constitution by the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 98 L.Ed. 2d 873, 74 S.Ct. 686, 38 A.L.R. 2d 1180 (1954).

In their commentary to the proposed constitution, the framers of the 1970 constitution wrote:

> Article IX has been rearranged to improve the order of treatment of the subjects dealt with by that article, and its language has been modified to eliminate obsolete provisions and to make the article reflect current practice in the administration and financing of schools . . . [i]t also authorizes units of local government to which the General Assembly assigns a share of the responsibility for financing public education to finance educational programs . . . from local revenues. It omits the now-unconstitutional language on the separation of the races in the public schools.

*Report of the North Carolina State Constitution Study Commission*, 34 (1968). The framers also noted that in their proposed constitution, which set forth Article IX, § 2(1) as it now appears, "editorial pruning, rearranging, rephrasing, and modest amendments occur. The more substantial changes have been reserved for handling in separate amendments." *Id.*, at 29.

The commentary, then, makes manifest the framers' intention that the new Constitution would not alter, but rather would reflect and preserve, the then current method of financing the State's public schools. At the time the Constitution was drafted and adopted, State law made it "the duty of the boards of education of the several administrative school units of the State to make provisions for the nine months' school term by providing adequate school buildings equipped with suitable school furniture and apparatus." G.S. 115-129 (1966) (Chapter 115 subsequently repealed, rewritten, and recodified as Chapter 115C, Sess. Laws

1981, c. 423, s.1). It was "the duty of the several boards of county commissioners to provide funds for the same." *Id.* State law further provided that:

> When funds accruing by law to the board of education are not sufficient to repair, maintain and insure properly the school plants of an administrative unit, it shall be the duty of the board of county commissioners in which such unit is located to supplement these funds by a tax levy and said board is so directed and authorized.

G.S. 115-80 (1966). *See also generally, Board of Education v. Board of Commissioners*, 26 N.C. App. 114, 214 S.E. 2d 412 (1975). Thus, under the financing scheme employed at the time of adoption of the 1970 Constitution, those counties with lower tax bases faced the same disadvantages as do counties with lower tax bases under the present financing scheme. Yet the framers clearly indicated their intent to make the new Constitution reflect that system.

Moreover, the Constitution itself contains provisions that contradict plaintiffs' arguments. The governing boards of units of local government having financial responsibility for public education are expressly authorized to "use local revenues to add to or supplement any public school or post-secondary school program." N. C. Const., Article IX, § 2(2). Clearly then, a county with greater financial resources will be able to supplement its programs to a greater degree than less wealthy counties, resulting in enhanced educational opportunity for its students. Furthermore, Article IX, § 7 of the Constitution requires that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools," creating yet another disparity between counties as to the financial resources available for supplementing the programs of the public schools. Both of these provisions obviously preclude the possibility that exactly equal educational opportunities can be offered throughout the State.

Plaintiffs cite *Sneed v. Board of Education, supra,* as authority for the proposition that there is a fundamental right to equal educational opportunities. In *Sneed,* the Supreme Court held that

a school board could assess small course fees without violating the mandate for free public schools contained in Article IX, § 2(1) of the Constitution. The Court stated that "[i]t is clear, then, that equal *access to participation* in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process." *Id.* at 618, 264 S.E. 2d at 113 (emphasis added). The fundamental right that is guaranteed by our Constitution, then, is to equal *access* to our public schools—that is, every child has a fundamental right to receive an education in our public schools. Furthermore, the State is given responsibility for overseeing the public schools of this State in order to ensure that every student in the State receives the education to which he or she is entitled. *Lane v. Stanley*, 65 N.C. 153 (1871). In the present case, plaintiffs have not alleged that they are being denied an education, but only that they are not receiving the same educational opportunities as students in some other places in the State. The State is required to provide a general and uniform education for the students in its charge. "There is no requirement that it provide identical opportunities to each and every student." *Kiddie Korner v. Board of Education*, 55 N.C. App. 134, 138-39, 285 S.E. 2d 110, 113 (1981), *appeal dismissed and cert. denied*, 305 N.C. 300, 291 S.E. 2d 150 (1982).

Plaintiffs contend that their argument does not require absolute equality from system to system, but rather requires only that the State cannot ignore the relative ability of counties to raise funds when disparities in county wealth deprive students of equal educational opportunity. However, if our Constitution demands that each child receive equality of opportunity in the sense argued by plaintiffs, only absolute equality between all systems across the State will satisfy the constitutional mandate. Any disparity between systems results in opportunities offered some students and denied others. Our Constitution clearly does not contemplate such absolute uniformity across the State.

The question remains, then, of what the mandate that "equal opportunities shall be provided for all students" does, in fact, guarantee. In our view, the only plausible way to interpret that provision is to relate it to the "separate but equal" phrase of the 1868 Constitution that it replaced. In *Brown v. Board of Education*, *supra*, the United States Supreme Court held that "segregation of children in public schools solely on the basis of race . . .

deprive[s] the children of the minority group of equal educational opportunities." *Id.* at 493, 98 L.Ed. 2d at 880, 74 S.Ct. at 691, 38 A.L.R. 2d at 1186. It is a fact of history, although a shameful one, that despite the Supreme Court's ruling in *Brown*, racial integration of the public schools in this State occurred neither quickly nor wholeheartedly. *See generally, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L.Ed. 2d 554, 91 S.Ct. 1267, *reh'g denied*, 403 U.S. 912, 29 L.Ed. 2d 689, 91 S.Ct. 2200, 2201 (1971); *Godwin v. Johnston County Board of Education*, 301 F. Supp. 1339 (E.D.N.C. 1969). By mandating equal opportunities for all students, the framers of the Constitution and the voters that adopted it were emphasizing that the days of "separate but equal" education in North Carolina were over, and that the people of this State were committed to providing all students with equal access to full participation in our public schools, regardless of race or other classifications. Any other interpretation, we believe, would require drawing inferences and conclusions that not only cannot be supported, but are, in fact, contradicted by the history surrounding the adoption of the Constitution.

Both of plaintiffs' claims for relief are premised upon the violation of a right which we have concluded does not exist in the context alleged by plaintiffs. Since no constitutional infirmity appears from the complaint, the only questions which it raises relate to the wisdom of the Legislature in providing for the present method of funding public education and in providing for and permitting five separate school systems to be maintained in Robeson County. These are matters of purely legislative concern.

> As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts—it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts.

*Lowe v. Tarble*, 312 N.C. 467, 471, 323 S.E. 2d 19, 22 (1984), *aff'd on reh'g*, 313 N.C. 460, 329 S.E. 2d 648 (1985), *quoting State v. Warren*, 252 N.C. 690, 114 S.E. 2d 660 (1960).

Plaintiffs have alleged no facts which would support a claim for relief or confer jurisdiction upon the courts of the State. The judgment of the trial court is, therefore, affirmed.

Affirmed.

Judges BECTON and COZORT concur.

STATE OF NORTH CAROLINA v. WALTER OLIVER MELVIN

No. 8612SC1071

(Filed 7 July 1987)

1. **Searches and Seizures § 15— bank accounts—no privacy interest of defendant —SBI's investigation no "search"**

Defendant attorney had no Fourth Amendment privacy interest in the banking records of an estate account and of his personal rental account, and an SBI agent's conversations with a bookkeeper at the bank concerning the balance in the accounts in question could not constitute a governmental "search" for Fourth Amendment purposes; therefore, the trial court properly denied defendant's motion to suppress the bank records of the estate account and his individual rental account.

2. **Embezzlement § 5— embezzlement from estate account—widow's testimony as to need admissible**

In a prosecution of defendant attorney for embezzlement of funds from an estate account, the trial court did not commit prejudicial error in allowing into evidence testimony by a widow that she needed the funds to keep her children in college, since defendant failed to show that, had the evidence been excluded, the jury would have reached a different result.

3. **Embezzlement § 6— attorney's deposit of check into personal account—sufficiency of evidence of embezzlement**

In a prosecution of defendant attorney for embezzlement, evidence that defendant deposited a Veteran's Administration insurance check into his own personal account rather than into an estate account and that he subsequently failed to turn the funds over to the widow was sufficient to be submitted to the jury.

APPEAL by defendant from judgment entered by *Barnette, Judge*. Judgment entered 10 April 1986 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 4 March 1987.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General G. Patrick Murphy and Special Deputy Attorney General William N. Farrell, Jr., for the State.*

*Hutchens & Waple, by Mark L. Waple, for defendant-appellant.*

GREENE, Judge.

Defendant was convicted of embezzlement and sentenced to three years' imprisonment. Defendant appeals.

The State's evidence showed that Mrs. Sarah Lewis employed defendant, an attorney, to assist her in the administration of her husband's estate. In December 1982, defendant and Mrs. Lewis opened an estate account at the United National Bank in Fayetteville (hereinafter, "UNB") and deposited a check for $19,950.10, which check represented the proceeds of a life insurance policy of Mrs. Lewis's deceased husband, Moses Lewis, Jr. Mrs. Lewis only authorized defendant to expend funds necessary to pay estate expenses and renounced her right to serve as administratrix of the estate in his favor. After conferring with defendant in August 1984, Mrs. Lewis became concerned the estate had not been settled. Defendant subsequently gave her an estate check for $11,936.15 and instructed her to hold the check briefly before cashing or depositing it. A few days later, Mrs. Lewis found the check was drawn on insufficient funds and contacted the State Bureau of Investigation.

The SBI was apparently already investigating defendant's handling of other trust accounts at various banks, including UNB. Based upon the information from Mrs. Lewis, an SBI agent informally conferred with a UNB bookkeeper on 19 December 1984 and confirmed the Moses Lewis, Jr., estate account had insufficient funds to cover the check defendant gave Mrs. Lewis. Based in part on these conversations, the SBI agent secured a search warrant on 25 January 1985 and seized all UNB bank records of the estate account of Moses Lewis, Jr. An affidavit in the record also reveals the SBI seized UNB records of defendant's personal rental account in connection with a search warrant issued for investigation of another UNB estate account defendant administered.

Contending the SBI agent's conversation with the UNB bookkeeper constituted a warrantless search that tainted any governmental use of defendant's bank records at trial, defendant moved prior to trial to suppress all evidence of transactions occurring in either defendant's personal rental account or the estate account which defendant administered. The court denied defendant's motion to suppress this evidence. Defendant also moved *in limine* to

strike any inflammatory testimony by Mrs. Lewis which might indicate to the jury she had suffered hardship from lack of the estate monies. This motion was also denied.

At trial, the State introduced the bank records of both defendant and the estate pursuant to a *subpoena duces tecum* issued to UNB's president. Those records showed numerous checks written to defendant on the estate account. The records also reflected the deposit in defendant's rental account of a Veteran's Administration insurance check payable to defendant as estate administrator in the sum of $5,028.75. The check was endorsed by defendant but proceeds of the check were never transferred to the estate account. At the conclusion of the State's evidence, defendant's motion to dismiss was denied.

The issues for this Court's determination are: 1) whether defendant had standing to object to the alleged warrantless search of the UNB records of the estate of Moses Lewis, Jr.; 2) whether the UNB records of defendant's personal rental account were properly admitted into evidence; 3) whether the trial court erred in denying defendant's motion *in limine*; and 4) whether the trial court erred in denying defendant's motion to dismiss.

I

**[1]** Defendant first contends the search warrant seeking the bank records of the estate of Moses Lewis, Jr., was the product of an unlawful search and seizure which violated defendant's rights under the Fourth and Fourteenth Amendments of the U.S. Constitution and Article I, Section 20 of the Constitution of North Carolina. Specifically, defendant argues the conversation between the SBI agent and the UNB bookkeeper constituted an unlawful warrantless search, the fruits of which tainted the subsequent warrant for search and seizure of the estate bank records.

A party seeking shelter under the Fourth Amendment has the burden of establishing that his personal rights were violated by the State's search and seizure. *State v. Jones*, 299 N.C. 298, 306, 261 S.E. 2d 860, 865 (1980). The United States Supreme Court has held the Fourth Amendment only protects those persons having a reasonable expectation of privacy in the premises searched. *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

In this case, defendant made no showing of any circumstances giving rise to his reasonable expectations of privacy as an individual in the banking records of the estate account of Moses Lewis, Jr. In *State v. Overton*, 60 N.C. App. 1, 298 S.E. 2d 695, *disc. rev. denied and appeal dism'd*, 307 N.C. 580, 299 S.E. 2d 652 (1983), defendant moved to suppress evidence concerning his bank and credit union accounts on the ground his Fourth Amendment protection against unreasonable searches and seizures had been violated. Citing *United States v. Miller*, 425 U.S. 435 (1976), the *Overton* Court held defendant had no standing to contest the bank's disclosure of his bank records. 60 N.C. App. at 31, 298 S.E. 2d at 713. In *Miller*, the United States Supreme Court specifically held a defendant's Fourth Amendment rights were not abridged when the records of defendant's bank accounts were disclosed in response to a *subpoena duces tecum*. The Court found there was no intrusion into any area protected by the Fourth Amendment:

> On their face, the documents subpoenaed here are not respondent's "private papers." . . . [R]espondent can assert neither ownership nor possession. Instead, these are the business records of the banks. . . . The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

425 U.S. at 440-43 (citations omitted).

Defendant argues *Miller* is distinguishable since the bank in *Miller* was subject to a *subpoena duces tecum* while, in the instant case, the UNB bookkeeper transmitted certain information about the status of the estate account to the SBI without legal process. Defendant overlooks our conclusion in *Overton* that defendant had no Fourth Amendment interest in his bank records regardless of the manner by which they were obtained. We there stated

> Defendant's contentions that his Fourth Amendment rights were violated when the state obtained an Application

> for Examination of Records instead of a subpoena *duces tecum and when it received some records without even this document* are meritless. He had no standing to contest the disclosure of the information, and his motion to suppress was, therefore, properly denied.

60 N.C. App. at 31, 298 S.E. 2d at 713 (emphasis added).

Defendant's argument that he somehow acquired Fourth Amendment standing by virtue of the SBI agent's informal conversation with the UNB bookkeeper rests on the following footnote from the *Miller* decision:

> This case differs from *Burrows v. Superior Court* [a California Supreme Court decision], in that the bank records of respondents' accounts were furnished in response to 'compulsion by legal process' in the form of subpoenas *duces tecum*. The court in *Burrows* found it 'significant . . . that the bank [in that case] provided the statements to the police in response to an informal oral request for information.' [Citations omitted.]

425 U.S. at 445 n.7. Defendant ignores this footnote's context and therefore misperceives the "difference" it notes between constitutional and statutory challenges to search and seizure. After denying defendant's Fourth Amendment interest in bank records, the *Miller* court stated:

> Respondent contends not only that the subpoena *duces tecum* directed against the banks infringed his Fourth Amendment rights, but that a subpoena issued to a bank to obtain records maintained pursuant to the [1970 Bank Secrecy Act, 12 U.S.C.A. Sec. 1829b *et seq.* (West 1980) and 31 U.S.C.A. Sec. 5311 *et seq.* (West 1983 and Supp. 1987)] is subject to more stringent Fourth Amendment requirements than is the ordinary subpoena. In making this assertion he relies on our statement in *California Bankers Assn., supra,* at 52, 39 L.Ed. 2d 812, 94 S.Ct. 1494, that access to the records maintained by banks under the Act is to be controlled by 'existing legal process.'

425 U.S. at 445 (text to which footnote 7 is appended).

Reading the *Miller* footnote in context, it is clear the presence or absence of "existing legal process" does not affect one's privacy interest in bank records under the Fourth Amendment; instead, the court simply acknowledges one may have *statutory* grounds to challenge the manner by which such records are obtained, irrespective of one's standing under the Fourth Amendment. *E.g.*, 31 U.S.C.A. Sec. 5317 (West 1983) (setting forth federal statutory requirements for legal process under former Bank Secrecy Act); *compare* 12 U.S.C.A. Sec. 3401 *et seq.* (West 1980) ("Right to Financial Privacy Act" restricting types of federal access to bank records) *with SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745 (1984) (purpose of financial privacy statute is to fill "gap" left by *Miller* ruling that customer has no constitutional standing to contest access to financial records). Defendant has cited us no statutes similarly regulating the access of State agencies to defendant's bank accounts. We note that even the federal Right to Financial Privacy Act only authorizes civil penalties or injunctive relief as remedies; by implication, Congress did not deem suppression of evidence to be an appropriate remedy. *United States v. Kington*, 801 F. 2d 733, 737 (5th Cir. 1986).

Since defendant therefore had no Fourth Amendment privacy interest in the UNB records under *Miller*, the SBI agent's conversation with the UNB bookkeeper could not constitute a governmental "search" for Fourth Amendment purposes. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("search" occurs when government infringes reasonable expectation of privacy). The trial court therefore correctly denied defendant's motion to suppress the bank records of the estate of Moses Lewis, Jr.

II

Defendant contends the trial court should have excluded evidence of his own personal rental account. For the reasons previously discussed with respect to the UNB estate account records, we find under *Miller* and *Overton* that defendant had no standing to object to the bank's turnover of its records of defendant's individual rental account.

III

**[2]** Defendant next contends the following testimony of Mrs. Lewis was irrelevant and should have been excluded by the trial court:

Q. Can you tell the jury for what purposes you were attempting to contact Mr. Melvin?

A. I asked him how long it was going to take him to finish settling my husband's estate due to the fact that this was my main source of money and I would like to get it because I had two children. I had two children in college, my daughter was at UNC-G in Greensboro and my son was in veterinary medicine at Tuskeegee Institute in Alabama and I needed these funds to pay some bills for them to keep them in school.

Among other things, the State argues the evidence was relevant to the issue of Mrs. Lewis's credibility. Defendant contends the testimony was likely to inflame the jury's emotions resulting in a decision based on sympathy, not the evidence.

Even if we assume the evidence was irrelevant under N.C.R. Evid. 401, we nonetheless find no reversible error since defendant has not shown the testimony misled the jury or otherwise prejudiced his case. The admission of irrelevant evidence is generally considered harmless error. The defendant has the burden of showing he was prejudiced by the admission of the evidence. *State v. Alston,* 307 N.C. 321, 339, 298 S.E. 2d 631, 644 (1983). In order to show prejudice, defendant must meet the statutory requirements of N.C.G.S. Sec. 15A-1443(a) (1983):

A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

In the present case, defendant has failed to carry his burden of showing any prejudice by the admission of Mrs. Lewis's testimony. The evidence in this case was overwhelmingly against defendant. Defendant nowhere suggests that, had this evidence been excluded, the jury would have reached a different result. Therefore, the trial court properly denied defendant's motion *in limine* to exclude this testimony.

IV

[3] At the conclusion of all the evidence, defendant's motion to dismiss was denied. Defendant now argues the State presented no evidence he personally received any estate funds and specifically contends the State failed to identify the signature on the disputed checks as being defendant's.

Upon a motion to dismiss a criminal action, all the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference from that evidence. *State v. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980). In considering the motion, the court must determine whether there is substantial evidence of each essential element of the offense charged. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* at 78-79, 265 S.E. 2d at 169.

In order to convict a defendant of embezzlement under N.C.G.S. Sec. 14-90 (1986), the State must prove three distinct elements: 1) that defendant, being more than sixteen years of age, acted as an agent or fiduciary for his principal; 2) that he received money or valuable property of his principal in the course of his employment and through his fiduciary relationship; and 3) that he fraudulently or knowingly and willfully misapplied or converted to his own use the money or valuable property of his principal which he had received in his fiduciary capacity. *State v. Pate*, 40 N.C. App. 580, 583, 253 S.E. 2d 266, 269, *cert. denied*, 297 N.C. 616, 257 S.E. 2d 222 (1979). Defendant challenges only the third element. In order to prove this element, it is not necessary to show defendant converted the property to his own use, provided the State shows defendant fraudulently or knowingly and willfully misapplied the property for purposes other than those for which he received it as agent or fiduciary. *Id.* at 583-84, 253 S.E. 2d at 269.

Viewed in the light most favorable to the State, the evidence in this case was sufficient to allow the reasonable inference that defendant either fraudulently or knowingly and willfully misapplied or converted estate funds for improper purposes. Defendant received a check from the Veteran's Administration in the amount of $5,028.75 and deposited those monies directly into his personal rental account. There is no evidence the proceeds were

ever transferred into the estate account or made available to Mrs. Lewis. On the contrary, the evidence showed that defendant wrote an estate check to Mrs. Lewis in the amount of $11,386.15, which check was returned by UNB for insufficient funds.

Knowing the money was not his, defendant nonetheless deposited the VA check into his personal account. Such evidence is sufficient to show embezzlement. In *State v. Buzzelli*, 11 N.C. App. 52, 180 S.E. 2d 472, *cert. denied*, 279 N.C. 350, 182 S.E. 2d 583 (1971), defendant, charged with embezzlement, had deposited $600.00 of her employer's funds into her own personal account. The Court found that action sufficient evidence from which a jury could "legitimately find that defendant fraudulently embezzled and converted to her own use the sum of $600.00 of her employer's funds." *Id.* at 55, 180 S.E. 2d at 475. We likewise find that defendant's deposit of the Veteran's Administration insurance check into his personal account and subsequent failure to turn the funds over to Mrs. Lewis is sufficient evidence of embezzlement for the jury. Accordingly, the trial court properly denied defendant's motion to dismiss.

No error.

Judges ARNOLD and MARTIN concur.

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JOHN H. TAYLOR, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ET AL., DEFENDANT AND THIRD PARTY PLAINTIFF v. SWANSON JOYCE, THIRD PARTY DEFENDANT

No. 8617SC1324

(Filed 7 July 1987)

**1. Limitation of Actions § 10; Army and Navy § 1— statute of limitations tolled during military service**

Plaintiff's action to recover compensation for a taking of his land by defendant was not barred by the 24-month statute of limitations of N.C.G.S. § 136-11, since that statute was automatically and unconditionally tolled by 50 U.S.C.A. App. § 525 until plaintiff's retirement from military service; further-

more, N.C.G.S. § 1-38, the seven-year statute of limitations for adverse possession under color of title, was also tolled by 50 U.S.C.A. App. § 525.

**2. Highways and Cartways § 9; Army and Navy § 1; Equity § 2— alterations to road—taking of soldier's property—action for compensation barred by laches**

Laches was available as a defense against plaintiff's claim for compensation for the taking of his land by defendant, notwithstanding the special protection plaintiff enjoyed under 50 U.S.C.A. App. § 525 during the period of his military service, where plaintiff visited the community where the property was located at least once a year or more during his time of military service; plaintiff offered no evidence of any pressing military duties or emergency military obligations in which he was involved from the date of the taking until his retirement; plaintiff learned of the paving and changes in the road in question two years after they were completed; and plaintiff contacted defendant concerning the changes in the road and his property the year before his retirement from military service.

APPEAL by plaintiff from *Rousseau, Judge.* Order entered 23 June 1986 in STOKES County Superior Court. Heard in the Court of Appeals 13 May 1987.

Defendant North Carolina Department of Transportation improved N.C.S.R. 1195 in Stokes County between May and August 1974 by realigning some curves and paving the road. Plaintiff is the owner of fifty acres of land which he acquired from his father in 1973. This property abuts N.C.S.R. 1195. A portion of the improvements made by defendant in 1974 cross part of plaintiff's property. Specifically, the road was realigned with .928 acre of right of way acquired across the northwestern portion of plaintiff's property and .047 acre of right of way across the northern corner of plaintiff's property.

Plaintiff served in the United States military from June 1957 until his retirement in June 1983. From 1974 until his retirement in 1983, plaintiff was stationed in the continental United States, except for a six-month period from January-July 1975, when he was stationed in the Panama Canal Zone. While in military service, plaintiff visited his home and family in Stokes County at least once a year or more.

Plaintiff learned of the paving and changes to N.C.S.R. 1195 in 1976. Plaintiff took no action at that time because he believed that defendant had a right to construct N.C.S.R. 1195 across portions of his property. Plaintiff first discussed this matter with an attorney in 1982, and in August 1982, plaintiff contacted defend-

ant concerning the changes to N.C.S.R. 1195 affecting his property.

Plaintiff brought this action on 20 March 1985 pursuant to N.C. Gen. Stat. § 136-111, seeking compensation for a taking of his land by defendant. G.S. § 136-111 provides, in pertinent part, that:

> Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation and no complaint and declaration of taking has been filed by said Department of Transportation may, within 24 months of the date of the taking of the affected property or interest therein or the completion of the project involving the taking, whichever shall occur later, file a complaint in the superior court . . . .

In his amended complaint, plaintiff specifically alleged that as a result of the improvements by defendant to N.C.S.R. 1195 he "has been denied suitable access to his property" and that "defendant's actions have resulted in a taking of the entire 50.03 acre tract of land belonging to plaintiff. . . ." Defendant denied the material allegations of plaintiff's amended complaint in its answer, and, by way of further defense, denied any taking by virtue of a right of way agreement from plaintiff and his wife to defendant's predecessor in interest dated 3 April 1974 and recorded in Book 217, page 169 in the Stokes County Register of Deeds office.

On 2 June 1986 a hearing was held pursuant to N.C. Gen. Stat. § 136-108 to determine all issues other than damages. After the hearing, the trial court entered an order which included findings of fact. Based on its findings, the court concluded, *inter alia*, that plaintiff's claim is barred by the twenty-four month statute of limitations contained in G.S. § 136-111 and that it is also barred by the doctrine of laches. The court further concluded that defendant "has obtained title to the right of way through plaintiff's property by adverse possession under color of title." The court ordered that plaintiff's action should be dismissed and that plaintiff should recover nothing from defendant. From this order, plaintiff appealed.

*Gregory Davis for plaintiff-appellant.*

*Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Eugene A. Smith and Assistant Attorney General Evelyn M. Coman, for defendant-appellee, North Carolina Department of Transportation.*

WELLS, Judge.

Plaintiff first contends that the trial court erred in conducting a non-jury hearing and determining all issues other than damages pursuant to G.S. § 136-108. However, counsel for plaintiff conceded in oral argument that the trial court properly conducted a hearing pursuant to G.S. § 136-108, and confined his argument to the question whether plaintiff's claim is barred by either the twenty-four month statute of limitations contained in G.S. § 136-111 or by the doctrine of laches. Accordingly, we do not consider plaintiff's first contention.

Plaintiff contends that the court improperly concluded that his claim is barred by the twenty-four month statute of limitations contained in G.S. § 136-111 and that it is also barred by the doctrine of laches. For the reasons set forth below, we hold that the court erred in concluding that plaintiff's claim is barred by the twenty-four month statute of limitations contained in G.S. § 136-111 and in concluding that defendant obtained title by adverse possession under color of title. We do hold, however, that plaintiff's claim is barred by laches. Accordingly, we affirm that portion of the court's order concluding that plaintiff's claim is barred by laches.

At the outset we note that plaintiff has waived his right to challenge the sufficiency of the evidence to support particular findings of fact by failing to except and assign error separately to each finding or conclusion that he contends is not supported by the evidence. N.C.R. App. Rules 10, 28; *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E. 2d 755, *cert. denied*, 317 N.C. 333, 346 S.E. 2d 137 (1986). The only question thus presented is whether the findings of fact support the conclusions of law and the conclusions support the judgment. *Concrete Service, supra.*

**[1]** Under G.S. § 136-111, a plaintiff has twenty-four months from "the date of the taking of the affected property or interest

therein or the completion of the project involving the taking, whichever shall occur later . . ." within which to bring a claim for compensation for an alleged taking. While plaintiff essentially concedes that he did not bring his claim within the prescribed twenty-four month limitations period, he contends that the statute of limitations was tolled by 50 U.S.C.A. App. § 525 of the Soldiers' and Sailors' Civil Relief Act until his retirement from military service in June 1983.

50 U.S.C.A. App. § 525 provides, in pertinent part:

> The period of military service shall not be included in computing any period . . . limited by any law . . . for the bringing of [an] action . . . in any court . . . against any person in military service . . . whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service. . . .

Courts generally have held that the express terms of 50 U.S.C.A. App. § 525 "make certain that the tolling of the statute of limitations is unconditional." *Bickford v. United States*, 656 F. 2d 636 (Ct. Claims 1981). *See also Ricard v. Birch*, 529 F. 2d 214 (4th Cir. 1975). *See, generally*, Annot., 36 A.L.R. Fed. 420 (1983 Supp.). *Cf. Pannell v. Continental Can Co.*, 554 F. 2d 216 (5th Cir. 1977). In other words, "[t]he only critical factor is military service; once that circumstance is shown, the period of limitations is automatically tolled for the duration of the service. . . ." *Ricard, supra.* A plaintiff-serviceman is not required "to show that his ability to bring . . . suit has been handicapped by his military service." *Bickford, supra.*

The trial court here found that plaintiff "served in military service from June 1957 until his retirement in June 1983." Following *Bickford, supra*, and *Ricard, supra*, we hold that the twenty-four month statute of limitations contained in G.S. § 136-111 was automatically and unconditionally tolled by 50 U.S.C.A. App. § 525 until plaintiff's retirement from military service in June 1983. Plaintiff brought this action on 20 March 1985, within twenty-four months of June 1983. Accordingly, we hold that the court erred in concluding that plaintiff's claim is barred by the statute of limitations.

**[2]** Similarly, N.C. Gen. Stat. § 1-38, the seven-year statute of limitations for adverse possession under color of title, was automatically and unconditionally tolled by 50 U.S.C.A. App. § 525 until plaintiff's retirement from military service in June 1983. Accordingly, we hold that the court erred in concluding that defendant obtained title to the right of way through plaintiff's property by adverse possession under color of title. We now consider the question of laches.

Laches is an affirmative defense and the party who pleads it has the burden of proof. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976).

> In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case. Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay.

*Id.*

Further,

> Lapse of time is not, as in the case when a claim is barred by a statute of limitation, the controlling or most important element to be considered in determining whether laches is available as a defense. The question is primarily whether the delay in acting results in an inequity to the one against whom the claim is asserted based upon . . . some change in the condition or relations of the property of the parties. Also to be considered is whether the one against whom the claim is made had knowledge of the claimant's claim and whether the one asserting the claim had knowledge or notice of the defendant's claim and had been afforded the opportunity of instituting an action. (Citations omitted.)

*Harris & Gurganus v. Williams*, 37 N.C. App. 585, 246 S.E. 2d 791 (1978). In *Costin v. Shell*, 53 N.C. App. 117, 280 S.E. 2d 42, *disc. rev. denied*, 304 N.C. 193, 285 S.E. 2d 97 (1981), we stated the applicable rules as follows:

> The doctrine of laches requires a showing (1) that the [plaintiff] negligently failed to assert an enforceable right within a reasonable time, . . . *and* (2) that the propounder of the doctrine was prejudiced by the delay in bringing the action. . . . (Citations omitted.)

Plaintiff's appeal raises the question whether laches is available as a defense against his claim in light of the special protection he enjoys under 50 U.S.C.A. App. § 525 during the period of his military service.

In *Deering v. United States*, 620 F. 2d 242 (Ct. Claims 1980) the Court considered this question and held that laches was available as a defense against a military pay claim brought by an active-duty serviceman notwithstanding 50 U.S.C.A. App. § 525. The Court explained:

> We can find no reason, and plaintiff has shown us none, why such an across-the-board exemption from the equitable doctrine of laches, always employed on a case-by-case basis, should be carved out for active duty military personnel. This is particularly true in light of the absence of such an exemption in the Act [50 U.S.C.A. App. § 525] itself.
>
> . . .
>
> [W]e hold that the exemption from statutes of limitations established by the Act should be applied apart from and irrespective of the doctrine of laches.
>
> . . .
>
> The words of the Act itself refer only to statutes of limitations. The Act is silent as to laches. Moreover, resort to the legislative history to interpret the Act is of little use, since the legislative history is scant indeed. We do know that the Supreme Court has said the purpose of the Act is to "protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231, 87 L.Ed. 1587 (1943). The

need to protect such persons from unwavering statutes of limitations is self-evident. Military personnel are often precluded by the nature of their military duties from attending courthouse proceedings. However, we can see no corresponding need to protect military personnel statutorily from the doctrine of laches. As an equitable defense, applied on a case-by-case basis only, laches includes built-in protection for military personnel unable to prosecute their claims due to the demands of military life. Military personnel legitimately unable to prosecute their claims can feel confident that courts, in applying this equitable doctrine, will duly consider the particular circumstances of a military person, taking all circumstances into account to see that equity is done.

We view our statute of limitations not as an absolute entitlement to a grace period in which to sue but rather as an outside limit beyond which Congress has determined claims are simply too stale to be litigated fairly. Implicit in the statute of limitations period is a shorter period in which laches may apply, should a particular plaintiff have unreasonably delayed and caused some prejudice to the . . . defendant. Indeed, we have repeatedly barred plaintiffs where their period of delay was significantly less than the full six years allowed by 28 U.S.C. § 2501 (1976). *See* authorities, with parenthetical delay periods indicated, cited in *Alpert v. United States*, 161 Ct.Cl. 810, 820-21 (1963). Were we to [hold otherwise] we can envision a circumstance wherein a serviceman delays filing suit through remaining in the military (thus avoiding statutes of limitations and laches), waiting for the most opportune moment to file a claim, after records have been destroyed or witnesses have died. Certainly the public policy in favor of swift adjudication of claims does not profit from such a situation.

In sum, we hold that a blanket exception to laches for active duty military personnel can not be read into the Act. As an equitable defense, laches will be applied after courts weigh all factors involved in each individual case, to be sure that injustice does not result to either party.

Following the reasoning of *Deering, supra,* we hold that plaintiff's exemption from the statute of limitations in G.S.

§ 136-111 during his military service established by 50 U.S.C.A. App. § 525 applies "apart from and irrespective of the doctrine of laches." *Deering, supra.* We now consider whether the court's findings support its conclusion that laches bars plaintiff's claim.

In *Harris & Gurganus, supra,* plaintiff sought specific performance of a covenant in a deed. Defendant asserted laches as an affirmative defense. The trial court concluded in its judgment that laches barred plaintiff's claim.

On appeal, we held that neither the evidence nor findings of fact supported the trial court's conclusion that laches barred plaintiff's claim. The only findings by the trial court which supported its conclusion of laches related to the amount of time elapsed. There was no evidence or findings as to (1) any inequity affecting defendant which resulted from plaintiff's delay, *viz.,* some change in condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim; (2) whether plaintiff's delay was without reasonable excuse; or (3) any lack of knowledge by defendant that plaintiff would assert its claim. *Harris & Gurganus, supra.*

The trial court here found, in pertinent part, that:

> 7. During his time of military service, the plaintiff visited his home and family in Stokes County at least once a year or more depending on where he was stationed.
>
> . . .
>
> 9. The plaintiff offered no evidence of any pressing military duties or emergency military obligations in which he was involved from 1974 until 1983.
>
> 10. The plaintiff learned of the paving and changes in N.C.S.R. 1195 in 1976.
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> . . .
>
> 13. The plaintiff contacted the Department of Transportation concerning the changes in the road and his property in August 1982.
>
> . . .

28. In 1985 when the Department of Transportation surveyed the plaintiff's property and existing N.C.S.R. 1195, it had difficulty in locating old irons and points of plaintiff's boundaries and had difficulty establishing the old road location.

Applying *Taylor*, *Costin*, and *Harris & Gurganus*, *supra*, to the foregoing findings of fact, we hold that they are sufficient to support the court's conclusion of laches.

Accordingly, we affirm that portion of the order concluding that plaintiff's claim is barred by laches.

Affirmed.

Judges ARNOLD and ORR concur.

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JOHN M. CARTER, PLAINTIFF v. N. C. STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS & LAND SURVEYORS; AND GEORGE T. PARIS, CHAIRMAN; AND MONTGOMERY T. SPEIR, EXECUTIVE SECRETARY

No. 8610SC1345

(Filed 7 July 1987)

1. **Appeal and Error § 6.3— subject matter jurisdiction—absence of exceptions—issue properly raised on appeal**

Notwithstanding the absence of exceptions properly set out in the record on appeal, a party may present for review the question of subject matter jurisdiction by raising the issue in his brief.

2. **Appeal and Error § 7; Professions and Occupations § 1— land surveyor's practices—complaint from fellow surveyor dismissed—standing to appeal—surveyor not aggrieved party**

Plaintiff was not an aggrieved party and therefore had no status to petition for judicial review of defendant's action in dismissing charges by plaintiff that a named land surveyor had used substandard surveying practices, since plaintiff's own status as a registered land surveyor was not directly or indirectly affected by defendant's action with respect to the accused land surveyor; plaintiff's dispute with the adjoining property owner over the location of the boundary would not be affected by defendant's decision as to whether or not it would pursue disciplinary proceedings against the accused surveyor; and any decision of defendant in regard to plaintiff's charges could not adversely affect plaintiff's legal rights or interests.

**3. Mandamus § 4— investigation of registered land surveyor—complainant not entitled to mandamus**

Plaintiff was not entitled to a writ of mandamus to compel defendant board to conduct a hearing on charges brought by plaintiff against a fellow registered land surveyor where there was no dispute with respect to the fact that defendant investigated the charges and exercised its judgment in determining whether they were of such a nature as to require a hearing or whether the charges should be dismissed, and defendant thus performed the duty required of it by N.C.G.S. § 89C-22(b).

ON certiorari to review judgment of *Brannon, Judge.* Judgment entered 7 May 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 2 June 1987.

*Everett, Hancock, Nichols & Calhoun, by M. Jackson Nichols, for plaintiff appellant.*

*Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by Wright T. Dixon, Jr., for defendants appellees.*

MARTIN, Judge.

Plaintiff brought this civil action seeking a writ of mandamus to compel defendants to perform duties allegedly required of them by statute. Upon motion of defendants made pursuant to G.S. 1A-1, Rules 12(b)(1) and 12(b)(6), the trial court entered judgment dismissing the action. Plaintiff's petition for writ of certiorari to review the judgment was granted by this Court. We affirm the judgment of the trial court.

I

In the record on appeal filed by plaintiff, five assignments of error are listed, each of which is followed by a correspondingly numbered exception together with the reference "(R p__)." However, there are no exceptions set out in the record on appeal as required by App. R. 10(b)(1) which provides, in part, 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 "exceptions 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). In addition, plaintiff has disregarded

the mandatory requirements of App. R. 28(b)(5), which requires that each question presented in the brief be followed by "a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record."

[1] Ordinarily, a failure to comply with 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 the present case, however, dismissal of plaintiff's complaint was based, in part, upon the trial court's conclusion that it was without subject matter jurisdiction. Notwithstanding the absence of exceptions properly set out in the record on appeal, a party may present for review the question of subject matter jurisdiction by raising the issue in his brief. App. R. 10(a). In his brief, plaintiff contends that the trial court has jurisdiction of this action and that it erred by granting defendants' Rule 12(b)(1) motion for dismissal. Accordingly, we will consider the issue of subject matter jurisdiction to be properly before us and, exercising the discretion granted us by App. R. 2, will review the merits of this appeal notwithstanding appellant's rules violations.

II

The North Carolina State Board of Registration for Professional Engineers and Land Surveyors (Board) is a statutorily created body charged with the duty of administering the provisions of Chapter 89C of the North Carolina General Statutes, "The North Carolina Engineering and Land Surveying Act"; defendants Paris and Speir are, respectively, its chairman and executive secretary. On or about 13 February 1985, plaintiff delivered to the Board information concerning a survey made of certain land in Rockingham County by Kenneth Vaughn, a registered land surveyor. Plaintiff, who is also a registered land surveyor and professional engineer, owns land which adjoins that surveyed by Vaughn. The material was accompanied by a letter addressed to the Board in which plaintiff stated: "The information is provided for your use to consider whether the methods used by Mr. Vaughn to survey the land . . . comply with the Standards of Practice approved by your Board." In an attachment to the letter, plaintiff pointed out several alleged deficiencies in the Vaughn survey.

The documents were referred to a Review Committee of the Board and an investigation of plaintiff's allegations was conducted. On 30 May 1985, the Review Committee reviewed the case, concluded that there was insufficient evidence to support a charge of incompetence, gross negligence, or misconduct against Vaughn, and recommended that the case be closed. The recommendation of the Review Committee was approved by the Board. Defendant Speir notified plaintiff of the Board's action by letter dated 17 June 1985. Following a voluminous amount of correspondence about the matter between plaintiff, his attorney, various elected officials of the State, and defendants, plaintiff commenced the present action on 18 December 1985. Plaintiff alleged that the Board's action in closing the case without conducting a hearing with respect to his complaint against Vaughn was arbitrary, capricious, and in violation of the Board's statutory duty. He sought issuance of "a writ of mandamus according to the course and practice of the Court, requiring and compelling the Defendants to conduct a hearing" on his complaint against Vaughn, and an order permitting him to intervene in the hearing pursuant to G.S. 150A-23(d).

Defendants moved to dismiss the complaint pursuant to G.S. 1A-1, Rules 12(b)(1) and 12(b)(6). Upon hearing the motions to dismiss, the trial court apparently treated the complaint as a petition for judicial review of an administrative decision pursuant to Article 4 of Chapter 150A of the General Statutes (amended and recodified as G.S. 150B, Art. 4, effective 1 January 1986) and concluded that, although the Board's action in closing the case was the functional equivalent of a finding that plaintiff's charges against Vaughn were unfounded, the Board had not technically complied with G.S. 89C-22(b), which requires that all charges filed with the Board be heard unless dismissed by the Board as "unfounded or trivial." An order was entered remanding the matter to the Board for consideration *de novo* of plaintiff's charges against Vaughn and action with respect thereto as required by G.S. 89C-22(b). The trial court ordered that a copy of the Review Committee's recommendation and a copy of the Board's action taken on the recommendation be filed with the court.

Upon remand, the Review Committee reconsidered plaintiff's charges against Vaughn and submitted to the Board a written recommendation that the charges be dismissed as unfounded. The

recommendation was considered by the Board at a meeting on 13 March 1986 and, after a presentation by plaintiff and his attorney, the Board voted to dismiss the charges against Vaughn as "unfounded." A report of the Board's action was submitted to the trial court.

At a subsequent hearing on defendants' motions to dismiss, the trial court reviewed the Board's report and permitted the parties to call witnesses and offer evidence. At the conclusion of the hearing, the trial court dismissed the action. The court concluded that plaintiff is not an "aggrieved" person as defined in the then applicable Administrative Procedure Act, G.S. 150A, and that the court was therefore without subject matter jurisdiction to judicially review the Board's action. The court also concluded, as a separate ground for dismissal of the action for mandamus, that "the pleadings show on their face that the Board received, investigated, considered and did not abuse its discretion in refusing to conduct a hearing, . . . thus leaving no issue to be determined . . . and the matter should be dismissed under Rule 12(B)(6) [sic]."

III

[2] Plaintiff did not expressly petition for judicial review of an agency decision pursuant to G.S. 150A, Article 4, however, it is apparent from the record that the parties and the trial court considered the complaint as such a petition, and, on appeal, plaintiff contends that the action was properly before the superior court for review of the Board's decision. He assigns error to the court's conclusion that it was without subject matter jurisdiction to judicially review the Board's action because plaintiff is not "aggrieved" as that term is defined by G.S. 150A-2(6). He contends that he has status to petition for judicial review of the Board's action as an "aggrieved party": (1) because he is the complainant against Vaughn and suffered "procedural injury" by the denial of a hearing on the charges which he preferred; (2) because "he has legal interests as a property owner who was adversely affected by" Vaughn's allegedly improper survey; and (3) because, as a surveyor, he is required to comply with the Board's rules. We are not persuaded by his argument.

G.S. 89C-22(d) provides that a registrant who is aggrieved by a final decision of the Board in a disciplinary matter may appeal for judicial review as provided by G.S. 150A, Article 4. G.S. 150A-

43 establishes the requirements for judicial review of an agency decision. The statute requires that: (1) the plaintiff seeking review must be an aggrieved party; (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) the plaintiff 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). Whether one has standing to obtain judicial review of an administrative decision is a question of subject matter jurisdiction. *Poret v. State Personnel Commission*, 74 N.C. App. 536, 328 S.E. 2d 880, *disc. rev. denied*, 314 N.C. 117, 332 S.E. 2d 491 (1985). G.S. 150A-2(6) 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 Co.*, 259 N.C. 589, 595, 131 S.E. 2d 441, 446 (1963).

By preferring charges that Vaughn had violated standards of conduct promulgated by the Board, plaintiff undertook to persuade the Board to initiate disciplinary proceedings against Vaughn. His stated motivation for filing the complaint was his understanding that he, as a registered land surveyor, had a duty to report to the Board the use, by other registered land surveyors, of substandard surveying practices. Plaintiff's own status as a registered land surveyor, however, was not directly or indirectly affected by the Board's action with respect to Vaughn. Neither would plaintiff's dispute with the adjoining property owner over the location of the boundary be affected by the Board's decision as to whether or not it would pursue disciplinary proceedings against Vaughn. Any decision of the Board in regard to plaintiff's complaint could not adversely affect plaintiff's legal rights or interests and he is, therefore, without standing as a "person aggrieved" to obtain judicial review of the Board's decision.

IV

**[3]** The primary relief sought by plaintiff in his complaint was the issuance of a writ of mandamus compelling the Board to conduct a hearing on the charges against Vaughn. Although plaintiff,

due to his violations of the appellate rules, has not properly preserved an exception to the dismissal of his action for mandamus, we have considered the arguments in his brief addressed to that issue.

In ruling upon defendants' motions to dismiss, the trial court considered not only the pleadings, but also affidavits, the Board's report, and the testimony of four witnesses presented at the hearing. Where matters outside the pleadings are presented to and considered by the court on a Rule 12(b)(6) motion to dismiss, the motion will be treated as one for summary judgment pursuant to Rule 56. G.S. 1A-1, Rule 12(b); *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Summary judgment is appropriate where there are no triable issues of fact and one party is entitled to judgment as a matter of law. *Brenner v. The Little Red School House, Ltd.*, 302 N.C. 207, 274 S.E. 2d 206 (1981).

A writ of mandamus is "an order from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E. 2d 97, 99 (1971). "It will lie only against a party under present legal obligation to perform the act sought to be enforced, and only at the instance of a party having a clear legal right to demand performance, and then only when there is no other adequate remedy available." 8 Strong's North Carolina Index 3d, *Mandamus*, § 1 at 441-42. The statutory authority for the remedy of mandamus by civil action, formerly found in G.S. 1-511 *et seq.*, was repealed effective 1 January 1970, however, the remedy previously provided by the writ of mandamus remains available through the equitable remedy of mandatory injunction. *Sutton v. Figgatt, supra.* The substantive grounds for granting the relief requested as developed under former practice still control. *Fleming v. Mann*, 23 N.C. App. 418, 209 S.E. 2d 366 (1974).

G.S. 89C-22(b) provides:

> All charges, unless dismissed by the Board as unfounded or trivial, shall be heard by the Board or hearing officer as provided under the requirements of Chapter 150A of the General Statutes.

According to the statute, the Board must conduct a hearing upon charges preferred against a registrant unless the Board determines the charges to be "unfounded or trivial" and dismisses them. The determination of whether charges are "unfounded or trivial" or are of sufficient substance to merit a disciplinary hearing is a decision necessarily committed to the sound discretion of the Board.

Mandamus will lie to require a board or tribunal to exercise its discretion, but not to direct or compel the manner in which such discretion or judgment should be exercised. *Stocks v. Thompson*, 1 N.C. App. 201, 161 S.E. 2d 149 (1968). Mandamus "will not lie where the act to be done involves the exercise of judgment and discretion." *Id.* at 203, 161 S.E. 2d at 152, *quoting* 2 McIntosh, N. C. Practice 2d, § 2445(3). In the present case, all of the evidence establishes that the Board, upon receipt of the charges made by plaintiff against Vaughn, referred the information to its review committee for investigation and evaluation. The review committee subsequently rendered a written recommendation concerning the charges which was considered and adopted by the Board. The Board then determined that the charges were unfounded and dismissed them. While the evidence discloses that plaintiff and one of his witnesses disagree with the Board's judgment, there is no dispute with respect to the fact that the Board investigated the charges and exercised its judgment in determining whether they were of such a nature as to require a hearing or whether the charges should be dismissed. The Board having performed the duty required of it by the statute, defendants were entitled, as a matter of law, to judgment dismissing plaintiff's complaint for mandamus.

The order of the trial court dismissing plaintiff's action is

Affirmed.

Judges BECTON and COZORT concur.

STATE OF NORTH CAROLINA v. JEFFREY WAYNE SULLIVAN

No. 865SC1314

(Filed 7 July 1987)

1. **Criminal Law §§ 34.4, 85— evidence of prior crime—inadmissible character evidence—error not prejudicial**

Though evidence that defendant came into possession of a large quantity of dynamite the day before the shooting with which he was charged was admissible under N.C.G.S. § 8C-1, Rule 404(b), to show preparation and plan, evidence that he stole the dynamite was not admissible under Rule 608 to show defendant's character for untruthfulness; however, admission of that evidence was harmless error where defendant admitted shooting the victim, and his defense was that he lost control in a fit of frustration and/or confusion.

2. **Homicide § 30.2— failure to submit lesser offense of voluntary manslaughter—no error**

The trial court in a first degree murder case did not err in failing to instruct the jury on the lesser included offense of voluntary manslaughter, since the victim's role in defendant's frustrated romance or the victim's refusal to behave toward a woman in the way defendant wished could not have constituted adequate provocation for a shooting in the eyes of a rational trier of fact; there was no evidence of self-defense; and there was no evidence of an affray between defendant and the victim or that defendant saw a weapon or felt threatened by the victim.

3. **Criminal Law § 138.32— homicide—compulsion—failure to find mitigating factor—no error**

In a homicide prosecution where the evidence tended to show that defendant shot a man with whom he competed for the same woman's affections, there was no merit to defendant's contention that the trial court erred in failing to find as a mitigating factor during sentencing that defendant acted under a compulsion which was insufficient to constitute a defense but significantly reduced his culpability, since the trial court considered the testimony of a psychiatrist, but chose not to label defendant's action as one performed under a "compulsion."

APPEAL by defendant from *Strickland, Judge.* Judgment entered 13 June 1986 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 11 June 1987.

*Attorney General Lacy H. Thornburg, by Associate Attorney General Rodney S. Maddox, for the State.*

*Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.*

BECTON, Judge.

Defendant, Jeffrey Wayne Sullivan, was convicted of second degree murder by a jury and sentenced to forty years imprisonment. He appeals. We find no prejudicial error.

I

Defendant concedes that he pulled the trigger of the pistol that launched five bullets into the head and chest of Robert Hurd, causing Hurd's death on 28 October 1985. The only issue contested at trial was the defendant's degree of culpability.

Defendant was charged with first-degree murder. The State's evidence showed that the defendant and Hurd were competing for the affection of the same woman (Susan Northam). Defendant confronted Hurd on numerous occasions, including the day of the shooting, to implore Hurd to "leave Susan alone." On the day of the shooting, defendant met with Hurd at a Hardee's Restaurant where he talked to Hurd for approximately one hour in an attempt to convince Hurd to either bow out or join him in insisting that Susan choose between the two men. When Hurd refused to adopt defendant's strategy for handling Susan, defendant went to his car and retrieved a pistol, which he hid in his belt, and a recent letter from Susan, which he showed to Hurd as positive proof that Susan preferred defendant. Hurd, then sitting behind the steering wheel of his own automobile, laughed at the letter. Defendant then displayed the pistol, pointing it at Hurd's face from close range.

Defendant testified that at that point Hurd said, "go ahead, you won't shoot," raised his hands quickly, with something held in his right hand, and suddenly thrust himself backward into the car seat. Defendant then shot Hurd five times, and fled.

Defendant was armed with a shotgun, pipe bombs, and dynamite. His path of flight took him through the woods of Brunswick County; through South Carolina, where he acquired a driver's license under an assumed name, pawned the pistol he used in the shooting, and stole a license plate from another automobile; and ultimately to Arizona, where he was apprehended by the Arizona State Police in his own automobile, which still contained the pipe bombs, a shotgun, and a large quantity of dynamite.

Hurd was found dead in his automobile holding a Bic ink pen in his right hand.

II

Defendant was charged with first degree murder. The jury found him guilty of the lesser included offense of second degree murder. Defendant raises three issues on appeal: (1) the trial court erred in admitting any testimony regarding defendant's acquisition and disposition of the dynamite; (2) the trial court erred in denying defendant's request for jury instruction on voluntary manslaughter; and (3) the trial court abused its discretion in failing to find as a mitigating factor in sentencing that defendant acted under a compulsion when shooting Hurd.

A

**[1]** Fleet Rose Spell testified that on the day before defendant shot Hurd, defendant gave a box of dynamite to Spell, referring to it as an early Christmas present. Defendant testified in his own behalf, and during cross-examination the following colloquy occurred:

Q. The dynamite that was in your car at that time, how long had you had it in your car?

MR. BAIN: Objection.

COURT: Overruled.

A. Probably less than 24 hours.

Q. Where did you get it from?

MR. BAIN: Objection.

COURT: Overruled.

A. A dynamite shack out in between Phoenix and Navassa in Brunswick County.

Q. Was that your dynamite?

MR. BAIN: Objection.

COURT: Overruled.

A. I am not sure whose it was.

Q. Did you have permission from anyone to take that dynamite from that shack?

MR. BAIN: Objection.

COURT: Overruled.

A. No, sir.

Q. How did you get in the dynamite shack to get the dynamite?

MR. BAIN: Objection.

COURT: Overruled.

A. I used a key. It has two locks on the door and [I] used a key in the bottom lock and opened it up but the top lock was a different grove [sic] where the key wouldn't slide in and I drilled the top lock out.

Q. What do you mean you drilled the top lock out?

MR. BAIN: Objection.

COURT: Overruled.

A. I took a drill like you would drill a hole in this board here.

Q. You happened to have a drill in your car that you went to get to drill it out?

MR. BAIN: Objection.

COURT: Overruled.

A. I didn't understand.

Q. Where did you get the drill from?

A. From home.

Q. How did you happen to have it?

A. I got it so I could do that.

Q. So less than 24 hours before you had broken into that shack for the purpose of stealing the dynamite. Is that correct?

MR. BAIN: Objection.

COURT: Overruled.

A. Less than 24 hours before.

Defendant contends that all of the testimony regarding his theft of the dynamite was irrelevant to the charges against him and was inadmissible character evidence.

No doubt the most often cited rule and exception in the North Carolina Rules of Evidence is Rule 404(b) which provides 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. 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." N.C. Gen. Stat. Sec. 8C-1-404(b) (1986). The State argues that the evidence regarding the dynamite was admissible under Rule 404(b) to show that defendant planned Hurd's murder. The State showed that defendant threatened Hurd just two days before he shot Hurd, that defendant amassed a personal armory shortly before the shooting, and that he implied to his best friend that he was leaving town. Those facts taken together paint a plausible picture of defendant planning Robert Hurd's murder and his own escape. Thus the evidence that defendant came into possession of a large quantity of dynamite the day before the shooting was admissible under Rule 404(b) to show "preparation" and "plan."

However, the manner by which defendant came to possess the dynamite has no relationship to his possible intent to shoot Hurd. In other words, while the criminal act of possessing dynamite was admissible to show defendant's plan to kill Hurd, his criminal act of stealing the dynamite was not. The State argues that the evidence that defendant stole the dynamite was admissible to show his character for untruthfulness under Rule 608. N.C. Gen. Stat. Sec. 8C-1-608 (1986). We agree that certain varieties of theft may reflect an individual's character for untruthfulness. But the crimes most commonly approved of involve some use of deception, fraud, or trickery. *See State v. Morgan*, 315 N.C. 626, 635, 340 S.E. 2d 84, 90 (1986). Defendant's act of breaking the lock on a dynamite shack hardly reflects on his

character for untruthfulness. The trial judge erred in admitting the evidence that defendant stole the dynamite.

Although we find that it was error to admit the evidence that defendant stole the dynamite pursuant to either Rule 404(b) or Rule 608 on the theories presented by the State on appeal, we hold that there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." N.C. Gen. Stat. Sec. 15A-1443(a) (1983). *See also State v. Morgan.* The error was therefore harmless in light of the other evidence properly admitted at trial.

The defendant admitted shooting Hurd. His defense was that he lost control in a fit of frustration and/or confusion. The focus of the State's inquiry about the theft was the timing—that is, that it occurred less than 24 hours before the shooting—rather than the theft itself.

B

[2] Defendant next contends that the trial court erred in failing to instruct the jury on the lesser included offense of voluntary manslaughter. The sole factor determining the judge's obligation to give such an instruction is whether there is any evidence in the record which might support a conviction for the less grievous offense. *See State v. Childress*, 228 N.C. 208, 45 S.E. 2d 42 (1947). As defendant notes, voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation, or in the exercise of self-defense where excessive force under the circumstance is employed, or where the defendant is the aggressor bringing on the affray. Although a killing under these circumstances is both unlawful and intentional, the circumstances themselves are said to displace malice and to reduce the offense from murder to manslaughter. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978); *State v. Ferrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980); *State v. Lindsay*, 45 N.C. App. 514, 263 S.E. 2d 364 (1980).

Defendant cannot logically maintain that Hurd's role in his frustrated romance or that Hurd's refusal to handle the situation in the manner that defendant wished, could have constituted "adequate provocation" for a shooting in the eyes of a rational trier of fact. Similarly, there is no evidence of self-defense. The

record does not contain any evidence of an affray or physical confrontation between Hurd and defendant at any time. Eyewitnesses testified that the two men were engaged in an apparently calm discussion immediately before the shooting. One witness stated that Hurd was smiling moments before defendant shot him. Defendant testified that Hurd raised his hands suddenly before he shot him but nowhere did defendant assert that he saw a weapon or even felt threatened by Hurd. This assignment of error is overruled.

C

**[3]** Defendant finally contends that the trial court abused its discretion by failing to find as a mitigating factor during sentencing, that defendant acted under a compulsion which was insufficient to constitute a defense but significantly reduced his culpability. Defendant bases this contention on the testimony of Dr. Bob Rollins, a forensic psychiatrist. Dr. Rollins testified that in his opinion the defendant was suffering from a mental and emotional disorder at the time of the shooting which severely impaired his judgment and caused him to lose control. He said the condition was brought on by defendant's inability to cope with the relationship between himself, Northam and Hurd. He described defendant's pulling the trigger in response to Hurd's hand movements as "reflexive."

The defendant has the burden of establishing mitigating factors by a preponderance of the evidence. *State v. Hinnant*, 65 N.C. App. 130, 308 S.E. 2d 732 (1983), *cert. denied*, 310 N.C. 310, 312 S.E. 2d 653 (1984). Black's Law Dictionary defines a compulsion as "forcible inducement to the commission of an act, . . . the act of driving or urging by force or by physical or moral constraint." Black's Law Dictionary 260 (rev. 5th ed. 1979). Defendant's mental condition was described as an absence of control, rather than as a subordination. The trial judge considered Dr. Rollins' testimony, then found as a mitigating factor that "the defendant was suffering from a mental condition that was insufficient to constitute a defense by [sic] significantly reduced his culpability for the offense." Obviously the trial judge did not ignore the evidence of a mitigating factor; rather, he chose not to label defendant's action as one performed under a "compulsion." This assignment of error is overruled.

We find no prejudicial error.

Judges MARTIN and COZORT concur.

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GEORGE R. HUNT v. CHARLES J. HUNT AND AMELIA P. HUNT

No. 8610SC892

(Filed 7 July 1987)

1. **Animals § 2.1— vicious propensities—notice to family member as notice to owner**

Notice of an animal's vicious propensities to a family member of the animal's keeper or owner is usually notice to the owner or keeper.

2. **Animals §§ 2.1, 3— permitting dog to roam at large—vicious propensities—punitive damages as jury issue**

Permitting a dog which is known to have twice attempted without provocation to bite a human being to run loose in an area inhabited or occupied by other people is evidence of a reckless or wanton indifference to or disregard for the safety of others sufficient to support an award of punitive damages, and the trial court therefore erred in entering partial summary judgment for defendant eliminating the punitive damages issue from the case.

Judge JOHNSON concurring in the result.

Judge BECTON dissenting.

APPEAL by plaintiff from *Farmer, Judge.* Order entered 12 June 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 14 January 1987.

Defendants, who lived adjacent to a trailer park where plaintiff lived, had had a German Shepherd dog named Rocky since 1979. According to plaintiff on 8 March 1983, while he was walking in his own yard defendants' dog without provocation ran onto plaintiff's property, seized his hand and bit it. Plaintiff thereafter sued defendants for compensatory and punitive damages alleging, in gist, that though the dog had dangerous propensities, which defendants knew about, they recklessly disregarded his rights and safety by permitting the dog to run loose before it bit him. After discovery was completed, defendants moved under Rule 56, N.C. Rules of Civil Procedure for an order of partial summary judgment eliminating the punitive damages issue from the case, and

following a hearing the motion was granted. Plaintiff's appeal is from that order and the only parts of the record that bear directly upon its validity are statements by the defendants in their depositions and answers to interrogatories to the effect that at the time of the biting the dog was roaming at large with their permission, the dog was not vicious to their knowledge, and they had received no complaints about it attacking anybody before it bit plaintiff; and two affidavits offered by plaintiff which indicate that the dog was vicious and defendants knew it. The affidavit of Marsha G. Wells, a schoolteacher who had resided near defendants for several years, stated:

> 3. In the Spring of 1982 I observed Mr. Hunt's german shepherd dog, "Rocky", chasing my eight-year-old daughter and my seven-year-old niece across a field near our home. The dog was barking and snapping at them and they were extremely frightened.
>
> 4. At this time Mr. Hunt was outside his home and observed the dog chasing the children. He called the dog off and the children were able to get inside the trailer safely.
>
> 5. I later called Charles Hunt and spoke personally to him about this incident, and asked him to keep his dog locked up. I told him that my children were afraid to play in their yard, and told him that Rocky seemed to spend more time in the trailer park area than he did in his own yard. Mr. Hunt was agreeable, and stated that he would keep the dog out of the trailer park.
>
> 6. After this incident Rocky continued to be seen in the trailer park, and for the safety of my children I simply kept them inside most of the time. I also know that my husband, Clarence Wells, called Charles Hunt on more than one occasion to complain about the dog.

The affidavit of Kip L. Boatwright, an industrial worker who used to live in the trailer park near the defendants, stated:

> 3. . . . On one occasion, prior to March 8, 1983, their german shepard (sic) dog attacked me while I was outside my trailer. This attack was unprovoked by me. I had a 2 x 4 in

front of me when the dog attacked, and his teeth bit into the 2 x 4. I was literally put in fear of my life, and ran to safety inside my trailer.

4. One of Charles Hunt's family members came down and got the dog, and I told him what had happened and told him to keep the dog locked up—that it was dangerous—and that I would shoot it if it came on my property again. He didn't seem to care one bit, and the dog continued to roam the area after this incident.

*Jernigan & Maxfield, by John A. Maxfield and Leonard T. Jernigan, Jr., for plaintiff appellant.*

*Young, Moore, Henderson & Alvis, by David P. Sousa and Ralph W. Meekins, for defendant appellees.*

PHILLIPS, Judge.

**[1]** The foregoing materials when viewed in the light most favorable to the non-movant plaintiff, as our law requires, *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979), tend to show that defendants' dog was running loose with their consent when it bit plaintiff and that they had knowledge that the dog had tried to bite other persons on two prior occasions. Defendants, after arguing in their brief that the incident described in Mrs. Wells' affidavit involved only a harmless manifestation of spirit by the dog, conceded that the dog's conduct, as reported, could be "construed by a jury as amounting to vicious propensities." That concession was in order and we agree with it, since Mrs. Wells purportedly saw the events recounted, complained directly to the defendant Charles Hunt about them, and the word "snapping" when used in describing a dog's approach to a person is usually understood to mean that the dog was snapping its teeth in an effort to bite that person. But as to Boatwright's affidavit, which describes an even stronger manifestation of vicious propensities, defendants argue that it is insufficient to establish their knowledge of that incident because the affidavit does not state that Boatwright told one of the defendants about it. This argument is rejected. The affidavit states that Boatwright told a member of defendants' family about the attack and notice of an animal's vicious propensities to a family member of the animal's keeper or owner is usually notice to the owner or keeper. 3A

C.J.S. *Animals* Sec. 181(b), p. 676 (1973). This rule, applicable in all cases involving domestic animals, is particularly appropriate in cases involving dogs that are family pets; for such dogs are usually looked after by the entire family, at least to some extent, and what one family member knows about the exploits of the family dog is usually known by the other family members. Furthermore, notice to one joint keeper of a domestic animal is also notice to the other keeper, 3A C.J.S., *supra*, and the affidavit indicates that the family member that the affiant notified was one of the dog's joint keepers since he "came down and got the dog." Contrary to defendants' argument, that plaintiff neither alleged nor showed by other evidence that this family member who came for the dog was one of the dog's keepers, is immaterial at this juncture, because on a hearing for summary judgment the non-movant is not required to refute what the movant has not established, *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979), and defendants presented nothing to indicate that they were the dog's sole keepers. Nor is it fatal to the affidavit's validity that Boatwright did not identify the family member that he told about the dog attacking him. The hearing was not a trial governed by strict rules of evidence; it was a hearing to determine only whether plaintiff is incapable of producing valid evidence on the issue raised, and the affidavit indicates that plaintiff can present testimony that bears directly on the issue in dispute. Since Boatwright claims that he had been defendants' near neighbor and discussed the dog's attack with a family member, it is proper to assume that he knows that family member and can identify him at trial. For in a hearing for summary judgment the non-movant's materials are to be indulgently regarded, *Van Poole v. Messer*, 19 N.C. App. 70, 198 S.E. 2d 106 (1973), and the drastic remedy of summary judgment is not to be imposed because of overdrawn questions about the admissibility of evidence that may not even arise at trial, but only when it is clearly shown that the non-movant cannot produce the necessary evidence at trial, *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975), and no such showing has been made here. This is not to say, of course, that the admissibility of the evidence referred to herein has been established, but only that it has not been shown that any of the purported evidence is necessarily inadmissible.

Thus, the only question presented by this appeal is whether the evidence that defendants' dog was running loose with their

consent when it bit plaintiff and they had knowledge that on two prior occasions the dog had tried to bite somebody is sufficient to support a verdict against them for punitive damages. In determining the question we are guided by the following established principles of law: Punitive damages are not recoverable as a matter of right in any case, but only in the discretion of the jury when the evidence warrants. *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393 (1956). In personal injury cases sounding in negligence punitive damages cannot be awarded where the defendant's wrong amounted to no more than ordinary negligence; they can only be awarded where there is a higher level of misconduct, such as wilfulness, wantonness or recklessness that indicates at least an indifference to or a disregard for the rights and safety of others. *Henry v. Deen,* 310 N.C. 75, 310 S.E. 2d 326 (1984); *Hinson v. Dawson, supra; Huff v. Chrismon,* 68 N.C. App. 525, 315 S.E. 2d 711, *disc. rev. denied,* 311 N.C. 756, 321 S.E. 2d 134 (1984); *Robinson v. Duszynski,* 36 N.C. App. 103, 243 S.E. 2d 148 (1978); W. Prosser and W. Keeton, The Law of Torts Sec. 2, p. 10 (5th ed. 1984). To establish the liability of the owner or keeper of a domestic animal for injury done to a human being there must be evidence that the animal had previously indicated its dangerous propensities and the owner or keeper had knowledge of it. But notwithstanding the old adage about every dog "being entitled to one bite," a dog bite victim does not have to show that the dog bit someone else earlier; he only has to show that the dog had demonstrated its vicious inclinations by trying to bite someone and that the owner or keeper had knowledge of it. *Hill v. Moseley,* 220 N.C. 485, 17 S.E. 2d 676 (1941). "Knowledge of one attack by a dog is generally held sufficient to charge the owner with all its subsequent acts." 4 Am. Jur. 2d *Animals* Sec. 95, p. 343 (1964). Finally, the wrong or fault in such cases is the *keeping* of a dangerous animal and liability does not depend upon proof that the owner was negligent in permitting it to run loose or in letting it escape, *Hill v. Moseley, supra,* though permitting a dangerous animal to run loose is certainly a circumstance to be considered in determining whether the tort was aggravated.

[2] Applying the foregoing principles of law to the record presented, we conclude that the trial court erred in removing the punitive damages issue from the case. If an owner's knowledge that his dog on one prior occasion tried to bite somebody is

enough to establish his liability for a later biting, as it certainly is, it necessarily follows that much more than ordinary negligence is indicated when an owner permits a dog to run loose that to his knowledge has tried to bite a human being on two prior occasions; indeed, the record before us contains no suggestion that the defendants permitted the dog to run at large through mere oversight or inadvertence. Under the circumstances therefore it seems plain to us, and we so hold, that permitting a dog that is known to have twice attempted without provocation to bite a human being to run loose in an area habitated or occupied by other people is evidence of a reckless or wanton indifference to or disregard for the safety of others, sufficient to support an award of punitive damages. Thus, we vacate the order appealed from. Our only alternatives to so doing, it seems to us, are to hold either that punitive damages cannot ever be awarded in a dog bite case, or that before damages can be awarded in such a case there must be evidence that to the owner's knowledge the dog made three or more attempts to harm human beings before it succeeded. We decline to make either holding. Needless to say, our decision is necessarily based upon plaintiff's version of the facts, rather than that of the defendants, and which is the true version is not for us, but a jury, to say.

Vacated and remanded.

Judge JOHNSON concurs in the result.

Judge BECTON dissents.

Judge JOHNSON concurring in the result.

I concur in the result. If this case involved unsuccessful efforts by defendant to control his dog—for example, if defendant's dog had dug under a fence or broken loose from a chain—I would not hesitate to affirm the trial court. However, on the facts of this case, the jury should be allowed to determine whether the defendant's actions in allowing his dog to roam loose constitutes the kind of egregious behavior that would warrant an award of punitive damages. Whether defendant was twice or thrice warned is but a factor the jury should consider.

Judge BECTON dissenting.

This Court will one day be asked to decide a "worst-scenario" dog-bite case with particularly egregious facts impelling the submission of a punitive damage issue to the jury. That case is not before us today, and I therefore dissent. First, in my view, "the wrong or fault . . . is [not] the *keeping* of a dangerous animal," *ante* p. 327; rather, it is in allowing the dog to escape and bite someone. Second, considering the facts of this case, I believe the trial court properly granted summary judgment on the punitive damages issue since the forecast of evidence only showed that defendant kept a dog whose vicious propensities were known to him. That forecast of evidence indicates negligence, nothing more; it constitutes the elements of the tort of keeping a vicious dog. Punitive damages are not awarded for mere ordinary negligence.

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STATE OF NORTH CAROLINA v. LARRY SPENCER EDGERTON

No. 869SC979

(Filed 7 July 1987)

**1. Criminal Law §§ 135.8, 138.14— notice to defendant of aggravating circumstances—question not before court on appeal**

A defendant charged with first degree murder is not entitled to notice of the evidence the State intends to offer in support of and to prove aggravating circumstances. Whether a defendant convicted of voluntary manslaughter is entitled to notice of aggravating circumstances which the State will attempt to prove was not before the court on appeal where defendant, after he was convicted of voluntary manslaughter, did not move to be apprised of the aggravating circumstances upon which the State would rely.

**2. Criminal Law § 76.7— voluntariness of confession—sufficiency of findings**

There was no merit to defendant's contention that his confession to a law enforcement officer should have been excluded because the evidence did not support the court's finding that the confession was made at the scene but rather only supported a finding that it was made a couple of days later at the courthouse in violation of his *Miranda* rights.

**3. Criminal Law § 76.5— effect of prior confession on subsequent confession—necessity for hearing and findings**

The trial court erred in failing to hear evidence and make findings concerning defendant's first confession and its influence on his second confession, the voluntariness of the first confession, and, if involuntary, whether the sec-

ond confession was made under the same prior influence; furthermore, since the second confession was the only confession admitted into evidence, and defendant's testimony contradicted the confession, it could not be said that admission of the second confession without appropriate findings was harmless error. N.C.G.S. § 15A-1443(b).

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 21 April 1986 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 11 February 1987.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General John R. Corne, for the State.*

*D. Bernard Alston for defendant appellant.*

GREENE, Judge.

Defendant was indicted for discharging a firearm into occupied property, assault with a deadly weapon with intent to kill inflicting serious injury and first degree murder (N.C.G.S. Secs. 14-34.1, 14-32(a) and 14-17 respectively). He appeals from a jury verdict of guilty of discharging a firearm into an occupied building, assault with a deadly weapon inflicting serious injury and voluntary manslaughter. He was sentenced to a total of 21 years imprisonment.

Defendant's arrest and conviction arise from an altercation in a trailer park located in Franklin County. At trial, the State claimed and defendant admitted he fired a shotgun into the trailer of William Bumpers. Defendant's evidence tended to show he shot into the trailer only after someone in the trailer shot at him. State's evidence tended to show defendant fired the first shot. It also tended to show he stood next to the trailer, broke a window, intentionally thrust the barrel of the shotgun into the interior of the trailer and fired. Fred Alston, Jr., and William Bumpers were both hit with shot from one firing of defendant's shotgun. Alston was also hit a second time. Alston died from his injuries. Bumpers survived.

The issues before us are: 1) whether a defendant for whom the State seeks the death penalty has the right to be apprised of the aggravating circumstances upon which the State will rely at the sentencing hearing and 2) whether the trial court erred in admitting defendant's confession.

I

[1] Defendant assigns error to the trial court's denial of his pretrial motion to compel the State to apprise him of the aggravating circumstances it would rely on in seeking the death penalty under N.C.G.S. Sec. 15A-2000. Defendant argues the court's denial violated his constitutional right to due process.

The aggravating circumstances which may be considered during the sentencing phase in a capital case are limited to the eleven listed in N.C.G.S. Sec. 15A-2000(e). In *State v. Taylor*, 304 N.C. 249, 257, 283 S.E. 2d 761, 768 (1981), the Supreme Court held that N.C.G.S. Sec. 15A-2000(e) gave sufficient notice to meet the constitutional requirements of due process and a defendant is not entitled to notice of the evidence the State intends to offer in support of and to prove aggravating circumstances. Thus, under *Taylor*, the trial court in the case before us did not err by denying defendant's pre-trial motion.

While at the time defendant made his pre-trial motion for apprisal he was charged with the capital offense of first degree murder, he was convicted of the lesser included offense of voluntary manslaughter. Voluntary manslaughter is not a capital offense but rather is a Class F felony, N.C.G.S. Sec. 14-18, for which the maximum sentence is 20 years imprisonment, N.C.G.S. Sec. 14-1.1(a)(6), and the presumptive sentence is six years. N.C.G.S. Sec. 15A-1340.4(f)(4).

The list of aggravating circumstances the court can consider in imposing a sentence for a Class F felony include, but are not limited to, those listed in N.C.G.S. Sec. 15A-1340.4(a)(1). After defendant was convicted of voluntary manslaughter, he did not move to be apprised of the aggravating circumstances upon which the State would rely to increase defendant's sentence beyond the presumptive sentence of six years. Therefore, the issue of whether a defendant is entitled to notice of aggravating circumstances which the State will attempt to prove under N.C.G.S. Sec. 15A-1340.4(a) is not before this Court. Defendant's assignment of error is overruled.

II

At trial, defendant objected to the admission of a confession the State contended he made to Franklin County Chief Deputy

Astor Bowden. The court conducted a *voir dire* to determine its admissibility:

Deputy Tommy Perry testified that when he arrived on the scene at Bumpers' trailer, he was told defendant had shot into the trailer. He found defendant at his mother's trailer not far from Bumpers'. Defendant had worked at the local jail in years past and knew Deputy Perry; he complied when Deputy Perry told him he wanted to talk with him and asked him to get into the patrol car. Once defendant had gotten into the car, Deputy Perry asked defendant if he had shot into the trailer. Defendant answered that he had. Deputy Perry then told him not to say anything else and that he needed to talk with Chief Deputy Bowden who was still at Bumpers' trailer. He did not question defendant further but drove him to Bumpers' trailer. During the ride, they both sat in the front seat of the patrol car. At no time did Deputy Perry read defendant the *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Once at Bumpers' trailer, Deputy Perry left defendant alone in the car and went into the trailer to get Chief Deputy Bowden. When Chief Deputy Bowden came to the patrol car, he sat in the back seat behind defendant and began to advise him of his rights by reading him the *Miranda* warnings. Deputy Perry remained with defendant during this time. His testimony and Chief Deputy Bowden's testimony was that even while the warnings were being read to him, defendant talked about the shooting in great detail. Chief Deputy Bowden testified that defendant told him Fred Alston, Jr., "jumped" him while he was passing by Bumpers' trailer. A fight ensued. After getting away from Alston, defendant went to his brother's trailer nearby and procured a shotgun and Alston also got a gun. Defendant returned to Bumpers' trailer and shouted at Alston to come out. When Alston did not appear, defendant broke a window, stuck the shotgun in and fired. Alston then opened the door and fired at him, upon which defendant fired through the window a second time. Then defendant's brother came up and took the gun from him.

Defendant testified during *voir dire* that when Deputy Perry approached him at his mother's trailer, he told him to get into the car and sit down. Deputy Perry asked him questions and they discussed the shooting and what led up to it. Deputy Perry never

gave him *Miranda* warnings, and after their discussion, they drove to the courthouse where defendant was held in the county jail. He was questioned by Chief Deputy Bowden for the first time one or two days after his arrest. At that time, he was read the *Miranda* warnings, but although he requested an attorney, Chief Deputy Bowden and other police officers continued to interrogate him and he responded.

Following the *voir dire*, the court made the required written findings of fact and conclusions of law. *State v. Moore,* 275 N.C. 141, 153, 166 S.E. 2d 53, 62 (1969). It found the confession had been made to Chief Deputy Bowden at the scene of the shooting and concluded that it had been made freely, voluntarily and knowingly. The confession was admitted into evidence.

Defendant puts forth two arguments as to why the confession to Chief Deputy Bowden should have been excluded from the evidence. He first argues it should have been excluded because the evidence did not support the court's finding that it was made at the scene but rather only supports a finding that it was made at the courthouse in violation of his right to counsel under *Miranda,* 384 U.S. 436. His second argument is that even if the confession was made at the scene, it was nonetheless involuntary.

A

[2] In determining whether the court's findings regarding the admissibility of the confession are supported by the evidence, we are required to consider not only the evidence adduced at the *voir dire* hearing, but all the evidence in the record. *Davis v. North Carolina,* 384 U.S. 737, 741-42 (1966); *State v. McCloud,* 276 N.C. 518, 529, 173 S.E. 2d 753, 761 (1970). The trial court's findings of fact are conclusive on appeal if they are supported by competent evidence in the record. *State v. Massey,* 316 N.C. 558, 573, 342 S.E. 2d 811, 820 (1986).

Defendant raises no issue that the testimony from Deputy Perry and Chief Deputy Bowden concerning where the confession was made was incompetent, he only contends it was inaccurate. There was competent evidence to support the court's finding that the confession was made at the scene of the shooting. We find no merit in defendant's contention that the court should have found the confession was made in the county jail one or two days after his arrest.

B

**[3]** Defendant next contends his confession to Chief Deputy Bowden should have been excluded because it was involuntary. He argues it was the product of a confession he made to Deputy Perry before Chief Deputy Bowden spoke to him in the patrol car and because his confession to Deputy Perry was involuntary, his confession to Chief Deputy Bowden was also involuntary and therefore inadmissible.

The appellate record reveals very little evidence concerning defendant's alleged confession to Deputy Perry. During direct examination, Deputy Perry testified he told Chief Deputy Bowden the defendant "had admitted to me that he was the one that did the shooting at the Bumpers' trailer." There was no objection from defendant's counsel; however, the court interrupted the examination and called counsel to the bench. The bench discussion does not appear in the record, but immediately thereafter, the court struck Deputy Perry's statement from the record.

Any extrajudicial statement of an accused which admits his guilt of an essential part of the offense charged is a confession. *State v. Williford*, 275 N.C. 575, 582, 169 S.E. 2d 851, 857 (1969).

> It is well settled "that where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence." *State v. Moore*, 210 N.C. 686, 188 S.E. 421 [1936]. The burden is upon the State to overcome this presumption by clear and convincing evidence. *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 [1968] . . . .

*State v. Silver*, 286 N.C. 709, 718, 213 S.E. 2d 247, 253 (1975).

When evidence before the court tends to show a defendant made a confession prior to the confession to which he objects, the court is required to determine whether the defendant made a prior confession and whether it was voluntary. *State v. Silver*, 286 N.C. 709, 213 S.E. 2d 247 (1975). If the court finds there was a prior confession and it was not voluntary, then the court must determine whether the second confession was made under the "same prior influence" which made the first confession involun-

tary. *State v. Edwards,* 284 N.C. 76, 199 S.E. 2d 459 (1973); *State v. Edwards,* 282 N.C. 201, 192 S.E. 2d 304 (1972); *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968). The State must overcome the presumption of "same prior influence" by showing something akin to surrendering the signed written confession to the defendant or informing him that his prior confession will not be used against him. *State v. Edwards,* 284 N.C. at 79, 199 S.E. 2d at 461. When there is conflicting evidence on any of the issues, the trial court is required to make findings; although the better practice is to always make findings. *State v. Biggs,* 289 N.C. 522, 529-30, 223 S.E. 2d 371, 376 (1976).

The record shows defendant confessed to Deputy Perry. There was conflicting evidence of how extensive the confession was and under what circumstances it was made. The court excluded from the jury's consideration the only record evidence of its content, but the record does not provide us with the reason for the exclusion.

It was incumbent on the trial court during *voir dire* to hear evidence concerning the prior confession and its influence on the second confession, make findings of fact and determine if the prior confession was voluntary or involuntary and, if involuntary, whether the second confession was made under the same prior influence. Because the court failed to do this, it is impossible for us to determine whether defendant's confession to Chief Deputy Bowden was correctly admitted. Therefore, we must hold its admission error.

We do not express an opinion whether defendant's confession to Chief Deputy Bowden was voluntary or involuntary. However, defendant would not be entitled to a new trial on the ground that its admission was error, if we can determine here that the error was harmless beyond a reasonable doubt. N.C.G.S. Sec. 15A-1443(b).

Even when there is other evidence sufficient to support a conviction, it cannot be said beyond a reasonable doubt that the erroneous admission of a defendant's confession is harmless error, *State v. Blackmon,* 280 N.C. 42, 50, 185 S.E. 2d 123, 128 (1971), unless some evidence, just as weighty, was properly admitted into evidence, such as another confession substantially similar to the confession erroneously admitted. *State v. Siler,* 292 N.C. 543,

552, 234 S.E. 2d 733, 739 (1977). Defendant claimed he shot at Alston in self-defense. His confession to Chief Deputy Bowden tended to show he went looking for Alston and shot first. Since it was the only confession admitted into evidence at defendant's trial and defendant's testimony contradicted the confession, we cannot say the admission of the confession to Chief Deputy Bowden was harmless error. Therefore, we reverse defendant's conviction and remand for new trial.

III

Defendant raised other issues which are unlikely to arise at the new trial, and we decline to address them.

New trial on each charge.

Judges WELLS and EAGLES concur.

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STATE OF NORTH CAROLINA v. BOBBY WALKER

No. 8612SC1266

(Filed 7 July 1987)

**Larceny § 5.1— possession of recently stolen goods—items in defendant's custody and control—sufficiency of evidence**

Evidence was sufficient to convict defendant of felonious larceny based on the doctrine of possession of recently stolen property where such evidence tended to show that, two days after a disc player and other items were stolen, defendant was observed standing with his half-brother and other men at the rear of an automobile; in the open trunk was a disc player; defendant knew the disc player was in the trunk of the car in which he was a passenger; witnesses testified that defendant had engaged in a conversation with individuals, pointing at the stolen item while within reach of it; the half-brother's claim that the stolen item belonged to him was for the jury to weigh; the scratching off of the serial number was evidence that the disc player was contraband; and evidence of defendant's wallet in pants found in the half-brother's spare bedroom with other stolen items was corroborative evidence of defendant's knowledge of and association with the stolen goods.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Hight, Judge.* Judgment entered 8 October 1986 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 5 May 1987.

*Attorney General Lacy H. Thornburg by Special Deputy Attorney General Guy A. Hamlin.*

*James R. Parish for defendant appellant.*

COZORT, Judge.

The defendant in this case was tried at the 6 October 1986 Criminal Session of Superior Court in Cumberland County on a bill of indictment charging him with second-degree burglary, felonious larceny, conspiracy to commit second-degree burglary, and felonious possession of stolen goods. On the day of the trial, the State elected not to proceed on the conspiracy charge, and it was dismissed. The defendant was tried on the remaining three charges, and the jury returned verdicts of guilty on each. After trial, the court granted the State's motion to arrest judgment on the charge of felonious possession of stolen goods. Judgment was entered on 8 October 1986 for an active prison sentence of twenty years. The defendant gave notice of appeal in open court.

The defendant attacks both the larceny and burglary convictions with the contention that the State failed to offer sufficient evidence of these offenses to justify the trial court's denial of his motions to dismiss. At trial the State relied on the doctrine of recent possession to establish the guilt of the defendant. We hold that the State met its burden by presenting sufficient evidence of each element of the doctrine.

The evidence for the State tends to show that between the hours of 6:15 p.m. on 18 February 1986 and 7:30 the next morning, the residence of Michael Hathaway and Peter Iandoli was broken into. Approximately $7,000.00 worth of personal property, including a Hitachi compact disc player, was stolen from their home. Neither Hathaway nor Iandoli was present at the time of the entry and theft.

Two days later, on 21 February 1986, two plainclothes investigators with the Fayetteville Police Department, Officers David P. Bloomfield and Richard F. Mica, witnessed the defendant and Wilfred Hayes, defendant's half-brother, standing with three or four other men, at the rear of a yellow Ford. This automobile was parked with its trunk open on Person Street in downtown Fayetteville. From the officers' vantage point, they were able to

view the contents of the trunk and therein saw a Hitachi compact disc player.

The officers observed the defendant talking with the other men. Although the officers were not close enough to hear any of the conversation, they did see the defendant, during the conversation, "making hand gestures back and forth to himself and to the Hitachi disc player." The defendant was close enough to the disc player that "if he had bent over, he could have touched it." There is evidence that Hayes may have spoken to the other men during this colloquy, but the defendant "appeared to be doing most of the talking." The defendant and Hayes left the Person Street location in the yellow Ford with Hayes driving. Officers Bloomfield and Mica followed and soon after stopped the vehicle. Upon opening the trunk, the officers found the Hitachi disc player that the defendant had been pointing to on Person Street. The serial numbers had been scratched out, but it was subsequently positively identified by Captain Iandoli, by other distinguishing characteristics, as having been taken from his home. At the scene of the stop, Hayes was asked by the officers if the disc player belonged to him, and he replied, "Yes, it's mine; that VCR is mine." The defendant and Hayes were arrested.

Police officers obtained a search warrant for 1407 Briarcliff Drive, Hayes' residence. The search of this address resulted in the recovery of numerous items taken from Captain Iandoli's home. In the "spare" bedroom, officers found a TV, cassette player, AM/FM receiver, and stereo speakers. A twin-size bed in that room appeared to have been slept in, and on the floor beside the bed was a dark blue pair of pants and a brown shirt. In the pants pocket was a wallet that contained court papers with the defendant's name on them. When questioned by officers, the defendant admitted that he had spent one night at the Briarcliff address but did not admit when he stayed there, that he was residing there, or that he had stayed more than one night. The defendant presented no evidence at trial.

The doctrine of recent possession is a rule of law which creates the presumption that one in possession of recently stolen property is guilty of its wrongful taking and of the unlawful entry associated with that taking. *State v. Maines*, 301 N.C. 669, 673, 273 S.E. 2d 289, 293 (1981). "When the doctrine of recent posses-

sion applies in a particular case, it suffices to repel a motion for nonsuit and defendant's guilt or innocence becomes a jury question." *Id.* at 674, 273 S.E. 2d at 293. It follows then, that if the facts of this case satisfy the elements that comprise the doctrine of recent possession, the appellant's assignments of error must fail. Justice Huskins, writing for a unanimous court in *Maines*, summarized that the presumption generated by the doctrine of possession of recently stolen property arises

> when, and only when, the State shows beyond a reasonable doubt: (1) the property described in the indictment was stolen; (2) the stolen goods were found in the defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; (citations omitted); and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt. (Citation omitted.)

*Id.*

The defendant does not contest the sufficiency of the State's evidence on the first and third elements; his argument focuses on the second element, and he contends that the State's evidence was insufficient to prove beyond a reasonable doubt that the items were found in his custody and under his control. We find no merit to defendant's argument.

Whether a defendant's possession of stolen articles will support an inference that he committed the crime that dispossessed the rightful owner

> does not require that the defendant have the article in his hand, on his person or under his touch. It is sufficient that he be in such physical proximity to it that he has the power to control it to the exclusion of others and that he has the intent to control it. (Citations omitted.) One who has the requisite power to control and intent to control access to and use of a vehicle or a house has also the possession of the known contents thereof.

*State v. Eppley*, 282 N.C. 249, 254, 192 S.E. 2d 441, 445 (1972). "The 'exclusive' possession required to support an inference or

presumption of guilt need not be a sole possession but may be joint. *State v. Holloway*, 265 N.C. 581, 144 S.E. 2d 634 (1965)." *Maines*, 301 N.C. at 675, 273 S.E. 2d at 294. Before the inference can arise when more than one person has access to the stolen property,

> the evidence must show the person accused of the theft had complete dominion, which might be shared with others, over the property or other evidence which sufficiently connects the accused person to the crime or a joint possession of co-conspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all. Stated differently, for the inference to arise, the possession in defendant must be to the exclusion of all persons not party to the crime.

*Id.* We find the State's evidence of defendant's actions concerning the Hitachi disc player in the trunk of the car on Person Street to be sufficient evidence of the defendant's custody of and control over the stolen property.

Citing *Maines*, defendant contends the evidence was insufficient because the State relied on "stacked" inferences. We disagree with the defendant's argument because our review of the evidence shows that the State did not rely on stacked inferences. The facts herein are distinguishable from those of *Maines*. In *Maines*, the State's evidence showed only that the defendant was the driver of a car which contained stolen goods. There were three other passengers, including the owner of the car, in the car at the time. There was no other evidence linking defendant to the stolen goods. The Supreme Court found the evidence insufficient because two inferences were stacked:

> [T]o convict defendant, the jury must infer that defendant possessed the goods from the mere fact of driving with the owner of the car seated beside him and then infer he was the thief who stole them based on the possession of recently stolen goods. We hold this criminal conviction cannot stand because it is based on stacked inferences. "Inference may not be based on inference. Every inference must stand upon some clear or direct evidence, and not upon some other inference or presumption." (Citations omitted.)

> In order to take the case against defendant Maines to the jury, the State must show something more than was shown here. For example, the State could make a case sufficient to repel nonsuit by evidence of an attempt by defendant as driver to avoid the officer when he approached the car, or evidence that the property is obviously contraband, or some evidence at the crime scene indicating defendant had been there, or evidence of constant association with or customary use of the car by defendant. No legal presumption that defendant was a thief could arise from merely driving the car with the owner present. (Citation omitted.)

*Maines*, 301 N.C. at 676, 273 S.E. 2d at 294-95. Chief Justice Branch, discussing *Maines*, in the text of *State v. Voncannon*, succinctly analyzed Maines' conviction as "improper because to permit conviction would have been to allow the inference of guilt based on recent possession to be stacked on the inference of possession based on the control of the car." 302 N.C. 619, 622-23, 276 S.E. 2d 370, 372 (1981).

This case presents a different set of circumstances. Unlike *Maines*, the defendant here knew that the disc player was in the trunk of the car in which he was a passenger. Witnesses testified that defendant had engaged in a conversation with individuals, pointing at the stolen item, while within reach of it.

Hayes' claim that the stolen item belonged to him was for the jury to weigh, especially in light of Hayes having improperly identified the item as a "VCR." Furthermore, the scratching off of the serial number is evidence that the disc player is contraband, thus meeting the "something more" test enunciated in *Maines*. Additionally, the evidence of defendant's wallet in pants found in Hayes' "spare" bedroom with other stolen items, though insufficient alone to convict the defendant, is corroborative evidence of the defendant's knowledge of and association with the stolen goods.

In sum, we find sufficient evidence to support the jury's finding of defendant's guilt. In the defendant's trial, we find

No error.

Judge GREENE concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the doctrine of recent possession as laid down in *State v. Voncannon*, 302 N.C. 619, 276 S.E. 2d 370 (1981), *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981), *State v. Parker*, 268 N.C. 258, 150 S.E. 2d 248 (1966), and *State v. Johnson*, 60 N.C. 235 (1864), does not apply to the State's evidence in this case, and without the doctrine the convictions have no evidentiary support. I vote to vacate both convictions.

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FEDERAL LAND BANK OF COLUMBIA, PLAINTIFF v. SAMUEL LIEBEN, DEFENDANT, CROSS-CLAIM PLAINTIFF AND THIRD PARTY PLAINTIFF v. GOODSON FARMS, INC., J. MICHAEL GOODSON AND ESTATE OF GREYLIN R. GOODSON, DEFENDANTS AND CROSS-CLAIM DEFENDANTS v. EDWARD F. MOORE, THIRD PARTY DEFENDANT

No. 874SC43

(Filed 7 July 1987)

**1. Uniform Commercial Code § 33— promissory note signed by defendants—liability—no evidence of suretyship**

The trial court properly entered summary judgment for plaintiff against defendants as principal debtors on a promissory note where the note provided that it was "the joint and several obligation of all persons executing it. Given under the hand and seal of the undersigned"; defendants signed the note directly below this language on the lower right-hand corner of the document; and there is a presumption that, nothing else appearing, a person who signs his or her name on the right-hand bottom corner of the face of a promissory note is a maker of that note and is primarily liable thereon. Furthermore, defendants failed to present any forecast of evidence to support their defense that they were sureties, not makers, and an assertion that their farm received proceeds of the loan and that they did not personally receive any funds was irrelevant to the suretyship defense.

**2. Attorneys at Law § 7.4— promissory note—attorneys' fees—notice of intention to enforce provisions**

In an action to recover on a promissory note there was no merit to defendants' contention that they did not receive notice pursuant to N.C.G.S. § 6-21.2 that plaintiff was going to enforce the attorneys' fees provision of the note which they had executed, since plaintiff sent a letter addressed to the president of defendants' farm corporation, a letter addressed to one defendant, and a letter to defendants' attorney, each giving notice of intent to collect at-

torneys' fees; furthermore, the last letter to defendants' attorney was not rendered ineffectual because litigation had already commenced or because it was sent to the attorney rather than to defendants themselves.

APPEAL by defendants Goodson from *Barefoot, Judge.* Order entered 11 August 1986 in Superior Court, DUPLIN County. Heard in the Court of Appeals 9 June 1987.

On 20 August 1985, plaintiff Federal Land Bank of Columbia (hereinafter, Land Bank) filed this action to recover on a guaranty executed by defendant Samuel Lieben guaranteeing payment of a loan of $1,350,000 made by Land Bank to Goodson Farms, Inc., J. Michael Goodson, and Greylin R. Goodson. Defendant Lieben responded to the complaint with a motion to add as additional defendants Goodson Farms, Inc., J. Michael Goodson, and the Estate of Greylin R. Goodson (hereinafter, defendants Goodson). The court allowed this motion, and Land Bank filed an amended complaint alleging that defendants Goodson, as principal debtors on a promissory note in favor of Land Bank, had failed and refused to pay the annual installment on the debt according to the terms of the note and that the entire indebtedness was currently due and payable. Defendant Lieben filed a timely answer to the amended complaint which denied liability and asserted various defenses, including a counterclaim, crossclaims, and a third party complaint against Edward F. Moore. Defendants Goodson filed timely answers to plaintiff's amended complaint and to defendant Lieben's crossclaims. Plaintiff Land Bank filed a timely reply to defendant Lieben's defenses and counterclaim, and third party defendant Moore filed a timely answer to defendant and third party plaintiff Lieben's third party complaint.

On 10 July 1986, plaintiff Land Bank filed a motion for summary judgment. On 11 July 1986, defendant Lieben filed a motion for summary judgment. By order dated 11 July 1986, the trial court denied both motions. Thereafter, on plaintiff Land Bank's motion for reconsideration of the order, the trial court granted summary judgment in favor of plaintiff Land Bank against defendants Goodson.

*Wells, Blossom and Burrows, by Richard L. Burrows, for plaintiff-appellee.*

*Kornegay and Head, P.A., by G. Russell Kornegay, III, for defendant-appellants.*

PARKER, Judge.

In the case before us, the trial court granted summary judgment in favor of plaintiff Land Bank against defendants Goodson Farms, Inc., J. Michael Goodson, and the Estate of Greylin R. Goodson, entitling plaintiff to recover of defendants Goodson, jointly and severally, the entire loan balance due, plus interest and attorneys' fees. Still to be determined in the trial court are (i) plaintiff Land Bank's claim based on the guaranty executed by defendant Lieben; (ii) defendant Lieben's counterclaim against plaintiff Land Bank for breach of fiduciary duty and for fraud; (iii) defendant Lieben's crossclaims against defendants Goodson for subrogation, for breach of fiduciary duty, and for fraud; and (iv) defendant and third party plaintiff Lieben's third party complaint against third party defendant Moore for indemnification. The trial court's order did not certify that there was "no just reason for delay" of appellate review of the order pursuant to G.S. 1A-1, Rule 54(b). Therefore, this appeal is interlocutory and subject to dismissal unless this Court determines that defendants Goodson would be deprived of a substantial right if the order is not reviewed before final judgment. G.S. 1-277(a) and 7A-27(d)(1). *See also Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

The "substantial right test" for appealability requires consideration of the particular facts of the case and the procedural context of the order from which appeal was taken. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). The case before us involves the respective liabilities among the alleged obligors, sureties, guarantors, indemnitor, and payee on a loan of $1,350,000. Because of the complexity of the facts and the possibility of inconsistent verdicts in separate trials, the order allowing summary judgment as to fewer than all defendants affects a substantial right. *See Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982).

In this appeal, defendants Goodson contend that the trial court erred in entering summary judgment because there was a triable issue of fact as to whether J. Michael Goodson and Greylin R. Goodson signed the note as joint obligors or as sureties. Defendants Goodson further contend that as sureties on the note they may assert as a defense discharge due to a material alteration of the underlying debt. After a careful review of the record,

we conclude that defendants Goodson have failed to sufficiently set forth specific facts showing there is a genuine issue for trial. We, therefore, affirm the order of the trial court granting summary judgment for plaintiff Land Bank against defendants Goodson.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). When the party bringing the action moves for summary judgment, that party must establish that the facts as to each essential element of its claim are in its favor and that there is no genuine issue of material fact with respect to any essential element. *Development Corp. v. James*, 300 N.C. 631, 637, 268 S.E. 2d 205, 209 (1980). Once the movant has met this burden, the "adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." G.S. 1A-1, Rule 56(e). If the non-movant fails to so respond, summary judgment is properly entered against him. *Id.*

**[1]** Attached to plaintiff Land Bank's amended complaint and marked as "Exhibit D" was a promissory note in the amount of $1,350,000, dated 31 July 1979, designating as payee plaintiff Land Bank. The last paragraph of the note states the following:

> This note is the joint and several obligation of all persons executing it. Given under the hand and seal of the undersigned.

Directly below this language, on the lower right-hand corner of the document, were the following endorsements: "Goodson Farms, Inc., by J. Michael Goodson, president"; "J. Michael Goodson"; and "Greylin R. Goodson." In their answer to the complaint, defendants Goodson admitted that "Exhibit D," the promissory note, and other documents were attached to the complaint and asserted, "These documents are the best evidence of their contents." In support of its motion for summary judgment, plaintiff Land Bank submitted, attached to the affidavit of a Land Bank employee, "Exhibit P-3," a copy of the Land Bank form which was mailed to defendants Goodson approving their loan subject to a list of "Special Conditions." The list of special conditions included the requirement, "That the note evidencing the loan be signed not

only by Goodson Farms, Inc., but also by J. Michael Goodson and wife, Greylin R. Goodson as joint and several makers of the note, along with the corporation."

In his affidavit, filed 21 July 1986, J. Michael Goodson stated, "That Greylin R. Goodson and I signed the Note which is the subject of this action only because the Federal Land Bank required our signatures for the loan to be closed." In his deposition of 20 February 1986, the following exchange took place between J. Michael Goodson and plaintiff Land Bank's attorney:

Q. This is the promissory note you executed on July 31, 1979–

A. Correct.

Q. –to the Federal Land Bank for $1,350,000?

A. Correct.

Q. You signed it, did you not, as president of Goodson Farms and individually, and your wife, Mrs. Greylin R. Goodson, also signed it at that time, did she not?

A. Yes.

The presumption is that nothing else appearing, a person who signs his or her name on the right-hand bottom corner of the face of a promissory note is a maker of that note and is primarily liable thereon. *O'Grady v. Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978); *Bank v. Jonas*, 212 N.C. 394, 193 S.E. 265 (1937); *Trust Co. v. York*, 199 N.C. 624, 155 S.E. 263 (1930); *Howell v. Roberson*, 197 N.C. 572, 150 S.E. 32 (1929). However, this presumption may be rebutted by parole evidence that the signer of the note is a surety and that the creditor knew at the time he received the note that the signer of the note was signing as a surety. *Davis v. Alexander*, 207 N.C. 417, 177 S.E. 417 (1934); *Furr v. Trull*, 205 N.C. 417, 171 S.E. 641 (1933); *Barnes v. Crawford*, 201 N.C. 434, 160 S.E. 464 (1931); *Welfare v. Thompson*, 83 N.C. 276 (1880). The burden is on the signer to show by the greater weight of the evidence that he signed the note as a surety and not as maker as shown on the face of the note. *Trust Co. v. York*, 199 N.C. at 629, 155 S.E. at 265. *See also Bank v. Jonas, supra.*

Defendants Goodson, in support of their contention that they signed the note as sureties, assert that Goodson Farms received

the proceeds of the loan evidenced by the promissory note and "That neither Greylin R. Goodson nor [J. Michael Goodson] have personally received any funds whatsoever from the monies that were loaned by the Federal Land Bank of Columbia to Goodson Farms, Inc." This contention is irrelevant to the suretyship defense. *See Fidelity Bank v. Garner*, 52 N.C. App. 60, 277 S.E. 2d 811 (1981). Moreover, the record reveals that the bulk of the loan evidenced by the note was used to liquidate prior loans made by Land Bank to J. Michael Goodson and Greylin R. Goodson individually.

On the undisputed facts, plaintiff Land Bank has established the essential elements of its claim; defendants Goodson have failed to present any forecast of evidence to support their defense that they were sureties, not makers, or to raise any genuine issue of material fact to defeat plaintiff's claim.

**[2]** Finally, defendants Goodson contend that they did not receive notice pursuant to G.S. 6-21.2 that plaintiff Land Bank was going to enforce the attorneys' fees provision of the note that they executed. This contention is without merit.

General Statute 6-21.2(5) requires the holder of a note such as the one at issue in this case, "after maturity of the obligation by default or otherwise," to "notify the maker . . . that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that such maker . . . has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees." There is ample evidence in the record that plaintiff Land Bank has complied with this provision.

Attached to plaintiff Land Bank's amended complaint were letters marked "Exhibit C-2" and "Exhibit C-3," each dated 28 June 1985 and signed by an officer of plaintiff Land Bank. "Exhibit C-2" was addressed to the president of Goodson Farms, Inc. "Exhibit C-3" was addressed to defendant J. Michael Goodson. The final paragraph of each letter stated the following:

> Unless a satisfactory arrangement is made within fifteen days from the date of this letter, I shall, without further notice to you, proceed with foreclosure. If foreclosure proceedings are initiated, we will enforce the provisions of our

note and deed of trust regarding payment of attorney's fees in addition to the outstanding balance due.

In their answer, defendants Goodson admitted that "Exhibits C-2" and "C-3" were attached to the complaint and stated, "It is further admitted that the plaintiff has purported to declare the entire indebtedness due and payable." On 1 August 1986, ten days prior to the trial court's order granting summary judgment and attorneys' fees, plaintiff Land Bank's attorney sent to defendants Goodson's attorney, by certified mail, return receipt requested, a letter again giving notice of plaintiff Land Bank's intent to seek attorneys' fees unless defendants Goodson paid the outstanding balance within five days.

The letters to defendant J. Michael Goodson and to Goodson Farms, Inc. gave sufficient notice that if no "satisfactory arrangements" were made within fifteen days from receipt of the letter, plaintiff Land Bank intended to enforce the terms of the promissory note regarding attorneys' fees. The letter of 1 August 1986 to defendants Goodson's attorney, after litigation of plaintiff Land Bank's claims had commenced, more carefully tracked the language of G.S. 6-21.2(5). This latter letter was not rendered ineffectual because litigation had already commenced. *See Gillespie v. DeWitt*, 53 N.C. App. 252, 280 S.E. 2d 736, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 832 (1981). Moreover, once litigation has begun, notice of a party's intent to collect attorneys' fees pursuant to G.S. 6-21.1 is not defective because it is sent to a party's attorney of record. *See Trust Co. v. Larson*, 22 N.C. App. 371, 206 S.E. 2d 775, *cert. denied*, 286 N.C. 214, 209 S.E. 2d 315 (1974).

For the foregoing reasons, after careful examination of the record, we affirm the order of the trial court granting summary judgment.

Affirmed.

Judges ARNOLD and JOHNSON concur.

WADESBORO RAINBOW FARM SUPPLY, INC. v. FRANK LOOKABILL

No. 8720DC53

(Filed 7 July 1987)

**Consumer Credit § 1— agricultural supplies charged to open-end account—applicability of Truth in Lending Act**

The Truth in Lending Act applied to an open-end credit transaction between the parties which allowed defendant to purchase agricultural supplies on credit, since the regulation which applied at the time of the transaction allowed the creditor to give the federally required disclosures or the disclosures required by state law, but not to give no disclosures, as contended by plaintiff.

APPEAL by plaintiff from *Beale, Judge*. Judgment entered 4 November 1986 in District Court, ANSON County. Heard in the Court of Appeals 9 June 1987.

Plaintiff Wadesboro Rainbow Farm Supply, Inc. instituted this action on 6 May 1985 to recover $5,992.39 allegedly owed by defendant on an open-end credit account. The sum sought represented a principal amount of $3,656.01, plus $2,336.38 in interest charged at an eighteen percent annual rate.

Defendant Frank Lookabill answered, asserting that plaintiff had violated the federal Truth in Lending Act, 15 U.S.C. § 1601, *et seq*. (1982), and regulations promulgated thereunder, in particular "Regulation Z," 12 C.F.R. § 226 (1981). Defendant sought dismissal of the plaintiff's action, plus the statutory penalty for violation of the Act and attorney's fees as provided for in 15 U.S.C. § 1640 (1982).

Both parties filed motions for summary judgment with accompanying affidavits. After hearing, the trial court ruled that plaintiff had violated the Truth in Lending Act. The court entered judgment requiring defendant to pay plaintiff the principal amount of the debt only, offset by the maximum statutory penalty of $1,000. Further, the court ordered that plaintiff pay the costs of the action plus a $1,000 attorney's fee to defendant. Plaintiff appeals.

*Dawkins and Lee, P.A., by W. David Lee, for plaintiff-appellant.*

*Henry T. Drake for defendant-appellee.*

PARKER, Judge.

The only question presented by this appeal is whether the transaction involved herein was subject to the Truth in Lending Act. Plaintiff contends on this appeal that the Truth in Lending Act did not apply to the transaction in this case and, thus, the district court erred in entering summary judgment for defendant. We disagree.

There is no conflict as to any fact relevant to a determination of this case. The undisputed facts are that plaintiff and defendant entered into an open-end credit transaction in March of 1982. The purpose of this transaction was to allow defendant to purchase agricultural supplies on credit. There was no written or oral agreement entered into at the time concerning interest payable on the unpaid balance of the account. The account had a principal balance of $3,656.01. Plaintiff began billing defendant in June 1984 and on the invoice was the language, "Terms: Net 30 days, Finance Charge: 1½% per month (Annual rate of 18%) will be added to past due balance." Plaintiff sent defendant monthly invoices for seven months, June through December 1984, while receiving one payment of $250 from defendant.

The undisputed facts show that if the Act did cover this transaction, plaintiff failed to comply with its requirements for disclosure of the terms for charging interest and the statutory penalty and attorney's fee were justified. *See* 15 U.S.C. §§ 1640(a)(2), (3) (1982). *See also Addison v. Britt*, 83 N.C. App. 418, 350 S.E. 2d 158 (1986). For an open-end credit plan, such as the transaction involved here, the Truth in Lending Act requires that, before an account is opened, the creditor must disclose to the recipient of the credit the terms under which the credit is being extended. These "material disclosures" as they are defined by the Act include, among other things, the method of determining the amount of any finance charges and the periodic interest rates used in making that determination, and the method of determining the balance upon which a finance charge will be imposed. 15 U.S.C. § 1637(a) (1982).

As the Truth in Lending Act read in March of 1982, the date of the transaction in this case, extensions of credit for agricultural purposes under $25,000, like the one involved here, were covered by the Act. Agricultural credit extensions in excess of

$25,000 were exempt. The Act had been amended in March of 1980 to exempt all extensions of credit for agricultural purposes from the Act, but that amendment was not to take effect until October 1982. The Board of Governors of the Federal Reserve Board was authorized to:

> . . . prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

15 U.S.C. § 1604(a) (1982).

After Congress amended the Truth in Lending Act in 1980 to exempt all credit extensions for agricultural purposes from the Act's coverage, effective in October 1982, concerns arose over the possible confusion resulting from the change. When the Truth in Lending Act was enacted in 1968, it preempted all existing state laws regulating consumer credit transactions, including those regulating agricultural credit transactions for less than $25,000. Then, when the amendment exempting all agricultural credit transactions from the Act's coverage went into effect in October 1982, those state laws regulating agricultural transactions were no longer preempted. To accommodate those creditors who had been complying with the Truth in Lending Act since 1968 and who needed a transition period before complying with state laws, the Board of Governors, pursuant to its statutory authority, adopted the following regulation:

> 226.3. *Exempted Transactions.* . . . (e) *Agricultural credit transactions.* Credit transactions primarily for agricultural purposes, including real property transactions, in which the amount financed exceeds $25,000.00 . . .; and, *at the creditor's option,* any credit transaction primarily for agricultural purposes in which the amount financed does not exceed $25,000.00.

12 C.F.R. § 226.3(e) (1981) (emphasis added). The regulation was effective from 21 May 1980 until it was amended on 1 October

1982 to exempt all agricultural credit transactions. The regulation was intended to "facilitate compliance" with the Act by providing creditors with the option of continuing to provide the disclosures required by federal law or to immediately begin providing the disclosures required by applicable state laws.

Plaintiff contends that this regulation, in effect at the time of the transaction involved in this case, enabled plaintiff to exempt the credit transaction between plaintiff and defendant from coverage under the Truth in Lending Act at its option. This interpretation urged by plaintiff conflicts with the interpretation given the regulation by the Board of Governors of the Federal Reserve Board, the agency which promulgated the regulation.

When the amended regulation was first proposed, it was published in the Federal Register accompanied by the agency's explanation of the regulation. That explanation was:

> The Board recognizes that an immediate mandatory exemption of agricultural credit might create problems for some creditors. Certain state statutes may require disclosures for agricultural credit that are inconsistent with those currently mandated by Regulation Z. Those inconsistent state laws have been preempted by federal Truth in Lending laws to the extent of their inconsistency. Once agricultural credit is exempted from federal Truth in Lending law, those state laws will again apply. Unless creditors subject to those laws are given an adequate opportunity to prepare to comply with them, the creditors would have to either temporarily suspend all agricultural lending that was previously exempt from the state laws or be in noncompliance with state laws. On the other hand, creditors not affected by such state laws would be required to continue to comply with Regulation Z during any delay in implementing the exemption.
>
> Therefore, the amendment to § 226.3 of Regulation Z gives creditors two options: (1) Cease making federal Truth in Lending disclosures for agricultural credit and comply with any previously preempted state laws; or (2) continue providing federal Truth in Lending disclosures and disregard any inconsistent state law. This election accommodates all creditors extending agricultural credit and comports with the

> intent of the simplification act to allow creditors two years to conform their practices to the new act.

45 Fed. Reg. 33,599 (1980). The interpretation by the Board of Governors of its own regulation is entitled to great weight unless it is clearly erroneous or inconsistent with the statute. *Bingler v. Johnson*, 394 U.S. 741, 89 S.Ct. 1439, 22 L.Ed. 2d 695 (1969).

The explanation makes clear that the "option" available to the creditor was to give the federally-required disclosures *or* the disclosures required by state law. There was not an option to give no disclosures, as plaintiff would have us hold. Further, in our view, the regulation as interpreted by plaintiff would have been outside the authority of the Board of Governors to enact. Congress had specifically stated in the Truth in Lending Act, as it read until 1 October 1982, that credit transactions for agricultural purposes under $25,000 were subject to the Act's requirements. 15 U.S.C. § 1603(5) (1974). A regulation which made compliance with the Act completely optional at the whim of the creditor for agricultural credit extensions under $25,000 would be contrary to the express language of the statute and, thus, void. *See Zuber v. Allen*, 396 U.S. 168, 90 S.Ct. 314, 24 L.Ed. 2d 345 (1969).

We conclude, therefore, that the district court properly applied the Truth in Lending Act to the transaction involved here. The statutory penalty was justified and was, in fact, mandatory once a violation of the Act was found. *Addison v. Britt, supra.* The award of attorney's fees was also proper. The judgment of the district court is

Affirmed.

Judges ARNOLD and JOHNSON concur.

PEOPLES SECURITY LIFE INSURANCE COMPANY v. MILTON S. HOOKS

No. 877SC48

(Filed 7 July 1987)

1. **Contracts § 31; Master and Servant § 11.1— recruiting another's employees— no cause of action recognized**

North Carolina does not recognize a claim for hiring or recruiting another employer's employee whose employment contract is terminable at will.

2. **Master and Servant § 11.1— no interference with former employer's policyholders—claim for breach of employment contract properly dismissed**

Plaintiff's complaint was insufficient to state a claim for breach of a provision of an employment contract regarding refraining from solicitation or servicing of policyholders or interference with existing policies where plaintiff alleged only that defendant enticed sufficient numbers of its employees to leave its employ so that it could no longer service its existing policyholders.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 19 November 1986. Heard in the Court of Appeals 9 June 1987.

This is a civil action instituted by plaintiff, Peoples Security Life Insurance Company, against defendant Milton S. Hooks.

On 13 December 1985, plaintiff filed a two-count complaint against its former agency manager. Count I of the complaint alleged, *inter alia,* that defendant resigned, took employment with another insurance company, intentionally induced 15 of plaintiff's insurance agents and 4 of its sales managers to "terminate their contracts of employment with plaintiff," and employed them with a rival insurance company. Count I further alleged that defendant had knowledge "that most of the contracts which plaintiff had with its insurance agents provided that in the event the agents left the employment of the company they agreed for a period of one year 'not to work upon or in any way interfere with any part of any account or territory upon which the Agent previously worked in the same State for the Company.' "

Count II of plaintiff's complaint, in pertinent part, alleged the following:

22. That pursuant to the terms of said contract between plaintiff, Peoples Security Life Insurance Company, and the defendant, Milton S. Hooks, Hooks agreed that upon termination he would, for a period of one year, refrain from 'solicita-

> tion or servicing of policyholders of the company . . . or in any way interfering with existing policies.'
>
> 23. That the defendant, Milton S. Hooks, has interfered with plaintiff's business in violation of his contract by hiring 15 of plaintiff's insurance agents, 4 of its sales managers and the District Marketing Specialist, thereby inducing them to terminate their employment with the plaintiff and leaving plaintiff without adequate means of servicing its policyholders and collecting its premiums.
>
> 24. That as a result of the defendant's breach of his contract, the plaintiff has been damaged for the cost of replacing agents in an amount in excess of $285,000.00 and for the loss of policy contracts in an amount in excess of $500,000.00.

Plaintiff, in its prayer for relief, sought to recover $785,000.00 in damages for Counts I and II, and $1,000,000.00 in punitive damages pursuant to Count I of its complaint.

On 10 February 1986, defendant filed a motion to dismiss for failure to state a claim upon which relief may be granted, an answer, and a counterclaim. Defendant, in his answer, generally denied the pertinent allegations of plaintiff's complaint and incorporated a copy of his contract into his answer.

In his counterclaim defendant alleged that plaintiff failed to pay him $7,711.20 representing payment for three weeks and one day of vacation that he was entitled to. Defendant further alleged that plaintiff's withholding of vacation pay due him constitutes a violation of G.S. 95-25.12.

On 19 November 1986, the trial court filed a judgment that dismissed plaintiff's complaint for failure to state a claim upon which relief may be granted. Rule 12(b)(6), N.C. Rules Civ. P. Plaintiff appeals.

*Mount White Hutson & Carden, P.A., by James H. Hughes, for plaintiff appellant.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr. and Jim W. Phillips, Jr., for defendant appellee.*

JOHNSON, Judge.

Plaintiff argues on appeal that the trial court erred in dismissing both counts of its complaint for failure to state a claim upon which relief may be granted. We disagree.

The test a trial court must apply when ruling on a motion to dismiss a complaint for failure to state a claim upon which relief may be granted is whether the pleading, when liberally construed, is legally sufficient. *E.g., Fowler v. Williamson*, 39 N.C. App. 715, 251 S.E. 2d 889 (1979). "To prevent a Rule 12(b)(6) dismissal, a party must (1) give sufficient notice of the events on which the claim is based to enable the adverse party to respond and prepare for trial, and (2) 'state enough to satisfy the substantive elements of at least some *legally recognized claim.*' " *Hewes v. Hewes*, 61 N.C. App. 603, 604, 301 S.E. 2d 120, 121 (1983) (emphasis supplied) (quoting *Orange County v. Dep't of Transportation*, 46 N.C. App. 350, 378-79, 265 S.E. 2d 890, 909 (1980)). A dismissal pursuant to Rule 12(b)(6), N.C. Rules Civ. P. is proper when the complaint reveals on its face that some fact essential to plaintiff's claim is missing. *Schloss Outdoor Adv. Co. v. The City of Charlotte*, 50 N.C. App. 150, 272 S.E. 2d 920 (1980).

Count I

[1] In the case *sub judice* Count I of plaintiff's complaint purports to state tortious interference with contract as a claim for relief. There are no cases reported in the state of North Carolina wherein a North Carolina Court has recognized a claim for hiring or recruiting another employer's employee whose employment contract is terminable at will. To the contrary, two Supreme Court opinions stand for the opposite of such a proposition. *See Haskins v. Royster*, 70 N.C. 601 (1874). *See also Morgan v. Smith*, 77 N.C. 37 (1877).

Plaintiff relies upon *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954) and *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). Although both *Smith* and *Childress* involved claims based upon malicious interference with employment contracts terminable at will, neither case was decided in the context of a competitive business setting wherein a competitor recruited the competition's employees whose contracts were terminable at will. We decline to extend the Supreme Court's holdings in *Smith* and

*Childress* to the distinguishable facts in the case *sub judice*. The trial court did not err in dismissing plaintiff's complaint for failure to state a claim upon which relief may be granted.

Count II

**[2]** Count II of plaintiff's complaint purports to state breach of an employment contract as a claim for relief. After thoroughly reviewing the pleadings we fail to find any factual allegations to support a claim for a breach of defendant's employment contract with plaintiff.

The pertinent contractual provision that plaintiff claims defendant breached is as follows:

> District manager shall thereafter for a period of one year refrain from further solicitation or servicing of policyholders of the Company or F & C of any district to which District Manager has been assigned, or in any way interfering with existing policies.

Plaintiff, in its complaint, did not allege that defendant solicited or serviced any of plaintiff's policyholders. There were no allegations that any of plaintiff's former agents solicited or serviced any of plaintiff's policyholders. The only allegation with which plaintiff attempted to support its claim for breach of the noncompetition covenant was that due to the departure of its employees it was left "without adequate means" to service its existing policyholders. We hold that Count II of plaintiff's complaint fails to allege facts sufficient to state a claim upon which relief may be granted. *Hewes, supra.*

We conclude that the trial court did not err in dismissing plaintiff's complaint for failure to state a claim upon which relief may be granted.

Affirmed.

Judges ARNOLD and PARKER concur.

EDITH B. SUMBLIN v. CRAVEN COUNTY HOSPITAL CORPORATION, A CORPORATION; COASTAL NEURO-PSYCHIATRIC ASSOCIATES, P.A., A CORPORATION; ELLIS F. MUTHER AND CLARENCE BALLENGER

No. 873SC77

(Filed 7 July 1987)

1. **Insane Persons § 1; False Imprisonment § 2.1— defendant confined to psychiatric ward of hospital—no false imprisonment**

The trial court properly dismissed plaintiff's complaint for false imprisonment based on her contention that she was unlawfully restrained by defendant hospital's neuro-psychiatric personnel because defendant failed to comply with statutory guidelines for involuntary commitment, since plaintiff's private physician ordered her placed in the neuro-psychiatric ward; the physician was not an agent of defendant; it was the physician, if anyone, and not the nurses or hospital personnel who sought involuntarily to commit defendant; and absent obvious negligence by the physician or danger to the patient, neither of which was present here, defendant's personnel were obligated to follow the instructions of the treating physician.

2. **Hospitals § 3.2— one patient molested by another—standard of care among hospitals—showing not required**

The trial court erred in granting summary judgment for defendant hospital on plaintiff's negligence claim based on her contention that she was molested by a fellow patient, since the alleged breach of duty did not involve the failure to render professional nursing or medical services requiring special skills, and it was therefore not necessary for plaintiff to establish the standard of care prevailing among hospitals in like situations.

APPEAL by plaintiff from *Herbert O. Phillips, III, Judge.* Order entered 22 September 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 9 June 1987.

*Jeffrey S. Miller for plaintiff appellant.*

*Sumrell, Sugg & Carmichael by Fred M. Carmichael and Rudolph A. Ashton, III, for defendant appellees.*

BECTON, Judge.

Plaintiff, Edith Sumblin, brought this action against defendant, Craven County Hospital Corporation (the Hospital), alleging that the Hospital (1) falsely imprisoned her by transferring her to its psychiatric ward, and (2) negligently failed to protect her from assaults by another patient. The trial judge granted the Hospital's motion for summary judgment on both causes of action. Sum-

blin appeals. We affirm as to the action for false imprisonment but reverse the trial judge's grant of the motion for summary judgment on the negligence action.

I

The parties agreed to the following facts. Edith Sumblin was hospitalized at Craven County Hospital on 10 June 1983 at the direction and under the care of her private physicians, Doctors Ballenger and Muther. Dr. Ballenger is a neurologist, and Dr. Muther is a psychiatrist. On 11 June 1983, Dr. Ballenger instructed Sumblin's attending nurses to transfer her to the Hospital's Neuro-Psychiatric ward. The nurses complied. Sumblin was not permitted to leave the psychiatric ward until 13 June 1983.

During her stay on the ward Sumblin was accosted by another patient known to her only as "Gerald." Sumblin alleged that "Gerald" often attempted and sometimes succeeded in putting his hands underneath her gown and grabbing her legs and clothing. She said she protested against these molestations and complained to the nurses. She further alleged that the nurses did not respond promptly or adequately to her complaints. Sumblin alleged that she suffered emotional injury as a result of "Gerald's" molestations.

The Hospital in their Answer maintained that the nurses responded timely and reasonably to Sumblin's complaints.

II

**[1]** Sumblin first contends that the trial judge erred in granting the Hospital's motion for summary judgment on her false imprisonment action. We disagree. False imprisonment is the involuntary and unlawful restraint of a person against her will without legal process. Strong's North Carolina Index, 3d Ed. False Imprisonment Sec. 1. Sumblin contends that she was unlawfully restrained by the Hospital's neuro-psychiatric personnel because the Hospital failed to comply with statutory guidelines for involuntary commitment.

The guidelines for involuntary commitment were provided in N.C. Gen. Stat. Chapter 122 (1985) which was repealed in 1986 and replaced by N.C. Gen. Stat. Chapter 122C (1986). The old and new statutes essentially set out the same procedures for involuntary

commitment. Assuming no emergency, commitment may be accomplished only after a magistrate or clerk of court issues an order to take custody. Such an order is based on a sworn affidavit by the party, which may be a physician, seeking commitment. In the instant case, Sumblin's private physician ordered her placed in the neuro-psychiatric ward. The physician was not an agent of the Hospital. It was the physician, if anyone, and not the nurses or hospital personnel who sought to involuntarily commit plaintiff. Thus the conduct of the hospital personnel was not unlawful in this case. Absent obvious negligence by the physician or danger to the patient, hospital personnel are obligated to follow the instructions of a treating physician. *See Byrd v. Marion General Hospital, et al.*, 202 N.C. 337, 162 S.E. 738 (1932). We find nothing in the complaint, affidavits or depositions to suggest that the physician's instructions were obviously negligent or dangerous to Sumblin. Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, fail to establish a genuine issue as to any material fact. *Johnston County Tuberculosis Ass'n, Inc. v. N.C. Tuberculosis and Respiratory Disease Ass'n, Inc.*, 15 N.C. App. 492, 190 S.E. 2d 264 (1972). The Hospital did not unlawfully restrain Sumblin. This assignment of error is overruled.

III

**[2]** Sumblin next contends that the trial judge erred in granting the Hospital's summary judgment motion on her negligence action. We agree. Sumblin alleged that she was repeatedly molested by "Gerald" during her stay on the neuro-psychiatric ward. She stated that she complained to the nurses on 11 June but they did not help; instead, they advised her to give him a cigarette and told her he would not harm her. On 12 June Sumblin's daughters visited her. They testified on deposition that "Gerald" sat at their mother's feet, followed her around the ward, and fondled and molested her during their visit. They complained to the nurses but the nurses told them that they could not manhandle the patients. "Gerald's" assaultive behavior continued for several hours. Sumblin's daughters contended that the nurses responded only after they threatened to handle "Gerald" themselves.

The Hospital contends that its personnel responded reasonably under the circumstances. The nurses' statements on deposi-

tion reflected a more thorough, ongoing attempt to insure that "Gerald" did not harm Sumblin and that "Gerald" himself was not harmed. Although the disagreement between the parties' versions of the events is obvious, the question whether the dispute reaches a *material* fact can only be resolved after we determine what standard of care should apply to hospital personnel in this case. The Hospital contends that the standard for health care providers should apply. It further argues that because Sumblin failed to offer an expert witness to establish a professional standard of care, she could not show that the Hospital performed negligently. We disagree. In *Burns v. Forsyth County Hospital Authority*, 81 N.C. App. 556, 344 S.E. 2d 839 (1986), this Court stated that a hospital, much like the proprietor of any public facility, owes a duty to its invitees to protect the patient against foreseeable assaults by another patient. "When the alleged breach does not involve the rendering or failure to render professional nursing or medical services requiring special skills, it is not necessary to establish the standard of due care prevailing among hospitals in like situations in order to develop a case of negligence." *Norris v. Rowan Memorial Hospital*, 21 N.C. App. 623, 626, 205 S.E. 2d 345, 348 (1974). Such is the case here. Sumblin alleged that she was assaulted by another patient. No special skill was required to protect her in this case. The trier of fact must decide whether hospital personnel acted as reasonably prudent persons under the circumstances.

The judgment is

Affirmed in part, reversed in part, and remanded.

Judges MARTIN and COZORT concur.

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IN RE: THE ESTATE OF DORA JONES TUCKER TRULL, DECEASED

No. 8720SC82

(Filed 7 July 1987)

**Courts § 6.3— appeal from clerk to superior court—timeliness**

The judge of the superior court erred in denying respondent's motion to dismiss the appeal from the order of the clerk denying petitioner's motion to

have respondent removed as executor of an estate, since the notice of appeal was not timely given as provided by N.C.G.S. § 1-272.

Judge PHILLIPS concurring in the result.

APPEAL by respondent from *Wood, Judge*. Orders entered 12 September 1986 in Superior Court, STANLY County. Heard in the Court of Appeals 10 June 1987.

This appeal arises from the denial of a motion made before the Clerk of Superior Court pursuant to G.S. 28A-9-1 to revoke the letters testamentary of respondent, Jonas H. Tucker. The record before us discloses the following uncontroverted facts: Dora Trull died testate on 20 March 1986. Respondent was designated as executor of her estate in her will and qualified as executor on 10 April 1986. On 22 May 1986, the petitioner, Calvin C. Tucker, filed a motion before the clerk to have respondent removed as executor. On 18 June 1986, after a hearing, the clerk announced his decision to deny the motion and directed the attorney for the respondent to prepare the order. On 7 July 1986, the clerk signed and filed the order denying the motion. The order recites that it was entered by the clerk on 18 June 1986. On 18 July 1986, the movant filed a written notice of appeal to the superior court from the order of the clerk signed and filed on 7 July 1986.

On 12 September 1986, after a hearing, Superior Court Judge William Z. Wood entered an order denying respondent's motion to dismiss the appeal to the superior court. On the same date, Judge Wood made findings of fact, conclusions of law and entered an order removing respondent as executor of the Estate of Dora Trull. Respondent appealed to this Court.

*William C. Tucker for petitioner, appellee.*

*David A. Chambers for respondent, appellant.*

HEDRICK, Chief Judge.

The determinative question raised on this appeal is whether the judge of the superior court erred in denying respondent's motion to dismiss the appeal from the order of the clerk denying petitioner's motion to have respondent removed as executor of Dora Trull's estate. If the judge of the superior court erred in denying the motion to dismiss the appeal from the clerk, he had no

authority to enter the order removing the executor, and such order must be vacated.

Appeals from the clerk to the judge of superior court in probate matters are controlled by G.S. 1-272, which, in pertinent part, provides:

> An appeal must be taken within 10 days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof.

Upon an appeal from an order of the clerk in a probate proceeding to remove an executor or administrator, the jurisdiction of the judge of superior court is derivative. *In re Estate of Lowther*, 271 N.C. 345, 156 S.E. 2d 693 (1967). Jurisdiction in these matters cannot be exercised by the judge of superior court except upon appeal. *Id.*

Petitioner, respondent, and the judge of the superior court in this case seem to attach great significance to whether the order of the clerk denying petitioner's motion to remove respondent as executor of the estate was entered on 18 June 1986 or 7 July 1986. While the answer to this question is not determinative of the issue raised by this appeal, we are of the opinion that the clerk's order was "entered" when the clerk announced after the hearing on 18 June 1986 that he would deny the petition. The party aggrieved by the ruling, the petitioner, was present and even excepted to the order and he, in our opinion, had ten days thereafter to give notice of appeal pursuant to G.S. 1-272. Assuming, however, that the order was entered on 7 July 1986, the notice of appeal given on 18 July 1986 was not given within ten days.

The superior court judge in his order denying the motion to dismiss the appeal from the clerk indicated that the time within which to give notice of appeal did not begin to run until the clerk filed the order denying the petition and mailed it to the appellee in accordance with G.S. 1A-1, Rule 58. This rule has no application

in this case. Rule 58 applies to judgments and orders entered in civil cases in district and superior court. G.S. 1A-1, Rule 1.

We hold the superior court judge erred in not allowing the respondent's motion to dismiss the appeal from the clerk because notice of appeal was not timely given as provided by G.S. 1-272 and that the superior court had no authority to enter the order removing the executor of the estate. Such order must be vacated, and this proceeding will be remanded to the superior court for entry of an order dismissing the appeal from the clerk and reinstating respondent as executor of the estate of Dora Trull.

Vacated and remanded.

Judge ORR concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in the result.

While I agree that respondent's appeal from the Clerk's order was not timely in any event and thus the Superior Court had no jurisdiction to hear the matter, I am of the opinion that good grounds existed for Judge Wood's finding that the order was "entered" on 7 July 1986.

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IN THE MATTER OF JAMES S., A JUVENILE

No. 873DC167

(Filed 7 July 1987)

**Infants § 9.1— guardian ad litem—relief from duties upon filing of adoption petition**

The trial court did not err in relieving a guardian ad litem of her responsibilities and denying her motion to gain access to the child's adoption records, since the guardian had no responsibilities once the adoption petition was filed.

APPEAL by Respondent from *Hunter, Judge.* Order entered 18 November 1986 in District Court, PITT County. Heard in the Court of Appeals 9 June 1987.

*Everett, Everett, Warren & Harper, by Ryal W. Tayloe, C. W. Everett, Sr., and Edward J. Harper II, for petitioner appellee.*

*David A. Leech for respondent appellant.*

BECTON, Judge.

Respondent, Carol Mattocks, guardian ad litem for James S., appeals from an order relieving her of all responsibilities as guardian ad litem and denying her request for access to reports and records regarding James S.'s adoption.

On 17 September 1985 Carol Mattocks was appointed guardian ad litem for James S. and his two half-brothers in a proceeding in which they were adjudged abused, neglected and dependent. They were placed in the custody of the Pitt County Department of Social Services (DSS). In September 1986 James' half-brothers were placed with their natural father. On 21 July 1986 a petition for James' adoption was filed. On 29 October 1986 the guardian ad litem filed a motion requesting access to James' adoption records. The DSS filed a petition in district court requesting that the court relieve the guardian ad litem of her responsibilities and deny her motion to gain access to James' adoption records. The court granted the relief sought by DSS. The guardian ad litem appealed. We affirm.

The guardian ad litem contends that the district court judge relieved her of responsibilities to James S. based on its mistaken belief that that court's jurisdiction ended upon the filing of an adoption petition. She argues that the juvenile court does not lose jurisdiction until that jurisdiction is terminated by statute (citing *In re Shoe*, 311 N.C. 586, 319 S.E. 2d 567 (1984)); and that the provisions of N.C. Gen. Stat. Sec. 7A-660(b) (1986) contemplate the continuation of the juvenile court's jurisdiction during the pendency of any adoptive proceeding because the court must review an agency's plan for the child in the event the adoption petition is dismissed or withdrawn. We disagree with her reading of the statutes.

Chapter 7A specifically directs the district court to conduct periodic reviews of the juvenile's case before an adoption petition is filed. N.C. Gen. Stat. Sec. 7A-660(c). Only when an adoption

petition is withdrawn or dismissed does the district court recommence its supervision. Jurisdiction over adoption proceedings is vested solely in superior court. Thus the district court has no jurisdiction to act once a petition for adoption is filed, and its jurisdiction is in abeyance once the petition is filed. The legislature charged the county department of social services or other licensed child-placing agency with the responsibility of selecting adoptive parents. N.C.G.S. Sec. 7A-659(f). The guardian ad litem's responsibility during this process is to raise any issue of the agency's abuse of discretion within ten days after she receives written notice of the filing of the adoption petition. The legislature provided no other responsibility for the guardian ad litem once a petition for adoption is filed, and, indeed, none seems appropriate. The superior court has the wherewithall to accept or dismiss the petition in the child's best interest. The legislature clearly vested the DSS with the duty and responsibility "to investigate the condition and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, to make appropriate inquiry to determine whether the proposed adoptive home is a suitable one for the child, and to investigate any other circumstances or conditions which may have a bearing on the adoption and which the court should have knowledge." N.C.G.S. Sec. 48-16(a) (1986). Absent any responsibilities or duties to perform, the guardian ad litem is superfluous to an adoption proceeding, and, in light of the thorough command given to the DSS, we fail to see how the child's interest might better be served by extending the guardian's role. More importantly, the guardian ad litem is required "to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the judge." N.C.G.S. Sec. 7A-586. The guardian was formally relieved in this case.

The order is affirmed.

Judges MARTIN and COZORT concur.

ROSE B. ELLIS v. MILDRED T. ROUSE

No. 8711SC134

(Filed 7 July 1987)

**Evidence § 50— injury to nerve—testimony by chiropractor improperly excluded**

In an action to recover for personal injuries sustained in an automobile accident, the trial court erred in excluding testimony by a chiropractor concerning nerve strain or sprain, since such injury and treatment were within the field of chiropractic as defined by N.C.G.S. § 90-157.2, but the court did not err in excluding evidence as to the strain or sprain of a muscle.

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 31 October 1986. Heard in the Court of Appeals 10 June 1987.

On 19 December 1983, plaintiff was injured when her automobile was struck from behind by defendant's automobile. Plaintiff alleged negligence on the part of defendant and sought damages in the amount of $50,000. Defendant admitted liability and a jury trial was had as to the issue of damages.

During the trial, plaintiff introduced opinion testimony from Dr. Edward E. Flaherty, a chiropractor. Dr. Flaherty testified that when plaintiff came to him in July of 1985, he diagnosed plaintiff as suffering from "cervical strain or sprain of the cervical-brachial or cervical plexus, with paresthesia." The trial court, however, excluded the following testimony by Dr. Flaherty relating to the causation of pain and injury, the permanency of the pain, and the permanent impairment resulting from the pain and injury.

> Q. Dr. Flaherty, sir, do you have an opinion as to what caused the pain in Rose Ellis's neck, left shoulder and left arm?
>
> A. Yes, I do.
>
> Q. What is that opinion, sir?
>
> A. It's my opinion that this came from the accident that she sustained on December 19, 1983.
>
> Q. And that would be the automobile accident, sir?
>
> A. The automobile accident.

Q. And do you have an opinion as to whether or not Rose Ellis will have pain in her neck for the rest of her life?

A. Yes, I do.

Q. What is that opinion?

A. That she will have a pain for the rest of her life.

Q. And do you have an opinion, Dr. Flaherty, as to whether or not Rose Ellis has sustained any permanent impairment as a result of the pain according to the guidelines of the American Medical Association?

A. Yes, I do.

Q. What is that opinion, sir?

A. On the value of pain, that she would be given approximately a five percent permanent impairment.

The jury awarded plaintiff $2,000 in damages. From this judgment, plaintiff appeals.

*Ronald T. Penny for plaintiff appellant.*

*Pope, Tilghman and Tart, by Johnson Tilghman, for defendant appellee.*

ARNOLD, Judge.

Plaintiff contends that the trial court erred in excluding Dr. Flaherty's opinion testimony because the testimony fell within the statutory limitations governing expert testimony by chiropractors.

G.S. 90-157.2 states:

> A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law as to etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological, and pathological considerations *within the scope of chiropractic.* (Emphasis added.)

Chiropractic is defined by G.S. 90-143 as

> the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the

spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body.

In the case *sub judice*, Dr. Flaherty's testimony included opinions on both the strain or sprain of certain muscles and the strain or sprain of certain nerves. The evidence offered concerning permanency of pain and impairment, however, made no distinction between muscles or nerves. This distinction is important. The testimony as to the strain or sprain of a muscle was properly excluded because such injury and treatment is beyond the field of chiropractic as defined by statute. On the other hand, the trial court erred in excluding the testimony concerning the nerve strain or sprain because such injury and treatment is within the field of chiropractic as defined by statute. G.S. 90-143. Therefore, the trial court incorrectly excluded the testimony as to the permanency of pain and impairment due to nerve damage.

New trial.

Judges JOHNSON and PARKER concur.

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GILBERT A. SOARES v. CAROLYN SOARES

No. 8615DC1241

(Filed 7 July 1987)

**1. Divorce and Alimony § 30— equitable distribution—sale of marital home ordered—appealability of order**

Though the trial court's order requiring that the marital home be sold was not a final judgment by its own terms, it nevertheless involved a substantial right, and defendant was entitled to an immediate appeal.

**2. Divorce and Alimony § 17— abandonment—insufficiency of findings**

The trial court's findings were too vague to resolve the critical question raised by defendant as to whether plaintiff did, in fact, abandon defendant either actually or constructively.

**3. Divorce and Alimony § 30— equitable distribution—marital home—failure to place value on—error**

The trial court in an equitable distribution proceeding erred in entering an order regarding the sale of the marital home where the court, though it

made some findings and conclusions regarding marital property, did not place a value on the home.

APPEAL by defendant from *Hunt, Judge.* Order entered 13 June 1986 in District Court, ORANGE County. Heard in the Court of Appeals 8 June 1987.

This is a civil action wherein plaintiff seeks an absolute divorce from defendant, equitable distribution of marital property and a determination of custody and support of children. Defendant filed an answer and counterclaim seeking divorce from bed and board, custody and support of children, alimony and attorney's fees.

On 9 August 1985, the trial court entered a judgment of absolute divorce, awarding custody of the minor children to defendant and ordering that "[t]he issues of alimony, equitable distribution of marital property, and child support are held open for further decision by the Court." On 13 June 1986, the court entered a judgment denying defendant's claims for alimony and attorney's fees and ordering that the marital residence be sold for not less than $140,000, apparently the appraised value of the property. The court found and concluded that an equitable distribution of the marital property may properly be made only upon the sale of the marital residence, and ordered that "[t]his matter is retained for further orders of this Court." Defendant appealed.

*Wishart, Norris, Henninger & Pittman, P.A., by June K. Allison, for plaintiff, appellee.*

*Edward J. Falcone for defendant, appellant.*

HEDRICK, Chief Judge.

**[1]** The judgment from which this appeal is taken is not a final judgment by its own terms. In our opinion, however, the order that the marital home be sold involves a substantial right from which defendant is entitled to an immediate appeal. G.S. 1-277.

**[2]** Defendant contends the trial judge erred in denying her claim for alimony based on abandonment. Abandonment is a legal conclusion which must be based upon factual findings supported by competent evidence. *Patton v. Patton,* 78 N.C. App. 247, 337 S.E. 2d 607 (1985), *rev'd in part on other grounds,* 318 N.C. 404,

348 S.E. 2d 593 (1986). The trial court based its denial of plaintiff's claim for alimony on the findings or conclusions that:

> 9. The evidence shows that the plaintiff and defendant each failed to communicate properly with one another, but the evidence fails to show that the plaintiff committed any of the acts enumerated in G.S. 50-16.2 such as would entitle the defendant to an award of alimony.
>
> 10. Specifically, the Court finds as a fact that although the plaintiff actually moved from the marital dwelling, the precipitating factor was the constructive abandonment of each party, one by the other, sometime prior to the actual move.

These quoted findings or conclusions are not sufficient to support the conclusion that either spouse constructively abandoned the other. These findings made by the trial court are too vague to resolve the critical question raised by defendant as to whether the plaintiff did in fact abandon defendant, either actually or constructively. The order denying defendant's claim for alimony must be vacated and this claim remanded to the district court for more detailed findings and conclusions with respect to defendant's claim for alimony.

**[3]** Defendant argues the trial judge erred in entering an order regarding child support and the sale of the marital home. It is well-settled that where alimony, child support and equitable distribution of marital property are requested, the equitable distribution of the property must be decided first. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E. 2d 256 (1985); *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E. 2d 600 (1985); *Capps v. Capps*, 69 N.C. App. 755, 318 S.E. 2d 346 (1984).

G.S. 50-20(c) requires the trial court to determine what is marital property, then to find the net value of the property and finally to make an equitable distribution of that property. *Turner v. Turner*, 64 N.C. App. 342, 307 S.E. 2d 407 (1983). Although the court in the present case made some findings and conclusions regarding marital property, it did not place a value on the marital home. Thus, the order that the marital home be sold for not less than $140,000 is at least premature. The appraised value of the property is not the net value of the property in question. Only the

court can place a value upon the property from the evidence. In this case, the court has not placed a value upon the marital property. Thus, the order appealed from, including the specific order that the property be sold for not less than $140,000, must be vacated and the cause remanded for further proceedings.

Vacated and remanded.

Judges PHILLIPS and ORR concur.

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J. M. HEINIKE ASSOCIATES, INC. v. THOMAS J. VESCE

No. 867SC1335

(Filed 7 July 1987)

**Constitutional Law § 74; Rules of Civil Procedure § 33— refusal to answer interrogatories—claim of self-incrimination unjustified**

The mere fact that an amendment to defendant's tax returns had been selected for examination by the IRS was insufficient to justify defendant's refusal to answer plaintiff's interrogatories as to defendant's finances on the ground that answers to the interrogatories would create a real danger of self-incrimination.

APPEAL by defendant from *Brown (Frank R.), Judge.* Order entered 3 October 1986 in Superior Court, NASH County. Heard in the Court of Appeals 13 May 1987.

On 9 September 1985, the trial court rendered summary judgment against defendant in the amount of $35,544.17. An execution was subsequently issued and returned unsatisfied.

Pursuant to G.S. 1-352.1, plaintiff submitted interrogatories to defendant concerning defendant's finances. Defendant objected to the interrogatories and moved for a protective order allowing him to refrain from answering the interrogatories. The motion was denied and the trial court ordered defendant to answer the interrogatories. From the order of the trial court, defendant appeals.

*Martin L. Cromartie, Jr. for plaintiff appellee.*

*G. Paul Duffy, Jr. for defendant appellant.*

ARNOLD, Judge.

In his sole assignment of error, defendant contends that "the trial court committed reversible error in denying defendant's objections to answering interrogatories and motion for a protective order because the uncontested evidence and the current state of the law support defendant's position that he was entitled to claim his Fifth Amendment privilege against self-incrimination and refrain from answering the interrogatories." We do not agree.

In his affidavit submitted to the court, defendant stated that he was previously convicted of filing a false corporate tax return and that he is currently under investigation on his personal tax returns for the years 1978 through 1985. Defendant also stated that the information sought by plaintiff could possibly be used against him in the current tax investigation.

The New Jersey attorney who represented defendant in the previous Federal tax prosecution also submitted an affidavit to the court. In his affidavit, the attorney stated that defendant "has received a communication from the Internal Revenue Service . . . advising that a claim recently filed by [defendant] in the form of an amendment to income tax returns (form 1040X) as to his personal returns for the years 1978 through 1981 inclusive, has been selected for examination . . . ." The attorney also stated that he believes defendant has "potential exposure" in connection with the examination.

Defendant has not provided any further explanation of the tax investigation.

The privilege against self-incrimination protects against real dangers, not remote and speculative possibilities. *Johnson County Nat'l Bank and Trust Co. v. Grainger*, 42 N.C. App. 337, 256 S.E. 2d 500, *disc. rev. denied*, 298 N.C. 304, 259 S.E. 2d 300 (1979). "[A] witness may not arbitrarily refuse to testify without existence in fact of a real danger, it being for the court to determine whether that real danger exists." *Id.* at 339, 256 S.E. 2d at 502.

> Determination of whether the privilege applies must be by the court, not the individual claiming the privilege. "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination.

It is for the court to say whether his silence is justified . . . ." *Hoffman v. United States*, 341 U.S. 479, 486, 95 L.Ed. 1118, 1124, 71 S.Ct. 814, 818 (1951).

*Stone v. Martin*, 56 N.C. App. 473, 476, 289 S.E. 2d 898, 901, *disc. rev. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982).

In the case *sub judice*, defendant has made a blanket objection to answering any of plaintiff's interrogatories. The mere fact that an amendment to defendant's tax returns has been selected for examination by the IRS is insufficient to justify defendant's refusal to answer the interrogatories. There is insufficient evidence that the answers to the interrogatories could be used against defendant in a subsequent criminal action. Therefore, defendant has failed to show that the answers to the interrogatories would create a real danger of self-incrimination.

The order of the trial court is

Affirmed.

Judges WELLS and ORR concur.

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G. A. GRIER, INC. v. THOMAS J. VESCE

No. 867SC1336

(Filed 7 July 1987)

APPEAL by defendant from *Brown (Frank R.), Judge.* Order entered 3 October 1986 in Superior Court, NASH County. Heard in the Court of Appeals 13 May 1987.

On 9 September 1985, the trial court rendered summary judgment against defendant in the amount of $29,889.20. An execution was subsequently issued and returned unsatisfied.

Plaintiff then submitted interrogatories to defendant concerning defendant's finances pursuant to G.S. 1-352.1. Defendant objected to the interrogatories and moved for a protective order to allow him to refrain from answering the interrogatories. The motion was denied and the trial court ordered defendant to answer

the interrogatories. From the order of the trial court, defendant appeals.

*No brief for plaintiff appellee.*

*G. Paul Duffy, Jr. for defendant appellant.*

ARNOLD, Judge.

For the reasons set forth in *J. M. Heinike Associates, Inc. v. Vesce*, 86 N.C. App. 372, 357 S.E. 2d 409 (1987), we affirm the order of the trial court.

Affirmed.

Judges WELLS and ORR concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

| Case | County | Disposition |
|---|---|---|
| BENTLEY v. NORTHWESTERN BANK No. 8722SC139 | Alexander (85CVS37) | Affirmed |
| BRADLEY v. BRADLEY No. 8626SC1013 | Mecklenburg (84CVS12654) | Affirmed |
| BRANCH BANKING & TRUST CO. v. H.I.C., INC. No. 8611SC1046 | Johnston (85CVS1680) | Affirmed |
| BRANCH BANKING & TRUST CO. v. JAMES EDWARDS CONSTRUCTION No. 8622SC1181 | Davie (86CVS107) | Appeal Dismissed |
| COLLINS v. N. C. FARM BUREAU MUTUAL INS. CO. No. 8630SC1190 | Graham (85CVS39) | No Error |
| CREEF v. CREEF No. 871DC29 | Dare (86CVD32) | Affirmed |
| EDWARDS v. WADE No. 8715SC184 | Orange (85CVS88) | Affirmed |
| HILL v. MSJ, INC. No. 863SC1196 | Pitt (84CVS406) | Dismissed |
| HOBBS v. BURLINGTON INDUSTRIES No. 8710IC71 | Ind. Comm. (I.C. 913501) | Affirmed |
| KELLY v. PHOENIX INS. CO. No. 8718SC149 | Guilford (85CVS4387) | Affirmed |
| LEMONS v. OLD HICKORY COUNCIL No. 8721SC110 | Forsyth (86CVS662) | Affirmed |
| LYNN v. MULLEN No. 8610SC1331 | Wake (84CVS3662) | No Error |
| McHARGUE v. BURLINGTON INDUSTRIES No. 8710IC80 | Ind. Comm. (I.C. 808393) | Affirmed |
| MERRITT v. MERRITT No. 8615DC1282 | Orange (85CVD416) | Affirmed in part; vacated in part. |

| | | |
|---|---|---|
| NANTAHALA POWER & LIGHT v. TOWN OF MURPHY<br>No. 8730SC30 | Macon<br>(85CVS322) | Affirmed |
| RIDDLE v. RIDDLE<br>No. 8625SC1299 | Burke<br>(83CVS1143) | Affirmed |
| SNYDER v. JEFFERSON STANDARD<br>No. 862SC844 | Beaufort<br>(84CVS220) | Reversed and Remanded |
| STACK v. COUNTY OF JACKSON<br>No. 8630SC664 | Jackson<br>(81CVS361) | Affirmed |
| STATE v. GASTON<br>No. 8619SC1203 | Cabarrus<br>(84CRS7755)<br>(84CRS7779)<br>(84CRS7780)<br>(84CRS7781) | No Error |
| STATE v. JACKSON<br>No. 8627SC1330 | Gaston<br>(86CRS1578) | No Error |
| STATE v. OLIVER<br>No. 8618SC1339 | Guilford<br>(85CRS54601) | Affirmed |
| STATE v. REID<br>No. 8726SC22 | Mecklenburg<br>(86CRS9420) | No Error |
| TEAGUE v. N. C. BD. OF DENTAL EXAMINERS<br>No. 8610SC915 | Wake<br>(84CVS7554)<br>(85CVS7247) | Affirmed |
| THOMPSON-ARTHUR PAVING v. R.G.K., INC.<br>No. 8618SC1120 | Guilford<br>(83CVS5058) | No Error |
| WALKER v. GUILFORD COUNTY<br>No. 8718DC6 | Guilford<br>(85CVD2794) | Affirmed |
| WELDON v. POTTER<br>No. 878SC111 | Lenoir<br>(85CVS171) | No Error |
| WILSON v. BOJANGLES<br>No. 8628SC770 | Buncombe<br>(86CVS1139) | Vacated and Remanded |

JERRY MORRIS v. R. G. BAILEY AND BRAGG AUTO HOME SALES, ET AL.

No. 8612DC1098

(Filed 21 July 1987)

1. **Appeal and Error § 31.1— framing of issues for jury—no objection before jury retired—assignment of error not considered**

Defendant's assignment of error regarding the framing of issues for the jury was overruled where defendant did not object to the issues before the jury retired. N.C.G.S. § 1A-1, Rule 49(c), N. C. Rules of App. Procedure, Rule 10(b)(2).

2. **Unfair Competition § 1— used car sale—condition of car falsely represented**

A finding by a jury that defendant had falsely represented to plaintiff that a car was in good mechanical and serviceable condition was sufficient to support the court's conclusion that defendant's actions constituted an unfair and deceptive trade practice. N.C.G.S. § 75-1.1.

3. **Trial § 15— motion in limine granted—no offer of proof—no error**

In an unfair and deceptive trade practice claim arising from the sale of a used car, the trial court's granting of plaintiff's motion *in limine* to exclude evidence of negotiations between the parties which occurred after plaintiff's revocation of his acceptance and the expiration of the warranty could not be deemed prejudicial error where defendant failed to make an offer of proof and include that evidence in the record.

4. **Appeal and Error § 30— unfair trade practice claim—testimony from other dissatisfied customers—irrelevance contentions not heard on appeal**

In an unfair and deceptive trade practice action arising from the sale of a used car in which the court allowed five other dissatisfied customers of the dealer to testify, defendant could not raise the issue of relevance on appeal since he objected only to the testimony of one witness and his objection was based on hearsay, not relevance.

5. **Trial § 14— plaintiff allowed rebuttal evidence—no abuse of discretion**

The trial court did not abuse its discretion by allowing plaintiff to introduce rebuttal evidence where defendant had already introduced evidence in its case in chief aimed at rebutting testimony from one of plaintiff's witnesses and plaintiff's evidence was, in effect, a surrebuttal of that evidence.

6. **Unfair Competition § 1; Appeal and Error § 31.1— sale of used car—false representation and breach of warranty submitted as one issue—entire damages trebled—no objection at trial**

In an unfair and deceptive trade practices action arising from the sale of a used car where the jury was instructed to give one figure for damages for defendant's false representation and breach of warranty and the court trebled the entire amount, it was reasonable to assume that part of the amount found by the jury was the result of the breach of warranty, which cannot be an unfair trade practice; however, defendant failed to request the trial court to

correct either its jury instructions or the verdict form prior to the jury's deliberation and defendant's argument was not considered on appeal.

**7. Unfair Competition § 1— sale of used car—buyer ordered to return car and seller to assume responsibility for loan—no error**

The trial court did not err in an unfair and deceptive trade practice case arising from the sale of a used car by ordering plaintiff to return the car to defendant and defendant to assume full responsibility for the outstanding loan on the car. The parties stipulated after the return of the jury's verdict that such directions would be part of the court's order; moreover, it was an appropriate order even without the stipulation because the objective was to restore plaintiff to his original condition, and requiring plaintiff to return the car and pay the outstanding balance on the loan would result in an unfair diminution of his damages. N.C.G.S. § 75-1.1.

**8. Unfair Competition § 1— sale of used car—plaintiff awarded attorney fees—no error**

The trial court's conclusion that plaintiff was entitled to attorney fees in an action for unfair and deceptive trade practices was supported by the findings of fact where the court found that defendant had willfully misrepresented the condition of the automobile and that defendant had refused without justification to fully resolve the matters which constituted the basis for the lawsuit.

**9. Unfair Competition § 1; Attorneys at Law § 7.5— unfair trade practice—attorney fees awarded—no findings—error**

The trial court erred in an unfair and deceptive trade practice action by awarding plaintiff an attorney fee of one-third the total award without findings as to the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, or the experience and ability of the attorney.

**10. Rules of Civil Procedure § 58— terms of judgment announced in open court—written judgment five days later—no error**

The trial court did not err by signing a written judgment where the court announced the general terms of its judgment in open court, defendant immediately gave oral notice of appeal, the court executed the written judgment five days later, the verdict was not for a sum certain or cost or that all relief be denied, and the trial judge did not direct the clerk to make any entry in the record. Even if the judgment had been entered in open court, the subsequent written judgment was not invalid because the written judgment conformed in general terms with the oral announcement of the judgment in open court. N.C.G.S. § 1A-1, Rule 58.

APPEAL by defendant Bragg Auto Home Sales from *Cherry, Judge*. Judgment entered 9 June 1986 in District Court, CUMBERLAND County. Heard in the Court of Appeals 31 March 1987.

*Edelstein and Payne, by M. Travis Payne for plaintiff-appellee.*

*Harris, Sweeny & Mitchell, by Ronnie M. Mitchell for defendant-appellant.*

GREENE, Judge.

This is a civil action for breach of warranty and deceptive trade practices. On 4 August 1984, plaintiff purchased a used 1979 Buick automobile from a partnership, doing business as Bragg Auto Home Sales. He brought suit against both the partnership and its partners as individuals.

Plaintiff's evidence at trial tended to show that before arranging the purchase, plaintiff informed Bragg's salesman he wanted a good car in which he could take his family halfway across the United States. He was told the Buick came with a 24 month/24,000 mile warranty and that "the engine reliability was real good." Plaintiff purchased the car for $6,554. He made a down payment of $2,554 on the car, and Bragg's employee contacted a financing company and arranged financing for the balance of the purchase price. During the signing of the sales contract and financing statements, Bragg's employee told plaintiff the 24 month/24,000 mile warranty did not come "automatically" with the car, but a 90-day warranty did and plaintiff could purchase the more extensive warranty for approximately $200 any time within the coverage of the 90-day warranty. After plaintiff paid the down payment, the car "wouldn't crank" and he was unable to drive it off the lot. When one of Bragg's employees did get it started, the car began smoking and its air conditioner wouldn't work. One of Bragg's employees agreed the dealership would correct the problems and along with plaintiff made a list of those things which needed repair. It was agreed the car would be ready within two days.

When plaintiff returned for the car two days later, it did not appear to him that any of the repairs had been made, and he told Bragg employees he wanted his money back. They refused. After plaintiff talked to a lawyer, the dealership agreed to issue a written 30-day warranty on the automobile. Plaintiff then took the car but returned it on several occasions for the needed repairs. Before the written warranty expired, the car's transmission re-

quired a $600 repair and Bragg refused to repair it. On 11 September 1984, plaintiff sent written notice to Bragg to revoke his acceptance of the car. Bragg refused to take the car back and did not refund plaintiff's money. Plaintiff testified he had made all the payments to the financing company to date.

Before trial, the court granted plaintiff's motion *in limine* to exclude evidence of defendants' offers to repair the car or otherwise settle the dispute with plaintiff after his revocation. During the trial, the court permitted testimony from five of plaintiff's witnesses that Bragg had sold cars in poor mechanical condition to them and had not kept its promises to repair the defects.

At the end of plaintiff's evidence, the court dismissed plaintiff's action against the individual defendants. Bragg then put on its evidence, and after its case, the court permitted plaintiff to present rebuttal evidence.

The jury was instructed and given a verdict form. After deliberation it returned with a verdict for plaintiff:

> 1. Did the defendant, Bragg Auto Home Sales do any one or more of the following in selling a 1979 Buick Riviera automobile to Jerry Morris?
>
> (a) Falsely represent to Jerry Morris that the automobile was in good mechanical and serviceable condition when it knew, or should have known, that this was false? YES
>
> (b) Warrant and promise Jerry Morris that it would repair mechanical defects in the car, at least for a period of thirty (30) days, commencing on August 17, 1984, and fail and refuse to do so? YES
>
> 2. Did Jerry Morris give notice of his revocation of acceptance of the 1979 Buick Riviera to Bragg Auto Home Sales within a reasonable time after he discovered, or should have discovered, the breach of warranty? YES
>
> 3. Was defendant's conduct in commerce or did it affect commerce? YES
>
> 4. Was the plaintiff injured as a proximate result of defendant's conduct? YES

5. By what amount, if any, has the plaintiff been injured? $7,308.61

After receiving the jury's verdict, the trial court concluded the acts found by the jury constituted unfair and deceptive trade practices. The court then trebled the damages found by the jury and awarded plaintiff attorney fees. The court further ordered plaintiff to return the car and ordered defendants to assume responsibility for any amount outstanding on the loan from the financing company. The court signed a written judgment to that effect on 9 June 1986. Defendant Bragg appeals.

The issues raised by defendant are: 1) whether the trial court erred in framing the issues put to the jury, 2) whether there was competent evidence to support the court's conclusion that defendant had engaged in deceptive and unfair practices, 3) whether the court's granting of plaintiff's motion *in limine* was error, 4) whether the court erred in allowing the five dissatisfied customers to testify, 5) whether the court erred in allowing plaintiff to present rebuttal evidence, 6) whether the relief entered in this case was appropriate, 7) whether the court erred in awarding plaintiff attorney fees and 8) whether the signing of the written judgment on 9 June 1986 was error.

I

**[1]** Defendant first argues the trial court erred in framing the issues submitted to the jury. The record shows defendant did not object to the issues before the jury retired. It cannot object to the issues now and argue they were inadequate or improper. N.C.G.S. Sec. 1A-1, Rule 49(c). N.C.R. App. P., Rule 10(b)(2). *Brant v. Compton,* 16 N.C. App. 184, 185, 191 S.E. 2d 383, 384, *cert. denied,* 282 N.C. 672, 196 S.E. 2d 809 (1972). This assignment of error is overruled.

II

**[2]** In an action brought under the Unfair and Deceptive Trade Practices Act, N.C.G.S. Sec. 75-1.1, the jury is to determine the facts. Based on those facts, the court is to determine, as a matter of law, whether the defendant engaged in "unfair or deceptive acts or practices." *Love v. Pressley,* 34 N.C. App. 503, 516, 239 S.E. 2d 574, 583 (1977), *disc. rev. denied,* 294 N.C. 441, 241 S.E. 2d 843 (1978). Defendant contends the jury's verdict does not support

the court's conclusion that defendant engaged in unfair and deceptive trade practices. This contention is meritless.

An unfair practice is one which offends "established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E. 2d 397, 403 (1981). Although a mere refusal to stand by a warranty is not a violation of the Unfair and Deceptive Trade Practices Act, *Trust Co. v. Smith*, 44 N.C. App. 685, 691, 262 S.E. 2d 646, 650, *disc. rev. denied*, 300 N.C. 379, 276 S.E. 2d 685 (1980) (*overruled on other grounds, Marshall v. Miller*, 302 N.C. 539, 545, 276 S.E. 2d 397, 401 (1981)), a false representation can constitute a deceptive practice. *See Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975).

Here, the jury found defendant falsely represented to plaintiff that the car was in good mechanical and serviceable condition. This finding is sufficient to support the court's conclusion that defendant's actions constituted unfair and deceptive trade practices in violation of N.C.G.S. Sec. 75-1.1.

III

[3] Defendant next contends the trial court erred by granting plaintiff's motion *in limine* to exclude evidence of negotiations between the parties which occurred after plaintiff's revocation of his acceptance and the expiration of the warranty.

Our review of the trial court's decision is precluded by defendant having failed to make an offer of proof and include that evidence in the record on appeal. Consequently, the trial court's ruling on this motion cannot be deemed prejudicial error. *Gower v. City of Raleigh*, 270 N.C. 149, 152, 153 S.E. 2d 857, 859-60 (1967).

IV

[4] Defendant's next contention is that the testimony from the five dissatisfied customers of Bragg was irrelevant and therefore inadmissible. However, defendant objected only to the testimony of one of those witnesses, Mildred Roberts, and the record reveals defendant's objections to Roberts' testimony were based not on relevance but on hearsay. Since there was no objection at trial on the ground of relevance, defendant cannot raise the issue on

appeal. *Santora, McKay & Ranieri v. Franklin,* 79 N.C. App. 585, 589, 339 S.E. 2d 799, 801-02 (1986).

V

**[5]** Defendant next contends plaintiff was not entitled to rebuttal evidence. At the end of defendant's evidence, plaintiff proposed to put on rebuttal evidence in the form of testimony from George Leggett, an employee of the Consumer Protection Section of the Attorney General's Office. In a hearing outside the jury's presence, plaintiff proposed he be allowed to rebut defendant's good business reputation and a statement made on the witness stand by one of Bragg's owners, R. G. Bailey. Defendant conceded the propriety of rebuttal on defendant's business reputation. It contended plaintiff was not entitled to rebut Bailey's statement because the issue to which it went was irrelevant. The court determined plaintiff was entitled to rebut Bailey's statement and allowed plaintiff to examine Leggett in this regard. Defendant's objection was noted in the record at the end of the hearing and is sufficient to preserve the issue for appellate review even though there was no objection to the evidence at the time it was offered to the jury. *State v. Mems,* 281 N.C. 658, 666-67, 190 S.E. 2d 164, 170 (1972).

Where one party introduces evidence as to a particular fact, the other party may introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be inadmissible on grounds of incompetence or irrelevance had it been offered initially. *In re Lee,* 69 N.C. App. 277, 284, 317 S.E. 2d 75, 79 (1984). The decision to permit rebuttal is committed to the discretion of the trial court. *Gay v. Walter,* 58 N.C. App. 360, 363, 283 S.E. 2d 797, 799 (1981), *modified on other grounds,* 58 N.C. App. 813, 294 S.E. 2d 769 (1982).

When plaintiff petitioned the court for the opportunity to present rebuttal evidence, defendant had already introduced evidence in its case in chief aimed at rebutting testimony from one of plaintiff's witnesses. Leggett's testimony was, in effect, a surrebuttal of that evidence. Therefore, it was within the trial court's discretion to admit that evidence, and we find the court did not abuse its discretion in doing so.

VI

We next address defendant's contentions regarding the relief awarded in this case.

A

**[6]** Here, the jury was instructed to give one figure for damages, if any, for defendant's false representation and breach of warranty. The jury found $7,308.61 in damages. The court trebled that amount. Defendant contends the court should not have trebled the entire amount. Since it was reasonable to assume part of the $7,308.61 in damages was a result of the breach of warranty, which under *Trust Co. v. Smith*, 44 N.C. App. 685, 691, 262 S.E. 2d 646, 650, *disc. rev. denied*, 300 N.C. 379, 267 S.E. 2d 685 (1980) (*overruled on other grounds, Marshall v. Miller*, 302 N.C. 539, 545, 276 S.E. 2d 397, 401 (1981)), cannot be an unfair trade practice, defendant argues the damages resulting from the breach should not have been trebled.

The basis of defendant's argument has merit, but defendants failed to request the trial court to correct either its jury instructions or the verdict form prior to the jury's deliberation. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure requires objection to jury instructions before the jury retires. *Mills v. New River Wood Corp.*, 77 N.C. App. 576, 579, 335 S.E. 2d 759, 761 (1985). We decline to consider this argument on appeal.

B

**[7]** Defendant also argues the trial court erred by requiring plaintiff to return the car to defendant and ordering defendant to assume full responsibility for the outstanding loan on the car. We disagree with defendant's contention for two reasons. First, after the return of the jury's verdict, the parties stipulated that such directions would be part of the court's order. Second, even if the parties had not stipulated to this part of the order, it was an appropriate order for the trial court to enter.

"The objective of any proceeding to rectify a wrongful injury resulting in a loss is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money." *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E. 2d 343, 347 (1950). Naturally, this principle ap-

plies without variation in an action under N.C.G.S. Sec. 75-1.1. *Bernard v. Central Carolina Truck Sales,* 68 N.C. App. 228, 233, 314 S.E. 2d 582, 585, *disc. rev. denied,* 311 N.C. 751, 321 S.E. 2d 126 (1984). If a plaintiff in an action under Section 75-1.1 involving the sale of a good retains the good, the difference in fair market value is an appropriate measure of damages. *Strickland v. A & C Mobile Homes,* 70 N.C. App. 768, 771, 321 S.E. 2d 16, 19 (1984), *disc. rev. denied,* 313 N.C. 336, 327 S.E. 2d 899 (1985). If, however, as is the situation here, the plaintiff does not retain the good, he may recover "the amount of his injury which was proximately caused by the unfair or deceptive act." *Bernard,* 68 N.C. App. at 233, 314 S.E. 2d at 585.

Here, before plaintiff purchased the car, he had his down payment and the payments he had made on the car loan. Evidence in the record reveals they totaled approximately $7,308.61. The jury concluded this was the amount of his injury. Defendant was entitled to have the car returned to it, but complains that it should not be required to pay off the outstanding balance of the loan. We hold that requiring defendant to pay off the outstanding balance of the loan was an appropriate order for the court to enter. If plaintiff had paid it, the result would be an unfair diminution of his damages.

We think it important to note that since plaintiff properly revoked his acceptance under N.C.G.S. Sec. 25-2-608, the issue of whether he could rescind the contract for violation of N.C.G.S. Sec. 75-1.1 without compliance with Chapter 25 is not before us.

VII

Defendant next contends the trial court erred in awarding plaintiff attorney fees. Defendant contends both that the trial court erred in determining plaintiff was entitled to attorney fees and that the amount awarded is not supported by the court's findings of fact.

A

**[8]** We first determine whether the trial court erred in determining plaintiff was entitled to attorney fees. A reasonable attorney fee may be awarded for a violation of Section 75-1.1 upon a specific finding by the trial judge that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C.G.S. Sec. 75-16.1.

Here, the trial court found defendant had "willfully misrepresented the condition of the automobile" and that defendant had "refused without justification to fully resolve the matters which constitute the basis for this lawsuit." These findings of fact are supported by competent evidence. Therefore, the court's determination that plaintiff was entitled to an award of attorney fees is supported by the findings of fact.

B

**[9]** We next determine whether the findings of fact are sufficient to support the amount of the award. Award or denial of attorney fees under N.C.G.S. Sec. 75-16.1 is a matter within the sole discretion of the trial judge. *Borders v. Newton*, 68 N.C. App. 768, 315 S.E. 2d 731 (1984). However, if an award is made, the statute requires the award be reasonable. In order for this Court to determine if the award of attorney fees is reasonable, the record must contain findings of fact to support the award. *Austin v. Austin*, 12 N.C. App. 286, 296, 183 S.E. 2d 420, 427 (1971).

Here, the trial court simply awarded plaintiff an attorney fee of one-third of the total award of $21,925.83, or $7,308.61. The judgment contained no findings of fact to support the court's conclusion that this was a reasonable fee such as the time and labor expended, the skill required to perform the legal services rendered, the customary fee for like work, or the experience and ability of the attorney. The failure of the court to consider and set out the factors above renders the findings of fact inadequate to support the amount of the award. Therefore, the award for attorney fees is vacated and the case remanded to district court.

VIII

**[10]** Defendant's final argument is that the trial judge erred in signing the judgment. Here, the trial court announced the general

terms of its judgment in open court. Defendant gave oral notice of appeal in open court immediately after the court announced its judgment. Five days later, the court executed a written judgment. Defendant contends the trial judge was not permitted to execute any written judgment that was different in any manner from the announcement of the judgment made in open court.

Defendant's contention hinges on our interpretation of the trial court's actions under Rule 58 of the North Carolina Rules of Civil Procedure, N.C.G.S. Sec. 1A-1, Rule 58:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover *only* a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> *In other cases* where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete *when an order for the entry of judgment* is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

Here, the verdict was not for "only a sum certain or cost or that all relief" be denied, but the trial judge awarded attorney fees and relief other than damages. Although the trial judge announced *his general holdings at the end of the trial,* he did not direct the clerk to make any entry in the record. Therefore, under the second paragraph of Rule 58, the judgment was not entered in open court and the written judgment of 9 June 1986 is the judg-

ment for the purposes of the Rules of Civil Procedure under the third paragraph of Rule 58. *See Gates v. Gates*, 69 N.C. App. 421, 425-26, 317 S.E. 2d 402, 405 (1984), *aff'd*, 312 N.C. 620, 323 S.E. 2d 920 (1985). The written judgment did not determine any issue different from those dealt with in the judgment announced in open court. Therefore, defendant's oral notice of appeal, though given in open court prior to the entry of judgment, was effective to give notice of appeal to the written judgment under N.C.G.S. Sec. 1-279(a). *See Brooks v. Gooden*, 69 N.C. App. 701, 706-07, 318 S.E. 2d 348, 352 (1984).

Even if the judgment had been entered in open court, the subsequent written judgment is not invalid. A trial court has the authority under N.C.G.S. Sec. 1A-1, Rule 58 to make a written judgment that conforms in general terms with an oral judgment pronounced in open court. *See Hightower v. Hightower*, 85 N.C. App. 333, ---, 354 S.E. 2d 743, 745 (1987). A trial judge cannot be expected to enter in open court immediately after trial the detailed findings of fact and conclusions of law that are generally required for a final judgment. If the written judgment conforms in general terms with the oral entry, it is a valid judgment. A notice of appeal entered in open court immediately after entry of the oral judgment does not remove the authority of the trial court to enter its written judgment which conforms substantially with the court's oral announcement. *Id.* Here, the written judgment conforms in general terms with the oral announcement of the judgment in open court and therefore, even if the judgment had been entered in open court, the subsequent written judgment is valid.

This assignment of error is overruled.

IX

*Affirmed in part; vacated in part.*

Chief Judge HEDRICK and Judge MARTIN concur.

RICHARD M. BOOHER AND NANCY ANN BROWN v. WILLIAM C. FRUE, RONALD K. PAYNE AND MICHAEL Y. SAUNDERS

No. 8728SC37

(Filed 21 July 1987)

1. **Fraud § 9— attorney-client relationship—constructive fraud—sufficiency of complaint**

Plaintiffs' complaint was sufficient to state a claim for constructive fraud where plaintiffs alleged facts and circumstances surrounding the formation and development of the confidential relationship between the male plaintiff and defendant attorneys; plaintiffs identified the specific transactions which they alleged to have been procured through constructive fraud and the times these transactions occurred; plaintiffs stated that defendants were trusted to look after plaintiffs' best interests; and plaintiffs' complaint which merely implied that a confidential relationship existed between plaintiff and one defendant was sufficient to withstand defendants' motion for dismissal.

2. **Trusts § 16— attorney-client relationship—constructive trust—sufficiency of complaint**

By alleging that a fiduciary relationship existed (lawyer and client), that a fiduciary duty was breached, and that defendants gained because of that breach (even though plaintiffs may have suffered no direct loss), plaintiffs made a claim for constructive trust sufficient to withstand defendants' motion to dismiss.

Judge JOHNSON dissenting.

APPEAL by plaintiffs from *Owens, Judge.* Order entered 27 March 1986 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 3 June 1987.

In their complaint filed 25 November 1985, plaintiffs alleged the following: In 1981 plaintiffs' son suffered injuries due to a work related accident in the state of Texas. He later died as a result of his injuries.

In September of 1982, plaintiff Booher was sitting in a lounge in Asheville, North Carolina talking to his employer about his son's accident and about his plans of traveling to Texas in a private plane in order to secure counsel for any claims arising out of his son's death. Defendant Frue, an attorney, joined in the discussion and agreed to accompany Booher to Texas and assist in locating counsel.

When Frue arrived at the airport to accompany Booher, he was with another attorney, defendant Payne. Booher assumed that Payne was Frue's partner and that Payne was making the trip at Frue's invitation.

At the suggestion of Frue, Booher met with a law firm in Texas about handling the probate matter of having plaintiff appointed administrator of his son's estate. That law firm referred Booher to defendant Saunders, a Houston trial lawyer, and arranged for Booher, Frue and Payne to meet with Saunders. Prior to this meeting, neither Frue nor Payne had ever communicated with Saunders.

After a short conference between Booher, Saunders, Frue and Payne, it was agreed that Saunders would receive a one-third contingency fee for representing plaintiffs in their life insurance claim and their wrongful death claim. In the claim for Workers' Compensation, Saunders would receive one-fourth of any recovery. At no time during the above meeting did Frue or Payne attempt any negotiations concerning Saunders' fee.

Immediately following the meeting, however, Frue and Payne met with Saunders alone. Frue represented that he was the referring attorney and proceeded to negotiate a referral fee for himself or for himself and Payne. Despite the fact that the referral was made by the law firm handling the probate matter, Frue and Payne secured a referral fee of one-third of whatever Saunders garnished as his fee for representing plaintiffs. Booher was not told of this arrangement.

After returning to Asheville, Booher approached Frue and offered to pay him for his time and efforts. Frue made no mention of the fee division agreement with Saunders. It was not until approximately one year later that Frue informed Booher of the arrangement. Booher immediately told Frue that he had no authority to negotiate such a fee for himself. Booher then telephoned Saunders, informed him of the situation and notified him not to pay the referral fee. Saunders, however, paid Frue and Payne the sum of $123,288.60 which the two parties divided.

Booher made demands that both Frue and Payne pay all of the fees received by them over to himself or that the funds be returned to Saunders. Frue and Payne refused. Plaintiffs, through

counsel, asked Saunders to join in this action as a party plaintiff so that the court could determine the rights of all interested parties. Saunders, however, refused to do so and he was made a defendant pursuant to Rule 19(a) of the North Carolina Rules of Civil Procedure.

Defendants Frue and Payne made motions to dismiss this action. The trial court granted these motions pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

From this order, plaintiffs appeal.

*Kennedy, Covington, Lobdell & Hickman, by James E. Walker and Alice Carmichael Richey, for plaintiff appellants.*

*Ronald W. Howell for defendant appellees Frue and Payne.*

ARNOLD, Judge.

Plaintiffs contend that the trial court erred in dismissing their complaint setting forth claims for constructive fraud and constructive trust. We agree.

[1] In order to survive a motion to dismiss under Rule 12(b)(6) a plaintiff must only "state enough to give the substantive elements of a legally recognized claim." *Raritan River Steel Co. v. Cherry, Bekaert and Holland*, 79 N.C. App. 81, 85, 339 S.E. 2d 62, 65, *disc. rev. granted*, 316 N.C. 734, 345 S.E. 2d 392 (1986). To set out a claim for constructive fraud a complaint must allege facts "(1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E. 2d 674, 679 (*quoting Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E. 2d 725, 726 (1950) ).

Plaintiffs have alleged facts and circumstances surrounding the formation and development of the confidential relationship between Booher and Frue and Payne. Plaintiffs have identified the specific transactions that they allege to have been procured through constructive fraud and the times that these transactions occurred. Plaintiffs also have stated that the defendants were trusted to look after plaintiffs' best interests.

Our Supreme Court has stated that a claim for constructive fraud requires less particularity than a claim for actual fraud since constructive fraud is based on a confidential relationship and not a specific misrepresentation. *Terry v. Terry*, 302 N.C. 77, 273 S.E. 2d 674 (1981). Although plaintiffs stated in their complaint that they never retained Payne to represent them in any capacity, plaintiffs also allege that they assumed he worked for Frue. Plaintiffs' complaint implies that a confidential relationship existed between Booher and both Frue and Payne. In order to prevail against Payne for constructive fraud, plaintiffs must prove at trial that a confidential relationship did in fact exist between Payne and Booher. It is enough at this stage, however, that plaintiffs' complaint imply that such a relationship existed.

A claim for relief should not be dismissed based on insufficiency unless it is certain that a plaintiff would not be entitled to relief under any state of facts which could be proved in support of plaintiff's claim. *Morrow v. Kings Department Stores*, 57 N.C. App. 13, 290 S.E. 2d 732, 734, *disc. rev. denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982). Plaintiffs' complaint for constructive fraud survives a motion to dismiss pursuant to Rule 12(b)(6).

**[2]** Plaintiffs' complaint also states a claim for constructive trust which survives a motion to dismiss pursuant to Rule 12(b)(6).

Concerning plaintiffs' claim for constructive trust, defendants make the statement in their brief that unjust enrichment is "based upon the principle that one person is unjustly enriched to the loss of another person." Defendants suggest that in all unjust enrichment cases, a plaintiff must have actual damages. This is incorrect.

Restitution recovery and damages recovery are based on entirely different theories. D. Dobbs, *Law of Remedies*, § 4.1, at 224 (1973). "(T)he main purpose of the damages award is some rough kind of compensation for the plaintiff's loss. This is not the case with every kind of money award, only with the damages award." *Id.* § 3.1 at 136. In this respect, restitution stands in direct contrast to the damages action. *Id.* § 4.1 at 224. "The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep." *Id.* A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any

unjust enrichment on the defendant's part. *Id.* The principle of restitution "is to deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . even though plaintiff may have suffered no demonstrable losses." *Id.*

The relationship between attorney and client is based upon the utmost trust and confidence. This relationship imposes "high duties and responsibilities" on the attorney. *Mebane v. Broadnax,* 183 N.C. 333, 335, 111 S.E. 627, 628 (1922). If counsel, contrary to the duty that his skill must be used solely for the benefit of the client, makes a personal profit out of the relationship, "the court will always set aside the transaction, or decree that the benefit which the attorney has reaped must be held in trust for the benefit of the client . . . ." *Id.* at 338, 111 S.E. at 629.

In *Speight v. Trust Co.,* 209 N.C. 563, 183 S.E. 734 (1936), our Supreme Court stated that the major premise underlying a constructive trust is that the trustee would be unjustly enriched if he were allowed to keep any profit made from a violation of the trust. The trustee must not gain any personal advantage touching the property as to which the fiduciary position exists. *Id.* If a fiduciary has made a profit through the violation of a duty owed to a plaintiff "he can be compelled to surrender the profit to the plaintiff." V. A. Scott, *The Law of Trusts* § 462-2, at 3418. "It is immaterial that the profit was not made at the expense of the beneficiary or principal . . . ." *Id.* § 502, at 3555.

We recognize that in *McGee v. Eubanks,* 77 N.C. App. 369, 374, 335 S.E. 2d 178, 181 (1985), *disc. rev. denied,* 315 N.C. 589, 341 S.E. 2d 27 (1986), this Court stated that a breach of the Code of Professional Responsibility "in and of itself would not be a basis for civil liability." However, what is involved in the case *sub judice* is not only a possible breach of the Code of Professional Responsibility, but also a claim of unjust enrichment based on the breach of fiduciary duty owed to plaintiffs. The *McGee* decision does not insulate attorneys from civil actions based on principles of common or statutory law, including claims for constructive fraud, unjust enrichment and constructive trust. To hold that defendants have no civil liability when a violation of a disciplinary rule is involved would fly against sound judgment and would ignore certain basic and well-established principles of law.

In summary, plaintiffs, by alleging that a fiduciary relationship existed, that a fiduciary duty was breached, and that defendants gained because of that breach (even though plaintiffs may have suffered no direct loss) have made a claim for constructive trust. The decision of the trial court dismissing this action is reversed and this case is remanded for further proceedings.

Reversed and remanded.

Judge PARKER concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent from the majority opinion to the extent that it holds that plaintiffs have alleged a legally recognized claim against defendants Frue and Payne.

Plaintiffs' complaint does not allege that defendants Frue and Payne entered into an attorney and client relationship with him. There are no allegations of a retainer fee offered by plaintiffs or accepted by defendants prior to the trip to Texas. Indeed plaintiffs' complaint alleges, *inter alia*, that "*At no time* did Booher intend to retain Frue to negotiate settlement or to institute legal proceedings in the State of Texas . . . . *At no time did Booher retain Payne to represent him in any capacity* . . . ." (Emphasis supplied.)

Assuming arguendo that there were allegations that plaintiffs retained defendants Frue and Payne to assist him in finding competent legal assistance, I do not find allegations that plaintiffs retained defendants Frue and Payne to negotiate a fee arrangement with Saunders. Moreover, there are no allegations that defendants Frue and Payne negotiated plaintiffs' fee arrangement with Saunders. There are no allegations that defendants Frue and Payne influenced plaintiffs to accept the fee arrangement with Saunders. There are no allegations that defendants Frue and Payne requested a referral fee from Saunders prior to or during any negotiations with Saunders regarding plaintiffs' fee arrangement with Saunders. Nor are there any allegations that defendants Frue and Payne influenced plaintiffs to retain Saunders

because they knew they could get a referral fee from him in particular or that their referral of plaintiffs to him was contingent upon their receiving a referral fee from him.

Plaintiffs' complaint, to the contrary, alleges that "At no time during the above meeting did Frue or Payne attempt any negotiation regarding Saunders' fee." There are no allegations in plaintiffs' complaint that the referral fee received by defendants, in any way, affected Saunders' contingency fee. In plaintiffs' complaint, it is patently alleged that defendants did not approach Saunders until the conclusion of the conference wherein plaintiff and Saunders had agreed to the contingency fees and plaintiff retained Saunders to represent him. Therefore, Count I of plaintiffs' complaint must fail or survive based on the allegation that defendants accepted a referral fee without disclosing said acceptance to plaintiffs.

It is a violation of the disciplinary rules of the North Carolina Code of Professional Responsibility for a retained attorney to divide legal fees with another attorney merely because an attorney has referred a client. DR 2-106(A), North Carolina Code of Professional Responsibility. This Court has previously stated that a "breach of the Code of Professional Responsibility in and of itself would not be a basis for civil liability." *McGee v. Eubanks,* 77 N.C. App. 369, 374, 335 S.E. 2d 178, 181 (1985), *disc. rev. denied,* 315 N.C. 589, 341 S.E. 2d 22 (1986). A violation of the ethical principle of not accepting a division of legal fees for a referral has not been accepted as a violation of a legal duty. I conclude that Count I of plaintiffs' complaint fails due to insufficient factual allegations to satisfy the elements of a legally recognized claim.

Plaintiffs' second count of the complaint seeks restitution through imposition of a constructive trust aimed at forcing defendants Frue and Payne to disgorge benefits that it would be unjust for them to keep. *See* D. Dobbs, *Law of Remedies,* sec. 4.1 at 224 (1973). Our Supreme Court has described a constructive trust as follows:

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud or some other circumstance making it inequitable for him to retain it against the claim of

> the beneficiary of the constructive trust . . . . It is an obligation or relationship imposed irrespective of the intent with which such party acquired the property, and in a well-nigh unlimited variety of situations. Nevertheless, there is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty or other wrongdoing by the holder of the property, or by one under whom he claims, the holder, himself, not being a bona fide purchaser for value.

*Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 211-12, 171 S.E. 2d 873, 882 (1970).

My review of plaintiffs' complaint does not reveal factual allegations sufficient to survive defendants' motion to dismiss. As discussed *supra* there are insufficient allegations of constructive fraud and insufficient allegations of a breach of a fiduciary duty. The essence of plaintiffs' allegations is that defendant Frue breached an ethical principle imposed upon him by the Rules of Professional Conduct. This principle prohibiting a non-disclosed division of legal fees as payment for a referral has not been accepted as a legal principle. Without precedent from our Supreme Court or this Court I decline to hold that plaintiffs have alleged a valid claim for a constructive trust on alleged referral fees received by defendants Frue and Payne from Saunders which plaintiffs allege were negotiated subsequent to the contingency fee agreement with Saunders and Booher's retention of Saunders to represent his interests. *See Eubanks, supra.*

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PAULINE R. BANNER v. ALBERT N. BANNER AND ALBERT N. BANNER v. PAULINE R. BANNER

No. 8621DC1229

(Filed 21 July 1987)

**1. Divorce and Alimony § 18.3— counterclaim for alimony—amendment to allege abandonment as grounds not allowed**

In an action for absolute divorce based on one year's separation where defendant counterclaimed for alimony, the trial court did not err in denying her motion to amend her counterclaim to allege abandonment as the ground for

her claim, since defendant admitted that she and plaintiff had lived separate and apart for six years before trial; never during that period had defendant filed an action alleging abandonment or requesting alimony and alimony *pendente lite*; the action had been pending for ten months, but defendant did not move to amend her complaint to add the ground of abandonment until the day of the trial; to have allowed defendant to amend her claim at that point would have caused further delay in the trial of the action; further delay is a sufficient reason to deny a motion to amend; and allowing the amendment would have required plaintiff to defend a stale abandonment claim when he was already entitled to divorce based on one year's separation.

**2. Divorce and Alimony § 20.1— claim for alimony—effect of divorce decree**

The trial court properly entered summary judgment for defendant in plaintiff's action for alimony since the parties were already divorced when plaintiff instituted her action. Furthermore, there was no merit to plaintiff's contention that her action was filed on 20 April 1984 before judgment was entered on the record book on 25 April 1984, since the trial court granted defendant an absolute divorce and stated its terms in open court on 5 April 1984, but the judgment was not entered on the record book until three weeks later because of plaintiff's counsel's request to review the drafted judgment before it was entered.

**3. Divorce and Alimony § 20.1; Rules of Civil Procedure § 41.1— voluntary dismissal of alimony claim—absolute divorce decree—alimony claim barred**

Once the parties were divorced, the wife, who had taken a voluntary dismissal of her alimony counterclaim, was barred from bringing a new alimony claim, despite the one year extension of N.C.G.S. § 1A-1, Rule 41(a).

APPEAL by plaintiff Pauline R. Banner and defendant Pauline R. Banner from *Harrill, Judge.* Judgments entered 25 April 1984 and 21 July 1986 in District Court, FORSYTH County. Heard in the Court of Appeals 8 April 1987.

This appeal involves two related cases both of which concern Mrs. Banner's action for alimony and which were consolidated for appeal. We affirm the trial court's decisions in both cases.

On 2 June 1983, Albert N. Banner filed an action for absolute divorce based on one year's continuous separation from Pauline R. Banner. Mrs. Banner answered and counterclaimed for alimony, but failed to set forth abandonment as the ground upon which she based her claim.

On 5 April 1984, the day of the pretrial conference, Mrs. Banner claimed that she was unaware that her counterclaim was defective and made a motion to amend it to include her grounds for alimony. This motion was denied.

On that same day, the parties went to trial and Mrs. Banner repeated her motion to amend, which was again denied. The trial proceeded on the divorce action alone and both Mr. Banner and Mrs. Banner testified that they had been separated since April, 1978, and that the separation was voluntary. Before resting, Mrs. Banner gave notice that she was taking a voluntary dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(a) on her counterclaim and she also withdrew her answer. The trial court then granted the divorce, dictated its terms and directed that counsel for Mr. Banner prepare the judgment and order reflecting the terms of the divorce. At Mrs. Banner's counsel's request, the trial court also directed that the drafted judgment and order be forwarded to him for review prior to being signed by the trial judge. Almost three weeks later Mrs. Banner's counsel approved the judgment. It was subsequently signed, filed and entered into the court's record book on 25 April 1984. From the judgment which denied her motion to amend, Mrs. Banner appealed.

On 20 April 1984, Mrs. Banner filed a new action in which she sought alimony and alimony *pendente lite* on the grounds that Mr. Banner willfully abandoned her in April, 1978. Mr. Banner filed an answer denying the allegations and moved for summary judgment on the grounds that the action was not timely filed and that there were no genuine issues of material fact. Summary judgment was granted and Mrs. Banner appealed.

*Womble Carlyle Sandridge & Rice, by David P. Shouvlin, attorney for Pauline R. Banner, appellant.*

*Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by Charles O. Peed, attorney for Albert N. Banner, appellee.*

ORR, Judge.

I.

[1] Mrs. Banner argues that the trial court erred in denying her motion to amend her counterclaim. We do not agree.

Although N.C.G.S. § 1A-1, Rule 15(a) provides that leave to amend "shall be freely given when justice so requires," the trial court has broad discretion in permitting or denying amendments after the time for amending as a matter of law has expired. *Willow Mountain Corp. v. Parker*, 37 N.C. App. 718, 247 S.E. 2d

11, *disc. rev. denied*, 295 N.C. 738, 248 S.E. 2d 867 (1978). In deciding whether or not to allow an amendment the trial court must also weigh the motion in light of the attendant circumstances. *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978), *disc. rev. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979).

The trial court's ruling on a motion to amend is not reviewable on appeal in the absence of a showing of an abuse of discretion. *Mangum v. Surles*, 12 N.C. App. 547, 183 S.E. 2d 839 (1971), *rev'd on other grounds*, 281 N.C. 91, 187 S.E. 2d 697 (1972). Absent any declared reason for denial of leave to amend, the appellate court may examine any apparent reasons for such denial. *Kinnard v. Mecklenburg Fair*, 46 N.C. App. 725, 266 S.E. 2d 14, *aff'd*, 301 N.C. 522, 271 S.E. 2d 909 (1980).

Although no specific reasons were given in the case *sub judice*, there were apparent reasons for denying Mrs. Banner's motion to amend. Mrs. Banner admitted in her answer that she and Mr. Banner had lived separate and apart since April 1978, six years before the trial. Yet never during that six year period had she filed an action alleging abandonment or requesting alimony and alimony *pendente lite*. In addition, this action had been pending for ten months, but Mrs. Banner did not move to amend her complaint to add the grounds of abandonment until the day of the trial. To have allowed Mrs. Banner to amend her claim at that point would have caused further delay in the trial of this action. Further delay is a sufficient reason to deny a motion to amend. *See Kinnard v. Mecklenburg Fair*, 46 N.C. App. 725, 266 S.E. 2d 14.

Furthermore, allowing the amendment would have required Mr. Banner to defend a stale abandonment claim, when he was already entitled to a divorce based on one year's continuous separation pursuant to N.C.G.S. § 50-6.

In light of these factors the trial court's denial of Mrs. Banner's motion did not constitute an abuse of discretion. Therefore, we affirm the decision of the trial court.

II.

**[2]** Mrs. Banner also argues that the trial court erred in granting Mr. Banner's summary judgment motion, because the factual matter of whether she is entitled to alimony and alimony

*pendente lite* on the grounds that Mr. Banner abandoned her is still in dispute. We disagree.

The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial, where it can be readily demonstrated that no material facts are in issue. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E. 2d 823, 829 (1971). "The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court." *Singleton v. Stewart*, 280 N.C. 460, 465, 186 S.E. 2d 400, 403 (1972).

Mr. Banner has clearly met the burden of showing that there are no genuine issues of fact for trial. The record shows that Mrs. Banner was barred from bringing an action for alimony, because the parties were already divorced.

N.C.G.S. § 50-11, "Effects of absolute divorce" provides that:

> (a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine . . . .
>
> . . .
>
> (c) Except . . . a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce.

Once a divorce judgment is rendered, this statute acts as a bar to the recovery of alimony, subject to the provisions of N.C.G.S. § 50-19 and N.C.G.S. § 50-6.

N.C.G.S. § 50-19 provides in pertinent part that:

> (a) . . . any action for divorce under the provisions of G.S. 50-5 or G.S. 50-6 that is filed as an independent, separate action may be prosecuted during the pendency of an action for:
>
> (1) Alimony;
>
> (2) Alimony *pendente lite*;
>
> . . .

> (c) Notwithstanding the provisions of this section, any divorce obtained under G.S. 50-5 or G.S. 50-6 by a supporting spouse shall not affect the rights of a dependent spouse with respect to any action for alimony or alimony pendente lite that is pending at the time the judgment for divorce is granted.

Similarly, N.C.G.S. § 50-6 states in part that:

> . . . a divorce under this section shall not affect the rights of a dependent spouse with respect to alimony which have been asserted in the action or any other pending action.

The intent of the legislature in enacting these provisions was to allow an absolute divorce pursuant to N.C.G.S. § 50-6 and still protect the rights of a dependent spouse to alimony raised in actions pending at the time of the divorce judgment. *Wilhelm v. Wilhelm*, 43 N.C. App. 549, 259 S.E. 2d 319 (1979).

Mrs. Banner argues, however, that under N.C.G.S. § 1A-1, Rule 58, her new action for alimony and alimony *pendente lite* was filed prior to the entry of the divorce judgment. Rule 58 provides that:

> . . . Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. . . .
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

The trial court granted Mr. Banner an absolute divorce and stated its terms in open court on 5 April 1984. However, this judgment was not entered on the record book until 25 April 1984, because of Mrs. Banner's counsel's request to review the drafted judgment before it was entered. While the judgment was being

reviewed, Mrs. Banner filed a new action on 20 April 1984, in which she alleged abandonment as grounds for alimony and alimony *pendente lite.* Mrs. Banner argues that since the entry of judgment did not take place until 25 April 1984 and she filed her new alimony claim on 20 April 1984, that her action was pending at the time the divorce judgment was entered and she still has a valid claim.

A judgment or order is not final under Rule 58 until it is entered on the clerk's minute book. *See Taylor v. Triangle Porsche-Audi, Inc.,* 27 N.C. App. 711, 220 S.E. 2d 806 (1975), *disc. rev. denied,* 289 N.C. 619, 223 S.E. 2d 396 (1976). However, the purpose of this rule is merely to give all parties fair notice of the entry of judgment. *Rivers v. Rivers,* 29 N.C. App. 172, 223 S.E. 2d 568, *disc. rev. denied,* 290 N.C. 309, 225 S.E. 2d 829 (1976). Even though recording the judgment may be essential to be effective against third persons, the "entry" of judgment is not essential as to the parties themselves. 46 Am. Jur. 2d *Judgments* § 57 (1969).

In the case at bar both of the parties and their attorneys were present in the courtroom when the divorce was granted and they were both fully aware of the terms of that divorce. Yet, the judgment could not be formally entered until Mrs. Banner's counsel had reviewed it. Mrs. Banner should not now be allowed to file a new alimony claim, when she was responsible for the delay in the divorce judgment being entered.

Mrs. Banner's new alimony action is barred, however, regardless of whether or not the divorce judgment was formally entered in the record book. N.C.G.S. § 50-19 provides that a divorce shall not affect the rights of a dependent spouse with respect to any action for alimony which is "pending" at the time the divorce judgment is "granted." The divorce judgment here was granted in open court on 5 April 1984. At that time there was no action for alimony or alimony *pendente lite* pending. Therefore, any claim for alimony brought after that date was barred.

Mrs. Banner also argues that the voluntary dismissal taken pursuant to N.C.G.S. § 1A-1, Rule 41(a) on her alimony counterclaim kept that action alive and pending for one year. Rule 41(a)(1) provides, in pertinent part:

> . . . an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case . . . . Unless otherwise stated in the notice of dismissal . . . , the dismissal is without prejudice . . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . .

Although the language of Rule 41(a) refers to plaintiffs, the rule applies with equal force to a defendant's counterclaim. W. Shuford, *N.C. Civil Practice and Procedure* § 41-4 (2d ed. 1981). In addition, while the rule requires "filing a notice of dismissal," such notice may also be given orally in open court. *Id.*

A voluntary dismissal under the current Rules of Civil Procedure is substantially the same as a voluntary nonsuit under the former procedure. *Collins v. Collins*, 18 N.C. App. 45, 196 S.E. 2d 282 (1973). "Under the former practice a judgment of voluntary nonsuit terminated the action and no suit was pending thereafter on which the court could make a valid order. . . . We think the same rule applies to an action in which a plaintiff takes a voluntary dismissal under G.S. 1A-1, Rule 41(a)(1)." *Id.* at 50, 196 S.E. 2d at 286.

**[3]** Since Mrs. Banner terminated her alimony counterclaim by taking a voluntary dismissal, there was no alimony action pending at the time the divorce judgment was granted. Therefore, once the parties were divorced, Mrs. Banner was barred from bringing a new alimony claim, despite the one year extension of Rule 41(a). We hold that summary judgment was appropriately granted and that the decision of the trial court should be affirmed.

Affirmed.

Judges ARNOLD and WELLS concur.

LARRY E. JOHNSON v. CASSIE MAE HUNNICUTT, WARREN H. HUNNICUTT, ROBERT A. HUNNICUTT, BENJAMIN K. HUNNICUTT AND JUDITH F. DEANS

No. 8610SC1274

(Filed 21 July 1987)

1. **Principal and Agent § 4— tenants in common—one tenant's authority to sell—statements by tenant binding only on self**

Statements by one tenant in common as to another tenant's authority to sell their property was binding only on the tenant who made the statement.

2. **Principal and Agent § 4— one tenant in common as agent of other tenants—failure to show principal-agent relationship**

The trial court did not err in ruling that statements by one defendant concerning his authority from other defendants to sell or grant an option for property owned by all defendants as tenants in common were binding on him but not on the other defendants, since there was no evidence from any source that three of the defendants had authorized the first defendant to act as their agent.

3. **Principal and Agent § 4; Vendor and Purchaser § 5.1— land owned by tenants in common—no authority of tenant to execute option—specific performance inappropriate**

In plaintiff's action for specific performance of an option to purchase land owned by defendants as tenants in common, the trial court properly directed verdict in favor of defendants where three of the owners did not execute the option; there was no evidence that the person who signed was the agent for those who did not sign; and specific performance will not be given as to land agreed to be conveyed by a person as agent when such agent has no authority to make the contract.

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 28 July 1986 in Superior Court, WAKE County. Heard in the Court of Appeals on 9 April 1987.

*Poyner & Spruill by David W. Long and Louis B. Meyer, III, for plaintiff appellant.*

*Kirk, Gay & Kroeschell by Philip G. Kirk and Joseph T. Howell for defendant appellees.*

COZORT, Judge.

Plaintiff sued defendants seeking specific performance of an option to purchase twenty-three (23) acres of property near Wendell at a price of one hundred twenty-five thousand dollars

($125,000). Plaintiff alleged that defendant Benjamin K. Hunnicutt had acted for himself and as an agent for the other defendants, all members of the same family, in negotiating the option to purchase and then accepting it by his endorsement of a one thousand dollar ($1,000) check given him by plaintiff. At the completion of the plaintiff's evidence, the trial court granted defendants' motion for a directed verdict. Plaintiff appealed. We find the trial court was correct in granting a directed verdict.

Plaintiff's evidence showed that the defendants are owners as tenants-in-common of twenty-three (23) acres of property in Wake County. In January of 1985, the plaintiff became interested in buying that property. As a result of a conversation he had with a relative of the defendants, plaintiff contacted O. W. Hedrick, a local real estate agent, to see if the tract of property was for sale. Hedrick informed plaintiff that defendant Benjamin K. "Ben" Hunnicutt had previously approached him about subdividing the tract of property and selling it. Hedrick offered to contact Ben Hunnicutt and the other defendants to see what they wanted to do with the property.

Defendant Ben Hunnicutt had contacted Hedrick in the spring of 1984 and arranged for Hedrick to do an appraisal of the property. Although Ben Hunnicutt referred to the tract as "his family plot," he alone paid for the appraisal. Hedrick testified they then discussed the possibility of subdividing the land and Hedrick's attempting to sell the tobacco allotment to raise the money to subdivide the property. When Hedrick had questions concerning the tobacco allotment, Ben Hunnicutt told him to call Cassie Mae Hunnicutt to get the relevant information. Subsequently, Ben Hunnicutt told Hedrick not to do anything else because Ben was handling the property.

Plaintiff never got a response from Hedrick about whether the property was for sale, and he contacted a friend of his, William Ray Fuller, Sr., who told plaintiff he knew the defendants. Plaintiff and Fuller went to see defendant Cassie Mae Hunnicutt in late March or early April of 1985. Plaintiff informed Cassie Mae Hunnicutt that he was interested in buying the property and asked her who he needed to talk with about this. Cassie Mae Hunnicutt told the plaintiff that Ben Hunnicutt had been selected as their selling agent, and plaintiff would have to talk to Ben Hun-

nicutt about buying the property. Cassie Mae Hunnicutt then wrote Ben Hunnicutt's name on a piece of paper and gave it to plaintiff.

Plaintiff called Ben Hunnicutt and inquired about the possibility of buying the property. Hunnicutt told plaintiff "he didn't know whether he could undo what he had done" and asked plaintiff to call him in a week. Plaintiff called Ben Hunnicutt a week later and Ben Hunnicutt told him the property was for sale by him for one hundred forty thousand dollars ($140,000). Plaintiff then made an offer of one hundred twenty-five thousand dollars ($125,000) for the property, and defendant Ben Hunnicutt told him he "would call his brothers and sisters" and get back with plaintiff. Ben Hunnicutt called plaintiff back and told him "they" had accepted plaintiff's offer.

Plaintiff's attorney prepared a written option to purchase containing the terms he and Ben Hunnicutt had discussed. Plaintiff had his attorney include the names of the cotenants on the option to purchase along with lines for their signatures but left off Warren H. Hunnicutt. The plaintiff then sent to Ben Hunnicutt the option to purchase contract dated 10 April 1985 along with a check in the amount of one thousand dollars ($1,000). The check was made payable to Ben Hunnicutt, and plaintiff noted on the check that it was for "option on property."

Upon receiving the option to purchase and the check, Ben Hunnicutt called the plaintiff, and they agreed to make corrections and some changes in the option. The exact amount of the acreage needed to be corrected, and the defendant Warren Hunnicutt's name needed to be added. A provision was added for the plaintiff to lease the tobacco allotment for the 1985 season if the option was not exercised. Ben Hunnicutt typed on the contract the corrections and changes to which he and plaintiff had agreed. Ben Hunnicutt then signed the option, endorsed the one thousand dollar ($1,000) check, and deposited it in his bank account on or about 16 April 1985. Plaintiff later received the cancelled check with his bank statement.

On 19 June 1985 plaintiff filed the complaint in this action seeking specific performance of the option to purchase contract. Plaintiff sued the five family members who owned the property as tenants-in-common. In the complaint plaintiff alleged that

defendant Ben Hunnicutt acted for himself and as an agent for the other four owners in negotiating the option to purchase and by accepting the option by his endorsement of a one thousand dollar ($1,000) check given him by the plaintiff. Plaintiff alleged that the defendants anticipatorily breached the option to purchase contract by informing him that they would not sell him the property.

After the trial court denied a motion by defendants to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, defendants filed an answer in which they denied any authority on the part of defendant Ben Hunnicutt to act as an agent for them. Defendants denied acceptance of the option to purchase. Defendants filed a motion for summary judgment which was denied on 31 December 1985. The case was tried during the 7 July 1986 term of Wake County Superior Court. At the close of plaintiff's evidence, the trial court granted defendants' motion for a directed verdict pursuant to Rule 50 of the Rules of Civil Procedure. Plaintiff appealed.

**[1]** In his first assignment of error plaintiff alleges "[t]he trial court erred in ruling that evidence of statements by the defendant Cassie Mae Hunnicutt regarding authority the defendant Ben Hunnicutt had from her and the other defendants to sell or grant an option for the subject property could be considered by the jury as binding on her but not as binding on the other defendants." Plaintiff argues that a wide latitude must be allowed in proving an agency relationship and that the evidence at issue is admissible against all defendants. We disagree with plaintiff.

"[I]n general the admissions of one part-owner or cotenant of property will not be evidence against the others." *Young v. Griffith*, 79 N.C. 201, 203 (1878). The parties herein stipulated prior to trial that the defendants were the owners of the subject property as tenants-in-common. Therefore, Cassie Mae Hunnicutt's statements concerning Ben Hunnicutt's authority to sell or grant an option for the property can only bind her. These statements are not binding on the other defendants.

Plaintiff urges us to find Cassie Mae Hunnicutt's statements admissible as to all defendants, citing *Stallings v. Purvis*, 42 N.C. App. 690, 257 S.E. 2d 664 (1979). In *Stallings*, the defendant owners were engaged in business as general partners. This Court

found the actions of the agent, who was also a partner, could bind the partnership to a lease on a building. In *Stallings*, however, there was evidence of ratification of the agent's actions by the general partners which estopped them from denying the agent's authority.

There is no evidence in the record below that defendants Warren H. Hunnicutt, Robert A. Hunnicutt, and Judith F. Deans ratified the acts of Ben Hunnicutt or the statement by Cassie Mae Hunnicutt that Ben Hunnicutt had authority to sell the property. We hold the trial court properly limited the application of statements by Cassie Mae Hunnicutt to her and not to the other defendants.

**[2]** The second assignment of error argues that the trial court erred in ruling evidence of statements by defendant Ben Hunnicutt referencing the authority he had from other defendants to sell or grant an option for the property was binding on him but not the other defendants.

The general rule for admissibility for the statements of an alleged agent has been codified by the adoption of N.C.G.S. § 8C-1, Rule 801(d), which in pertinent part reads as follows:

> (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 . . . (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship . . . .

In *Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 399-400, 331 S.E. 2d 148, 156-57, *disc. rev. denied*, 314 N.C. 664, 336 S.E. 2d 399 (1985), this Court held that an alleged agent's out-of-court statements to the effect that he was working for the defendant insurer while investigating plaintiff could properly be considered on the question of agency. *Dailey* found the evidence of agency admissible when "(1) the fact of agency appears from other evidence and (2) the statements were within the agent's actual or apparent authority." *Id.* at 399, 331 S.E. 2d at 156-57. In *Dailey*, the "other" evidence on the question of whether the person was an agent was

the defendant's naming of the person in question as an agent in an interrogatory. *Id.* at 399, 331 S.E. 2d at 157.

We find the instant situation distinguishable from *Dailey.* The only evidence of defendant Ben Hunnicutt's agency and his authority to speak for the other defendants are the statements made by defendant Cassie Mae Hunnicutt concerning his authority to sell or lease the property and of witnesses O. W. Hedrick and William Ray Fuller, Sr., who had contact with Ben Hunnicutt and Cassie Mae Hunnicutt only. There was no evidence from any source that the three other defendants had authorized Ben Hunnicutt to act as their agent. Therefore, Ben Hunnicutt's statements could bind only him and Cassie Mae Hunnicutt. The trial court correctly ruled that Cassie Mae Hunnicutt's statement that Ben Hunnicutt had authority to sell the property is not binding on the other defendants.

**[3]** Plaintiff's third assignment of error alleges that the trial court erred when it granted a directed verdict in favor of the defendants at the close of the plaintiff's evidence. Plaintiff argues that sufficient evidence was presented to go to the jury on the issue of Ben Hunnicutt's authority to bind the other defendants on the option. We disagree.

> The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence. G.S. 1A-1, Rule 50(a); *Wallace v. Evans,* 60 N.C. App. 145, 298 S.E. 2d 193 (1982). The evidence must be taken in the light most favorable to the plaintiff. *Farmer v. Chaney,* 292 N.C. 451, 233 S.E. 2d 582 (1977). Contradictions, conflicts, and inconsistencies in the evidence must be drawn in the plaintiff's favor. *Tripp v. Pate,* 49 N.C. App. 329, 271 S.E. 2d 407 (1980). The question presented on appeal is whether the evidence taken in the light most favorable to plaintiff is sufficient for submission of the case to the jury.

*Hitchcock v. Cullerton,* 82 N.C. App. 296, 297, 346 S.E. 2d 215, 217 (1986).

"Agency is a fact to be proved as any other, and where there is no evidence presented tending to establish an agency relationship the alleged principal is entitled to a directed verdict." *Smith v. VonCannon,* 17 N.C. App. 438, 439, 194 S.E. 2d 362, 363, *aff'd,*

283 N.C. 656, 197 S.E. 2d 524 (1973). Where some evidence is presented of an agency relationship, agency is a fact to be proved and a question for the jury. *Industries, Inc. v. Distributing, Inc.*, 49 N.C. App. 172, 173, 270 S.E. 2d 515, 516 (1980).

The evidence presented at trial by plaintiff was sufficient to prove Ben Hunnicutt's authority to act for himself and Cassie Mae Hunnicutt. There is no evidence that Ben Hunnicutt had authority to act for the three other owners, and there is no evidence the three other owners ratified the acts of Ben Hunnicutt or the statements of Cassie Mae Hunnicutt. Plaintiff cannot compel specific performance of the option where three of the owners did not execute the option, and there is no evidence that the person who signed was the agent for those who did not sign. Specific performance will not be given as to land agreed to be conveyed by a person as agent when such agent has no authority to make the contract. *Tillery v. Land*, 136 N.C. 537, 48 S.E. 824 (1904). Plaintiff did not seek, in the alternative, specific performance of the undivided interest in the land of Ben Hunnicutt and Cassie Mae Hunnicutt; and we therefore do not address whether plaintiff was entitled to such relief. *Id.*

The granting of a directed verdict for defendants is

Affirmed.

Judge PHILLIPS concurs in result.

Judge GREENE concurs.

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ZEPHYR M. HUDSON, EMPLOYEE-PLAINTIFF v. MASTERCRAFT DIVISION, COLLINS & AIKMAN CORPORATION, EMPLOYER-DEFENDANT, AND AETNA CASUALTY & SURETY COMPANY, CARRIER-DEFENDANT

No. 8710IC199

(Filed 21 July 1987)

**1. Master and Servant § 72— workers' compensation—partial disability of thumb—insufficiency of evidence**

Evidence was insufficient to support the Industrial Commission's finding and conclusion that plaintiff suffered a five percent permanent partial disability of her left thumb as a result of her injury by accident.

2. **Master and Servant § 94— workers' compensation—temporary total disability —sufficiency of evidence**

   Evidence was sufficient to support the Industrial Commission's finding that plaintiff was temporarily totally disabled as a result of a work related injury where it tended to show that her doctor recommended that she refrain from using scissors in her work due to the problem with her thumb which resulted from a work related injury, and that she not do any work which required heavy lifting or working above her shoulders due to her non-work related brachial neuritis; the doctor's recommendation was reported to defendant employer; and plaintiff was placed on medical leave of absence due to the restrictions placed upon her.

3. **Master and Servant § 94.1— workers' compensation—duration of temporary total disability—insufficiency of findings**

   The Industrial Commission's findings with respect to the duration of plaintiff's temporary total disability were not supported by the evidence where the Commission found that her temporary total disability began on 5 February 1985 but all the evidence disclosed that plaintiff continued to work until 8 February 1985; and, because the Commission failed to make any finding of fact as to the date plaintiff reached maximum medical improvement, it was impossible for the Commission properly to determine the duration of plaintiff's healing period, upon which an award of benefits for temporary disability must be based.

4. **Master and Servant § 75— workers' compensation—cost of treatment by second physician—necessity for treatment—notice to Commission—insufficiency of findings**

   The Industrial Commission erred in ordering defendant to pay the cost of plaintiff's treatment by a second physician without first finding that the physician's treatment was "required to effect a cure or give relief" from her injury or that plaintiff had sought approval by the Commission of her procurement of the physician's services "within a reasonable time."

APPEALS by plaintiff and defendants from Opinion and Award of the North Carolina Industrial Commission entered 27 August 1986. Heard in the Court of Appeals 11 June 1987.

Plaintiff filed this claim for workers' compensation benefits for an alleged accidental injury to her hand arising out of and in the course of her employment with Mastercraft Division, Collins and Aikman Corporation. The claim was initially heard by Deputy Commissioner Shuping who awarded plaintiff compensation for a five percent permanent partial disability of her left thumb pursuant to G.S. 97-31(1), but declined to award compensation for temporary total disability. Deputy Commissioner Shuping also ordered defendants to pay the expenses of plaintiff's medical

treatment incurred through 5 February 1985, but not thereafter. Plaintiff appealed to the Full Commission.

On appeal, the Full Commission found that plaintiff was temporarily totally disabled from 5 February 1985 until 10 October 1985 as a result of her accidental injury, and that she sustained a five percent permanent partial disability of her left thumb. The Commission awarded compensation accordingly and ordered defendants to pay all medical expenses incurred by plaintiff as a result of her injury by accident. Plaintiff and defendants appealed.

*Cox and Gage, by Robert H. Gage, for plaintiff appellant.*

*Hedrick, Eatman, Garner & Kincheloe, by Edward L. Eatman, Jr., for defendants appellants.*

MARTIN, Judge.

In the present case, there is no dispute that plaintiff sustained a compensable injury. The parties contend on appeal, however, that the Commission erred in determining the extent to which plaintiff is entitled to compensation for temporary and permanent disability as a result of her injury. Their contentions have merit and require that we remand the case for additional findings with respect to both questions.

Appellate review of a decision of the Industrial Commission is limited to a determination of whether or not there is competent evidence to support the Commission's findings, and whether or not those findings justify the Commission's legal conclusions and decision. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). The Commission is the sole judge of the weight and credibility of the evidence, but its findings must be supported by some competent evidence in the record. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E. 2d 389 (1980).

Evidence before the Commission in the present case tended to show that in 1984, and for approximately four and one-half years prior thereto, plaintiff was employed as a cone winder operator for defendant-employer. In January or February of 1984, she sustained an injury when a spindle fell from the machine she was operating and struck her left thumb. She was treated for her

injury by Dr. Hobart Rogers and recovered. She did not file a claim for compensation for her injury.

On or about 28 December 1984, plaintiff sustained a similar injury when another spindle fell and struck her left thumb. She continued to work until 12 January 1985, when she sought treatment from Dr. Rogers due to severe pain in her hand. She returned to work on 14 January and worked on light duty status until 8 February 1985 when she was placed on medical leave of absence by defendant-employer.

Dr. Rogers testified that plaintiff complained of pain in her left hand, her left arm, and her neck. In his opinion she suffered from capsulitis around the left thumb, caused by her job-related injury, and from brachial neuritis which was not related to her employment. He last saw plaintiff on 5 February 1985, at which time he recommended that she not continue to perform the cone winding job because it required the use of scissors which "aggravated the problem with her thumb." He also recommended, due to plaintiff's brachial neuritis, that she not do any work that required heavy lifting or working above shoulder level. Because of the limitation of the use of her thumb, Dr. Rogers testified that in his opinion plaintiff had sustained a five percent permanent partial disability of her left thumb as a result of the injury by accident.

On 25 February 1985, plaintiff sought treatment from Dr. Brown Crosby. According to Dr. Crosby's testimony, plaintiff suffered from a sprain of her left thumb and from carpal tunnel syndrome, or compression of the median nerve, of her left hand. In Dr. Crosby's opinion, plaintiff reached maximum medical improvement on 18 October 1985. He continued to treat her until 10 January 1986 when he released her to return to work. Dr. Crosby rated her permanent partial disability as ten percent of her left hand. He testified on direct examination that plaintiff's injury could have been caused by her 28 December 1984 accident. On cross-examination, however, Dr. Crosby testified that he could not state to a medical certainty that plaintiff had carpal tunnel syndrome or that her condition was work-related.

I

PLAINTIFF'S APPEAL

**[1]** The Commission found as a fact that at the time of plaintiff's 5 February 1985 visit to Dr. Rogers, he gave her a five percent permanent partial disability rating of her left thumb. The Commission went on to find and conclude that plaintiff suffered a five percent permanent partial disability of her left thumb as a result of her injury by accident. Plaintiff assigns error to these findings, contending that they are not supported by competent evidence. We agree.

G.S. 97-31 provides for compensation for temporary disability during the healing period and for an award for permanent disability at the end of the healing period when maximum recovery has been achieved. *Moretz v. Richards & Associates, Inc.*, 74 N.C. App. 72, 327 S.E. 2d 290 (1985), *modified and aff'd*, 316 N.C. 539, 342 S.E. 2d 844 (1986). The healing period of an injury is defined as "the time when the claimant is unable to work because of his injury, is submitting to treatment . . . or is convalescing." *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288-89, 229 S.E. 2d 325, 328 (1976), *disc. rev. denied*, 292 N.C. 467, 234 S.E. 2d 2 (1977). The healing period ends when, "after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established." *Id.* at 289, 229 S.E. 2d at 329.

Dr. Roger's testimony does not support the Commission's findings. Dr. Rogers did not testify that he rated plaintiff's permanent partial disability at the time of her 5 February 1985 visit, or that she had reached maximum medical improvement on that date. Indeed, his clinical note of her visit indicates that plaintiff continued to have pain in her thumb, that she should not continue the work that she was doing, and that she should return to see him in six weeks. Moreover, Dr. Rogers did not render an opinion as to the date upon which plaintiff reached maximum medical improvement nor did he indicate that he had any knowledge of her condition upon reaching that point. At the time Dr. Rogers rendered his opinion as to permanent disability, i.e., 18 June 1985, plaintiff continued to be, according to other findings by the Commission, temporarily totally disabled to work and, therefore, was still in the healing period and had not reached maximum medical improvement. Thus, Dr. Rogers' rating of plaintiff's permanent

disability was premature. Since there was no other competent evidence to support the Commission's finding that plaintiff's permanent partial disability was limited to five percent of her thumb, we must vacate the award and remand the case for a proper determination of the extent of her permanent disability.

II

DEFENDANTS' APPEAL

**[2]** Defendants contend that there is no evidence to support the Commission's finding that plaintiff was temporarily totally disabled as a result of a work-related injury. We disagree.

There was evidence tending to show that after examining plaintiff on 5 February 1985, Dr. Rogers recommended that she refrain from using scissors in her work, due to the problem with her thumb, and that she not do any work that required heavy lifting or working above her shoulders, due to her non-work-related brachial neuritis. Dr. Rogers' recommendation was reported to defendant-employer, and plaintiff was placed on medical leave of absence due to the restrictions placed upon her. Although defendant-employer offered evidence tending to show that plaintiff was placed on leave due to the restrictions associated with her brachial neuritis, plaintiff testified that she was told the restrictions on her use of scissors resulted in her medical layoff. Though he equivocated on cross-examination, Dr. Crosby testified that plaintiff's carpal tunnel syndrome could have been caused by the 28 December 1984 accident. In the opinion of Dr. Crosby, plaintiff reached maximum medical improvement on 18 October 1985. In our view, this evidence was sufficient to support the Commission's finding that plaintiff was temporarily totally disabled as a result of her accidental injury.

**[3]** The Commission's findings with respect to the duration of plaintiff's temporary total disability are not, however, supported by the evidence. The Commission found that her temporary total disability began on 5 February 1985, when all of the evidence discloses that plaintiff continued to work until 8 February 1985. The Commission did not find the date upon which plaintiff reached her maximum medical improvement, but determined that her temporary disability ceased on 10 October 1985, a date for which there is no evidentiary support whatsoever. Because the Commission failed to make any finding of fact as to the date plaintiff reached

maximum medical improvement, it was impossible for the Commission to properly determine the duration of plaintiff's healing period, upon which an award of benefits for temporary disability must be based. *Moretz v. Richard & Associates, Inc., supra.* Accordingly, we must vacate the award of compensation for temporary total disability and require the Commission, upon remand, to find additional facts with respect to the duration of plaintiff's temporary total disability.

Defendants also assign error to the Commission's award of the expense of plaintiff's medical treatment by Dr. Crosby. They cite two grounds for their contention: first, they contend that Dr. Crosby did not treat plaintiff for a work-related injury, and second, that the Commission did not approve such treatment. Because we have determined that the evidence is sufficient to support a finding that the condition for which Dr. Crosby treated plaintiff resulted from an injury by accident arising out of and in the course of her employment, we overrule defendants' first contention without further discussion. The second contention, however, has merit.

**[4]** G.S. 97-25 authorizes the Industrial Commission to award to an injured employee, in addition to recoverable compensation, expenses for medical treatment "as may reasonably be required to effect a cure or give relief" from the work-related injury. Ordinarily, the employer will provide any necessary medical treatment; however, the "injured employee has the right to procure, even in the absence of an emergency, a physician of his own choosing, subject to the approval of the Commission." *Schofield v. The Great Atlantic & Pacific Tea Co.*, 299 N.C. 582, 591, 264 S.E. 2d 56, 62 (1980). Prior approval of the employee's procurement of his own physician is not required; the employee simply must obtain approval from the Commission "within a reasonable time after he has selected a physician of his own choosing to assume treatment," *id.* at 593, 264 S.E. 2d at 63, and the Commission must make appropriate findings "relative to whether such approval was sought . . . within a reasonable time." *Id.* at 594, 264 S.E. 2d at 64. In addition:

> upon submission of a claim for approval for medical treatment rendered by the employee's own physician, there must be findings based upon competent evidence that the treat-

> ment was "required to effect a cure or give relief," . . . . There should also be findings that the condition treated is, or was, caused by, or was otherwise traceable to or related to the injury giving rise to the compensable claim. [Citation omitted.]

*Id.* at 595, 264 S.E. 2d at 64-65.

In the present case, defendant-employer arranged and provided for medical treatment of plaintiff's injuries by Dr. Rogers. After a short course of treatment, however, plaintiff became dissatisfied with Dr. Rogers' diagnosis and treatment of her condition and procured the services of Dr. Crosby. The Commission concluded that plaintiff is "entitled to payment of all medical bills incurred as a result of her injury by accident, including the cost of medical treatment by Dr. Crosby," but made no findings that Dr. Crosby's treatment was "required to effect a cure or give relief" from her injury, or that plaintiff had sought approval by the Commission of her procurement of Dr. Crosby "within a reasonable time." Findings with respect to these requirements of the law should have been made in the present case and it was error for the Commission to order defendant to pay the cost of plaintiff's treatment by Dr. Crosby without doing so.

The Opinion and Award of the Industrial Commission is vacated and this case is remanded to the Commission for further findings of fact made in accordance with this opinion.

Vacated and remanded.

Judges BECTON and COZORT concur.

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BRENDA H. BYRD (FORMERLY OWENS) v. DAVID MARVIN OWENS

No. 8626DC1138

(Filed 21 July 1987)

**1. Divorce and Alimony § 30— equitable distribution of marital property—parties' stipulation classifying note as marital property—no understanding by parties as to effect of stipulation**

The parties' stipulation classifying a promissory note to defendant as marital property was not valid where the legal effect of the stipulation would

be the distribution of dual nature property as if it were entirely marital property, but there was nothing in the record to show the trial court made any inquiries of the parties to ensure that they understood the legal effect of the stipulation; nor was it clear from the record that the parties had any understanding of the effect their stipulation would have on a particular debt for which apparently only defendant was legally liable.

**2. Divorce and Alimony § 30— equitable distribution of marital property—husband's debts and guarantees not properly considered**

In an action for equitable distribution of marital property, the trial court erred in failing to consider defendant's $250,000 debt to a bank incurred after the parties' separation and defendant's personal guarantees incurred in relation to his business ventures, since those transactions pertained to corporations with which defendant was involved both before and after the date of separation.

APPEAL by defendant from *Brown, L. Stanley, Judge.* Judgment entered 29 May 1986, in District Court, MECKLENBURG County. Heard in the Court of Appeals 11 March 1987.

*A. Marshall Basinger, II, for plaintiff-appellee.*

*Warren C. Stack for defendant-appellant.*

GREENE, Judge.

Plaintiff brought this action seeking absolute divorce from her husband and equitable distribution of their marital property. On 9 April 1984, the trial court granted the parties an absolute divorce. Both parties remarried and, on 29 May 1986, the trial court entered a judgment for equitable distribution. Defendant appeals from the judgment distributing their marital property.

Plaintiff and defendant were married in November 1957. Two children were born of the marriage, both of whom are now in their majority. In 1974, the parties moved from the State of Virginia to Iredell County, North Carolina, and purchased a home as tenants by the entirety. Shortly thereafter, defendant returned to Virginia. He continued to provide financial support and occasionally visited his wife in Iredell County. The parties separated on 8 November 1982.

Prior to the separation, defendant started a Virginia business known as D. Owens & Associates (hereinafter, "D. Owens"). The corporation distributed computer systems and terminals and, de-

fendant testified, had done "very well" through 1982 but had borrowed heavily to maintain cash flow. Some evidence tended to show defendant personally guaranteed some of the loans. At the date of separation, defendant owned 95% of D. Owens' stock. Less than two months after the separation, in December of 1982, he sold all his stock to Duke of Energy, Inc. (later to reincorporate under the name of T.U. International, Inc., and hereinafter referred to as "T.U."). He received several million shares of T.U. in exchange. Defendant testified the T.U. stock was trading publicly at that time for $5.00 a share, but his stock was restricted by federal regulations making it impossible to sell the stock publicly for two years.

After the sale of D. Owens to T.U., defendant borrowed $250,000 from Dominion National Bank (hereinafter, "Dominion") and, in the spring of 1983, purchased several million more shares of T.U. from a majority shareholder at ten cents a share. This purchase gave defendant 37% of T.U.'s stock. He testified he also received proxies for another 23% of T.U.'s stock giving him control of the corporation. Defendant testified he then became T.U.'s chief executive officer in an effort to salvage the corporation and that he personally guaranteed loans to the corporation totaling approximately $10,000,000.

About 16 months later, on 14 August 1984, defendant sold 99% of his T.U. stock to First Tarent Corporation. In exchange, First Tarent gave defendant an unsecured promissory note for $1,154,420. The principal on the note was due in five years, and the note required semi-annual interest payments at 13% per annum. It also contained a provision whereby First Tarent could cancel the note by returning the stock to defendant. Defendant testified he had not received any payment from First Tarent and had brought suit against the corporation for the collection of the note. The corporation counterclaimed for fraud in the transaction. At the time of the distribution hearing, that suit had not been resolved. Defendant also testified that T.U. (now a subsidiary of First Tarent) had filed bankruptcy on 5 September 1985.

Prior to the equitable distribution hearing, the parties stipulated that the First Tarent note, issued nearly two years after their separation, was marital property. They did not

stipulate to its value, neither did they present direct evidence of the fair market value of D. Owens at the date of separation. Plaintiff did, however, present evidence that the several million T.U. shares defendant had received in exchange for D. Owens had a value of $13,125,000 even though the stock was restricted. The court made an apparent unequal division of the marital property, giving defendant 80% interest in the promissory note from First Tarent and a $10,000 promissory note issued to defendant by Terminals Unlimited, Inc., a subsidiary of T.U. The rest of the parties' marital property, including the marital home valued at $70,000, was distributed to plaintiff. In its order, the court declared the value of the First Tarent note to be whatever was collected on the note without regard to the cost of recovery expended by defendant.

The issues before us are: 1) whether the parties' stipulation classifying the First Tarent note as marital property was valid and 2) whether the trial court erred in failing to consider defendant's debt to Dominion and his personal guarantees of corporate loans.

I

[1] In applying our equitable distribution statute, the trial court must follow a three-step procedure: 1) classification, 2) evaluation and 3) distribution. *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). Thus, when parties to an equitable distribution action make a valid stipulation that certain property is to be classified as marital property, the trial court is nonetheless required to value and distribute that property.

The trial court in this case did not value the note but simply distributed it by giving an 80% interest to defendant and 20% to plaintiff. N.C.G.S. Sec. 50-21(b) (Supp. 1985) requires all marital property to be valued as of the date of separation if the parties' absolute divorce is based on one year's separation. If the parties' stipulation as to the classification of the First Tarent note was valid, the note should have been valued as of the date of separation. The note was issued 14 August 1984, nearly two years after the separation date, making the valuation of the note itself on that date impossible. However, based on the appellate record, there was evidence which could have been used to give the note a

value as of the date of separation by using the traditional methods of tracing funds already applied by our courts in equitable distribution cases. *Nix v. Nix*, 80 N.C. App. 110, 341 S.E. 2d 116 (1986); *Mauser v. Mauser*, 75 N.C. App. 115, 118-19, 330 S.E. 2d 63, 65 (1985); *Wade v. Wade*, 72 N.C. App. 372, 381-82, 325 S.E. 2d 260, 269, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985) (adopting the "source of funds" approach to classification under N.C.G.S. Sec. 50-20). It can be determined from the record that the corporation D. Owens and the money borrowed from Dominion, though not then owned by either party, were the assets in existence at the date of separation which were eventually converted into the First Tarent note. Even though neither valuation would be simple, each asset must be valued. *See Poore v. Poore*, 75 N.C. App. 414, 331 S.E. 2d 266, *disc. rev. denied*, 314 N.C. 543, 335 S.E. 2d 316 (1985) (regarding the valuation of a business). However, the court would be required to proceed with the valuation and distribution of the First Tarent note as marital property only if the parties' stipulation to the note's classification was valid.

Parties to an equitable distribution action must understand and freely agree to the legal effects of their stipulations, and the record must affirmatively reflect that they understand and agree. *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E. 2d 600 (1985). The court must make contemporaneous inquiries of the parties at the time the stipulations are entered and it should read to them the terms of the stipulations. *Id.* at 556, 328 S.E. 2d at 602.

In the case before us, there is nothing in the record to show the trial court made any inquiries of the parties to ensure they understood the legal effect of the stipulation. The parties' stipulation as to the classification of the First Tarent note would have an important effect on the total value of their marital property. It is apparent to us from the evidence in the record that, without the stipulation, the First Tarent note would be classified as dual nature property: property that is part separate and part marital. *Willis v. Willis*, 85 N.C. App. 708, 710, 355 S.E. 2d 828, 830 (1987); *Nix v. Nix*, 80 N.C. App. 110, 113, 341 S.E. 2d 116, 120 (1986). Thus, the legal effect of the parties' stipulation would be the distribution of dual nature property as if it were entirely marital property. It is not clear that the parties understood this.

Neither is it clear from the record that the parties had any understanding of the effect their stipulation would have on the Dominion debt, upon which apparently only defendant was legally liable. Defendant testified he used the money he borrowed from Dominion to buy part of the T.U. stock exchanged for the First Tarent note. We note for clarity that the record before us reveals the debt was incurred between the date of separation and the date the parties were divorced. It is not clear from the record whether the parties understood that the Dominion debt would be classified as a marital debt because of their stipulation.

Since the record does not affirmatively reflect that the parties understood the legal effect their stipulation as to the classification of the First Tarent note would have, this case must be remanded for a new trial.

II

**[2]** Defendant raises an issue on appeal which may reoccur at trial, and, for that reason, we choose to address it here. Defendant contends the trial court did not consider every liability of the parties as required by N.C.G.S. Sec. 50-20(c)(1) in making an unequal distribution. He says the court considered neither his debt of $250,000 to Dominion incurred after the date of the parties' separation nor his personal guarantees incurred in relation to his business ventures.

N.C.G.S. Sec. 50-20(c) states:

> There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:
>
> (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
>
> . . .

Since the assets and obligations of a husband and wife are reciprocally related, there can be no complete and equitable distribution of their property without also considering and distributing their debt. "Distribution of marital debts has the benefit of resolving all issues flowing from the former marriage

relationship." *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E. 2d 427, 430 (1987). Debt, as well as assets, must be classified as marital or separate property. If the debt is classified as marital, the court must value the debt and distribute it pursuant to N.C.G.S. Sec. 50-20(c). For the purpose of an equitable distribution, marital debt is debt incurred during the marriage for the joint benefit of the husband and wife. *Geer*, 84 N.C. App. at 475, 353 S.E. 2d at 429. The burden of proof is on the party seeking to classify the debt as marital. If the debt is classified as separate, the court must value it and then, pursuant to N.C.G.S. Sec. 50-20(c)(1) consider it in making a distribution.

In the case before us, the court made no mention of the debt to Dominion or defendant's personal guarantees in its findings of fact. While the debt to Dominion was incurred by defendant after the parties' separation, it was used to purchase the First Tarent note. Evidence in the record tends to show defendant had personally guaranteed loans to the corporations he was involved with both before and after the date of separation. The court should have classified and valued the debt to Dominion and proceeded to either distribute it as marital debt or consider it as separate debt in making the distribution. Because the court did not classify this debt, its conclusions of law determining the distribution of the marital property are not supported by the findings of fact.

As to defendant's personal guarantees, even though the valuation of the contingent liability is difficult, the trial court must also classify and value them if the defendant presents sufficient evidence as to their value. A trial court

> should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. On appeal, if it appears that the trial court reasonably approximated the net value . . . based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.

*Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E. 2d 266, 272, *disc. rev. denied*, 314 N.C. 543, 335 S.E. 2d 316 (1985).

III

New trial.

Judges ARNOLD and MARTIN concur.

GLORIA WHISENHUNT AND CURTIS WHISENHUNT v. ROBERT P. ZAMMIT, M.D., AND POLLACK, ZAMMIT & FERGUSON, M.D., P.A.

No. 8621SC930

(Filed 21 July 1987)

1. **Hospitals § 6; Physicians, Surgeons and Allied Professions § 12.1— medical malpractice—"credentialing records" of hospital privileged**

The trial court in a medical malpractice action did not err in refusing to allow plaintiffs, through discovery, to get the "credentialing records" of a hospital as they pertained to defendant, since the documents sought were confidential and privileged under N.C.G.S. §§ 143-318.11 and 131E-95.

2. **Physicians, Surgeons and Allied Professions § 15— reading from drug inserts not allowed—no error**

In a medical malpractice action where plaintiffs alleged that defendant failed to monitor effects of prescription medication, the trial court did not err in refusing to allow plaintiffs' expert witness to read from drug inserts provided by pharmaceutical manufacturers, since plaintiffs did not show that their expert witness relied upon the packaging inserts to arrive at his opinions; moreover, even if it was error to exclude the evidence, such error was not prejudicial to plaintiffs, since the witness was allowed to read from the Physicians Desk Reference, and it contained basically the same warnings and contraindications as the package inserts.

3. **Physicians, Surgeons and Allied Professions § 15.1— malpractice—expert witness—impeachment questions proper**

The trial court in a medical malpractice action did not err in permitting impeachment of the plaintiffs' expert witness by cross-examination concerning his suspension of staff privileges from two hospitals, since the questions allowed the jury to decide how much weight to give to the witness's testimony and allowed the jury to determine the bias of the witness.

APPEAL by plaintiffs from *Long, Judge.* Judgment entered 28 February 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals on 3 February 1987.

*Harrell Powell, Jr., and Garry Whitaker for plaintiff appellants.*

*Petree, Stockton & Robinson by J. Robert Elster, Michael L. Robinson and J. David Mayberry for defendant appellees.*

COZORT, Judge.

Plaintiffs filed suit for negligence against defendants, alleging defendant physician failed to monitor effects of prescription

medication. The action centers around treatment rendered by defendant, Dr. Robert Zammit, following a total abdominal hysterectomy which was performed on plaintiff Gloria Whisenhunt. One week after her operation, the plaintiff began to experience symptoms consistent with a post-operative infection. A regimen of antibiotic therapy was started, and the types of antibiotic drugs that plaintiff was taking were modified periodically to combat the symptoms of infection she exhibited. As a result of the use of several types of antibiotics, the plaintiff contracted pseudomembranous enterocolitis, a condition characterized by constant diarrhea. At the conclusion of the evidence, the jury returned a verdict for the defendants. On appeal, the plaintiffs argue that the trial court committed prejudicial error by prohibiting discovery of the "credentialing records" of Forsyth Memorial Hospital as they pertain to defendant Zammit; that the trial court erred in not allowing the plaintiffs' expert witness to read from drug inserts provided by pharmaceutical manufacturers; and that the trial court erred in allowing defendants to cross-examine plaintiffs' expert about the suspension of the expert's privileges at two hospitals. We find no error.

**[1]** The plaintiffs first contend that the trial court erred by not allowing them, through discovery, to get the "credentialing records" of Forsyth Memorial Hospital as they pertain to Dr. Zammit. Immediately prior to the trial of this matter, about two years after plaintiffs commenced this action, the plaintiffs, pursuant to N.C.G.S. § 1A-1, Rule 45(c), issued a subpoena to Forsyth Memorial Hospital (a non-party in the case) seeking production of its credentialing file on Dr. Zammit. Forsyth Memorial moved to quash the subpoena on the grounds that the documents sought were confidential and privileged, under N.C.G.S. §§ 143-318.11 and 131E-95. The trial court granted the motion to quash. In their brief, plaintiffs argue that the trial court erred because the information requested was not privileged under these statutes. We disagree.

N.C.G.S. § 143-318.11(a)(17) states that a public body may hold an executive session and exclude the public:

(17) To hear, consider, and decide matters involving admission, discipline, or termination of members of the medical

> staff of a public hospital. Final action on an admission or termination shall be reported at an open meeting.

Subsection (d) of N.C.G.S. § 143-318.11 provides that minutes and records of an executive session may be withheld from public inspection so long as public inspection would frustrate the purpose of the executive session. Plaintiffs have made no showing that they sought information other than that covered specifically by N.C.G.S. § 143-318.11(a)(17). We find the information sought to be privileged under that statute.

The plaintiffs' primary argument on this issue is that N.C.G.S. § 131E-95(b) does not apply in this case because the records they seek about Dr. Zammit are *not* the medical review committee's records about Dr. Zammit's treatment of plaintiff. Plaintiffs argue that they are seeking the "credentialing records of [defendant Zammit] in their entirety." Plaintiffs argue they are entitled to discover those records. We do not agree.

Our Supreme Court was recently faced with a similar issue in *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 347 S.E. 2d 824 (1986). In that case, the plaintiff had alleged a negligence claim against a physician after the physician had performed surgery. Plaintiff also alleged a claim against a hospital for "corporate negligence" for allowing the physician to continue to practice at the hospital after having been put on notice of the physician's failure to meet ordinary standards of care. The plaintiff argued that proceedings of the medical review committee related to the corporate negligence claim of hospital were not privileged under N.C.G.S. § 131E-95 because they were not the records of the review of the specific claim against the physician. The Supreme Court rejected that argument, in an opinion by Justice (now Chief Justice) Exum:

> It would severely undercut the purpose of § 95, *i.e.*, the promotion of candor and frank exchange in peer review proceedings, if we adopted plaintiffs' construction of the statute, for it would mean these proceedings were no longer protected whenever a claim of corporate negligence was made alone or coupled with a claim of negligence against an individual physician.

> Neither do we think the language of the statute, considered in context, permits the construction plaintiffs urge. Subsection (a) of § 95 constitutes a broad grant of immunity from liability for damages "in *any* civil action on account of *any* act, statement or proceeding undertaken, made or performed within the scope of the functions of the committee." (Emphases supplied.) Subsection (b) of § 95 protects documents and related information against discovery or introduction into evidence "in *any* civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee." (Emphasis supplied.) A civil action against a hospital grounded on the alleged negligent performance of the hospital's medical review committees is by the statute's plain language a civil action resulting from matters evaluated and reviewed by such committees. (Footnote omitted.)

*Id.* at 82-83, 347 S.E. 2d at 828-29.

We find the analysis in *Shelton* applicable here. Plaintiffs cannot carve out an exception to § 95 by claiming they want to review credentialing records of defendant "in their entirety." The purpose of § 95 is to promote candor in peer review proceedings, and we will not undercut that purpose. The trial court did not err in quashing the subpoena.

**[2]** The plaintiffs' second contention on appeal is that the trial court erred in not allowing the plaintiffs' expert witness to read from drug inserts provided by pharmaceutical manufacturers. During the testimony of Dr. Jim Cleary, plaintiffs' expert witness, plaintiffs attempted to have Dr. Cleary read to the jury packaging inserts accompanying two prescription antibiotics. The plaintiffs contend that the inserts should have been allowed to have been read into evidence pursuant to N.C.G.S. 8C-1, Rule 803(18) which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (18) 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, periodi-

> cals, 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 supplied.]

To comply with Rule 803(18), the plaintiffs must show that the packaging inserts were relied upon by the expert witness in direct or cross-examination and must establish the inserts as reliable authority. After careful review of the trial transcripts, we find no testimony by the plaintiffs' expert that he relied on the packaging inserts. The expert witness stated that as a result of being asked to testify in this case he took specific courses in pharmacology so he could be prepared to give an honest, straightforward answer with questions dealing with pharmacology. When asked on direct examination what sources he had researched, the expert witness testified that he reviewed the Physicians Desk Reference, The Merck Manual (a concise summary of the practice of medicine) and specific books on gastroenterology. He never testified that he had relied on the packaging inserts to arrive at his opinions in this case. The only mention of the packaging inserts was when he was asked, on direct examination, if they were sent to physicians and if they were updated. Therefore, since the plaintiffs did not show that their expert witness relied upon the packaging inserts to arrive at his opinions, they failed to meet the requirements of N.C.G.S. § 8C-1, Rule 803(18).

Even if the action of excluding the inserts from being read into evidence was error, it was not prejudicial to the plaintiffs. The plaintiffs' expert witness testified that the Physicians Desk Reference contained basically the same warnings and contraindications as the package inserts. The trial court allowed the expert witness to read into evidence and to the jury portions of the Physicians Desk Reference dealing with the drugs in question. Since the expert was able to read essentially the same evidence from the Physicians Desk Reference as he would have from the inserts, any error was harmless.

**[3]** The plaintiffs' third contention on appeal is that the trial court committed prejudicial error and abused its discretion in per-

mitting impeachment of the plaintiffs' expert witness by permitting cross-examination on specific instances of conduct: his suspension of staff privileges from Lula Conrad Hoots Hospital in Yadkinville and Forsyth Memorial Hospital. Plaintiffs argue that the probative value of the impeachment was substantially outweighed by the unfair prejudice, the confusion of the issues, and the misleading of the jury. We find no merit to this argument.

N.C.G.S. § 8C-1, Rule 403 provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This state rule is identical to its federal counterpart. Looking to the federal courts for guidance, we find the following from the United States Court of Appeals for the Fourth Circuit: "Appraisal of the probative and prejudicial value of evidence under Rule 403 (Fed. R. Evid. 403) is entrusted to the sound discretion of the trial judge; absent extraordinary circumstances, the Court of Appeals will not intervene in its resolution." *U.S. v. MacDonald*, 688 F. 2d 224, 227 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed. 2d 951 (1983). The North Carolina Supreme Court has followed this reasoning. *See State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986). In the present case, we find no abuse of discretion. The question of reasons for the witness's suspension allow the jury to decide how much weight to give to his testimony. The circumstances of his suspension may also have a bearing on the bias of the witness, which is a proper consideration for the jury.

In the trial below, we find

No error.

Judges MARTIN and PARKER concur.

ST. PAUL FIRE & MARINE INSURANCE COMPANY AND CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, PLAINTIFFS v. FREEMAN-WHITE ASSOCIATES, INC. AND WILLIAM FUNDERBURK, DEFENDANTS, AND THIRD-PARTY PLAINTIFFS v. MCCARTHY BROTHERS COMPANY, THIRD-PARTY DEFENDANT

No. 8626SC1240

(Filed 21 July 1987)

**Architects § 3— negligence claim paid by insurer—waiver by insurer of claim against architects to extent of insurance coverage—jury question**

The trial court erred in granting defendants' motion to dismiss plaintiff insurer's action against defendant architects where plaintiff alleged that collapse of part of a hospital during construction was proximately caused by the negligence of defendants and that, pursuant to a builders risk insurance policy between the hospital and plaintiff, plaintiff paid benefits to the hospital and was subrogated to the rights of the hospital against defendants, since the contract documents involved were ambiguous and unclear and would not support a finding by the trial court that, as a matter of law, plaintiff waived any claim it may have had against defendants for their negligence to the extent that the hospital had obtained hazard insurance coverage for damage to the property during construction.

Judge ARNOLD dissenting.

APPEAL by plaintiffs from *Saunders, Judge.* Order entered 20 May 1986 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 6 May 1987.

On 26 April 1983, defendant Freeman-White Associates, Inc. entered into a contract with the Charlotte-Mecklenburg Hospital Authority (hereinafter Hospital) to render architectural services for the design and construction of a new hospital and medical center. The contract between Freeman-White and the Hospital was the 1980 Edition of the American Institute of Architects, AIA Document B141/CM, Standard Form Agreement Between Owner and Architect, Construction Management Edition, with some modifications. This contract incorporated by reference, in part, the 1980 Edition of the American Institute of Architects, AIA Document A201/CM, General Conditions of the Contract for Construction, Construction Management Edition.

Freeman-White subsequently entered into a contract with defendant William Funderburk to assist in designing the work. Pursuant to the contract between Freeman-White and the Hospital,

the Hospital purchased builders risk insurance from St. Paul Fire & Marine Insurance Company (hereinafter St. Paul). The Hospital selected McBro, a division of McCarthy Brothers, Inc. to serve as construction manager.

During the course of construction, the south wing of the project collapsed causing property damage in excess of $10,000.00. As a result, the Hospital collected benefits from the "all risk" insurance policy.

Plaintiffs instituted this action against defendants Freeman-White and Funderburk alleging that the collapse was proximately caused by the negligence of defendants, and that pursuant to the insurance policy between the Hospital and St. Paul, St. Paul paid benefits to the Hospital and is subrogated to the rights of the Hospital against defendants.

Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) on the ground that plaintiffs' complaint failed to state a claim upon which relief can be granted. The trial court granted defendants' motion.

From the order of the trial court, plaintiffs appeal.

*Yates, Fleishman, McLamb & Weyher, by Barbara B. Weyher and Gary R. Poole, for plaintiff-appellants.*

*Griffin, Cochrane & Marshall, by John Dean Marshall, Jr., Luther P. Cochrane and Jeanette R. Hait; and Jones, Hewson & Woolard, by Robert G. Spratt, III, for defendant-appellees.*

WELLS, Judge.

It seems apparent from the briefs of the parties that there is little question that plaintiffs' complaint, on its face, sets forth a valid claim for relief against defendants for negligence in the performance of their professional duties owed to plaintiffs. The complications in the case arise out of the provisions of contract documents attached to and incorporated in the complaint. The order of the trial court allowing defendants' N.C. Gen. Stat. 1A-1, Rule 12(b)(6) motion to dismiss indicates that the trial court was convinced that in these contract documents, plaintiff waived any claim it may have had against defendants for their negligence to the extent plaintiffs had obtained hazard insurance coverage for

damage to the property during construction. This is the central point addressed by the parties in their briefs. Thus, our task is to examine the contract documents to determine whether these documents were so clear in their provisions as to allow the trial court to find such a waiver, as a matter of law.

The contract documents are lengthy and detailed, but a few provisions pertinent to the question before us convince us that the trial court erred in allowing defendants' motion to dismiss.

Paragraph 11.4 of the agreement between the owner (plaintiff) and the architect (defendants) (AIA Document B141/CM) provides:

> The Owner and the Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages covered by any property insurance during construction as set forth in the 1980 Edition of AIA Documents A201/CM, General Conditions of the Contract for Construction, Construction Management Edition. The Owner and the Architect shall each require similar waivers from their contractors, consultants and agents.

Paragraph 11.3.1 of the General Conditions of the Contract for Construction (AIA Document A201/CM) provides in pertinent part as follows:

> Unless otherwise provided, the Owner shall purchase and maintain property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall include the interests of the Owner, the Construction Manager, the Contractor, Subcontractors and Sub-subcontractors in the Work, and shall insure against the perils of fire and extended coverage and shall include "all risk" insurance for physical loss or damage including, without duplication of coverage, theft, vandalism and malicious mischief. . . .

By separate document, the parties added a paragraph numbered 11.5 to the agreement between the owner and the architect (AIA Document B141/CM). That paragraph provides:

> The Architect shall maintain in force an Architects and Engineers Professional Liability Insurance Policy providing coverage for errors and omissions of professional services in

architecture, building design, HVAC, electrical, mechanical, structural engineering, that might be made pursuant to this Agreement and protecting the Owner from the direct and consequential results of such errors and omissions. Such insurance shall provide coverage on an occurrence and aggregate basis in amounts not less than $1,000,000 respectively. This insurance shall be maintained in force during the life of the Project and for that period of time following the date of final completion during which an action for professional liability on the part of the Architect for this Project may be brought by the Owner under North Carolina Law. The Architect may provide such insurance protection to the Owner through commercial insurance or other financial mechanisms acceptable to the Owner, and the Owner's acceptance shall not be unreasonably withheld.

The contract thus contains provisions which appear to be inconsistent with each other, or are at least susceptible to more than one interpretation: (1) that the true intent of the parties was that the owner would waive all claims against the architect for damage against which the owner had insured itself; and (2) that the architect would provide its own insurance coverage for damages caused for its own errors and omissions, thereby negating waiver as to such losses. Under such circumstances, plaintiff would be allowed to introduce extrinsic evidence to show the true intent of the parties. *See Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968); *see also Silver v. Board of Transportation*, 47 N.C. App. 261, 267 S.E. 2d 49 (1980).

Under *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), and its progeny, a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, pursuant to G.S. 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure, should not be granted unless it appears to a certainty that plaintiff is not entitled to relief under any statement of facts which could be proved in support of the claim.

The contract between plaintiffs and defendants being ambiguous and unclear as to plaintiffs' intent to waive its negligence claim against defendants, the trial court erred in dismissing plaintiffs' action.

Reversed and remanded.

Judge ORR concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

I dissent. While the majority correctly states that our task is to examine the contract documents and determine whether or not the provisions within are ambiguous, the majority fails to recognize one of the basic rules of contract interpretation. A contract must be construed as a whole, considering each clause and word with reference to all other provisions and *giving effect to each whenever possible. Marcoin, Inc. v. McDaniel,* 70 N.C. App. 498, 320 S.E. 2d 892 (1984). With this duty in mind, the provisions of the contract in the case *sub judice* are unambiguous and the waiver contained in 11.4 prevents plaintiffs from bringing this action.

The owner was required by the contract to purchase "all risk" and property insurance. Knowing this and realizing that the waiver in 11.4 applies only to damages to the work occurring during construction, section 11.5 requires defendants to purchase professional liability insurance covering the following: During construction, defendants were to insure against damages other than to the work itself resulting from defendants' negligence, including claims for bodily injury, damage to other property and claims made by third parties. After construction was completed, however, defendants were additionally required to obtain insurance covering damage to the work itself.

Reading each clause with reference to the other provisions and giving each effect, it is clear that the owner waived its rights to recover from other parties for damages covered by insurance. *See Trump-Equitable Fifth Ave. v. H.R.H. Construction Corp.,* 66 N.Y. 2d 779, 488 N.E. 2d 115, 497 N.Y.S. 2d 369 (1985); *South Tippecanoe School Bldg. Corp. v. Shambaugh & Son, Inc.,* 182 Ind. App. 350, 395 N.E. 2d 320 (1979); *Village of Rosemont v. Lentin Lumber Co.,* 144 Ill. App. 3d 651, 494 N.E. 2d 592 (1986). Thus, I find no error in the trial court's granting of defendants' motion to dismiss.

SUE M. MATHIS AND F. HOLLAN MATHIS v. HARVEY C. MAY, W. LESLIE McLEOD, WILLIAM K. STALLWORTH, JOHN C. STALLWORTH, DRS. MAY, McLEOD & STALLWORTH, P.A., AND MECKLENBURG OBSTETRIC AND GYNECOLOGICAL ASSOCIATES, P.A.

No. 8626SC1333

(Filed 21 July 1987)

**Physicians, Surgeons & Allied Professions § 13— malpractice—limitation of action —doctrine of "continued course of treatment"—no applicability to continued course of non-treatment**

Plaintiffs' claim for medical malpractice in failing to diagnose a malignant tumor accrued 15 May 1981, the day defendant informed the female plaintiff by letter that she had no malignancy, and plaintiffs had an *outside limit of four* years, or until 15 May 1985, in which to file their action; therefore, plaintiffs' claim filed on 13 September 1985 was barred by the statute of limitations. Furthermore, there was no merit to plaintiffs' contention that defendant had a continuing duty to treat and diagnose plaintiff for the entire one-year period following his negative diagnosis, that his last act occurred no earlier than 15 May 1982, and that they therefore had until 15 May 1986 in which to file their action, since North Carolina, though recognizing the doctrine of a "continued course of treatment," has never applied the doctrine where there has been a continued course of non-treatment. N.C.G.S. § 1-15(c).

APPEAL by plaintiffs from *Williams (Fred J.), Judge.* Order entered 2 October 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 May 1987.

This is a medical malpractice action in which plaintiffs alleged that defendants were negligent in relying on a false negative mammogram and in failing to diagnose the presence of a tumor. Defendants moved for summary judgment on the grounds that the action was barred by the applicable statute of limitations. The trial court granted the motion and dismissed the action. We affirm the trial court's decision.

On 7 May 1981, plaintiff Sue M. Mathis contacted defendant Dr. Harvey C. May for the diagnosis and treatment of a lump in her right breast. Dr. May had Mrs. Mathis undergo a xeromammogram which found "mild to moderate fibrocystic disease of the breasts, with no radiographic evidence of malignancy." However, the mammogram report which was submitted to Dr. May also included a warning which stated that "[a] negative x-ray report should not delay biopsy if a dominant or clinically suspicious mass is present. 4-8% of cancers are not identified by x-ray."

Dr. May informed Mrs. Mathis by letter dated 15 May 1981 that the xeromammogram "showed no mass in either breast" and that there was "no suggestion of malignancy or tumor." He did not suggest further diagnostic evaluation or follow-up treatment.

On 3 October 1984, Mrs. Mathis visited Dr. Ronald L. Brown for further diagnosis, because the breast mass still persisted. Dr. Brown had Mrs. Mathis undergo another xeromammogram which showed an area characteristic of malignancy. Subsequently, Mrs. Mathis had a right modified radical mastectomy.

On 13 September 1985, plaintiffs filed this action against Dr. May and his associates and alleged that they were negligent in relying on a false negative mammogram and in failing to perform further diagnostic tests to rule out the existence of a tumor as the source of Mrs. Mathis' breast lump. Defendants moved for summary judgment on the grounds that plaintiffs' action was barred by the statute of limitations.

In opposition to this motion plaintiffs filed the affidavit of Dr. Emerson Day, who had reviewed the medical records in this case. Dr. Day alleged that Dr. May failed to comply with the standard of care in that he overrelied on a negative mammogram and failed to follow up with Mrs. Mathis for a period of one year after his 15 May 1981 diagnosis.

The trial court found that the action was not commenced within the limitations period and that defendants were entitled to summary judgment. From this decision, plaintiffs appeal.

*Kenneth B. Oettinger and Grover C. McCain, Jr., attorneys for plaintiff-appellants.*

*Golding, Crews, Meekins & Gordon, by John G. Golding and Rodney Dean, attorneys for defendant-appellees.*

ORR, Judge.

Plaintiffs contend that the trial court erred in granting summary judgment, because the applicable statute of limitations had not expired prior to the filing of this action. We do not agree.

"A motion for summary judgment may be granted only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law." *Ballenger v. Crowell,*

38 N.C. App. 50, 53, 247 S.E. 2d 287, 290 (1978). The rule "allows quick and final disposition of claims where there is no real question as to whether plaintiff should recover, or where the defendant has established a complete defense." *Oakley v. Little*, 49 N.C. App. 650, 652, 272 S.E. 2d 370, 372 (1980). Here defendants had a complete defense under the statute of limitations.

The statute of limitations operates to vest a defendant with the right to rely on it as a defense and the court has no discretion in considering whether a claim is barred by it. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 573, 174 S.E. 2d 870, 872, *cert. denied*, 277 N.C. 110, --- S.E. 2d --- (1970).

> Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all.

*Id.* at 573-74, 174 S.E. 2d at 872.

The applicable statute of limitations in this action is N.C.G.S. § 1-15(c) which states in part that:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the *performance of or failure to perform professional services* shall be deemed to accrue at the time of the *occurrence of the last act* of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the *last act* of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . . . (Emphasis added.)

N.C.G.S. § 1-15(c) establishes two instances in which medical malpractice can occur: (1) the performance of professional services; and (2) the failure to perform professional services. *Schneider v. Brunk*, 72 N.C. App. 560, 565, 324 S.E. 2d 922, 925 (1985). The statute further provides that for both actions and omissions the cause of action accrues and the statute of limitations begins to run at the time of defendant's *last act* giving rise to the cause of action.

N.C.G.S. § 1-15(c) provides an exception to the standard three year statute of limitations period for medical malpractice actions under N.C.G.S. § 1-52. It applies when an injury which is not readily apparent is discovered more than two years after defendant's last act which gave rise to the claim. *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E. 2d 228 (1981). A plaintiff has one year from the date of discovery of the injury within which to bring an action, subject to an absolute or outer time limit of four years. "This outer time limit begins with the last act of the defendant giving rise to the cause of action." *Black v. Littlejohn*, 312 N.C. 626, 629, 325 S.E. 2d 469, 472 (1985).

In the case *sub judice*, Mrs. Mathis did not discover her injury until 18 October 1984, when the second mammogram was performed and more than two years after her last contact with Dr. May on 15 May 1981. Under the statute Mrs. Mathis had one year from the date of discovery to bring her malpractice action, subject to the outer limit of four years. Therefore, plaintiffs had from 18 October 1984 until 15 May 1985 to file a timely complaint. Since she did not file her complaint until 13 September 1985, her claim is barred by the statute of limitations.

Plaintiffs, however, contend that their complaint was, in fact, filed within the statutory period. They base this argument on Dr. Day's affidavit, which states that Dr. May had a continuing duty to treat and diagnose Mrs. Mathis for the entire one year period following his negative diagnosis. According to this theory Dr. May's last act occurred no earlier than 15 May 1982, so that plaintiffs had until 15 May 1986 in which to file their action. Since they filed their complaint on 13 September 1985, they argue that they have filed within the statutory period.

Although North Carolina has recognized the doctrine of a "continued course of treatment" to extend the statute of limitations, it has never applied the doctrine where there has been a continued course of non-treatment. The continued course of treatment doctrine "applies to situations in which the doctor continues a particular course of treatment over a period of time. . . . '[W]here the injurious consequences arise from a continuing course of *negligent* treatment . . . the statute does not ordinarily begin to run until the injurious treatment is terminated. . . . The malpractice in such cases is regarded as a continuing tort because of the persistence of the physician or surgeon in continuing and repeating the *wrongful* treatment.'" *Ballenger v. Crowell*, 38 N.C. App. at 58, 247 S.E. 2d at 293 (emphasis supplied and citation omitted).

In the case at bar, however, the relationship between Mrs. Mathis and Dr. May terminated on 15 May 1981, when he informed her by letter that no malignancy existed. After this date there was no further contact between Mrs. Mathis and Dr. May and nothing occurred which could be called a "last act" under the statute. The act for which Dr. May was hired, the diagnosis of a breast mass, was completed upon the rendering of a negative diagnosis and there were no further opportunities for Dr. May to detect Mrs. Mathis' condition. If, as alleged, Dr. May was negligent in either misdiagnosing Mrs. Mathis' condition or in failing to order a course of follow-up treatment, that negligence occurred on 15 May 1981 and at no later time.

Although N.C.G.S. § 1-15(c) extends the limitations period where the discovery of an injury is delayed, this extension was not intended to defeat the outer time limit of four years from the defendant's last act. In *Black v. Littlejohn*, 312 N.C. 626, 325 S.E. 2d 469, the Court stated:

> When the discovery rule within G.S. § 1-15(c) was coupled with an outer limit from the last act of defendant giving rise to the cause of action, the legislature wisely effectuated a compromise to balance the needs of the malpractice victims and those of health care providers and insurers.

312 N.C. at 637, 325 S.E. 2d at 477.

The present action accrued on 15 May 1981, the day Dr. May informed Mrs. Mathis by letter that there was no malignancy. Plaintiffs had an outside limit of four years, or until 15 May 1985, in which to file an action for malpractice. Since plaintiffs did not file their claim until 13 September 1985, they failed to file within the prescribed limitations period and thus their claim is barred. Therefore, the trial court's decision to grant summary judgment is affirmed.

Affirmed.

Judges ARNOLD and WELLS concur.

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STATE OF NORTH CAROLINA v. JOSEPH MARIO TARANTINO

No. 8624SC693

(Filed 21 July 1987)

**Searches and Seizures § 25— probable cause based on information gained during impermissible search—prior opinion not altered**

The actions of a detective in entering a roofed and enclosed porch at the rear of defendant's building, bending over, and looking through a crack about three feet from the porch floor, even when considered in light of *U. S. v. Dunn*, 480 U.S. ---, amounted to an impermissible invasion of defendant's reasonable expectation of privacy in his building and its contents, and the opinion of the Court of Appeals in *State v. Tarantino*, 83 N.C. App. 473, is not altered.

ON rehearing pursuant to the 9 April 1987 Order of the Supreme Court of North Carolina directing that this cause be reconsidered in light of *United States v. Dunn*, 480 U.S. ---, 94 L.Ed. 2d 326, 107 S.Ct. 1134 (1987). Originally heard in the Court of Appeals 30 October 1986.

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

*Beskind and Rudolf, P.A., by Thomas K. Maher and David S. Rudolf; Loflin and Loflin, by Thomas F. Loflin, III, for defendant appellant.*

MARTIN, Judge.

This case was initially before us upon the State's appeal from an order of the Avery County Superior Court suppressing evidence seized by law enforcement officers during a search of defendant's building pursuant to a search warrant. We concluded that the information which furnished probable cause for issuance of the search warrant was obtained as a result of a constitutionally impermissible search of defendant's premises and affirmed the order of the trial court. *State v. Tarantino*, 83 N.C. App. 473, 350 S.E. 2d 864 (1986). The Supreme Court of North Carolina allowed the State's subsequent petition for discretionary review for the limited purpose of entering the following order:

> The case is remanded to the Court of Appeals for further review in light of the U.S. Supreme Court's decision in U.S. v. DUNN (9 March 1987) [sic].

*State v. Tarantino*, 319 N.C. 409, 354 S.E. 2d 727 (1987). We have complied with the directive of our Supreme Court and conclude that the facts of the present case so distinguish it from those presented in *United States v. Dunn*, 480 U.S. ---, 94 L.Ed. 2d 326, 107 S.Ct. 1134, *reh'g denied*, --- U.S. ---, 95 L.Ed. 2d 519, 107 S.Ct. 1913, that the holdings in that case are not dispositive of the issue involved in this appeal and do not require that we alter our previous decision.

In *United States v. Dunn, supra*, Drug Enforcement Administration agents, using electronic devices and aerial photography, traced large quantities of chemicals and equipment used in the manufacture of controlled substances to a barn located on defendant Dunn's 198-acre ranch. The entire ranch was encircled by a perimeter fence and contained several interior fences. Dunn's residence and a nearby greenhouse were encircled by an interior fence and the barn in question was located about fifty yards outside this fence. All of the buildings were about a half-mile from the public road. The front of the barn was enclosed by a wooden fence and locked, waist-high gates, and had an open overhang. A netting material was stretched from the ceiling of the barn to the top of the wooden gates such that it was necessary to stand next to the netting in order to see into the barn.

Law enforcement officers made a warrantless entry onto Dunn's ranch in the nighttime, crossing the perimeter fence and interior fences, including the wooden fence enclosing the front portion of the barn, but did not enter the barn. Using a flashlight and looking through the netting, the officers observed what they thought to be a drug laboratory. On the basis of the information acquired through their entry onto Dunn's ranch, the officers obtained a search warrant. They executed the warrant, seized chemicals and equipment and arrested Dunn.

The primary issue before the United States Supreme Court in *Dunn* was whether the barn containing the drug laboratory was within the curtilage of Dunn's residence, so as to be accorded protection under the Fourth Amendment. Applying four factors in its analysis of the issue, the Court concluded that Dunn's barn and the area immediately surrounding it were outside the curtilage of the house. This holding is inapplicable to the present case because no extent-of-curtilage question has been presented.

In *Dunn*, however, the Court also held that the officers' observation of the interior of the barn from their vantage point at its front gate was not an unreasonable search proscribed by the Fourth Amendment. Relying upon its decisions in *Hester v. United States*, 265 U.S. 57, 68 L.Ed. 898, 44 S.Ct. 445 (1924) and *Oliver v. United States*, 466 U.S. 170, 80 L.Ed. 2d 714, 104 S.Ct. 1735 (1984), the Court reasoned that the area around the barn, being outside the curtilage, was essentially an "open field," unprotected by the Fourth Amendment, and that there is no constitutional prohibition against police observations made while standing in an open field just as there is no prohibition against observations made from a public place. *See California v. Ciraolo*, 476 U.S. ---, 90 L.Ed. 2d 210, 106 S.Ct. 1809, *reh'g denied*, --- U.S. ---, 92 L.Ed. 2d 728, 106 S.Ct. 3320 (1986). Finally, citing *Texas v. Brown*, 460 U.S. 730, 75 L.Ed. 2d 502, 103 S.Ct. 1535 (1983), the Court stated that "the officers' use of the beam of a flashlight, directed through the essentially open front of respondent's barn, did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment." *Dunn, supra*, at ---, 94 L.Ed. 2d at 337, 107 S.Ct. at 1141.

The facts of the present case are sufficiently summarized in our previous opinion, *State v. Tarantino, supra*. In its new brief,

the State insists that *Dunn* requires that we set aside our previous decision and reverse the trial court's order suppressing the evidence seized from defendant Tarantino's building. As grounds for its position, the State first appears to argue that Tarantino's building was not a place entitled to Fourth Amendment protection. The decision of the United States Supreme Court in *Dunn* did nothing to alter the rule that the Fourth Amendment applies whenever the person invoking its protection has exhibited an actual expectation of privacy which society is prepared to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 61 L.Ed. 2d 220, 99 S.Ct. 2577 (1979). The protection of the Fourth Amendment extends to privacy interests in commercial property. *See Oliver v. United States, supra*, at 178, n.8, 80 L.Ed. 2d at 224, 104 S.Ct. at 1741. In the present case, the trial court concluded that Tarantino had a reasonable expectation of privacy in his building. Its conclusion is fully supported by its findings of fact.

Even so, argues the State, the actions of Detective Baker in looking through cracks in a rear wall of Tarantino's building were no more intrusive of Tarantino's privacy interests than were the actions of the officers in *Dunn*, who had to stand immediately next to the netting and use a flashlight in order to see into the barn. We disagree.

In *Dunn*, after deciding that the observations of the officers were made from open fields, which are no different for Fourth Amendment purposes than a public place, the Court relied upon "the premise that the Fourth Amendment 'has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.'" *Dunn, supra*, at ---, 94 L.Ed. 2d at 337, 107 S.Ct. at 1141, *quoting California v. Ciraolo, supra*, at ---, 90 L.Ed. 2d at 216, 106 S.Ct. at 1812. The Court referred to the area into which the officers looked as "the *essentially open front* of respondent's barn." *Dunn, supra*, at ---, 94 L.Ed. 2d at 337, 107 S.Ct. at 1141 (emphasis supplied). The fact that the officers used a flashlight did not render their observation an unreasonable intrusion. *Id.*

In the present case, we hasten to agree with the State that Detective Baker's use of a flashlight to illuminate the interior of Tarantino's building does not, standing alone, render his actions

impermissibly intrusive. *See Texas v. Brown, supra, and United States v. Lee*, 274 U.S. 559, 71 L.Ed. 1202, 47 S.Ct. 746 (1927). There are, however, important factual differences between *Dunn* and the present case. While the officers in *Dunn* made their observation from an "open field" outside the barn, Detective Baker went into a roofed and enclosed porch at the rear of Tarantino's building in order to gain the vantage point from which he made his observation. The front of Dunn's barn was "essentially open"; Tarantino had boarded all of his windows and doors. The observation in *Dunn* was made when the officers "peered into the barn's open front"; the aperture through which Detective Baker made his observation consisted of several quarter-inch cracks in a rear wall located within an enclosed porch. In order to make his observation, it was necessary for Detective Baker "to bend his body to look through a crack about three feet from the porch floor . . . placing his eye within a foot of the opening." *State v. Tarantino, supra*, at 479, 350 S.E. 2d at 867. There was no evidence that the contents of Tarantino's building were visible from any position other than as previously described, in daylight or otherwise. The contents certainly could not have been viewed from any area accessible to the general public. *See Katz v. United States*, 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967); *See v. City of Seattle*, 387 U.S. 541, 18 L.Ed. 2d 943, 87 S.Ct. 1737 (1967).

We remain of the opinion that the actions of Detective Baker, even when considered in light of *United States v. Dunn, supra*, amounted to an impermissible invasion of Tarantino's reasonable expectation of privacy in his building and its contents. Accordingly we decline to disturb our previous decision. The order of the trial court is affirmed.

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

CITY FINANCE COMPANY OF GOLDSBORO, INC., TRUSTEE FOR GENERAL ELECTRIC CREDIT CORP. v. RONNIE LEE BOYKIN AND LOUREATHA M. BOYKIN

No. 864DC1355

(Filed 21 July 1987)

1. **Judgments § 25.3; Rules of Civil Procedure § 60.2— action not prosecuted— failure to communicate with attorney—no excusable neglect—no relief from judgment**

Plaintiff was not entitled to have a judgment against it set aside on the ground of excusable neglect where there was no evidence that plaintiff maintained a reasonable level of communication with its attorney or that it followed the progress of the case during the two years it was pending. N.C.G.S. § 1A-1, Rule 60(b)(1).

2. **Attorneys at Law § 7.5— unfair trade practices—attorney's fees awarded to consumer—attorney's fees expended to protect judgment proper**

Where defendants were initially awarded attorney's fees under N.C.G.S. § 75-16.1, any effort by defendants to protect their judgment should likewise entitle them to attorney's fees; therefore, they were entitled to attorney's fees to defend plaintiff's motion to set aside the judgment and to attorney's fees for time expended on plaintiff's appeal from denial of its motion.

APPEAL by plaintiff and defendants from *Martin (James N.), Judge.* Order entered 30 September 1986 in District Court, SAMPSON County. Heard in the Court of Appeals 13 May 1987.

Plaintiff filed a complaint for money owed and sought claim and delivery of defendants' personal property in pursuing collection of a note. Defendants answered and asserted that the note was void and then counterclaimed for damages and attorney's fees based on plaintiff's unfair collection practices under Chapter 75 of the North Carolina General Statutes.

Plaintiff, in attempting to collect upon the note, had been calling defendant repeatedly at work. On two occasions Mr. Boykin asked that plaintiff not call him there and gave plaintiff an alternate phone number where he could be reached when not at work. The number was that of defendants' next door neighbor, who would go get them when they received a call or would take a message if they were not at home. Although it had the alternate number, plaintiff still continued to call defendant at work in violation of N.C.G.S. § 75-52(4).

The case was placed on the trial calendar for the civil session beginning 2 June 1986. A copy of this calendar was addressed and mailed to plaintiff's counsel and was never returned to the court. The case was called for trial on 3 June 1986, but neither plaintiff nor its attorney appeared. Defendants moved to dismiss plaintiff's claim for failure to prosecute pursuant to N.C.G.S. § 1A-1, Rule 41. Once this motion was granted, defendants presented evidence to support their counterclaim. The trial court entered judgment in defendants' favor and awarded them $500 in damages and $850 in attorney's fees.

Plaintiff filed a motion to set aside the judgment on the grounds that it had no notice that the matter was set for trial. Defendants then filed a motion for attorney's fees expended in defense of plaintiff's motion. The trial court denied both motions and both parties appealed. Subsequently, defendants also filed a motion for attorney's fees for time expended on this appeal.

*Harrison, Heath and Simpson, P.A., by Fred W. Harrison, attorney for plaintiff.*

*East Central Community Legal Services, by Leonard G. Green, attorney for defendants.*

ORR, Judge.

I.

[1] Plaintiff argues that the trial court erred in denying its motion to set aside the judgment. We do not agree.

N.C.G.S. § 1A-1, Rule 60(b) provides that:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect.

Plaintiff contends that the judgment should be set aside because any failure to prosecute this suit was due to the negligence of its attorney and not to any negligence on its own part. Although the negligence of an attorney is generally not imputed to a client, a client may be charged with the inexcusable neglect of his attorney if the client himself fails to exercise proper care.

*Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *disc. rev. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976).

The standard of care required of a litigant in the participation of a lawsuit is that which a man of ordinary prudence usually bestows on his important business. *Id.* Where a litigant merely turns a legal matter over to an attorney, even upon the latter's assurance that he will handle the matter, and then the litigant does nothing further about it, such neglect is not excusable. *Howard v. Williams*, 40 N.C. App. 575, 253 S.E. 2d 571 (1979). Once a litigant engages an attorney, he must thereafter diligently confer with that attorney and generally try to keep informed of the proceedings. *See Electric Co. v. Carras*, 29 N.C. App. 105, 223 S.E. 2d 536 (1976).

The evidence in the case *sub judice* reveals that plaintiff failed to give the prosecution of this case the attention which a man of ordinary prudence gives his important business. Plaintiff initiated this suit and had a duty to monitor its progress. Yet, there is no evidence that plaintiff maintained a reasonable level of communications with its attorney or that it followed the progress of the case during the two years it was pending. Therefore, plaintiff has failed to demonstrate that it exercised the proper care necessary to establish excusable neglect and to justify setting aside the judgment entered against it.

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the Court abused its discretion." *Burwell v. Wilkerson*, 30 N.C. App. 110, 112, 226 S.E. 2d 220, 221 (1976). Given the evidence, we hold that there was no abuse of discretion in denying plaintiff's motion to set aside the judgment and the judgment of the trial court is affirmed.

II.

**[2]** Defendants argue that the trial court erred in denying their motion for attorney's fees for time expended in defending plaintiff's motion to set aside the judgment. We agree.

Defendants were initially awarded attorney's fees under N.C.G.S. § 75-16.1, which states that:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his

> discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit.

Once the trial court found that plaintiff's actions were willful and that its refusal to cease calling Mr. Boykin at work constituted an unwarranted refusal by plaintiff to resolve the issue, it properly awarded attorney's fees to defendants.

Upon a finding that defendants were entitled to attorney's fees in obtaining their judgment, any effort by defendants to protect that judgment should likewise entitle them to attorney's fees. In *Hill v. Jones*, 26 N.C. App. 168, 215 S.E. 2d 168, *cert. denied*, 288 N.C. 240, 217 S.E. 2d 664 (1975), this Court held that the trial court has the authority to award attorney's fees for all phases of a case. In that case the Court was applying the provisions of N.C.G.S. § 6-21.1, which authorizes attorney's fees in cases involving property damage of $10,000 or less. N.C.G.S. § 6-21.1 is similar in wording and purpose to N.C.G.S. § 75-16.1 and provides that:

> [i]n any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

In *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1973), the Supreme Court upheld an award of attorney's fees under N.C.G.S. § 6-21.1 and stated that:

> The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that [it] is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

*Id.* at 239, 200 S.E. 2d at 42 (citations omitted).

Like N.C.G.S. § 6-21.1, N.C.G.S. § 75-16.1 should be construed and applied liberally in order to grant defendants an additional award of attorney's fees for time spent in protecting their judgment. Defendants were awarded only $500 in damages and $850 in attorney's fees. Had they not been awarded attorney's fees, it would not have been economically feasible for them to have defended this suit. Likewise, without an additional award of attorney's fees for time expended in defense of plaintiff's motion, it was not economically feasible for them to try and preserve that judgment.

Therefore, we reverse the decision of the trial court on this issue and remand for findings on the hours spent in defense of plaintiff's motion and on a reasonable hourly fee and for the entry of an additional award of attorney's fees.

For the aforementioned reasons, we also grant defendants' motion for attorney's fees for time expended on appeal. Attorney's fees may be awarded on appeal in the discretion of the trial court. *Hill v. Jones*, 26 N.C. App. 168, 215 S.E. 2d 168. Therefore, we remand to the trial court for a determination of the hours spent on appeal and a reasonable hourly rate and for the entry of an appropriate attorney's fee award.

Affirmed in part and reversed and remanded in part.

Judges ARNOLD and WELLS concur.

JAMES E. McKNIGHT v. SIMPSON'S BEAUTY SUPPLY, INC., AND ISSAC SIMPSON

No. 8627SC1256

(Filed 21 July 1987)

**1. Master and Servant § 10.1— grounds for termination of employment—work performed in reasonably diligent manner—jury question**

In an action to recover for breach of an employment contract, there was no merit to defendant employer's contention that, as a matter of law, there was no question for the jury to decide because the contract expressly authorized defendant to terminate plaintiff's employment upon becoming dissatisfied with his services and the evidence indisputably showed defendant's dissatisfaction, since the contract, in fact, provided that defendant could discharge plaintiff only for failure to carry out his duties in a reasonably proper, diligent, and effective manner, and whether plaintiff did so was a question for the jury.

**2. Torts § 1; Trespass § 2— punitive damages for intentional infliction of emotional distress—failure to show employer's conduct "outrageous"**

The trial court erred in directing verdict against plaintiff on his claim for intentional infliction of emotional distress and punitive damages based on plaintiff's failure to produce expert medical testimony that he suffered such distress, but such error was not prejudicial because plaintiff's evidence was insufficient to establish the first element of this cause of action, that is, that defendant's conduct in dismissing him was "outrageous."

APPEAL by plaintiff and defendant corporation from *Sitton, Judge*. Judgment entered 10 June 1986 in Superior Court, GASTON County. Heard in the Court of Appeals 1 June 1987.

Plaintiff sued defendants for (1) breach of a written contract to employ him for two years; (2) breach of an oral contract to reimburse him for his expenses in moving from Manassas, Virginia to Gastonia, North Carolina where defendant's business is situated; (3) intentionally inflicting emotional distress; and (4) punitive damages based on the intentional infliction of emotional distress claim. In answering the complaint defendants denied all claims and the corporate defendant counterclaimed for plaintiff's failure to repay a loan. By some means not disclosed by the record the individual defendant was removed from the case before trial, and at the close of plaintiff's evidence his claims for intentionally inflicting emotional distress and punitive damages were dismissed by a directed verdict. At the close of all the evidence plaintiff's other claims and the corporate defendant's counterclaim were submitted to the jury, whose verdict was to the effect that:

Defendant corporation breached its contract to employ plaintiff for two years and owed him $31,000; defendant corporation breached its contract to pay plaintiff's relocation expenses and owed him $1,500; and defendant corporation loaned plaintiff $4,500 that he had not repaid. From judgment entered on the verdict both parties appealed.

*Smith, Helms, Mulliss & Moore, by H. Landis Wade, Jr. and Elizabeth M. Quattlebaum, for plaintiff appellant-appellee.*

*James R. Finch for defendant appellee-appellant.*

PHILLIPS, Judge.

In its brief defendant appellant makes only two contentions; both concern the employment contract claim and neither has merit. As to that claim the evidence of both parties showed without dispute that though defendant contracted in writing to employ plaintiff for a period of two years it discharged him after a few months, and the only matter in dispute is the cause of plaintiff's discharge or defendant's right to discharge him. On that issue plaintiff's evidence tended to show that he did his work properly and defendant discharged him without just cause, while defendant's evidence tended to show that it was dissatisfied with plaintiff's work and had cause to fire him.

[1] The first contention is that as a matter of law there was no question for the jury to decide because the contract expressly authorized defendant to terminate plaintiff's employment upon becoming dissatisfied with his services and the evidence indisputably showed defendant's dissatisfaction. The contract provision that defendant relies upon in making this contention reads as follows:

> Employee agrees that he will at all times faithfully, industriously and to the best of his ability, experience and talent perform all of the duties that may be required of and from him pursuant to the express and implicit terms hereof, *to the reasonable satisfaction of employer.* (Emphasis supplied.)

Obviously, the writing does not support defendant's argument. The provision simply means that plaintiff agreed to perform his work to defendant's *reasonable satisfaction*; it does not mean, as

defendant in effect argues, that plaintiff agreed to satisfy defendant's unreasonable or capricious demands and was subject to dismissal if he did not. Thus, proving that it was dissatisfied with plaintiff's work did not end the matter and leave the jury with nothing to determine, as defendant maintains. In order to justify terminating plaintiff's employment before the agreed period ended defendant had to go further and show that its dissatisfaction was reasonable; and since plaintiff's evidence tended to show that he complied with all the contract terms and did his work in a proper manner, whether defendant's dissatisfaction with plaintiff was reasonable and whether it had just cause to dismiss him was an issue of fact for the jury, rather than one of law for the court. But the foregoing provision is not the only provision of the contract that bears upon plaintiff's obligations and defendant's termination rights. Two other provisions make it even clearer that defendant had no right to discharge plaintiff whenever it wanted to. One states that plaintiff was to be employed for two years "commencing on February 15, 1985 and terminating on February 15, 1987, subject, however, to prior termination as hereinafter provided"; and the other states, in substance, that defendant could terminate the contract upon plaintiff either becoming unable to do the work or upon his failure or refusal to do it. Still another provision concerning plaintiff's duties was incorporated into the contract by operation of law; for the law implies a promise on the part of every employee to serve his employer faithfully and discharge his duties with reasonable diligence, care and attention. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E. 2d 569 (1964). These are the provisions that established the duties and rights of the parties; none of them gave defendant the right to fire plaintiff upon merely becoming dissatisfied with his services; under them defendant could discharge plaintiff only for not carrying out his duties in a reasonably proper, diligent, and effective manner.

Defendant's other contention, that the court failed to properly instruct the jury regarding its right to dismiss plaintiff for just cause, cannot be entertained because it is not based upon an appropriate exception and assignment of error. Rule 10(a), N.C. Rules of Appellate Procedure. The assignment and exception that defendant refers to as supporting this contention concerns the court's alleged failure to charge the jury on plaintiff's duty to mitigate the damages—a position not argued here and thus aban-

doned. Rule 28(b), N.C. Rules of Appellate Procedure. Furthermore, the instruction that the court gave the jury concerning defendant's right to discharge plaintiff for "just cause" appears to be correct.

**[2]** In his appeal plaintiff makes only one contention that requires determination, and that is that the court erred in dismissing his claim for the intentional infliction of emotional distress and punitive damages. In directing verdict against that claim the court expressly based it on plaintiff's failure to produce expert medical testimony that he suffered such distress. This was error. Though expert medical testimony may be necessary to establish that some types of emotional distress were suffered or that it was caused by a defendant's outrageous conduct, such testimony was not indispensable to a jury trial on plaintiff's claim. To have a jury trial on that issue plaintiff only had to present competent evidence that he suffered emotional distress and that it resulted from defendant's conduct; and his evidence that he was "shocked" and "upset" following the abrupt, unexplained termination of his employment without cause met that requirement. Which is not to say, of course, that medical testimony is not necessary when the claimed result is an unusual emotional state, not within the common knowledge and experience of laymen, that in itself requires medical diagnosis. Our holding is simply that the jury was capable of determining without the aid of a physician or psychiatrist whether plaintiff was shocked and upset following his abrupt, unexplained dismissal and whether such feelings were caused by defendant's conduct. Nevertheless, the error was not prejudicial, because plaintiff's evidence was insufficient to establish the first element of this cause of action—to wit, that defendant's conduct in dismissing him was "outrageous" within the contemplation of *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981) and Sec. 46 of Restatement (Second) of Torts (1965). Plaintiff's evidence tended to show only that the discharge was abrupt, without cause, and unexplained; which is not enough to support a claim for intentionally inflicting emotional distress, *Dickens v. Puryear*, *supra*, though it is enough to support a claim for breach of contract.

As to plaintiff's appeal—affirmed.

As to defendant's appeal—no error.

Chief Judge HEDRICK and Judge ORR concur.

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JOSEPH M. PHELPS v. DUKE POWER COMPANY

No. 8615SC1311

(Filed 21 July 1987)

1. **Damages § 13.2— expert economic testimony on impaired future earning capacity—expert medical testimony as to causation unnecessary**

In an action to recover damages for personal injuries sustained when plaintiff received an electrical shock from defendant's high voltage power line, there was no merit to defendant's contention that expert economic testimony on the issue of impaired future earning capacity was inadmissible absent independent expert medical testimony establishing the cause of plaintiff's disability, since plaintiff's testimony that prior to the accident he farmed at least 12 hours per day without tiring but that, after the accident, his diminished capacity to farm owing to fatigue forced him to farm less and to give up farming his tobacco crop was sufficient, standing alone, to establish causation.

2. **Interest § 2; Judgments § 55— prejudgment interest—failure to raise issue in trial court**

Plaintiff could not argue for the first time on appeal that the trial court should have awarded prejudgment interest from the date his action was instituted to the extent that defendant had liability insurance covering plaintiff's claim; however, notwithstanding plaintiff's failure to raise the question of liability insurance, the court should have awarded interest from the date a directed verdict was entered in the first trial against plaintiff's negligence claim. N.C.G.S. § 24-5.

APPEAL by defendant from *Battle, Judge.* Judgment entered 10 June 1986 in ORANGE County Superior Court. Heard in the Court of Appeals 12 May 1987.

Plaintiff, a farmer, brought this action on 19 November 1982 seeking to recover damages for personal injuries sustained on 23 November 1979 when he received an electrical shock from defendant's high voltage power line. Plaintiff alleged that his injuries from this accident were caused by defendant's negligence.

The case was tried before a jury. At the close of plaintiff's evidence, the court granted defendant's motion for a directed ver-

dict. Plaintiff appealed. This Court held that the trial court erred in directing a verdict for defendant on the issue of negligence and awarded plaintiff a new trial on this issue in *Phelps v. Duke Power Co.*, 76 N.C. App. 222, 332 S.E. 2d 715, *disc. rev. denied,* 314 N.C. 668, 336 S.E. 2d 401 (1985). Reference is made to that opinion for the additional factual background of this case.

On remand, the case was tried again before a jury. At trial, plaintiff presented evidence through expert medical testimony that he suffers from post-traumatic stress syndrome resulting from his exposure to electrical shock in the 23 November 1979 accident. Post-traumatic stress syndrome is a type of mental disorder involving the development of characteristic symptoms following a psychologically traumatic event. Some of these characteristic symptoms include a re-experiencing of the traumatic event and a numbing of responsiveness to, or reduced involvement with, the external world.

Plaintiff presented evidence that, since the accident, he is easily fatigued and short-winded and, overall, his endurance and physical strength have been greatly reduced. Prior to the accident, plaintiff farmed at least twelve hours per day without getting tired. Since the accident, plaintiff only has been able to farm for six to eight hours and must take naps each day. Plaintiff testified that, owing to his reduced endurance, he is no longer able to farm his tobacco crop as he had done prior to the accident. Plaintiff's experts opined that plaintiff's symptoms were consistent with post-traumatic stress syndrome.

Over defendant's objection, the court permitted plaintiff to present expert testimony showing his economic damages from his inability to farm his tobacco crop.

The jury returned a verdict for plaintiff finding defendant negligent and awarding plaintiff $600,000 in damages for personal injuries. The trial court entered judgment in accordance with the verdict, ordering plaintiff to recover $600,000 with interest from 9 June 1986, the date of the jury's verdict. Defendant appealed.

*Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by Douglas Hargrave, G. Nicholas Herman and Alonzo B. Coleman, Jr., for plaintiff-appellee.*

*Newsom, Graham, Hedrick, Bryson & Kennon, by Joel M. Craig; Cheshire & Parker, by Lucius M. Cheshire; and William I. Ward, Jr., for defendant-appellant.*

WELLS, Judge.

*Defendant's Appeal*

**[1]** Defendant's sole contention is that the court "erred in permitting the introduction of expert economic testimony on the issue of impaired future earning capacity, as plaintiff's evidence failed to establish a foundation for the recovery of such damages." Plaintiff offered the testimony of Dr. J. Carl Poindexter, an economics professor at North Carolina State University, to provide expert evidence on plaintiff's damages from his inability to farm tobacco since the accident. *Citing Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965) and its progeny, defendant contends Dr. Poindexter's testimony was inadmissible absent independent expert medical testimony establishing the cause of plaintiff's disability. We disagree.

Defendant's argument overlooks the well-established principle in North Carolina that, in many instances, lay testimony is competent to establish the cause of an injured plaintiff's disability. *McGee v. Insurance Co.*, 51 N.C. App. 72, 275 S.E. 2d 212, *disc. rev. denied*, 303 N.C. 181, 280 S.E. 2d 452 (1981); *Goble v. Helms*, 64 N.C. App. 439, 307 S.E. 2d 807 (1983), *disc. rev. denied*, 310 N.C. 625, 315 S.E. 2d 690 (1984); Brandis, N.C. Evidence, Sec. 129 (2d rev. ed. 1982). The recent North Carolina Rules of Evidence do not change this rule. *See* N.C. Gen. Stat. § 8C-1, Rule 701. Plaintiff testified that, prior to the accident, he farmed at least twelve hours per day without getting tired, but that, after the accident, his diminished capacity to farm owing to fatigue has forced him to farm less and to give up farming his tobacco crop. We hold that this testimony, standing alone, is sufficient to establish causation. *McGee, supra.* Plaintiff here actually more than satisfied his burden of showing causation by presenting, in addition to his own testimony, the testimony of family members and a number of friends and expert medical testimony linking his injuries from the accident to his disability.

Having presented sufficient evidence of causation, plaintiff thus was entitled to introduce expert evidence on his damages from this disability. *See* N.C. Gen. Stat. § 8C-1, Rule 104(b). Accordingly, we hold that the Court did not err in admitting the testimony of Dr. Poindexter.

*Plaintiff's Cross-Assignment of Error*

[2] Pursuant to N.C.R. App. Proc. 10(d), plaintiff attempts to cross-assign as error the court's award of interest from the date of the jury's verdict. Plaintiff maintains that (1) to the extent defendant had liability insurance covering plaintiff's claims, the court should have awarded interest on the judgment from the date the action was instituted instead of from the date the jury reached a verdict and (2) for that portion of the judgment not covered by liability insurance, the court should have awarded interest from 31 May 1984, the date a directed verdict was entered in the first trial against plaintiff's negligence claim. Plaintiff's cross-assignment of error constitutes an attack on the judgment and not an alternative basis in law for supporting the judgment. Ordinarily, this type of conditional appeal is not allowed. Rule 10(d) of the North Carolina Rules of Appellate Procedure; *Stevenson v. Dept. of Insurance*, 45 N.C. App. 53, 262 S.E. 2d 378 (1980). However, by order of this Court dated 4 May 1987 we allowed plaintiff's motion pursuant to Rule 2 for review of his cross-assignment of error by writ of certiorari under Rule 21(a).

The applicable statute governing prejudgment interest in the instant case is former N.C. Gen. Stat. § 24-5 (1983 Cum. Supp.) prior to its amendment in 1985. *See* 1985 N.C. Session Laws, ch. 214. Former G.S. § 24-5 provides, in pertinent part, that:

> The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. The preceding sentence shall apply only to claims covered by liability insurance. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly.

Based on this statute, plaintiff now argues for the first time on appeal that the trial court should have awarded prejudgment interest from the date his action was instituted, to the extent that defendant had liability insurance covering plaintiff's claim.

However, plaintiff did not address the question of liability insurance at trial. He neither presented any evidence nor made any request for findings on this issue. Accordingly, we hold that, because plaintiff failed to raise this issue at trial, he is now precluded from raising it for the first time on appeal.

We further hold, however, that, notwithstanding plaintiff's failure to raise the question of liability insurance, the court should have awarded interest from 31 May 1984, the date a directed verdict was entered in the first trial against plaintiff's negligence claim. *See Jackson v. Gastonia,* 247 N.C. 88, 100 S.E. 2d 241 (1957). Accordingly, we vacate that portion of the judgment ordering plaintiff to recover interest on the judgment from 9 June 1986, the date of the jury's verdict in the second trial, and remand the cause for entry of a judgment ordering plaintiff to recover $600,000 with interest from 31 May 1984, the date a directed verdict was entered in the first trial against plaintiff's negligence claim.

No error in part, vacated in part, and remanded.

Judges ARNOLD and ORR concur.

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CHARLES NORRIS v. MARY McCLOUD BELCHER, J. A. BELCHER, JR., AND JEWEL LEE MINTER, CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF JOHN ANTHONY BELCHER, DECEASED, AND WILLIAM PARKER

No. 8629DC1254

(Filed 21 July 1987)

**Limitation of Actions § 14— breach of contract—accrual of action—oral acknowledgment insufficient to extend period of limitation**

Plaintiff's claim to recover on a contract was barred by the statute of limitations, and the trial court erred in concluding that defendants were equitably estopped to plead the statute of limitations where the most the evidence disclosed was that defendants orally promised to pay, and there was no showing of a written promise as required by N.C.G.S. § 1-26.

Judge PHILLIPS dissenting.

APPEAL by defendants from *Guice, Judge*. Judgment entered 5 June 1986 in District Court, TRANSYLVANIA County. Heard in the Court of Appeals 1 June 1987.

This is a civil action wherein plaintiff seeks to recover $6,936.00 for the balance due on a contract. In his complaint, filed 1 August 1983, plaintiff alleged that in January 1973, John A. Belcher, deceased, and defendant Parker contracted with him to "do grading and hauling work" on a housing development in Transylvania County, North Carolina, that he completed the work in a workmanlike manner, and that he demanded payment under the terms of the contract. Plaintiff further alleged that John A. Belcher and defendant Parker assured him "year after year" that they would pay him, but that he was never paid. Defendants filed an answer, and a motion to dismiss alleging that plaintiff's claim was barred by the three-year statute of limitations, G.S. 1-52.

After a trial by the judge without a jury, the trial court made findings and conclusions and entered a judgment for plaintiff in the amount of $6,702.40.

Defendants appealed.

*Averette & Barton, by Donald H. Barton, for plaintiff, appellee.*

*Ramsey, Hill, Smart, Ramsey & Pratt, P.A., by Michael K. Pratt, for defendants, appellants.*

HEDRICK, Chief Judge.

The determinative question raised on this appeal is whether the trial court erred in concluding that "the conduct of Defendants William Parker and John Anthony Belcher, deceased, in repeatedly assuring the Plaintiff of forthcoming payment estops them from asserting the defenses of the statute of limitations." It is undisputed that the last work performed by plaintiff for defendants pursuant to the contract giving rise to the indebtedness sued upon was no later than 1975, and that suit was not instituted until 1 August 1983. It is clear that plaintiff's claim against defendants would be barred by the applicable statute of limitations, G.S. 1-52, unless defendants were equitably estopped, as the trial court concluded, from relying on the statute of limitations as a bar to plaintiff's claim.

It is manifest from the judgment entered that the trial judge based his conclusion that defendants were equitably estopped to plead the statute of limitations on the findings that from the period of 1974 until 1983 John A. Belcher and defendant Parker informed plaintiff "on numerous occasions" that they would pay him the amount due under the contract. These findings are supported by the evidence in the record tending to show that plaintiff, on one occasion in 1974, asked John A. Belcher to pay him and asked defendant Parker for payment on about twenty different occasions between the time he completed the work and 1982. Plaintiff testified that each time he discussed his bill with defendant Parker or John A. Belcher, that they told him that they would pay him. In our opinion this evidence and these findings of fact fall far short of supporting the conclusion that defendants are equitably estopped from asserting the statute of limitations as a defense. *See Yancey v. Watkins*, 2 N.C. App. 672, 163 S.E. 2d 625 (1968).

G.S. 1-26 provides as follows: "No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest." A new promise to pay a debt fixes a new date from which the statute of limitations runs, but under G.S. 1-26 such a promise must be in writing to be binding. *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E. 2d 323 (1960). Partial payment of a debt also starts the statute of limitations running anew, but only when it is made under circumstances which indicate that the debtor recognizes the debt as existing and his willingness, or at least his obligation, to pay the balance. *Battle v. Battle*, 116 N.C. 161, 21 S.E. 177 (1895).

In our opinion, the most the evidence and findings of fact disclose in the present case is that defendant Parker and John A. Belcher orally promised to pay. Although plaintiff received his wages of $4.50 per hour while he worked on the housing development, John A. Belcher and defendant Parker have made no payments of the remaining amount due under the contract or given any written promises to pay from 1975 until this suit was instituted in 1983. In our opinion, it is clear that plaintiff's claims are barred by G.S. 1-52, and the trial judge erred in concluding

that defendants were equitably estopped to plead the statute of limitations. The judgment must be reversed and the cause remanded to the district court for entry of an order dismissing plaintiff's claims. Since we are ordering that plaintiff's claim must be dismissed, it is unnecessary for us to address defendants' remaining assignments of error.

Reversed and remanded.

Judge ORR concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In addition to the finding stated in the majority opinion—that on numerous occasions between 1974 and 1983 the deceased and his partner promised to pay plaintiff what was due him—the court also found as facts that: Their promises to pay plaintiff were false; they were made with the intent that plaintiff should rely upon them; plaintiff did rely upon them; plaintiff's reliance upon the false promises was reasonable; and through defendants' false promises plaintiff was induced to forego suing defendants until 1983. Since these findings are supported by competent evidence they are the established facts of the case; and in my view they lead unerringly and correctly to the legal conclusion that the defendants are estopped from asserting the statute of limitations in defense of plaintiff's claim. Having dishonestly induced plaintiff not to sue them while he could have effectively done so, can a court of law correctly permit them to build a defense to the case on their own chicanery? I say not, and vote to uphold the judgment of the trial court.

IN THE MATTER OF THE WILL OF MACK BUNCH, DECEASED

No. 8714SC96

(Filed 21 July 1987)

**Bastards § 13; Wills § 16— child not properly legitimated—no right to file caveat**

The trial court properly granted summary judgment for the propounder of a will on the ground that caveator had no legal standing to contest the validity of the will where caveator claimed to be the illegitimate daughter of testator, but testator never substantially complied with the provisions of N.C.G.S. § 29-19(b) by acknowledging in a written instrument executed or acknowledged before a proper certifying officer that he was caveator's father.

APPEAL by caveator from *Lake, Judge.* Order entered 10 October 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 June 1987.

On 11 June 1985 Mack Bunch died leaving a writing that has been probated in common form as his Last Will and Testament. Dorothy E. Faison filed a caveat in which she alleged that she is the testator's daughter and thus has a legal interest in his estate, and that his purported will, which does not mention her, was invalid for several reasons. The executrix under the will, as propounder, denied the material allegations of the caveat and moved for summary judgment on the ground that the caveator has no legal standing to contest the validity of the will. Following a hearing at which affidavits and exhibits were presented by both parties an order was entered granting the propounder's motion. The evidence presented at the hearing shows without dispute that: The caveator is the illegitimate daughter of the testator and he orally acknowledged that fact to her and several others on many occasions; Mack Bunch never adopted the caveator, never married her mother, and never brought a special proceeding under G.S. 49-10 to legitimate her. Other evidence offered as proof that Mack Bunch formally acknowledged his parentage of the caveator in compliance with the provisions of G.S. 29-19(b) will be discussed in the opinion.

*Randall, Yaeger, Jervis & Stout, by Robert B. Jervis, for caveator appellant.*

*C. C. Malone, Jr. for propounder appellee.*

PHILLIPS, Judge.

As the caveator recognized in the court below and concedes here: In this state except as authorized by statute an illegitimate child has no legal right to share in the estate of its father; in view of the facts stated above the only statute that could possibly grant her that right is G.S. 29-19(b). This statute states that an illegitimate child may succeed to the estate of:

> Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

Thus, the only question raised by this appeal is whether the court erred in ruling that the affidavits, exhibits and other materials presented at the hearing on propounder's motion, when viewed in the most favorable light for the non-movant caveator, did not tend to show that her father, Mack Bunch, substantially complied with those provisions. Other than the established facts above stated caveator's evidence only tends to show that: Caveator's original North Carolina birth certificate states that she was born in Wake County on 10 June 1939, that her mother was Beatrice Hicks and her father was Earl Mac Hicks, whose whereabouts and occupation were then unknown. Caveator moved to New York in 1965 and while there her father took steps to get her birth certificate amended to show that she was his daughter; he sent her a North Carolina "Birth Certificate Amendment Application" form, which she had her mother, who lived in the Bronx, fill in and sign. And after the form was completed and signed by her mother the caveator sent it to her father. In that application, Ms. Hicks stated in substance that: She was unmarried when the child was born; when the child was just a baby she gave her to Mildred Bunch (the mother of the testator), and the child thereafter lived in Raleigh with Mrs. Bunch and always used the surname of Bunch; and all her records were in that name. A space on the application form designated "Name of Father" had "Earl Mac Hicks" typed in it; a space identified as Item 9 and designated "Item(s) Wrong Or Missing (At Time of Birth)" contains the words

"Mack Bunch" in the handwriting of Mack Bunch; and a space identified as Item 10 and designated "Facts As They Should Have Been Stated At The Time of Birth," has the name "Dorothy Bunch" typed in. At the end of the application, Ms. Hicks signed and solemnly swore before a New York Notary Public that: "(1) [She had] personal knowledge of the correctness of the statement made in this application; (2) That the facts listed under Item 9 of this application were incorrectly stated or omitted *at the time of birth*; (3) That the amendment specified under Item 10 of this application will change the original record so as to make it reflect the true facts *as they existed at the time of birth*." (Emphasis in original.) Upon Mack Bunch receiving the application he submitted it to the Office of Vital Statistics of the North Carolina Board of Health and on 6 December 1965 the caveator's original birth certificate was amended to change her surname from Hicks to Bunch. But Mack Bunch is not listed anywhere in the application as an applicant, nor did he sign the application before any of the certifying officers referred to in G.S. 52-10(b) (notary public, justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice).

The application does not meet the requirements of G.S. 29-19(b) and we affirm the dismissal of caveator's case. It contains no statement by Mack Bunch or anyone else that he was the father of the child; and even if his signature in the blank space involved could be construed to be an unambiguous acknowledgment of paternity, which it cannot, he did not swear to it before any official authorized to administer oaths, as the statute expressly requires. For that matter, the application does not even show that its purpose was to establish that Mack Bunch was the caveator's father; the only reason stated in it for changing the child's name was that she had lived with Mrs. Bunch and gone by that name since she was a baby. Thus, while Mack Bunch may very well have intended to formally acknowledge his paternity of the caveator, it cannot be deduced that he in fact ever did so in the manner that the statute requires.

Affirmed.

Judges WELLS and ORR concur.

JOSEPH H. WHITFIELD v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 867DC938

(Filed 21 July 1987)

1. **Insurance § 68.6— automobile insurance—medical payments—exclusion for injury when struck by family-owned vehicle—exclusion inapplicable**

The provision of an automobile insurance policy excluding medical payments coverage for bodily injury sustained when the person was struck by a vehicle owned by any family member did not apply to this case where a family member's stationary, disabled car was propelled into plaintiff after it was struck by a car not belonging to a family member.

2. **Attorneys at Law § 7.5— unwarranted refusal to pay by insurer—award of attorney's fees proper**

The trial court did not abuse its discretion in finding that there was an "unwarranted refusal" by defendant to pay an insurance claim pursuant to N.C.G.S. § 6-21.1 and by awarding attorney's fees to plaintiff under this statute.

DEFENDANT appeals from *Thomas, Judge.* Judgment entered 1 July 1986 in District Court, NASH County. Heard in the Court of Appeals on 15 January 1987.

*Moore, Diedrick, Whitaker and Carlisle by Sam Q. Carlisle, II, for plaintiff appellee.*

*Valentine, Adams, Lamar and Etheridge by L. Wardlaw Lamar; and Robert R. Gardner and Henry V. Ward, Jr., for defendant appellant.*

COZORT, Judge.

Plaintiff was injured when his disabled automobile was propelled into him after being struck by another automobile. Plaintiff incurred $5,893.20 in medical expenses. Plaintiff had medical payments coverage of $1,000.00 with an insurer other than defendant. Plaintiff is the son of the named insureds on an automobile insurance policy issued by defendant insurance company. This policy contains an omnibus clause which provides for medical coverage of a member of the household of the named insureds if struck by another automobile. The policy contained an exclusion providing that defendant company would not provide medical payments coverage for bodily injury sustained when the person is

struck by a vehicle owned by any family member. The defendant insurance company refused payment based on this exclusion. Plaintiff sued defendant to recover payments. The trial court entered summary judgment for plaintiff and awarded attorney's fees of $565.25, pursuant to N.C.G.S. § 6-21.1. On appeal, defendant contends that the trial judge erred by granting the plaintiff's motion for summary judgment and by awarding attorney's fees to the plaintiff. We affirm.

**[1]** Defendant's first contention is that the trial court erroneously granted summary judgment in favor of plaintiff. The defendant contends it was justified in denying coverage, citing the exclusion provided in the policy. Summary judgment is appropriate "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). After reviewing the undisputed facts and the policy provision in question, we find the trial court did not err by entering summary judgment for the plaintiff.

The exclusionary clause of the policy under which the defendant denies coverage reads as follows:

> We do not provide Medical Payments Coverage for any person for bodily injury: . . . . [s]ustained while occupying, or when struck by, any vehicle (other than your covered auto) which is: . . . owned by any family member . . . .

The injury occurred when the plaintiff was standing near his own disabled automobile. His disabled automobile was struck by another automobile and propelled into him. The defendant argues that the exclusionary provision requires as a matter of law a finding that the plaintiff is not entitled to coverage under the medical payments provision of his parents' policy. We do not agree. We believe the policy contemplates exclusion in terms of a family member being struck by his own car when his car is moving. We believe it does not exclude coverage when a family member's stationary, disabled car is propelled into him after being struck by a car not belonging to a family member. The purpose of the policy coverage is to protect those covered individuals from moving vehicles of non-family members. Here the moving vehicle which posed the danger was the non-family member's car. The physical

impact was provided by the other automobile; the plaintiff's automobile was merely the conduit of the impact.

In *DeBerry v. American Motorists Insurance Co.*, 33 N.C. App. 639, 645, 236 S.E. 2d 380 (1977), this Court considered a similar issue. In *DeBerry*, the insurance company denied coverage where the policy provided coverage for bodily injury when the insured was "struck by an automobile," and the facts were that the plaintiff was not struck directly by an automobile; instead, the automobile hit a rope barrier which broke and struck the plaintiff. After reviewing cases from various jurisdictions, this Court found the plaintiff had been struck by an automobile, reasoning as follows:

> One insured may be injured when the vehicle in which he is riding is struck by an automobile, and another insured may be injured when the parked vehicle next to which he is standing is struck by an automobile and is propelled against the insured's body. The common and ordinary meaning of the phrase "struck by an automobile" compels the conclusion that the insured has indeed been "struck by an automobile" in both these situations. To create a distinction with legal significance between a collision situation where an automobile collides with a car occupied by the insured and a collision situation where an automobile collides with some other object which strikes the insured is to engage in metaphysical hairsplitting completely at odds with the common and ordinary meaning of "struck by an automobile."

*Id.* at 644-45, 236 S.E. 2d at 384.

We find that reasoning persuasive and hold that the trial court correctly entered summary judgment for the plaintiff.

**[2]** The defendant's second contention on appeal is that the trial judge erred in finding that there was an "unwarranted refusal" by the defendant under N.C.G.S. § 6-21.1 and by awarding attorney's fees to the plaintiff under this statute. N.C.G.S. § 6-21.1 provides in pertinent part that:

> In any . . . suit against an insurance company under a policy issued by the defendant insurance company and in which the insured . . . is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance

company to pay the claim . . . the presiding judge may, in his discretion, allow a reasonable attorney fee.

The allowance of counsel fees under the authority of this section is, by express language of this section, in the discretion of the presiding judge. Without a showing of any abuse of the trial judge's discretion, the trial judge's determination to award counsel fees will not be overturned. *Hillman v. United States Liability Insurance Co.*, 59 N.C. App. 145, 296 S.E. 2d 302 (1982), *cert. denied*, 307 N.C. 468, 299 S.E. 2d 221 (1983). We have reviewed the trial court's four-page order in which he finds and concludes that the refusal to pay the claim was unwarranted. We find no abuse of discretion.

The judgment of the trial court is

Affirmed.

Judges MARTIN and PARKER concur.

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DUKE POWER COMPANY v. MARVEL E. DANIELS

No. 8719DC21

(Filed 21 July 1987)

1. **Rules of Civil Procedure § 17— plaintiff as real party in interest**

There was no merit to defendant's complaint that the action was not brought by the real party in interest, since the record indisputably showed that Duke Power was the real party in interest and that it, as the plaintiff, brought the action rather than the authorized collection agent who merely signed the complaint on plaintiff's behalf.

2. **Rules of Civil Procedure § 17— representative capacity of person signing complaint not indicated—no error**

There was no merit to defendant's contention that the action should have been dismissed because the person who signed the complaint did not indicate her representative capacity, since the action was not brought in a representative capacity but was brought on its own behalf by Duke Power, and the failure of plaintiff's employee to indicate that she was signing the complaint as the company's agent was a harmless oversight with no legal consequences.

**3. Attorneys at Law § 1.2— filing of complaint in Small Claims Court—no practicing law by corporation**

There was no merit to defendant's contention that, by having its lay employee sign the complaint in the Small Claims Division of our court system, plaintiff corporation practiced law in violation of N.C.G.S. § 84-5.

APPEAL by defendant from *Grant, Judge*. Judgment entered 16 September 1986 in District Court, ROWAN County. Heard in the Court of Appeals 13 May 1987.

On 5 November 1985 plaintiff sued in the Small Claims Division of the Rowan County District Court to collect an unpaid power bill in the amount of $605.88, and after judgment was entered against her defendant appealed to the District Court. Some months later, citing the provisions of Rules 9, 11, 12(b) and 17(a), N.C. Rules of Civil Procedure, defendant moved to dismiss plaintiff's action on the ground that the complaint was not signed by the company's director, registered agent or attorney, but by Trudy P. Wall, whose capacity to act for plaintiff was not indicated. It soon was made to appear by plaintiff's affidavit, however, that Ms. Wall, employed by plaintiff in its Credit Department, was an authorized agent in collecting overdue accounts. Based upon evidence developed during discovery showing that defendant owed the debt sued for, plaintiff then moved for summary judgment and following a hearing on both motions judgment was entered denying defendant's and granting plaintiff's.

*Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Richard R. Reamer, for plaintiff appellee.*

*Marvel E. Daniels, pro se, defendant appellant.*

PHILLIPS, Judge.

**[1, 2]** Even though plaintiff had the burden of proof, the order of summary judgment against defendant was properly entered and we affirm it, since the evidence as to defendant's indebtedness was not only uncontradicted it was highly credible. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Blackwell v. Massey*, 69 N.C. App. 240, 316 S.E. 2d 350 (1984). For in answering plaintiff's interrogatories defendant admitted under oath that she received electrical service from plaintiff during the period involved and signed a document acknowledging that she owed the bill sued for; there

was evidence that the meter at defendant's place worked properly and had been read correctly; and defendant offered no proof of payment, an affirmative defense. 10 Strong's N.C. Index 3d, *Payment* Sec. 4 (1977). Nevertheless, without the support of an assignment of error so maintaining, as Rule 10, N.C. Rules of Appellate Procedure requires, defendant pointlessly argued in the brief that there was an issue of fact for the jury to try. Another groundless contention, also unsupported by an assignment of error, is that plaintiff's action was not brought by "the real party in interest" as required by Rule 17, N.C. Rules of Civil Procedure, whereas the record indisputably shows that Duke Power Company is the real party in interest and that it, as the plaintiff, brought the action, rather than Trudy Wall, who merely signed the complaint upon plaintiff's behalf. The three assignments of error that defendant did file have no more merit. Indeed, the first one presents nothing for us to determine, since it is a broadside assignment that does not state the question it was intended to raise. *Kleinfeldt v. Shoney's of Charlotte, Inc.*, 257 N.C. 791, 127 S.E. 2d 573 (1962). The second assignment is that the case should have been dismissed because "plaintiff, not a natural person, suing in a representative capacity which did not indicate the capacity and authority of the parties bringing the action" violated Rule 9(a), N.C. Rules of Civil Procedure. If we understand the meaning of this indefinitely worded assignment, and we may not, it is based upon a misunderstanding of both Rule 9(a) and the nature of this action. For the action was not brought in a "representative capacity," either by Ms. Wall or plaintiff; it was brought on its own behalf by Duke Power Company, as the record indisputably shows, and Ms. Wall, an agent and employee, merely signed the complaint for plaintiff. That she did not then indicate she was signing as the company's agent and employee was a harmless oversight with no legal consequences. Certainly such a slight discrepancy is not to be equated with the failure of an administrator, guardian, trustee or other representative suing for the benefit of an estate or beneficiary to affirmatively state that fundamental fact and the basis for his authority, as Rule 9(a) requires.

**[3]** By her other assignment of error defendant contends that none of the courts in which this matter has been litigated ever acquired jurisdiction over it because plaintiff's complaint in the

Magistrate's court was signed by its lay agent and employee, Trudy Wall. The argument is that by having its lay employee sign the complaint in the Small Claims Division of our court system, plaintiff corporation practiced law in violation of the provisions of G.S. 84-5; which strikes us as far-fetched and unsound for several reasons. First, we do not believe that a corporation that merely fills in and signs one of the simple complaint forms that the General Assembly itself devised, G.S. 7A-232, and that our clerks of court regularly supply to prospective plaintiffs in small claims actions, is practicing law within the contemplation of G.S. 84-5, the main purpose of which is to prohibit corporations from performing legal services for *others*. Second, even if such an innocuous act is deemed to technically violate the statute, it is not of such gravity, in our opinion, as to deprive the court of jurisdiction and justify the dismissal of plaintiff's action. Third, in enacting our small claims court system and in devising the simple forms and procedures that are used and followed therein, Article 19, Chapter 7A, N.C. General Statutes, the General Assembly apparently intended, it seems to us, to provide our citizens, corporate as well as individual, with an expedient, inexpensive, speedy forum in which they can process litigation involving small sums without obtaining a lawyer, if they choose to do so. *See*, Haemmel, *The North Carolina Small Claims Court—An Empirical Study*, 9 W.F.L. Rev. 503 (1973). This decision, of course, has no bearing upon litigation in any court but the Magistrate's court, as plaintiff has been represented by counsel since defendant appealed to the District Court.

It is somewhat ironical that defendant largely bottoms her appeal upon plaintiff not being represented by counsel in the small claims court; for the foundationless and misguided course that defendant has followed since she was served with process strongly indicates the need for advice by learned counsel.

Affirmed.

Judges COZORT and GREENE concur.

WILLIAM H. HODGES AND WIFE, BETTY L. HODGES, JOHN LEGG AND WIFE, MARGARET LEGG, AND DOUGLAS H. STARR AND WIFE, HENRIETTA STARR v. RUSSELL WINCHESTER AND WIFE, RONA K. WINCHESTER; RALPH W. WINCHESTER AND WIFE, LOIS WINCHESTER; AND H. S. WARD, JR., TRUSTEE FOR CLYDE SAVINGS AND LOAN ASSOCIATION

No. 8630SC1343

(Filed 21 July 1987)

**Easements § 5.3— easement by implication—sufficiency of evidence**

Evidence was sufficient to show that plaintiffs owned an easement by implication across the lands of defendants where it tended to show that plaintiffs and defendants owned adjoining tracts of land which had a common source; at the time of severance there was then a road from plaintiffs' property across defendants' property to a road; plaintiffs' land was surrounded by a ridge of hills impractical to traverse; the fact that people lived there almost continuously during the many years involved necessarily indicated that they passed over defendants' land; and since there was no other road into the property, it could be inferred that the road referred to in the severance deed was the same road being regularly and openly used 35 years later when one witness was a child and being used for 40 or so years after that by whoever occupied the land and being used when defendants blocked it.

APPEAL by defendants from *Allen, C. Walter, Judge.* Judgment entered 21 July 1986 in Superior Court, SWAIN County. Heard in the Court of Appeals 8 June 1987.

*Siler & Clark, by Keith L. Clark, for plaintiff appellees.*

*Smith, Bonfoey & Queen, by Frank G. Queen, for defendant appellants.*

PHILLIPS, Judge.

The plaintiffs and the defendants own adjoining tracts of Swain County land that have a common source of title. Defendants' property is located between Sawmill Creek Road, a state maintained road, and plaintiffs' property, which is essentially a mountain cove surrounded by mountain ridges. Before this action was brought plaintiffs' property was served by an old service road that ran across defendants' property to Sawmill Creek Road. When defendants blocked the road plaintiffs sued to establish their ownership of an easement over it and defendants' land. Following a jury trial in which defendants presented no evidence the verdict was that plaintiffs own an easement by implication, but

not an easement of necessity or by adverse use. The only question presented by defendants' appeal is whether the verdict is sufficiently supported by evidence. We hold that it is.

Plaintiffs' evidence, in pertinent part, was as follows: Sometime before 1895 W. J. Dehart acquired title to both tracts involved. In 1895 when Dehart severed the two tracts by conveying the land now owned by plaintiffs, he made no express provision in the deed for ingress and egress over the tract now owned by defendants, but his deed contained a call stating "South 6 West 14 poles to a Spanish oak on the bank of the road at the gate," and plaintiffs contend that the road referred to is the road involved in this case. *Plaintiff William H. Hodges* testified that: In 1972 when plaintiffs purchased their property the road from it to Sawmill Creek Road, though very crude and apparently not used for some time, was passable with a car or truck and no other road led to the property. *Rosalie Dehart,* who was born in the Sawmill Creek Road community in 1924 and lived there until 1956, testified that: She is familiar with the two tracts of land; her father and grandparents once owned the land now owned by plaintiffs and her grandparents lived on the property in a log house until 1934; for several years after that the house was rented; from her earliest recollection there was a road into the place from Sawmill Creek Road about where the road in question is; the property was farmed and timber was cut and hauled out; the timber was logged out in the 1940's and the road was wide enough for big log trucks; and through the many years that she has known about the roadway it stayed open and was used without dispute or controversy until the present controversy arose. *James Herron,* a licensed land surveyor hired in 1978 by plaintiffs, testified that: In examining and surveying plaintiffs' property he found an old house site and evidence of a road leading from it across defendants' property to Sawmill Creek Road; that though he did not find either the Spanish oak or the gate referred to in the 1895 deed he located a stump which he believed was where the oak had stood. *Thomas W. Jones,* an attorney who searched the titles of the properties in question, testified that: Although there had been no express recognition of the easement in any of the deeds in plaintiffs' or defendants' chain of title, all the deeds contained the call "South 6 West 14 poles to a Spanish oak on the bank of the road at the gate," and he opined that in

view of the common source of title of the two tracts if the jury should find that the road was visible and in use at severance, that it had been continually used since then, and was the only reasonable access to plaintiffs' property, that plaintiffs would own an easement by implication.

In this state an easement by implication has three requisites: (1) a separation of title; (2) the use claimed must have been so obvious and long continued as to show it was meant to be permanent; and (3) the easement must be reasonably necessary to the enjoyment of the benefited land. *Barwick v. Rouse*, 245 N.C. 391, 95 S.E. 2d 869 (1957); *Carmon v. Dick*, 170 N.C. 305, 87 S.E. 224 (1915); *Dorman v. Wayah Valley Ranch, Inc.*, 3 N.C. App. 559, 165 S.E. 2d 561 (1969). Defendants concede that the first and third requisites have been established by evidence and it is clear, we think, when the evidence is viewed in the light most favorable to plaintiffs, *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978), that the second requisite has also been established. The 1895 deed of severance shows that there was then a road of some kind from Sawmill Creek Road into what is now plaintiffs' property; that the land is surrounded by a ridge of hills impractical to traverse and people lived there almost continuously during the many years involved necessarily indicates that they passed over defendants' land; and since there was no other road into the property, it is inferable that the road referred to in the deed is the same road that was being regularly and openly used, without controversy or dispute, thirty-five years later when Mrs. Dehart was a child and that was used for forty or so years after that by whoever occupied the land and was still there and being used when defendants blocked it.

We therefore hold that plaintiffs have upheld their burden of proof, as required by the above decisions, and no error in the trial has been made to appear.

No error.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. DALLAS STEELE, JR.

No. 8626SC1264

(Filed 21 July 1987)

1. **Constitutional Law § 67— drug user accompanying undercover officer—revealing of identity not required**

The State was not required to reveal the identity of the drug user who accompanied an undercover officer when he allegedly purchased drugs from defendant, since the undisclosed person was not an informant, but a "cool face" used by police to make it appear that the drug buyer was "safe"; moreover, there was no indication whatever that defendant could have defended the case more effectively had he known who the "cool face" was.

2. **Criminal Law § 80.2— SBI agent's notes—no inspection by defendant—no prejudicial error**

Defendant failed to show prejudicial error in the trial court's refusal to permit defendant to inspect the notes of an SBI agent after a police officer reviewed the notes and then testified, since the police officer neither made nor adopted the notes but only used them to refresh his memory as to the times involved, which was not a critical factor in the State's case; moreover, defendant failed to include the notes in the record and so failed to show that the court abused its discretion. N.C.G.S. § 8C-1, Rule 612.

APPEAL by defendant from *Kirby, Judge*. Judgment entered 24 July 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 May 1987.

Defendant was convicted by a jury of felonious possession of cocaine with the intent to sell and deliver it and of felonious sale and delivery of it, in violation of G.S. 90-95. He cites as prejudicial error only the trial judge's denial of his motions to require the State to reveal the identity of a person that witnessed the alleged transaction and to permit him to examine the notes a witness who testified against him used to refresh his memory. The evidence pertinent to these contentions, all by the State, tended to show the following:

On the morning of 8 December 1985 Charlotte police officers Henderson and Kearney had a meeting at which Kearney introduced Henderson to a person known to Kearney as a drug user who would assist Henderson in purchasing illegal drugs on the streets of Charlotte. In police parlance a person known to have used drugs who accompanies the police in making undercover drug purchases is known as a "cool face." Following the meeting,

Officer Henderson, dressed in civilian clothes and accompanied by the reputed drug user, drove his unmarked police car to a public parking lot in a Charlotte neighborhood where drug traffic had been reported. During the same period Kearney, accompanied by SBI Agent Bowman, stationed his car where they could see the parking lot involved. After entering the parking lot Henderson pulled his car alongside a brown Ford Granada occupied by two black males and expressed an interest in purchasing cocaine. The driver of the Ford, after saying that he could get some cocaine, drove away and returned about two minutes later with .310 grams of white powder containing cocaine, which he gave to Henderson for $50. After paying for the cocaine Henderson drove away, met with Kearney and SBI Agent Bowman, who had observed the entire transaction from about 100 yards away, and gave Kearney the cocaine for safekeeping. Henderson also wrote a note describing the transaction, in which no mention was made of the reputed drug user. Several weeks later when defendant was arrested Officer Henderson identified him as the cocaine vendor. The reputed "cool face" who accompanied Henderson and witnessed the transaction neither testified nor assisted in the identification of defendant. SBI Agent Bowman made notes about the transaction that she and Kearney observed and before testifying Kearney reviewed those notes in order to refresh his memory as to "the time in which we observed Officer Henderson."

*Attorney General Thornburg, by Assistant Attorney General Wilson Hayman, for the State.*

*Public Defender Day, by Assistant Public Defender Susan J. Weigand, for defendant appellant.*

PHILLIPS, Judge.

**[1]** In arguing that the trial judge should have required the State to reveal the identity of the drug user who accompanied Officer Henderson, defendant characterizes that person as an "informant" whose knowledge was crucial to Henderson's ability to identify the seller of the cocaine. But all the evidence tends to show that the undisclosed person was not an "informant," but a "cool face" used by the police to make it appear that the buyer was "safe." According to the *voir dire* and other testimony of the officers the "cool face" neither provided information about defend-

ant's drug selling activities, nor directed them to the place where the drug purchase was made, nor assisted in the identification of the defendant later. But even if the ruling was error, it was not prejudicial error, because there is no indication whatever that defendant could have defended the case more effectively if he had known who the "cool face" was, *see State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Boles*, 246 N.C. 83, 97 S.E. 2d 476 (1957), and the contention is therefore overruled.

**[2]** Nor do we see any prejudicial error in the court's refusal to permit defendant to inspect the notes of SBI Agent Bowman after Officer Kearney testified. First, G.S. 15A-903(f) does not apply to his motion, as defendant argues, because according to the evidence Kearney neither made nor adopted the notes, as that rule requires, but only used them to refresh his memory as to the times involved, which was not a critical factor in the State's case. The only critical factor in the case was Henderson's identification of the defendant and since Bowman was 100 yards away when Henderson allegedly saw the defendant and did not participate in the identification, it seems unlikely that her notes were material to that issue. Under the circumstances defendant's access to the notes was governed by Rule 612, N.C. Evidence Code, which authorizes the court in its *discretion* to permit an adverse party to examine writings used by a witness to refresh his memory before testifying. But since the notes are not in the record we have no basis for concluding either that they would have materially benefited defendant or that the court abused its discretion in not permitting defendant to examine them.

No error.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. BRICE MILLS, JR., AKA BRICE JUNIOR MILLS

No. 8629SC1280

(Filed 21 July 1987)

**Criminal Law § 143.12— revocation of probation—original sentence activated—no error**

Where defendant violated a condition of his probation and a superior court judge continued defendant on probation and did not activate any of the prison sentences earlier imposed by another superior court judge, the second judge's order undertaking to consolidate and reduce defendant's sentences was unauthorized and without effect so that a third superior court judge, who found that defendant had violated the terms of his probation, had authority to revoke the probation and activate the original sentences without reducing them. N.C.G.S. § 15A-1344(d).

APPEAL by defendant from *Snepp, Judge.* Judgments entered 24 July 1986 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 1 June 1987.

Defendant appeals from the revocation of his parole and the activation of his original sentences. The events pertinent hereto follow: On 2 May 1983, after pleading guilty to one count of felonious forgery, one count of felonious uttering, four counts of feloniously obtaining property by false pretense, and one count of misdemeanor bad checks, defendant was sentenced by Judge Burroughs to three consecutive two year sentences and one two year sentence that was not designated as either consecutive or concurrent; but the prison sentences were suspended for five years and defendant was placed on probation for five years with the condition that he report to his probation officer within 72 hours of his release. Instead of complying with the order defendant first reported to his probation officer 22 days after his release and then only after the probation officer had conducted a search for him. On 4 March 1985 a hearing was eventually held on the probation violation report, after which Judge Gudger found that defendant had wilfully and without lawful cause violated the terms and conditions of his probation, entered an order that continued defendant on probation, but modified the conditions of probation by consolidating the sentences for judgment and reducing both the sentence terms and the period of probation to three years. On 25 June 1985 defendant was again charged with violating his condi-

tions of probation. Following a hearing thereon and a finding that defendant had wilfully violated his probation Judge Snepp entered an order revoking his probation and activating the sentences originally imposed by Judge Burroughs.

*Attorney General Thornburg, by Associate Attorney General Donald W. Laton, for the State.*

*Jarald N. Willis for defendant appellant.*

PHILLIPS, Judge.

Defendant's only assignment of error concerns the activation of his original sentences. He argues that only the sentences as modified by Judge Gudger could be activated. The invocation was authorized by law and we overrule the assignment. The applicable statute is G.S. 15A-1344(d), which provides:

> . . . If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court . . . may continue him on probation, with or without modifying the conditions . . . or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing . . . The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence.

This statute, as we read it, authorizes the court to reduce a prison sentence previously imposed only when the prison sentence is activated and the probation is revoked. Since Judge Gudger continued defendant on probation and did not activate any of the prison sentences earlier imposed by Judge Burroughs, his order undertaking to consolidate and reduce defendant's sentences was unauthorized and without effect. Thus, upon it being shown that defendant had violated the terms of his probation, Judge Snepp had the authority under this statute to revoke the probation and activate the original sentences without reducing them. Contrary to defendant's argument, Judge Snepp did not improperly overrule another Superior Court judge; he merely exercised the authority that the statute gave him.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. JOHNNY WOOTEN, JR.

No. 868SC1252

(Filed 21 July 1987)

**Criminal Law § 22— evidence of plea bargain—admission prejudicial error**

The admission of an officer's testimony that defendant told him that "his lawyer wanted to plead him to six years to the offense and he wanted to know what he should do" violated the statute prohibiting evidence of plea bargaining, N.C.G.S. § 15A-1025, and constituted prejudicial error.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 26 June 1986 in Superior Court, WAYNE County. Heard in the Court of Appeals 5 May 1987.

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

*John P. Edwards, Jr., for defendant appellant.*

ORR, Judge.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. After a trial by jury, defendant was found guilty of the charge and sentenced to an active term of eighteen years.

Defendant contends on appeal that the trial court erred in refusing to strike part of the testimony of investigating police officer, Ronald Melvin. Officer Melvin testified that defendant spoke with him after defendant's arrest and said that "his [defendant's] lawyer wanted to plead him to six years to the offense and he wanted to know what he should do." This testimony, defendant asserts, is expressly prohibited by N.C.G.S. § 15A-1025, which provides: "The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of

the defendant in any criminal or civil action or administrative proceedings." We are persuaded by defendant's argument.

The validity of plea negotiations was recognized by the U.S. Supreme Court in *Santobello v. New York*, 404 U.S. 257, 30 L.Ed. 2d 427 (1971), which held, "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged." 404 U.S. at 260, 30 L.Ed. 2d at 432. *See State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976).

The North Carolina Legislature adopted the U.S. Supreme Court's rationale in 1973, formalizing the procedures for "plea bargaining" by enacting N.C.G.S. § 15A-1021 through § 15A-1026. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921.

N.C.G.S. § 15A-1025 was designed to facilitate plea discussions and agreements by protecting both defendants and prosecuting officials from being "penalized for engaging in practices which are consistent with the objectives of the criminal justice system." § 3.4 ABA Standards on Pleas of Guilty, p. 78, March 1968; American Law Institute, A Model Code of Pre-Arraignment Procedure—Tentative Draft No. 5, Article 350.7 (1972). N.C.G.S. § 15A-1025 (1983).

In the present case, the plea bargain discussed in Officer Melvin's testimony was negotiated by defendant's counsel and the prosecutor. Consequently, these negotiations were explicitly protected by N.C.G.S. § 15A-1025 from admission at trial.

Although admission of erroneous testimony does not automatically justify a new trial, on these facts we believe such action is necessary. *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E. 2d 204 (1983); *Board of Education v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970).

Defendant entered a plea of not guilty to the charge of assault with intent to kill. The admission of evidence that defendant was considering pleading guilty to the charge and accepting a six year prison term was highly prejudicial to his case and potentially influenced the jury verdict. Therefore, we vacate defendant's sentence and remand this case for a new trial.

Defendant raises additional assignments of error on appeal. After a review of the record, however, we conclude these assignments are without merit and decline to discuss them.

New trial.

Judges ARNOLD and WELLS concur.

## CASES REPORTED WITHOUT PUBLISHED OPINION

### FILED 21 JULY 1987

| Case | County | Disposition |
|---|---|---|
| CITY OF SHELBY v. SPANGLER No. 8627SC1258 | Cleveland (85CVS1051) | No Error |
| DIXON v. BRINSON No. 864SC1233 | Onslow (78CVS387) | Affirmed |
| IN RE EARP No. 8710DC62 | Wake (86SPC942) | Affirmed and remanded for correction of administrative error. |
| JENKINS v. PATTERSON No. 8711SC256 | Lee (85CVS978) | Affirmed |
| McDONALD v. McDONALD No. 8627SC1158 | Lincoln (86CVS324) | Reversed |
| O'NEAL v. WILKS No. 8621DC1151 | Forsyth (85CVS1081) | Vacated and remanded in part. |
| SCHMIDT v. ESTATE OF BOWDEN No. 8629DC1169 | Transylvania (82CVD338) | New Trial |
| STATE v. BENNETT No. 8717SC12 | Stokes (85CRS3135) (85CRS3136) (85CRS3139) (85CRS3140) | Reversed |
| STATE v. FERRARA No. 874SC206 | Onslow (86CRS7300) | No Error |
| STATE v. MACKEY No. 8729SC276 | Henderson (86CRS5104) | New Trial |
| STATE v. MIXON No. 863SC1140 | Craven (85CRS15698) (85CRS15699) | No Error |
| WALKER v. WALKER No. 8614DC1290 | Durham (82CVD00567) | Affirmed in part, vacated in part and remanded for entry of further order. |

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|---|---|---|
| WELLS v. ELSWICK<br>No. 8627SC1248 | Gaston<br>(85CVS2663) | Affirmed |
| WEST v. KING'S<br>No. 8621SC369 | Forsyth<br>(82CVS2975) | Affirmed |

PATRICIA LACKEY v. BERNARD BRESSLER, M.D., WILLIAM H. BEUTE, M.D., DUKE UNIVERSITY MEDICAL CENTER, DUKE UNIVERSITY, JOHN DOE, MARY ROE, DOE MEDICAL CENTER, SMITHKLINE CORPORATION AND MACNEILAB, INC.

No. 8622SC1164

(Filed 4 August 1987)

**1. Limitation of Actions § 4.2; Physicians, Surgeons and Allied Professions § 13— medical malpractice claim—barred by G.S. 1-15(c)**

The trial court properly granted summary judgment in an action for medical malpractice, breach of contract and assault and battery based on the running of the statute of limitations where a review of plaintiff's complaint, answers to interrogatories, and admissions established that the last act by defendant Bressler giving rise to the three causes of action occurred in or about June of 1972, the last act by defendants Duke University Medical Center and Duke University occurred on 1 May 1979, and plaintiff instituted the suit on 17 April 1984. The Legislature passed N.C.G.S. § 1-15(c) specifically to address the question of when an action for medical malpractice would be barred by time; the breach of contract claim was governed by N.C.G.S. § 1-15(c) because N.C.G.S. § 1-52(16), governing civil actions arising out of personal injury, specifically states that a cause of action for personal injury attributable to professional malpractice is governed by N.C.G.S. § 1-15(c); North Carolina does not recognize breach of contract as a legal theory under which one can recover for negligent malpractice; and the assault and battery claim was in fact a negligent malpractice claim because plaintiff alleged a failure to obtain informed consent rather than an unauthorized procedure.

**2. Fraud § 12; Physicians, Surgeons and Allied Professions § 16.1— fraudulent concealment by hospital—insufficient evidence**

The trial court properly granted summary judgment on plaintiff's claim for fraudulent concealment arising from professional malpractice against Duke University Medical Center and Duke University where plaintiff alleged that defendants deliberately concealed from her that she had developed Tardive Dyskinesia as a result of their negligence in order to prevent her from bringing a malpractice suit against the hospital, a claim implying actual or constructive fraud. While plaintiff sufficiently alleged a fiduciary relationship arising from the physician-patient relationship, her treatment by numerous other physicians and medical facilities constituted the seeking of independent advice and prevented plaintiff from contending that she relied solely upon Duke University Medical Center to inform her of her condition and its causation, and rebutted the presumption of reliance and intentional deceit arising out of the fiduciary relationship. Plaintiff was therefore required to present a forecast of evidence sufficient to support a claim for constructive fraud or actual fraud and was unable to do so.

APPEAL by plaintiff from *Cornelius, Judge,* and *Mills, Judge.* Orders entered 16 October 1985 and 6 June 1986 in Superior

Court, IREDELL County. Heard in the Court of Appeals 5 May 1987.

Plaintiff brought suit against defendants Bernard Bressler, M.D., Duke University Medical Center, and Duke University for medical malpractice, breach of contract, and assault and battery. As part of the same action, plaintiff also sued defendants Duke University Medical Center and Duke University for fraudulent concealment. All of the above claims arose out of a course of medical treatment received by plaintiff while she was a patient of defendants Duke University Medical Center and Dr. Bressler.

The three defendants made motions for summary judgment as to all of plaintiff's claims, which the trial court granted after finding all claims barred by the applicable statutes of limitations. From summary judgment, plaintiff appeals. We find, after reviewing the evidence, that the trial court's actions were proper.

*Avery, Crosswhite & Whittenton, by William E. Crosswhite, attorney for plaintiff appellant.*

*Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay and David H. Batten, attorneys for defendant appellees, Bernard Bressler, M.D., Duke University and Duke University Medical Center.*

ORR, Judge.

In support of her claims against defendants, plaintiff's complaint made the following allegations.

From 1969 to 1 May 1979, plaintiff sought and received medical treatment for a neurological condition and psychiatric difficulties from Duke University Medical Center. As part of this treatment in May 1971, Dr. Bressler, a psychiatrist with the psychiatric unit of Duke Medical Center, placed plaintiff on a drug regimen, which included the neurological drugs Haldol and Thorazine. Plaintiff continued to take the two drugs until 17 April 1974, when she was admitted to Broughton Hospital for treatment of a claimed overdose of Thorazine. On 17 April 1974, she permanently stopped taking either Thorazine or Haldol.

The complaint alleged that while taking these two drugs plaintiff developed an irreversible neurological condition known

as Tardive Dyskinesia (TD), and that this condition was directly and proximately caused by defendants' negligence. This negligence allegedly consisted of improperly prescribing Haldol and Thorazine for plaintiff's use, failing to properly monitor the effects of these drugs on plaintiff's condition, and continuing to treat plaintiff with these drugs for an extended period of time. In addition, plaintiff alleged that defendants failed to inform either plaintiff or her family that the use of Haldol or Thorazine could have serious side effects, including the development of TD.

Plaintiff's amended complaint further alleged that defendants Duke University Medical Center and Duke University committed fraudulent concealment in order to prevent her from bringing a malpractice action by intentionally failing to inform plaintiff both that she had TD and that she had developed TD as a result of defendants' negligence.

I.

[1] The first issue on appeal is whether the trial court properly granted summary judgment for defendants on the issues of malpractice, assault and battery, and breach of contract. Defendants contend that each of these claims was barred by the applicable statute of limitations, and we agree.

Defendants may meet the burden of proof required for obtaining summary judgment by showing that the plaintiff "cannot surmount an affirmative defense which would bar the claim." *Bernick v. Jurden*, 306 N.C. 435, 441, 293 S.E. 2d 405, 409 (1982); *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). The statute of limitations, if properly pled and if all the facts with reference thereto are admitted or established, may act as an affirmative defense, barring plaintiff's claims and entitling defendants to summary judgment as a matter of law. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E. 2d 350 (1985); *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E. 2d 878 (1971); N.C.G.S. § 1A-1, Rule 56 (1983).

A review of the evidence discloses that plaintiff's claims of malpractice, breach of contract, and assault and battery are governed by the statute of limitations contained in N.C.G.S. § 1-15(c), which states in part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. *Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action* . . . . (Emphasis added.)

The Supreme Court addressed the application of this statute in *Black v. Littlejohn,* 312 N.C. 626, 325 S.E. 2d 469 (1985) and concluded that:

> [t]he legislature's adoption of an outer limit or repose of four years from the last act of the defendant giving rise to the cause of action for non-apparent injuries contained in G.S. 1-15(c) . . . clearly [has] the effect of granting the defendant an immunity to actions for malpractice after the applicable period of time has elapsed.

312 N.C. at 633, 325 S.E. 2d at 475. "This outer limit is more precisely referred to as a period of repose. . . . 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." *Id.* at 632-33, 325 S.E. 2d at 474-75 (citations omitted). In addition, our Court has held that the trial court has no discretion in determining whether a claim is barred by the statute of limitations. *Congleton v. City of Asheboro,* 8 N.C. App. 571, 174 S.E. 2d 870 (1970).

A review of plaintiff's complaint, answers to interrogatories, and admissions establishes that the last act taken by defendant Dr. Bressler, giving rise to the three causes of action, occurred in or about June 1972. Although plaintiff contends Dr. Bressler is responsible for the entire period during which she took the drugs, she has presented no evidence in support of her contention. At most the record shows that Dr. Bressler prescribed for plaintiff's use a one-year dosage of Haldol and Thorazine in June 1971. How plaintiff obtained additional refills of Dr. Bressler's original prescription is unclear. It is clear, however, that Dr. Bressler did not see or treat plaintiff again after her discharge from the Duke Medical Center psychiatric unit on 30 June 1971. Without some evidence from plaintiff showing Dr. Bressler's involvement in the refill of her later prescriptions, we cannot hold him responsible for these actions.

The documents further show that the last act taken by defendants Duke University Medical Center and Duke University, giving rise to the three causes of action, occurred on 1 May 1979, when Duke University Medical Center last treated plaintiff as an outpatient.

Plaintiff instituted this suit against defendants, for the claims arising out of these actions on 17 April 1984, approximately twelve years after defendant Dr. Bressler's last act, and four years, eleven months, seventeen days after defendant Duke University Medical Center's last act. Consequently, any claim of plaintiff's, arising out of defendants' actions and governed by N.C.G.S. § 1-15(c), would be barred by the running of the statute.

A. Negligent Malpractice Claim.

The legislature passed N.C.G.S. § 1-15(c) specifically to address the question of when an action for medical malpractice would be barred by time. *Roberts v. Durham County Hospital Corp.*, 56 N.C. App. 533, 289 S.E. 2d 875 (1982), *aff'd*, 307 N.C. 465, 298 S.E. 2d 384 (1983). We conclude, therefore, that N.C.G.S. § 1-15(c) governed the time limitation on plaintiff's claim for negligent malpractice, and that the trial court properly granted summary judgment as to this claim.

B. Breach of Contract Claim.

We next consider plaintiff's claim for breach of contract. Plaintiff contended that defendants had made an implied contract

with plaintiff to provide her with a standard of health care which was as high as that provided by the medical profession in the Durham metropolitan area. She further alleged that defendants' negligent acts, resulting in personal injury to plaintiff, breached this implied contract.

N.C.G.S. § 1-52(16) governs the statute of limitations for all civil actions arising out of personal injury. N.C.G.S. § 1-52(16) specifically states that a cause of action for personal injury, attributed to malpractice arising out of the performance of or failure to perform professional services, is governed by N.C.G.S. § 1-15(c). As discussed earlier in this opinion, plaintiff did not file her complaint within the N.C.G.S. § 1-15(c) statutory period. Accordingly, this cause of action was barred by the statute of limitations.

Moreover, we note that North Carolina does not recognize breach of contract as a legal theory under which one can recover for negligent malpractice.

C. Assault and Battery Claim.

Plaintiff's third claim, for assault and battery, alleged that defendants failed to properly inform either plaintiff or her family of the risks inherent in both the use and continued use of neuroleptic drugs when obtaining consent from these parties for this type of treatment. Plaintiff asserts that defendants' failure to obtain *informed consent* vitiates any express or implied consent to such treatment. Consequently, all actions taken by defendants in prescribing and administering these drugs were performed without authority, and, therefore, constituted an assault and battery on plaintiff's person.

Plaintiff's contention is erroneous.

> Where a medical procedure is completely unauthorized, it constitutes an assault and battery, i.e., trespass to the person. . . . If, however, the procedure is authorized, but the patient claims a failure to disclose the risks involved, the cause of action is bottomed on negligence. Defendants' failure to make a proper disclosure is in the nature of malpractice (negligence) and the three-year statute of limitations applies.

*Nelson v. Patrick*, 58 N.C. App. 546, 550, 293 S.E. 2d 829, 832 (1982) (citations omitted); N.C.G.S. §§ 1-15(c) and 1-52(16) (1983). *See Starnes v. Taylor*, 272 N.C. 386, 158 S.E. 2d 339 (1968).

For this reason, we conclude that this claim was also barred by the N.C.G.S. § 1-15(c) time limitation, and that the trial court properly granted defendants' motion for summary judgment.

II.

**[2]** The next issue on appeal is whether the trial court properly granted summary judgment, dismissing plaintiff's claim of fraudulent concealment against Duke University Medical Center and Duke University. Plaintiff's complaint alleged that defendants deliberately concealed from her the fact that she had developed TD as a result of their negligence in order to prevent her from bringing a malpractice suit against the hospital. This claim implies recovery under either a theory of actual fraud or constructive fraud.

The Supreme Court discussed extensively the law governing the charges of constructive fraud and actual fraud in *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E. 2d 879 (1986).

In *Watts*, as in the present case, the plaintiff alleged that defendants fraudulently concealed material facts concerning plaintiff's injuries to prevent plaintiff from bringing an action for an alleged prior malpractice against defendants.

Justice Martin, speaking for the Supreme Court in *Watts*, stated the law and elements of constructive fraud as follows:

> Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less 'exacting' than that required for actual fraud. . . . When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit. . . . 'This presumption arises not so much because [the fiduciary] has committed a fraud, but [because] he may have done so.' . . . The superior party may rebut the presumption by showing, for example, 'that the confidence reposed in him was not abused, but that the other party acted on independent advice.' . . . Once rebutted, the pre-

> sumption evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud.
>
> In stating a cause of action for constructive fraud, the plaintiff must allege facts and circumstances '(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.'

*Watts*, 317 N.C. at 115-16, 343 S.E. 2d at 884 (citation omitted).

To establish the two elements of constructive fraud, plaintiff first alleged she had been a patient of Duke University Medical Center. In support of this allegation, the hospital's medical records showed that plaintiff was treated by Duke University Medical Center, after receiving her prescription for Haldol and Thorazine in June 1971, on 20 September 1977, 3 January 1978, 7 February 1978, 22 through 28 February 1978, and approximately ten times between 11 April 1978 through 1 May 1979. Since it is recognized that the relationship of patient and physician is a fiduciary one, "imposing upon the physician the duty of good faith and fair dealing," this allegation was sufficient to establish the first element of the charge. *Black v. Littlejohn*, 312 N.C. at 646, 325 S.E. 2d at 482; *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E. 2d 879.

Next, plaintiff alleged she was harmed by her fiduciary relationship with the hospital, when the hospital concealed from her the fact that its doctors had negligently treated her with drugs, causing her irreparable physical harm. Plaintiff further alleged the hospital's concealment benefitted it by allowing the statute of limitations to run on plaintiff's action for medical malpractice against the hospital based upon the actions of its doctors.

Unrefuted, plaintiff's second set of allegations, as set forth in her affidavits and other records considered by the trial court, are sufficient to establish the second element of the charge of constructive fraud, giving plaintiff the ability to withstand a motion for summary judgment. *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E. 2d 879.

There was, however, additional evidence presented to the trial court pertaining to this charge. Plaintiff's answers to defend-

ants' interrogatories disclosed that plaintiff had sought additional medical help for her condition, during the time period she was allegedly Duke University's Medical Center's patient, from the following: Iredell Memorial Hospital and staff Drs. George Eckley or James Rhyne on 15 April 1974, 13 December 1977, 22 through 26 May 1979, 11 June 1979, and 13 through 15 August 1982; Broughton Hospital and staff Drs. James Mattox or Michael Knoelke on 17 April 1974 and 12 June through 19 July 1979; and Iredell County Mental Health Clinic approximately 89 times between 1979 and 1982 for therapy and treatment by medical personnel.

The Supreme Court also addressed the effect of independent medical treatment upon a claim for constructive fraud arising out of the alleged concealment of medical malpractice in *Watts* stating:

> Evidence put forward . . . amply demonstrates that plaintiff sought and received a number of second opinions as to the source of her complaints. Even if a presumption of fraud arises from the alleged benefit to defendants of buttressing their medical reputations, the history of plaintiff's seeking and acquiring numerous second opinions from several other specialists dispels the presumption of reliance and intentional deceit that arises from the fiduciary relation itself.

*Watts*, 317 N.C. at 116, 343 S.E. 2d at 884. Based upon the holding in *Watts*, this Court concludes that plaintiff's treatment by numerous other physicians and medical facilities constituted the seeking of independent advice and prevented plaintiff from contending that she relied solely upon Duke University Medical Center to inform her of her condition and its causation. Accordingly, we find that the above evidence rebutted the presumption of reliance and intentional deceit arising out of the fiduciary relationship. As a result, plaintiff was required to present a forecast of evidence sufficient to support a claim for constructive fraud. Plaintiff failed in this respect.

Unable to rely on a claim of constructive fraud, plaintiff must allege facts supporting actual fraud to survive summary judgment on this issue.

The five essential elements of actual fraud are: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (1974)); *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E. 2d 879. In addition, N.C.G.S. § 1A-1, Rule 9(b) requires that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." This requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation, and what was obtained as a result of the fraudulent acts or representations. *Terry v. Terry*, 302 N.C. 77, 273 S.E. 2d 674. *See also* N.C.G.S. § 1A-1, Rule 9(f) (1983).

To meet the requirements stated above, plaintiff's forecast of evidence in the present case must show that named medical personnel, employed by Duke University Medical Center, deliberately concealed information from her, intending to and succeeding in, deceiving her as to her condition and its causation, and causing her to lose her claim against defendants for negligent malpractice. *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E. 2d 879.

After reviewing the documents submitted by plaintiff in opposition to the motion, we find that her forecast of evidence was insufficient to withstand a motion for summary judgment on either theory of fraud as to defendants Duke University and Duke University Medical Center.

We conclude, therefore, that plaintiff's claims of malpractice, breach of contract, and assault and battery were barred by N.C.G.S. § 1-15(c), and that the trial court properly granted defendants', Dr. Bressler, Duke University Medical Center, and Duke University, motion for summary judgment on these claims. We further hold that plaintiff's forecast of evidence was insufficient to support a claim for fraudulent concealment on the part of defendants Duke University Medical Center and Duke University, and that summary judgment was also properly granted on this claim.

No error.

Judges ARNOLD and WELLS concur.

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THE NORTH CAROLINA STATE BAR v. C. LEROY SHUPING, ATTORNEY

No. 8610NCSB563

(Filed 4 August 1987)

**1. Attorneys at Law § 12— violation of disciplinary rule—public censure—findings supported by evidence**

Findings of a Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar regarding an estate proceeding handled by an attorney, including findings that the attorney had filed estate accounts late, had advanced undifferentiated amounts to himself as attorney and coexecutor without prior approval of the Clerk of Superior Court, and had failed to respond to orders and notices from the Clerk, were supported by clear, cogent and convincing evidence. Furthermore, the findings, conclusion and result were supported by substantial evidence under the whole record test.

**2. Attorneys at Law § 11— conclusion of Disciplinary Hearing Committee on whether one disciplinary rule violated—five disciplinary rules alleged to have been violated—remanded**

An order of discipline of a Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar was remanded where the complaint alleged that five disciplinary rules had been violated by the defendant, the issue of whether one of those rules had been violated was resolved by a statement of the Hearing Committee Chairman, and the Committee's order made a conclusion of law on only one other disciplinary rule. Proceedings before a Hearing Committee shall conform as nearly as practicable with the requirements of the Rules of Civil Procedure, and Rule 52(a)(1) of the North Carolina Rules of Civil Procedure has been interpreted to require the trial court to find the facts specially and state separately the conclusions of law and thereby resolve all controversies between the parties raised by the pleadings and the evidence.

APPEAL by plaintiff from Order of the Disciplinary Hearing Commission of the North Carolina State Bar entered 23 December 1985. Heard in the Court of Appeals 12 November 1986.

*L. Thomas Lunsford, II, and Lester V. Chalmers, Jr., for plaintiff appellant.*

*Luke W. Wright for defendant appellee.*

COZORT, Judge.

In a complaint filed by the North Carolina State Bar, the defendant attorney was charged with violating five (5) Disciplinary Rules under the North Carolina State Bar Code of Professional Responsibility. After a hearing before a Hearing Committee of the Disciplinary Hearing Committee, the Hearing Committee found that the defendant had committed the acts as alleged in the complaint and concluded that the defendant's acts constituted a violation of one (1) of the Disciplinary Rules cited in the complaint. In its Order of Discipline, the Hearing Committee issued a Public Censure. The State Bar appeals, alleging the Hearing Committee erred by failing to conclude that the other Disciplinary Rules cited in the complaint also had been violated. We agree in part with the State Bar's contention, and we remand the case for further consideration by the Disciplinary Hearing Commission. Pertinent facts and procedural history follow.

This case arose out of an estate proceeding in Guilford County. The defendant, C. Leroy Shuping, Jr., a licensed attorney since 1947, was named co-executor for the Estate of Hubbard Harvey Longest on 6 March 1979. On 4 February 1983, the co-executor of the estate filed a petition to revoke defendant's letters testamentary, alleging, *inter alia,* that defendant had advanced himself fees without the approval of the clerk of court as required by law, and had not timely filed required documents. On 16 January 1984, an order revoking the defendant's letters testamentary was affirmed by Superior Court Judge Hal Hammer Walker, the defendant was removed as co-executor, and defendant was ordered to account to the co-executor for all the assets of the estate. On appeal the Court of Appeals affirmed in an opinion filed 7 May 1985. *In re Estate of Longest,* 74 N.C. App. 386, 328 S.E. 2d 804 (1985). In that opinion, this Court upheld the findings that defendant was late in filing accounts of the estate, *id.* at 392, 328 S.E. 2d at 808, and had "improperly advanced himself the sum of $32,950.00 from the estate." *Id.* at 394, 328 S.E. 2d at 809.

On 26 August 1985 the North Carolina State Bar (hereinafter "plaintiff,") filed a complaint against the defendant. The complaint alleged these pertinent facts:

> 4. On or about March 6, 1979, the Defendant received letters testamentary as co-executor of the estate of Hubbard

Harvey Longest from the Guilford County Clerk of Superior Court. The Defendant was the decedent's attorney at the time of his death. The decedent's sister, Virginia L. Burroughs, a resident of the State of Virginia, also received letters testamentary as co-executor.

5. Shortly after their appointment, the co-executors agreed that the Defendant would be solely responsible for preparing and filing the 90-day inventory, the annual and final accounts, and the various tax returns. The Defendant and Burroughs also agreed that the Defendant would be solely responsible for maintaining the estate's books of account and checkbook.

6. On or about August 30, 1979, the Defendant filed the estate's 90-day inventory approximately 53 days late. No extension of time for filing had been obtained.

7. On or about October 22, 1980, the Defendant filed the estate's first annual account approximately 196 days late. Prior to filing the account, the Defendant received notices dated May 16, 1980, and September 18, 1980, from the Clerk of Superior Court that the annual account was overdue. The estate's first annual account was not approved by the Clerk of Superior Court because no petition for or order allowing $3,750.00 in undifferentiated commissions and attorneys fees which had already been disbursed by the Defendant to himself was filed with the account. A copy of the first annual account is attached hereto, identified as Plaintiff's Exhibit #1, and incorporated by reference as if fully set forth herein.

8. The Defendant was sent notices from the Clerk of Superior Court on November 10, 1980, February 18, 1981, April 13, 1981, May 15, 1981, July 10, 1981, and August 28, 1981, soliciting the petition and order referred to in the preceding paragraph. The Defendant did not file a petition for allowance of his fees and commissions until January 3, 1983.

9. The Defendant was sent notices from the Office of the Clerk of Superior Court informing him that the estate's second annual account was overdue on April 13, 1981, May 15, 1981, July 10, 1981, and August 28, 1981. On or about Sep-

tember 17, 1981, the Assistant Clerk of Superior Court entered an order in the estate requiring the Defendant to file the account within twenty days of service. The Defendant was subsequently granted an extension to file the account until December 21, 1981.

10. On or about December 16, 1982, the Defendant filed the estate's second annual account approximately two years and nine months late. A copy of the account is attached hereto, identified as Plaintiff's Exhibit #2, and incorporated by reference as if fully set forth herein.

11. The second annual account filed by the Defendant was not approved by the Clerk of Superior Court because it reflected payments of $8,600.00 in undifferentiated attorneys fees and commissions to the Defendant and was unsupported by a petition for and an order allowing such payments.

12. On or about December 16, 1982, the Defendant filed the estate's third annual account approximately one year and nine months late. The third annual account was not approved by the Clerk of Superior Court because it reflected payments of $12,350 in undifferentiated attorneys fees and commissions to the Defendant and was unsupported by a petition for and or order allowing such payments. A copy of the account is attached hereto, identified as Plaintiff's Exhibit #3, and incorporated by reference as if fully set forth herein.

13. On or about March 7, 1983, the Defendant filed the estate's fourth annual account. This account reflected payments of $8,250.00 in undifferentiated attorneys fees and commissions to the Defendant and was unsupported by an order allowing such payments. A copy of this account is attached hereto, identified as Plaintiff's Exhibit 4, and incorporated by reference as if fully set forth herein.

14. During his administration of the estate the Defendant paid to himself without the prior approval of the Clerk of Superior Court sums totalling $32,950.00 for his services as co-executor and attorney for the estate. Of that amount, the Defendant paid himself $29,200.00 after he had received notice from the Clerk's office that his first annual account

would not be approved unless supported by an order allowing the fees and commissions he claimed.

15. On or about September 20, 1983, the Clerk of Superior Court, on motion of the co-executor Burroughs, revoked the letters testamentary of the Defendant pursuant to North Carolina General Statutes § 28A-9-1(a)(3) finding that the Defendant's failure to file timely inventories and accounts, withdrawing fees and commissions without the approval of the Clerk of Superior Court, and failure to duly and timely respond to orders and notices from the Clerk of Superior Court constituted default or misconduct within the meaning of that statute. That order was affirmed by order of the Superior Court dated January 16, 1984. The Superior Court's decision was subsequently affirmed by the North Carolina Court of Appeals by decision filed May 7, 1985.

The complaint then prayed for disciplinary action against the defendant, alleging that the actions of the defendant constituted grounds for discipline:

A. By failing to timely file the inventory and accounts of the Longest estate and by repeatedly ignoring official notices concerning overdue filings, neglected a legal matter entrusted to him and engaged in professional conduct which adversely reflects on his fitness to practice law in violation of Disciplinary Rules 6-101(A)(3) and 1-102(A)(6) of the North Carolina Code of Professional Responsibility; and

B. By paying himself executor's commissions and attorneys fees which had not been previously allowed by the Clerk of Superior Court, charged and collected an illegal fee, allowed the exercise of his professional judgment on behalf of his client to be adversely affected by his own financial interest, and failed to maintain client funds in trust in violation of Disciplinary Rules 2-105(A), 5-101(A) and 9-102(A) of the North Carolina Code of Professional Responsibility.

The proceedings were conducted in accordance with the Code of Professional Responsibility as it existed at the time of the alleged misconduct. Those Rules are found at 283 N.C. 783 (1973), as amended at 307 N.C. 712 (1982). The Rules of Professional Con-

duct adopted by the Supreme Court on 7 October 1985, 312 N.C. 845 (1985), extensively rewrote the Code of Professional Responsibility.

The matter was heard by a Hearing Committee of the Disciplinary Hearing Commission on 22 and 23 November 1985. On 23 December 1985, the Hearing Committee issued an Order of Findings of Fact and Conclusions of Law. The findings of fact in that order essentially found the facts to be as alleged in the complaint. Among the findings of fact were the following crucial findings:

> 11. On or about December 16, 1982, the Defendant filed the estate's second annual account approximately one year and nine months late. The second annual account filed by the Defendant was not approved by the Clerk of Superior Court because it reflected payments of $8,600.00 in undifferentiated attorney's fees and executor's commissions to the Defendant which had not been previously allowed by the Clerk.
>
> 12. On or about December 16, 1982, the Defendant filed the estate's third annual account approximately nine months late. The third annual account was not approved by the Clerk of Superior Court because it reflected payments of $12,350 in undifferentiated attorney's fees and executor's commissions to the Defendant which had not been previously allowed.
>
> 13. On or about March 7, 1983, the Defendant filed the estate's fourth annual account. This account reflected payments of $8,250.00 in undifferentiated attorney's fees and executor's commissions to the Defendant which had not been previously allowed by the Clerk.
>
> 14. During his administration of the estate, the Defendant paid to himself without the prior approval of the Clerk of Superior Court sums totalling $32,950.00 for his services as co-executor and attorney for the estate. Of that amount, the Defendant paid himself $23,400 after he had received notice from the Clerk's office that his first annual account would not be approved unless supported by an order allowing the fees and commissions he claimed, and had been informed by the Clerk that all future compensation would have to be approved in advance of payment.

The Hearing Committee then made one Conclusion of Law:

> By failing to timely file the inventory and accounts of the Longest estate and by repeatedly ignoring official notices concerning overdue filings, the Defendant neglected a legal matter entrusted to him in violation of Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility.

In its Order of Discipline filed the same day, the Hearing Committee ordered that defendant be Publicly Censured for his misconduct. On 27 January 1986, the plaintiff filed Notice of Appeal to this Court.

On appeal, the plaintiff contends that the Hearing Committee erred by failing to conclude as a matter of law that defendant's actions violated more than one Disciplinary Rule. Plaintiff further contends that the imposition of the Public Censure was not appropriate because, if the Committee had concluded that additional Rules had been violated, a more severe measure of discipline would have been appropriate. The defendant has also assigned error to the Committee's Orders. He excepted to nine (9) of the Committee's Findings of Fact and to its Conclusion of Law. In his brief he argues that there was insufficient evidence to support the nine findings of fact, that the Conclusion of Law is in error because there are no correct findings to support it, that the Committee erred by failing to grant defendant's motion to dismiss the charges against him, and that the order is erroneous because it is not supported by correct findings and the law.

We first consider defendant's argument.

> The standard of proof in attorney discipline and disbarment proceedings is one of "clear, cogent and convincing" evidence. Rules of the North Carolina State Bar, Art. IX, Sec. 14(18). . . .
>
> The standard for judicial review of attorney discipline cases is the "whole record" test. *N.C. State Bar v. DuMont*, 304 N.C. 627, 286 S.E. 2d 89 (1982). This test requires the reviewing court to
>
>> consider the evidence which in and of itself justifies or supports the administrative findings and . . . also [to] take into account the contradictory evidence or evidence

> from which conflicting inferences can be drawn. . . . Under the whole record test there must be substantial evidence to support the findings, conclusions and result. . . . The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion.

*Id.* at 643, 286 S.E. 2d at 98-9 (citations omitted).

*N. C. State Bar v. Sheffield,* 73 N.C. App. 349, 354, 326 S.E. 2d 320, 323 (1985).

**[1]** The defendant does not individually argue each of the challenged findings. Rather, he presents a broadside attack on the Committee's findings, contending that the "Findings of Fact and Conclusions of Law as to neglect should be set aside as not being supported by the whole record of clear, cogent and convincing competent evidence and the charges of neglect against defendant should be dismissed." We disagree. We have reviewed the evidence presented below. We find the Committee's findings to be supported by clear, cogent and convincing evidence. We further find the findings, conclusion, and result to be supported by substantial evidence under the whole record test. The defendant's assignments of error are overruled.

**[2]** We now turn to the plaintiff's argument that the Committee erred by failing to find that additional Disciplinary Rules had been violated by defendant's conduct. Although we do not believe the evidence was such that the Committee was compelled to find the Rules were violated, for reasons which follow, we believe the Committee's order is in error for failing to make conclusions of law as to *whether* the defendant's conduct, as found in the Findings of Fact, violated the Disciplinary Rules as alleged in the complaint.

The complaint alleged that five Disciplinary Rules had been violated by the defendant. It alleged that by failing to timely file the inventory and accounts and by repeatedly ignoring notices concerning overdue filings, the defendant had (1) neglected a legal matter entrusted to him, in violation of DR6-101(A)(3); and (2) engaged in professional conduct which adversely reflects on his fitness to practice law, in violation of DR1-102(A)(6). The complaint further alleged that by paying himself executor's commis-

sions and attorney's fees which had not been authorized by the clerk of court, the defendant had (3) charged and collected an illegal fee, in violation of DR2-105(A); (4) allowed the exercise of his professional judgment to be adversely affected by his own financial interest, in violation of DR5-101(A); and (5) failed to maintain client funds in trust, in violation of DR9-102(A). While the Committee found the facts to be as alleged by plaintiff in the complaint, the Committee's order made a Conclusion of Law on only one Disciplinary Rule, DR6-101(A)(3). The failure to make conclusions on the other Disciplinary Rules alleged in the complaint was error.

Under Art. IX, Sec. 14(12) of the Rules of the North Carolina State Bar,

> [p]leadings and proceedings before a Hearing Committee shall conform as nearly as is practicable with requirements of the Rules of Civil Procedure and for trials of non-jury civil causes in the Superior Courts except as otherwise provided hereunder.

We find nothing in the Rules of the State Bar which would preclude the Hearing Committees from complying with Rule 52(a)(1) of the North Carolina Rules of Civil Procedure, which provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

Rule 52(a)(1) has been interpreted to require the trial court to "find the facts specially and state separately his conclusions of law and thereby resolve all controversies between the parties raised by the pleadings and the evidence. (Citations omitted.)" *Associates, Inc. v. Myerly and Equipment Co. v. Myerly*, 29 N.C. App. 85, 88, 223 S.E. 2d 545, 547 (1976).

The allegations of the complaint and the evidence presented at the hearing raised the issues of whether the defendant's conduct constituted violations of five separate Disciplinary Rules. The Hearing Committee concluded that DR6-101(A)(3) had been violated. The order made no conclusion on the remaining Disciplinary Rules alleged to have been violated in the complaint. Thus, the matter is remanded for the Hearing Committee to make con-

clusions of law as to whether the defendant's conduct, as specifically found in the Findings of Fact enumerated in the 23 December 1985 Order, constitute violations of Disciplinary Rules 1-102 (A)(6), 5-101(A), and 9-102(A). The Hearing Committee is to make the additional conclusions of law without the taking of additional evidence. The Hearing Committee may make additional findings of fact, if necessary to resolve all issues.

We have specifically deleted DR2-105(A) from the list of Disciplinary Rules to be considered on remand. The record reveals that the Hearing Committee Chairman, after the Committee concluded its deliberations, informed defendant that "the State Bar has not established by clear, cogent and convincing evidence a violation of the statute—or the Code 2.105(a) [*sic*] in that there's no showing of illegality on the basis of fraud." We deem that statement to be a resolution of the issue of whether Disciplinary Rule 2-105(A) was violated.

The plaintiff urged this Court to conclude that the additional Disciplinary Rules had been violated and further urged that this Court enter its own order of discipline. We decline to so do. While we acknowledge the inherent authority of each court of North Carolina, including this Court, to discipline attorneys, *see, e.g., In re Robinson*, 37 N.C. App. 671, 679, 247 S.E. 2d 241, 244 (1978), we believe the better course of action in this case is to remand the matter to the State Bar so that the Bar may finish that which it started.

In conclusion, we find the Hearing Committee's findings and conclusion that defendant violated DR6-101(A)(3) are supported by substantial evidence in the record. The matter is remanded for the Hearing Committee to determine whether the defendant's actions constituted violations of Disciplinary Rules 1-102(A)(6), 5-101(A), and 9-102(A); and, if so, whether a different order of discipline should be entered.

Affirmed in part and remanded.

Chief Judge HEDRICK and Judge MARTIN concur.

MILLIS CONSTRUCTION COMPANY v. FAIRFIELD SAPPHIRE VALLEY, INC.

No. 8630SC1209

(Filed 4 August 1987)

**1. Contracts § 21.3— anticipatory breach of contract—instruction required**

The trial court erred in refusing to instruct the jury on anticipatory breach of contract by repudiation as requested by defendant where there was evidence that the parties entered contracts for plaintiff to perform framing work for five residential buildings; plaintiff told defendant's construction manager that he could not perform the remaining contracts unless he was paid the retainage for one building before he was entitled to it under the contract; and such statement was made at least one month before completion of three of the buildings was required under the terms of the contracts.

**2. Contracts § 21.2— breach of contract—materiality—amount of recovery**

The evidence in a breach of contract action presented jury questions as to whether defendant owner breached construction contracts with plaintiff by failing to pay plaintiff money owed for work performed by plaintiff as of the date defendant contends plaintiff anticipatorily breached the contracts and, if so, whether defendant's breach was material, thus entitling plaintiff to retainages on buildings which he failed to complete.

APPEAL by defendant from *Allen (C. Walter), Judge.* Judgment entered 8 May 1986 in Superior Court, JACKSON County. Heard in the Court of Appeals 8 April 1987.

This is a civil action for breach of contract. Defendant Fairfield Sapphire Valley, Inc. is the owner and developer of a large tract of land near Cashiers in Jackson County. Plaintiff Millis Construction Company (owned by Brent Millis) is an independent contractor. Beginning in June 1984 and at various times thereafter, plaintiff and defendant entered into five separate written "subcontracts" for the framing of five residential buildings on defendant's land. The five residential buildings were numbered by the contracts 6, 7, 8, 9 and 10 as part of the Fairway Forest project in Cashiers. This action involves no claim or dispute as to building number 6. The contract price for each building was $29,500.00 which included a $4,500.00 profit to plaintiff. Plaintiff agreed to provide all labor and tools to frame the buildings and defendant agreed to provide all the necessary materials. Finished carpentry work was not contemplated as part of the contracts by the parties.

During the course of construction, plaintiff was paid weekly "draws" against the total contract prices. Each "draw" was based on the percentage of work completed as evidenced by plaintiff's invoices submitted to and approved by the site superintendent and defendant's construction manager, James Coker. Defendant's vice president for construction engineering, Carey Ayers, had sole final authority to approve payment. This process took approximately two weeks. No check was ever issued in payment of plaintiff's invoices without Carey Ayers' signature. Pursuant to the contracts, ten percent of each draw was retained by defendant with the total retainage due to plaintiff thirty days after satisfactory completion of each building.

According to plaintiff's evidence, while the buildings were still under construction in early September 1984, plaintiff expanded to do work in Nashville, Tennessee. Brent Millis left the job site but kept his office, office personnel and employees at the site. He introduced James Coker to his project manager Lee Myers and authorized Myers to sign on the contracts as a representative of Millis Construction Company. Plaintiff took no key workmen to Nashville. Millis returned weekly to Cashiers to check on the project. Defendant knew that Millis was no longer on the job site daily but knew of his whereabouts in Nashville.

James Coker testified that in October and November of 1984 he began to hear rumors that some of plaintiff's crew had quit and that Millis was not coming on the job weekly. He discussed the rumors with Lee Myers and learned that there was a problem with employees leaving the job, that there were not enough men to do the work, that work was behind schedule and of bad quality. According to Brent Millis, he knew of no problems at the Fairway Forest project until 14 November 1984 when Lee Myers called him in Nashville and told him that Coker would not pay the weekly "draw" until he talked with Millis in person. Millis immediately drove to Cashiers and met with Coker in Coker's office on Friday, 16 November 1984.

At the November 16 meeting Millis stated that he was "belly up" and "busted." He had not paid his employees all their wages four weeks earlier. He was concerned about how he would pay them for the next two weeks. He stated that he had no operating capital and he did not think there was enough money available to

complete the job. Millis stated that he had no money to pay labor but that if Coker would agree to release the retainage on building number 7 which was 99% complete he would have enough money to pay labor. Coker asked if Millis wanted out of the contract and the following exchange took place:

> MILLIS: I guess I don't have any choice once again. Everybody has quit me now. Lee said everybody just walked out. . . . I just as soon finish the buildings. I'm open for any suggestions.
>
> COKER: Well, I don't know. Can you get with these guys and see what you can do and then let's try to get together Monday and work something out?
>
> MILLIS: Okay.
>
> COKER: On what we intend to do and what you intend to do. Why don't we do that and Monday we'll get together first thing and get it worked out.
>
> MILLIS: Okay. Is there any chance that I can get that retainage to meet payroll.
>
> COKER: Well, that's something I'm going to have to find out.

Brent Millis testified that it was his impression that all of the problems were worked out on Friday. He was not able to be in Cashiers on Monday but told Lee Myers to pick up the check. Some of plaintiff's workers were at the job on Monday, others were at home waiting to be called in once Myers received the check. Lee Myers testified that he tried to meet with Coker on Monday morning to get the check but Coker was not around. Coker testified that he was available on Monday but that Millis never showed up. He tried to contact Millis by telephone but never reached him. The record is not clear about whether any check was available from defendant to plaintiff on that Monday. It is also unclear what amount of money was owed for work completed and approved and whether defendant had decided to release the retainage on building number 7.

Coker met with his superior Carey Ayers on Monday to tell him that Millis had not met with him. As a result of his meeting with Coker, Carey Ayers sent the following letter to Millis on 19 November 1984:

Reference: Fairway Forest
buildings 7, 8, 9 and 10

Dear Mr. Millis:

The work progress on the above referenced buildings is unacceptable. Unless substantial work is begun immediately, we will be forced to terminate our contract on the above buildings. As provided in our contract on the above buildings this is your 48-hour notice of contract termination.

Ayers talked with Millis later in the week. According to Ayers, he could not get a commitment from Millis as to whether Millis would complete the contracts, whether he had enough capital to pay his workers and even if he desired to complete the buildings. Mr. Ayers' opinion was that Millis would not complete and Ayers then contracted with others to have the buildings completed. Mr. Ayers testified that defendant is owed $23,825.43 due to plaintiff's failure to complete the contracts.

Plaintiff filed its complaint for breach of contract alleging damages in excess of $10,000.00. Defendant answered denying the material allegations of plaintiff's complaint and counterclaimed for breach of contract and damages in excess of $10,000.00. The jury returned a verdict in favor of plaintiff in the amount of $25,000.00 and the defendant appeals.

*Smith, Bonfoey & Queen by Frank G. Queen for plaintiff-appellee.*

*Coward, Cabler, Sossomon & Hicks by J. K. Coward, Jr. for defendant-appellant.*

EAGLES, Judge.

[1] Defendant assigns error to the trial judge's refusal to charge the jury on the issue of anticipatory breach as requested by the defendant pursuant to G.S. 1A-1, Rule 51(b).

It is the duty of the trial judge without any special requests to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence. *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 192 S.E. 2d 1 (1972). When a party ap-

propriately tenders a written request for a special instruction which is correct in itself and supported by the evidence, the failure of the trial judge to give the instruction, at least in substance, constitutes reversible error. *Bass v. Hocutt*, 221 N.C. 218, 19 S.E. 2d 871 (1942); *Faeber v. E.C.T. Corp., supra.* Here, we believe the trial court improperly refused to give the requested instruction on anticipatory breach.

The trial court submitted two issues to the jury on breach of contract: Did the defendant breach its contract with the plaintiff and did the plaintiff breach its contract with the defendant? Breach of contract occurs when a party fails to perform a contractual duty which has become absolute. J. Calamari and J. Perillo, The Law of Contracts section 12-1, at 513 (3d ed. 1987). As explained by the Restatement when performance of a duty under contract is presently due any nonperformance constitutes a breach. Restatement (Second) of Contracts section 235(2) (1981). Breach may also occur by repudiation. *Id.* at section 236 comment a. Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. Calamari and Perillo, section 12-4, at 524; Restatement (Second) of Contracts at section 250 comment a. When a party repudiates his obligations under the contract *before* the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises. Calamari and Perillo, section 12-3, at 521. One effect of the anticipatory breach is to discharge the non-repudiating party from his remaining duties to render performance under the contract. Restatement (Second) of Contracts at section 253(2).

> [W]hen a party to a contract gives notice that he will not honor the contract, the other party to the contract is no longer required to make a tender or otherwise to perform under the contract because of the anticipatory breach of the first party.

*Dixon v. Kinser and Kinser v. Dixon*, 54 N.C. App. 94, 101, 282 S.E. 2d 529, 534 (1981), *disc. rev. denied*, 304 N.C. 725, 288 S.E. 2d 805 (1982).

Here there was sufficient evidence to support an instruction that the plaintiff's statements during the November 16 meeting constituted a repudiation. In order to constitute a repudiation, a

party's statement "must be sufficiently positive to be reasonably interpreted that a party will not or cannot substantially perform." Calamari and Perillo, section 12-4, at 525 (quoting Restatement (Second) of Contracts at section 250 comment b). For example, if a party to a contract states "I doubt I will perform," his statement, alone, is not sufficiently positive to be reasonably interpreted by the other party to mean that he will not perform. *Id.* at 524. However, if a party to the contract states that he cannot perform except on some condition which goes outside the terms of his contract then the statement will constitute a repudiation. *Id.* at 525. Applying these rules to the facts here, we hold that plaintiff's statements on November 16 could have constituted a repudiation. According to defendant's evidence, at the meeting between Coker and Millis, Millis stated that he was "busted," "belly-up" and would be unable to complete the contract unless he received retainage on building number 7. However, according to the terms of the contract, plaintiff was not entitled to retainage until 30 days after building number 7 was completed. At the time of the November 16 meeting building number 7 was not yet completed. Clearly at the time of the November 16 meeting, plaintiff was not yet entitled to any retainage under the terms of the contract. In essence, his statement was that he could not perform the remaining contracts except on some condition outside the terms of the contracts, i.e. that he be paid the retainage before he was entitled to it under the contract.

If the repudiation occurs before the time of performance arises under the contract, the repudiation is anticipatory and the issue of anticipatory breach arises. Here plaintiff's statements were made on November 16, at least one month before completion of buildings 8, 9 and 10 was required under the terms of plaintiff's contracts. The effect of breach by anticipatory repudiation is to relieve the non-repudiating party from further performance under the contract. *Dixon v. Kinser, supra.* We agree with defendant's argument that had the jury been given the opportunity to consider the issue of anticipatory breach, it could have found that the defendant did not breach its contract with plaintiff but was no longer required to perform under the contract due to plaintiff's anticipatory breach or breach by anticipatory repudiation. *Dixon v. Kinser, supra.* Accordingly, the trial court erred in refusing to

instruct the jury on the issue of anticipatory breach as requested by defendant.

[2] The issue of anticipatory breach does not affect defendant's obligation under its contracts to pay for work performed, invoiced and approved as of the date of the November 16 meeting, where defendant alleges plaintiff anticipatorily breached its contracts with defendant. Up until that date plaintiff had fully performed. The evidence suggests that plaintiff was owed money for work performed, invoiced and approved by defendant as of 16 November 1984 and that defendant without justification refused to pay for that work. Plaintiff's exhibit number four sets out the following amounts as being owed for invoices not paid: $3,064.50 for building number 8; $5,172.75 for building number 9; and $2,034.00 for building number 10. In addition, plaintiff's exhibit number four indicates that plaintiff was overpaid in the amount of $1,675.95 for work completed, invoiced and approved on building number 7. Plaintiff also claims retainage on buildings 8, 9 and 10 in the amounts of $1,276.89, $2,548.98 and $1,588.00 respectively. However, plaintiff never satisfactorily completed buildings 8, 9 and 10 and consequently would only be entitled to retainage on these buildings if it is found by the trier of the fact that defendant materially breached its contract with plaintiff. The general rule governing bilateral contracts requires that if either party commits a material breach of the contract, the other party should be excused from the obligation to further perform. *Coleman v. Shirlen*, 53 N.C. App. 573, 281 S.E. 2d 431 (1981). The question of whether a breach is material or immaterial is ordinarily a question of fact. *Id.* If the breach is material, the aggrieved party may cancel the contract and sue for total breach if he can show that he was ready, willing and able to perform but for the breach. *See* Calamari and Perillo, section 11-18, at 458. As a result, he may recover all of his damages under the contract. *Id.* If the breach is immaterial the aggrieved party may not cancel the contract but may sue for partial breach. When a party sues for partial breach, the contract continues and the aggrieved party may only recover those damages actually caused by the breach. *Id.* at 458-59.

In summary, we conclude that the evidence of record raises several questions. Did the defendant breach its contracts with plaintiff by failing to pay plaintiff money owed as of 16 November 1984 for work performed by plaintiff? If so, was the breach ma-

terial, thereby entitling plaintiff to recover for all damages under his contracts with defendant, or was the breach immaterial, thereby entitling plaintiff only to recover those damages actually caused by the breach? If the defendant did not materially breach its contract with plaintiff, then did plaintiff anticipatorily breach its contract with defendant by statements made by Millis at the 16 November 1984 meeting thereby excusing defendant from further performance under its contracts with plaintiff? If so, then defendant was justified in mitigating its damages by securing other contractors when it became obvious that plaintiff would not perform.

We note from the verdict in this case that the jury found that the defendant breached its contract with plaintiff. However, on this record it is not clear whether the jury in answering this issue relied on evidence that defendant failed to pay money due to plaintiff on 16 November or on evidence that defendant on 19 November sent the letter giving plaintiff its 48-hour notice of termination. Here the issues of breach and anticipatory breach are so intertwined that we cannot say, even given the jury's verdict, that the trial court's error in refusing to instruct the jury on anticipatory breach was harmless. Consequently, there must be a new trial.

New trial.

Chief Judge HEDRICK and Judge PARKER concur.

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LARRY N. HIGGINS v. JO ANNE W. HIGGINS

AND

JO ANNE W. HIGGINS v. LARRY N. HIGGINS

No. 8618DC1058

(Filed 4 August 1987)

**Husband and Wife § 12— separation agreement—resumption of sexual relations—provisions contingent on living separate and apart—invalidated**

The trial court properly granted summary judgment in favor of plaintiff wife on her complaint for an equitable distribution as to the marital residence where the parties had executed a separation agreement in which plaintiff wife

agreed to transfer her interest in the marital home to defendant husband if they had lived continuously separate and apart for one year, and there was undisputed evidence that plaintiff and defendant engaged in sexual relations during the one year period. Sexual relations between spouses separated less than one year invalidate those obligations of the parties, pursuant to a separation agreement, that are contingent upon the requirement that the parties "live continuously separate and apart" for one year. N.C.G.S. § 50-6.

Judge ORR dissenting.

APPEAL by defendant from *Lowe, Judge*. Judgment entered 26 May 1984 in District Court, GUILFORD County. Heard in the Court of Appeals 10 March 1987.

*Hatfield & Hatfield, by Kathryn K. Hatfield, attorney for Jo Anne W. Higgins.*

*Smith, Patterson, Follin, Curtis, James & Harkavy, by Charles A. Lloyd and Martha E. Johnston, attorneys for Larry N. Higgins.*

JOHNSON, Judge.

Plaintiff-wife and defendant-husband executed a separation agreement on 13 December 1983 which purported, in part, to distribute the marital property owned by the parties, pursuant to N.C.G.S. sec. 50-20(d). Provision four of the agreement provided that:

> It is agreed that the residence and lot located at 3207 Edgewater Drive, Greensboro, North Carolina, shall remain titled in the name of Larry N. Higgins and Jo Anne W. Higgins for a period of one year from the date of this agreement and it is agreed that *if the parties have lived continuously separate and apart for that full period* that in that event Mrs. Higgins shall transfer her interest in the residence and lot to Mr. Higgins as part of property settlement as provided therein. Mr. Higgins and Mrs. Higgins have agreed upon a division of all their personal property and Mrs. Higgins agrees to remove all the personal property that she shall be entitled to from the residence located at 3207 Edgewater Drive within a reasonable time after the execution of this agreement.

In accordance with provision four, plaintiff moved out of the marital residence shortly after signing the separation agreement. In

the one-year period following execution of the agreement, plaintiff and defendant attended two car shows together, one in January 1984 and the other in March 1984. At each of the shows, the parties shared a hotel room for four days. Plaintiff also attended the funeral of defendant's brother with defendant in March 1984, driving to and from the funeral with defendant and sharing the same room with him for two nights at his parent's home. In February 1984, the parties took their daughter to the circus, and in March 1984, plaintiff took defendant to and from the hospital when defendant underwent minor surgery. Plaintiff testified that while participating in these activities the parties engaged in several acts of sexual intercourse. Defendant testified that he recalls engaging in only one act of sexual intercourse with the plaintiff during the time in question.

In December 1984, one year after execution of the separation agreement, defendant asked plaintiff to transfer her interest in the marital residence to him, in conformity with provision four. When she refused to do so, defendant sought a declaratory judgment from the trial court, holding provision four to be valid and ordering plaintiff to comply with the terms of the provision. In response, plaintiff brought suit against defendant seeking absolute divorce and equitable distribution of the marital residence and certain personal property, pursuant to N.C.G.S. sec. 50-20.

The parties consolidated their actions for a hearing by the district court. At the hearing, plaintiff orally moved for summary judgment contending that the sexual relations between her and defendant during the separation period ended her legal obligation to transfer her interest in the residence to defendant, and entitled her to summary judgment on this issue, as a matter of law. The trial court accepted plaintiff's argument, granted her motion for summary judgment, and dismissed defendant's action.

From the trial court's judgment, defendant appeals.

The sole issue on appeal is whether provision four was unambiguous, permitting the trial court to grant summary judgment for plaintiff on the issue of the provision's enforceability, as a matter of law.

"Summary judgment is proper when there is no genuine issue as to any material fact." G.S. 1A-1, Rule 56(e) (1983). It is a

drastic remedy not to be granted "unless it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E. 2d 214, 217 (1975). The burden is on the moving party to establish the lack of any triable issue of fact. Summary judgment should be denied "[i]f different material conclusions can be drawn from the evidence." *Credit Union v. Smith*, 45 N.C. App. 432, 437, 263 S.E. 2d 319, 322 (1980).

The portion of provision four at issue states:

> [I]t is agreed that if the parties have lived continuously separate and apart for that full period [of one year] that in that event Mrs. Higgins shall transfer her interest in the residence and lot to Mr. Higgins as a part of [the] property settlement as provided herein.

Plaintiff contends that by engaging in sexual relations during the one-year separation period, she and defendant failed to live "continuously separate and apart for the full period" as required by provision four. Underlying plaintiff's contention is the premise that the phrase "live continuously separate and apart" must be given its legal definition, derived from N.C.G.S. sec. 50-6.

N.C.G.S. sec. 50-6 is a divorce statute which permits the granting of absolute divorce when a husband and wife have *lived separate and apart for one year.* Prior cases have held that under N.C.G.S. sec. 50-6 this separation requirement will not be met if during the one-year period the couple engages in sexual relations. *Ledford v. Ledford*, 49 N.C. App. 226, 229-30, 271 S.E. 2d 393, 396-97 (1980). *See also Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978); *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976). Undisputed evidence that plaintiff and defendant engaged in sexual relations during the one-year period was before the trial court; consequently, if the legal definition derived from N.C.G.S. sec. 50-6 applies, summary judgment for plaintiff on this issue would be proper.

Generally, a separation agreement is construed by the same rules of construction as an ordinary contract. *See Turner v. Turner*, 242 N.C. 533, 89 S.E. 2d 245 (1955). Two basic principles of contract construction are (1) "that a contract must be construed as a whole, considering each clause and word with reference to all

other provisions and giving effect to each whenever possible," and (2) "that the common or normal meaning of language will be given to the words of a contract" absent evidence disclosing an intent that they be given their technical or legal meaning. *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 504, 320 S.E. 2d 892, 897 (1984), *disc. rev. denied*, 312 N.C. 797, 325 S.E. 2d 631 (1985).

Once these contract principles are applied, "[t]he general rule is that where the entire contract is in writing and the intention of the parties is to be gathered from it, the effect of the instrument is a question of law, but if the terms of the agreement are equivocal or susceptible of explanation by extrinsic evidence the jury under proper instructions may determine the meaning of the language employed." *Goodyear v. Goodyear*, 257 N.C. 374, 380, 126 S.E. 2d 113, 118 (1962); *Owens v. Little*, 13 N.C. App. 484, 186 S.E. 2d 182 (1972).

At issue is the effect of the language in the separation agreement "if the parties have lived continuously separate and apart" on Mrs. Higgins' ownership interest in the marital home considering that the parties had sexual relations within a year of entering into the agreement. We have previously held that, as a matter of law, sexual relations between spouses during the separation period negates the requirement under G.S. 50-6 that the parties live separate and apart for purposes of an absolute divorce. *Ledford, supra.* The case *sub judice* involves the effect of sexual relations on a provision in a separation agreement involving a property settlement, and not on absolute divorce. The legal significance given to sexual relations between separated spouses in light of the "live continuously separate and apart" language in G.S. sec. 50-6—i.e. that sexual relations during the one-year separation period means that the parties are no longer living separate and apart for purposes of absolute divorce—is persuasive in determining the legal significance of the same or similar language on a separation agreement where the parties have engaged in sexual relations while separated for less than one year. We now hold that sexual relations between spouses separated for less than one year invalidates those obligations of the parties, pursuant to a separation agreement, that are contingent upon the requirement that the parties "live continuously separate and apart" for one year.

We find nothing equivocal or ambiguous about the language in either paragraph four or elsewhere in the separation agreement regarding the "lived continuously separate and apart" provision. The separation agreement is contained entirely in a single writing, and the record before this Court does not show evidence of the parties' intent outside of that writing. The effect of the separation provision on the parties' property settlement is clear; if the parties do not live continuously separate and apart for one year, then Mrs. Higgins is not obligated to transfer her interest in the marital residence to Mr. Higgins. The parties in the case *sub judice* admitted to having sexual relations during the one-year separation period. Such sexual relations, as a matter of law, caused the parties to no longer be living separate and apart, thereby invalidating Mrs. Higgins' obligation under the separation agreement to transfer her interest in the marital residence to Mr. Higgins.

Because the evidence at trial tended to show that no genuine issue of material fact existed as to whether the parties engaged in sexual relations during the one-year separation period as proscribed by their separation agreement, we hold that the trial court properly granted summary judgment in favor of Mrs. Higgins on her complaint for an equitable distribution as to the marital residence.

No error.

Judge EAGLES concurs.

Judge ORR dissents.

Judge ORR dissenting.

I respectfully disagree with the conclusions reached by the majority opinion and therefore, dissent.

A critical basis of the majority opinion is that the document in question is a "separation agreement." In fact, however, the document is captioned "Agreement *and* Deed of Separation." (Emphasis added.) In paragraph 21 of this agreement, it states:

> Pursuant to the provision of G.S. 50-20(d), the parties have agreed that the above division constitutes a distribution of

> marital property and such distribution shall be deemed to be equitable as between them. That except for the distribution in the manner provided for in this agreement, each of the parties hereto does hereby irrevocably and forever waive any and all rights whatsoever to a distribution of the property owned by the said parties, whether pursuant to Section 20 of Chapter 50 of the North Carolina General Statutes, or its equivalent, in the State of North Carolina or in any other state.

The paragraph in contention in the case *sub judice* deals with the transfer of the wife's ownership interest in the marital residence, thereby clearly being property subject to the equitable distribution laws of this state. N.C.G.S. § 50-20(d) states:

> Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

The agreement in question was (1) in writing; (2) duly executed and acknowledged in accordance with the provision of N.C.G.S. § 52-10 by both parties; and (3) provided for distribution of the marital property in a manner deemed by the parties to be equitable.

I consider this agreement to meet all the requirements of a N.C.G.S. § 50-20(d) agreement and, therefore, subject to rules applicable to this specific type of agreement.

If, as contended in this dissent, this is a N.C.G.S. § 50-20(d) agreement, then the isolated act or acts of sexual intercourse between the parties does not automatically void the provision requiring the wife to transfer her interest in the marital home upon "living separate and apart for one year."

As stated in *Love v. Mewborn*, 79 N.C. App. 465, 339 S.E. 2d 487, *disc. rev. denied*, 317 N.C. 704, 347 S.E. 2d 43 (1986): "property settlements may be executed before, during or after marriage and are not necessarily terminated by reconciliation." 79 N.C. App. at 466, 339 S.E. 2d at 488. In *Love*, a single act of sexual

relations during a twenty-four hour reconciliation period was held not to void alimony payments agreed to in a "separation agreement and property settlement." In addition, this Court in *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984), has stated "that the public policy of our state, as expressed by G.S. § 50-20(d), permits spouses to execute a property settlement at any time, regardless of whether they separate immediately thereafter or not." 69 N.C. App. at 488, 317 S.E. 2d at 100. In *Buffington*, the defendant wife contended that the separation agreement executed by her was void solely on the grounds that she continued to live with the plaintiff for eighteen days after the agreement was signed. Our Court held that she could not avoid the separation agreement under those conditions.

Finally, the majority's conclusion that the resumption of sexual relations, as a matter of law, caused the parties to "no longer be living separate and apart" is, in my opinion, incorrect. As previously pointed out, resumption of sexual relations does not, as a matter of law, void a N.C.G.S. § 50-20(d) agreement. Therefore, to conclude that the parties "no longer live separate and apart" because of the resumption of sexual relations, is to give the phrase a meaning beyond the context of this agreement and to affix to it a meaning reserved for situations other than a property settlement under N.C.G.S. § 50-20(d). There is no basis in our statutes or case law to conclude that the incorporation of the phrase "live separate and apart for one year" into a N.C.G.S. § 50-20(d) agreement means that sexual relations will result in the conclusion, as a matter of law, that the parties no longer live separate and apart. The intent of the parties as to the application of this phrase in their agreement is instead a question to be decided by the trier of fact. Summary judgment was therefore, in my opinion, improvidently granted.

MARGIE T. WHITEHURST, EXECUTRIX OF THE ESTATE OF NORMAN L. WHITEHURST, AND MARGIE T. WHITEHURST, INDIVIDUALLY v. CRISP R.V. CENTER, INC., A. L. CRISP AND FINANCE AMERICA, INC.

No. 873SC19

(Filed 4 August 1987)

1. **Uniform Commercial Code § 24— defective engine in motor home—warranty of fitness—revocation of acceptance**

Plaintiffs revoked their acceptance of a motor home within a reasonable time where all the evidence showed that, two days after plaintiffs learned that the engine was defective and only thirty-two days after they bought the motor home, their attorney wrote defendants a letter stating that plaintiffs were returning the vehicle to defendants and rescinding the purchase because the engine was seriously defective, and a contrary jury verdict must be set aside and a new trial ordered. However, where all the evidence supported the jury finding that defendants made and breached an implied warranty of fitness of the motor home for a particular purpose, the new trial will be restricted to the issue of whether plaintiffs withdrew their revocation of acceptance and to the issue of damages. N.C.G.S. §§ 25-2-607(3)(a) and 25-2-608(2).

2. **Unfair Competition § 1— defective engine in motor home—no unfair trade practice**

Evidence that defendants breached an implied warranty of fitness by selling a motor home with a defective engine that had to be replaced was insufficient to establish an unfair and deceptive trade practice under N.C.G.S. § 75-1 *et seq.*

Chief Judge HEDRICK concurring in part and dissenting in part.

APPEAL by plaintiffs and cross appeal by defendants from *Small, Judge.* Judgment entered 17 July 1986 in Superior Court, CARTERET County. Heard in the Court of Appeals 3 June 1987.

Norman L. Whitehurst and wife, Margie T. Whitehurst, sued the defendants Crisp to revoke the purchase of a Coachman Camper and to recover for breach of warranties and unfair and deceptive trade practices in connection therewith. In the suit they also sought to enjoin defendant Finance America, Inc. from enforcing a security device it held on the vehicle, but that defendant has been eliminated from the case by stipulation. Before trial Norman L. Whitehurst died and the executrix of his estate was substituted as plaintiff in his stead. At trial the jury found that in selling the motor home defendants Crisp had breached the implied warranty of fitness for a particular purpose and plaintiffs had not notified defendants of their revocation of acceptance

within a reasonable time after discovering the breach. Under the court's instructions this verdict ended the case and judgment was entered accordingly.

The evidence at trial relating to plaintiffs' appeal and defendants' cross appeal indicated that: On 27 July 1984 the Whitehursts purchased a new 26-foot Coachman Camper from defendant Crisp R.V. Center, Inc. in Chocowinity for $33,208. They paid for the camper by trading in their truck and trailer for $8,112 and by financing the balance with defendant Finance America, Inc. over a ten-year period at 15% interest. The vehicle, an apartment on wheels, was pulled by a Chevrolet truck engine that General Motors warranted and the corporate defendant stood behind. In driving the vehicle to their home, about 70 miles away, to Morehead City and back three days later, and back to the dealership on 16 August 1984, a total distance of approximately 225 miles, plaintiffs noticed nothing wrong with the way the vehicle's engine performed. On 16 August 1984 the vehicle was left with defendants for some minor adjustments and repairs not involving the truck engine, and Mr. Whitehurst picked up the repaired camper on 28 August 1984. On the trip home the engine began making noises and "missing and cutting out" so badly that it took about three hours to travel the 70 miles involved. Upon arriving home Whitehurst immediately telephoned defendant Crisp, President of the corporate defendant, told him of the problems with the truck engine, and demanded that defendants take the camper back and give them a new one. Defendant Crisp told him to have the engine examined by a Chevrolet dealer, as such dealers were the only ones authorized to do warranty work on Chevrolet engines, and that whatever was required to meet the engine warranty would be done. Two days later, on 30 August 1984, Whitehurst drove the vehicle to a Chevrolet dealership in New Bern, where a mechanic listened to the engine and advised him that while he could not be sure without dismantling the engine that it probably had a defective piston and would take two weeks to repair. Whitehurst then drove the camper back home and engaged an attorney, who notified defendants by letter mailed that same day that plaintiffs were returning the vehicle to them and rescinding the purchase because the engine was seriously defective. The letter also told defendants of the difficulties plaintiffs had had with the engine and what the mechanic said about it, and

that in settlement plaintiffs would accept either a new camper or the return of their purchase money and trade in. Five days later, on 4 September 1984, the vehicle was left at defendants' place of business and its keys given to an employee. On 7 September 1984 defendants' counsel wrote plaintiffs' counsel and asked that before the Whitehursts rescinded the contract and began litigation that the engine be inspected by a Chevrolet mechanic and defendants be advised whether the Whitehursts would accept a new engine if the inspection showed that the engine was seriously defective, or would accept the repair of the engine if the inspection showed that the defects were minor and repairable. In responding to this letter on 14 September 1984, plaintiffs' lawyer did not state whether plaintiffs would or would not accept a new engine or the repair of the old one as the inspection showed was appropriate, but did state that the engine should be thoroughly inspected "to determine exactly what the problem is" and stated that the Whitehursts preferred for the inspection to be made by Smith, the head mechanic at Tryon Chevrolet in New Bern, rather than by a Morehead City Chevrolet dealer defendants suggested. On 17 September 1984 defendants took the camper to Tryon Chevrolet and asked that the knock in the engine be checked and the defect corrected; but Tryon would not begin the inspection, which involved dismantling the engine, until one of the plaintiffs authorized them to do so, and a day or two later Norman Whitehurst authorized the inspection. After the inspection was completed General Motors decided that the engine was not repairable and authorized Tryon to replace it with a new engine under the warranty. The new engine was not received from General Motors until several weeks later, however, and before it was received defendant Crisp telephoned Tryon Chevrolet several times about it; and upon finally ascertaining from Tryon's mechanic Smith sometime in November that the engine had been received and installed, Crisp asked him if he had notified plaintiffs that the vehicle was ready and Smith said he had notified plaintiffs' lawyer, who happened to be in the garage getting his own vehicle repaired a few days after the new engine was put in plaintiffs' vehicle. There was no further communication between the parties or their lawyers, according to the evidence, until plaintiffs filed suit on 7 December 1984.

*Bennett, McConkey, Thompson, Marquardt & Wallace, by Thomas S. Bennett, for plaintiff appellants-appellees.*

*William B. Cherry and Wheatly, Wheatly, Nobles & Weeks, by C. R. Wheatly, III, for defendant appellees-appellants.*

PHILLIPS, Judge.

**[1]** The trial ended prematurely and the case must be tried again, because the verdict is contrary to the evidence of both parties and is supported by the evidence of neither. The evidence presented during the trial contains few contradictions and raises only two main issues of fact—whether after revoking their acceptance of the camper plaintiffs later withdrew their revocation, and whether plaintiffs are entitled to recover either actual or incidental damages of defendants—and it is both incongruous and erroneous that the trial ended before any of the matters really in dispute were determined. For defendants' evidence, as well as plaintiffs', shows clearly, unambiguously and without contradiction that plaintiffs revoked their acceptance of the camper within a reasonable time after learning the engine was defective, and the verdict to the contrary should have been set aside, as plaintiffs moved. Leaving aside plaintiffs' evidence, in pertinent part *defendants'* evidence relating to their breach of warranty and plaintiffs' revocation of the purchase was that: On 27 July 1984 the Whitehursts bought a new Coachman Camper from defendants for $33,208; Coachman Campers are made to live in while traveling from place to place and defendants knew that plaintiffs bought the camper for that purpose; the vehicle had a new Chevrolet truck motor, which General Motors warranted and the corporate defendant stood behind; on 28 August 1984, just 32 days after defendants sold the vehicle, plaintiff Norman Whitehurst complained to defendant Crisp about the motor not running properly and being defective and demanded at that time that the sale be cancelled; defendant Crisp told Whitehurst the problem with the engine might be minor and correctable and that he should have the engine examined by a Chevrolet dealer qualified to do warranty work on Chevrolet engines and if the engine was not up to the warranty it would be corrected; two days later plaintiffs had the engine so examined, at least to some extent, and that very day plaintiffs' lawyer notified defendants in writing that the purchase was being rescinded and the vehicle returned to defend-

ants' place of business because, according to the mechanic that examined it, the vehicle engine was seriously defective. Upon receiving this letter defendants had their lawyer write plaintiffs' lawyer for permission to have the engine more thoroughly inspected by a Chevrolet approved mechanic and had their lawyer to find out, if he could, whether plaintiffs would accept a new engine if the inspection showed that the one in it was not repairable, and would accept the repair of the engine if the inspection revealed that the defects were minor and repairable; defendants received permission to have the motor inspected and after the motor was dismantled and thoroughly inspected General Motors, the maker of the warranty, recognized that the engine was not repairable and had it replaced by a new engine under the warranty.

The foregoing evidence, which is neither ambiguous nor contradicted by other evidence, clearly establishes as a matter of law that plaintiffs revoked their acceptance of the camper in a timely and effective manner in full compliance with our law. Leaving aside the evidence of plaintiffs' attempt to revoke the purchase on 28 August 1984 when the motor first failed to perform satisfactorily, this evidence shows that plaintiffs' revocation was initiated no later than 30 August 1984, only two days after plaintiffs first learned that the engine might be defective; for it was on that day that their lawyer wrote defendants that the sale was being rescinded and the camper was being returned to them. And it is equally clear that the revocation was completed a day or two later when defendants admittedly received the letter. G.S. 25-2-608(2). Although whether the acceptance of a purchase has been timely revoked under the Uniform Commercial Code is usually a question of fact, when the facts are undisputed and only one inference can be drawn from them it is a question of law for the court. *Maybank v. Kresge Co.*, 302 N.C. 129, 134, 273 S.E. 2d 681, 684 (1981); *see also, Adler v. United States*, 270 F. 2d 715 (8th Cir. 1959). Returning the vehicle purchased to the defendants, notifying them in writing that the purchase was rescinded because the motor was defective, and demanding the delivery of a new vehicle or the return of the purchase price can only be construed as being a revocation of acceptance, in compliance with G.S. 25-2-608. And mailing the written notification of revocation to the seller within two days after the engine first failed to perform satisfactorily and

on the very day that the purchasers were advised by a Chevrolet mechanic that the engine defect was serious can only be construed as notice made within a reasonable time under the provisions of G.S. 25-2-607(3)(a) and G.S. 25-2-608(2). That the jury found otherwise was due to the confusing and inconsistent instructions that they received from the court, as the record plainly shows. Instead of peremptorily charging the jury on this issue, or even charging on the issue separately, the court intertwined its instructions with instructions concerning whether plaintiffs withdrew their revocation and in doing so charged on a multitude of alternatives to the resultant confusion of the jury, as their requests for clarification attest. One alternative erroneously charged on by the court was that plaintiffs' acceptance of the vehicle might have been revoked by filing suit, which was more than three months after the camper was returned to the seller and defendants were notified in writing that the purchase had been rescinded.

**[2]** In vacating the judgment and remanding for a new trial we do not set aside the finding that defendants made and breached the implied warranty of fitness, however, for the same undisputed, unambiguous evidence referred to above also establishes as a matter of law that defendants made and breached that warranty. G.S. 25-2-315. For it is a matter of common knowledge that the motor in a new motor vehicle is of substantial importance to the value and utility of such a vehicle and the uncontroverted evidence shows that: The motor in the vehicle plaintiffs purchased was warranted as a new motor; barely a month after the purchase the motor failed to perform like a new motor and the seller and warranter after inspecting it had the motor taken out and replaced. Nor do we order a new trial on plaintiffs' unfair and deceptive trade practices claim, not reached by the jury, because the evidence presented does not support that claim. The evidence presented, even when viewed in the most favorable light for the plaintiffs, as our law requires, only shows that in selling a motor vehicle with a motor that was defective and had to be replaced defendants breached an implied warranty of fitness, and that is not enough to establish an unfair and deceptive trade practice under G.S. 75-1, *et seq. Warren v. Guttanit, Inc.*, 69 N.C. App. 103, 317 S.E. 2d 5 (1984). Since it has been judicially established by the evidence of the parties that defendants made and breached

an implied warranty of fitness for a particular purpose, and that plaintiffs revoked their acceptance of the motor vehicle in a timely and effective fashion, the new trial will be only on issues concerning defendants' allegation that plaintiffs withdrew their revocation of acceptance and on plaintiffs' allegations that they are entitled to recover actual and incidental damages. In the trial of these issues statutes that should be consulted include G.S. 25-2-711(1), G.S. 25-2-714 and G.S. 25-2-715; and the decisions that should be consulted include *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E. 2d 802 (1975), *disc. rev. denied*, 289 N.C. 613, 223 S.E. 2d 391 (1976) and the cases therein cited.

We overrule plaintiffs' several other contentions without discussion because they are not based upon exceptions properly taken and assignments of error properly made as sections (b) and (c) of Appellate Rule 10 require; and we overrule defendants' cross appeal without discussion because the arguments made in support thereof are not based upon any assignments of error, as Rule 28(b)(5) of the appellate rules requires.

Vacated and remanded.

Judge ORR concurs.

Chief Judge HEDRICK concurs in part and dissents in part.

Chief Judge HEDRICK concurring in part and dissenting in part.

I agree with the majority opinion that the plaintiffs are entitled to a new trial. In my opinion, however, the next trial should embrace all issues raised by the pleadings and the evidence presented at the new trial. I do not agree with the majority's efforts to restrict the new trial to the issue of whether plaintiffs withdrew the revocation of acceptance and to the issue of damages.

STATE OF NORTH CAROLINA v. WILLIE ANTHONY MOBLEY

No. 8626SC1020

(Filed 4 August 1987)

**1. Criminal Law § 66.11— pretrial identification at crime scene— procedures not impermissibly suggestive**

A larceny victim's out-of-court identification of defendant was not impermissibly suggestive so as to require suppression of the victim's in-court identification of defendant where the victim saw someone trying to drive away his truck; when the truck stalled, the victim opened the truck door, tried to pull the driver out of the truck, and tried to grab the driver after he wrecked and got out of the truck; the victim had a chance to view the driver for five to eight seconds during the incident; the victim's description of the driver and his clothing matched that of defendant and the clothing defendant was wearing when he was picked up by the police a short time later; a police officer returned to the crime scene with two men in the back seat of the police car, and the victim immediately identified defendant as he emerged from the police car; and the identification took place within an hour after the offense occurred.

**2. Criminal Law § 101.1— statement by prospective juror—curative instruction insufficient**

The trial court's curative instruction was insufficient to cure prejudice from a potential juror's statement during *voir dire* that he was a policeman and that he had had "dealings with the defendant on similar charges." On defendant's motion to dismiss the jurors who heard the statement, the trial court was required, at the least, to make inquiry of the other potential jurors as to the effect of the statement, and the most prudent option for the court would have been to dismiss the jurors who heard the statement and start over with jury selection.

APPEAL by defendant from *Friday, Judge.* Judgment entered 17 April 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 12 February 1987.

*Attorney General Lacy H. Thornburg by Assistant Attorney General William B. Ray for the State.*

*Wishart, Norris, Henninger & Pittman by Alan R. Krusch for defendant appellant.*

COZORT, Judge.

Defendant was tried upon proper indictments charging him with (1) one count of larceny of an automobile, N.C.G.S. § 14-72, and (2) one count of misdemeanor hit and run resulting in proper-

ty damage, N.C.G.S. § 20-166. On appeal defendant alleges that the trial court committed prejudicial error by denying defendant's motion to dismiss the jurors because of a juror's statement that he was a police officer and had previous "dealings with the defendant on similar charges." We believe the trial court erred by failing to determine whether the juror's statement had any effect on the other jurors, and we grant defendant a new trial.

The State's evidence tended to show that on 31 December 1985 Calvin Jones, Jr., parked his 1974 Ford truck, valued at about four thousand dollars ($4,000.00), at his girlfriend's home in Charlotte at about 4:00 to 5:30 p.m. While Jones was inside his girlfriend's house, she asked him if that was his truck being started outside. Remembering he had left his keys in the truck, Jones went to the door and saw the truck had been backed into the street. Jones walked over to the truck, which had stalled. Jones opened the truck door as the driver was trying to start the engine. He observed the face of the driver for less than five seconds. The driver got the truck started, stomped on the gas, and lost control of the truck. The truck went across the street through a fence and ran up on the porch of a residence. Jones chased the driver and saw the driver's face again for one or two seconds. Jones grabbed the driver, and the driver fell down. The driver got up and ran away.

The police were called and Jones described the driver of his truck to the police officer as "short and dark skinned, and he had his hair cut short, and he didn't have a beard or anything, and he had on a blue jean-like jacket and some blue jean pants, like." The police officer asked Jones to stay at his girlfriend's house because they had stopped a man matching the description given by Jones. In forty-five minutes to an hour the police officer returned with two men in the back seat of the police car.

The police officer testified that he "told [Jones] that one of these guys might have been the guy involved in the larceny of his vehicle." When the first man emerged from the patrol car Jones told the officer he was not the driver. As the second man, the defendant herein, was getting out of the car, Jones asked him to take the scarf off his head. Jones immediately identified him as the driver of the truck. Jones testified that it was "kind of dark" but there was a street light overhead, the light was on in the

patrol car, and the two police officers standing outside had flashlights. The police officer testified it was about 6:00 p.m. when the identification was made, and it had started raining slightly. Jones identified the defendant in court as being the driver of his truck.

The defendant's evidence tended to show that the defendant spent the night on 30 December 1985 at his sister's home in Charlotte. On the morning of 31 December 1985, the defendant and Kevin Woodard, his sister's son, left the house and were together throughout the morning. The two men did some drinking and later went to a friend's house at approximately 1:30 p.m. They stayed at the friend's house for a short time and drank some more while waiting for the friend's son.

Woodard left the friend's house at approximately 4:30 p.m. or 4:45 p.m., and the defendant was still there. Woodard testified it was not dark at this time, but it had started drizzling rain. Woodard then walked to a service station on Interstate 77, which took him about thirty minutes to an hour. The next time Woodard saw defendant, defendant was getting out of a friend's car, and they started to go get a beer when a police officer pulled up. The police officer asked them to accompany him, and the defendant and Woodard got in the patrol car.

The police officer took the defendant and Woodard to see Jones. When the defendant and Woodard got out of the car, Jones identified the defendant as the one who tried to steal his truck.

The jury returned verdicts of guilty on both charges. The defendant was sentenced to three (3) years active term on the larceny charge, and was given a two-year suspended sentence, to run consecutively to the active term, on the hit and run charge.

Before turning our attention to the primary issue on this appeal, the statement by the juror, we deem it appropriate to first consider defendant's assignment of error that the evidence was not sufficient to go to the jury. The defendant contends there was no substantial evidence that he was the perpetrator of the offense. Defendant contends that the only evidence identifying him as the perpetrator of this offense is Jones' identification of him the evening of the incident. He argues that the identification should have been suppressed and that, without Jones' identification, the State had no case against him. We disagree.

[1] First, we disagree with defendant's contention that the trial court should have granted defendant's motion to suppress the in-court identification of the defendant by Jones. The defendant contends that the out-of-court identification process was impermissibly suggestive and violated defendant's constitutional right to due process of law. Defendant alleges that the circumstances in this case suggest the probability of misidentification. We do not agree.

> Pretrial showup identifications, though they are suggestive and unnecessary, are not, however, *per se* violative of a defendant's due process rights. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140 (1977). The primary evil to be avoided is the substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. at 198, 34 L.Ed. 2d at 410. *See also State v. Oliver*, 302 N.C. at 45, 274 S.E. 2d at 194. Whether there is a substantial likelihood of misidentification depends on the totality of the circumstances.
>
>> The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.
>
> *State v. Turner*, 305 N.C. at 364, 289 S.E. 2d at 373-74 (*quoting Manson v. Brathwaite*, 432 U.S. at 114, 53 L.Ed. 2d at 154). If under the totality of the circumstances there is no substantial likelihood of misidentification, then evidence of pretrial identification derived from unnecessarily suggestive pretrial procedures may be admitted. *State v. Turner*, 305 N.C. 356, 289 S.E. 2d 368; *State v. Oliver*, 302 N.C. 28, 45, 289 S.E. 2d 183, 194.

*State v. Flowers*, 318 N.C. 208, 220, 347 S.E. 2d 773, 781 (1986).

The evidence below shows that Jones had a chance to view the defendant for a period of approximately five to eight seconds during the incident. Jones was very intent on seeing the defendant as he tried to pull him out of the truck and tried to grab him

after he got out of the truck. Jones described the defendant as short, dark skinned, with short hair, no beard, and wearing a blue jean-like jacket and some blue jean pants. This description fit the defendant when he was picked up by the police officer a short time later. Jones identified defendant immediately as he emerged from the police car. The identification took place within an hour after the offense took place, after the police officer stated to Jones that "one of these guys might have been the guy involved in the larceny of his vehicle."

We hold that under the totality of the circumstances test the out-of-court identification of defendant was not so impermissibly suggestive as to violate defendant's constitutional right to due process of law. The trial court did not commit prejudicial error in denying defendant's motion to suppress the in-court identification based on the out-of-court identification process.

With the evidence of Jones' identification of defendant having been properly admitted, we find the evidence, when viewed in the light most favorable to the State, *State v. Diaz*, 317 N.C. 545, 546-47, 346 S.E. 2d 488, 490 (1986), is sufficient to defeat the motion to dismiss the charges. Jones, the eyewitness, identified defendant as the perpetrator of the offense. That evidence was enough to take the case to the jury.

**[2]** We now turn to the definitive issue in this case, the defendant's contention that the trial court committed prejudicial error by denying defendant's motion to dismiss the jurors. Defendant argues that all the jurors should have been dismissed because one juror, who identified himself as a police officer, stated that he had "dealings with the defendant on similar charges." Under the circumstances presented in this case, we agree with defendant.

During jury selection, a potential juror stated:

> A JUROR: I am a policeman . . . and I have also had dealings with the defendant on similar charges.
>
> THE COURT: Beg your pardon?
>
> THE JUROR: I have also had dealings with the defendant on similar charges.

The trial court excused the juror and instructed the jury:

THE COURT: Ladies and Gentlemen of the Jury, the Court will ask the jury to strike from their mind any reference the officer may have made to the defendant because it is not evidence in the case. Completely strike it out. Thank you very much.

The defendant's attorney made a motion to dismiss the jurors based on the officer's statements concerning the defendant. The trial court denied defendant's motion to dismiss.

In *State v. McAdoo*, 35 N.C. App. 364, 241 S.E. 2d 336, *disc. rev. denied*, 295 N.C. 93, 244 S.E. 2d 262 (1978), this Court held that not every prejudicial statement by a juror would entitle the defendant to a new trial. In *McAdoo*, a prospective juror stated he knew the defendant because defendant "had tried to lift a power saw from [me]." *Id.* at 365, 241 S.E. 2d at 337. The trial court excused the juror on its own motion. The defendant's attorney was allowed to ask the juror in the presence of all the other members of the panel if it was not a fact that defendant was found not guilty of this charge. The juror answered affirmatively. *Id.* On appeal, this Court held that the statement was not so prejudicial as to warrant a new trial because there was nothing in the record to show the defendant was prevented from questioning the jurors on *voir dire* as to the weight they gave the juror's testimony. *Id.* at 366, 241 S.E. 2d at 338. This Court distinguished the situation in *McAdoo* from the facts in *State v. Drake*, 31 N.C. App. 187, 229 S.E. 2d 51 (1976). In *Drake*, the trial court was faced with an allegation that one juror made a statement to another juror questioning the honesty of the defendant. The statement occurred in the coffee shop during a recess. The trial court denied defendant's motion for a mistrial. The Court of Appeals ordered a new trial, finding that it was error for the trial court to deny the motion for a mistrial without determining the truth of the allegation and, if true, its effect on other jurors who heard it. *Id.* at 192, 229 S.E. 2d at 55.

We believe the trial court's denial of the defendant's motion to dismiss the remaining jurors in the case below brings this case in line with *Drake* and distinguishes it from *McAdoo*. A statement by a police officer-juror that he knows the defendant from "similar charges" is likely to have a substantial effect on other jurors. The potential prejudice to the defendant is obvious. On the de-

fendant's motion to dismiss the other jurors, the trial court, at the least, should have made inquiry of the other jurors as to the effect of the statement. The more prudent option for the trial court would have been to dismiss the jurors who heard the statement and start over with jury selection. In any event, the attempted curative instruction was simply not sufficient. The defendant is entitled to a

New trial.

Judges MARTIN and PARKER concur.

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BERNETTE COTTON, JUDY LYNN JONES, AND ELIZA HARVEY, ET AL. v. NORMAN K. STANLEY AND EVELYN B. STANLEY

No. 8610SC997

(Filed 4 August 1987)

**1. Landlord and Tenant § 19.1— rental property—violation of Housing Code—no entitlement to complete refund of rent**

A Raleigh Housing Code provision prohibiting an owner from renting as a dwelling "any vacant structure" after the housing inspector has issued an order to repair did not make it unlawful to continue to collect rent from present occupants of an offending structure and did not automatically reduce the fair rental value of such units to zero between the date defendant landlords had notice of violations of the Housing Code and the date repairs were made so as to entitle plaintiff tenants to a complete refund of all rent paid during that time.

**2. Landlord and Tenant § 19.1— rent abatement for failure to make repairs—evidence of fair rental value**

In an action by plaintiff tenants for rent abatement based on the landlords' failure to repair the rental units in accordance with a city housing code, plaintiffs were not required to present direct evidence of the "as is" fair rental value of the rental units; rather, the jurors, from their own experience with living conditions, could determine the "as is" fair rental value of the units by considering the testimony of plaintiffs and the city housing inspector.

**3. Landlord and Tenant § 19.1— rental property—rent abatement for failure to make repairs—amount of recovery**

In an action by plaintiff tenants for a rent abatement based on defendant landlords' alleged violation of the Residential Rental Agreements Act by failing to make repairs by the repair deadline, defendants will be liable for the difference between the fair rental value of the units "as is" and the fair rental

value of the units "as warranted" for the period between the expiration of a reasonable opportunity to repair after notice to the defendants by the housing inspector and the date repairs were made, and any special and consequential damages alleged and proven.

APPEAL by plaintiffs from judgment entered by *Stephens, Judge.* Judgment entered 24 April 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 10 March 1987.

*East Central Community Legal Services, by Augustus S. Anderson, Jr., and Robert A. Miller for plaintiff-appellants.*

*No brief for defendant-appellees.*

GREENE, Judge.

This is a class action filed on behalf of two groups of tenants against their landlords, Norman K. and Evelyn B. Stanley. The class represented by Bernette Cotton consists of all past and present tenants. It requested the remedies of damages and injunctive relief and is the only appellant here. Plaintiffs claimed defendants violated the Residential Rental Agreements Act, N.C.G.S. Sec. 42-38 *et seq.*, and that the violations of the Act were unfair business practices as defined by N.C.G.S. Sec. 75-1.1.

At trial, plaintiffs presented evidence that tended to support their allegations that defendants: 1) charged their tenants excessive late penalties, 2) brought summary ejectment proceedings for the sole purpose of collecting back rent and late penalties rather than evicting tenants, 3) maintained an intentionally misleading method of accounting in order to collect rent in excess of rent actually owed and 4) broke their lease contracts with plaintiffs by raising rents without plaintiffs' consent before the leases expired. Plaintiffs also presented a great deal of evidence through Beal Bartholomew, Housing Inspection Administrator for the City of Raleigh, in support of their allegation that defendants violated part of the Residential Rental Agreements Act, N.C.G.S. Sec. 42-42(a)(1), in that they failed to repair their rental property in accordance with the Raleigh Housing Code. Raleigh City Code of Ordinances, Article H. Housing Code, Sec. 10-6121 *et seq.* (1984). N.C.G.S. Sec. 42-42(a)(1) (1984) requires landlords to "[c]omply with the current applicable building and housing codes . . . to the extent required by the operation of such codes . . . ."

Mr. Bartholomew testified to the Housing Agency's procedure in responding to reports of Housing Code violations. He testified that an inspection is made of the property and if a violation is found, the agency sends a letter to the owner notifying him of the inspection and advising him to appear for a hearing on the violations. The Housing Code requires this hearing be held no sooner than ten days but no later than thirty days after the inspection. At the hearing, the owner may contest the existence of the violations or show the violations have been corrected. If the hearing board determines the reported violations exist, it sends the owner an order to repair which informs him of the deadline by which the violations must be corrected.

Mr. Bartholomew also described the appeal procedure, what his office does when repairs are not made by the repair deadline and other matters not pertinent to this appeal. He testified that 48 of defendants' nearly 200 rental properties had at one time or another been found to violate Raleigh's Housing Code.

Plaintiffs' evidence also tended to show defendants often failed to repair their rental property by the deadline to repair and that at least ten members of the class represented by Cotton had paid rent to defendants while their units were still in violation of the Housing Code even after the repair deadline.

At the close of plaintiffs' case, defendants moved for directed verdict on all issues. The court granted their motion on the issue of whether plaintiffs were entitled to damages. Defendants offered no evidence. After instruction and deliberation, the jury answered that defendants had engaged in a pattern of: 1) charging unfair, unreasonable and excessive late payment penalties; 2) bringing unfair and unnecessary summary ejectment proceedings against tenants; 3) continuing to collect the full amount of rent for rental units which were in violation of the City Housing Code; and 4) continuing to collect the full amount of rent in rental units which had material defects in heating and plumbing facilities or such other material defects that rendered the units unsafe or unfit. The court then determined, pursuant to *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E. 2d 574, 583 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978), that the practices found by the jury violated N.C.G.S. Sec. 75-1.1, which prohibits unfair or deceptive acts or practices in or affecting commerce. The court

permanently enjoined defendants from further engaging in the acts the jury found to be unfair.

The class of plaintiffs represented by Cotton appeals from the directed verdict for defendants on the issue of damages. Defendants did not file a brief. The issues raised are: 1) whether the court could have determined plaintiffs' damages as a matter of law and 2) whether there was sufficient evidence for the jury to determine plaintiffs' damages as a question of fact.

Tenants may bring an action for breach of the implied warranty of habitability, seeking rent abatement, based on their landlord's noncompliance with N.C.G.S. Sec. 42-42(a). *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 368, 355 S.E. 2d 189, 193 (1987). The rent abatement is calculated as the difference between the fair rental value of the premises if as warranted (*i.e.*, in full compliance with N.C.G.S. 42-42(a) ) and the fair rental value of the premises in their unfit condition ("as is") plus any special and consequential damages alleged and proved. *Id.* at ---, 355 S.E. 2d at 194 (allowing special and consequential damages); *Brewington v. Loughran*, 183 N.C. 559, 565, 112 S.E. 257, 260 (1922) (special damages allowed as part of tenants' remedy against landlord for breach of lease contract).

I

**[1]** Plaintiffs argue they are entitled to a complete refund of all rent paid between the date defendants had notice of the violations of the Housing Code and the date repairs were made. They first contend the court should have determined, as a matter of law, that for a portion of that time the fair rental value of the units was zero. Their argument is based on Section 10-6125(c) of the Raleigh City Housing Code which prohibits an owner from renting as a dwelling "any vacant structure" after the housing inspector has issued an order to repair. Plaintiffs contend since defendants could not rent their units if they were vacant, the fair rental value of each unit was zero. The point of plaintiffs' argument is that their units had no market value until the violations were corrected. We disagree.

While Section 10-6125(c) makes it "unlawful to rent or offer for rent as a dwelling any vacant structure . . . upon which an order to repair . . . has been issued . . .," we find the Housing

Code does not make it unlawful to continue to collect rent from present occupants of an offending structure. We hold that the illegality of re-renting the unit on the open market does not automatically reduce the unit's fair rental value to zero. The measure of the unit's fair rental value is not the price at which the owner could *lawfully* rent the unit to a new tenant in the open market, but the price at which he could rent it if it were lawful for him to do so. Thus, the trial court did not err by refusing to find the fair rental value of the plaintiffs' units was zero during the period of time between the repair deadline and the date of repair.

II

Plaintiffs next argue the issue of damages should have been submitted to the jury.

Plaintiffs presented abundant evidence of the existence of both Raleigh Housing Code violations, a violation of N.C.G.S. Sec. 42-42(a)(1), and other violations of N.C.G.S. Sec. 42-42(a) in regards to defendants' rental property. The violations include: 1) non-weather tight doors and windows; 2) inadequate heating and hot water; 3) unsanitary conditions providing a breeding ground for rats and other pests; 4) leaking and broken pipes; 5) improper electrical wiring and overloaded circuits; 6) improper drainage and sewage connections resulting in sewage lying on top of the ground; 7) broken steps, window panes and anti-pest screens leading to crawl spaces; 8) missing or ripped screening on windows and doors and 9) deteriorating floor joists, exterior walls, interior walls, ceilings and roofs. Almost every piece of property plaintiffs described had three or more violations. Plaintiffs also presented evidence of the rent they paid defendants during the periods of time the violations existed.

**[2]** At trial, defendants argued plaintiffs' evidence was insufficient for the jury because plaintiffs did not present any *direct* evidence of the units' "as is" fair rental value. Direct evidence of fair rental value is an opinion of what the premises would rent for on the open market from either an expert or a witness qualified by familiarity with the specific piece of property. *See Huff v. Thornton*, 287 N.C. 1, 6, 213 S.E. 2d 198, 202 (1975) (discussing direct evidence of fair market value). Defendants' argument is meritless.

The fair rental value of property may be determined "by proof of what the premises would rent for in the open market, *or* by evidence of other facts from which the fair rental value of the premises may be determined." *Brewington v. Loughran*, 183 N.C. 559, 565, 112 S.E. 257, 260 (1922) (emphasis added); *Sloan v. Hart*, 150 N.C. 269, 275, 63 S.E. 1037, 1039 (1909). The "other facts" of which *Brewington* and *Sloan* speak include the dilapidated condition of the premises—indirect evidence of fair rental value. *Huff v. Thornton*, 287 N.C. 1, 213 S.E. 2d 198 (1975); *Simon v. Mock*, 75 N.C. App. 564, 331 S.E. 2d 300 (1985). The rent agreed upon by the parties when entering into the lease is some evidence of the property's "as warranted" fair rental value, but it is not binding. *See Martin v. Clegg*, 163 N.C. 528, 530, 79 S.E. 1105, 1106 (1913).

Here, plaintiffs' evidence was sufficient to show both fair rental value "as warranted" and fair rental value "as is." From their own experience with living conditions, the jury could determine the "as is" fair rental value of plaintiffs' units by considering the testimony of both plaintiffs and Mr. Bartholomew. A party is not required to put on direct evidence to show fair rental value. *Accord, Martin v. Clegg*, 163 N.C. 528, 79 S.E. 1105.

**[3]** We hold the trial court erred by entering directed verdict for defendants on the issue of damages. We remand for a trial on that issue. Defendants will be liable for the difference between the fair rental value of the units "as is" and the units' fair rental value "as warranted," for the period between the expiration of a reasonable opportunity to repair after notice to the defendants and the date repairs were made, plus any special and consequential damages alleged and proven. *See* 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, 795 (1978) (indicating the landlord should have a reasonable time after notice to repair the defects which violate the Residential Rental Agreements Act); *Brewington*, 183 N.C. at 561, 112 S.E. at 258 (a landlord must have a reasonable opportunity to comply with the lease before a tenant is justified in abandoning the leasehold).

As this is a class action, it may be the trial court will determine individual proof of damages to be impractical and some form of aggregate proof of damages to be more appropriate. This is a

matter not now before us, and it will be left to the trial court. *See* 2 H. Newberg, Newberg on Class Actions Sec. 10.01 *et seq.* (2d ed. 1985 Supp. 1987).

The trial court has already determined defendants' practices were unfair business practices and violated N.C.G.S. Sec. 75-1.1. In the event it is found plaintiffs were damaged, the trial court will be required to treble those damages under N.C.G.S. Sec. 75-16. *Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E. 2d 397, 402 (1981).

New trial on the issue of damages.

Judges ARNOLD and PARKER concur.

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HOME ELECTRIC CO. OF LENOIR, INC., A NORTH CAROLINA CORPORATION v. HALL AND UNDERDOWN HEATING AND AIR CONDITIONING COMPANY, A NORTH CAROLINA PARTNERSHIP

No. 8625SC1189

(Filed 4 August 1987)

**Contracts § 21.2; Estoppel § 6— construction contract—affirmative use of promissory estoppel—Rule 12(b)(6) dismissal proper**

The trial court did not err in an action for breach of contract by granting defendant's Rule 12(b)(6) motion for dismissal where plaintiff general contractor had obtained a bid from defendant subcontractor for duct work; there was no allegation that plaintiff ever promised defendant that it would use its services if its own bid for the work was accepted; and defendant refused to perform the work after the contract was awarded to plaintiff. North Carolina case law has not approved the doctrine of promissory estoppel for affirmative relief, and has not recognized it as a substitute for consideration.

APPEAL by plaintiff from *Sitton, Judge.* Judgment entered 30 September 1986 in Superior Court, CALDWELL County. Heard in the Court of Appeals 1 April 1987.

Plaintiff, Home Electric Co. of Lenoir, Inc., was the successful bidder for the performance of all of the electrical, heating and air conditioning work on Camelot Manor, a rest home construction project. According to the complaint, prior to plaintiff submitting

its bid, defendant, Hall and Underdown Heating and Air Conditioning Company, "affirmatively promised Plaintiff it would perform the duct work" on Camelot Manor. Plaintiff relied on defendant's price of $29,400 in submitting its bid for the work. However, there was *no* allegation in the pleadings that plaintiff ever promised defendant that it would use its services if its own bid for the work was accepted.

After plaintiff was awarded the contract, defendant informed plaintiff it was not going to do the duct work. Plaintiff then obtained the same services from another subcontractor at a cost of $58,693.18–$29,293.18 *more* than the price quoted by defendant. Plaintiff brought suit to recover $29,293.18.

In its complaint plaintiff alleged the existence of a contract between plaintiff and defendant, but failed to allege any consideration existed for its formation. Instead, plaintiff relied on the theory of promissory estoppel as a substitute for consideration. Defendant answered and moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The trial court granted that motion and stated that "[t]he appellate courts of North Carolina have never applied the doctrine of promissory estoppel to purported contracts between subcontractors and contractors as a substitute for consideration . . . ." From that judgment, plaintiff appeals.

*Delk, Swanson & Einstein, by Joseph C. Delk, III, David A. Swanson and Edwin S. Hartshorn, III, attorneys for plaintiff appellant.*

*Whisnant, Simmons, Groome, Tuttle & Pike, by H. Houston Groome, Jr. and Vanessa Barlow, attorneys for defendant appellee.*

ORR, Judge.

Plaintiff argues that the trial court erred in dismissing its contractual claim on the grounds of a failure of consideration. It is contended by the plaintiff that the doctrine of promissory estoppel should apply in the case *sub judice* so as to serve as a substitute for consideration. We decline to expand the use of the doctrine of promissory estoppel in cases such as this one and affirm the trial court's decision for the reasons set forth below.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint, *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E. 2d 161, 163 (1970), which will be dismissed if it is completely without merit. *Lee v. Paragon Group Contractors*, 78 N.C. App. 334, 337 S.E. 2d 132 (1985). A complaint is without merit if (1) there is an absence of law to support a claim of the sort made; (2) there is an absence of fact sufficient to make a good claim; or (3) there is the disclosure of some fact which will defeat a claim. *Id.* at 337, 337 S.E. 2d at 134. In the case *sub judice*, there is an absence of law to support the plaintiff's claim.

Plaintiff's complaint alleges the existence of a contract between plaintiff and defendant. However, the complaint fails to allege the existence of any consideration for defendant's promise to perform the duct work for $29,400. A contract, to be enforceable, must be supported by adequate consideration. *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E. 2d 697 (1968). Consideration which is sufficient to support a contract "consists of 'any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee.'" *Lee v. Paragon Group Contractors*, 78 N.C. App. at 338, 337 S.E. 2d at 134 (citation omitted).

Plaintiff, however, asserts the doctrine of promissory estoppel and argues that it serves as a substitute for consideration.

The Restatement of Contracts states the following:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Restatement (Second) of Contracts § 90 (1979). The comment to this section states that this section is often referred to in terms of "promissory estoppel."

However, there are differing interpretations of § 90.

> It [§ 90] appears to be intended as a substantive rule of law to be used as a sword under which a promisee can bring an action and, if he proves the elements set out in § 90, enforce the promise. By supplying the missing elements to the con-

> tract it appears to give the promisee an enforceable right of action in contract against his promisor. In effect, if a complaint is patterned after § 90, it anticipates the defenses of lack of assent and lack of consideration, and thus precludes, at least as a matter of law, the promisor's reliance on such defenses.
>
> Apparently not all legal scholars equate promissory estoppel with § 90 of the Restatement. The position has been taken that promissory estoppel applies only in cases where there is a promise or representation as to an intended abandonment by the promisor of a legal right which he holds or will hold against the promisee.

Annot. "Statute of Frauds—Promissory Estoppel," 56 A.L.R. 3d 1047 (1974).

The North Carolina Courts have recognized to a limited extent the doctrine of promissory estoppel, but have not expressly recognized it in all situations. Furthermore, our Courts have never recognized it as a substitute for consideration, either in construction bidding, or in any other context. The North Carolina cases which have applied the doctrine have only done so in a defensive situation, where there has been an intended abandonment of an existing right by the promisee. North Carolina case law has not approved the doctrine for affirmative relief.

In *Clement v. Clement*, 230 N.C. 636, 55 S.E. 2d 459 (1949), the Supreme Court recognized the doctrine of promissory estoppel in the limited context of a judicial waiver. In that case defendant asserted the doctrine to prevent plaintiff from charging interest when plaintiff had previously agreed not to charge it. The Court stated that promissory estoppel would apply to the waiver situation, but refused to apply the doctrine on these facts. It stated that the waiver of interest on a loan was an extrajudicial waiver and also that there was no detrimental reliance by the promisee in that case.

The most recent and definitive discussion of promissory estoppel occurred in the case of *Wachovia Bank v. Rubish*, 306 N.C. 417, 293 S.E. 2d 749, *reh. denied*, 306 N.C. 753, 302 S.E. 2d 884 (1982), where defendant relied on his landlord's promise not to require a written notice to renew his lease. After the landlord

died, defendant failed to give written notice of renewal and the landlord's executors cancelled his lease and sued for summary ejectment. The Court held that defendant could assert promissory estoppel as a defense to the summary ejectment action by proving an express or implied promise to waive the written notice provision and by proving his detrimental reliance on that promise. It is important to note that the opinion makes no mention of § 90 of the Restatement of Contracts and deals with the waiver of a legal right.

Plaintiff relies on *Allen M. Campbell Co., Gen. Cont. v. Virginia Metal Ind.*, 708 F. 2d 930 (4th Cir. 1983), a case arising in North Carolina, to support its theory of promissory estoppel as a substitute for consideration. In that case, plaintiff contractor used defendant subcontractor's oral bid for metal doors in formulating its prime bid for a construction project. Plaintiff was awarded the contract, but defendant was unable to deliver the goods at the stated price. Plaintiff sued on a theory of promissory estoppel to recover the difference between the price of defendant's oral bid and its replacement cost. The Fourth Circuit Court of Appeals held that plaintiff could recover on the theory of promissory estoppel and concluded that North Carolina courts would have applied the doctrine had they been faced with those facts.

The Court in *Campbell* relied on *Wachovia* as explicitly holding, "that the law of North Carolina includes, and where appropriate applies, the doctrine of promissory estoppel." *Campbell*, 708 F. 2d at 931. The Court then applied the elements of promissory estoppel to the pleadings in *Campbell* and concluded that it had been error to dismiss the case under Rule 12(b)(6) of the Federal Rules.

However, the *Wachovia* case, while recognizing the doctrine of promissory estoppel, makes no assertion that this Court can apply the doctrine in an affirmative manner, particularly under the facts of this case. This Court, therefore, cannot base an expansive interpretation and use of promissory estoppel in the case *sub judice*, on the precedential value of *Wachovia*. Neither is this Court obligated to rely on *Campbell* which is not binding precedent on North Carolina Courts and is distinguishable on its facts from the *Wachovia* case.

In *Campbell*, the Fourth Circuit allowed the use of the doctrine to grant affirmative relief to the plaintiff. As stated previously, the doctrine has only been permitted in North Carolina for defensive relief and both North Carolina cases which recognized the doctrine involved the waiver of a preexisting right by a promisee.

Also, the plaintiffs in *Campbell* and in the case at bar were attempting to create a contract which would not exist without the application of promissory estoppel. In *Clement* and *Wachovia*, however, the parties were merely attempting to modify a valid contract which was already in existence.

Allowing a cause of action based on promissory estoppel in construction bidding also creates the potential for injustice. It forces the subcontractor to be bound if the general contractor uses his bid, even though the general contractor is not obligated to award the job to that subcontractor. The general contractor is still free to shop around between the time he receives the subcontractor's bid and the time he needs the goods or services, to see if he can obtain them at a lower price.

Using the doctrine in this context is also inequitable in that it allows the general contractor to sue the subcontractor if the subcontractor is unable to perform after the contractor has used his bid, but before he has formally accepted the subcontractor's offer. The subcontractor, however, is powerless and has no grounds on which to sue the contractor if the contractor refuses to use the subcontractor for the actual work.

Finally, general contractors can avoid this problem entirely by securing a contract with the subcontractor at the outset, conditioned on a successful bid. Contractors should be responsible for protecting themselves without having to resort to the use of promissory estoppel for relief.

For the foregoing reasons, we hold that the trial court was correct in granting defendant's motion to dismiss for failure to state a claim.

Affirmed.

Judges JOHNSON and EAGLES concur.

SAM WILLIS v. SARAH WILLIS

No. 8626DC1069

(Filed 4 August 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 as of date of separation**

Where, after the date of separation, defendant husband closed a joint bank account, cashed a joint certificate of deposit, sold a jointly owned cafe, and commingled the proceeds with his separate property in his own bank account, the trial court erred in failing to value such property for equitable distribution purposes as of the date of separation and in merely finding that one-third of the husband's new bank account was marital property since (1) by looking only to the funds in the husband's account at the time of the hearing, the court failed properly to trace all of the marital property as it existed on the date of separation and (2) by applying a two to one ratio to the funds as they existed in the husband's account, the court failed to consider that proceeds from the joint bank account and cafe sale were part marital and part separate and that proceeds from the certificate of deposit were wholly marital.

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. Defendant-appellant's Petition for Rehearing allowed 14 July 1987.

*Paul J. Williams for plaintiff appellee.*

*R. Lee Myers for defendant appellant.*

BECTON, Judge.

In an opinion in the above-styled matter filed 19 May 1987, this Court addressed the two issues presented and "[a]ffirmed in part, reversed in part, and remanded" this case to the trial court. We affirmed on one issue, holding that the trial court's error, in not valuing all of the marital property as of the date of separation, was not prejudicial. We reversed on the other issue, holding

that the trial court erred in concluding that the Claremont Road property was marital property and in finding that it had actively appreciated in the amount of $9,990. We now conclude, based on the defendant-appellant's 24 June 1987 Petition to Rehear and a review of the Record on Appeal that the trial court's error, in not valuing all of the marital property as of the date of separation, was prejudicial and that the entire case should be reversed and remanded. The original opinion filed in this case, *Willis v. Willis*, 85 N.C. App. 708, 355 S.E. 2d 828 (1987), is hereby superseded by this opinion.

I

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.

II

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 there-

fore failed to equitably distribute the marital property. We address these in order.

III

[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 (1986). 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 sep-

arate 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 entitled 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.

IV

**[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 a joint bank account, a Certificate of Deposit, and a jointly owned business known as "Sam's Cafe" were not listed among the marital assets, and instead 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 joint bank accounts, cashed in the Certificate of Deposit, 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 contends that she was prejudiced by the trial judge's failure to assign a value to the property as it existed on the date of separation. We agree. By looking only to the funds in the UCB account at the time of the hearing, the trial judge failed to properly trace all of the marital property as it existed at the time of separation. By applying a two-to-one ratio to the funds as they existed in the UCB account, the trial judge failed to take into account that that account con-

sisted of funds from three sources, two of which were part marital and part separate (proceeds from the sale of Sam's Cafe and the funds from the C&S account), and one of which was wholly marital (the proceeds from the Certificate of Deposit).

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. We remand so that he may do so.

Reversed and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

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COLLEEN SHIELS STACK v. MECKLENBURG COUNTY, MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES, LUTHERAN FAMILY HOMES IN NORTH CAROLINA, INC., AND KEN GOLDEN

No. 8626SC1216

(Filed 4 August 1987)

1. **Master and Servant § 87— claim for willful, wanton and reckless negligence by employer—recovery limited to Workers' Compensation Act**

The trial court properly granted defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(1) of plaintiff's claim for willful, wanton and reckless negligence in an action arising from the rape of plaintiff by a "Willie M" child while plaintiff was supervising a group home operated by defendant Lutheran Family Services. When an employee's injury is covered by the Workers' Compensation Act, the right to bring an independent negligence action against the employer is barred by the existence of the Workers' Compensation remedy, and, since the Act's coverage extends to injuries resulting from the employer's willful, wanton and reckless negligence, there is no issue regarding an election of remedies in this case. N.C.G.S. § 97-10.1.

**2. Master and Servant § 87— workers' compensation—exclusive remedy rule—intentional conduct exception—intentional infliction of emotional distress—claims properly dismissed**

The trial court properly granted defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's claims for intentional injury, intentional infliction of emotional distress, and punitive damages arising from the rape of plaintiff in a group home which she was supervising as an employee of defendant where plaintiff failed to allege that defendant intended to harm her through its conduct.

APPEAL by plaintiff from *Ferrell, Judge*. Judgment entered 8 September 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 May 1987.

This is a civil action by an employee for personal injuries caused by the tortious conduct of her employer. From an order allowing defendant's motions to dismiss for lack of subject matter jurisdiction and failure to state a claim on which relief may be granted, the plaintiff appeals.

The complaint alleges the following:

In January of 1984, the plaintiff accepted an internship with the defendant, Lutheran Family Services in North Carolina, Inc., which operates group homes for minors. Her primary responsibility involved weekend duty as a resident supervisor of the defendant's group homes.

Plaintiff's internship ended in May of 1984 but she agreed to remain after this date because of a shortage of personnel. In July of 1984, plaintiff was raped while supervising one of defendant's group homes. Plaintiff alleged that the rapist, a resident of the group home, was a "Willie M" child, a designation which refers to youths who are unusually dangerous or difficult to treat. Plaintiff filed this action against her employer alleging willful, wanton and reckless negligence, intentional injury and intentional infliction of emotional distress and seeking both compensatory and punitive damages.

The trial court dismissed plaintiff's claim for willful, wanton and reckless negligence because of a lack of subject matter jurisdiction. G.S. 1A-1, Rule 12(b)(1). Plaintiff's remaining claims were dismissed because they failed to state claims on which relief could be granted. G.S. 1A-1, Rule 12(b)(6). Plaintiff appeals.

*Mark A. Michael for the plaintiff-appellant.*

*Smith Helms Mullis & Moore, by H. Landis Wade, Jr. and Elizabeth M. Quattlebaum and Gerdes, Mason, Wilson & Tolbert, by Michael Wilson for the defendant-appellee.*

EAGLES, Judge.

I

[1] Plaintiff first contends that the court erred in dismissing her claim for willful, wanton and reckless negligence. This contention presents the question of whether the North Carolina Workers' Compensation Act represents an employee's exclusive means of recovery for personal injuries resulting from the willful, wanton and reckless negligence of an employer. Following the precedent of *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 340 S.E. 2d 295 (1986), we hold that it is an employee's exclusive remedy.

G.S. 97-10.1 states that:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

The exclusive remedy portion of the statute limits an employee to recovery under the Workers' Compensation Act. Accordingly, an employee must pursue those claims covered by the Act before the North Carolina Industrial Commission.

Because of the limited recovery afforded by the Act, our courts have recognized a few exceptions to its exclusive coverage. When an employer intentionally injures an employee, an independent civil action is available. *Essick v. City of Lexington*, 232 N.C. 200, 60 S.E. 2d 106 (1950). Likewise, an injured employee may maintain a tort action against a co-employee for intentional injury. *Wesley v. Lea*, 252 N.C. 540, 114 S.E. 2d 350 (1960). This court, on the basis of a selection of remedies, denied an employee's right to sue outside the Workers' Compensation Act

to recover for willful, wanton and reckless negligence of a fellow employee. *Freeman v. SCM Corporation*, 66 N.C. App. 341, 311 S.E. 2d 75 (1984). The Supreme Court allowed discretionary review and in a *per curiam* decision made clear that an employee's purported selection of remedies was not the determinative factor in the decision that claimant's only avenue of recovery was the Industrial Commission. *Freeman v. SCM Corporation*, 311 N.C. 294, 316 S.E. 2d 81 (1984). Subsequently, in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E. 2d 244 (1985), the exception for recovery against a co-employee was extended to conduct which is willful, wanton and reckless. *Freeman* precludes an employee who qualifies for workers' compensation from bringing a similar negligence action against an employer.

Most recently, the Supreme Court reaffirmed *Freeman* in *Barrino v. Radiator Specialty Co., supra.* In a split decision, the Court rejected an independent action for the willful, wanton and reckless negligence of an employee and refused the separate action because of the *Freeman* precedent. *Id.* at 510, 340 S.E. 2d at 302. Two justices agreed that the civil action was not available but relied instead on an election of remedies theory. The plaintiff's "election" to receive benefits under the Workers' Compensation Act precluded an independent civil action. *Id.* at 516, 340 S.E. 2d at 309 (Billings, J., concurring). The three remaining justices dissented, disputing that plaintiff did not have an alternative remedy. *Id.* at 517, 340 S.E. 2d at 305 (Martin, J., dissenting).

Plaintiff now contends that the *Barrino* decision permits an election for an employee injured by the willful, wanton and reckless negligence of an employer. Plaintiff argues that the injured worker can choose either the Act's compensation or a civil action. We hold that the *Barrino* decision, when read in context with *Freeman* requires a contrary conclusion.

The *Freeman* decision expressly negated any inference that an employer's willful negligence creates alternative remedies. *Freeman*, 311 N.C. at 296, 316 S.E. 2d at 82. Likewise, *Barrino*, in refusing to overrule *Freeman*, recognized that "[t]he operative fact in establishing exclusiveness is that of actual coverage, not of election to claim compensation in a particular case." *Barrino*, 315 N.C. at 506, 340 S.E. 2d at 300 (quoting 2A Larson, The Law of

Workmen's Compensation, section 65.14 (1984)). Accordingly, when an employee's injury is covered by the Act, the right to bring an independent negligence action against the employer is barred by the existence of the workers' compensation remedy.

Since the Act's coverage extends to injuries resulting from an employer's willful, wanton and reckless negligence, there is no issue regarding an election of remedies in this case. This coverage relegates the plaintiff to the compensation designated by the Act.

Our decision here is controlled by the *Freeman* and *Barrino* precedents. Plaintiff's employment at the time of the rape subjects her to the provisions of the Workers' Compensation Act. Her rights and remedies against defendant employer were determined by the Act and she was required to pursue them before the North Carolina Industrial Commission. *Freeman, supra.* Therefore, the trial court lacked subject matter jurisdiction and properly dismissed this claim.

II

**[2]** Plaintiff also alleges claims based on intentional injury and intentional infliction of emotional distress. By doing so, plaintiff attempts to utilize the intentional conduct exception from the exclusive remedy rule pursuant to the decision in *Essick v. City of Lexington, supra.*

The trial court granted the defendant's Rule 12(b)(6) motion to dismiss these claims for failure to state a claim on which relief can be granted. The scope of review for a Rule 12(b)(6) motion involves a determination of whether the complaint's allegations contain sufficient material to comprise the elements of some claim recognizable in law. *Hendrix v. Hendrix,* 67 N.C. App. 354, 313 S.E. 2d 25 (1984).

Plaintiff first claims intentional injury. By her employer's failure to disclose the history of sexual misconduct associated with the group home, plaintiff claims defendant-employer intentionally misrepresented the danger involved.

Plaintiff's allegations asserting intentional injury do not differ from those used to support her wanton, willful and reckless claim. She cannot change a negligence claim simply by applying an "intentional conduct" label. Plaintiff fails to allege that

Lutheran intended to harm her through its conduct. The failure to allege an actual intent to injure precludes the plaintiff from invoking the exemption for intentional conduct. *See Barrino*, 315 N.C. at 507-08, 340 S.E. 2d at 300. Therefore, the trial court properly dismissed this claim.

Plaintiff also alleges intentional infliction of emotional distress. In *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E. 2d 116 (1986), this court recognized that the Workers' Compensation Act does not bar a claim for intentional infliction of emotional distress. An essential element of this tort requires the plaintiff to prove the intent to cause emotional distress. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). Again, the absence of allegations that Lutheran intended to injure the plaintiff requires dismissal of this claim.

Finally, plaintiff assigns as error the court's dismissal of her claim for punitive damages. Recovery of punitive damages depends on the successful maintenance of one of plaintiff's other claims. Since plaintiff's underlying causes of action were properly dismissed, this claim must also be dismissed.

Claims against an employer for willful, wanton and reckless negligence fall under the coverage of the Workers' Compensation Act. Accordingly, the trial court did not have subject matter jurisdiction of plaintiff's claim and properly dismissed it. Similarly, plaintiff's claims involving intentional conduct were properly dismissed for their failure to state claims on which relief could be granted.

Affirmed.

Chief Judge HEDRICK and Judge PARKER concur.

JO ANN STEPHENS v. ROGER WAYNE HAMRICK

No. 8627DC1251

(Filed 4 August 1987)

1. **Divorce and Alimony § 24; Parent and Child § 10— child support—acceptance of payments under URESA order—enforcement of South Carolina order**

The trial court erred by holding that plaintiff's acceptance of child support payments under a North Carolina URESA order barred her rights under a prior South Carolina child support order. Plaintiff is entitled to bring an action to enforce the South Carolina order, and defendant is entitled to receive credit under N.C.G.S. § 52A-21 for the payments he made under the URESA order.

2. **Divorce and Alimony § 24.4— child support—statute of limitations**

The trial court erred in holding that the enforcement of a child support order entered eighteen years earlier was barred by the statute of limitations. However, pursuant to N.C.G.S. § 1-47, sums which became due more than ten years before plaintiff's complaint was filed may not be recovered in such an action.

3. **Divorce and Alimony § 24.4; Equity § 2.2— child support order—laches inapplicable to enforcement**

The trial court erred in holding that the enforcement of a child support order entered eighteen years earlier was barred by laches since the obligation to furnish support is continuous, and the doctrine of laches does not apply to bar enforcement of a support order.

4. **Constitutional Law § 26.5; Divorce and Alimony § 26.2— foreign child support order—full faith and credit**

The trial court's failure to enforce a South Carolina child support order in an action to recover arrearages due under that order violates the full faith and credit clause of the U.S. Constitution.

APPEAL by plaintiff from *Hamrick, Judge.* Order filed 28 July 1986 in District Court, CLEVELAND County. Heard in the Court of Appeals on 9 April 1987.

*Hamel, Helms, Cannon, Hamel and Pearce by A. Elizabeth Green for plaintiff appellant.*

*Herbert C. Combs, Jr., for defendant appellee.*

COZORT, Judge.

Plaintiff-wife, Jo Ann Stephens, and defendant-husband, Roger Wayne Hamrick, were married in 1963 and subsequently divorced in 1969. There were two children born of the marriage.

The parties lived in South Carolina at the time of their separation, and on 13 April 1968, an order was entered in the Court of Common Pleas of Cherokee County, South Carolina, which provided that the plaintiff would have custody of the two minor children and that the defendant would pay the sum of $40 per week as child support. Thereafter, the plaintiff moved to Florida and defendant moved to Cleveland County in North Carolina.

In the fall of 1968, plaintiff initiated an action for child support under the Uniform Reciprocal Enforcement of Support Act (hereinafter "URESA") in the State of Florida. As a result, an order was entered on or about 15 November 1968 in Cleveland County directing defendant to pay $75 per month child support. Defendant has substantially complied with the URESA order. On 19 February 1986, the plaintiff registered in Mecklenburg County, North Carolina, the 1968 South Carolina support order directing $40 per week child support payments. Plaintiff then sought to collect the deficiency between what the defendant paid under the Cleveland County order of November 1968, the URESA order, and what he would have paid had he complied with the April 1968 order from the court in South Carolina. Plaintiff's complaint claimed arrearages of at least $18,825. Upon defendant's motion, the action was transferred to Cleveland County. The District Court of Cleveland County dismissed the action, concluding that enforcement of the South Carolina order was barred by the statute of limitations, that the defendant has been prejudiced by the plaintiff's delay in asserting rights to support under the 1968 South Carolina order, and that the plaintiff has acquiesced in the defendant's paying under the North Carolina URESA order of 1968 for eighteen years and has abandoned any rights to enforce the South Carolina order.

On appeal, the plaintiff contends that the trial court erred in holding that by accepting payments under the 1968 North Carolina URESA order, the plaintiff had abandoned her rights to child support under the prior South Carolina support order. The plaintiff also contends that the trial court erred in holding that the enforcement of the child support order is barred by laches and by the statute of limitations. The plaintiff's final contention is that the trial court's failure to enforce the South Carolina order violates the full faith and credit clause of the United States Con-

stitution. We agree with plaintiff and reverse the dismissal of the action.

[1] We first consider plaintiff's contention that the trial court erred by holding that by accepting payments under a North Carolina URESA order, plaintiff had abandoned her rights to child support payments awarded under a prior South Carolina support order.

The Uniform Reciprocal Enforcement of Support Act (N.C. G.S. § 52A-1, *et seq.*) states clearly that "[t]he remedies herein provided are in addition to and not in substitution for any other remedies." N.C.G.S. § 52A-4. In N.C.G.S. § 52A-21 we find:

> A support order made by a court of this State pursuant to this Chapter does not nullify and is not nullified by a support order made by a court of this State pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law regardless of priority of issuance, unless otherwise specifically provided by the court. Amounts paid for a particular period pursuant to any support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this State.

In *County of Stanislaus v. Ross*, 41 N.C. App. 518, 522, 255 S.E. 2d 229, 231 (1979), this Court stated, through Judge Mitchell:

> The legislature apparently intended that its enactment of G.S. 52A-21 . . . would provide authority to the courts of this State to apply the Uniform Reciprocal Enforcement of Support Act so as to provide for the support of a minor child independent of and without regard for any other support judgments . . . . [W]e find this view consistent with the legislative intent that the remedies provided by the act be "in addition to and not in substitution for any other remedies" and that the act "be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states having a substantially similar act." G.S. 52A-4; G.S. 52A-32.

Thus, it is clear that the trial court erred by concluding that plaintiff's acceptance of payments under the URESA order barred

her rights under the South Carolina order. The plaintiff is entitled to bring an action to enforce the South Carolina order, with the limitations we shall discuss below, and the defendant is entitled to receive credit, under N.C.G.S. § 52A-21, for the payments he made under the URESA order.

**[2]** We likewise agree with plaintiffs that the trial court erred in holding that the enforcement of the child support order is barred by laches and by the statute of limitations.

In *Streeter v. Streeter*, 33 N.C. App. 679, 682, 236 S.E. 2d 185, 187 (1977), the court stated:

> " 'There is no express statute of limitations in North Carolina relating to the commencement of actions for alimony or support. Since the obligation of the husband to furnish support to his wife and minor children is a continuing one, it would seem that a mere lapse of time alone should not be a bar to the commencement of the action.' [Citation omitted.]"

However, sums which become due more than 10 years before the filing of the complaint are barred by the 10-year provision of N.C.G.S. § 1-47 from being included when determining arrearages. *Lindsey v. Lindsey*, 34 N.C. App. 201, 203, 237 S.E. 2d 561, 563 (1977). Therefore, it was error for the trial court to hold that enforcement of the child support order was barred. The statute of limitations does not apply except for the 10-year provision of N.C.G.S. § 1-47. There is no bar to the plaintiff's recovery of the deficiency occurring in the 10 years immediately prior to the filing of the order.

**[3]** The trial court also erred in holding that the enforcement of the child support order is barred by laches. As stated by the court in *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 271, 192 S.E. 2d 449, 456 (1972), "[l]aches is the negligent omission for an unreasonable time to assert a right enforceable in equity." In the majority of cases in which questions involving the doctrine of laches have been considered, the defense of laches has not been accepted as sufficient. 2 Lee, N.C. Family Law § 164 (1980). No North Carolina case has been found wherein laches has been allowed as a defense to the enforcement of a court order for alimony or support. *Id.* Since the obligation to furnish support is continuous, a lapse of time will not be a bar to the commencement

of an enforcement action. *Streeter*, 33 N.C. App. at 682, 236 S.E. 2d at 187. Therefore, the doctrine of laches does not apply to bar enforcement of the support order, and it was error for the trial court to so hold.

**[4]** The plaintiff's final argument is that the trial court's failure to enforce the South Carolina order violates the full faith and credit clause of the United States Constitution. Again, we agree.

> The full faith and credit clause in the United States Constitution, Article IV, Sec. 1, requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered. [Citation omitted.] A decree for the future payment of alimony or child support is, as to installments past due and unpaid, within the protection of the full faith and credit clause of the Constitution unless by the law of the state in which the decree was rendered its enforcement is so completely within the discretion of the courts in that state that they may annul or modify the decree as to overdue and unsatisfied installments. [Citations omitted.]

*Fleming v. Fleming*, 49 N.C. App. 345, 349-50, 271 S.E. 2d 584, 587 (1980). Nothing appears in the record below to invoke the exception expressed in *Fleming*. The South Carolina order was entitled to full faith and credit under the United States Constitution.

In summary, we hold that the trial court erred by dismissing the plaintiff's action. The plaintiff is entitled to enforce the 1968 order from South Carolina and to seek arrearages accruing thereon within the 10 years allowed under N.C.G.S. § 1-47. The defendant is entitled to receive credit against the arrearages for payments made under the URESA order. The order is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges PHILLIPS and GREENE concur.

ROY L. KIRKMAN AND WIFE, LULA B. KIRKMAN, CLINTON (NMI) KIRKMAN AND WIFE, ANN LYVONNE KIRKMAN, AND JAMES E. KIRKMAN (UNMARRIED), PLAINTIFFS v. ADDIE WILSON (WIDOW), ZENO M. EVERETTE, JR. AND WIFE, CAROL H. EVERETTE, ERNEST F. BOYD AND WIFE, SYBIL E. BOYD, BRENDA H. MANNING, LOUIS EARL TOLER AND WIFE, JOYCE D. TOLER, LINWOOD EARL BRAXTON AND WIFE, EARLINE BRAXTON, ELVIRA JOHNSON (WIDOW), RICHARD D. JEWELL AND WIFE, PATSY JOHNSON JEWELL, AND MARIE H. WISE (WIDOW), DEFENDANTS

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ERNEST F. BOYD AND WIFE, SYBIL E. BOYD, BRENDA H. MANNING, LOUIS EARL TOLER AND WIFE, JOYCE D. TOLER, LINWOOD EARL BRAXTON AND WIFE, EARLINE BRAXTON, ELVIRA JOHNSON (WIDOW), AND RICHARD D. JEWELL AND WIFE, PATSY JOHNSON JEWELL, THIRD PARTY PLAINTIFFS v. J. L. WILSON AND WIFE, ADDIE WILSON, CORA LEE BAILEY AND HUSBAND, DENNIS BAILEY, JIMMY MORRIS AND WIFE, JANICE MARLENE MORRIS, DORIS EVELYN SADLER AND HUSBAND, CLEM M. SADLER, BRITT ANNIE WARREN AND HUSBAND, JAMES W. WARREN, DORA LEE SUMRELL AND HUSBAND, WILLIAM H. SUMRELL, STEPHEN KITE AND WIFE, JULIA LAURA KITE, GUY C. FORNES AND WIFE, LENA FRANCES FORNES, JAMES S. DIXON AND WIFE, AMANDA DIXON, CLAUDIS DIXON AND WIFE, ADA MAE DIXON, OFFICE OF THE CLERK OF THE SUPERIOR COURT OF CRAVEN COUNTY, NORTH CAROLINA AND CRAVEN COUNTY, NORTH CAROLINA, BY AND THROUGH ITS BOARD OF COMMISSIONERS, THIRD PARTY DEFENDANTS

AND

DORIS EVELYN (SADLER) FORREST, DORA LEE SUMRELL AND HUSBAND, WILLIAM H. SUMRELL AND BRITT ANNIE WARREN, ADDITIONAL THIRD PARTY PLAINTIFFS v. CRAVEN COUNTY AND FIREMAN'S FUND INSURANCE COMPANIES, ADDITIONAL THIRD PARTY DEFENDANTS

No. 873SC10

(Filed 4 August 1987)

**Appeal and Error § 6.2— remainder interest in land—Marketable Title Act—motion to dismiss plaintiffs' claim denied—appeal premature**

*Defendants' appeal from the denial of their motion to dismiss plaintiffs' action for a judgment declaring them to be fee simple owners of tracts of land which defendants occupied was properly dismissed as interlocutory.*

APPEAL by defendants Zeno M. Everette, Jr. and Carol H. Everette from *Reid, Judge.* Order entered 30 September 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 3 June 1987.

On 22 January 1985 plaintiffs filed this action for a judgment declaring that they are the fee simple owners of, and are entitled to possess, certain tracts of Craven County land that various of the defendants now occupy and claim to own. In their answer the appealing defendants Zeno M. Everette, Jr. and wife, Carol H. Everette, denied plaintiffs' material allegations and asserted four separate and distinct affirmative defenses—the North Carolina Real Property Marketable Title Act, estoppel, record title and adverse possession. Defendants also moved to dismiss the action on the stock ground that the complaint failed to state a claim for which relief could be granted. When the motion was heard, after the parties stipulated that it could be treated as a motion for summary judgment, the court denied it. The evidence presented at the hearing consisted of the will of A. E. Kirkman, both as executed and recorded, the deeds in the defendants' chain of title, and various facts stipulated to by the parties. In pertinent part the evidence tended to establish the following:

In 1941 A. E. Kirkman died. By the terms of his will, duly probated, all his real estate was left to his son, Gussie C. Kirkman "to have and to use during his life time, with out the right or privilige (sic) to sell or convey the said relstate (sic) in any form or manner, and at the death of my son, the aforesaid G. C. Kirkman, it is my will and I so direct, that the aforesaid relstate (sic) shall be left to the legal children of my son, the aforesaid G. C. Kirkman." The original will, providing as above, is filed in the Office of the Clerk of Superior Court of Craven County; but in recording the will in the Will Book the Clerk's staff miswrote the foregoing provision to incorrectly state that the real estate went to Gussie C. Kirkman to have and use during his lifetime *with* the right to sell or convey "in any form or manner, and at the death of my son [Gussie] it is my will and I so direct that the aforesaid real estate shall be left to the legal children of my son, the aforesaid G. C. Kirkman." Between January, 1947 and October, 1949 Gussie C. Kirkman, joined by his wife, Sabrah L. Kirkman, purported to convey all the real estate willed to him by warranty deeds in fee simple. Each defendant is in possession of some of the land formerly owned by A. E. Kirkman and claims title as a result of direct or mesne conveyances from G. C. Kirkman and wife, Sabrah L. Kirkman. On 13 November 1982 G. C. Kirkman died leaving three sons, Roy L. Kirkman, Clinton Kirkman and James E. Kirkman who, in bringing this action, alleged superior title to the lands by virtue of the remainder interest devised to

them by the will of A. E. Kirkman. The defendants Everette acquired the property on which they now live by a general warranty deed on 15 May 1978 from W. H. Gurkin, Jr. and wife, Carthene Gurkin; the Gurkins acquired the property on 31 May 1956 by a general warranty deed from G. L. Wilson and wife, Addie Wilson; and the Wilsons acquired the property on 7 October 1949 by a general warranty deed from Gussie C. Kirkman and wife, Sabrah L. Kirkman. The plaintiffs' claims against the other defendants are the same as against the appealing defendants but involve different tracts of land acquired by different deeds and conveyances on different dates. Following the hearing on defendants' motion the trial court entered an order finding that the motion was "based upon the application of Chapter 47B of the North Carolina General Statutes, better known as the Marketable Title Act; and further, that there is no precedence established in this State for an act such as the Marketable Title Act to extinguish the rights of vested remaindermen who do not have the actual right to possession of property" and denied the motion. Upon defendants' further motion to amend the order, the court modified the order under the purported authority of Rule 54, N.C. Rules of Civil Procedure, "to state that this is a final Judgment as to one or more but fewer than all of the claims or parties and there is no just reason for delay."

*Ward and Smith, by J. Randall Hiner and Leigh A. Allred, for plaintiff appellees.*

*Leboeuf, Lamb, Leiby & MacRae, by Jane Flowers Finch and Albert D. Barnes, for defendant appellants.*

PHILLIPS, Judge.

This appeal is not authorized and we dismiss it. It is from an interlocutory order denying a motion to dismiss plaintiffs' action and a substantial right is not affected. *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976). That the trial judge amended the order to state that it is a "final Judgment" did not change its nature, *Tridyn Industries, Inc. v. American Mutual Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979), and make appealable what is clearly not appealable under the provisions of G.S. 1-277 and G.S. 7A-27. *Fraser v. DiSanti*, 75 N.C. App. 654, 331 S.E. 2d 217, *disc. rev. denied*, 315 N.C. 183, 337

S.E. 2d 856 (1985). Furthermore, in denying defendants' motion to dismiss no determination was made that is subject to appellate review. Contrary to defendants' impression, the trial court did not strike the defense based upon the Marketable Title Act; it merely observed that there is no precedent for defendants' claim that their unbroken chain of record title to the land for more than 30 years rendered unenforceable plaintiffs' claims as remaindermen under the will of A. E. Kirkman. This observation does not prevent defendants from continuing to assert the Marketable Title Act in their defense. But even if it did, other issues in the case would still remain to be tried, as the defendants pled three other defenses, any of which, from ought we know, might control the case. The amendment to the order undertaking to authorize defendants' immediate appeal is not sanctioned by Rule 54(b), N.C. Rules of Civil Procedure—which by its terms is limited to instances where less than all the claims made in a case are finally adjudicated. Too, while Rule 54(b) makes it possible to appeal before an entire case has been adjudicated, it does not authorize the appeal of claims that have not been finally adjudicated. Though the contentions of the parties concerning the applicability of the Marketable Title Act are interesting, under the record no question concerning that Act is properly before us, and we will not anticipate such a question and determine it.

Appeal dismissed.

Chief Judge HEDRICK and Judge ORR concur.

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FREDERICK BYRD v. DR. RICHARD P. HANCOCK

No. 8611SC1317

(Filed 4 August 1987)

**1. Physicians, Surgeons and Allied Professions § 13— medical malpractice—statute of limitations—last act of defendant—earlier acts of defendant**

Where plaintiff instituted an action against defendant doctor on 22 August 1985 for setting his broken leg improperly on 6 May 1982 and for failing to detect the deformity when defendant X-rayed his leg and discharged him on 25 August 1982, the trial court erred in ruling that any claim for acts or omissions which occurred more than three years before the action was com-

menced was barred by N.C.G.S. § 1-15(c) since plaintiff's claim accrued on 25 August 1982 when the last act of the defendant giving rise to the cause of action occurred, and, having commenced his action within three years of that date, plaintiff could properly rely on acts or omissions that occurred earlier so that none of his claim was barred by the statute of limitations.

2. **Physicians, Surgeons and Allied Professions § 15.2— medical malpractice— physician's affidavit—familiarity with standards in county unnecessary**

A physician's affidavit was not improperly considered by the trial court in ruling on defendant's motion for summary judgment in a medical malpractice case because no evidence was presented to show that the affiant was familiar with the standards of medical practice in Harnett County since defendant's forecast of proof did not call into question either the propriety of defendant's treatment of plaintiff or the medical standards of Harnett County, and since the knowledge of local medical practices was not a prerequisite to the admission of an experienced physician's opinion about a medical record he has studied or the efficacy of a medical procedure with which he is familiar.

APPEAL by plaintiff and defendant from *Barnette, Judge*. Order entered 11 September 1986 in Superior Court, HARNETT County. Heard in the Court of Appeals 12 May 1987.

Plaintiff appeals and defendant cross appeals from a partial summary judgment in favor of defendant doctor, who plaintiff sued on 22 August 1985 for setting his broken leg improperly and for failing to detect and correct the deformity. The complaint alleges that plaintiff was under defendant's care from 6 May 1982, the day the leg was injured, until 25 August 1982 when defendant advised him the fractures were healed and discharged him. Defendant denied the material allegations in the complaint and pleaded in defense that the action was barred by the applicable statute of limitations.

Defendant's motion for summary judgment was supported by his own affidavit, to the following effect: Defendant began treating plaintiff immediately following the fracture of both bones of the left leg; he put a cast on the leg and treated plaintiff in the hospital until 12 May 1982; on 16 June 1982 he removed the cast, noting that an ulcer had developed on the left heel, and took X-rays which indicated that the fractures had not fully healed; on 24 June 1982 defendant considered recasting the leg, but decided against it, and after examining plaintiff instructed him to return on 2 July 1982; that appointment was not kept by plaintiff and defendant next saw him on 25 August 1982 in the hospital emergency room when plaintiff came in without an appointment com-

plaining of pain in his heel. At that time defendant examined and took X-rays only of the heel; plaintiff did not complain about the fracture and "there was no evidence of any rotational deformity"; no medical treatment of the leg was rendered; in defendant's opinion no medical treatment that could have affected the result of the prior treatment could have been begun at that time. Attached to the affidavit, according to defendant, were all of plaintiff's medical records which show, among other things, that plaintiff's injured leg was X-rayed on 11 May 1982, 16 June 1982 and 25 August 1982 and that the August 25 X-rays were interpreted by the hospital radiologist as showing that the healing of the fractured bones was incomplete.

Plaintiff's response to defendant's affidavit consisted mostly of his own affidavit and that of Dr. Barry Jacobs, a Maryland physician specializing in general surgery with some claimed expertise in orthopedics and emergency room medicine. In his affidavit plaintiff stated, in pertinent part, that he was under defendant's care until 25 August 1982 when defendant X-rayed his leg and discharged him, and that sometime subsequent thereto he ascertained that the fractured bones in his leg had grown back in an improper position. By his affidavit Dr. Jacobs stated in substance that: After reviewing all of plaintiff's X-rays and hospital records he was of the opinion that all the X-rays taken during the healing period showed an excessive, unacceptable degree of angulation of one of the fractured leg bones; the same degree of angulation as before was shown by the 25 August 1982 X-ray; if defendant had begun special orthopedic casting and bracing on 25 August 1982 when the last X-rays were taken it probably would have corrected the deformity; the need for special orthopedic casting or corrective surgery was "evident in the X-rays of August 25, 1982 and previous"; on 25 August 1982 plaintiff was still in a convalescent healing period and obviously in no condition to be discharged from the care of his physician; according to the records plaintiff continued as defendant's patient through 25 August 1982.

*Bryan, Jones, Johnson & Snow, by Robert C. Bryan, for plaintiff appellant-appellee.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James G. Billings and Susan M. Parker, for defendant appellee-appellant.*

PHILLIPS, Judge.

[1] In ordering partial summary judgment for defendant the trial judge ruled that "any claim for any acts or omissions which occurred prior to 22 August 1982" (three years before suit was filed) is barred by G.S. 1-15(c). The ruling is erroneous. G.S. 1-15(c) provides that except where otherwise provided by statute, the statute of limitations for medical malpractice actions is three years and the cause of action is deemed "*to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action.*" (Emphasis supplied.) According to plaintiff's evidence the last act of the defendant giving rise to the cause of action occurred on 25 August 1982 when defendant failed to note from the X-rays taken that day that the fractured bones of plaintiff's leg were healing in an improper position and failed to take steps to correct the deformity that developed; and having instituted suit within three years of that day he is not barred from relying upon acts or omissions that occurred before then, since under the terms of the statute his cause of action accrued on that day, rather than earlier. In view of the evidence that he examined and X-rayed plaintiff's leg on 25 August 1982, defendant's argument that plaintiff's failure to keep the 2 July 1982 appointment terminated the physician-patient relationship as a matter of law is unavailing. For that matter defendant's own affidavit, even though it contains a denial to the contrary, indicates that he examined plaintiff's injured leg on 25 August 1982; for in it he states as a fact, which if true could only have been ascertained by examining the leg, that on that day there was no "evidence of rotational deformity." In any event, viewing this and the other evidence presented in the light most favorable for the non-movant plaintiff, as our law requires, *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974), it is quite clear that no part of plaintiff's claim is barred as a matter of law and that when defendant last treated plaintiff's injured leg, what its condition then was, and whether it could have been corrected are issues of fact for a jury to determine. Since no part of plaintiff's action is barred by the statute of limitations, it necessarily follows that defendant's cross appeal from the court's failure to dismiss plaintiff's entire claim on that ground has no merit, and we overrule it.

[2] In cross appealing defendant also brought forward an assignment of error contending that the court erred in considering the

affidavit of Dr. Jacobs. This assignment is broadside not in compliance with the provisions of Rule 10(c), N.C. Rules of Appellate Procedure, because it does not state the legal basis for the error alleged. Though the assignment raises no question for appellate review, the argument made to support it is so singularly fallacious we chose to discuss it. The argument, vigorously and extensively made, is that the affidavit was improperly considered because no evidence was presented to show that Dr. Jacobs is familiar with the standards of medical practice in Harnett County; an argument clearly irrelevant to the issues raised at the hearing on defendant's motion for summary judgment. At that hearing the only issues defendant addressed by his evidence were the statute of limitations, the date when defendant last did anything or failed to do anything in regard to plaintiff's injured leg, and whether at that time the deformity that developed was correctable. Since defendant's forecast of proof did not call into question either the propriety of defendant's treatment of plaintiff or the medical standards of Harnett County, plaintiff was not obliged to make any showing whatever with respect to these matters. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). Furthermore, Dr. Jacobs' affidavit did not concern the standards of medical practice in Harnett County. It concerned only the condition of plaintiff's leg as revealed by the X-rays and medical records and the efficacy of an universally known procedure in correcting tibial and fibular fractures that heal with excessive angulation. The condition of a fractured bone, as shown by X-rays and medical records, and its effective treatment is not a matter that is within the idiosyncratic province of local practitioners; it is a medical matter within the competence of any physician that is educated and experienced in that field, as Dr. Jacobs' affidavit indicates that he is. Certainly, it is not the law, as defendant seemingly argues, that knowledge of local medical practices is a prerequisite to a medically educated, experienced physician expressing an opinion about a medical record that he has studied or the efficacy of a medical procedure that he is familiar with.

As to plaintiff's appeal—reversed.

As to defendant's cross appeal—affirmed.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. JEFF MAYES

No. 8627SC1346

(Filed 18 August 1987)

1. **Obscenity § 2— dissemination of obscenity—"community" not defined—statute not unconstitutional**

Neither N.C.G.S. § 14-190.1, the statute prohibiting dissemination of obscenity, nor the trial judge's instructions contravened the U. S. Constitution by failing to specify what was meant by the "community" whose standards should be used in determining whether the material in question was obscene.

2. **Obscenity § 2— dissemination of obscenity—no uniform statewide standard of obscenity**

Permitting jurors to apply the standards of the community from which they came, rather than requiring the application of a uniform statewide standard of obscenity, does not violate the equal protection clause of the N. C. Constitution. Art. I, § 19 of the N. C. Constitution.

3. **Obscenity § 3— dissemination of obscenity—exclusion of testimony—no error**

In a prosecution of defendant for intentional dissemination of obscenity, the trial court did not err in excluding: (1) testimony by a witness concerning results of a statewide survey he conducted for the defense, since the testimony excluded had no relevance to what the community considered obscene; (2) testimony by a speech communications professor as to whether the materials at issue were obscene, since the questions put to the witness were not premised upon his knowledge of contemporary community standards; and (3) testimony by a private investigator as to the availability of similar material in the community, since availability means nothing more than that other people are engaged in similar activities and is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance.

4. **Obscenity § 3— dissemination of obscenity—guilty knowledge—sufficiency of evidence**

In a prosecution of defendant for intentional dissemination of obscenity, evidence of defendant's guilty knowledge was sufficient to be submitted to the jury where there was evidence that defendant told a plainclothes law enforcement officer that the materials for sale in the bookstore were illegal, and there was testimony tending to show that defendant was the store manager.

5. **Obscenity § 3— dissemination of obscenity—intent and guilty knowledge—instructions proper**

In a prosecution of defendant for intentional dissemination of obscenity, the trial court properly instructed the jury on the issue of defendant's intent and guilty knowledge where the court instructed the jurors that, to convict defendant, they must find beyond a reasonable doubt that he intentionally disseminated material which, when viewed in its entirety, was obscene, and the court further instructed that the State bore the burden of proving beyond

a reasonable doubt that defendant "knew the content, character and nature of the magazines as a whole which he sold. . . ."

Judge BECTON concurring in part and dissenting in part.

APPEAL by defendant from *Owens, Judge.* Judgment entered 21 August 1986 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 11 June 1987.

Defendant was charged with two counts of intentional dissemination of obscenity in violation of G.S. 14-190.1. At trial, the State presented evidence tending to show that on 1 October 1985, Sergeant Ralph McKinney of the Cleveland County Sheriff's Department went to the Shelby Three Adult Bookstore on Highway 74 west of Shelby in Cleveland County. Sgt. McKinney was dressed in plain clothes. As he approached the door of the bookstore, he was met by defendant, who asked Sgt. McKinney if he was a "cop." Sgt. McKinney responded by asking "if I looked like a cop." Defendant remarked that he had been expecting the police all day. Sgt. McKinney asked, "You mean this stuff is illegal now?" Defendant responded, "Under the new law, it is."

Sgt. McKinney followed defendant into the bookstore and then browsed for about twenty minutes. He selected two magazines, took them to the cash register, and placed them upon the counter. Defendant rang up the sale and Sgt. McKinney paid him for the magazines.

The State introduced both magazines into evidence. One magazine, entitled "Express—The Pursuit of Pleasure," contains erotic stories, reviews of various erotic magazines and video tapes, interviews, advertisements, and many graphic and explicit photographs of nude and partially clad men and women engaged in various sexual acts, including vaginal intercourse, anal intercourse, fellatio, cunnilingus, masturbation, group sex and bondage. The other magazine, entitled "Cockscrew," consists solely of graphic and explicit photographs of two males, sometimes nude and sometimes partially clad, engaging in fellatio, anal intercourse, and masturbation, with a tenuous and scant storyline running throughout.

Defendant did not testify. Dr. Charles Winick, a psychologist called as a defense witness, testified that, in his opinion, the magazines appealed to a normal interest in sex, rather than a pru-

rient interest, and had serious artistic and scientific merit. Upon the State's objection, the trial court excluded the testimony of a private investigator as to the availability of similar materials in Cleveland County and adjoining counties, and the testimony of an expert witness in the field of communication as to whether the magazines fell within the statutory definition of obscenity.

Defendant was convicted of both counts by the jury and judgment was entered upon the verdicts. Defendant appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.*

*Lipsitz, Green, Fahringer, Roll, Schuller & James, by Stanley J. Sliwa and Herbert L. Greenman; and James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr., for defendant-appellant.*

MARTIN, Judge.

Defendant contends that his convictions must be set aside for several reasons. First of all, he contends that his conviction is constitutionally invalid because the jury was not required to apply a statewide contemporary community standard in determining whether the materials at issue in this case were obscene. He also assigns error to the exclusion of: (1) evidence as to the availability of similar materials in the community; (2) evidence as to the results of a public opinion survey; and (3) expert opinion testimony upon the issue of the obscenity of the materials. In addition, he challenges the sufficiency of the State's evidence, assigns error to portions of the trial court's instructions to the jury, and contests the constitutionality of G.S. 14-190.1 on a number of grounds. For the following reasons, we hold that defendant received a fair trial, free of prejudicial error.

We begin our analysis by stating that which is firmly established: obscene material receives no protection under the First Amendment to the United States Constitution. *Miller v. California,* 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607, *reh'g denied,* 414 U.S. 881, 38 L.Ed. 2d 128, 94 S.Ct. 26 (1973); *Roth v. United States,* 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304, *reh'g denied,* 355 U.S. 852, 2 L.Ed. 2d 60, 78 S.Ct. 8 (1957). "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 86 L.Ed. 2d 1031, 1035, 62 S.Ct. 766, 769 (1942). States, therefore, are free to enact criminal statutes prohibiting the dissemination of obscene material, provided that specified guidelines are followed so that protected speech is not also prohibited. *See Miller, supra.*

**[1]** By his first assignment of error, defendant contends that G.S. 14-190.1 is constitutionally infirm because it does not require the jury to apply statewide community standards in determining whether materials are obscene. He also contends that his conviction is invalid because the trial court failed to instruct the jury to apply a statewide standard or to define for the jury the relevant community whose standards were to be applied. We reject his contentions.

G.S. 14-190.1(b) provides that material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

G.S. 14-190.1(c) defines sexual conduct as:

(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

The language used in this statute closely follows the three-pronged test set forth by the United States Supreme Court in *Miller v. California, supra:*

> 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. As recently as the present term, the Supreme Court has reemphasized that contemporary community standards are to be applied to the first two prongs, while the third prong is to be examined according to the reasonable person standard. *See Pope v. Illinois*, 481 U.S. ---, 95 L.Ed. 2d 439, 107 S.Ct. 1918 (1987).

In *Miller*, the Court held that the use of national standards to determine whether material is obscene is not a constitutional requirement, and that states could properly employ statewide contemporary community standards. *Miller*, however, does not *require* the use of statewide standards. In *Jenkins v. Georgia*, 418 U.S. 153, 41 L.Ed. 2d 642, 94 S.Ct. 2750 (1974), the trial court instructed the jury to apply "community standards" without defining the geographical limits of "community." The Supreme Court approved the instructions, stating that:

> *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification . . . or it may choose to define the standards in

> more precise geographic terms, as was done by California in *Miller.*

*Id.* at 157, 41 L.Ed. 2d at 648, 94 S.Ct. at 2753. *See also Hamling v. United States*, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887, *reh'g denied,* 419 U.S. 885, 42 L.Ed. 2d 129, 95 S.Ct. 157 (1974). Our General Assembly chose not to define "community" in precise geographic terms when it enacted G.S. 14-190.1. In the absence of a precise statutory specification of "community," the trial judge properly declined to judicially restrict or expand that term, permitting the jurors to apply the standards of the community from which they came in much the same manner as they would determine "the propensities of a 'reasonable' person in other areas of the law." *Id.* at 104-105, 41 L.Ed. 2d at 613, 94 S.Ct. at 2901. Accordingly, we hold that neither G.S. 14-190.1 nor the judge's instructions in this case contravene the Constitution of the United States by failing to specify what is meant by "community."

**[2]** Defendant argues, however, that the use of a statewide standard is required by Article I, § 19 of the Constitution of North Carolina, which provides in part that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges . . . or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied equal protection of the laws. . . ." Defendant argues that use of any standard smaller than a statewide one is impermissible because such a standard would make it illegal in some parts of this State to do that which is legal in other parts of the State.

G.S. 14-190.1 makes it a criminal offense in North Carolina to disseminate obscenity. This is so throughout the State. It is true that the application of standards of a community smaller than statewide may result in the possibility that material considered obscene in some areas of the State will not be considered obscene in other areas. This possibility does not, however, render the statute unconstitutional. In *Miller, supra,* the Supreme Court held that the federal Constitution does not require materials to be judged in the light of hypothetical national standards, saying that it is unrealistic and not constitutionally required that "the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.* at 32, 37 L.Ed. 2d at 435, 93 S.Ct. at 2619. In *Hamling, supra,* the Court held that a

juror sitting in obscenity cases is permitted "to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Id.* at 105, 41 L.Ed. 2d at 613, 94 S.Ct. at 2901.

> The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.

*Id.* at 106, 41 L.Ed. 2d at 614, 94 S.Ct. at 2902. In *Jenkins, supra,* the Court held that in state obscenity cases, jurors need not be instructed "to apply the standards of a hypothetical statewide community." *Id.* at 157, 41 L.Ed. 2d at 648, 94 S.Ct. at 2753.

We believe that the reasoning of the United States Supreme Court is applicable as well to the "equal protection of the laws" clause of our State Constitution. Ours is a large and diverse State, and it is unrealistic to expect to find that the same standards exist throughout the State or that the residents of one part of the State would have knowledge of the community standards held in another area. Thus we hold that permitting jurors to apply the standards of the community from which they come, rather than requiring the application of a uniform statewide standard of obscenity, does not violate the equal protection clause of the North Carolina Constitution.

**[3]** Defendant next argues that the trial court erred by preventing the jury from hearing certain proffered evidence. Specifically, defendant assigns error to the exclusion of testimony by Dr. Charles Winick, a psychologist, sex therapist, and public opinion researcher, concerning the results of a statewide survey which he conducted for the defense; the exclusion of opinion testimony by Dr. Terry Cole, a speech communications professor at Appalachian State University, as to whether the materials at issue in this case were obscene; and the exclusion of testimony by private investigator Jan Frankowitz as to the availability of similar material in the community. We hold that the trial court committed no error prejudicial to defendant by excluding the testimony of either expert witness nor of Ms. Frankowitz.

The United States Supreme Court has held that there is no constitutional need for expert testimony that the subject materials are obscene once the materials have been placed in evidence, as the materials themselves are the best evidence of what they represent. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 37 L.Ed. 2d 446, 93 S.Ct. 2628, *reh'g denied,* 414 U.S. 881, 38 L.Ed. 2d 128, 94 S.Ct. 27 (1973). The defense is free, however, to introduce expert testimony as to the obscenity of the materials. *Kaplan v. California,* 413 U.S. 115, 37 L.Ed. 2d 492, 93 S.Ct. 2680, *reh'g denied,* 414 U.S. 883, 38 L.Ed. 2d 131, 94 S.Ct. 28 (1973). 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, 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 G.S. 8C-1, Rule 702, "the test of admissibility is helpfulness." Brandis, *North Carolina Evidence* § 132 (Cum. Supp. 1986). As explained 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. 7 J. Wigmore, *Evidence* Sec. 1923 at 29 (Chadbourn rev. 1978). Applying this test requires balancing the probative value of the testimony against its potential for prejudice, confusion or undue delay." *Id.* at 495, 337 S.E. 2d at 156.

Defendant first argues that the trial court erred by preventing Dr. Winick from testifying as to results of a survey he conducted in North Carolina. That survey, conducted among 400 adults in 41 counties, contained the following questions pertinent to defendant's argument:

> 2. In your opinion, have standards changed in recent years, so that depictions of nudity and sex are more acceptable or less acceptable in movies, video cassettes, publications, and other materials depicting nudity and sex and available only to adults, but not to children?
>
> 3. Do you agree or disagree that adults who want to, have the right to obtain and see movies, video cassettes, publications and other materials depicting nudity and sex and which are available only to adults, but not to children?

> 4. Do you agree or disagree that adults who want to, have the right to patronize and make purchases at bookstores where publications and other materials depicting nudity and sex are available only to adults, but not to children?
>
> 5. Do you agree or disagree that adults that want to, have the right to patronize theatres where movies presenting nudity and sex are available only to adults, but not to children?
>
> 6. Do you think it is alright or not alright, for adults who wish to do so, to obtain and see in the privacy of their homes, movies, video cassettes, publications and other materials depicting nudity and sex, which are available only to adults and not to children?
>
> 7. We have used the words nudity and sex in the preceding questions. What we mean by these words includes exposure of the genitals and every kind of sexual activity, no matter how graphically depicted. Is that what you understood we meant, or did you think we meant something else?

After conducting a *voir dire*, the court permitted Dr. Winick to testify concerning the responses to questions 2 and 7 of the survey but excluded any testimony relating to questions 3 through 6. Defendant argues that this exclusion was improper because it removed from the jury's consideration information which would have been valuable in assisting it in determining community standards. We find no error in the trial court's ruling.

The questions excluded by the court have absolutely no relevance to what the community considers obscene. Questions 3, 4 and 5 are general opinion questions as to what adults "have the right" to obtain and view; they have little, if any, probative value on the issue of whether "the average person applying contemporary community standards" would find that the subject magazines are patently offensive or appeal to the prurient interest in sex. We agree with the analysis of the Georgia Court of Appeals in *Flynt v. State*, 153 Ga. App. 232, 264 S.E. 2d 669, *cert. denied*, 449 U.S. 888, 66 L.Ed. 2d 114, 101 S.Ct. 245 (1980):

> One may be of the opinion that adults have the right to obtain and view materials depicting "nudity and sex" although they would themselves regard the material as exceeding the

> bounds of "contemporary community standards" and as patently offensive. The survey asked no more than whether the respondents objected to the dissemination of materials depicting nudity and sex to willing adults, not whether they regarded material such as that depicted in appellant's magazines as obscene in themselves.

*Id.* at 233, 264 S.E. 2d at 672.

Similarly, question 6 did not address the issue of the obscenity of any material, but only the question of whether adults had a right to view, in the privacy of their homes, materials depicting nudity and sex. However, G.S. 14-190.1 prohibits only the intentional dissemination of obscenity, not the private possession thereof. The First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Stanley v. Georgia,* 394 U.S. 557, 22 L.Ed. 2d 542, 89 S.Ct. 1243 (1969). Therefore, this question has no probative value regarding the question of contemporary community standards, or even regarding the crime with which defendant was charged. We find no abuse of discretion by the trial court in excluding evidence of these survey questions.

Defendant also assigns error to the court's exclusion of expert testimony by Dr. Terry Cole as to whether in his opinion, the magazines in question depict sexual conduct in a patently offensive way, whether they appeal only to a prurient interest, and whether they have serious literary, artistic, political, or scientific value. Defendant's proffer of evidence reveals that Dr. Cole would have testified, in summary, that due to the fact that the magazines were offered for sale at places frequented only by adults who chose to do so, he was of the opinion that the magazines are not patently offensive. He would also have testified that the magazines have scientific value because of their use in speech classes when discussing obscenity, as well as in marriage counseling and sex therapy, and that they have political value because they contribute to the public debate concerning obscenity and sexuality. We hold that the trial judge did not commit reversible error by excluding Dr. Cole's testimony.

The issues before the jury were whether, under contemporary community standards, the magazines are patently offensive and appeal to prurient interest and whether they have literary,

artistic, political, or scientific value. The inquiry put to Dr. Cole with respect to whether or not the material is patently offensive was not premised upon his knowledge of contemporary community standards, and was therefore irrelevant to, and could not have assisted the jurors in deciding, the issues in the case. *See State v. Knox, supra.* Neither the fact that the materials might be used in teaching classes on obscenity and in classroom discussions with respect thereto, nor the fact that the materials are relevant to the public debate on the issue of obscenity establish that the materials have serious scientific or political value. Under such circular reasoning, nothing could ever be found obscene because its value derives from the fact that it may be obscene. Such a result was certainly not intended by the Supreme Court when it established the *Miller* test. We find no error in the exclusion of this testimony.

Dr. Cole also testified on *voir dire* that the materials at issue in this case have scientific value in marriage and sex counseling and do not appeal to a prurient interest in sex. We question whether such testimony is within the expertise of Dr. Cole, who was tendered and admitted as an expert in "speech communication in the context of public communication." However, even assuming that the trial court should have permitted Dr. Cole to state these opinions before the jury, defendant has suffered no prejudice by their exclusion because the same evidence was subsequently placed before the jury through the testimony of Dr. Winick. "[A] litigant is not harmed by the exclusion of testimony, when the same, or substantially the same, testimony is subsequently admitted." *Powell v. Daniel,* 236 N.C. 489, 492, 73 S.E. 2d 143, 145 (1952).

Defendant also assigns error to the trial court's refusal to allow Jan Frankowitz to testify before the jury concerning her purchase of two magazines, described as similar to the materials at issue, from a "Pantry" convenience store in Shelby. Defendant argues that this evidence was probative of, and therefore relevant to, the issue of the "contemporary community standard with respect to patent offensiveness and prurient appeal of sexually explicit materials." We disagree. Availability of similar material alone means nothing more than that other persons are engaged in similar activities. *Hamling, supra; Flynt, supra.* Evidence of mere availability of similar materials is not by itself sufficiently pro-

bative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance. *See United States v. Manarite*, 448 F. 2d 583 (2d Cir.), *cert. denied*, 404 U.S. 947, 30 L.Ed. 2d 264, 92 S.Ct. 298 (1971). Defendant argues that the availability of the magazines bought by Ms. Frankowitz in a neighborhood convenience store indicates community acceptance. On the contrary, this indicates only availability, not acceptance. We find no error in the trial court's exclusion of this evidence.

[4] Defendant next assigns as error the trial court's denial of his motions to dismiss and for judgment notwithstanding the verdict. Citing *Smith v. California*, 361 U.S. 147, 4 L.Ed. 2d 205, 80 S.Ct. 215 (1959), *reh'g denied*, 361 U.S. 950, 4 L.Ed. 2d 383, 80 S.Ct. 399 (1960), defendant accurately argues that dissemination of obscenity cannot be a strict liability crime, and that G.S. 14-190.1(a) requires proof of both intent and guilty knowledge. *See Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E. 2d 383 (1987), *citing State v. Bryant and State v. Floyd*, 16 N.C. App. 456, 192 S.E. 2d 693 (1972), *appeal dismissed and cert. denied*, 282 N.C. 583, 193 S.E. 2d 747, *vacated and remanded*, 413 U.S. 913, 37 L.Ed. 2d 1036, 93 S.Ct. 3065, *reaffirmed*, 20 N.C. App. 223, 201 S.E. 2d 211 (1973), *affirmed*, 285 N.C. 27, 203 S.E. 2d 27, *cert. denied*, 419 U.S. 974, 42 L.Ed. 2d 188, 95 S.Ct. 238 (1974). Defendant's contention that the State presented insufficient evidence to show defendant's guilty knowledge, however, is without merit. At trial, Sgt. McKinney testified that defendant told him that the materials for sale in the bookstore were illegal. In addition, there was testimony tending to show that defendant was the store manager. Treating this evidence in the light most favorable to the State, as we must, *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982), we hold that it is sufficient to permit a reasonable inference that defendant knew the nature and content of the materials he sold to Sgt. McKinney. The evidence was, therefore, sufficient to withstand defendant's motions.

[5] By the same argument in his brief, defendant assigns error to the trial court's instructions to the jury on the issue of defendant's intent and guilty knowledge. Defendant contends that the trial court's denial of numerous requests for jury instructions resulted in a failure by the court to explain to the jury "the ex-

planatory and guiding principles needed to properly apply the complex principles of law involved to the facts of this case." We disagree.

A judge's charge to the jury is sufficient when it fully instructs the jury on all substantive areas of the case and adequately defines and applies the law thereto. *State v. McNeil*, 47 N.C. App. 30, 266 S.E. 2d 824, *cert. denied and appeal dismissed*, 301 N.C. 102, 273 S.E. 2d 306 (1980), *cert. denied*, 450 U.S. 915, 67 L.Ed. 2d 339, 101 S.Ct. 1356 (1981). Although a judge is required to give such instructions as may be specifically requested, when correct and supported by the evidence, the instructions need not be in the exact language requested; it is sufficient if the court gives the instructions in substance. *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976); *State v. Travatello*, 24 N.C. App. 511, 211 S.E. 2d 467 (1975). The court's instructions must be read as a whole and in context, and individual portions will not be held prejudicial if the charge as a whole is correct. *State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247, 104 S.Ct. 263 (1983).

In the present case, the trial judge properly instructed the jurors that, to convict defendant, they must find beyond a reasonable doubt that he intentionally disseminated material which, when viewed in its entirety, is obscene. The judge instructed the jury that the State bore the burden of proving beyond a reasonable doubt that defendant "knew the content, character and nature of the magazines as a whole that he sold. . . ." The instructions given were a sufficient statement of the law with respect to defendant's intent and guilty knowledge. This assignment of error is overruled.

We have also reviewed defendant's other assignments of error with respect to the court's instructions to the jury. We conclude that the instructions, when construed as a whole and in context, were correct.

Finally, defendant contends that the trial court should have dismissed the charges because G.S. 14-190.1 is unconstitutional. He bases his constitutional challenge to the statute upon five asserted shortcomings: (1) that the statute fails to include scienter as an element of the proscribed conduct; (2) that it fails to provide for a prompt judicial determination of obscenity; (3) that it is

overbroad in that it does not specify that the unlawful dissemination of obscenity is limited to that dissemination which occurs in a public place; (4) that it is overbroad in its definition of "sexual conduct"; and (5) that it fails to require that material be "taken as a whole" in the determination of the material's literary, artistic, political, or scientific value. Each of these issues has previously been decided adversely to defendant. *Cinema I Video v. Thornburg, supra.* We find no error in the denial of his motion to dismiss based upon the asserted unconstitutionality of the statute.

In conclusion, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judge COZORT concurs.

Judge BECTON concurs in part and dissents in part.

Judge BECTON concurring in part and dissenting in part.

Considering the facts of this case, I concur in the majority's resolution of defendant's assignments of error concerning the exclusion of evidence.

Consistent with the views expressed in my dissent in *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305 (1986), I continue to believe that N.C. Gen. Stat. Sec. 14-190.1 is unconstitutional in that (1) it fails to include scienter as an element of the proscribed conduct; (2) it fails to provide for a prompt judicial determination of obscenity; and (3) it is overbroad and proscribes the private dissemination of obscenity in one's home. However, I am compelled to concur in the result reached by the majority because our Supreme Court affirmed this Court's decision in *Cinema I. Cinema I Video v. Thornburg*, 320 N.C. 485, 358 S.E. 2d 383 (1987).

And although the intractable and confusing nature of obscenity case law is seldom more apparent than in the federal decisions elaborating on "contemporary community standards," I nevertheless concur in the result reached by the majority that N.C. Gen.

Stat. Sec. 14-190.1 (1986) is not constitutionally infirm because it fails to require jurors to apply statewide community standards in determining whether materials are obscene.[1] Statewide standards are not required by the United States Constitution or the North Carolina Constitution.

I disagree with the majority's resolution of defendant's assignment of error concerning the jury instructions, and I therefore dissent.

The Trial Court's Refusal to Define or Elaborate on the Term "Contemporary Community Standard."

Although the court's refusal to instruct the jury to apply a statewide standard was not error, the jury instruction was nevertheless improper. The trial judge charged the jury utilizing the language "contemporary community standard" without elaborating on its meaning or giving any direction to the jury to reach a consensus on the relevant community.

The majority begs the question by holding that the trial judge "permit[ted] jurors to apply the standards of the community from which they come, rather than requiring the application of a uniform statewide standard of obscenity," *ante* p. 575. We do not know what standard the jury applied, or if the jury applied any *one* standard. As defendant argues in his brief, "Each jury member was left to apply not only his or her individual assessment of what the average person might think, but also to determine from where the average person should be drawn. Some may have applied town or neighborhood standards, some countywide or some statewide notions of community acceptance."[2] And this is

1. Further, as a practical matter, I am not convinced that the application of a statewide standard would have benefited the defendant, since "in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single [statewide] standard as in allowing distribution in accordance with local tastes . . ." because the use of a statewide standard "necessarily implies that material found tolerable in some places, but not under the [statewide] criteria, will nevertheless be unavailable where they are acceptable." *Miller v. California*, 413 U.S. 15, 33, 37 L.Ed. 2d 419, 436 (1973) n.24.

2. Defendant made a similar argument at the charge conference as the following exchange shows:

not an abstract or mere academic possibility. The prosecutor argued to the jury as follows:

> Ultimately, ladies and gentlemen of the jury, it's for you to decide the community standard and what the community standards are here in Cleveland County and what you consider to be the community.
>
> * * *
>
> Now, when you decide that, ladies and gentlemen, I'll ask you to think about where you live, whether it's Kings Mountain, whether it's Boiling Springs or here in the City of Shelby.

---

MR. SLIWA: Or Kings Mountain—the situation being where you've got jurors—Kings Mountain being in two counties, it would mean you could tell them it's—if you leave "community" undefined or even suggest to them that it's smaller than North Carolina or includes the county from which they're drawn, they're going to be asked to disregard the community—the jurors—the community that lives across the street from them because that's part of their community.

MR. BROWN: Obviously, when you have a community standard, you're going to, you know—the same book may generate a conviction in one community and not another. That's what community standard is. It depends upon how the community—and if that jury views the average adult and whatever they feel their community is.

In Charlotte—most people in Charlotte probably feel their community is just Charlotte. And I've learned now that when you come out to these more rural areas, "community" here probably doesn't mean just Shelby. It may. I don't know what they take it from. But in the more rural areas, I suspect they'd feel like their community encompasses a bit more of outlying territory, but, you know, since the legislature struck "statewide," I think they meant for juries to just base it on whatever they feel their community is; and I don't think it's for us to define that for them—

THE COURT: All right.

MR. BROWN: —in any way, shape or form.

THE COURT: All right, Request Number Twenty-one is DENIED.

MR. SLIWA: Is Your Honor going to tell the jurors that it's up to them to determine what the community is?

MR. BROWN: Just tell them they have to apply their community standard.

MR. SLIWA: Without asking them to define what the community is?

MR. BROWN: Yes.

MR. SLIWA: Specific EXCEPTION to that.

> You think about your community and think about the entire county and if you live right on a county line, think of your community, whatever you consider your community to be.
>
> * * *
>
> You know, the bottom line is it's your duty—you speak for the community. And the reason that the legislature put the community standard in here is that, you know, it's just entirely possible that the community in Charlotte or the community in Greensboro or the community in San Francisco or the community in Buffalo may have differing views about just what they will tolerate in these materials—what obscenity really means. And so that's why the community standard is in there and it is now the—it's your turn to speak for the community and decide what the average adult in this community will and will not tolerate as to these types of materials.

In contrast, the defense urged the jury that the standard should be a statewide one:

> And I don't mean to be saying by my argument that Cleveland County is the community, because some of you folk live in Kings Mountain, and Kings Mountain, as we all know, is right on the border and a part of Kings Mountain is right over there in Gaston County. So it's not Cleveland County and it's not Gaston County. In fact, the problem is, you've got to figure out what "community" means.
>
> * * *
>
> But I'll say to you, as far as what the average person thinks, it just hasn't been proved.
>
> We tried to conduct a survey and get it in here to show you about it—what we think the survey would indicate the average person in North Carolina—because it seems to me, folks, that the standard is North Carolina. Because down here at number four, it talks about whether it's privileged or protected under the North Carolina Constitution, and we can't have one law in North Carolina for people who live in Kings Mountain and another one for the people who live in Shelby.

> We've got one law for North Carolina, so it seems to me you got to think about North Carolina.
>
> * * *
>
> And where is there any evidence about what the contemporary community standard is? In fact, what is it? Ask yourself that. What is the community?
>
> A lot of you good folks probably watch television that emanates out of Charlotte—Channel Nine and Channel Three. Some of you may take the Charlotte paper. A few of you are from Charlotte. Some of you are from Ohio. What does "community" mean? What does it mean to you?

In light of these arguments, a clarifying instruction was particularly important.

To support its conclusion that the trial "judge's instructions in this case [did not] contravene the Constitution of the United States" by failing to specify what is meant by "community," *ante* p. 574, the majority relied on *Jenkins v. Georgia,* 418 U.S. 153, 157, 41 L.Ed. 2d 642, 648 (1974). In my view, *Jenkins* should not control the disposition of this case. First, the *Jenkins* language relied upon by the majority, which effectively gives jurors unbridled discretion to determine the relevant community, seems incongruous with other language in *Jenkins* that jurors should not have "unbridled discretion in determining what is 'patently offensive.'" *Id.* at 160, 41 L.Ed. 2d at 650. More important, however, I am loathe to accept as controlling language from *Jenkins* which is based on a supposition. The *Jenkins* Court said "[we] also agree with the Supreme Court of Georgia's *implicit approval* of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.'" *Id.* at 157, 41 L.Ed. 2d at 648. (Emphasis added.) Additionally, the language on which the majority relies is dicta. The court held that Jenkins' conviction should be reversed because the film "Carnal Knowledge" did not depict sexual conduct in a patently offensive way.

Moreover, the *Jenkins* Court's attempt to interpret *Miller v. California,* 413 U.S. 15, 37 L.Ed. 2d 419 (1973) was clarified further in *Hamling v. United States,* 418 U.S. 87, 41 L.Ed. 2d 590 (1974). The *Hamling* Court stated that "[t]he result of the *Miller* cases, . . . as a matter of constitutional law . . ., is to permit a juror sit-

ting in obscenity cases to draw on knowledge of the *community or vicinage from which he comes* in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Hamling v. United States*, 418 U.S. at 105, 41 L.Ed. 2d at 613 (emphasis added).

In my view, under the majority's interpretation, which permits a jury to define the relevant community, the statute would be void for vagueness because "people of common intelligence must necessarily guess at its meaning and differ as to its application." *See Treants Enterprises, Inc. v. Onslow County*, 83 N.C. App. 345, 350 S.E. 2d 178 (1986), *citing State v. Vestal*, 281 N.C. 517, 189 S.E. 2d 152 (1972). Neither the prosecutor nor the defense counsel could ascertain from the plain language of the statute what community should be used when determining whether the materials were patently offensive. The average merchant could hardly be expected to do so.

Separate and apart from the constitutional issues in this case, the statute itself supports my belief that defendant's conviction should not stand when the jurors may have used different standards to judge his conduct. In 1985, the North Carolina Legislature deleted the statewide community standard that had been required since 1971. In doing so, it did not intend that some or all of the twelve jurors in obscenity cases thereafter use a statewide standard. In my view, and consistent with the dictates of *Miller* and *Hamling*, the legislature intended that jurors would apply the standards of the community from which the jury pool was drawn. The *Hamling* Court said:

> Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw.

418 U.S. at 105-06, 41 L.Ed. 2d at 613-14.

In their article, generally upholding the North Carolina Obscenity Statutes, Currin and Showers, while noting that defendants will often attempt to limit or expand the community and that prosecutors will in some cases choose the most morally conservative venue, conclude that "the most prudent instruction

should adopt local community standards phrased so that 'the jury is entitled to draw on its own knowledge of the moral views and sense of the average person in the community from which [he] came.'" (Footnote omitted.) Currin and Showers, Regulation of Pornography—The North Carolina Approach, 21 Wake Forest Law Review No. 2, 1986, pp. 289, 290. Because no such instruction was given in this case, defendant is entitled, in my view, to a new trial.

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STATE OF NORTH CAROLINA v. KEITH SUGGS

No. 8615SC988

(*Filed 18 August 1987*)

**1. Criminal Law § 34.5— evidence of other crimes—actual conviction not required**

A defendant need not be actually convicted of prior crimes before evidence of those crimes is admitted under N.C.G.S. § 8C-1, Rule 404(b).

**2. Criminal Law § 34.5— evidence of defendant's *commission of other crime*—admissibility to show identity**

In a prosecution of defendant for robbery with a dangerous weapon, the question of defendant's identity as the appliance store robber in this case was sufficiently indefinite to permit evidence of his commission of an earlier appliance store robbery under the identity exception stated in N.C.G.S. § 8C-1, Rule 404(b); furthermore, the robberies were sufficiently similar to indicate that the same person committed both crimes, and the evidence thus met the similarity threshold to the identity exception. In addition, the evidence was relevant pursuant to N.C.G.S. § 8C-1, Rule 401.

**3. Criminal Law § 66.6— pretrial photographic lineup—no suggestiveness**

A pretrial photographic lineup was not impermissibly suggestive, since the fact that defendant's appearance was somehow distinct from the other suspects' photographs did not alone render the lineup impermissibly suggestive, and there was no indication that the procedure resulted in a very substantial likelihood of irreparable misidentification, as the witnesses could clearly see the robber under adequate lighting during a violent crime which surely commanded their attention; one witness's description of the robber afterwards accurately resembled defendant; and both witnesses chose defendant's photograph without hesitation only days after the robbery.

**4. Robbery §§ 1.2, 6— two assaults—three indictments for armed robbery—judgment arrested on one indictment**

Although money was taken from three separate sources, a store and two employees, only two assaults occurred, and judgment is therefore arrested as to one of three indictments for armed robbery.

**5. Constitutional Law § 78; Robbery § 6.1— two counts of armed robbery—consecutive 14-year sentences not cruel and unusual**

The imposition of consecutive 14-year sentences for two counts of armed robbery was not cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.

APPEAL by defendant from judgment entered by *McLelland, Judge.* Judgment entered 11 February 1986 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 3 March 1987.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Wilson Hayman, for the State.*

*Daniel H. Monroe for defendant-appellant.*

GREENE, Judge.

Defendant was separately indicted on three counts of robbery with a dangerous weapon in connection with the robbery of a rental appliance store. The indictments were consolidated for trial and defendant was found guilty of all three counts and sentenced to three consecutive prison terms of 14 years each. At trial, defendant requested the court prevent the State's mention of the fact defendant was also charged with various other counts of armed robbery. The trial court denied this motion *in limine.* Defendant also moved the court suppress any evidence of his pretrial in-court identification. The court conducted a *voir dire* on this motion to suppress and denied the motion. At the close of evidence, defendant moved to dismiss certain counts for lack of sufficient evidence. The court also denied this motion. Defendant appeals.

The State's evidence tended to show Messrs. Justice and Page, employees of a rental appliance store in Burlington, were closing the store around 6:00 p.m. one evening. A black male in the store suddenly placed a small nickel-or-silver-plated handgun at Justice's temple and ordered Page to lie down on the floor. Justice later described the man as about 5′10″ in height, darkly complected, weighing approximately 165 pounds, with sunglasses and normal length hair. The man took money out of the store's cash drawer as well as money from Justice's person. The robber also took money from Page, including some store money which was in Page's possession.

Testimony showed officers exhibited six photographs to Justice and Page after the robbery: each separately selected a photograph of defendant as the robber. Justice clearly identified defendant in court as the robber. Although Page stated he had an opportunity to observe the robber's body size and shape, he testified in court he was "not absolutely sure, but [defendant] looks an awful lot like" the robber. Furthermore, the assistant manager of Video City in Burlington also testified that, ten days before the appliance store robbery, a black man wearing sunglasses and carrying a silver-plated handgun entered her store and took money from her cash register. She identified defendant in court as the same person who robbed her store on that prior occasion. Defendant did not himself testify but offered a witness who testified defendant was with her at the time of the robbery.

The issues for this Court's determination are: (1) whether the trial court properly allowed evidence of a prior robbery with which defendant was charged; (2) whether the trial court properly allowed testimony that defendant's photograph was selected from a photographic lineup; (3) whether the trial court properly denied defendant's motion to dismiss; and (4) whether defendant's sentence constituted cruel and unusual punishment.

I

At the time of trial of this matter, defendant was also charged with the prior robbery of the Video City store. A copy of a verdict sheet attached to defendant's brief indicates defendant was subsequently acquitted of those charges. Defendant moved *in limine* to prevent any use of the Video City charges against him and objected at trial to his in-court identification by the assistant manager of Video City. While defendant, among other things, raises the issue of the court's failure to conduct a *voir dire* or make findings in denying his motion, we are not required to address this issue since defendant has not made this issue the basis of any assignment of error or exception in the record. N.C.R. App. P. Rule 10(a). However, we note in any case that defendant's failure to file an affidavit with facts supporting his motion under N.C.G.S. Sec. 15A-977(a) (1983) permitted the court's summary denial of defendant's motion under Section 15A-977(c)(2). *See State v. Satterfield*, 300 N.C. 621, 625, 268 S.E. 2d 510, 513-14 (1980) (court upheld summary denial of motion under Section 15A-977(c)

where no facts presented to support general objection to results of blood test).

The State contends evidence of the prior robbery was properly admitted pursuant to N.C.G.S. Sec. 8C-1, Rule 404(b) (1986). Defendant argues evidence of the prior robbery should not have been admitted because: (A) Rule 404(b) is inapplicable where defendant has neither pleaded nor been found guilty of the prior robbery; and (B) defendant's alleged prior conduct is inadmissible under Rule 404(b) as well as otherwise irrelevant and prejudicial.

A

**[1]** Rule 404(b) states in relevant part:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, *identity*, or absence of mistake, entrapment or accident. [Emphasis added.]

Since the scope of Rule 404(b) includes "wrongs or acts," the Rule does not on its face require such extrinsic acts result in criminal liability. Furthermore, in *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986), our Supreme Court impliedly addressed the issue whether a defendant must be actually convicted of prior crimes before evidence of those crimes is admitted under Rule 404(b). In *Morgan*, defendant was asked on cross-examination if he had assaulted two other people with a deadly weapon. There was no evidence defendant had been found guilty of those charges. The State argued the cross-examination was permissible under Rule 404(b). The Court stated:

> For purposes of this discussion, *we shall assume that defendant was not convicted of either alleged previous assault*. Thus, this exchange informed the jury that defendant . . . *may* have pointed a shotgun at two men other than [the deceased] within three months of the [date] when similar conduct resulted in [the deceased's] death and defendant's arrest therefor.

315 N.C. at 632, 340 S.E. 2d at 88-89 (emphasis added). Since the *Morgan* Court applied Rule 404(b) despite assuming defendant

was not convicted of the other crimes, we conclude conviction of other crimes is not a prerequisite to their admissibility under Rule 404(b). *See also* 2 Weinstein and Berger, Weinstein's Evidence Par. 404[08] at 57 (1985) (under F. R. Evid. 404(b), conduct need not be criminal or unlawful if it sheds light on defendant's character and relevant to something other than criminal propensity). Consequently, the trial court did not abuse its discretion under N.C.G.S. Sec. 8C-1, Rule 104(a) (1986) in admitting evidence pursuant to Rule 404(b) of the similar Video City robbery with which defendant had been charged, but not convicted.

B

**[2]** Defendant next argues evidence of the Video City robbery was inadmissible under Rule 404(b) as an impermissible attempt to introduce evidence of a crime separate and distinct from the crime charged. It was well established in North Carolina long before the adoption of Rule 404(b) that "the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime." *State v. Williams*, 303 N.C. 507, 513, 279 S.E. 2d 592, 596 (1981) (quoting *State v. Humphrey*, 283 N.C. 570, 572, 196 S.E. 2d 516, 518, *cert. denied*, 414 U.S. 1042 (1973)); *see also State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954). However, the *McClain* Court also described an "identity" exception to this rule as follows:

> Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged in another offense was committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged.

240 N.C. at 175, 81 S.E. 2d at 367. This identity exception is now explicitly part of Rule 404(b). In *State v. Moore*, 309 N.C. 102, 106, 305 S.E. 2d 542, 545 (1983), our Supreme Court further stated that, before this exception is relevant, "there must be some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes."

The identity of the appliance store robber was clearly at issue in this case. Although Justice identified defendant as the

robber, Page testified he was not "absolutely" sure. Defendant argued his in-court identification was tainted by an allegedly impermissible photographic lineup. Defendant further argued none of the eyewitnesses had sufficient opportunity to view the robber since they lay face down on the floor during a significant portion of the robbery. Therefore, we conclude the question of defendant's identity as the appliance store robber in this case was sufficiently indefinite to permit evidence of his commission of the earlier Video City robbery under the identity exception stated in Rule 404(b).

We also find sufficient similarities between the appliance store and Video City robberies to comply with the *Moore* Court's similarity threshold to the identity exception. Both crimes were armed robberies of retail stores. In both instances, the perpetrator wore dark sunglasses, carried a brightly-plated gun and subdued the store clerks before taking money from the cash register. Prior to each robbery, the robber first came into the store and walked around looking at merchandise. Both attacks occurred in Burlington within a ten day period. The robberies of the two stores were thus sufficiently similar to indicate the same person committed both crimes; therefore, evidence of the Video City robbery falls within the identity exception to Rule 404(b). *See Moore*, 309 N.C. at 106, 305 S.E. 2d at 545.

We next determine if the evidence of the Video City robbery was relevant under N.C.G.S. Sec. 8C-1, Rule 401 (1986) which provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

In *State v. Weaver*, 318 N.C. 400, 403, 348 S.E. 2d 791, 793 (1986), the Supreme Court noted that "evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." The fact of defendant's identity as the appliance store robber is clearly of consequence to the determination of this action. Since defendant's alleged participation in the Video City robbery tends to prove or disprove his identity as the appliance store robber, evidence of the other robbery is thus relevant under Rule 401.

Even if evidence of the Video City robbery is permitted under Rule 404(b) and is relevant under Rule 401, the evidence may nevertheless be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C.G.S. Sec. 8C-1, Rule 403 (1986). We are satisfied the probative force of the Video City robbery evidence substantially outweighed any potential such evidence unfairly prejudiced defendant. The evidence was highly probative of the identity of the appliance store robber which in turn was the only disputed issue at trial.

II

**[3]** In compliance with N.C.G.S. Sec. 15A-977(a) (1983), defendant moved to suppress evidence of a pre-trial photographic lineup at which both Justice and Page selected defendant as the appliance store robber. Defendant argues the trial court erroneously allowed such testimony since defendant contends the photographic array was impermissibly suggestive. *See State v. Watson*, 294 N.C. 159, 162, 240 S.E. 2d 440, 443 (1978) (evidence of out-of-court identification inadmissible if pre-trial confrontation procedures are impermissibly suggestive). Defendant argues he did not resemble either the composite drawing used to assemble the lineup or the other lineup suspects (whose facial hair in turn conflicted with statements the appliance store robber was clean shaven).

Viewing the photographic array supplied by defendant in light of the other *voir dire* evidence, we conclude this photographic lineup was not impermissibly suggestive. That defendant's appearance was somehow distinct from the other suspects' photographs did not alone render the lineup impermissibly suggestive. *See State v. Freeman*, 313 N.C. 539, 545, 330 S.E. 2d 465, 471 (1985). More important, "even though a pre-trial identification procedure may be suggestive, it will be *impermissibly* suggestive only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification." *State v. Lyszaz*, 314 N.C. 256, 264, 333 S.E. 2d 288, 294 (1985) (emphasis added). The *Lyszaz* Court stated the factors to be considered included: 1) The opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description of the criminal; 4) the level of certainty demonstrated by the witness at

the confrontation; and 5) the length of time between the crime and the confrontation. *Id.*

Examining the record and briefs in light of the *Lyszaz* factors reveals both eyewitnesses could clearly see the robber under adequate lighting during a violent crime which surely commanded their complete attention. Justice's description of the robber afterwards accurately resembled defendant. Both Justice and Page chose defendant's photograph without hesitation only days after the robbery. *Cf. Freeman*, 313 N.C. at 543-45, 330 S.E. 2d at 471 (similar evidence held to satisfy same factors when used to determine whether pretrial lineup tainted in-court identification). As these factors do not indicate a very substantial likelihood of irreparable misidentification under *Lyszaz*, we conclude the trial court properly denied defendant's motion to suppress evidence of this photographic array.

We note our conclusion the photographic lineup was not impermissibly suggestive moots defendant's additional contention the suggestiveness of the lineup later tainted the eyewitnesses' in-court identification. While defendant also assigns error to the court's failure to make findings of fact regarding the legitimacy of this photographic array, the court was not obligated to make such findings under Section 15A-977(c), (f) since there was no material conflict in the evidence at the *voir dire*. *See State v. Phillips*, 300 N.C. 678, 685, 268 S.E. 2d 452, 457 (1980). The necessary findings are implied from the admission of the challenged evidence. *Id.*

III

**[4]** Arguing he could not be convicted of the armed robbery of both the appliance store and of each employee, defendant next contends the trial court erred in denying his motion to dismiss at least two of the three armed robbery counts for lack of sufficient evidence. Defendant was charged with three counts of robbery with a dangerous weapon by three separate indictments which respectively alleged: 1) the theft of currency from the appliance store in the presence of Justice and Page; 2) the theft of currency from the person of Justice; and 3) the theft of a wallet, currency and credit cards from the person of Page.

In *State v. Beaty*, 306 N.C. 491, 496, 293 S.E. 2d 760, 764 (1982), our Supreme Court stated:

> In order to sustain the conviction and sentence at one trial for multiple offenses arising out of a single criminal incident, each offense must rest on different necessary elements. The test is '[w]hether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment' or 'whether the same evidence would support a conviction in each case.' *State v. Hicks*, 233 N.C. 511, 516, 64 S.E. 2d 871, 875 (1951).

In *Beaty*, there were two indictments for armed robbery arising out of the assault of a single employee, during which assault property was taken from both the employee and the business. The *Beaty* Court stated that, "[t]he controlling factor in this situation is the existence of a single assault," not the two sources (the store and the employee) from which the money was taken. *Id.* at 499-500, 293 S.E. 2d at 766. The fact there were two indictments was deemed irrelevant. The Court therefore concluded only one armed robbery had occurred.

In the instant case, there were three separate armed robbery indictments; however, although money was taken from three separate sources (the store and each of the two employees), the "controlling factor" under *Beaty* is that only two assaults (of the two employees) occurred. Since the facts charging defendant with armed robbery of the appliance store would also sustain a conviction for armed robbery of either store employee, the robbery of the store and of *both* employees under these circumstances resulted in only two armed robberies.

Judgment must thus be arrested as to one of the three indictments. Defendant received an identical 14-year term for each of the three convictions. Since judgment may be arrested as to any of the three, *see Beaty*, 306 N.C. at 501, 293 S.E. 2d at 767, we have elected to arrest judgment on the indictment alleging armed robbery from the person of James Gordon Page, Case No. 85CRS16070.

IV

**[5]** Defendant's final argument is that his total sentence of 42 years of imprisonment for three armed robberies is cruel and unusual punishment prohibited by both the State and Federal Constitutions. Since we have above arrested one conviction, we

note defendant's two remaining consecutive sentences now total 28 years.

The trial court's sentence of 14 years on each armed robbery count constitutes the minimum and presumptive sentence under N.C.G.S. Sec. 14-87(d) (1986). *State v. Crain*, 73 N.C. App. 269, 272, 326 S.E. 2d 120, 123 (1985). Our courts have consistently held a sentence within the statutory maximum is not unconstitutionally cruel and unusual unless the punishment provisions of the statute itself are unconstitutional. *E.g.*, *State v. Legette*, 292 N.C. 44, 57, 231 S.E. 2d 896, 904 (1977) (holding prior imprisonment under Section 14-87 of five years to life was constitutionally valid). The imposition of consecutive sentences, each of which constitutes the statutory minimum, cannot alone constitute cruel and unusual punishment. *See State v. Handsome*, 300 N.C. 313, 317, 266 S.E. 2d 670, 674 (1980) (upholding consecutive sentences within statutory limits for offenses including armed robbery); *see also State v. Ysaguire*, 309 N.C. 780, 785, 309 S.E. 2d 436, 440 (1983) (upholding consecutive life terms for sexual assault, burglary and robbery).

As defendant contends, the Eighth Amendment also requires "a criminal sentence . . . be proportionate to the crime for which the defendant has been convicted." *Ysaguire*, 309 N.C. at 786, 309 S.E. 2d at 440 (quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983)). Stating sentences in non-capital cases would be found constitutionally disproportionate only in "exceedingly unusual" cases, *id.* at 786, 309 S.E. 2d at 441, the *Ysaguire* Court's analysis emphasized comparing the sentence imposed to: 1) the gravity of the offense; and 2) other sentences imposed in this State for the same offense. *Id.* at 787, 309 S.E. 2d at 441; *see generally Solem*, 463 U.S. at 290-91.

The *Ysaguire* Court characterized armed robbery as one "of the most serious crimes recognized by our statutes." 309 N.C. at 787, 309 S.E. 2d at 441. In analyzing the gravity of an offense for purposes of determining proportionate sentencing, the *Solem* Court recognized that "non-violent crimes are less serious than crimes marked by violence or the threat of violence." 463 U.S. at 292-93. In view of the "substantial deference that must be accorded legislatures and sentencing courts," *id.* at 290 n.16, the presumptive minimum sentence of 14 years for armed robbery is certainly not so "grossly disproportionate [to the gravity of the

offense] as to violate Eighth Amendment proscriptions of cruel and unusual punishment." *Ysaguire*, 309 N.C. at 786, 309 S.E. 2d at 440. Furthermore, since the sentence defendant received was the minimum and presumptive sentence under Section 14-87(d), that sentence can hardly be grossly disproportionate to other sentences imposed in this State pursuant to the same armed robbery statute. *Cf. Ysaguire*, 309 N.C. at 787, 309 S.E. 2d at 441 (consecutive sentences for rape not unusual in North Carolina).

Accordingly, we hold the imposition of consecutive 14-year sentences for two counts of armed robbery does not violate the proscriptions of the Eighth Amendment.

V

As to Case No. 85CRS16070 (armed robbery of Page), the judgment must be arrested. In Case No. 85CRS16068 and Case No. 85CRS16069 (armed robbery of the appliance store and Justice, respectively), we find no error.

No error.

Judges ARNOLD and MARTIN concur.

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MARY ALENE STRICKLAND, EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. 8610IC1273

(Filed 18 August 1987)

1. **Master and Servant § 68— workers' compensation—byssinosis—expert testimony sufficient to support Commission's finding**

Medical expert opinion testimony was sufficient to support the Industrial Commission's finding of fact that plaintiff had the occupational disease byssinosis as a result of her exposure to cotton dust while in defendant's employ.

2. **Master and Servant § 68— workers' compensation—permanency of lung damage—finding supported by evidence**

The Industrial Commission's finding that damage to plaintiff's lungs was permanent was adequately supported by the evidence where an expert medical witness testified that plaintiff was still capable of ordinary activity, but he also testified that damage to her lungs was permanent.

3. **Master and Servant § 69— workers' compensation—no evidence of total incapacity to earn wages—compensation for loss of lung function proper**

Where there was no evidence that plaintiff suffered a total incapacity to earn wages because of her byssinosis, the Industrial Commission properly compensated plaintiff under N.C.G.S. § 97-31(24) for loss of lung function rather than under N.C.G.S. § 97-29.

4. **Master and Servant § 69— workers' compensation—byssinosis—no award for heart problems—no relationship between problems shown**

The Industrial Commission did not err in failing to make an award for plaintiff's heart problems under N.C.G.S. § 97-31 where there was no evidence that plaintiff's heart problems were caused by or affected by her occupational disease.

5. **Master and Servant § 75— workers' compensation—future medical expenses**

A workers' compensation proceeding is remanded to the Industrial Commission for a determination as to whether further medical treatments are required to provide needed relief, and, if such a finding is made, plaintiff is entitled to an award for future medical expenses under N.C.G.S. § 97-59.

APPEAL by plaintiff and defendants from the Opinion and Award of the Industrial Commission filed 27 August 1986. Heard in the Court of Appeals 8 June 1987.

This is a lung disease case in which the Industrial Commission awarded plaintiff $5,000 in benefits for "partial loss of lung function" pursuant to N.C.G.S. § 97-31(24) of the Workers' Compensation Act. Both plaintiff and defendants appealed from this award. We affirm the decision of the Industrial Commission.

Plaintiff is 66 years old with only a fourth grade education. Other than her textile experience and sewing ability, she has had no other training or employment skills.

In 1944, she worked for approximately eight months in what is now Burlington Industries. In 1952, she resumed her employment with Burlington Industries and worked there until 1970 under working conditions which she described as very dusty. In 1970, plaintiff left Burlington Industries because of her arthritis and shortly thereafter went to work for Bonder's Coat Manufacturing as a seamstress. She worked there until December, 1974, when she again had to stop working because of her arthritis.

In 1956, plaintiff first began to have breathing problems which took the form of bronchitis and were characterized by a shortness of breath. She had never smoked cigarettes and had no

breathing problems before working at the mill. Plaintiff testified that her breathing problems improved when she was out of the mill on weekends and became worse when she returned for her shift on Sunday evenings. She also stated that her symptoms got progressively worse over the years of her employment at Burlington Industries. She eventually had to seek medical treatment and had to take prescribed medications for these problems. She was also hospitalized because of her bronchitis, "heavy colds" and "hard breathing."

In 1979, plaintiff first saw her present physician, Dr. Hasham, who diagnosed her breathing problems as emphysema, bronchitis and chronic obstructive pulmonary disease. He referred her to Dr. Rubin, a pulmonary disease specialist, who diagnosed plaintiff's condition as "mild obstructive lung disease." Dr. Rubin determined that she had permanent lung damage as a result of her exposure to cotton dust, but that her impairment did not impinge on her ability to work in a non-dusty environment.

On 23 June 1980, plaintiff filed a claim with the Industrial Commission. The Deputy Commissioner's Opinion and Award concluded that plaintiff has the occupational disease byssinosis which had caused permanent injury to both of her lungs as a result of her occupational exposure to cotton dust at defendant-employer. The Deputy Commissioner awarded compensation in the amount of $3,500 pursuant to N.C.G.S. § 97-31(24) and ordered defendants to pay all medical expenses incurred by plaintiff when submitted through the carrier for approval by the Industrial Commission.

Defendants filed an Application for Review to the Full Commission which adopted the Deputy Commissioner's order, but increased plaintiff's award to $5,000. From this opinion and award, both parties appeal.

*Lore & McClearen, by R. Edwin McClearen, attorney for plaintiff-appellant.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by C. Ernest Simons and Steven M. Sartorio, attorneys for defendant-appellants.*

ORR, Judge.

I.

[1] Defendants argue that plaintiff failed to prove that she sustained a compensable occupational lung disease, because there was no evidence that her respiratory problems were caused by her employment at Burlington Industries. We disagree.

To receive benefits for an occupational disease under the Workers' Compensation Act, N.C.G.S. Chapter 97, there must be a causal connection between the plaintiff's disease and her employment. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E. 2d 359, 365 (1983).

In the case *sub judice*, plaintiff used the expert opinion testimony of Dr. Rubin to prove the causal connection between her injury and her employment conditions. An expert witness may base his testimony on his personal knowledge or observation or on hypothetical questions addressed to him. *Todd v. Watts*, 269 N.C. 417, 152 S.E. 2d 448 (1967). When a party uses a hypothetical question, that question must:

> (1) list only such facts as are directly in evidence *or may justifiably be inferred therefrom*, (2) list enough facts to allow the witness to express an intelligent and safe opinion, and (3) make it clear that the opinion is based on the hypothesis that the facts listed will be found by the [jury] to exist. 1 Stansbury, North Carolina Evidence, Sec. 137 (Brandis Rev. 1982).

*Ballenger v. ITT Grinnell Industrial Piping*, 80 N.C. App. 393, 399-400, 342 S.E. 2d 582, 587 (1986) (emphasis supplied).

Plaintiff's attorney asked Dr. Rubin several hypothetical questions, all based upon the same set of hypothetical facts. As stated, these facts were:

> That Ms. Mary Alene Strickland was born on April 19, 1921, and began working for what is now Burlington Industries in about late 1944, and worked for about six months as a winder, and that cotton was the material being processed, and it was dusty.
>
> She returned to work with Burlington Industries in 1952 in the spool room, where she worked until November of 1970, at

which time she left. Cotton was the material being processed during this period, and the conditions were dusty then.

Beginning approximately 1956, she began noticing periods of bronchitis with the production of sputum. Her symptoms were brought on by exposure at work, and would improve upon leaving work, especially on the weekends.

She had shortness of breath and cough, which was made worse by return to work on Monday morning. Her symptoms progressed to the point where, before she left work in 1970, it in her opinion, limited her ability to do her job. The patient still produces sputum, and she had no breathing problems prior to going to work at Burlington Industries. She had never smoked cigarettes.

Based on these facts Dr. Rubin testified through a series of hypothetical questions that in his opinion, plaintiff's exposure to cotton dust at Burlington Industries could have caused her lung disease and lung impairment.

Defendants argue that Dr. Rubin's opinion testimony should be stricken and not considered as evidence because the stated facts were incomplete and inaccurate regarding plaintiff's condition and her work history. For instance, defendants contend that the facts did not include any information on plaintiff's exact exposure to cotton dust at Burlington Industries or whether she was exposed to cotton dust at Bonder's. In addition, the facts do not state that plaintiff quit her jobs at Burlington Industries and at Bonder's because of her arthritis and not because of her lung impairment. However, "the omission of a material fact from a hypothetical question does not necessarily render the question objectionable, or the answer incompetent. . . . It is left to the cross-examiner to bring out facts . . . that have been omitted [from the hypothetical question] and thereby determine if their inclusion would cause the expert to modify or reject his or her earlier opinion." *Ballenger v. ITT Grinnell Industrial Piping*, 80 N.C. App. at 400, 342 S.E. 2d at 587.

The Industrial Commission's findings of fact in a workers' compensation award are conclusive and binding on appeal if they are supported by the evidence. *Hilliard v. Cabinet Co.*, 54 N.C. App. 173, 282 S.E. 2d 828 (1981) *rev'd on other grounds*, 305 N.C.

593, 290 S.E. 2d 682 (1982). We hold that the evidence in the case *sub judice* supports the Commission's finding of fact that plaintiff has the occupational disease byssinosis as a result of her exposure to cotton dust at Burlington Industries.

**[2]** Defendants also argue that plaintiff has not sustained a compensable occupational disease, because the evidence fails to show that there was any permanent injury to plaintiff's lungs. We find this contention to be without merit.

In order to recover for an injury under N.C.G.S. § 97-31(24), a plaintiff "must show from medical evidence that he has loss of or permanent injury to an *important* external or internal organ . . . ." *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 142-43, 266 S.E. 2d 760, 762 (1980) (emphasis supplied).

Defendants argue that the damage to plaintiff's lungs is not permanent, because Dr. Rubin testified that plaintiff is still capable of ordinary activity and that her lung impairment is reversible. However, Dr. Rubin also testified that the damage to plaintiff's lungs was permanent and stated that:

> Once there is damage to the airways, the airways are damaged permanently. You may be able to return the physiology, the functioning of the airways, close to normal. But the structural abnormality persists.

From this testimony we hold that the Commission's finding that damage to plaintiff's lungs was permanent was adequately supported by the evidence and is therefore binding upon this Court.

II.

**[3]** Plaintiff argues that the Industrial Commission erred in basing its award on N.C.G.S. § 97-31, the scheduled damage provision, rather than on N.C.G.S. § 97-29, the wage loss provision.

Before compensation may be awarded under N.C.G.S. § 97-29, N.C.G.S. § 97-30 or N.C.G.S. § 97-31, of the Workers' Compensation Act, "disability" must exist. *West v. Bladenboro Cotton Mills*, 62 N.C. App. 267, 302 S.E. 2d 645 (1983). Disability is defined by the Workers' Compensation Act as the incapacity to earn wages because of injury, rather than physical disablement or impairment. N.C.G.S. § 97-2(9) (1985). The Supreme Court has fur-

ther stated that in order to find disability the Industrial Commission must find:

> (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment, and (3) that the plaintiff's incapacity to earn was caused by his injury.

*Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E. 2d 374, 379 (1986).

In the case *sub judice* the Industrial Commission found as a fact that:

> Plaintiff has a permanent disability as a result of the occupational disease byssinosis in that she has permanent injury to two important internal organs, the lungs.

Having found that plaintiff suffered a permanent injury to her lungs, the Industrial Commission made an award under N.C.G.S. § 97-31, the scheduled organ damage provision. Under this provision a worker may receive compensation even if he cannot demonstrate loss of wage-earning capacity, because losses included in the schedule are conclusively presumed to diminish wage-earning ability. *Loflin v. Loflin,* 13 N.C. App. 574, 186 S.E. 2d 660, *cert. denied,* 281 N.C. 154, 187 S.E. 2d 585 (1972).

Plaintiff contends, however, that since the Industrial Commission made a finding of permanent disability, it should have also made findings regarding her loss of wage-earning capacity and then made an award under N.C.G.S. § 97-29. Often an award under N.C.G.S. § 97-29 better fulfills the policy of the Workers' Compensation Act than an award under N.C.G.S. § 97-31(24), because it is a more favorable remedy and is more directly related to compensating a worker's inability to work. *West v. Bladenboro Cotton Mills,* 62 N.C. App. 267, 302 S.E. 2d 645.

In the present case, plaintiff suffered a permanent disability to her lungs for which she was compensated under N.C.G.S. § 97-31(24). Compensation under N.C.G.S. § 97-29 is available only where a total incapacity to earn wages occurs. There is no evidence that plaintiff suffered a total incapacity to earn wages be-

cause of her byssinosis so as to warrant an award under N.C.G.S. § 97-29. Therefore, we affirm the Industrial Commission's award under N.C.G.S. § 97-31(24).

[4] Plaintiff argues that if the Industrial Commission was correct in making an award under N.C.G.S. § 97-31, that it should have made an additional award under that section for the damage to her heart as a result of her occupational disease. We disagree.

Plaintiff's medical records reveal evidence of a heart condition, cardiomegaly and an enlarged heart. Dr. Rubin did testify that there was a relationship between *severe* chronic obstructive lung disease and chronic heart disease, and that *significant* obstructive lung disease can be a factor in the worsening of heart disease. However, Dr. Rubin testified that plaintiff had only "mild" obstructive lung disease, so any testimony on whether "severe" or "significant" obstructive lung disease can cause or aggravate heart disease is irrelevant to plaintiff's condition. In addition, nothing in Dr. Rubin's testimony concerning the relationship between occupational lung disease and heart problems relates specifically to plaintiff's own heart condition and respiratory problems.

Since there is no evidence that plaintiff's heart problems were caused or impacted by her occupational disease, we hold that the Industrial Commission did not err in failing to make an award for plaintiff's heart problems under N.C.G.S. § 97-31.

[5] Plaintiff contends that the Industrial Commission erred in failing to make an award for future medical expenses under N.C.G.S. § 97-59.

"G.S. 97-59 requires the Commission to award expenses for future medical treatment to an employee who suffers from an occupational disease for so long as that treatment will either 'lessen the period of disability' or 'provide needed relief.' *Smith v. American & Efird Mills*, 305 N.C. 507, 290 S.E. 2d 634 (1982); G.S. 97-59." *Heffner v. Cone Mills Corp.*, 83 N.C. App. 84, 86, 349 S.E. 2d 70, 73 (1986).

In the case at bar, the Industrial Commission's award included the following:

> Defendants shall pay all medical expenses incurred by the plaintiff as a result of said occupational disease when bills for

the same are submitted through the carrier for approval by the Industrial Commission.

It is unclear from this language whether the Industrial Commission intended to include future medical expenses in this award. In addition, the Industrial Commission failed to make any findings that future treatment would or would not "provide needed relief." It appears from the evidence, however, that plaintiff would benefit from a continued program of medical treatment. Dr. Rubin stated that in his opinion a continued program of medical treatment would lessen the impairment to plaintiff's lungs. He also stated that people with plaintiff's form of lung disease experience deterioration in lung function, which can be prevented or minimized by bronchodilator therapy. Therefore, we remand this part of the case to the Industrial Commission for a determination of whether future medical benefits are "required to . . . provide needed relief." N.C.G.S. § 97-59 (1985).

The Commission has already made an award to plaintiff for damage to her lungs as a result of an occupational disease. Therefore, a finding that future medical treatment would provide plaintiff with "needed relief," entitles plaintiff to medical treatment under N.C.G.S. § 97-59.

N.C.G.S. § 97-59 provides by a literal interpretation of its language that payment for medical treatment "to provide needed relief" *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." *See Joyner v. Rocky Mount Mills*, 85 N.C. App. 606, 609, 355 S.E. 2d 161, 162 (1987).

We have reviewed plaintiff's remaining assignments of error and find them to be without merit.

For the foregoing reasons, we affirm the Industrial Commission's finding that plaintiff has byssinosis and its corresponding award under N.C.G.S. § 97-31(24) for damage to an internal organ. We remand to the Industrial Commission for additional findings on the issue of future medical expenses.

As to defendants' appeal, we affirm. As to plaintiff's appeal, we remand for additional findings on future medical expenses, but otherwise affirm.

Judges PHILLIPS and EAGLES concur.

MCB LIMITED, A NORTH CAROLINA PARTNERSHIP v. CHARLES HUGH McGOWAN, JR., JANICE M. BARBRE AND WILLIAM I. WOOTEN, JR., TRUSTEE

No. 863DC1307

(*Filed 18 August 1987*)

**Mortgages and Deeds of Trust § 9— purchase money deed of trust—subordination clause—void for indefiniteness**

Where plaintiff purchased property from defendants who accepted a purchase money deed of trust which contained a provision requiring defendants to subordinate their lien to future construction and permanent financing loans arranged by plaintiff during development of the property, plaintiff's complaint seeking to have the subordination clause declared valid and to require defendants to issue multiple deeds of subordination in conformity with the clause was properly dismissed, since the clause stated that defendants would subordinate their position upon plaintiff's request "in such amount as may be reasonably requested"; this phrase required the parties to agree at a future time as to whether a loan requested by plaintiff was reasonable; and this requirement of future agreement on the material terms concerning application of the subordination provision rendered this clause void for indefiniteness as a matter of law.

APPEAL by plaintiff from *Hunter, Judge.* Order entered 15 July 1986 in District Court, PITT County. Heard in the Court of Appeals 12 May 1987.

*Narron, Holdford, Babb, Harrison & Rhodes, P.A., by Walter L. Hinson, attorney for plaintiff-appellant.*

*Everett, Everett, Warren & Harper, by C. W. Everett, Sr. and Edward J. Harper II, attorneys for defendant-appellees McGowan and Barbre.*

*Williamson, Herrin, Barnhill & Savage, by Mickey A. Herrin, attorney for defendant-appellee Wooten.*

ORR, Judge.

Plaintiff, a limited partnership, contracted to purchase real property from defendants for the purpose of commercial development. To aid in financing the development, plaintiff's sales contract included a provision requiring defendants to accept a purchase money deed of trust. In addition, defendants were to execute a deed or deeds of subordination to construction and/or permanent financing.

On or about 1 August 1983 defendants tendered to plaintiff, in pertinent part, a deed for the property and plaintiff tendered a deed of trust securing the balance of the purchase price. The deed of trust also contained a provision requiring defendants to subordinate their lien to future construction and permanent financing loans arranged by plaintiff during development of the property.

Subsequently plaintiff obtained a construction loan for repair and renovation of the property, to which defendants subordinated their lien position. However, when plaintiff asked defendants to subordinate a second time, to a loan permanently financing the development of the property, defendants refused.

Plaintiff sued for a declaratory judgment, requesting the trial court to find valid the subordination clauses in the sales contract and deed of trust, to require defendants to issue multiple deeds of subordination in conformity with the clauses, and to award plaintiff a minimum of $25,000 in damages. Defendants filed a motion to dismiss for failure to state a claim for relief. The trial court granted defendants' motion and ordered plaintiff's complaint dismissed. From this order plaintiff appeals.

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Azzolino v. Dingfelder*, 71 N.C. App. 289, 322 S.E. 2d 567 (1984). A complaint will be found insufficient "if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim." *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E. 2d 240, 241 (1981); *Collins v. Edwards*, 54 N.C. App. 180, 282 S.E. 2d 559 (1981).

After reviewing plaintiff's complaint, we find the subordination provisions in the contract and deed of trust were void for indefiniteness. Therefore, plaintiff's complaint failed to state a legally recognizable claim for relief and was properly dismissed.

In North Carolina "[o]ne of the essential elements of every contract is mutual[ity] of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and their minds must meet as to *all* the terms. If *any* portion of the proposed terms is not settled, or no

mode agreed on by which they may be settled, there is no agreement." *Croom v. Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735, 737 (1921) (emphasis added). *See Boyce v. McMahan*, 285 N.C. 730, 208 S.E. 2d 692 (1974); *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E. 2d 584 (1980); *Gray v. Hager*, 69 N.C. App. 331, 317 S.E. 2d 59 (1984). A contract, and by implication a provision, "leaving material portions open for future agreement is nugatory and void for indefiniteness." *Boyce v. McMahan*, 285 N.C. at 734, 208 S.E. 2d at 695. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). Consequently any contract provision, including a subordinating provision, failing to specify either directly or by implication a material term is invalid as a matter of law.

The specificity of terms in a subordination clause is a question of first impression in North Carolina. In addressing this question we will first review the circumstances in which subordination provisions are used and the purpose behind this use. We will then look to other jurisdictions for guidance in determining what terms are material in such clauses. Finally we will apply the contract law discussed above to the facts in the present case.

A subordination clause is one in which a seller of land, after retaining a security interest in the property sold, permits his interest to become secondary in priority to an encumbrance placed upon the property by the purchaser. *See Roskamp Manley Assoc. v. Davin Dev. & Inv.*, 184 Cal. App. 3d 513, 229 Cal. Rptr. 186 (1986); Annot. "Specific Performance—Definiteness," 26 A.L.R. 3d 855 (1969); Subordination Agreements, Dee Martin Calligar, 70 Yale L.J. 376 (1961).

In the present case and under the typical arrangement, the land is sold subject to a purchase money mortgage and the purchaser is authorized to subject the land to a subsequent mortgage to borrow funds for construction or development. *Id.* This clause is designed to allow a purchaser to develop the land with a relatively small initial investment in the purchase of the property. Inherent in this financing mechanism is the seller's risk of losing both his land and the balance due on the purchase price if the development is not successful. Since the land sold stands as security for not only the initial purchase price but also the costs of development, the foreclosure of the first deed of trust could result in the seller's inability to recover either the land or the money due him. *Id.*

As a result of the unique risks inherent in subordination clauses, other jurisdictions require these clauses to "contain terms that will define and minimize the risk that the subordinating liens will impair or destroy the seller's security." *Handy v. Gordon*, 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 770-71, 422 P. 2d 329 (1967); *Spangler v. Memel*, 7 Cal. 3d 603, 102 Cal. Rptr. 807, 498 P. 2d 1055 (1972).

Only one jurisdiction, California, has dealt extensively with the problem of enforcement of subordination provisions. In *Gould v. Callan*, 127 Cal. App. 2d 1, 273 P. 2d 93 (1954), California first identified the material terms of such a clause, holding that the subordination provisions must draw, at a minimum, the outside limits of the seller's exposure by stipulating the amount of the new proposed loan by the buyer, the maximum rate of interest, and the term and method of the loan's repayment. The *Gould* Court found that failure to include these terms rendered a clause incomplete and too uncertain for enforcement. *Gould v. Callan*, 127 Cal. App. 2d 1, 273 P. 2d 93. *Accord, Roskamp Manley Assoc. v. Davin Dev. & Inv.*, 184 Cal. App. 3d 513, 229 Cal. Rptr. 186 (1986); *Cummins v. Gates*, 235 Cal. App. 2d 417, 45 Cal. Rptr. 532 (1965); *Magna Development Co. v. Reed*, 228 Cal. App. 2d 230, 39 Cal. Rptr. 284 (1964); *Roven v. Miller*, 168 Cal. App. 2d 391, 335 P. 2d 1035 (1959).

In later cases the California Courts recognized, as does this Court, that the degree of particularity discussed above is not always attainable where details of future loans are not known prior to the sale of the property. In *Stockwell v. Lindeman*, 229 Cal. App. 2d 750, 40 Cal. Rptr. 555 (1964) the California Court of Appeals held that a subordination clause must state the matters which most directly affect the security of the seller's purchase money mortgage—the maximum amount of the proposed loan and the maximum rate of interest permitted on the future obligation. Remaining details in the provision may be determined by an outside standard, such as a third party institutional lender, custom and usage in the area for such loans, or negotiations between the lender and the buyer. *Id. Accord, Yackey v. Pacifica Development Co.*, 99 Cal. App. 3d 776, 160 Cal. Rptr. 430 (1979); *Eldridge v. Burns*, 76 Cal. App. 3d 396, 142 Cal. Rptr. 845 (1978); *Woodworth v. Redwood Empire Sav. & Loan Assn.*, 22 Cal. App. 3d 347, 99 Cal. Rptr. 373 (1971); *Magna Development Co. v. Reed*, 228 Cal.

App. 2d 230, 39 Cal. Rptr. 284; *Gould v. Callan*, 127 Cal. App. 2d 1, 273 P. 2d 93. However, the *Stockwell* Court stressed that a subordination provision will be found uncertain and unenforceable, if *any* details are left to the future agreement of the *buyer* and the *seller*. *Stockwell v. Lindeman*, 229 Cal. App. 2d 750, 40 Cal. Rptr. 555. Prior to and since *Stockwell*, the California Courts have consistently held that when a material term is reserved for future agreement by the parties to a contract no legal obligation arises until the parties reach such agreement, since they may be unable to reach a consensus as to that term on a later date. *Id. Accord*, *Roskamp Manley Assoc. v. Davin Dev. & Inv.*, 184 Cal. App. 3d 513, 229 Cal. Rptr. 186; *Yackey v. Pacifica Development Co.*, 99 Cal. App. 3d 776, 160 Cal. Rptr. 430; *Lawrence v. Shutt*, 269 Cal. App. 2d 749, 75 Cal. Rptr. 533 (1969); *White Point Co. v. Herrington*, 268 Cal. App. 2d 458, 73 Cal. Rptr. 885 (1968); *Magna Development Co. v. Reed*, 228 Cal. App. 2d 230, 39 Cal. Rptr. 284; *Gould v. Callan*, 127 Cal. App. 2d 1, 273 P. 2d 93.

The California Courts' treatment of subordination provisions left to the future agreements of the parties is in conformity with the general contract law in North Carolina, which also holds that such provisions are void for indefiniteness. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392; *Boyce v. McMahan*, 285 N.C. 730, 208 S.E. 2d 692; *Croom v. Lumber Co.*, 182 N.C. 217, 108 S.E. 735; *Gray v. Hager*, 69 N.C. App. 331, 317 S.E. 2d 59; *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E. 2d 584.

In evaluating the validity of the subordination clauses in question, it is unnecessary to consider the specificity of the material terms contained in these provisions.

In the case *sub judice* the subordination provision in the parties' sales contract provided: "The $70,000.00 note shall be 1st. deed of trust until Michael Buck [general partner of plaintiff] secures permanent financing on the building. At that time, note shall become 2nd. deed of trust." The subordination provision incorporated in plaintiff's deed of trust stated:

> This is a purchase money deed of trust.
>
> The Beneficiary by the acceptance of this deed of trust agrees to and with the Grantors herein to execute a deed or deeds of subordination upon the request of the Grantors in

such amount as may be reasonably requested by the Grantors so as to allow the Grantors to procure a construction loan on the above-described real property and thereafter, to secure a permanent financing loan of the above-described real property and to execute and deliver to any such construction lender and/or permanent financing lender, a deed of trust which shall be a first deed of trust having priority over this deed of trust and to that end the Beneficiaries herein agree by acceptance of this deed of trust upon request to subordinate the lien of this deed of trust and agree to execute a deed or deeds of subordination at any time during the term of this deed of trust such deed or deeds of subordination to subordinate the lien of this deed of trust to the lien of a construction loan deed of trust and/or a permanent loan deed of trust to be given by the Grantors to a construction and/or permanent financing lender. All of the parties of this deed of trust agree that it shall not be necessary for the Trustee to join in the execution of any deed of subordinations subordinating this deed of trust to the lien of any other deed of trust, but said deed of subordination may be executed by the Beneficiary alone without joinder of the Trustee.

The only phrase present in either clause, addressing the terms of the subordinating loans, is contained in the deed of trust and states that defendants will subordinate their position upon plaintiff's request "in such amount as may be reasonably requested by" plaintiff. Plainly, this phrase requires the parties to agree at a future time as to whether a loan requested by plaintiff is reasonable. This requirement of future agreement on the material terms concerning application of the subordination provision renders this clause void for indefiniteness as a matter of law, without requiring this Court to consider whether the necessary material terms were present to afford defendants' security interest adequate protection.

Plaintiff also argues that defendants, having once subordinated their lien position in accordance with the subordinate clauses, are now equitably estopped from challenging the clauses' enforceability.

Plaintiff raises this argument for the first time on appeal. Equitable estoppel, however, is an affirmative defense, which must

be specifically pled to be properly before a trial court. N.C.G.S. § 1A-1, Rule 8(c) (1983); *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E. 2d 656 (1984); *Smith v. Hudson*, 48 N.C. App. 347, 269 S.E. 2d 172 (1980). "Failure to plead an affirmative defense ordinarily results in waiver thereof," *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. at 6, 312 S.E. 2d at 660; *Delp v. Delp*, 53 N.C. App. 72, 280 S.E. 2d 27, *disc. rev. denied*, 304 N.C. 194, 285 S.E. 2d 97 (1981), although the issue may still be tried if raised by the parties' express or implied consent. N.C.G.S. § 1A-1, Rule 15(b) (1983); *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E. 2d 656.

In the present case, plaintiff neither pled nor tried the case on this theory, and thus cannot now present it on appeal. *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E. 2d 656; *Delp v. Delp*, 53 N.C. App. 72, 280 S.E. 2d 27; *Grissett v. Ward*, 10 N.C. App. 685, 179 S.E. 2d 867 (1971).

We conclude therefore that plaintiff's subordination provisions were void for indefiniteness as a matter of law and find no error in the trial court's granting of defendants' motion to dismiss.

No error.

Judges ARNOLD and WELLS concur.

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FIRST VALUE HOMES, INC. v. JOHNNY DUANE MORSE, AND WIFE, KELLY SHOEMAKER MORSE

No. 8727SC2

(Filed 18 August 1987)

**Damages § 7— sale of mobile home—buyer's refusal to accept delivery—no liquidated damages clause—seller limited to $500**

Pursuant to N.C.G.S. § 143-143.21, the seller of a mobile home was limited to $500 in damages when the purchasers refused to accept delivery, and a paragraph on the reverse of the sales agreement was not a liquidated damages clause falling within the exception to the statute, since the clause was not for a sum certain, the amount could not be calculated using a mathematical formula, and the paragraph provided for the recovery of actual damages rather than liquidated damages and thus was superseded as a seller's remedy by N.C.G.S. § 143-143.21.

APPEAL by defendants from *Hyatt, Judge*. Judgment entered 4 August 1986 in Superior Court, GASTON County. Heard in the Court of Appeals 8 June 1987.

On 4 October 1984, plaintiff and defendants entered into a contract for the sale of a single-wide mobile home. Defendants, the Morses, requested a number of special features for their mobile home, including cherry birch paneling, light gold bathroom fixtures, and burnt orange carpeting. They were told by a salesman for plaintiff that the mobile home would have to be specially ordered from the factory in Indiana. Defendants gave plaintiff a $10,000 deposit.

Defendants discovered upon delivery of the mobile home that it lacked many of the special features they had ordered. As a result defendants rejected delivery, and demanded that plaintiff remove the mobile home from their lot and refund their deposit. Plaintiff removed the home and eventually resold it, but refused to refund the $10,000 deposit to defendants.

Plaintiff brought suit for damages incurred as a result of the Morses' refusal to accept the mobile home. The Morses counterclaimed for return of their deposit and for damages resulting from plaintiff's alleged unfair trade practices pursuant to N.C.G.S. § 75-1.

Before any evidence was introduced at trial, defendants made a motion *in limine* to limit plaintiff's evidence of damages to $500 pursuant to N.C.G.S. § 143-143.21. The motion was denied. Plaintiff then introduced evidence of damages exceeding $500.

Defendants moved at the appropriate times for a directed verdict, for judgment notwithstanding the verdict, for a new trial, and for remittitur of all damages awarded plaintiff over $500. All motions were denied. The jury found that First Value had substantially performed its obligations under the contract and was entitled to damages of $10,000. The jury also determined that the Morses suffered no injury. Defendants bring this appeal.

*Whitesides, Robinson, Blue and Wilson, by Henry M. Whitesides and David W. Smith, III, attorneys for plaintiff appellee.*

*Kelso & Ferguson, by Lloyd T. Kelso, attorney for defendant appellants.*

ORR, Judge.

The issue before this Court is whether N.C.G.S. § 143-143.21 limiting damages when a buyer of a mobile home fails to accept *delivery applies to the facts of this case.*

N.C.G.S. § 143-143.21, enacted in 1981 as part of a bill regulating the manufactured housing and mobile home industry, reads in pertinent part:

> **§ 143-143.21. Limitation on damages.**
>
> If the buyer fails to accept delivery of a manufactured home, the seller may retain actual damages according to the following terms:
>
> . . .
>
> (2) If the manufactured home is a single-wide unit and is specially ordered from the manufacturer for the buyer, the maximum retention shall be five hundred dollars ($500.00).
>
> . . .
>
> Nothing in this Part shall prevent the parties to a manufactured home sales contract from contracting for liquidated damages otherwise permitted by law.

Defendants contend that this statute is controlling and that, therefore, the trial court should have limited plaintiff's proof of damages to $500 in accordance with the statutory limit. Plaintiff counters by maintaining that paragraph six on the reverse of the sales agreement is a liquidated damages clause falling within the § 143-143.21 exception.

Paragraph six of the "plain language purchase agreement" signed by the parties reads as follows:

> **6. FAILURE TO COMPLETE PURCHASE.** If I fail or refuse to complete this purchase within thirty (30) days of the date of this contract, or within an agreed-upon extension of time, for any reason (other than cancellation because of an increase in price), you may keep that portion of my cash deposit which will reimburse you for expenses and other losses including attorney fees and court cost incurred, because I failed to com-

> plete this purchase. . . . You shall have all the rights of a seller upon breach of a contract, under the Uniform Commercial Code §§ 2-708, 2-710, 2-718, of the Uniform Sales Act (as applicable).

Defendants argue that this provision concerns the amount of actual damages the mobile home seller can recover and, as such, is superseded by N.C.G.S. § 143-143.21. We agree.

"Liquidated damages are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable . . . if the breach occurs." McCormick, Damages § 146 (1935). Quoted with approval in *Kinston v. Suddreth*, 266 N.C. 618, 620, 146 S.E. 2d 660, 662 (1966). Excessive liquidated damages are termed a penalty, and a provision fixing unreasonably large liquidated damages is unenforceable. *Knutton v. Cofield*, 273 N.C. 355, 360-61, 160 S.E. 2d 29, 34 (1968).

A valid liquidated damages clause must meet several requirements, the first of which concerns the specificity with which damages are stipulated. Black's Law Dictionary states that the term "liquidated damages" is applicable "when a *specific sum* of money has been expressly stipulated by the parties to a bond or other contract as the amount of damages to be recovered by either party for a breach of the agreement by the other." Black's Law Dictionary 353 (rev. 5th ed. 1979) (emphasis added).

Virtually every reported case in North Carolina analyzing a liquidated damages clause refers to a "sum fixed by contract," *Bradshaw v. Millikin*, 173 N.C. 432, 435, 92 S.E. 161, 163 (1917); or a "sum specified," *Brenner v. School House, Ltd.*, 302 N.C. 207, 214, 274 S.E. 2d 206, 211 (1981); or a "sum certain," *Horn v. Poindexter*, 176 N.C. 620, 621, 97 S.E. 653, 653 (1918). "It has been held that to be valid, a provision for liquidated damages must be for a certain sum, and not be such as will call for future action by the court to determine the amount thereof." 25 C.J.S. *Damages* § 101 at 1025 (1966).

Plaintiff contends that while the amount of liquidated damages in the sales agreement with the Morses is not for a "sum

certain," the amount is easily calculable using a mathematical formula expressed in paragraph six. In *Knutton*, the Supreme Court of North Carolina approved the use of a mathematical formula to compute liquidated damages.

The plaintiff in *Knutton* contracted with the defendant to install an electric coin-operated phonograph in the defendant's restaurant. A contract clause provided that in the event the defendant disconnected the phonograph or installed another phonograph not owned by the plaintiff, plaintiff would be entitled to liquidated damages according to the following formula:

> The total receipts from the operation of the Phonograph, less the amount paid over to the Location Owner for the weeks preceding the breach by the Location Owner of the terms, covenants and conditions of this agreement, shall be totalled and divided by the number of weeks that have elapsed since the commencement date of this agreement and the sum resulting shall constitute the 'net average weekly payment.' This 'net average weekly payment' shall be multiplied by the number of weeks remaining under the terms of this agreement, and such resulting sum shall immediately become due and payable.

*Knutton v. Cofield*, 273 N.C. at 357, 160 S.E. 2d at 31-32. In *Knutton* the clause in question specifically calls for liquidated damages and the formula is very precise in specifying the method to be used in calculating those damages. In the case *sub judice* no specific reference is made to liquidated damages (other than a reference to § 2-718 of the UCC). Also the alleged formula in the First Value contract is far less distinct. Since no adequate mathematical formula is present in First Value's contract with the Morses to calculate a set amount of liquidated damages, and no sum certain is expressed otherwise, paragraph six in the sales agreement cannot be deemed a liquidated damages clause.

More importantly, paragraph six provides for the recovery of actual damages rather than liquidated damages and thus is superseded as a seller's remedy by N.C.G.S. § 143-143.21. "Actual damages are synonymous with compensatory damages and with general damages." *Ringgold v. Land*, 212 N.C. 369, 371, 193 S.E. 267, 268 (1937). "Compensatory damages, as indicated by the word employed to characterize them, simply make good or replace the

loss caused by the wrong." *Waters v. Telegraph Co.*, 194 N.C. 188, 197, 138 S.E. 608, 612 (1927). The stated purpose of the clause in the Morses' sales contract is to "reimburse [the seller] for expenses and other losses including attorney fees and court cost incurred, because [the buyer] failed to complete this purchase." "Reimburse" is defined as "to pay back, to make restoration, to repay that expended; to indemnify, or make whole." Black's Law Dictionary 1157 (rev. 5th ed. 1979). Money paid First Value to "reimburse" or "compensate" their expenses and losses is clearly in the nature of actual damages. Paragraph six of the sales contract merely seeks to provide the seller with an actual damages remedy so as to "restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money." *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E. 2d 343, 347 (1950).

Contrary to the appellee's contentions, a clear distinction does exist between actual and liquidated damages. Since the contract clause in question addresses the retention by the seller of actual (compensatory) damages rather than liquidated damages, defendants' dispute with First Value is governed by N.C.G.S. § 143-143.21. The trial court committed an abuse of discretion in not granting defendants' motion *in limine* to limit appellee's proof of damages to $500 pursuant to N.C.G.S. § 143-143.21.

We find as a matter of law that N.C.G.S. § 143-143.21 is applicable to the case at bar so that plaintiff's maximum retention for damages is $500. The trial court erred in not granting defendants' motion for a directed verdict. "Where rulings are made under a misapprehension of the pertinent principles of law, the practice is to vacate such rulings and remand the cause for further proceedings." *Owens v. Voncannon*, 251 N.C. 351, 355, 111 S.E. 2d 700, 703 (1959). Since we find that the trial court entered judgment in the case at bar under a misapprehension of the applicability of N.C.G.S. § 143-143.21, the prior judgment for $10,000 in favor of plaintiff should be vacated, and this proceeding should be remanded for the entry of a judgment awarding plaintiff $500 pursuant to N.C.G.S. § 143-143.21.

For the above reasons, we vacate the judgment of the trial court for plaintiff in the amount of $10,000, and remand this case for entry of judgment for plaintiff in the amount of $500.

Vacated and remanded.

Judges PHILLIPS and EAGLES concur.

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NORVEL T. MCKENZIE, EMPLOYEE, PLAINTIFF v. MCCARTER ELECTRICAL COMPANY, EMPLOYER, PENNSYLVANIA NATIONAL INSURANCE COMPANY, CARRIER, DEFENDANT

No. 8710IC98

(Filed 18 August 1987)

1. **Master and Servant § 65.2— workers' compensation—back injury—subsequent disability to legs**

The Industrial Commission erred in failing to make findings as to disability to plaintiff's legs caused by his arachnoiditis.

2. **Master and Servant § 69— workers' compensation—amount of recovery—choice of remedies**

The Industrial Commission erred in limiting plaintiff's award to the scheduled injuries set forth in N.C.G.S. § 97-31 since plaintiff would be entitled to choose between the remedies provided for in N.C.G.S. § 97-29 and N.C.G.S. § 97-31(23) should the Commission ultimately find that there was a compensable loss to plaintiff because of his arachnoiditis so as to render plaintiff totally incapacitated.

3. **Master and Servant § 69.2— workers' compensation—successive injuries—compensation for permanent and total disability proper**

Plaintiff who suffered two injuries to his back and who subsequently developed arachnoiditis was entitled to receive compensation under N.C.G.S. § 97-29 if he was permanently and totally disabled, and this was true even though no single injury resulted in total and permanent disability, so long as the combined effect of all the injuries caused permanent and total disability.

APPEAL by plaintiff from Opinion and Award of the Industrial Commission filed 14 August 1986. Heard in the Court of Appeals 10 June 1987.

This is a workers' compensation case where plaintiff was awarded compensation under N.C.G.S. § 97-31 for damage to his back resulting from a work-related injury. Plaintiff appeals and contends that since he was totally disabled an award should have been made under N.C.G.S. § 97-29.

On 9 August 1978, plaintiff, 62, suffered an injury to his back while on the job at defendant-employer. After he reached maximum medical improvement, plaintiff received a 25 percent permanent partial disability rating to his back as a result of the injury. However, he was able to continue working full time as a supervisor for defendant-employer.

On 20 January 1982, while still working for defendant, plaintiff suffered another injury to his back. Plaintiff's doctor, Dr. Blaine Nashold, found that the second injury caused an additional 25 percent permanent partial disability to plaintiff's back, for a total permanent disability rating of 50 percent.

Upon the termination of temporary total benefits for the second injury, plaintiff requested a hearing before the Industrial Commission and contended that the 50 percent disability rating was too low. After this hearing, the Deputy Commissioner entered an opinion and award which found that plaintiff reached maximum medical improvement on 19 September 1984 and that he had a total of 50 percent permanent partial disability to his back. The Deputy Commissioner also found that plaintiff had developed arachnoiditis. As a result of this condition plaintiff experiences sustained back and leg pain and has difficulty with prolonged sitting or standing. In addition, the Deputy Commissioner found that plaintiff can perform only sedentary activities with minimal physical activity.

Finally, the Deputy Commissioner found that due to the 20 January 1982 injury, plaintiff is incapable of earning the wages he was earning with defendant in the same or any other type employment. However, the Deputy Commissioner concluded that plaintiff was *not* totally disabled, since no other part of plaintiff's body (other than his back) was permanently disabled. Based on these findings, the Deputy Commissioner awarded plaintiff compensation under N.C.G.S. § 97-31 for the 25 percent permanent partial disability to his back as a result of the second injury.

Plaintiff appealed this opinion and award to the Full Commission, which affirmed the Deputy Commissioner's opinion and award with a dissent by Commissioner Clay. From the Full Commission's decision, plaintiff appeals.

*Mast, Tew, Morris, Hudson & Schulz, P.A., by Bradley N. Schulz and George B. Mast, attorneys for plaintiff appellant.*

*Young, Moore, Henderson & Alvis, P.A., by B. T. Henderson II and Joseph W. Williford, attorneys for defendant appellees.*

ORR, Judge.

Plaintiff argues that the Industrial Commission erred in limiting his compensation to an award for damage to his back under N.C.G.S. § 97-31.

In order to obtain compensation under the Workers' Compensation Act, the claimant must prove the existence of a disability as well as its extent. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). "Disability" is defined by N.C.G.S. § 97-2(9) as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." "To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E. 2d 374, 378-79 (1986).

In the case *sub judice*, the Industrial Commission found that plaintiff met the three-part test set forth above and held that plaintiff was disabled.

Once the Industrial Commission found that a "disability," as defined by N.C.G.S. § 97-2(9), exists, the Commission must then determine whether that disability is (1) permanent total, (2) permanent partial, (3) total temporary, or (4) partial temporary. *Gamble v. Borden, Inc.*, 45 N.C. App. 506, 508, 263 S.E. 2d 280, 281, *disc. rev. denied*, 300 N.C. 372, 267 S.E. 2d 675 (1980). Therefore, two questions arise: first, whether the disability is "total" or "partial"; and second, whether the disability is "permanent" or "temporary."

"A permanent total case is one in which an employee sustains an injury which results in his inability to function in any work-related capacity at any time in the future. . . . A temporary total

case is one in which the employee is temporarily unable to perform any work duties." *Id.* at 508, 263 S.E. 2d at 281.

" '[S]pecific findings by the Commission with respect to the crucial facts, upon which the question of plaintiff's right to compensation depends, are required.' . . . 'If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon matters in controversy, the proceeding must be remanded for the Commission to make proper findings.' " *Gamble v. Borden, Inc.*, 45 N.C. App. at 508, 263 S.E. 2d at 281-82 (citations omitted).

[1] In the case at bar, the Commission found in part that:

> Plaintiff has developed arachnoiditis (inflammation and scarring of the nerves). As a result, he experiences sustained back and leg pain, anxiety and depression and difficulty with prolonged standing or sitting. . . . Plaintiff can only perform sedentary activities with minimum physical activity.
>
> Due to the January 20, 1982 injury, plaintiff is incapable of earning the wages he was earning as a supervisor with defendant-employer in the same or any other type employment; however, plaintiff is *not* totally disabled. Plaintiff's back is permanently partially disabled, and no other part of his body is permanently damaged.

Clearly the Commission acknowledged the existence and severity of the arachnoiditis condition but failed to treat it as a separate condition.

In *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985), the Court addressed a set of facts similar to those in the case at bar. In *Fleming*, the plaintiff sustained a 50 percent permanent partial disability to his back as a result of a compensable accident and developed arachnoiditis, which caused pain in his back and legs. The result was that plaintiff could not pursue work of any kind and could not earn any wages. The Supreme Court held that when "an injury to the back causes referred pain to the extremities of the body and this pain impairs the use of the extremities, then the award of workers' compensation must take into account such impairment." *Id.* at 546, 324 S.E. 2d at 218-19. Furthermore, "a disabled plaintiff suffering from 'chronic back and leg pain' as a result of a work-related injury to the back

[can]not be fully compensated under N.C. Gen. Stat. 97-31(23) and [is] entitled to compensation under N.C. Gen. Stat. 97-29." *Harmon v. Public Service of N.C., Inc.*, 81 N.C. App. 482, 484, 344 S.E. 2d 285, 286 (1986).

Therefore, the Commission's failure to make findings as to disability to plaintiff's legs caused by the arachnoiditis was error and requires a remand to the Commission for appropriate findings.

**[2]** Plaintiff contends further that the Commission erred by limiting his award to the scheduled injuries set forth in N.C.G.S. § 97-31. Our Supreme Court in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986), ruled that "Section 29 [compensation rates for total incapacity] is an alternate source of compensation for an employee who suffers an injury which is also included in the schedule. The injured worker is allowed to select the more favorable remedy, but he cannot recover compensation under both sections because Section 31 is 'in lieu of all other compensation.'" 318 N.C. at 96, 348 S.E. 2d at 340. Therefore, should the Commission ultimately find that there is a compensable loss to plaintiff because of the arachnoiditis, so as to render plaintiff totally incapacitated, then he can choose between N.C.G.S. § 97-31(23) and N.C.G.S. § 97-29.

**[3]** Defendant contends that plaintiff is not totally disabled as a result of the 1982 accident, because the arachnoiditis and pain to his legs resulted from the 1978 accident. However, in *Wilder v. Barbour Boat Works*, 84 N.C. App. 188, 352 S.E. 2d 690 (1987), the plaintiff suffered a 15 percent disability to his left leg as a result of a 1983 accident on the job. Prior to that injury plaintiff had suffered a 30 percent permanent disability to the same leg from another work-related accident, so that his total disability was 45 percent. After he was awarded compensation under N.C.G.S. § 97-31, plaintiff argued that the second accident materially aggravated his preexisting infirmity, so that he was entitled to receive compensation for total disability under Section 29. This Court agreed and stated that "where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the pre-existing condition will not be weighed. *Anderson v. A. M. Smyre Co.*, 54 N.C. App. 337, 283 S.E. 2d 433 (1981)." *Id.* at 196, 352 S.E. 2d at 694. "If

an injured employee is *permanently* and *totally* disabled as the term is defined by N.C.G.S. 97-2(9), then he or she is entitled to receive compensation under N.C.G.S. 97-29. . . . (Citations omitted.) This is true even though no single injury of claimant resulted in total and permanent disability, so long as the combined effect of all of the injuries caused permanent and total disability." *Fleming v. K-Mart Corp.*, 312 N.C. at 547, 324 S.E. 2d at 219 (emphasis added).

For the foregoing reasons, we hold that plaintiff is not limited to recovery under N.C.G.S. § 97-31. Therefore, we remand this case to the Industrial Commission for additional findings as to plaintiff's disability resulting from the arachnoiditis. Having disposed of plaintiff's appeal in this manner, we need not address plaintiff's remaining assignments of error.

Remanded for additional findings.

Judges WELLS and PHILLIPS concur.

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ELMER WAYNE HOLLEY AND WIFE, CAROL HOLLEY v. HERCULES, INCORPORATED AND AMERICAN PETROFINA, INCORPORATED, D/B/A HERCOFINA, AND DEWITT MCKOY

No. 875SC1

(Filed 18 August 1987)

**Damages § 12.1; Rules of Civil Procedure § 41.1— punitive damages not specifically alleged—voluntary dismissal—punitive damages claim preserved**

When plaintiff refiled his action within one year of his voluntary dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(a), his claim for punitive damages, which he specifically alleged in the second action but not the first, was nevertheless not barred by the statute of limitations, since he alleged facts in the first action which were sufficient to support an award of punitive damages, and his allegations in the second action with regard to the recklessness of defendant and his indifference to plaintiff's safety added nothing of any consequence to the suit.

APPEAL by plaintiff, Elmer Wayne Holley, from *Reid, Judge.* Order entered 10 September 1986 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 May 1987.

On 12 April 1982 plaintiff, Elmer Wayne Holley, a pipefitter employed by the concern that maintained defendant Hercules' industrial plant near Wilmington, sustained personal injuries at that facility while replacing a leaking gasket in a pipeline condenser. On 7 April 1983 he sued only the corporate defendants for the compensatory damages he allegedly sustained as a consequence of that incident. In that action, also filed in the Superior Court of New Hanover County, he alleged by his complaint and amended complaint in substance that: His injuries were due to the negligence of two employees of the corporate defendants, DeWitt McKoy and an unidentified control room operator; their negligence consisted of charging a large pipeline close to the one plaintiff was working on without notifying him, though they knew that charging a line causes a great deal of vibration and creates an extremely dangerous condition for workers in close proximity to it, and McKoy either gave the unknown control room operator approval to charge the line before warning plaintiff or the control room operator charged the line without either obtaining approval or warning plaintiff; because of the vibration caused by the charging of the line, plaintiff had to leap from his work place to the floor about nine feet below and in doing so was injured. On 18 March 1985 Elmer Wayne Holley voluntarily dismissed that action without prejudice, as Rule 41 of the N.C. Rules of Civil Procedure permits; and this action based on the same accident and injury was filed within a year thereafter, on 17 March 1986. The new complaint essentially duplicates the allegations earlier made as to where, when, why, and how plaintiff Elmer Wayne Holley was injured and sustained compensatory damages, it being alleged, as before, in essence that Elmer Wayne Holley was injured because either defendant McKoy or the unknown control room operator charged the line without notifying him. The complaint in this action also alleges in gist that: Because of Elmer Wayne Holley's injury Carol Holley was damaged by being deprived of his society and companionship; defendant DeWitt McKoy was individually negligent and liable as a joint tort feasor; and McKoy "acted with reckless and wanton disregard of the Plaintiff, Elmer Wayne Holley's rights and exhibited a gross indifference to the rights and safety of others." In the prayer for relief in this complaint plaintiffs prayed for the recovery of compensatory damages for Elmer Wayne Holley because of his personal injuries, compen-

satory damages for Carol Holley's loss of consortium, and punitive damages for both plaintiffs.

After answering the complaint Hercules, Incorporated, the only defendant served with process in this action, moved for summary judgment "on the grounds that the Plaintiffs' causes of action are barred by the applicable Statute of Limitations." The motion was granted as to the claims of Carol Holley and the claim of Elmer Wayne Holley for punitive damages, but the motion was denied as to Elmer Wayne Holley's claim for compensatory damages. Carol Holley did not appeal.

*Shipman & Lea, by H. Kenneth Stephens, II, for plaintiff appellant Elmer Wayne Holley.*

*Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams and Charles D. Meier, for defendant appellee Hercules, Incorporated.*

PHILLIPS, Judge.

The only question presented by this appeal is whether the so-called claim or cause of action of Elmer Wayne Holley for punitive damages based upon the defendant's negligence in causing him to be personally injured is barred by the three-year statute of limitations, admittedly the applicable statute. G.S. 1-46; G.S. 1-52(16). It is not contended here that his action for compensatory damages is barred by that statute and there is no basis for doing so, though it was instituted more than three years after the injuries were allegedly sustained; for that part of this action virtually duplicates the first action which was commenced within the statutory period, and this action was brought within a year after that action was voluntarily dismissed without prejudice, as Rule 41(a)(1), N.C. Rules of Civil Procedure expressly permits. But since the so-called claim or cause of action for punitive damages was not asserted until this action was refiled, more than three years after the incident giving rise to the claim occurred, it is not quite as obvious that Rule 41(a)(1) extended the time for filing it as well.

The provisions of Rule 41(a)(1) that concern us state that unless the terms of the dismissal provide otherwise, and plaintiff's dismissal did not provide otherwise, that "a new action

based on the same claim may be commenced within one year" after a voluntary dismissal without prejudice is taken. Defendant appellee, contending that the claim is barred and that Rule 41(a)(1) does not save it, points to *Stanford v. Owens*, 76 N.C. App. 284, 332 S.E. 2d 730, *disc. rev. denied*, 314 N.C. 670, 336 S.E. 2d 402 (1985) as controlling. In that case it was held that a cause of action for fraud, first asserted after the statute of limitations had otherwise run, was not saved by Rule 41(a)(1), though it was asserted in connection with a timely refiled action for negligent misrepresentation and the fraud claim was based on the same lot sale that the negligent misrepresentation claim was based on. But there is a significant, and we think decisive, difference between *Stanford* and this case. Fraud is a cause of action with distinctive elements that distinguish it from a cause of action based on negligent misrepresentation, and when the cause of action for fraud was first asserted in *Stanford* the statute of limitations had already run against it; whereas in this case only one cause of action is asserted, and it is the same cause of action that was asserted in the first case because there is no *cause of action* for punitive damages and no such cause is asserted herein. Causes of action are the vehicles by which legal rights and remedies are enforced, but no one has a legal right to punitive damages. Punitive damages are recoverable only in the discretion of the jury when the wrong is of an aggravated nature. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956). For punitive damages to be awarded in a personal injury action sounding in negligence, as this one, the defendant's wrong must amount to more than ordinary negligence; it must reach a higher level of misconduct, such as wilfulness, wantonness or recklessness indicating an indifference to or a disregard for the rights and safety of others. *Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1984); *Hinson v. Dawson, supra; Huff v. Chrismon*, 68 N.C. App. 525, 315 S.E. 2d 711, *disc. rev. denied*, 311 N.C. 756, 321 S.E. 2d 134 (1984); *Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E. 2d 148 (1978); W. Prosser and W. Keeton, The Law of Torts Sec. 2, p. 9 (5th ed. 1984).

Furthermore, our courts have usually not required the pleader to specifically plead, by name, punitive damages; they have rather held that it is enough that the facts tending to establish the aggravated character of the wrong are alleged, and that characterizing a party's conduct as being wilful, or wanton,

or reckless without alleging the specific acts relied upon are but conclusions that add nothing to the allegation. *Cook v. Lanier*, 267 N.C. 166, 147 S.E. 2d 910 (1966); *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955). Thus, in this case, since plaintiff alleged in the first action that defendant's employees activated a pipeline close to where plaintiff was working without warning him, that charging a line created a dangerous situation, and before charging a line they were required to notify those in close proximity thereto, an adequate factual basis was stated for the jury finding that defendant acted with reckless disregard for plaintiff's safety and for awarding punitive damages if they concluded such damages should be awarded. That in the complaint in this action plaintiff went further and characterized the acts previously described as being reckless and indifferent to his safety added nothing of any consequence to the suit; certainly it did not add an enforceable claim or cause of action that the statute of limitations had run against.

Rule 41(a)(1) extends the time within which a party may refile suit after taking a voluntary dismissal when the refiled suit involves the same parties, rights and cause of action as in the first action. *Goodson v. Lehmon*, 225 N.C. 514, 35 S.E. 2d 623 (1945); *Whitehurst v. Virginia Dare Transportation Co.*, 19 N.C. App. 352, 198 S.E. 2d 741 (1973). This refiled action now involves the same parties, the same rights and the same cause of action as before; and under the plain provisions of the rule no part of the action as refiled is barred by the statute of limitations.

Reversed.

Judges COZORT and GREENE concur.

JUNG KEUN KIM v. DALE LEE HANSEN AND DONALD HERMAN HANSEN

No. 868SC1271

(Filed 18 August 1987)

**Damages § 17.5— lost earnings—refusal to instruct error**

That plaintiff was not employed when she was injured and had not been employed for wages since coming to this country did not eliminate the fact that the jury could have properly found from the evidence that, except for defendant's negligence, she would have obtained and held a financially remunerative schoolteaching job during some part of the four and a half years preceding the trial of the case, and the trial court therefore erred in refusing to charge the jury as to plaintiff's loss of earnings and earning capacity prior to trial.

APPEAL by plaintiff from *Llewellyn, Judge.* Judgment entered 11 July 1986 in Superior Court, WAYNE County. Heard in the Court of Appeals 9 April 1987.

Plaintiff sued for personal injuries allegedly sustained on 28 October 1981 when a truck owned by Donald Herman Hansen, operated by Dale Lee Hansen, crossed the center line of a two-lane highway in Wayne County and struck a car in which she was riding as a passenger. Before the trial began the case against Donald Herman Hansen, who was not properly served with process, was dismissed and defendant Dale Lee Hansen stipulated that he was negligent in causing the collision involved. The case was tried just on the damages issue, which the jury answered in the amount of $2,500. Plaintiff's motion to set the verdict aside and grant her a new trial was denied and judgment for plaintiff was entered on the verdict. Plaintiff's evidence presented during the trial tended to show the following pertinent to the appeal:

Before the collision plaintiff, a Korean native who had been in this country approximately a year and a half, was 30 years old, and in good health. For seven years before coming here she taught school in Korea and is qualified to teach in any elementary school where the Korean language is used. She came to Goldsboro with her husband Churl Keun Kim, a Presbyterian minister, and in addition to keeping house she assisted him in performing various pastoral duties, but was not employed in this country before the collision. The collision threw plaintiff's body about in the car;

her head shattered the windshield and her left shoulder and both hips and legs hit parts of the car and were bruised and sore. Immediately after the collision she was treated in the emergency room of Wayne Memorial Hospital and released. The next day she had pain in her head, knees, legs, back and shoulders and was treated by Goldsboro physician Dr. Ashton Griffin. The day after that she was dizzy and nauseated and was again treated by Dr. Griffin. Between then and 4 January 1982 she continued to have various aches and pains and was again seen by Dr. Griffin. On 4 January 1982 she was nervous and afraid to ride in a car, and Dr. Griffin suggested that she consider consulting a psychiatrist. During his treatment of plaintiff Dr. Griffin took a number of X-rays, none of which disclosed a bone injury, and he diagnosed her injuries as bruises and contusions about the knees. On 12 January 1982 plaintiff and her husband moved to New Jersey where she was treated by several different doctors, one of whom testified that she has a disabling injury of the lower back caused by the collision. Due to her severe back pain and headaches she was unable to work about the home as before and on one occasion she was hospitalized for two weeks. Her medical expenses amount to $7,427.35 altogether. In the New Jersey area where plaintiff and her husband have lived since 1982, many jobs teaching in Korean speaking elementary schools at an annual salary of $20,000 have been available to plaintiff but she did not seek to obtain any of them because she was physically unable to do the work.

Defendant's evidence consisted of the deposition of a medical expert, who testified in substance that in his opinion plaintiff's low back disability was not caused by the collision, because no symptoms or complaints concerning the back are recorded in the earlier medical records, and that the injuries caused by the collision were minor and of a temporary effect.

*Thomas E. Strickland for plaintiff appellant.*

*Dees, Smith, Powell, Jarrett, Dees & Jones, by William W. Smith and Tommy W. Jarrett, for defendant appellee Dale Lee Hansen.*

PHILLIPS, Judge.

Three of the assignments of error plaintiff brought forward in her brief are manifestly without merit and only need to be mentioned. One is that the trial judge erred in instructing the jury on proximate cause. The contention is not that the instruction given was legally incorrect, but that it was incorrect to charge on proximate cause at all since negligence was stipulated. But it is elemental law that a tort feasor is liable only for those damages which proximately flow from his tort, *King v. Britt*, 267 N.C. 594, 148 S.E. 2d 594 (1966), and it was not only proper, it was necessary for the court to charge thereon. The other two assignments relate to the court's denial of plaintiff's motions to set the verdict aside on the ground that the damages awarded were inadequate and that the verdict was contrary to the greater weight of the evidence. Both of these motions were addressed to the judge's sound discretion, *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982), and in denying them we see no indication that his discretion was abused.

But plaintiff's other assignment of error—that the court erred in refusing to charge the jury that plaintiff might have suffered an earnings or earnings capacity loss up to the time of trial—has merit. There was evidence that except for defendant's negligence plaintiff would have earned wages as a schoolteacher during the four years or so after the accident and preceding the trial that she and her husband lived in New Jersey. Her doctor there testified in substance that plaintiff had been disabled because of headaches and back pain since he first examined her in July 1982; and her husband testified that as a qualified, experienced elementary schoolteacher plaintiff could have readily obtained a teaching job at $20,000 a year in one of the many New Jersey schools in their area that required Korean language teachers, but did not do so because of her back pain and headaches. The transcript indicates that the trial judge refused to instruct the jury on this aspect of the evidence because plaintiff was not employed when the collision occurred and had not been employed since coming to this country. Yet on the same evidence the court properly instructed the jury that plaintiff's damages could include compensation for loss of earning capacity during the years that lay ahead. In doing so, however, the court accentuated its error in failing to charge as to the impairment of plaintiff's earning capacity in the

past by explicitly and pointedly limiting the jury's consideration of earning capacity and earnings losses to those that might occur in the future. "The element of loss of time is held properly to include only such loss as has accrued up to the time of trial; a subsequent loss of time is to be included in a recovery for decreased earning capacity." 25 C.J.S. *Damages* Sec. 38, p. 721 (1966). Both loss of time and loss of earning capacity are recoverable when established by evidence, since in cases like this the plaintiff, if entitled to recover at all, is entitled to recover all damages, past and prospective alike, that result from a defendant's negligence. *Dickson v. Queen City Coach Co.*, 233 N.C. 167, 173, 63 S.E. 2d 297, 302 (1951). That plaintiff was not employed when she was injured and had not been employed for wages since coming to this country does not eliminate the fact that the jury could have properly found from the evidence that except for defendant's negligence she would have obtained and held a financially remunerative schoolteaching job during some part of the four and a half years preceding the trial of the case. In *Johnson v. Lewis*, 251 N.C. 797, 112 S.E. 2d 512 (1960), our Supreme Court held that it was proper to instruct the jury both as to the plaintiff's lost time and earning power, even though there was no evidence that she had ever worked except as a housewife; in so doing the Court observed that the plaintiff was entitled to work if she wanted to, and whether she did or not if her capacity to work and earn money had been impaired, she had suffered a substantial loss for which compensation was due. Though the small amount of damages awarded indicates that the jury did not find that plaintiff was permanently injured and disabled because of the collision, the failure to charge as to her evidence of lost time was nevertheless prejudicial. The jury could have found that even though her injuries would not prevent her from working and earning money in the future they had prevented her from earning money in the past. Furthermore, the apparent conclusion that plaintiff was not permanently injured and would not suffer any earning capacity loss in the future could have been affected by the jury not being permitted to consider any such losses as might have occurred in the past. For after being told in effect that earning capacity losses in the past when the effects of the injury may have been more severe were not compensable, it would be very difficult, indeed, for any jury to conclude that compensation was due for more uncertain losses in the future.

New trial.

Judges COZORT and GREENE concur.

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STATE OF NORTH CAROLINA, EX REL. GRACE H. ROHRER, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF ADMINISTRATION v. SIDNEY ARTHUR CREDLE

No. 862SC1017

(Filed 18 August 1987)

1. **Waters and Watercourses § 6— taking oysters in navigable waters—no prescriptive use**

The exclusive right to take oysters from lands under navigable waters in this State cannot be acquired by prescriptive use.

2. **Deeds § 14.3; Waters and Watercourses § 6— claim of exclusive right to take oysters in navigable waters—no reliance on common law right of piscary—profit a prendre—no *exclusive* right**

In claiming to have acquired the exclusive right to take oysters from certain of the State's submerged lands, defendant could not rely on the common law right of piscary, which is the right to fish in another man's waters, since the right is a type of *profit a prendre* which will not support a claim of *exclusive* right because: (1) the grant of a *profit a prendre* does not preclude the grantor from exercising a like right upon the land or granting such right to others also, and (2) exclusive fishing rights in *any* waters can only be acquired either by a grant of the soil under the water in which the fishing is done, or by a grant of the fishing distinct from the soil, and neither grant was ever made to defendant or his predecessor in title.

APPEAL by defendant from *Watts, Brown, Frank R.*, and *Small, Judges.* Orders and judgment entered 25 October 1984, 3 May 1985 and 5 May 1986 in Superior Court, HYDE County. Heard in the Court of Appeals 10 February 1987.

*Attorney General Thornburg, by Special Deputy Attorney General Daniel F. McLawhorn and Assistant Attorney General J. Allen Jernigan, for plaintiff appellee.*

*Davis & Davis, by Geo. Thomas Davis, Jr., for defendant appellant.*

PHILLIPS, Judge.

Plaintiff sued to remove a cloud on its title to a certain 640-acre tract of Hyde County land, most of which is situated beneath the waters of Swan Quarter Bay, a navigable body of water. *State ex rel. Blount v. Spencer*, 114 N.C. 770, 19 S.E. 93 (1894). Defendant, a 72-year-old fisherman, has taken oysters from that part of Swan Quarter Bay most of his life, as did his father before him. In his answer defendant asserted that he owns the land, either by grant or adverse possession, and in any event owns the exclusive right to take oysters from it by prescriptive use. Information developed during discovery indicated that defendant's claims of ownership or right were based upon the following: (a) two deeds to his father, one by S. S. Mann, the other by Zeb Hayes, that purported to convey portions of a 640-acre grant the State made to Joseph Hancock in 1786; (b) a perpetual franchise to take oysters from 10 described acres that the State granted to J. W. Hayes in 1889; (c) an entry filed in 1891 by S. S. Mann for a perpetual franchise to cultivate shellfish in 640 described acres; and (d) the claim that he and his father possessed the land and had been taking oysters from it under a claim of right continuously since 1917. Eventually, on one ground or another, the State moved to dismiss each of defendant's claims or defenses and after several different hearings were held all the claims or defenses were dismissed. On 25 October 1984, because of defendant's failure or inability to comply with discovery, Judge Watts struck or dismissed defendant's claim to own the land involved based on the State's grant to Joseph Hancock in 1786. On 3 May 1985 Judge Brown, by an order of partial summary judgment, dismissed the claims that defendant owned the land by adverse possession and had the exclusive right by prescriptive use to take oysters from it; the latter claim was dismissed not because of any supposed insufficiency in the evidence, but upon the express ground that the exclusive right to take oysters from the State's submerged lands cannot be acquired by prescriptive use. And on 5 May 1986, by final judgment, Judge Small held that defendant's evidentiary forecast was insufficient either to rebut the presumption established by G.S. 146-79 that the State has title to the lands in controversy or to establish a chain of title to any perpetual shellfish franchise the State ever granted for the lands and waters involved.

[1] Though defendant appealed from all the orders or judgments entered, he has expressly abandoned all his assignments of error except those relating to the claim that he has acquired by prescriptive use the exclusive right to take shellfish from the submerged lands involved. Thus, it has become the law of the case, *Gower v. Aetna Insurance Co.*, 281 N.C. 577, 189 S.E. 2d 165 (1972), that defendant does not own the lands in controversy, either by grant or adverse possession, and has no exclusive franchise to take shellfish from them; and the only question presented for our determination, therefore, is—Can the exclusive right to take oysters from lands under navigable waters in this State be acquired by prescriptive use? We hold that it cannot and affirm the orders and judgment appealed from. For it has been the announced law in this State almost from its inception that: Lands under navigable waters can neither be appropriated by private persons nor conveyed to them by the State except for a public purpose when authorized by statute; and that such lands and the waters above them are held in trust for the use and benefit of all our people, each of whom, subject to reasonable legislative regulation in the public interest, has a right to navigate, fish, and carry on commerce in such waters as he sees fit. *Ward v. Willis*, 51 N.C. 183 (1858). In keeping therewith, grants of such lands not so authorized have been adjudged not to convey title, but only an easement, *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39 (1903), and it has been held that there can be no exclusive right to fish in navigable streams. *Skinner v. Hettrick*, 73 N.C. 53 (1875). The general common law rule in this country as to taking oysters is in the same vein and is that "no right in natural oyster beds can be gained by prescription against the state." Gould, A Treatise on the Law of Waters, Third Edition, p. 49 (1900).

[2] The legal vehicle or theory that defendant relies upon in claiming to have acquired the exclusive right to take oysters from the State's submerged lands is the common law right of piscary, which is the right to fish in another man's waters. Webster's Real Estate Law in North Carolina, Sec. 309, p. 373 (1971). The right of piscary (like the right to hunt, dig sand, and pasture cattle) is a type of *profit a prendre* or "right of common" that one person can have in the soil of another under certain circumstances. Black's Law Dictionary 1376 (rev. 4th ed. 1968). But while the theory is

interesting, and ingeniously argued by defendant, it does not support a claim of *exclusive* right for two reasons: First, *profits a prendre* are not exclusive to the holder for "the grant of a *profit a prendre* does not preclude the grantor from exercising a like right upon the land or granting such right to others also." *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 267, 192 S.E. 2d 449, 453 (1972); *Council v. Sanderlin*, 183 N.C. 254, 111 S.E. 265 (1922). Second, in *Collins v. Benbury*, 25 N.C. 277 (1842) it was ruled that exclusive fishing rights in *any* waters can only be acquired either by a grant of the soil under the water in which the fishing is done, or by a grant of the fishing distinct from the soil, and it is the law of the case that neither grant was ever made to defendant or his predecessor in title.

Affirmed.

Judges BECTON and JOHNSON concur.

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MYRTLE A. RILEY v. CALVIN C. RILEY, JR. AND WIFE, JUDITH S. RILEY; PEGGY R. MATTHEWS AND HUSBAND, JAMES L. MATTHEWS; DELORES R. PROPST; BILLIE KAY RILEY; AND CALVIN C. RILEY, JR., ADMINISTRATOR OF THE ESTATE OF CALVIN C. RILEY, SR.

No. 879SC99

(Filed 18 August 1987)

**Husband and Wife § 11.1— separation agreement—death of husband—provisions as to disposition of marital home enforceable**

The agreement of a separated husband and wife to buy or sell each other's equity in their marital home which they owned as tenants by the entirety was enforceable in spite of the death of the husband before divorce, and the trial court erred in granting plaintiff's motion for summary judgment in her action to have herself declared to be the fee simple owner of the property after the husband's death.

APPEAL by defendants from *Johnson, E. Lynn, Judge*. Judgment entered 3 December 1986 in Superior Court, VANCE County. Heard in the Court of Appeals 10 June 1987.

*Stainback & Satterwhite, by Paul J. Stainback, for plaintiff appellee.*

*Watkins, Finch & Hopper, by William L. Hopper, for defendant appellants.*

PHILLIPS, Judge.

This appeal concerns the agreement of a separated husband and wife to buy or sell each other's equity in their marital home, which they owned as tenants by the entirety; an agreement that was soon followed by the death of the husband and the filing of this action by the wife to have herself declared to be the fee simple owner of the property involved. Defendants—the children of the decedent and the administrator of his estate—alleged in their answer and counterclaim that plaintiff's rights in the property are governed by the terms of the agreement referred to and that under those terms she must either buy Calvin Riley's equity in the property for $15,000, or sell her equity to them for that amount, or have the property sold and the proceeds divided. Both parties moved for summary judgment and the court granted plaintiff's motion and denied defendants'. In our opinion the court's action in both respects was erroneous and we vacate the judgment entered and remand for the entry of an order of summary judgment for the defendants. The pertinent facts follow:

Plaintiff had been married to Calvin C. Riley, Sr. for more than twenty years when they separated on 2 April 1984. Nearly two years later, on 20 March 1986, they executed a Separation Agreement and Property Settlement in which it was recited, *inter alia,* that: They had already divided the personal property acquired by them during the marriage; each renounced his or her right to inherit or share in the property of the other; the agreement was "in conformity with the provisions of N.C.G.S. 50-20, otherwise known as the Marital Equitable Distribution Act," and provided for "a just and equitable division of any and all property" that the parties then held or had acquired during their marriage; the agreement would "survive any decree of divorce" thereafter entered and the terms and conditions would be enforceable "in any lawful manner prescribed by the laws of the State of North Carolina." With respect to the entireties held house and lot the agreement made the following specific provisions: It provided that plaintiff could purchase Calvin Riley's

equity in the property for $15,000 "within one year of the date of the entry of an order of divorce"; that if she did not exercise her right of purchase within that time Calvin Riley could purchase her equity for the same amount within ninety days after "the termination of the one year period as is hereinabove set forth"; and that if neither bought the equity of the other the property would be listed for sale with a licensed real estate broker and upon it being sold the net proceeds would be equally divided. The day after the agreement was executed plaintiff filed for divorce, but the action was discontinued after Calvin Riley died ten days later.

Under our law separation and property settlement agreements are as binding and enforceable as other contracts. 2 Lee, North Carolina Family Law, Sec. 198 (4th ed. 1980); *Lane v. Scarborough*, 284 N.C. 407, 200 S.E. 2d 622 (1973); *Riddle v. Riddle*, 32 N.C. App. 83, 230 S.E. 2d 809 (1977). And under the express terms of the agreement involved the spouses agreed to divide into two equal shares the property and equity that they had previously held together as one marital unit and they agreed on a plan to liquidate the interest of one or both spouses. Neither the agreement to divide the interest nor the commitment to buy or sell the divided interest was contingent upon the entry of a divorce decree, as plaintiff argues, or the continued life of the parties. The finality of the terms agreed to is unmistakable; the entirety held property interest was divided into two equal, individually owned shares and the buy-sell conditions were such that they could be complied with by either the parties or their personal representatives. The absence of a divorce decree did not undo the division of the property interest that had already been made or cancel the buy-sell agreement. The provision in the agreement concerning the entry of a divorce decree related only to the time that plaintiff's option, limited to a period of one year, began to run. Nor was the agreement nullified by the death of one of the parties; unexpected and untimely death is a constant possibility and in the absence of indications to the contrary the law assumes that parties make their contracts in light thereof. *Shutt v. Butner*, 62 N.C. App. 701, 303 S.E. 2d 399, *disc. rev. denied*, 309 N.C. 462, 307 S.E. 2d 367 (1983); *see also, Lane v. Scarborough, supra*; 17A C.J.S. *Contracts* Sec. 465 (1963).

Vacated and remanded.

Chief Judge HEDRICK and Judge ORR concur.

# CASES REPORTED WITHOUT PUBLISHED OPINION

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| Case | County | Disposition |
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| BARNABY v. BOARDMAN<br>No. 863SC1234 | Carteret<br>(82CVS130) | Affirmed in part, reversed in part and remanded |
| GARRETT v. RETIREMENT SYSTEM<br>No. 875SC47 | Pender<br>(86CVS69) | Reversed and Remanded |
| GILBERT v. CITY OF ASHEVILLE<br>No. 8628SC399 | Buncombe<br>(79CVS1376) | Affirmed |
| GRIER v. WESTERN CAROLINA CENTER<br>No. 8610IC1200 | Ind. Comm.<br>(TA-8619) | Reversed and Remanded |
| HELMS v. COMMUNITY THRIFT<br>No. 8610IC1349 | Ind. Comm.<br>(I.C. 004189) | Reversed and Remanded |
| NICHOLS v. WALKER<br>No. 8629SC1185 | Transylvania<br>(84CVS005) | Remanded with Directions |
| PARTON v. PARTON<br>No. 8630DC1289 | Haywood<br>(84CVD719)<br>(85CVD276) | Affirmed and Remanded |
| SHISHKO v. WHITLEY<br>No. 864DC1193 | Onslow<br>(80CVD2359) | Affirmed and Remanded |
| STATE v. BLACKMON<br>No. 864SC1215 | Duplin<br>(86CRS1226)<br>(86CRS1227)<br>(86CRS1228)<br>(86CRS1229)<br>(86CRS1230)<br>(86CRS1231)<br>(86CRS1232)<br>(86CRS1233)<br>(86CRS1234)<br>(86CRS1235)<br>(86CRS1236)<br>(86CRS1237)<br>(86CRS2109)<br>(86CRS2110)<br>(86CRS2111)<br>(86CRS2112)<br>(86CRS2113)<br>(86CRS2114) | Reversed in part, vacated in part and no error in part |
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| | | |
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| ELLIS v. WILLIAMS<br>No. 8510SC368 | Wake<br>(84CVS4067) | Affirmed |
| IN RE APPEAL OF LUTHERAN RETIREMENT MINISTRIES, INC.<br>No. 8610PTC1320 | Prop. Tax Comm.<br>(85PTC51) | Affirmed in part; reversed in part; and remanded |
| IN RE BEYER<br>No. 8724DC209 | Watauga<br>(85J42) | Reversed and Remanded |
| IN RE BROOME<br>No. 8728DC161 | Buncombe<br>(84J180) | Affirmed |
| IN RE COX<br>No. 8727DC246 | Gaston<br>(82J84) | Affirmed |
| INGLE v. CARSWELL<br>No. 8725SC157 | Burke<br>(85CVS856) | No Error |
| JONES v. JONES<br>No. 8715DC331 | Orange<br>(85CVD377) | Vacated and Remanded |
| STATE v. BLAND<br>No. 875SC119 | Pender<br>(86CRS1595) | Appeal Dismissed |
| STATE v. BOAHN<br>No. 8712SC303 | Hoke<br>(86CRS3369)<br>(86CRS3370) | No Error |
| STATE v. COLBERT<br>No. 8725SC243 | Catawba<br>(85CRS14553) | Judgment Arrested |
| STATE v. HATFIELD<br>No. 8715SC236 | Alamance<br>(86CRS2781) | No Error |
| STATE v. SLOAN<br>No. 8725SC242 | Burke<br>(85CRS2968) | Affirmed |
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| WITHERSPOON v. McKEE<br>No. 8621SC1293 | Forsyth<br>(84CVS3866) | Affirmed |
| YOKLEY v. SPARKS<br>No. 8722SC269 | Davie<br>(85SP75) | Affirmed |

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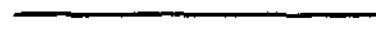

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WITNESSES

## ANIMALS

**§ 2.1. Liability of Owner for Injuries Caused by Dogs**

Permitting a dog known to have twice attempted to bite a human being to run loose in an area occupied by others is evidence of a reckless or wanton indifference for the safety of others sufficient to support an award of punitive damages. *Hunt v. Hunt*, 323.

## APPEAL AND ERROR

**§ 6.2. Finality as Bearing on Appealability**

The trial court's judgment dismissing plaintiffs' claims of punitive damages against all defendants and dismissing claims against the former law partners of Francis Fairley for acts in his capacity as executor of an estate were immediately appealable. *Shelton v. Fairley*, 147.

Defendants' appeal from the denial of their motion to dismiss plaintiffs' action for a judgment declaring them to be fee simple owners of tracts of land which defendants occupied was interlocutory. *Kirkman v. Wilson*, 561.

**§ 6.3. Appeals Based on Jurisdiction**

Notwithstanding the absence of exceptions in the record on appeal, a party may present for review the question of subject matter jurisdiction by raising the issue in his brief. *Carter v. N.C. State Bd. for Professional Engineers*, 308.

**§ 6.8. Appeals on Motions for Summary Judgment**

Denial of defendant's motion for summary judgment was not reviewable where there was a final judgment rendered in a trial on the merits. *Lewis v. Stitt*, 103.

**§ 7. Parties Who May Appeal**

Plaintiff surveyor had no standing to petition for judicial review of action by the Board for Professional Engineers dismissing charges by plaintiff that a fellow land surveyor had used substandard surveying practices. *Carter v. N.C. State Bd. for Professional Engineers*, 308.

**§ 30. Exceptions and Assignments of Error Relating to Evidence**

Where five other dissatisfied customers of a car dealer testified in an unfair and deceptive trade practice action, defendant could not raise the issue of relevance on appeal since he objected to the testimony of only one witness and that objection was based on hearsay. *Morris v. Bailey*, 378.

**§ 31.1. Necessity and Timeliness of Objections**

Defendant's assignment of error regarding the framing of issues for the jury was overruled where defendant did not object to the issues before the jury retired. *Morris v. Bailey*, 378.

## ARCHITECTS

**§ 2. Fees**

The trial court did not err in its evidentiary rulings in an action to collect a fee for architectural services. *Design Associates, Inc. v. Powers*, 216.

**§ 3. Liability for Defective Conditions**

The trial court erred in dismissing plaintiff insurer's action against defendant architects where plaintiff alleged that collapse of part of a hospital during construction was proximately caused by the negligence of defendants and that, pursuant to

**ARCHITECTS — Continued**

a builders risk insurance policy issued to the hospital, plaintiff paid benefits to the hospital and was subrogated to the rights of the hospital against defendants. *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 431.

**ARMY AND NAVY**

**§ 1. Generally**

The 24-month statute of limitations for an action to recover compensation for a taking of land by the Department of Transportation and the seven-year statute of limitations for adverse possession under color of title were tolled by federal statute until plaintiff's retirement from military service. *Taylor v. N.C. Dept. of Transportation*, 299.

Laches was available as a defense against plaintiff's claim for compensation for the taking of his land by the Department of Transportation notwithstanding the special protection enjoyed by plaintiff during the period of his military service. *Ibid.*

**ARREST AND BAIL**

**§ 11.4. Liabilities on Bail Bonds; Judgments against Sureties**

The trial court did not err by denying a petition to remit judgment upon forfeiture of bail bonds where the fact that the sureties had located the defendant in a Mexican prison did not constitute extraordinary cause shown. *S. v. Vikre*, 196.

**ASSAULT AND BATTERY**

**§ 3. Actions for Civil Assault**

Plaintiff's evidence was sufficient for the jury in a civil action against defendant for assault. *Johnson v. Bollinger*, 1.

**ATTORNEYS AT LAW**

**§ 1.2. Unauthorized Practice of Law**

Plaintiff corporation did not practice law in violation of G.S. 84-5 by having its lay employee sign the complaint in an action in small claims court. *Duke Power Co. v. Daniels*, 469.

**§ 5.1. Liability for Malpractice**

The trial court properly dismissed plaintiffs' claim for legal malpractice where plaintiffs failed to present evidence of the applicable standard of care for attorneys in the same or a similar community. *Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis*, 51.

**§ 7.4. Fees Based on Provisions of Notes and other Instruments**

Where this matter was disposed of by a construction of the parties' separation agreement, plaintiff wife was not entitled to attorney fees under a provision of the agreement providing for attorney fees if it should become necessary for a party to initiate legal proceedings to enforce the provisions of the agreement. *Baird v. Baird*, 201.

Defendants received adequate notice that plaintiff was going to enforce the attorney fee provision of a note which they had executed. *Federal Land Bank v. Lieben*, 342.

## ATTORNEYS AT LAW — Continued

**§ 7.5. Allowance of Fees as Part of Costs**

Where defendants were initially awarded attorney fees under G.S. 75-16.1, they were also entitled to attorney fees to defend plaintiff's motion to set aside the judgment and to attorney fees for time expended on plaintiff's appeal from the denial of its motion. *City Finance Co. v. Boykin*, 446.

The trial court erred in an unfair and deceptive trade practice action by awarding plaintiff an attorney fee of one-third the total award without the necessary findings. *Morris v. Bailey*, 378.

The trial court did not abuse its discretion in finding that there was an unwarranted refusal by defendant insurer to pay an insurance claim and by awarding attorney fees to plaintiff under G.S. 6-21.1. *Whitfield v. Nationwide Mutual Ins. Co.*, 466.

**§ 11. Disbarment Procedure**

An order of discipline of a Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar was remanded where the complaint alleged that five disciplinary rules had been violated by defendant and the Committee's order made a conclusion of law on only one disciplinary rule. *N.C. State Bar v. Shuping*, 496.

**§ 12. Grounds for Disbarment**

Findings of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar regarding an estate proceeding handled by an attorney were supported by clear, cogent and convincing evidence. *N.C. State Bar v. Shuping*, 496.

## AUTOMOBILES AND OTHER VEHICLES

**§ 55.2. Negligence in Operation of Vehicle; Driving without Lights**

Testimony by defendant's witness that he could see plaintiff's car approaching even though the headlights were not on did not establish that defendant was contributorily negligent as a matter of law in entering the highway from a driveway in defendant's counterclaim against plaintiff. *Frye v. Anderson*, 94.

**§ 83.2. Contributory Negligence of Pedestrians while Walking along Highway**

The evidence was sufficient to support a jury finding that plaintiff garbage collector was contributorily negligent in failing to keep a proper lookout when he was struck by defendant's van while walking alongside his truck to reenter the cab. *Whitley v. Owens*, 180.

## BASTARDS

**§ 13. Legitimation**

Testator's purported illegitimate daughter had no standing to caveat testator's will where testator never substantially complied with statutory provisions for acknowledging that he was the caveator's father. *In re Will of Bunch*, 463.

## BURGLARY AND UNLAWFUL BREAKINGS

**§ 3. Indictment**

An indictment charging defendant with conspiracy "to commit Breaking, Entering and Larceny" was not fatally defective because it failed to allege conspiracy to break "or" enter. *S. v. Hicks*, 36.

**BURGLARY AND UNLAWFUL BREAKINGS – Continued**

**§ 5.9. Sufficiency of Evidence of Breaking or Entering and Larceny of Business Premises**

The evidence was sufficient to support three breaking or entering convictions even though defendant did not physically enter the buildings. *S. v. Medlin*, 114.

**CONSPIRACY**

**§ 6. Sufficiency of Evidence**

Defendant could not be convicted of both conspiracy to break or enter and conspiracy to commit larceny where there was evidence of only one agreement. *S. v. Hicks*, 36.

Three judgments on seven convictions for conspiracy to break and enter were vacated and remanded for one judgment where the charges arose out of break-ins at several related stores and meetings which took place after the break-ins to divide the spoils and to discuss the next break-in and the gist of the meetings was to plan subsequent break-ins in furtherance of the original unlawful agreement. *S. v. Medlin*, 114.

**§ 8. Judgment**

The trial court erred when sentencing defendant on convictions for a conspiracy to commit felonious breaking or entering by sentencing defendant as a Class H rather than a Class J felon. *S. v. Medlin*, 114.

**CONSTITUTIONAL LAW**

**§ 12.1. Police Power; Regulation of Specific Trades**

Statutes requiring businesses purchasing or selling military property to obtain a license, post a $1,000 bond, provide personal information about the owners, and maintain certain records concerning acquisitions constitute an unreasonable exercise of the police power. *Poor Richard's, Inc. v. Stone*, 137.

**§ 20.2. Equal Protection; Action Affecting Education**

Plaintiffs' right to equal educational opportunity guaranteed by the N.C. Constitution is not violated by the present statutory method of financing public schools or by the operation of five separate administrative school units in Robeson County. *Britt v. N.C. State Board of Education*, 282.

**§ 26.5. Full Faith and Credit; Child Support**

The trial court's failure to enforce a South Carolina child support order in an action to recover arrearages due under that order violates the full faith and credit clause of the U.S. Constitution. *Stephens v. Hamrick*, 556.

**§ 67. Right of Confrontation; Identity of Informants**

The State was not required to reveal the identity of the drug user who accompanied an undercover officer when he allegedly purchased drugs from defendant where the undisclosed person was not an informant but was a "cool face" used by police to make it appear that the drug buyer was safe. *S. v. Steele*, 476.

**§ 74. Self-Incrimination Generally**

The mere fact that an amendment to defendant's tax returns had been selected for examination by the IRS was insufficient to justify defendant's refusal to answer plaintiff's interrogatories as to defendant's finances on the ground that the answers would create a danger of self-incrimination. *J. M. Heinike Assoc., Inc. v. Vesce*, 372.

## CONSTITUTIONAL LAW — Continued

**§ 78. Cruel and Unusual Punishment Generally**

The imposition of consecutive 14-year sentences for two counts of armed robbery was not cruel and unusual punishment. *S. v. Suggs*, 588.

## CONSUMER CREDIT

**§ 1. Generally**

The Truth in Lending Act applied to an open-end credit transaction which allowed defendant to purchase agricultural supplies from plaintiff on credit. *Wadesboro Rainbow Farm Supply, Inc. v. Lookabill*, 349.

## CONTRACTS

**§ 16.1. Time of Performance**

There is no prejudicial error in an action to collect advances made pursuant to an oral agreement which did not specify a time for repayment where the court instructed the jury that plaintiff had the burden of satisfying the jury that the time period between the making of the loan and the filing of the lawsuit was a reasonable length of time. *Phillips & Jordan Investment Corp. v. Ashblue Co.*, 186.

**§ 21.2. Breach of Building and Construction Contracts**

The trial court did not err in an action for breach of contract by granting defendant's Rule 12(b)(6) motion for dismissal where plaintiff general contractor had obtained a bid from defendant subcontractor, defendant refused to perform the work after the contract was awarded to plaintiff, and plaintiff contended that the doctrine of promissory estoppel should apply as a substitute for consideration. *Home Electric Co. v. Hall and Underdown Heating and Air Cond. Co.*, 540.

The evidence in a breach of contract action presented jury questions as to whether defendant owner breached construction contracts with plaintiff by failing to pay money owed on the date plaintiff anticipatorily breached the contracts and, if so, whether defendant's breach was material, thus entitling plaintiff to retainages on buildings which he failed to complete. *Millis Construction Co. v. Fairfield Sapphire Valley*, 506.

**§ 21.3. Anticipatory Breach**

The trial court erred in refusing to instruct the jury on anticipatory breach of contract by repudiation as requested by defendant. *Millis Construction Co. v. Fairfield Sapphire Valley*, 506.

**§ 31. Interference with Contractual Rights by Third Persons Generally**

North Carolina does not recognize a claim for hiring or recruiting another employer's employee whose employment is terminable at will. *Peoples Security Life Ins. Co. v. Hooks*, 354.

## CORPORATIONS

**§ 6. Right of Stockholders to Maintain Action**

Plaintiff's action brought on behalf of a corporation and other shareholders to recover damages allegedly caused by the mismanagement and neglect of defendants was properly dismissed where plaintiff did not demand that the corporate directors take steps to recover the damages allegedly sustained. *Roney v. Joyner*, 81.

## COURTS

**§ 6.3. Appeals from Clerk; Procedure**

A superior court judge erred in denying respondent's motion to dismiss an appeal from the clerk's order denying petitioner's motion to have respondent removed as an estate executor where notice of appeal was not timely given. *In re Estate of Trull,* 361.

**§ 21.1. Conflict of Laws; Choice of Law as Affected by Public Policy**

The trial court correctly concluded that North Carolina's statutes of repose barred plaintiff's products liability claim arising from an injury to plaintiff's foot suffered on a sharp metal surface on the bottom of a chair in Florida where the chair was designed and manufactured in North Carolina and purchased in Florida. *Boudreau v. Baughman,* 165.

## CRIMINAL LAW

**§ 22. Pleas Generally**

The admission of an officer's testimony that defendant told him that "his lawyer wanted to plead him to six years to the offense and he wanted to know what he should do" violated the statute prohibiting evidence of plea bargaining and constituted prejudicial error. *S. v. Wooten,* 481.

**§ 34.4. Admissibility of Evidence of other Offenses**

Though evidence that defendant came into possession of a large quantity of dynamite the day before the shooting with which he was charged was admissible under Rule 404(b) to show preparation and plan, evidence that he stole the dynamite was not admissible under Rule 608 to show defendant's character for untruthfulness. *S. v. Sullivan,* 316.

**§ 34.5. Admissibility of Evidence of other Offenses to Show Identity of Defendant**

A defendant need not be actually convicted of prior crimes before evidence of those crimes is admitted under Rule of Evidence 404(b). *S. v. Suggs,* 588.

The question of defendant's identity as the appliance store robber in this case was sufficiently indefinite to permit evidence of his commission of an earlier appliance store robbery under the identity exception stated in Rule of Evidence 404(b). *Ibid.*

**§ 66.6. Lineup Identification; Suggestiveness of Lineup**

The fact that defendant's appearance was somehow distinct from the other suspects' photographs did not alone render a pretrial photographic lineup impermissibly suggestive. *S. v. Suggs,* 588.

**§ 66.11. Identification of Defendant, Confrontation at Scene of Crime or Arrest**

A larceny victim's out-of-court identification of defendant was not impermissibly suggestive so as to require suppression of the victim's in-court identification of defendant. *S. v. Mobley,* 528.

**§ 76.5. Confession; Voir Dire Hearing; Findings of Fact Generally**

The trial court erred in failing to make findings concerning defendant's first confession and its influence on his second confession which was admitted into evidence, the voluntariness of the first confession, and, if involuntary, whether the second confession was made under the same prior influence. *S. v. Edgerton,* 329.

**CRIMINAL LAW — Continued**

**§ 80.2. Discovery and Inspection of Records and other Writings**

The trial court did not commit prejudicial error in refusing to permit defendant to inspect notes of an SBI agent after a police officer reviewed the notes and then testified. *S. v. Steele,* 476.

**§ 85. Character Evidence Relating to Defendant**

Evidence that defendant stole dynamite the day before a shooting was not admissible under Rule 608 to show defendant's character for untruthfulness. *S. v. Sullivan,* 316.

**§ 101.1. Statements of Prospective Jurors**

The trial court's curative instruction was insufficient to cure prejudice from a potential juror's statement during voir dire that he was a policeman and that he had had "dealings with the defendant on similar charges." *S. v. Mobley,* 528.

**§ 101.2. Misconduct Affecting Jury; Exposure to Evidence not Formally Introduced**

An order permitting a jury view was not fatally defective because it failed to include an instruction to the officer escorting the jury that no one was to be allowed to communicate with the jury. *S. v. Davis,* 25.

**§ 101.3. Permitting Jury to View Evidence Outside Courtroom**

The defendant was not prejudiced by the conduct of a jury view because the press was allowed to be present, members of the press were introduced to the jury, and jurors were allowed to ask questions. *S. v. Davis,* 25.

**§ 124. Sufficiency and Effect of Verdict in General**

Defendant was not prejudiced by failure of the words "not guilty" to appear on the verdict form itself. *S. v. Hicks,* 36.

**§ 135.8. Sentence in Capital Case; Aggravating Circumstances**

A defendant charged with first degree murder is not entitled to notice of the evidence the State intends to offer to prove aggravating circumstances. *S. v. Edgerton,* 329.

**§ 138.14. Fair Sentencing Act; Consideration of Aggravating and Mitigating Factors in General**

Whether a defendant convicted of voluntary manslaughter is entitled to notice of aggravating circumstances which the State will attempt to prove was not before the court on appeal. *S. v. Edgerton,* 329.

The trial court separately considered the aggravating and mitigating sentencing factors as to each of defendant's convictions where the court held one sentencing hearing but completed two sentencing forms. *S. v. Washington,* 235.

**§ 138.32. Sentencing; Mitigating Factor of Compulsion**

In a homicide prosecution where the evidence tended to show that defendant shot a man with whom he competed for the same woman's affections, the trial court did not err in failing to find as a mitigating factor during sentencing that defendant acted under a compulsion which was insufficient to constitute a defense but significantly reduced his culpability. *S. v. Sullivan,* 316.

**§ 143.12. Sentence upon Revocation of Probation**

Where defendant violated a condition of his probation and a superior court judge continued defendant on probation, and a second judge thereafter reduced the

**CRIMINAL LAW — Continued**

sentences and continued defendant on probation, a third judge who found that defendant had again violated the terms of his probation had authority to revoke the probation and activate the original sentences without reducing them. *S. v. Mills*, 479.

## DAMAGES

**§ 7. Liquidated Damages**

A paragraph in a mobile home sales agreement was not a liquidated damages clause since it was not for a sum certain, and the seller of the mobile home was limited under G.S. 143-143.21 to $500 in damages when the purchasers refused to accept delivery. *First Value Homes, Inc. v. Morse*, 613.

**§ 11.2. Punitive Damages; Circumstances where Inappropriate**

The trial court did not err by dismissing plaintiffs' claims for punitive damages against the law partners of the executor of an estate where the evidence showed that any liability on the part of those defendants was derivative. *Shelton v. Fairley*, 147.

**§ 12.1. Pleading Punitive Damages**

When plaintiff refiled his action within one year of his voluntary dismissal, his claim for punitive damages, which he specifically alleged in the second action but not the first, was not barred by the statute of limitations since he alleged facts in the first action which were sufficient to support an award of punitive damages. *Holley v. Hercules, Inc.*, 624.

**§ 13.2. Competency of Evidence of Lost Earnings or Profits**

Expert medical testimony establishing the cause of plaintiff's disability was not necessary for the admission of expert economic testimony on the issue of plaintiff's impaired future earning capacity where plaintiff's testimony was sufficient to establish causation. *Phelps v. Duke Power Co.*, 455.

**§ 17.5. Instructions on Lost Earnings**

The trial court erred in refusing to charge the jury as to plaintiff's loss of earnings and earning capacity prior to trial even though plaintiff was not employed when she was injured and had not been employed for wages since coming to this country. *Kim v. Hansen*, 629.

## DECLARATORY JUDGMENT ACT

**§ 9. Verdict and Judgment**

The trial court's order granting summary judgment for plaintiff in a declaratory judgment action was sufficient even though it did not explicitly state the grounds for the order. *Poor Richard's, Inc. v. Stone*, 137.

## DEEDS

**§ 14.3. Reservations and Exceptions; Profits a Prendre**

In claiming the exclusive right to take oysters from certain of the State's submerged lands, defendant could not rely on the common law right of piscary, which is the right to fish in another man's waters. *State ex rel. Rohrer v. Credle*, 633.

**DEEDS — Continued**

**§ 21. Stipulation for Reconveyance of Land to Grantor**

A contract to give plaintiffs the right of first refusal for certain described real property owned by defendant was unenforceable where it contained no provision for determining the price of exercising the right. *Levan v. Eidson,* 100.

## DIVORCE AND ALIMONY

**§ 16.6. Alimony without Divorce; Sufficiency of Evidence**

The trial court erred in finding that plaintiff wife was a dependent spouse where the evidence showed that the year the parties separated plaintiff's income was $19,301.46 and defendant's income was $24,447.26. *Caldwell v. Caldwell,* 225.

**§ 17. Alimony upon Divorce from Bed and Board**

The trial court's findings were too vague to resolve the question as to whether plaintiff actually or constructively abandoned defendant. *Soares v. Soares,* 369.

**§ 18.3. Alimony Pendente Lite; Pleadings**

The trial court in a divorce action did not err in denying defendants' motion to amend her counterclaim for alimony to allege abandonment as the ground for her claim. *Banner v. Banner,* 397.

**§ 20.1. Right to Alimony; Effect of Decree for Absolute Divorce**

The trial court properly entered summary judgment for defendant in plaintiff's action for alimony since the parties were already divorced when plaintiff instituted her action. *Banner v. Banner,* 397.

Once the parties were divorced, the wife who had taken a voluntary dismissal of her alimony counterclaim was barred from bringing a new alimony claim despite the one year extension of Rule 41(a). *Ibid.*

**§ 24. Child Support Generally**

The trial court erred by holding that plaintiff's acceptance of child support payments under a North Carolina URESA order barred her rights under a prior South Carolina child support order. *Stephens v. Hamrick,* 556.

**§ 24.4. Enforcement of Child Support Orders**

The enforcement of a child support order entered eighteen years earlier was not barred by the statute of limitations, but pursuant to G.S. 1-47, sums which became due more than ten years before plaintiff's complaint was filed may not be recovered in such an action. *Stephens v. Hamrick,* 556.

The doctrine of laches does not apply to bar enforcement of a child support order. *Ibid.*

**§ 26.2. Modification of Foreign Child Support Orders; Requirement of Changed Circumstances**

The trial court's failure to enforce a South Carolina child support order in an action to recover arrearages due under that order violates the full faith and credit clause of the U.S. Constitution. *Stephens v. Hamrick,* 556.

**§ 30. Equitable Distribution**

Where the parties orally acknowledged their written agreement for distribution of marital property before a certifying officer but defendant husband refused to sign it, the agreement was not duly executed and could not provide the basis for court-ordered equitable distribution prior to a decree of absolute divorce. *Collar v. Collar,* 105.

**DIVORCE AND ALIMONY — Continued**

Defendant could immediately appeal the trial court's order requiring that the marital home be sold. *Soares v. Soares*, 369.

The trial court in an equitable distribution proceeding erred in entering an order regarding the sale of the marital home without placing a value on the home. *Ibid.*

A stipulation classifying a promissory note to defendant as marital property was not valid where the legal effect of the stipulation would be the distribution of dual nature property as if it were entirely marital property. *Byrd v. Owens*, 418.

The trial court in an equitable distribution proceeding erred in failing to consider defendant's $250,000 debt to a bank incurred after the parties' separation and defendant's personal guarantees incurred in relation to his business ventures. *Ibid.*

The trial court erred when it failed to determine what percentages of the total investment in a home were marital and separate and then to award each estate a proportionate part of the equity in the home. *Willis v. Willis*, 546.

Where, after the date of separation, defendant husband closed a joint bank account, cashed a joint certificate of deposit, sold a jointly owned cafe, and commingled the proceeds with his separate property in his own bank account, the trial court erred in failing to value such property for equitable distribution purposes as of the date of separation and in merely finding that one-third of the husband's new bank account was marital property. *Ibid.*

**EASEMENTS**

**§ 5.3. Creation of Easements by Implication; Sufficiency of Evidence**

The evidence was sufficient to show that plaintiffs owned an easement by implication across the lands of defendants. *Hodges v. Winchester*, 473.

**§ 8.1. Nature and Extent of Easement; Construction of Instruments**

The trial court erred by granting a motion to dismiss under G.S. 1A-1, Rule 12(b)(6) by some of the defendants in an action to have an easement extinguished for violation of its restrictions where the language of the easement was ambiguous. *Leonard v. Pugh*, 207.

**EMBEZZLEMENT**

**§ 5. Evidence**

The trial court in an embezzlement case did not commit prejudicial error in permitting a widow to testify that she needed the funds to keep her children in college. *S. v. Melvin*, 291.

**§ 6. Sufficiency of Evidence**

The evidence was sufficient for the jury in a prosecution of defendant attorney for embezzlement of funds from an estate account. *S. v. Melvin*, 291.

**EQUITY**

**§ 2. Laches**

Laches was available as a defense against plaintiff's claim for compensation for the taking of his land by the Department of Transportation notwithstanding the special protection enjoyed by plaintiff during the period of his military service. *Taylor v. N.C. Dept. of Transportation*, 299.

## EQUITY — Continued

**§ 2.2. Applicability of Doctrine of Laches to Particular Proceedings**

The doctrine of laches does not apply to bar enforcement of a child support order. *Stephens v. Hamrick,* 556.

## ESTOPPEL

**§ 4.2. Conduct of Party Sought to Be Estopped; Silence**

Defendant lessors were not estopped to deny plaintiff sublessee's right to continue in possession of the premises after termination of the original lease by failing to inform plaintiff that his occupancy was on a month-to-month basis and by permitting plaintiff to make capital improvements to the leased property. *Neal v. Craig Brown, Inc.,* 157.

Defendant franchisor was not liable for alleged negligence by a franchisee in failing to provide adequate security for a patron who was assaulted on motel premises owned by the franchisee under the theory of agency by estoppel. *Hayman v. Ramada Inn, Inc.,* 274.

## EVIDENCE

**§ 15.2. Relevancy and Competency of Evidence; Particular Circumstances**

The trial court did not err in an action to collect advances made to defendant by Piney Mountain Properties by refusing to admit an appraisal of property owned by Piney Mountain. *Phillips & Jordan Investment Corp. v. Ashblue Co.,* 186.

**§ 33. Hearsay Evidence in General**

There was no prejudicial error in an action to collect advances made to defendant by Piney Mountain Properties from the trial court's failure to make findings on all six parts of the inquiry set out in *State v. Smith,* 315 N.C. 76, before excluding testimony regarding a conversation with the deceased controller of defendant and Piney Mountain. *Phillips & Jordan Investment Corp. v. Ashblue Co.,* 186.

**§ 50. Testimony by Medical Experts**

A chiropractor could properly testify concerning nerve strain or sprain but not muscle strain or sprain. *Ellis v. Rouse,* 367.

## FALSE IMPRISONMENT

**§ 2.1. Sufficiency of Evidence**

The trial court properly dismissed plaintiff's complaint for false imprisonment based on her contention that she was unlawfully restrained by defendant hospital's neuro-psychiatric personnel where plaintiff's private physician had ordered her placed in the neuro-psychiatric ward. *Sumblin v. Craven County Hospital Corp.,* 358.

## FRAUD

**§ 4. Knowledge and Intent to Deceive**

Plaintiff's claim of fraud in a court ordered commissioner's sale of a condominium must fail where plaintiff conceded that defendant did not have any actual knowledge that his representations about the number of liens against the condominium were false. *Gibson v. Lambeth,* 264.

**FRAUD — Continued**

**§ 9. Pleadings**

Plaintiffs' complaint was sufficient to state a claim for constructive fraud against two North Carolina attorneys who negotiated a referral fee with a Texas attorney after the Texas attorney had been hired on a contingency fee basis to handle claims arising out of the death of plaintiffs' son. *Booher v. Frue,* 390.

**HIGHWAYS AND CARTWAYS**

**§ 9. Actions against the Department of Transportation**

Laches was available as a defense against plaintiff's claim for compensation for the taking of his land by the Department of Transportation notwithstanding the special protection enjoyed by plaintiff during the period of his military service. *Taylor v. N.C. Dept. of Transportation,* 299.

**HOMICIDE**

**§ 30.2. Submission of Lesser Offense of Manslaughter**

The trial court in a first degree murder case did not err in failing to instruct the jury on the lesser included offense of voluntary manslaughter. *S. v. Sullivan,* 316.

**HOSPITALS**

**§ 3.2. Liability of Noncharitable Hospital for Negligence of Employees**

It was not necessary for plaintiff to establish the standard of care prevailing among hospitals in like situations in her action against defendant hospital based on her contention that she was molested by a fellow patient. *Sumblin v. Craven County Hospital Corp.,* 358.

**§ 6. Regulation of Physicians**

A hospital's credentialing records pertaining to defendant physician were confidential and privileged and not subject to discovery. *Whisenhunt v. Zammit,* 425.

**HUSBAND AND WIFE**

**§ 11.1. Operation and Effect of Separation Agreements**

The agreement of a separated husband and wife to buy or sell each other's equity in their marital home which they owned as tenants by the entirety was enforceable in spite of the death of the husband before divorce, and the wife therefore did not become the fee simple owner of the property upon the husband's death. *Riley v. Riley,* 636.

**§ 11.2. Construction of Separation Agreements**

There was sufficient evidence to support the trial court's finding that the term "net professional income" in a separation agreement means gross medical income less ordinary and necessary expenses of producing such income and less state and federal taxes on such income. *Baird v. Baird,* 201.

A provision in a separation agreement merely set a cap on defendant's support payments of 25% of defendant's "net professional income and/or retirement income" and did not require that income deductions mentioned in another provision of the separation agreement be deducted from the 25% cap. *Ibid.*

## HUSBAND AND WIFE — Continued

**§ 12. Separation Agreement; Resumption of Marital Relationship**

The trial court properly granted summary judgment in favor of plaintiff wife on her complaint for an equitable distribution as to the marital residence where the parties had executed a separation agreement in which plaintiff wife agreed to transfer her interest in the marital home to defendant husband if they had lived continuously separate and apart for one year. *Higgins v. Higgins*, 513.

**§ 13. Separation Agreement; Bonds and Enforcement**

Where this matter was disposed of by a construction of the parties' separation agreement, plaintiff wife was not entitled to attorney fees under a provision of the agreement providing for attorney fees if it should become necessary for a party to initiate legal proceedings to enforce the provisions of the agreement. *Baird v. Baird*, 201.

## INDICTMENT AND WARRANT

**§ 11.1. Identification of Victim; Corporations and other Entities**

An indictment for criminal possession of personal property of "Norman's T.V." was not fatally defective for failure to allege ownership of property in a natural person capable of holding title to the property. *S. v. Medlin*, 114.

**§ 17.4. Variance as to Ownership**

There was not a fatal variance between an indictment for criminal possession of personal property of Norman's T.V. and the evidence where the evidence at trial showed an ownership interest in the stolen property in Norman Shultz. *S. v. Medlin*, 114.

## INFANTS

**§ 9.1. Duties and Authority of Guardian Ad Litem**

A guardian ad litem had no responsibilities once an adoption petition was filed, and the court did not err in relieving the guardian of her responsibilities and denying her motion to gain access to the child's adoption records. *In re James S.*, 364.

## INJUNCTIONS

**§ 12.3. Findings of Fact and Conclusions of Law**

An injunctive order which does not state the reason for its issuance is merely irregular and is properly corrected by a motion made before the trial court. *Poor Richard's, Inc. v. Stone*, 137.

## INSANE PERSONS

**§ 1. Commitment of Insane Persons to Hospitals**

The trial court properly dismissed plaintiff's complaint for false imprisonment based on her contention that she was unlawfully restrained by defendant hospital's neuro-psychiatric personnel where plaintiff's private physician had ordered her placed in the neuro-psychiatric ward. *Sumblin v. Craven County Hospital Corp.*, 358.

## INSURANCE

**§ 68.6. Automobile Insurance; Provisions of Policy; "Struck by Automobile"**

The provision of an automobile insurance policy excluding medical payments coverage for bodily injury sustained when a covered person was struck by a vehicle owned by any family member did not apply where a family member's disabled car was propelled into plaintiff after it was struck by a car not belonging to a family member. *Whitfield v. Nationwide Mutual Ins. Co.*, 466.

**§ 136. Actions on Fire Policies**

Plaintiff's evidence was sufficient to establish a tortious bad faith refusal by defendant insurer to settle plaintiff's fire insurance claim so as to support plaintiff's claim for punitive damages although defendant eventually did pay plaintiff's claim. *Robinson v. N.C. Farm Bureau Ins. Co.*, 44.

## INTEREST

**§ 2. Time and Computation**

Plaintiff could not argue for the first time on appeal that the trial court should have awarded prejudgment interest from the date his action was instituted to the extent defendant had liability insurance covering plaintiff's claim, but the court should have awarded interest from the date a directed verdict was entered in the first trial against plaintiff's negligence claim even though plaintiff failed to raise the question of liability insurance. *Phelps v. Duke Power Co.*, 455.

## JUDGMENTS

**§ 25.3. Attack on Judgment; Imputation to Litigant of Attorney's Failure to Plead, Appeal or Attend Trial**

Plaintiff was not entitled to have a judgment against it set aside on the ground of excusable neglect where plaintiff failed to maintain a reasonable level of communication with its attorney during the two years the case was pending. *City Finance Co. v. Boykin*, 446.

**§ 55. Right to Interest**

The trial court did not err by awarding defendants interest on the amount of overpayments to a fuel oil dealer, but should not have trebled damages on an unfair and deceptive trade practices judgment before calculating the interest. *Sampson-Bladen Oil Co. v. Walters*, 173.

Plaintiff could not argue for the first time on appeal that the trial court should have awarded prejudgment interest from the date his action was instituted to the extent defendant had liability insurance covering plaintiff's claim, but the court should have awarded interest from the date a directed verdict was entered in the first trial against plaintiff's negligence claim even though plaintiff failed to raise the question of liability insurance. *Phelps v. Duke Power Co.*, 455.

## JUDICIAL SALES

**§ 2. Conduct of Sale**

Defendant fully complied with statutory notice requirements for a public foreclosure sale of a condominium. *Gibson v. Lambeth*, 264.

**§ 4. Rights of Bidders; Relief from Bid**

The rule of caveat emptor applied to a court ordered commissioner's sale of a condominium. *Gibson v. Lambeth*, 264.

**JUDICIAL SALES — Continued**

Plaintiff's claim of fraud in a court ordered commissioner's sale of a condominium must fail where plaintiff conceded that defendant did not have any actual knowledge that his representations about the number of liens against the condominium were false. *Ibid.*

**KIDNAPPING**

**§ 1.3. Instructions**

The trial court committed plain error in instructing the jury on a theory of kidnapping not charged in the indictment. *S. v. McClain,* 219.

**LABORERS' AND MATERIALMEN'S LIENS**

**§ 1. Lien of Person Dealing Directly with Owner**

The trial court did not err in an action to recover a fee for architectural services by not dissolving a lien placed on defendant's home where plaintiff had furnished professional design services pursuant to a contract. *Design Associates, Inc. v. Powers,* 216.

**§ 6. Filing of Notice of Claim of Lien**

The trial court was correct in refusing to allow plaintiff to amend his claim of lien to state a later date as the date of last furnishing of labor and materials. *Brown v. Middleton,* 63.

**LANDLORD AND TENANT**

**§ 13.2. Renewals and Extensions**

Plaintiff sublessee could not exercise an option to renew granted in the original lease or demand performance of the renewal option contained in the sublease. *Neal v. Craig Brown, Inc.,* 157.

**§ 19.1. Rent and Actions Therefor; Defenses; Recovery Back of Payment**

A Raleigh Housing Code provision prohibiting an owner from renting as a dwelling "any vacant structure" after the housing inspector has issued an order to repair did not automatically reduce the fair rental value of an offending structure between the date defendant landlord had notice of violations of the Housing Code and the date repairs were made so as to entitle plaintiff tenants to a complete refund of all rent paid during that time. *Cotton v. Stanley,* 534.

In an action by plaintiff tenants for a rent abatement because of defendant landlords' failure to make repairs by the repair deadline, defendants will be liable for the difference between the fair rental value of the units "as is" and the fair rental value of the units "as warranted" for the period between the expiration of a reasonable opportunity to repair after notice to defendants by the housing inspector and the date repairs were made. *Ibid.*

**LARCENY**

**§ 5.1. Possession of Recently Stolen Property; Necessity that Possession Be Personal**

The evidence was sufficient to convict defendant of felonious larceny based on the doctrine of possession of recently stolen property. *S. v. Walker,* 336.

### LARCENY – Continued

**§ 7.10. Sufficiency of Evidence; Possession of Stolen Property**

Unique tools and metal work found on premises shared by defendant and his mother were not of a type normally found or traded in lawful channels so that the lapse of nine days between their taking and their discovery did not defeat the inference of defendant's guilt arising from his possession of recently stolen property. *S. v. Washington,* 235.

### LIBEL AND SLANDER

**§ 14.1. Pleadings; Words Actionable Per Se and Words Susceptible of Two Interpretations**

Plaintiff's complaint was insufficient to state a claim for slander per se but was sufficient to state a claim for slander per quod. *Johnson v. Bollinger,* 1.

### LIMITATION OF ACTIONS

**§ 4.2. Accrual of Negligence Actions**

The six-year statute of limitations of G.S. 1-50(5) barred a personal injury action against defendant city based on the approval by defendant's building inspector of the remodeling of a restaurant entryway which allegedly did not meet building code requirements. *Gillespie v. Coffey,* 97.

The trial court properly granted summary judgment in an action for medical malpractice, breach of contract and assault and battery based on the running of the statute of limitations. *Lackey v. Bressler,* 486.

**§ 4.3. Accrual of Breach of Contract Actions**

The trial court did not err by denying defendant's motions to dismiss and for judgment n.o.v. in an action to collect advances made to defendant where the loan agreement did not specify a time for repayment. *Phillips & Jordan Investment Corp. v. Ashblue Co.,* 186.

**§ 10. Tolling of Statute by Absence and Nonresidence**

The 24-month statute of limitations for an action to recover compensation for a taking of land by the Department of Transportation and the seven-year statute of limitations for adverse possession under color of title were tolled by federal statute until plaintiff's retirement from military service. *Taylor v. N.C. Dept. of Transportation,* 299.

**§ 14. Acknowledgment or New Promise**

Defendants were not equitably estopped to plead the statute of limitations in a contract action because of their oral promise to pay. *Norris v. Belcher,* 459.

### MANDAMUS

**§ 4. Duties of Administrative Bodies Generally**

Plaintiff was not entitled to a writ of mandamus to compel defendant board to conduct a hearing on charges brought by plaintiff against a fellow registered land surveyor. *Carter v. N.C. State Bd. for Professional Engineers,* 308.

## MASTER AND SERVANT

**§ 10.1. Grounds for Discharge**

An employment contract requiring plaintiff employee to perform his work to the reasonable satisfaction of defendant did not authorize defendant to terminate plaintiff's employment upon becoming dissatisfied with his services, and a jury question was presented as to whether defendant had just cause to discharge plaintiff. *McKnight v. Simpson's Beauty Supply, Inc.*, 451.

**§ 11.1. Competition with Former Employer**

North Carolina does not recognize a claim for hiring or recruiting another employer's employee whose employment is terminable at will. *Peoples Security Life Ins. Co. v. Hooks*, 354.

Plaintiff's complaint was insufficient to state a claim for breach of a provision of an employment contract concerning solicitation or servicing of the employer's policyholders and interference with existing policies where plaintiff alleged that defendant enticed sufficient numbers of its employees to leave its employ so that it could no longer service its existing policyholders. *Ibid.*

**§ 55.1. Workers' Compensation; Necessity for and What Constitutes Accident**

Plaintiff's testimony was sufficient to support the Commission's finding that plaintiff suffered an injury to his back arising out of and in the course of his employment with defendant which was the direct result of a specific traumatic incident. *Kelly v. Carolina Components*, 73.

**§ 55.5. Workers' Compensation; Relation of Injury to Employment Particularly as to "Arising Out of" Employment**

The death of a furniture designer who was struck by a vehicle while rendering emergency assistance to a stranger on the highway while in the course of his employment also arose out of his employment. *Roberts v. Burlington Industries*, 126.

**§ 65.2. Workers' Compensation; Back Injuries**

The Industrial Commission erred in failing to make findings as to disability to plaintiff's legs caused by his arachnoiditis. *McKenzie v. McCarter Electrical Co.*, 619.

**§ 68. Workers' Compensation; Occupational Diseases**

Medical expert testimony was sufficient to support the Industrial Commission's finding that plaintiff had the occupational disease byssinosis as a result of her exposure to cotton dust while in defendant's employ. *Strickland v. Burlington Industries, Inc.*, 598.

A finding that damage to plaintiff's lungs was permanent was adequately supported by the evidence. *Ibid.*

**§ 69. Workers' Compensation; Amount of Recovery Generally**

The Industrial Commission erred in finding that plaintiff could not be compensated under G.S. 97-29 for permanent total disability because plaintiff's back injury was covered under G.S. 97-31. *Harrington v. Pait Logging Co.*, 77.

The Industrial Commission erred in limiting plaintiff's award to the scheduled injuries set forth in G.S. 97-31 since plaintiff would be entitled to choose between the remedies provided for in G.S. 97-29 and G.S. 97-31(23) should the Commission ultimately find that there was a compensable loss to plaintiff because of his arachnoiditis so as to render plaintiff totally incapacitated. *McKenzie v. McCarter Electrical Co.*, 619.

**MASTER AND SERVANT — Continued**

Where there was no evidence that plaintiff suffered a total incapacity to earn wages because of her byssinosis, the Industrial Commission properly compensated plaintiff under G.S. 97-31(24) for loss of lung function rather than under G.S. 97-29. *Strickland v. Burlington Industries, Inc.*, 598.

**§ 69.2. Workers' Compensation; Successive Injuries**

Plaintiff who suffered two injuries to his back and who subsequently developed arachnoiditis was entitled to receive compensation under G.S. 97-29 if he was permanently and totally disabled even though no single injury resulted in total and permanent disability. *McKenzie v. McCarter Electrical Co.*, 619.

**§ 72. Workers' Compensation; Partial Disability**

The evidence was insufficient to support a finding by the Industrial Commission that plaintiff suffered a five percent permanent partial disability of her left thumb as a result of her injury by accident. *Hudson v. Mastercraft Div., Collins & Aikman Corp.*, 411.

**§ 75. Workers' Compensation; Medical Expenses**

The Industrial Commission erred in ordering defendant employer to pay the cost of plaintiff's treatment by a second physician without first finding that the physician's treatment was "required to effect or give relief" from her injury or that plaintiff had sought approval by the Commission of the physician's services "within a reasonable time." *Hudson v. Mastercraft Div., Collins & Aikman Corp.*, 411.

A workers' compensation proceeding is remanded for a determination as to whether further medical treatments are required to provide needed relief so as to entitle plaintiff to an award for future medical expenses. *Strickland v. Burlington Industries, Inc.*, 598.

**§ 78. Workers' Compensation; Enforcing Payment**

The Industrial Commission correctly concluded in a workers' compensation case that an initial award entered in 1980 was controlling and that plaintiff was not entitled to interest on the award. *Peoples v. Cone Mills Corp.*, 227.

**§ 87. Workers' Compensation; Claim under Act as Precluding Common Law Action**

The trial court properly granted defendant's motion for a Rule 12(b)(6) dismissal of plaintiff's claim for willful, wanton and reckless negligence in an action arising from the rape of plaintiff by a "Willie M" child in a group home. *Stack v. Mecklenburg County*, 550.

The trial court properly granted defendant's Rule 12(b)(6) motion to dismiss plaintiff's claims for intentional injury, intentional infliction of emotional distress, and punitive damages arising from the rape of plaintiff in a group home which she was supervising as an employee of defendant. *Ibid.*

**§ 93.3. Workers' Compensation; Proceedings before Commission; Expert Evidence**

A hypothetical question posed to a medical expert was not improper because it did not include a reference to plaintiff's employment with another employer subsequent to plaintiff's employment with defendant but prior to the witness's treatment of plaintiff's back. *Kelly v. Carolina Components*, 73.

**§ 94. Workers' Compensation; Findings of Commission**

The evidence was sufficient to support a finding by the Industrial Commission that plaintiff was temporarily totally disabled as a result of a work related injury

**MASTER AND SERVANT — Continued**

to her thumb where plaintiff was placed on medical leave of absence due to restrictions placed upon her by her doctor. *Hudson v. Mastercraft Div., Collins & Aikman Corp.*, 411.

**§ 94.1. Workers' Compensation; Sufficiency of Findings of Fact; Instances where Findings Are Improper**

The Industrial Commission's findings with respect to the duration of plaintiff's temporary total disability were not supported by the evidence. *Hudson v. Mastercraft Div., Collins & Aikman Corp.*, 411.

**MORTGAGES AND DEEDS OF TRUST**

**§ 9. Release of Part of Land from Mortgage Lien**

A subordination clause in a purchase money deed of trust requiring defendants to subordinate their position upon plaintiff's request "in such amount as may be reasonably requested" was void for indefiniteness since it required the parties to agree at a future time as to whether a loan requested by plaintiff was reasonable. *MCB Limited v. McGowan*, 607.

**MUNICIPAL CORPORATIONS**

**§ 2.1. Annexation; Compliance with Statutory Requirements in General**

There was no merit to petitioners' argument in an annexation proceeding that respondent improperly included two additional areas, neither of which would independently meet the "urban purposes" requirement of G.S. 160A-36(c), within the proposed annexation area in order to comply with the coincidence of boundary requirement of G.S. 160A-36(b)(2). *Huyck Corp. v. Town of Wake Forest*, 13.

Plans for providing police and fire protection services to an annexed area were sufficient to satisfy statutory requirements. *Ibid.*

**§ 2.2. Annexation; Requirements of Use and Size of Tracts**

Evidence was sufficient to support the trial court's finding that an area proposed for annexation complied with the "urban purposes" requirement of G.S. 160A-36(c). *Huyck Corp. v. Town of Wake Forest*, 13.

**§ 2.6. Annexation; Extension of Utilities to Annexed Territory**

The validity of an annexation ordinance was not contingent upon the passage of a bond referendum on a specified date but was contingent upon the town's having the necessary funds appropriated for extension of water and sewer services as of the effective date of the ordinance. *Huyck Corp. v. Town of Wake Forest*, 13.

**§ 30. Power of Municipality to Zone Generally**

A town ordinance describing the area over which it seeks to exercise extraterritorial jurisdiction by reference to a map which shows lines located around the lake and around the town limits does not comply with the description requirements of G.S. 160A-360(b). *Town of Lake Waccamaw v. Savage*, 211.

**NEGLIGENCE**

**§ 22. Sufficiency of Complaint in Negligence Actions**

Plaintiff's complaint was sufficient to allege negligence by defendants in allowing rainwater to collect in the bed of a dump truck and to spill onto the highway

**NEGLIGENCE — Continued**

where it froze and caused plaintiff's vehicle to slide off the road. *Stewart v. Allison*, 68.

**§ 48. Negligence in Condition of Buildings; Condition and Maintenance of Entryway**

Summary judgment was properly entered for defendants in an action to recover for personal injuries sustained by plaintiff when she fell in a restaurant entryway where plaintiff presented no evidence that alleged building code violations in remodeling the entryway proximately caused her injuries. *Gillespie v. Coffey*, 97.

**OBSCENITY**

**§ 2. Definition of Obscenity**

Neither G.S. 14-190.1 nor the trial judge's instructions contravened the U.S. Constitution by failing to specify what was meant by the "community" whose standards should be used in determining whether material was obscene. *S. v. Mayes*, 569.

Permitting jurors to apply the standards of the community from which they came rather than requiring the application of a uniform statewide standard of obscenity does not violate the equal protection clause of the N.C. Constitution. *Ibid.*

**§ 3. Prosecutions for Disseminating Obscenity**

In a prosecution of defendant for intentional dissemination of obscenity, the trial court did not err in excluding testimony concerning results of a statewide survey the witness conducted for the defense, testimony by a speech communications professor as to whether the materials at issue were obscene, and testimony by a private investigator as to the availability of similar material in the community. *S. v. Mayes*, 569.

Evidence of defendant's guilty knowledge was sufficient for a charge of intentional dissemination of obscenity to be submitted to the jury. *Ibid.*

The trial court properly instructed the jury on the issue of defendant's intent and guilty knowledge in a prosecution for intentional dissemination of obscenity. *Ibid.*

**PARENT AND CHILD**

**§ 2.3. Child Neglect**

A child was a neglected and dependent juvenile where the father prevented the child from receiving remedial care offered by the public school's special education classes, the trial court properly granted legal custody to DSS, and the court properly ordered that the child return to public school. *In re Devone*, 57.

**§ 10. Uniform Reciprocal Enforcement of Support Act**

The trial court erred by holding that plaintiff's acceptance of child support payments under a North Carolina URESA order barred her rights under a prior South Carolina child support order. *Stephens v. Hamrick*, 556.

**PARTNERSHIP**

**§ 5. Liability of Partners for Torts Committed by One Partner**

The trial court did not err by granting summary judgment for defendants on the issue of their liability as law partners for the acts of Francis Fairley as executor of an estate. *Shelton v. Fairley*, 147.

## PARTNERSHIP — Continued

**§ 8. Death of Partner**

The term "net value" in a partnership agreement was ambiguous, and a jury question was presented in an action by a partnership to acquire the partnership interest of two deceased partners on the question of whether "net value" means net book value or market value. *Development Enterprises v. Ortiz,* 191.

## PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

**§ 12.1. Malpractice; Actions and Procedure**

A hospital's credentialing records pertaining to defendant physician were confidential and privileged and not subject to discovery. *Whisenhunt v. Zammit,* 425.

**§ 13. Limitations of Action for Malpractice**

Plaintiffs' claim for medical malpractice in failing to diagnose a malignant tumor accrued on the date defendant informed the female plaintiff by letter that she had no malignancy, and the statute of limitations barred plaintiffs' claim filed more than four years after that date. *Mathis v. May,* 436.

Plaintiff's claim for medical malpractice accrued on 25 August 1982 when defendant X-rayed plaintiff's leg and discharged him, and, having commenced his action within three years of that date, plaintiff could properly rely on acts or omissions that occurred earlier so that none of his claim was barred by the statute of limitations. *Byrd v. Hancock,* 564.

**§ 15. Malpractice; Competency and Relevancy of Evidence**

In a medical malpractice action based upon defendant's alleged failure to monitor effects of prescription medication, the trial court properly refused to allow plaintiffs' expert witness to read from drug inserts provided by pharmaceutical manufacturers. *Whisenhunt v. Zammit,* 425.

**§ 15.1. Malpractice; Expert Testimony**

The trial court in a medical malpractice action properly permitted impeachment of plaintiffs' expert witness by cross-examination concerning his suspension of staff privileges from two hospitals. *Whisenhunt v. Zammit,* 425.

**§ 15.2. Malpractice; Expert Testimony; Who May Testify as Experts**

A physician's affidavit was not improperly considered by the trial court in ruling on defendant's motion for summary judgment in a medical malpractice case because no evidence was presented to show that the affiant was familiar with the standards of medical practice in Harnett County. *Byrd v. Hancock,* 564.

**§ 16.1. Malpractice; Sufficiency of Evidence**

The trial court properly granted summary judgment on plaintiff's claim for fraudulent concealment arising from professional malpractice against Duke University Medical Center and Duke University. *Lackey v. Bressler,* 486.

## PRINCIPAL AND AGENT

**§ 4. Proof of Agency**

Defendant motel franchisor was not liable for alleged negligence by a franchisee in failing to provide adequate security for a patron who was assaulted on motel premises owned by the franchisee under theories of principal-agent relationship, apparent agency or agency by estoppel. *Hayman v. Ramada Inn, Inc.,* 274.

**PRINCIPAL AND AGENT – Continued**

Statements by one defendant concerning his authority from other defendants to sell or grant an option for property owned by all defendants as tenants in common were binding only on the defendant who made the statements. *Johnson v. Hunnicutt*, 405.

The trial court would not order specific performance of an option to purchase land owned by tenants in common where only one tenant signed the option and there was no evidence that he was the agent for those who did not sign. *Ibid.*

## PROFESSIONS AND OCCUPATIONS

**§ 1. Generally**

The suspension of petitioner's license as a professional engineer did not comply with procedures mandated by statute where petitioner was not given notice that a proceeding could result in the suspension of his license. *In re Miller v. Bd. of Registration for Professional Engineers*, 91.

Plaintiff surveyor had no standing to petition for judicial review of action by the Board for Professional Engineers dismissing charges by plaintiff that a fellow land surveyor had used substandard surveying practices. *Carter v. N.C. State Bd. for Professional Engineers*, 308.

## PROPERTY

**§ 4.2. Willful Destruction of Property; Sufficiency of Evidence**

The evidence was sufficient to support defendant's conviction for willful damage to real property for water damage to the toilet and floor of the N.C. Art Museum by clogging a constantly running toilet with paper towels, but the evidence was insufficient to support defendant's conviction for willful damage to an art object deposited in a museum. *S. v. Davis*, 25.

## RAPE AND ALLIED OFFENSES

**§ 6. Instructions**

Defendant was deprived of his right to a unanimous verdict where the court erroneously instructed the jury that it could convict defendant of first degree sex offense if it found that he forced the victim to perform either fellatio or anal intercourse. *S. v. Callahan*, 88.

**§ 6.1. Instructions on Lesser Degrees of Crime**

Defendant was not entitled to an instruction on attempt in a prosecution for first degree sex offense. *S. v. Callahan*, 88.

## RECEIVING STOLEN GOODS

**§ 2. Indictment**

The name of the person from whom goods were stolen is not an essential element of an indictment alleging possession of stolen goods, nor is a variance between the indictment's allegations of ownership of property and proof of ownership fatal. *S. v. Medlin*, 114.

## ROBBERY

**§ 1.2. Relation to Other Crimes**

Although money was taken from a store and two employees, only two assaults occurred, and judgment must be arrested as to one of the three armed robbery charges. *S. v. Suggs*, 588.

**§ 6.1. Sentence**

The imposition of consecutive 14-year sentences for two counts of armed robbery was not cruel and unusual punishment. *S. v. Suggs*, 588.

## RULES OF CIVIL PROCEDURE

**§ 15. Amended Pleadings**

Where plaintiff failed to take any action to amend his complaint either before or after its dismissal, he could not complain on appeal that he lacked adequate opportunity to amend under Rule 15(a). *Johnson v. Bollinger*, 1.

**§ 15.1. Discretion of Court to Grant Amendment of Pleadings**

The trial court did not abuse its discretion by allowing defendant to amend its answer to add the defense of the statute of limitations in an action in North Carolina arising from a cut suffered by plaintiff in Florida on a chair designed and manufactured in North Carolina. *Boudreau v. Baughman*, 165.

The trial court did not abuse its discretion by permitting defendants to amend their counterclaim where it was unlikely that plaintiff was surprised or prejudiced by the amendment. *Sampson-Bladen Oil Co. v. Walters*, 173.

**§ 17. Parties Plaintiff and Defendant; Capacity**

A power company's action was not subject to dismissal because the person who signed the complaint did not indicate her representative capacity. *Duke Power Co. v. Daniels*, 469.

**§ 33. Interrogatories**

The mere fact that an amendment to defendant's tax returns had been selected for examination by the IRS was insufficient to justify defendant's refusal to answer plaintiff's interrogatories as to defendant's finances on the ground that the answers would create a danger of self-incrimination. *J. M. Heinike Assoc., Inc. v. Vesce*, 372.

**§ 41.1. Voluntary Dismissal**

Once the parties were divorced, the wife who had taken a voluntary dismissal of her alimony counterclaim was barred from bringing a new alimony claim despite the one year extension of Rule 41(a). *Banner v. Banner*, 397.

When plaintiff refiled his action within one year of his voluntary dismissal, his claim for punitive damages, which he specifically alleged in the second action but not the first, was not barred by the statute of limitations since he alleged facts in the first action which were sufficient to support an award of punitive damages. *Holley v. Hercules, Inc.*, 624.

**§ 41.2. Dismissal in Particular Cases**

The trial court was within its discretion in dismissing with prejudice plaintiff's claim for emotional distress where plaintiff failed to move that the dismissal be without prejudice and failed to show why he should be given a chance to refile his complaint. *Johnson v. Bollinger*, 1.

**RULES OF CIVIL PROCEDURE – Continued**

**§ 55. Default**

The trial court did not err by not entering judgment by default against the nonanswering defendants in an action to have an easement extinguished where some of the defendants answered. *Leonard v. Pugh,* 207.

**§ 56. Summary Judgment**

An order of summary judgment was for partial summary judgment affecting only the issue of defendants' debt for fuel oil received during 1983, and not affecting their counterclaim for overcharges in 1982. *Sampson-Bladen Oil Co. v. Walters,* 173.

**§ 58. Entry of Judgment**

The trial court did not err by signing a written judgment five days after the announcement of the general terms of judgment in open court where the written judgment conformed in general terms with the oral announcement. *Morris v. Bailey,* 378.

**§ 60.2. Grounds for Relief from Judgment**

Plaintiff was not entitled to have a judgment against it set aside on the ground of excusable neglect where plaintiff failed to maintain a reasonable level of communication with its attorney during the two years the case was pending. *City Finance Co. v. Boykin,* 446.

**§ 65. Injunctions**

An injunctive order which does not state the reason for its issuance is merely irregular and is properly corrected by a motion made before the trial court. *Poor Richard's, Inc. v. Stone,* 137.

**SCHOOLS**

**§ 1. Establishment and Maintenance**

Plaintiffs' right to equal educational opportunity guaranteed by the N.C. Constitution is not violated by the present statutory method of financing public schools or by the operation of five separate administrative school units in Robeson County. *Britt v. N.C. State Board of Education,* 282.

**SEARCHES AND SEIZURES**

**§ 14. Voluntary, Free and Intelligent Consent to Search**

Consent to search outbuildings and a car was voluntarily given by defendant's mother, though a coercive threat of arrest was made, where the threat occurred after the consent searches of the car and outbuildings. *S. v. Washington,* 235.

**§ 15. Standing to Challenge Lawfulness of Search**

An attorney acting as an estate administrator had no Fourth Amendment privacy interest in the estate bank account records, and an SBI agent's conversations with a bank bookkeeper about the estate account did not constitute a governmental "search" for Fourth Amendment purposes. *S. v. Melvin,* 291.

**§ 16. Consent to Search Given by Members of Household**

Defendant's possessory interest conferred standing to challenge the search of his mother's house where he regularly resided, but certain outbuildings did not come within the protected curtilage of the residence. *S. v. Washington,* 235.

## SEARCHES AND SEIZURES — Continued

There was no merit to defendant's argument that he had such exclusive control over outbuildings that his co-occupant mother was not empowered to consent to their search. *Ibid.*

**§ 18. Consent to Search Given by Owner of Vehicle**

Defendant was not the proper person to consent to the search of an automobile where his mother was the registered owner and he was not in apparent control. *S. v. Washington*, 235.

**§ 25. Application for Warrant; Insufficiency of Showing of Probable Cause**

The actions of a detective in entering a roofed and enclosed porch at the rear of defendant's building, bending over, and looking through a crack about three feet from the porch floor amounted to an impermissible invasion of defendant's reasonable expectation of privacy in his building and its contents. *S. v. Tarantino*, 441.

## SOCIAL SECURITY AND PUBLIC WELFARE

**§ 1. Generally**

A decision by the Division of Social Services to deny petitioner medicaid benefits retroactive to three months was supported by substantial evidence. *Surgeon v. Division of Social Services*, 252.

A division of Social Services medicaid eligibility requirement that certain funds be designated for burial expenses before they could be excluded from allowable reserves and which provided that the funds could be excluded as of the first day of the month in which the individual signed a statement of designation improperly limited the retroactive coverage to which petitioner was entitled pursuant to federal regulations. *Ibid.*

## TAXATION

**§ 27. Gift Taxes**

Plaintiff's transfer of property to his son did not constitute a parol trust in his behalf, and gift taxes could properly be assessed against plaintiff. *Day v. Powers, Sec. of Revenue*, 85.

## TORTS

**§ 1. Nature and Elements of Torts**

Defendant's conduct in approaching plaintiff in an angry and threatening manner while wearing a pistol was insufficient to support a claim of intentional infliction of emotional distress. *Johnson v. Bollinger*, 1.

The trial court erred in directing a verdict against plaintiff on his claim for intentional infliction of emotional distress because plaintiff failed to produce expert medical testimony that he suffered such distress, but such error was not prejudicial where plaintiff's evidence was insufficient to establish the element of outrageous conduct. *McKnight v. Simpson's Beauty Supply, Inc.*, 451.

## TRESPASS

**§ 2. Forcible Trespass and Trespass to the Person**

Defendant's conduct in approaching plaintiff in an angry and threatening manner while wearing a pistol was insufficient to support a claim of intentional infliction of emotional distress. *Johnson v. Bollinger*, 1.

**TRESPASS — Continued**

The trial court erred in directing a verdict against plaintiff on his claim for intentional infliction of emotional distress because plaintiff failed to produce expert medical testimony that he suffered such distress, but such error was not prejudicial where plaintiff's evidence was insufficient to establish the element of outrageous conduct. *McKnight v. Simpson's Beauty Supply, Inc.*, 451.

**TRIAL**

**§ 3.2. Particular Grounds for Continuance**

The trial court did not err in denying the corporate defendant's motion at the beginning of trial for a continuance after defendant's counsel of record was disqualified and removed by the trial court on the day before trial. *Brown v. Rowe Chevrolet-Buick*, 222.

**§ 14. Order of Proof and Reopening Case for Additional Evidence**

The trial court did not abuse its discretion by allowing plaintiff to introduce rebuttal evidence. *Morris v. Bailey*, 378.

**§ 15. Objections and Exceptions to Evidence**

The granting of plaintiff's motion in limine to exclude evidence of negotiations between the parties could not be deemed prejudicial error where defendant failed to make an offer of proof and include the evidence in the record. *Morris v. Bailey*, 378.

**TRUSTS**

**§ 13.2. Parol Agreement to Purchase or Accept Title for Benefit of Another**

The trial court erred in engrafting a parol trust on property conveyed by plaintiff to his son. *Day v. Powers, Sec. of Revenue*, 85.

**§ 16. Actions to Establish Constructive Trusts; Parties and Pleadings**

Plaintiffs stated a claim for constructive trust against two North Carolina attorneys who negotiated a referral fee with a Texas attorney after plaintiffs had hired the Texas attorney on a contingency fee basis to handle claims arising out of the death of plaintiffs' son even though plaintiffs may have suffered no direct loss. *Booher v. Frue*, 390.

**UNFAIR COMPETITION**

**§ 1. Unfair Trade Practices**

Systematically overcharging a customer for fuel oil for two years is an unfair trade practice clearly within the purview of G.S. 75-1.1. *Sampson-Bladen Oil Co. v. Walters*, 173.

A finding by a jury that defendant had falsely represented that a car was in good condition was sufficient to support the conclusion that defendant engaged in unfair and deceptive trade practices. *Morris v. Bailey*, 378.

There was no prejudice in an unfair and deceptive trade practices action where the jury was instructed to give one figure for damages for defendant's false representation and breach of warranty and the court trebled the entire amount, but defendant failed to object. *Ibid.*

The trial court did not err in an unfair and deceptive trade practice case arising from the sale of a used car by ordering plaintiff to return the car to defendant and defendant to assume full responsibility for the outstanding loan on the car. *Ibid.*

**UNFAIR COMPETITION — Continued**

The trial court's finding that plaintiff was entitled to attorney fees in an action for unfair and deceptive trade practices was supported by the findings of fact. *Ibid.*

Evidence that defendants breached an implied warranty of fitness by selling a motor home with a defective engine was insufficient to establish an unfair trade practice. *Whitehurst v. Crisp R.V. Center,* 521.

**UNIFORM COMMERCIAL CODE**

**§ 24. Buyer's Remedies; Right to Revoke Acceptance of Goods; Particular Cases**

The evidence showed that plaintiffs revoked their acceptance of a motor home within a reasonable time, and where all the evidence supported the jury finding that defendants breached an implied warranty of fitness of the motor home for a particular purpose, a new trial will be restricted to the issue of whether plaintiffs withdrew their revocation of acceptance and to the issue of damages. *Whitehurst v. Crisp R.V. Center,* 521.

**§ 33. Liability of Parties; Signatures**

Defendants failed to present any forecast of evidence to support their defense to an action on a note that they signed the note as sureties and not as makers as shown on the face of the note. *Federal Land Bank v. Lieben,* 342.

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**§ 5.1. Matters Precluding Specific Performance**

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