NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BETTY FORTUNE, INDIVIDUALLY, AND DALE FORTUNE, A MINOR, BY HIS GUARDIAN AD LITEM, BETTY FORTUNE v. FIRST UNION NATIONAL BANK, A CORPORATION AND AS EXECUTOR AND TRUSTEE OF THE ROBERT L. FORTUNE ESTATE AND TRUST

No. 8612SC1213

(Filed 1 September 1987)

1. **Executors and Administrators § 39; Trusts § 11— executor-trustee—breach of fiduciary duty—sufficiency of evidence**

The evidence was sufficient to permit the jury to find that defendant bank breached its fiduciary duty as executor and trustee by retaining in the estate the stock of a car dealership which had been owned and operated by testator where it tended to show that several people expressed an interest in purchasing the dealership but that defendant decided, without taking offers, to retain and operate the corporation; the dealership sustained substantial losses beginning immediately after testator's death and continuing up until the estate sold the stock two years later; investing in a car dealership was more risky than many other investments; making a dealership successful depended heavily on the abilities of the general manager; defendant knew that testator had been critical to the success of the car dealership and discounted the book value of the stock on the estate tax return by 35% in part due to the death of testator; and defendant knew that the general manager it chose for the dealership had no experience in many facets of managing such a dealership.

2. **Executors and Administrators § 39; Trusts § 11— breach of fiduciary duty—executor or trustee—statute of limitations**

Actions against an executor or trustee for breach of fiduciary duty are actions arising out of a contract which are governed by the three-year statute of limitations of N.C.G.S. § 1-52(1).

3. Limitation of Actions § 11; Trusts § 11— beneficiary's action against trustee—statute of limitations tolled by beneficiary's minority

Where a trust has a claim against a third party and the trustee is competent to sue, a statute of limitations will be deemed to have run against all beneficiaries, regardless of minority, when it has run against the trustee. However, an action against a trustee for breach of fiduciary duty is a claim of the beneficiary, not the trust, and the statute of limitations is tolled during the beneficiary's minority. N.C.G.S. § 1-17(a).

4. Trusts § 11— discretionary trust—trustee's breach of fiduciary duty—no individual recovery by beneficiary

A beneficiary of a "family trust" is not entitled to an award of damages individually for breach of fiduciary duty by the executor-trustee where the trust was a "discretionary trust" in which the trustee had the discretion whether, and to what extent, to distribute trust income or principal to the beneficiaries, and the value of the beneficiary's interest in the trust was thus speculative. Rather, the damages should be placed in trust to be administered pursuant to the terms of the "family trust."

5. Evidence § 24— deposition—inadmissible hearsay—absence of prejudice

The deposition of a former trust officer of defendant bank was hearsay, and the trial court erred in permitting plaintiff to read a portion of the deposition into evidence, where the deponent was available to testify and N.C.G.S. § 8C-1, Rule 804(b)(1) thus did not render the deposition admissible, and where the deponent was not an officer of defendant at the time of his deposition so as to make the deposition admissible under N.C.G.S. § 1A-1, Rule 32(a)(3). However, such error was not prejudicial where much of the information in the deposition was established by the trial testimony of other witnesses and of the deponent himself, and where the most damaging testimony from the deponent came during his testimony at the trial.

6. Trial § 36.1— instructions—use of "that you have found"—no comment on the evidence

The trial court's reference to breach of fiduciary duty "that you have found" when instructing the jury on the issue of damages did not constitute an improper comment on the weight of the evidence on the issue of defendant's breach of fiduciary duty where the court had earlier charged that the jury was not to proceed to the issue of damages unless it first decided the issue of liability in plaintiffs' favor.

7. Appeal and Error § 31.1— assignments of error to instructions—effect of failure to object at trial

Assignments of error to the instructions given and to the court's failure to give equal stress to the contentions of the parties will not be considered on appeal where defendant failed to object to the court's instructions before the jury retired. App. Rule 10(b)(2).

8. Appeal and Error § 24.1— ineffectual cross-assignments of error

Plaintiff appellee's cross-assignments of error were ineffectual where they did not present an alternative basis to support the trial court's judgment. App. Rule 10(d).

APPEAL by defendant from *Barnette, Judge.* Judgment entered 25 June 1986 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 11 May 1987.

This is an action against the executor of an estate for breach of fiduciary duty. The evidence at trial tended to show the following. On 1 February 1977, Robert L. Fortune died, survived by his wife, Betty, and ten year old son, Dale. The estate's major asset was all of the outstanding stock of Royal Dodge, Inc. (Royal Dodge), a North Carolina corporation. Royal Dodge owned two car dealerships, both of which had been operated by Mr. Fortune, a condominium in North Myrtle Beach, and a diamond ring.

Mr. Fortune's will required that, after payment of his debts and certain bequests of personal property, his residuary estate be divided into two trusts. The first trust was a "marital deduction" trust. The second trust, entitled the "family trust," was to consist of whatever property remained after the funding of the marital deduction trust. The "family trust" provided that, during the life of Betty Fortune, the trustee in its "absolute discretion" could accumulate all or any part of the trust's income or distribute all or any part of it to either Betty Fortune, Dale Fortune, or any issue of Dale Fortune. The trustee was also given the power to distribute the trust's principal in the same discretionary manner. The trust provided that, upon the death of Betty Fortune, all trust property would be distributed to Dale Fortune, or, if Dale predeceased his mother, to any of his surviving issue. Defendant, First Union National Bank, was named in the will as executor of the estate and trustee of both trusts.

Defendant qualified as executor of the estate on 8 February 1977. Although several people expressed an interest in purchasing some or all of the stock of Royal Dodge, defendant decided to retain the stock. Defendant immediately elected two of its employees to Royal Dodge's Board of Directors, replacing the position held by Mr. Fortune, as well as the position to which Dale Fortune had been named. On 24 March 1977, the Board added two more director's positions, electing another of defendant's employees and William Campbell, a former employee of Chrysler Credit Corporation who had recently been hired as Royal Dodge's new general manager. Mr. Campbell was also elected president of the corporation.

During the following two years, however, Royal Dodge sustained losses in excess of $380,000. In September 1978 the Board replaced Mr. Campbell with Charles R. Thompson. On 7 February 1979, Mr. Thompson purchased the stock held by the estate for $90,000, payable in 10 equal installments. The agreement was conditioned on, among other things, the buyer obtaining the release of the estate and Betty Fortune from "contingent" liabilities of approximately $2,500,000 due two banks and Chrysler Credit Corporation. Due to previous litigation against Chrysler Credit Corporation, defendant had received permission from the Cumberland County Superior Court Clerk to extend the time for administering the estate. Consequently, the estate has not yet been closed and, except for one dollar, the two trusts not yet funded.

On 2 March 1982, Ms. Fortune brought this action for herself and, as Guardian Ad Litem, for her son Dale. The complaint alleged that defendant acted fraudulently and negligently in managing the assets of the estate. Plaintiffs requested: (1) the removal of defendant as both executor and trustee; (2) an accounting to the court for all the assets of the estate; (3) payment to plaintiffs of all income generated from the estate; (4) an order surcharging defendant for costs and damages to the estate and trusts; (5) compensatory damages for mental anguish and emotional trauma; and (6) punitive damages. On 10 October 1983, defendant moved for judgment on the pleadings, or, in the alternative, for summary judgment on all claims. By order filed 30 January 1984, the trial court granted summary judgment in favor of defendant on all claims by Betty Fortune except her claim for an accounting. The court granted defendant's motion for judgment on the pleadings on Dale Fortune's claims for fraud and special damages but denied it as to his other claims.

The remaining claims were tried before a jury. After plaintiff's evidence was presented, the trial court granted defendant's motion for a directed verdict on the issue of punitive damages. The court submitted the following issues to the jury: (1) whether defendant breached its fiduciary duty to Dale Fortune in administering the estate or acting as trustee, and (2) if so, what amount of damages are due Dale Fortune. The jury returned a verdict for Dale Fortune in the amount of $413,744.76. Defendant's motions for judgment notwithstanding the verdict and, alternatively, for a new trial, were denied.

McLeod, Senter & Winesette, by Joe McLeod, for the plaintiff-appellees.

Hamel, Helms, Cannon, Hamel & Pearce, by Reginald S. Hamel; Francis C. Clark, Staff Attorney, First Union National Bank; Maupin, Taylor, Ellis & Adams, by R. Stephen Camp, for defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first argues that the trial court erred in denying its motions for directed verdict and for judgment notwithstanding the verdict. Defendant contends that the evidence was insufficient to show it breached its fiduciary duty, and that Dale Fortune's claims were barred by the statute of limitations. We disagree.

An executor acts in a fiduciary capacity to those who are beneficiaries of the estate. *See Moore v. Bryson*, 11 N.C. App. 260, 181 S.E. 2d 113 (1971); G.S. 32-2. G.S. 28A-13-10(c) provides that an executor of an estate is liable:

> [F]or any loss to the estate arising from his failure to act in good faith and with such care, foresight and diligence as an ordinarily reasonable and prudent man would act with his own property under like circumstances. If the exercise of power concerning the estate is improper, the personal representative is liable for breach of fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. G.S. 28A-13-10(c).

Therefore, an executor, in performing those duties related to managing the estate's assets, acts as a trustee to beneficiaries of the estate. *Id.*; Restatement (Second) of Trusts section 6, comment b (1959). Bogert, The Law of Trusts and Trustees section 12 (rev. 2d ed. 1984). As such, the executor is liable for the depreciation of assets which an ordinarily prudent fiduciary would not have allowed to occur. *See* G.S. 36A-2(a); Restatement (Second) of Trusts section 209 (1959); Bogert, The Law of Trusts and Trustees section 702 (rev. 2d ed. 1982).

The evidence showed that several people expressed an interest in purchasing Royal Dodge but that defendant decided,

without taking offers, to retain and operate the corporation. It also showed that Royal Dodge sustained substantial losses beginning immediately after Mr. Fortune's death and continuing up until the time the estate sold the stock. There was evidence that investing in a car dealership was more risky than many other investments; that making it successful depended heavily on the abilities of the general manager; that defendant knew Mr. Fortune had been critical to the success of the car dealerships, so much so that they discounted the book value of the stock on the estate tax return by 35%, in part due to the death of Mr. Fortune; and that defendant knew Mr. Fortune's replacement, Mr. Campbell, had no experience in many facets of managing a car dealership.

When determining whether to grant a motion for a directed verdict, the evidence must be viewed in the light most favorable to the non-moving party, giving it the benefit of every reasonable inference which can be drawn therefrom. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985). Defendant argues that the inquiries about purchasing the stock were not sufficiently attractive to justify sale of the stock and that an ordinarily reasonable and prudent person would not have been able to anticipate the stock's decline in value. The validity of those arguments, however, is for the jury to decide. The evidence was sufficient to permit the jury to find that defendant's retention of Royal Dodge stock was a breach of its fiduciary duty. Therefore, the trial court properly denied defendant's motion for a directed verdict.

[2] We also find no merit in defendant's argument that the statute of limitations had run against Dale Fortune's claims. G.S. 1-52(1) provides that actions on a contract, or obligations or liabilities arising out of a contract, must be brought within three years of the breach. Actions against an executor or trustee for breach of fiduciary duty are actions arising out of contract. *Tyson v. N.C.N.B.*, 305 N.C. 136, 286 S.E. 2d 561 (1982). G.S. 1-17(a), however, provides for the tolling of most statutes of limitation, including G.S. 1-52(1), during a person's minority. Therefore, even assuming this action was brought after the three year statutory period, because Dale Fortune was a minor when the complaint was filed, the statute of limitations does not bar his claims.

[3] Defendant, however, arguing that plaintiff's claim belongs to the trust, contends that a statute of limitations which runs against the trustee will also run against all of the beneficiaries. We disagree. Where a trust has a claim against a third party, and the trustee is competent to sue, a statute of limitations will be deemed to have run against all beneficiaries, regardless of minority, when it has run against the trustee. *See* 76 Am. Jur. 2d *Trusts* section 594 (1975). An action against a trustee for breach of fiduciary duty, however, is a claim of the beneficiary, not the trust. *Id.*, section 578. *See also* Restatement (Second) of Trusts section 200, comment a (1959); Bogert, The Law of Trusts and Trustees section 861 (rev. 2d ed. 1982). Therefore, common provisions for the tolling of the statute of limitations are available to a beneficiary in an action against his trustee. Bogert, The Law of Trusts and Trustees section 951 (2d rev. ed. 1982). The trial court did not err in failing to grant defendant's motion for a directed verdict on the grounds that Dale Fortune's claims were barred by the statute of limitations.

II

Defendant has made several assignments of error regarding the measure of damages received by plaintiff. Defendant argues that: (1) the trial court should have granted plaintiff's motion for a directed verdict because plaintiff failed to prove his damages with reasonable certainty; (2) the trial court erred in failing to give a requested instruction that plaintiff was entitled to only "nominal damages"; and (3) the trial court erred in instructing the jury that plaintiff, Dale Fortune, was a "joint beneficiary" of the estate and, therefore, could be awarded one-half of the estate's damages. We agree with defendant that the award of damages given to plaintiff, individually, was erroneous. Nevertheless, none of defendant's objections at trial point to any reversible error by the trial court. Therefore, while we remand for modification of the trial court's judgment to require a different remedy, we affirm the liability of defendant for the amount of the jury's award.

[4] Defendant correctly argues that the speculative nature of plaintiff's interest precludes him from an individual award of damages. The "family trust" established by Mr. Fortune's will is a "discretionary trust" designed to benefit Betty Fortune, Dale Fortune, and any children Dale may have. A "discretionary trust" is

a trust where the trustee has discretion whether, and to what extent, to apply trust income or principal to, or for the benefit of, the beneficiaries. *Lineback v. Stout*, 79 N.C. App. 292, 339 S.E. 2d 103 (1986); G.S. 36A-115(b)(1). By nature then, the value of a beneficiary's interest in a discretionary trust is problematic and any recovery for damage to that interest becomes dubious. In addition, since plaintiff's interest in the estate arises solely out of his interest in an essentially unfunded trust, not only does the nature of the trust make plaintiff's interest uncertain, but the amount of property from which that interest springs is as yet undetermined.

Under these circumstances, plaintiff Dale Fortune is not entitled to recover damages personally. Unless, by the proper exercise of a trust's terms, the trustee is obligated to pay or apply a sum certain to, or for the benefit of, the beneficiary, the beneficiary has no right to an action at law against the trustee for breach of fiduciary duty. *See* Restatement (Second) of Trusts sections 197-198, and comments (1959); Bogert, The Law of Trusts and Trustees, section 870 (rev. 2d ed. 1982); Bogert, Trusts, section 157 (6th ed. 1987). Instead, his interest in the trust property remains an equitable one for which the remedy is suing the trustee to redress the breach by accounting to the trust for damages caused thereby. *See* Restatement (Second) of Trusts section 199 (1959); Bogert, The Law of Trusts and Trustees, sections 970-971 (rev. 2d ed. 1983). Here, the trust is still "active," not "passive," *see Riddle v. Riddle*, 58 N.C. App. 594, 293 S.E. 2d 819 (1982), and there is no allegation that, under the terms of the trust, plaintiff is owed a sum certain of the trust's income or principal. Consequently, plaintiff is not entitled to an individual monetary award.

The rule that a trust beneficiary under these circumstances may not recover damages individually is mandated by several, well-established common law principles. First, all damages, except nominal damages, must be proven with reasonable certainty. *Phillips v. Insurance Co.*, 43 N.C. App. 56, 257 S.E. 2d 671 (1979). Because plaintiff cannot show if, when, how frequently, or to what extent, the trustee will exercise its discretion in distributing the trust's income and principal, any degree of certainty in determining his damages is impossible. Second, damages for breach of trust are designed to restore the trust, and the beneficiary, to the same position they would have been in had there been no breach.

See Freeman v. Cook, 41 N.C. 373 (1 Ired. 1849); Bogert, The Law of Trusts and Trustees section 706 (rev. 2d ed. 1982). Prior to defendant's breach, the estate had title to the property and plaintiff had a mere expectancy in a portion of its income and principal. An award of damages directly to plaintiff leaves the estate without the assets it otherwise would have had and gives plaintiff a sum of money he would not necessarily have been entitled to. Last, courts should not alter the intent of the donor by giving a beneficiary more or less of an interest in the trust than what was intended. *Penick v. Bank*, 218 N.C. 686, 12 S.E. 2d 253 (1940). Mr. Fortune anticipated that, until Ms. Fortune's death, his son Dale would share in his residuary estate only in the discretion of the trustee. He also intended that any children Dale might have in the future, whose interests were not represented at trial, would also have an interest in the income and principal of the trust. Permitting an award to Dale Fortune individually, free of the trust, defeats the purposes of the trust.

Although plaintiff Dale Fortune is not entitled to recover the amount of the jury's verdict individually, defendant's assignments of error relating to the measure of damages are without merit. Defendant complains that the trial court should have granted its motion for directed verdict and should have given the jury defendant's requested instruction that plaintiff could recover only nominal damages. Defendant does not complain that the evidence of damage to the estate was insufficient, only that it was insufficient to show plaintiff's individual damages. The complaint, however, properly prayed for an accounting and a surcharging of defendant trustee for damages caused to the estate and trusts. In addition, plaintiff's individual claim for special damages was dismissed before trial. Therefore, when defendant moved for a directed verdict and requested an instruction on nominal damages, the question of what damages were recoverable by Dale Fortune individually was not even an issue. Since there was evidence of damage to the estate, the trial court did not err in denying defendant's motion or in failing to give defendant's requested instruction.

Defendant's assignment of error regarding the trial court's instruction that plaintiff was a "joint beneficiary" of the estate is similarly without merit. Defendant argues that the instruction erroneously enabled plaintiff to recover one-half the estate's

damages when the evidence of damage to his interest was merely speculative. We have already addressed that argument. Moreover, defendant does not argue that one-half of the total damages is inappropriate for the estate to recover, only that it is an inappropriate measure of damages for Dale Fortune individually to recover. Therefore, the question of the proper measure of damages recoverable by an estate or trust from its fiduciary when, as here, fewer than all of the beneficiaries are able to maintain an action for breach of fiduciary duty, is not before us. Defendant's assignment of error regarding the trial court's instruction on "joint beneficiaries" is overruled.

III

[5] Next, defendant argues that the trial court erred in admitting certain deposition testimony at trial. We find no prejudicial error.

During trial, plaintiff was allowed to read into evidence, over defendant's objection, part of the deposition testimony of Mr. Wayne Jordan. Mr. Jordan had served as a Trust Officer for defendant during much of the administration of Mr. Fortune's estate. Mr. Jordan left defendant's Trust Department in 1985 and returned there in 1986. At the time his deposition was taken, however, Mr. Jordan was not employed by defendant.

Except as provided in G.S. 8C-1, Rule 804(b)(1) the deposition testimony of Mr. Jordan is inadmissible hearsay. Since Mr. Jordan was available to testify, and in fact later did so, Rule 804(b)(1) is inapplicable. G.S. 1A-1, Rule 32(a)(3), however, provides, in part, that a deposition may be used as substantive evidence where the deponent "*at the time of taking the deposition* was an officer, director, or managing agent" [emphasis added] of a private corporation which is an adverse party to the party using the deposition. Since Mr. Jordan was not an officer of defendant at the time his deposition was taken, its admission as substantive evidence was error.

The burden, however, is on the complaining party to show not only that the trial court erred but that the error was prejudicial. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968). The admission of incompetent evidence will not be held prejudicial where its importance is abundantly established by

other competent evidence. *Board of Education v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970). Although defendant has established that admission of Mr. Jordan's deposition testimony was error, it has failed to show how that testimony harmed its chances of success. Much of the deposition consisted of Mr. Jordan describing his own, and defendant's background in trust administration, the election of directors to Royal Dodge's Board, the appointment of William Campbell as general manager, and the manner in which defendant oversaw the corporation's management. Much of that same information was established by testimony from other witnesses and, later in the trial, by Mr. Jordan himself. Furthermore, the most damaging testimony from Mr. Jordan, that regarding the degree of losses suffered by Royal Dodge and the failure of defendant to follow up on offers to purchase the corporation, came during his testimony at trial, not from his deposition. Consequently, the error in admitting the deposition as substantive evidence was not prejudicial.

IV

Defendant has also assigned as error several parts of the trial court's instructions. Specifically, defendant claims that the trial court erred in: (1) instructing that plaintiff must prove that the breach of fiduciary duty "that you have found," caused him damage; (2) instructing the jury that defendant was responsible for managing Royal Dodge by virtue of its control of the corporation's Board of Directors; (3) instructing that if the fiduciary has special skills or is named as fiduciary based on its representations of special skills, then it was under a duty to use those skills; and (4) failing to give equal stress to the contentions of the parties. We disagree.

[6] Defendant contends that, by using the phrase "that you have found" when instructing the jury on the issue of damages, the trial court improperly commented on the weight of the evidence on the issue of defendant's breach of fiduciary duty. Since the court was instructing on the issue of damages, however, it was understandably speaking of liability in the past tense. Earlier, the trial court charged the jury that it was not to proceed to decide the issue of damages unless it first decided the issue of liability in plaintiffs' favor. Consequently, the jury could not have interpreted the phrase as intimating that the trial judge believed

defendant had breached its fiduciary duty to plaintiff. This assignment of error is without merit.

[7] By failing to object to the trial court's instructions before the jury retired to deliberate, defendant has waived any right to make its three remaining arguments the subject of an assignment of error. N.C.R. App. P. 10(b)(2); *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). This is true even as to defendant's argument relating to the trial court's summary of the parties' contentions. *Rector v. James*, 41 N.C. App. 267, 254 S.E. 2d 633 (1979) (objections to the statement of contentions must ordinarily be brought to the trial court's attention). While no objection to the statement of the parties' contentions is required if it includes an expression of opinion on the evidence, *State v. Watson*, 1 N.C. App. 250, 161 S.E. 2d 159 (1968), merely giving unequal stress to them does not amount to an expression of opinion.

V

Last, defendant contends that the trial court erred in failing to grant its motion for a new trial. A decision whether to grant a new trial is discretionary with the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in a substantial miscarriage of justice. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). We find no abuse of discretion here.

VI

[8] Plaintiff has raised, by cross-assignments of error, the questions of whether the trial court erred in granting summary judgment against plaintiff, Betty Fortune, and in granting defendant's motion for directed verdict on the issue of punitive damages. Rule 10(d) of the North Carolina Rules of Appellate Procedure allows an appellee to make cross-assignments of error only when presenting an alternative basis to support the trial court's judgment. Plaintiff's assignments of error do not present an alternative basis for supporting the judgment. The proper method of raising plaintiff's arguments is an independent appeal. *See Whedon v. Whedon*, 68 N.C. App. 191, 314 S.E. 2d 794 (1984), *rev'd on other grounds*, 313 N.C. 200, 328 S.E. 2d 437 (1985). Here, plaintiff did not give notice of appeal or submit a separate appellant brief. In addition, we note that not all of the materials considered by the

trial court in granting summary judgment against Ms. Fortune are in the record. Therefore, plaintiffs' purported appeal is dismissed.

VII

[4] Plaintiff Dale Fortune may not personally recover the damages awarded. Instead, the proper equitable remedy is to place those damages in trust, to be administered pursuant to the terms of the "family trust" for the benefit of Dale Fortune and his future issue, if any. Plaintiff Betty Fortune's interest is limited to her share in the estate's remaining assets. Therefore, we remand this case and direct that the judgment be modified consistent with this opinion. In addition, the trial court, on remand, retains jurisdiction to address any other equitable relief requested in the complaint.

Affirmed and remanded.

Judges ARNOLD and PARKER concur.

STATE OF NORTH CAROLINA v. GERALD WAYNE BROWN

No. 864SC929

(Filed 1 September 1987)

1. **Automobiles and Other Vehicles § 112.1— manslaughter—evidence of intoxication—sufficient**

There was sufficient evidence of defendant's intoxication for an involuntary manslaughter charge arising from a pedestrian being hit by defendant's van to go to the jury where defendant admitted drinking eight beers from 8:30 to 11:30 p.m.; there was evidence that defendant was not impaired at that time; the victim was struck between 1:05 a.m. and 1:52 a.m.; and defendant admitted having four beers, being "intoxicated," and having "consumed too much beer" at 2:30 a.m. to 3:00 a.m. Although evidence of consumption alone is not sufficient, it was reasonable for the jury to infer intoxication from his earlier drinking of eight beers, despite evidence to the contrary.

2. **Criminal Law § 106.4— death of pedestrian—admission by driver of intoxication—substantial independent evidence of trustworthiness**

In a prosecution for involuntary manslaughter following the death of a pedestrian who was struck by defendant's van, there was substantial evidence

tending to establish the trustworthiness of defendant's admission that he was intoxicated and had consumed too much beer.

3. **Criminal Law § 86.2— cross-examination concerning prior guilty plea—no attorney at prior trial—conviction admissible**

In a prosecution for involuntary manslaughter following the death of a pedestrian struck by defendant's van, allegedly while defendant was intoxicated, the trial court did not err by allowing the State to ask defendant whether he had been convicted in 1977 of driving under the influence based upon a guilty plea without an attorney where the evidence supported the court's finding that a defendant failed to show that he was indigent at the time of the 1977 conviction. N.C.G.S. § 15-980(a) and (c).

APPEAL by defendant from *Strickland, Judge.* Judgment entered 21 February 1986 in Superior Court, ONSLOW County. Heard in the Court of Appeals 10 February 1987.

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

Merritt & Stroud by Timothy E. Merritt for defendant appellant.

COZORT, Judge.

The defendant was charged in indictments proper in form with manslaughter (N.C.G.S. § 14-18) and hit and run resulting in personal injury or death (N.C.G.S. § 20-166(a)). He was convicted of involuntary manslaughter and hit and run with personal injury or death not apparent to the defendant. The State's case on involuntary manslaughter was based on its contention that a pedestrian was killed when struck by defendant's van which was being operated by the defendant while the defendant was impaired by alcohol. The only evidence of defendant's impairment or intoxication was his admission that he was "intoxicated" and "had consumed too much beer" about one to three hours after the pedestrian was killed. The defendant denied being intoxicated when the incident occurred and denied seeing or striking the pedestrian. We hold that the defendant's admission was sufficient to supply the necessary evidence of impairment, and we find no error in the conviction. The facts follow.

The State's evidence tended to show that in the early morning hours of Sunday, 20 October 1985, Larry Keith Drum, a

Sergeant in the United States Marine Corps, and Ron Kistner discovered a person lying in the road at the intersection of Lake Street and Barbara Avenue in Jacksonville. They saw that the man was bleeding and having difficulty breathing. The Highway Patrol and an ambulance were called and the rescue squad came and took the person away.

Trooper Richard Allen Hood of the North Carolina Highway Patrol was dispatched to the scene, arriving at 1:52 a.m. The injured person had been taken away by the rescue squad prior to his arrival. Sergeant Drum and Kistner told him where the person had been discovered in the road. Trooper Hood found several pieces of what appeared to be amber turn light lens. Trooper Hood put the amber lens pieces in a bag. One piece of the lens had a Chrysler insignia on it. Trooper Hood went to a Chrysler dealership nearby and began comparing the lens piece with the Chrysler insignia on it to the lenses on vehicles at the dealership. He determined that the piece discovered in the road compared to that of a Dodge van at the dealership. Trooper Hood drove back to the scene of the accident, arriving at about 3:00 a.m. He then started driving up and down nearby streets, looking for a Dodge van.

At about 3:30 a.m. Trooper Hood found a Dodge van parked on the side of the road. The right turn signal lens had been broken. The pieces he had retrieved from the scene of the accident matched the van he found. Trooper Hood later learned that the house in front of which the van was parked was the residence of Robin Nuss. Trooper Hood called a wrecker and had the vehicle impounded. He learned that the van was registered to Gerald Wayne Brown, the defendant. He went to the address listed for the defendant, woke up the occupants there, and learned that Brown no longer lived there.

At 4:00 a.m., Trooper Hood went off duty and went home. Later that day he looked up Gerald Wayne Brown in the telephone directory and called the number listed for him. A male answered the phone and identified himself as Gerald Wayne Brown. Brown said he owned a 1979 black and red van which he had left at the house of a friend, Robin Nuss. Trooper Hood told Brown he was investigating an accident. Upon a request by Trooper Hood, Brown stated that he and his wife would meet

Trooper Hood at the Highway Patrol Station at 4:00 p.m. When he arrived at the station, the defendant Brown was advised of his rights and made this statement, in writing:

> Drove back from Cherry Point tournament arriving at about 8:30 P.M. Went home and then went to Alibi Bar from 9:30 to 11:30, consuming about eight cans of beer. Left and went to Shogun on Highway 24, left went to Jiffy-Mart, arriving 1:00 P.M. Went to Robin Nuss's house after picking up eggs and bacon at Jiffy Mart, arriving at Robin's house at approximately 1:30 P.M. Left Robin's house around 3:00 P.M. Wife drove home. Left van parked at Robin's house. Got a call about 1:30 P.M. 20 October, stating van was involved in accident. Came to . . . Highway Patrol Office to see Officer Hood 4:00 P.M. 20 October.

In response to questions by Trooper Hood, defendant Brown stated that he drove from the Jiffy Mart to Nuss's house between 2:30 a.m. and 3:00 a.m., leaving his van there and riding home with his wife because he "didn't want to drive because intoxicated [*sic*]." Defendant Brown admitted driving through the intersection where the victim was found; however, he denied striking anyone. He told Trooper Hood there was no damage to his van. Later that day, Trooper Hood examined the defendant's van again. The right side mirror was pulled back from the body of the van, and there was a small dent in the body under the right side of the windshield. Trooper Hood removed the grill from the front of the van and fit the pieces of turn light lens in the grill.

The person found lying in the street was later identified as Leslie Frank McPherson. McPherson died at 2:25 p.m. on Monday, 21 October 1985. An autopsy was performed by Dr. Charles L. Garrett, who found McPherson had received a severe injury to his head resulting in a fracture of his skull and bruising and tearing of his brain. The cause of death was the head injury. The injuries received by McPherson were consistent with his having been struck by a motor vehicle.

Patricia Gibbs, a friend of McPherson's, testified that he called her from a pay phone at the Jiffy Mart on Barbara Avenue at about 11:45 p.m. on the evening of 19 October 1985. They talked until about 1:05 a.m., 20 October 1985, when McPherson told her he was going to walk home and hung up the phone.

The defendant testified in his own behalf and presented other witnesses. The defendant is a Gunnery Sergeant in the United States Marine Corps, having enlisted in 1968. On Saturday, 19 October 1985, he went to a softball tournament at Cherry Point. He ate three hot dogs there at noon and returned to Jacksonville when the tournament was over, arriving in Jacksonville around 8:00 p.m. to 8:30 p.m. His wife was not ready to go out with him at the time. He left alone; she agreed to meet him later at the Alibi Bar, a local establishment. The defendant left his home between 8:30 p.m. and 9:00 p.m., driving his 1979 Dodge van. The defendant stayed at the Alibi until about 11:30 p.m. During that time, he drank approximately eight (8) 12-ounce cans of beer. He ate nothing at the Alibi, and in fact the record shows that he had nothing to eat after he returned to Jacksonville until he went to the Nuss home for breakfast. He left the Alibi at about 11:30 p.m. to go to the Shogun, a local restaurant. His wife, who had joined him at the Alibi, also went to the Shogun, following defendant in her car. The defendant testified he was not intoxicated when he left the Alibi. The defendant was at the Shogun for about an hour. He had nothing to eat or drink at the Shogun.

Around 12:30 a.m., defendant and his wife left the Shogun with plans to go to the house of friends, Robin and Carol Nuss, for breakfast. Defendant and his wife went next door to the Jiffy Mart and bought bacon, eggs, and a 12-pack of beer. The defendant drove to Nuss's house, which was a short distance away. The drive took about five (5) minutes. The defendant drove through the intersection of Lake Street and Barbara Avenue. The defendant testified that during this drive nothing unusual happened and that he saw no one walking or lying in the street. He testified that he did not strike anyone in the intersection. The defendant also testified that his ability to operate a motor vehicle was not impaired by his consumption of alcoholic beverages. While at the Nuss home, the defendant ate breakfast and drank "probably four" 12-ounce cans of beer. He and his wife left to go home about 2:30 a.m. to 3:00 a.m. The defendant left his van at the Nuss's to ride home with his wife. He testified he let his wife drive home because "at the time I thought I had consumed too much beer and I was very tired."

The defendant's wife, Carolyn Sue Brown, testified that she drank two beers while they were at the Alibi and two more at the

Shogun. When they were leaving the Shogun, she was of the opinion that her husband walked and spoke normally and that he was not impaired by alcohol. She followed him from the Shogun to the Nuss's house, and nothing out of the ordinary happened.

John Lane Garcia, the husband of the owner of the Alibi, saw the defendant at the Alibi and at the Nuss's house. In his opinion the defendant was not impaired by alcoholic beverages; to the contrary, he "was in good shape." Also, the defendant acted normal when he got to the Nuss's; he did not appear to be upset.

Harry Garfield Reckline, a retired United States Marine Corps Sergeant, saw defendant at the Shogun at about 11:30 p.m.-12:00 midnight. Reckline, who had drunk about six (6) beers during the course of the evening, stated that, in his opinion, the defendant did not appear to be impaired.

The defendant also offered witnesses who attested to his good character.

The jury found the defendant guilty of involuntary manslaughter and guilty of hit-and-run with personal injury or death not apparent to the defendant. The offenses were consolidated for judgment, and the trial court imposed an active sentence of 3 years, the presumptive term for involuntary manslaughter. The defendant appeals.

The primary issue to be decided on appeal is whether the trial court erred in denying the defendant's motion for dismissal at the close of the State's evidence and the motion for directed verdict at the close of all the evidence. These motions raise the issue of whether the evidence is sufficient to take the case to the jury.

> It is well settled that upon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evi-

dence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980).

State v. Brown, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984).

In his brief the defendant does not challenge the sufficiency of the evidence on the misdemeanor hit-and-run conviction. Thus, our discussion is limited to the involuntary manslaughter conviction.

> "Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." [Citation omitted.] . . . .
>
> * * * *
>
> [W]hen a death is caused by one who was driving under the influence of alcohol, only two elements must exist for the successful prosecution of manslaughter: a willful violation of N.C.G.S. 20-138 and the causal link between that violation and the death.

State v. McGill, 314 N.C. 633, 637, 336 S.E. 2d 90, 92-93 (1985).

[1] There was sufficient circumstantial evidence that McPherson was killed when hit by the van driven by defendant. The key question here is whether there was sufficient evidence of the defendant's intoxication to prove a willful violation of N.C.G.S. § 20-138.1. *Id.* There was no testimony from expert witnesses or from lay witnesses who observed the defendant that he was intoxicated when he was driving his van from the Shogun to the Nuss's house, through the intersection where McPherson was killed. The defendant admitted that he drank eight beers in a period of time between 8:30 p.m. and 11:30 p.m. and that he had nothing else to drink until after he reached the Nuss's house. He denied that he was intoxicated or impaired when he was driving to the Nuss's house, which is the crucial time. McPherson was struck at some time between 1:05 a.m. and 1:52 a.m. The defendant's wife testified that the defendant was not impaired when he left the Shogun at approximately 12:30 a.m. John Lane Garcia testified that he saw the defendant at the Alibi (before McPherson

was killed) and at the Nuss's house (which would have been after McPherson was struck); and in his opinion the defendant "was in good shape." A third witness, Harry Garfield Reckline, testified that he saw defendant at the Alibi at about 12:00 midnight, and the defendant did not appear to be impaired.

The State argues in its brief that the defendant's admission that he drank eight (8) beers from 8:30 p.m. to 11:30 p.m. on 19 October 1985 was sufficient evidence to go to the jury on the question of whether the defendant was impaired by alcohol when he was operating his van between 1:05 a.m. and 1:52 a.m. on 20 October 1985. We reject that argument.

> Under our statutes, the consumption of alcohol, standing alone, does not render a person impaired. *State v. Ellis*, 261 N.C. 606, 135 S.E. 2d 584 (1964). An effect, however slight, on the defendant's faculties, is not enough to render him or her impaired. *State v. Hairr*, 244 N.C. 506, 94 S.E. 2d 472 (1956). Nor does the fact that defendant smells of alcohol by itself control. *State v. Cartwright*, 12 N.C. App. 4, 182 S.E. 2d 203 (1971). On the other hand, the State need not show that the defendant is "drunk," i.e., that his or her faculties are *materially* impaired. *See State v. Painter*, 261 N.C. 332, 134 S.E. 2d 638 (1964). The effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired. *See State v. Felts*, 5 N.C. App. 499, 168 S.E. 2d 483 (1969) (new trial on other grounds).

State v. Harrington, 78 N.C. App. 39, 45, 336 S.E. 2d 852, 855 (1985). Thus, there must be some evidence of the defendant's intoxication and that he was impaired, or the conviction cannot stand. Evidence of consumption alone, without evidence of intoxication or impairment, is not sufficient.

The only evidence that the defendant was intoxicated or impaired came from the defendant himself. The defendant told Trooper Hood when interviewed on the afternoon of 20 October 1985 that he did not drive from the Nuss's home to his home at about 2:30 a.m. to 3:00 a.m. because he "didn't want to drive because intoxicated [*sic*]." At trial the defendant testified that he had four (4) beers at the Nuss's house, and he didn't drive home because "at the time I thought I had consumed too much beer and I was very tired." The question then is whether the defendant's

admission of being "intoxicated" or having "consumed too much beer" at 2:30 a.m.-3:00 a.m. is sufficient evidence from which the jury could infer that the defendant was impaired between 1:05 a.m. and 1:52 a.m. We hold the evidence was sufficient.

If the defendant admitted that he was intoxicated at 2:30 a.m. or 3:00 a.m. after having four (4) beers, it is reasonable for the jury to infer that the intoxication was a carry-over from his earlier drinking of eight (8) beers between 8:30 p.m. and 11:30 p.m. Or, it would be reasonable for the jury to infer that if defendant admitted that the consumption of four (4) beers at 2:30 a.m. was enough to make him intoxicated at that time, then the consumption of eight (8) beers earlier in the evening was enough to make him intoxicated earlier, despite his testimony and the testimony of other witnesses that he was not impaired. Those contradictions or discrepancies are to be resolved by the jury in their fact-finding process. *State v. Brown*, 310 N.C. at 566, 313 S.E. 2d at 587.

[2] We further hold, following *State v. Parker*, 315 N.C. 222, 337 S.E. 2d 487 (1985), that the defendant's admission of impairment is supported by substantial independent evidence tending to establish the trustworthiness of the admission so as to sustain the conviction. We first note, that under *State v. Trexler*, 316 N.C. 528, 342 S.E. 2d 878 (1986), the corpus delicti rule applies with equal force to a *confession*, an acknowledgment of guilt to a crime charged, and to an *admission*, a statement of pertinent facts which, in light of other evidence, is incriminating. *Id.* at 531, 342 S.E. 2d at 879-80. The defendant's statements that he was "intoxicated" and had "consumed too much beer" were admissions, *i.e.*, statements which incriminated him given other facts in evidence. In *Parker*, the Supreme Court held:

> We adopt a rule in non-capital cases that when the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

State v. Parker, 315 N.C. at 236, 337 S.E. 2d at 495.

We find the defendant's admission of impairment to be trustworthy. There was evidence both from defendant and other witnesses that defendant was an experienced drinker. The defendant acknowledged that he drank often, and that he generally did not drink more than eight beers in an evening. We believe his admission of intoxication is trustworthy and was sufficient evidence of the element of impairment to take the case to the jury.

[3] The defendant has raised one other issue for our consideration. On cross-examination, the State was permitted, over the objection of the defendant, to ask the defendant whether he had been convicted in 1977 of driving under the influence. The defendant contends the trial court erred in allowing this evidence because the defendant was not represented by counsel in the 1977 conviction, and he was indigent. We disagree.

Under N.C.G.S. § 15A-980(a), "[a] defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State is to impeach the defendant . . . ." Under N.C.G.S. § 15A-980(c), the defendant has the burden of proof by the preponderance of the evidence "that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel." We have held that the defendant must meet his burden on *all three facts. State v. Haislip*, 79 N.C. App. 656, 658, 339 S.E. 2d 832, 834 (1986).

In the case below, the trial court heard evidence after the defendant moved to suppress the 1977 conviction. The trial court then entered an order which appears in the transcript as follows:

> 1. That this is an evidentiary hearing and that the defendant and his counsel are present and that the State's attorney is present. That the defendant, Gerald Wayne Brown being the sole witness at this hearing, was sworn and testified that he pled guilty to the offense of driving under the influence in Onslow County in July, 1977, at which time he was not represented by an attorney.
>
> Next. That the witness Brown testified that he did not waive an attorney.
>
> Next. That the defendant Brown testified that he had called an attorney and was quoted a fee; that he does not re-

member but he was advised as to the penalty that he might receive.

Next. That the defendant Brown then made his own decision that he could not afford to hire an attorney.

Next. That on the occasion of the offense to which the defendant entered a plea of guilty, he was driving a vehicle not owned by him. That at said time, the defendant's pay grade in the United States Marine Corps was E-6 over eight years. Just make that E-6 with eight years of service, and that he was not married at the time.

That the defendant did not at that time own an automobile or a motor vehicle but was paying on other debts for items that he had purchased while overseas.

Based upon the foregoing findings of fact—well, find another finding.

That the defendant did not make a request of the Court at any time that he be appointed counsel on the grounds of being indigent.

Based upon the foregoing findings of fact, the Court concludes as a matter of law that the burden is upon the defendant to prove by a preponderance of the evidence that his July, 1966 conviction for DUI was obtained in violation of his right to counsel.

2. That the defendant has failed to prove by a preponderance of the evidence that he was indigent within the meaning of the General Statutes of North Carolina.

Upon the foregoing findings of fact and conclusions of law, it is ordered that the defendant's motion to suppress is DENIED.

Our scope of review on an order from a motion to suppress is limited to "determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. (Citation omitted.)" *State v. Cooke*, 306 N.C. 132, 134, 291 S.E. 2d 618, 619 (1982). Our review of the record convinces us that

there is evidentiary support for the findings made and that the conclusion reached is consistent with those findings.

In the trial below, we find

No error.

Judges MARTIN and PARKER concur.

STATE OF NORTH CAROLINA v. MILAS H. MACK, JR.

No. 8626SC1328

(Filed 1 September 1987)

1. **Robbery § 4.6— armed robbery—evidence sufficient**

Defendant's motion to dismiss a charge of armed robbery for insufficient evidence was properly denied where the State's evidence established that the codefendant Fitzsimmons endangered the ice cream clerk's life with a firearm, and that property was taken from the cash drawer. Although there was no direct evidence of who took the money, the jury could infer that defendant took the money and fled, and there was evidence that Fitzsimmons and defendant were acting together pursuant to a common plan or purpose in that defendant showed no surprise or fear when Fitzsimmons entered the store brandishing his gun, defendant stood motionless beside the gunman and only stared silently at the store clerk after Fitzsimmons' entry, defendants fled the store within seconds of each other, and the clerk testified that Fitzsimmons ran by the cash register without even bothering to check whether any money remained in the drawer.

2. **Robbery § 5.4— instructions on misdemeanor larceny as lesser-included offense refused—no error**

The trial court properly refused to instruct the jury on misdemeanor larceny as a lesser-included offense of armed robbery where no reasonable view of the evidence would permit the jury to find that defendant took money from the cash register without the consent and collaboration of an armed codefendant.

3. **Criminal Law § 34.2— armed robbery—testimony allegedly implicating defendant in prior robbery of same store—no prejudice**

There was no prejudice in an armed robbery prosecution of an ice cream store from the admission of testimony that the clerk recognized the gunman, Fitzsimmons, because "they" had robbed him previously. The clerk referred to no person other than Fitzsimmons, and defendant did not show that a different result would have been reached had the testimony been excluded. N.C.G.S. § 8C-1, Rule 403.

4. Criminal Law § 138.29— aggravating factors—pending charges

The trial court did not err in sentencing defendant for armed robbery where the court commented on defendant's pending charges, but the record did not affirmatively disclose that the court enhanced defendant's sentence based on the pending charges. N.C.G.S. § 15A-1340.4(a) (1986).

5. Criminal Law § 138.28— prior convictions—prosecutor's statement—insufficient evidence

A sentence of 29 years, 11 months for armed robbery was remanded for resentencing where the record clearly revealed that the court based its finding of prior convictions solely on the prosecutor's remarks. N.C.G.S. § 15A-1340.4(a)(1)(o).

Judge PHILLIPS concurs in the result.

APPEAL by defendant from *Wright, Judge.* Judgment entered 6 August 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 May 1987.

Defendant appeals his armed robbery conviction. Although defendant offered no evidence at trial, the State's evidence tended to show defendant entered an ice cream parlor and ordered an ice cream cone from the store clerk. After the clerk handed defendant the cone, he opened the cash drawer and asked defendant for payment. While standing directly in front of the cash register, defendant stated he did not have enough money. As the clerk and defendant discussed the price of the ice cream cone, the store's front door bell sounded and a second man entered the store with a gun. The clerk recognized the second man as Michael Fitzsimmons from an earlier robbery of the ice cream store. Defendant showed no fear or surprise but simply stood in front of the cash register facing the clerk. Fitzsimmons grabbed the clerk and forced him face down onto the floor and held him there for about five seconds until the front bell again rang. At this sound, Fitzsimmons immediately put his gun in his pocket and ran by the cash drawer out the front door. Defendant was no longer present. The clerk did not see anyone take any money from the cash drawer but afterwards discovered some $60 had been stolen. Defendant and Fitzsimmons were both charged with committing armed robbery of the ice cream store and their cases joined for trial. During the trial, Fitzsimmons pleaded guilty to armed robbery and did not appear further.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for the State.

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

GREENE, Judge.

The issues for this Court's determination are: I) whether the State presented sufficient evidence that defendant "acted in concert" with Fitzsimmons during the armed robbery; II) whether the trial court should have submitted the allegedly lesser included offense of misdemeanor larceny to the jury; III) whether the trial court erroneously admitted evidence of a prior robbery of the ice cream store; IV) in sentencing defendant, whether the trial court: (A) erroneously considered charges pending against defendant or (B) erroneously found defendant's prior conviction under N.C.G.S. Sec. 15A-1340.4(a)(1)(o) based on statements by the prosecutor.

I

[1] Upon defendant's motion to dismiss for insufficient evidence under N.C.G.S. Sec. 15A-1227 (1983), the court must determine as a matter of law whether the State has produced substantial evidence of each of the material elements of the offense charged and substantial evidence that defendant was the perpetrator of the crime. *State v. LeDuc*, 306 N.C. 62, 75, 291 S.E. 2d 607, 615 (1982). There was no evidence defendant personally committed all the necessary elements of armed robbery under N.C.G.S. Sec. 14-87 (1986). *See generally State v. Bates*, 309 N.C. 528, 534, 308 S.E. 2d 258, 262 (1983) (summarizing elements of nonconsensual taking of another person's property, in his presence or from his person, by endangering or threatening person's life with deadly weapon). Therefore, the State sought to prove the necessary elements of the offense by proving defendant acted "in concert" with Fitzsimmons:

> It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with

> another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Joyner, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979). Defendant argues the State presented insufficient evidence to show defendant acted with Fitzsimmons pursuant to a common plan or purpose to commit armed robbery.

Upon defendant's motion to dismiss, the court is required to consider the evidence in the light most favorable to the State, the State is entitled to every reasonable inference to be drawn from the evidence and all contradictions and discrepancies are for the jury to resolve. *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980). The test of the sufficiency of the evidence to sustain a conviction is the same whether the evidence is direct, circumstantial, or both: whether the jury may infer defendant's guilt beyond a reasonable doubt from the circumstances. *See State v. Rowland*, 263 N.C. 353, 358, 139 S.E. 2d 661, 665 (1965). The State's evidence established that the codefendant Fitzsimmons endangered the ice cream clerk's life with a firearm and that property was taken from the cash drawer. While there is no direct evidence who took the money from the register, the jury could reasonably infer defendant took the money from the drawer and left the store: after Fitzsimmons apparently heard defendant leave the store, Fitzsimmons fled, after which the clerk discovered money missing from the cash drawer. Regardless of who took the money, there was likewise other evidence Fitzsimmons and defendant were acting together pursuant to a common plan or purpose: defendant showed no surprise or fear when Fitzsimmons entered the store brandishing his gun; after Fitzsimmons' entry, defendant stood motionless beside the gunman and only stared silently at the store clerk; and both defendants fled the store within seconds of each other. The clerk furthermore testified Fitzsimmons ran by the cash register without even bothering to check whether any money remained in the drawer.

We find this evidence sufficient to permit the reasonable inference that defendant and Fitzsimmons were acting together in pursuance of a common plan to take money from the store by threatening the clerk's life with a deadly weapon. Accordingly, the trial judge properly denied defendant's motion to dismiss.

II

[2] Defendant next contends the trial judge improperly failed to submit a misdemeanor larceny verdict to the jury. The trial judge must instruct the jury of a lesser-included offense when there is evidence from which the jury could find defendant committed such lesser offense. *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). There is some confusion whether misdemeanor larceny is a lesser-included offense of armed robbery. *See State v. Hurst*, 82 N.C. App. 1, 15-16, 346 S.E. 2d 8, 16-17, *disc. rev. allowed*, 318 N.C. 698, 350 S.E. 2d 861 (1986) (summarizing two lines of Supreme Court decisions). However, assuming *arguendo* misdemeanor larceny is a lesser-included offense of armed robbery, no reasonable view of this evidence would in any event permit the jury to find defendant himself took the money from the cash register without the consent and collaboration of Fitzsimmons. Since there was sufficient evidence of armed robbery and insufficient evidence of misdemeanor larceny, the trial court correctly refused to submit the issue of misdemeanor larceny to the jury. *See Redfern*, 291 N.C. at 321, 230 S.E. 2d at 154.

III

[3] Defendant next contends the trial court erroneously allowed the store clerk's following testimony:

> Q. I believe the last question I had for you, sir, was at the time the gunman [Fitzsimmons] came in the store, did you recognize that man?
>
> A. Yes.
>
> Q. How did you recognize him?
>
> . . . .
>
> A. I recognized him from coming in the store where *they* well, would have been on the 13th, when *they* robbed me on the 13th. [Emphasis added.]
>
> . . . .
>
> Q. Is he the man that was the gunman on [the] November 13th and November 26th robberies?
>
> A. Yes.

Defendant argues the witness's statement that "they robbed me" improperly led the jury to conclude defendant and Fitzsimmons had previously robbed the same ice cream parlor. Defendant argues the witness's statement was in any event irrelevant and prejudicial.

While our rules of evidence do not allow evidence of other crimes to prove defendant's criminal propensities, *see* N.C.G.S. Sec. 8C-1, Rule 404(a) (1983), Rule 404(b) allows evidence of other crimes for the purpose of proving a "plan." In any case, the clerk's testimony cannot be reasonably construed to indicate defendant actually committed any other crime with Fitzsimmons since the witness referred to no person other than Fitzsimmons. While this portion of the clerk's testimony might appear irrelevant since Fitzsimmons was no longer on trial, we cannot say defendant has been prejudiced by its admission in evidence. Exclusion of allegedly prejudicial evidence under N.C.G.S. Sec. 8C-1, Rule 403 is a matter within the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986). Furthermore, defendant has failed to show that, had this allegedly prejudicial testimony been excluded, a different result would have been reached at trial. N.C.G.S. Sec. 15A-1443 (1986). Any error by the trial court was thus harmless.

IV

A

[4] Although neither the court's sentencing form nor the record reveals the court specifically found defendant's pending charges aggravated his sentence, the court did make the following references to defendant's pending charges:

> THE COURT: Let the Record reflect that it appeared often in the pre-hearing conferences that the Court is aware that Mr. Mack is under arrest for three breaking and enterings and larceny in Mecklenburg County, but they have not come to trial. He's been arrested but not indicted. Further, he's a suspect in a double homicide. Proceed.
>
> . . . .
>
> THE COURT: One second. He also has been—he is possibly implicated in another armed robbery at this same ice cream store, but based on representation of Counsel, ap-

parently that was not a true charge, based on statements of the co-Defendants[,] that was very weak.

. . . .

THE COURT: Mr. Mack, you're in a lot of trouble. In fact, you're in more trouble than anyone I've seen in my Court in months. Now, I'm going to sentence you then I'm going, I would think that the sentence I'm going to give you will be taken into account by the District Attorney's office and by the Judges in the other cases.

Defendant argues the court improperly considered these other charges in sentencing. A pending charge *per se* is clearly not a mandatory aggravating factor enumerated under N.C.G.S. Sec. 15A-1340.3(a)(1) (1986). Under Section 15A-1340.4(a), the trial court may however consider any unenumerated aggravating factor it finds by a preponderance of the evidence and which is "reasonably related to the purposes of sentencing" as set forth in Section 15A-1340.3:

> The primary purposes of sentencing . . . are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

Since a pending charge raises no inference of defendant's guilt of the crime charged, *see State v. Williams*, 279 N.C. 663, 673, 185 S.E. 2d 174, 180 (1971), the mere fact of pending charges is not itself an unenumerated aggravating factor "reasonably related to the purposes of sentencing" set forth by the Legislature. *See State v. McLean*, 83 N.C. App. 397, 402, 350 S.E. 2d 171, 175 (1986) (since pur hearsay, pending charges for other crimes inadmissible as basis for deciding parole of "no benefit" to Committed Youthful Offender). This is not to say evidence of pending charges may never be used to establish *other* proper aggravating factors which require no inference defendant is guilty of the crime charged. Thus, the Legislature has specifically enumerated Section 15A-1340.4(a)(1)(k) which provides a sentence may be increased if defendant has committed the offense while on release

for a pending felony charge. *See State v. Webb*, 309 N.C. 549, 559, 308 S.E. 2d 252, 258 (1983) (holding such factor did not violate due process since one demonstrates "disdain for the law" by committing offense while on release, irrespective of one's presumed innocence of such pending charge). While pending charges may in such narrow instances be admissible to prove a sentencing factor, the sentencing court may never enhance defendant's presumptive sentence merely because defendant has charges for other crimes pending against him.

Nevertheless, we uphold the trial court's sentencing in the instant case since the record does not affirmatively disclose the court enhanced defendant's sentence based on any consideration of his pending charges. *See State v. Corbett*, 309 N.C. 382, 403, 307 S.E. 2d 139, 152 (1983), (where no indication trial court considered evidence of crimes for which defendant acquitted, resentencing denied); *see also State v. Snowden*, 26 N.C. App. 45, 46, 215 S.E. 2d 157, 158, *cert. denied*, 288 N.C. 251, 217 S.E. 2d 675 (1975) (where punishment within lawful limits and record did not affirmatively disclose impropriety, sentence deemed regular and valid). Instead, the trial court's statements merely indicate it was aware of defendant's pending charges, not that it found or even considered them a factor aggravating defendant's sentence. *Cf. McLean*, 83 N.C. App. at 402, 350 S.E. 2d at 175 (sentencing court's statement strongly suggested it denied parole based on pending charges). Therefore, the sentencing court's statements regarding defendant's other pending charges do not themselves necessitate resentencing.

B

[5] Defendant finally contends the trial judge improperly found the aggravating sentencing factor of prior convictions under N.C.G.S. Sec. 15A-1340.4(a)(1)(o) (1986). Although the assistant district attorney and defendant both made references to defendant's alleged prior convictions at the sentencing hearing, defendant argues the court's finding was not supported by sufficient evidence to prove defendant's prior convictions by a preponderance of evidence. *See* Section 15A-1340.4(a), (b).

N.C.G.S. Sec. 15A-1340.4(e) (1986) states "prior convictions may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." These

methods of proof are permissive rather than mandatory. *State v. Thompson*, 309 N.C. 421, 424, 307 S.E. 2d 156, 159 (1983). While defendant's sentence of 29 years, 11 months was within the statutory limits for this offense, the sentence exceeded the presumptive term of 14 years. Therefore, if the assertion of defendant's prior convictions is not supported by sufficient evidence, the case must be remanded for a new sentencing hearing. *See State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983) (if sentence imposed is beyond presumptive term and aggravating factor not supported by sufficient evidence, must remand case for new sentencing hearing).

The State argues the following unsworn statements by the assistant district attorney and defendant sufficiently proved defendant's prior convictions:

> MR. STATON: Your Honor, as aggravating factors in this case, the State would present that Mr. Mack, the Defendant, has been convicted on a charge of Felonious Breaking and Entering and Felonious Larceny on July the 8th, 1981, received a ten-year suspended sentence and five years probation.
>
> THE COURT: That was Felonious Breaking and Entering and Larceny?
>
> MR. STATON: Yes, sir. Mr. Mack has been convicted of two counts of Felonious Breaking and Entering, I believe, on May 7th, 1981—
>
> THE COURT: Go ahead.
>
> MR. STATON: Was convicted of two counts of Felonious Breaking and Entering in 1981. At that time he received a ten year suspended sentence and five years probation. His probation was revoked in 1983, sent to the Department of Corrections in Raleigh I believe in Central Prison to serve approximately a three year active sentence, and was paroled on December 12th, 1984. That, to the best of my knowledge, is the record that we have. It may not be complete.
>
> THE COURT: He has one prison term?
>
> MR. STATON: Pardon?

THE COURT: He's been to prison once, or twice?

MR. STATON: Once, to my knowledge, for Breaking and Entering and Larceny.

THE COURT: I find the aggravating factor that the Defendant has been judged guilty of crimes involving more than sixty days imprisonment. . . .

[There follows the complete discussion of defendant's pending charges previously excerpted as well as discussion of possible mitigating factors.]

THE COURT: Stand up, Mr. Mack.

How long did you spend in jail the last time, in prison?

DEFENDANT: Twelve months.

The record does not indicate on what the assistant district attorney's statements were based. The record does indicate defendant neither objected to the prosecutor's statements nor offered any evidence in contradiction.

At the outset, we note the formal rules of evidence do not apply to sentencing hearings. N.C.G.S. Sec. 15A-1334(b) (1983). Absent objection at the sentencing hearing or assertion of the "plain error" rule, we also note defendant has waived objection to the competency of the prosecutor's statements as an acceptable method of proof. *See State v. Massey*, 59 N.C. App. 704, 705, 298 S.E. 2d 63, 64 (1982) (failure to object to reading record into evidence would waive right to challenge admission of evidence even if incompetent); *cf. State v. Carter*, 318 N.C. 487, 490-91, 349 S.E. 2d 580, 582 (1986) (although court noted defendant neither objected to officer's testimony of prior convictions nor argued "plain error" on appeal, court nevertheless determined officer's recollection was acceptable and sufficient evidence of defendant's prior convictions). However, while defendant may have waived challenging the competency of the assistant prosecutor's statements, defendant was not required to object at the sentencing hearing in order to assert the insufficiency of the remarks as a matter of law to prove his prior convictions by a preponderance of the evidence. *See* Section 15A-1446(d)(5) (1983) (error based on insufficiency of evidence as matter of law may be subject of appellate review without objection or motion below); *see also State v. Thompson*,

60 N.C. App. 679, 684, 300 S.E. 2d 29, 32, *modified and aff'd*, 309 N.C. 421, 424-25, 307 S.E. 2d 156, 159 (1986) (although no apparent objection to prosecutor's statements based on "memory" and "indication on folder," on appeal Supreme Court deemed such statements "insufficient" to prove prior convictions).

It is clear a prosecutor's mere unsupported statement is not sufficient proof of defendant's prior convictions under Section 15A-1340.4(a)(1)(o). *State v. Swimm*, 316 N.C. 24, 32, 340 S.E. 2d 65, 70-71 (1986); *accord Thompson*, 309 N.C. at 423-25, 307 S.E. 2d at 159 (1983); *State v. Harris*, 65 N.C. App. 816, 818, 310 S.E. 2d 120, 122 (1984) (statement by district attorney "standing alone" that defendant "had record of prior convictions" is not sufficient proof of prior convictions). *Cf. State v. Bynum*, 65 N.C. App. 813, 814-15, 310 S.E. 2d 388, 389-90, *disc. rev. denied*, 311 N.C. 404, 319 S.E. 2d 275 (1984) (statement based on "FBI printout" was sufficient proof by preponderance of evidence); *see also Massey*, 59 N.C. App. at 705, 298 S.E. 2d at 64-65 (trial court properly found defendant's prior convictions where prosecutor read defendant's "Department of Justice record" into evidence).

We note the record clearly reveals the court based its finding of defendant's prior convictions solely on the prosecutor's remarks, not on any statement made by defendant *after* the court entered its finding. We also recognize some confusion in the remarks themselves regarding which alleged conviction resulted in what specific imprisonment. Furthermore, defendant simply answered "twelve months" when the court subsequently asked how long had he spent "in jail the last time, in prison." The court did not ask *why* defendant spent such time in jail or prison. Since this colloquy occurs several transcript pages after the prosecutor's remarks regarding prior convictions and after much discussion of defendant's pending charges, it is not clear to what defendant's brief statement refers. We cannot say defendant has clearly admitted any prior conviction for which his sentence could be enhanced under the statute. *Cf. State v. Graham*, 309 N.C. 587, 593, 308 S.E. 2d 311, 316 (1983) (defendant's sworn testimony of prior convictions itself constituted separate and sufficient proof of convictions as well as "cured" prior proof of convictions based on hearsay).

Thus, under *Thompson* and *Harris*, the prosecutor's unsupported remarks "stood alone" and were insufficient to prove defend-

ant's prior convictions under Section 15A-1340.4(a)(1)(o) by a preponderance of the evidence. Pursuant to the rule enunciated in *Ahearn*, we therefore remand the case for resentencing. 307 N.C. at 602, 300 S.E. 2d at 701.

No error in trial. Sentence is vacated and remanded for resentencing in accordance with this opinion.

Judge COZORT concurs.

Judge PHILLIPS concurs in the result.

CHARLES YOUNGBLOOD v. NORTH STATE FORD TRUCK SALES AND LIBERTY MUTUAL INSURANCE COMPANY

No. 8610IC1243

(Filed 1 September 1987)

Master and Servant § 49.1— workers' compensation—teaching defendant's employees how to use equipment—employee of defendant

Plaintiff was an employee of defendant rather than an independent contractor when he was injured while teaching defendant's employees how to straighten damaged truck frames with Kansas Jack equipment where plaintiff sold Kansas Jack equipment on a commission basis in the Atlanta, Georgia area and sometimes taught the buyers' employees how to use the equipment; plaintiff agreed to instruct defendant's employees in the use of Kansas Jack equipment for $250 per day plus expenses for four or five days, as defendant thought their progress required; plaintiff was told by defendant when to begin and stop work and when to break for lunch; and plaintiff was told which trucks to use in instructing defendant's employees and to begin "hands-on" training at a certain point.

Judge GREENE dissenting.

APPEAL by defendants from the Opinion and Award of the North Carolina Industrial Commission filed 11 August 1986. Heard in the Court of Appeals 9 April 1987.

On 23 July 1984, while instructing employees of defendant North State Ford Truck Sales in Raleigh, N.C. how to straighten damaged truck frames with machinery manufactured by the Kansas Jack Equipment Company, plaintiff was seriously and perma-

nently injured when one of the chains used in his demonstration snapped and struck him in the neck. His claim for workers' compensation benefits was heard under a stipulation limiting the issue to whether at the time of the accident plaintiff was an employee of defendant North State Ford Truck Sales under the N.C. Workers' Compensation Act. At the hearing testimony and exhibits to the following effect were received into evidence:

During the ten years before the fall of 1983 plaintiff had operated his own truck repair shop in Lilburn, Georgia where he became familiar with the use of Kansas Jack equipment. In the fall of 1983 he became an independent sales agent for Interstate Marketing Corporation of Nashville, Tennessee and in that capacity sold Kansas Jack equipment on a commission basis in a sixteen county area around Atlanta, Georgia. He received no benefits or salary from Interstate Marketing and was free to sell other types of equipment or merchandise, but Interstate did furnish him a van, with a Kansas Jack logo on its sides for advertising purposes, that he was free to use as he saw fit. Plaintiff worked directly for Interstate only on one occasion when it hired him at the rate of $250 a day to teach employees of one of its customers how to use Kansas Jack equipment. In July, 1984 North State Ford wanted to get its employees trained in the use of some Kansas Jack equipment that it had; the available alternatives were to send the employees to classes conducted by the equipment manufacturer in Kansas, which was too expensive, or have an instructor come to North State's site in Raleigh. In searching for an available instructor North State contacted Kansas Jack's Knoxville, Tennessee representative, who put them in touch with plaintiff. After much discussion plaintiff agreed to come to Raleigh and instruct defendant's employees in the use of Kansas Jack equipment for $250 per day plus expenses. Under the agreement plaintiff was to instruct the employees for four or five days, as North State thought their progress required, between the hours of 7:30 a.m. and 4:30 p.m. with an hour off for lunch at noon. On the morning of 23 July plaintiff arrived at defendant's facility and the body shop manager, Alan Chapman, had the employees place all the Kansas Jack equipment out on the floor, along with the trucks that were to be repaired during the instruction process. According to plaintiff Chapman told him to teach the employees how to use "frame gauges" that morning, which he did, and in the after-

noon Chapman told him to do some "hands-on training." That afternoon while plaintiff and the North State trainees were straightening a truck frame the accident occurred and plaintiff was injured. The carrier paid plaintiff for one day's work plus his travelling expenses, but declined to pay either his medical expenses, which amount to approximately $300,000, or any disability compensation.

Following the hearing Deputy Commissioner Page, in addition to finding facts substantially in accord with the above, found that at the time of the accident plaintiff was "an independent sales representative for Interstate Marketing Corporation"; that he set his own price for instructing North State's employees; that he arrived at North State driving a van "owned by IMC which had the Kansas Jack name and trademark" on it; that he was not required to sign any North State Ford employment forms; that North State did not provide him with a copy of its employee handbook before he began work and was not required to withhold any tax from his pay; that the plaintiff "has established his reputation as having an independent calling" to teach the use of Kansas Jack equipment; and that while the "defendant had the right to require certain results from the plaintiff . . . [it] did not have any control or right of control over the plaintiff's teaching methods." Based upon those and other findings Deputy Commissioner Page concluded that at the time of plaintiff's injury he was not an employee of North State but was an independent contractor and denied his claim for benefits under our Workers' Compensation Act.

Upon plaintiff appealing the Full Commission found additional facts to the effect that: It was agreed that North State could stop the instruction whenever it appeared that the trainees had learned how to use the equipment; that plaintiff was to be paid on a daily basis and was told to work the normal schedule of other body shop employees, who had an hour off for lunch from noon until 1 p.m.; that he would be allowed to quit work at 4:30 p.m. when the other workers normally quit for the day; that Chapman was not "willing to pay either plaintiff or the other employees for overtime work"; that Chapman directed plaintiff to repair particular trucks during the instruction process; that Chapman "checked on the progress being made by plaintiff and the other employees" and instructed plaintiff to give the employees

"hands-on" training during the afternoon of 23 July, which he did; and that it was during the "hands-on" training that the chain snapped and injured him. The Commission also found that "even though North State Ford hired [plaintiff] to teach its employees because of his skill and expertise, North State Ford retained the right to control the details of plaintiff's work by setting his hours of work, choosing the dates on which he was to work, providing all materials and assistance which he needed, paying him on a time basis, checking the progress of his work, and retaining the right to fire him at any time [and] North State Ford also retained the right to control the progress of plaintiff's work through its right to stop, delay or otherwise interfere with plaintiff's teaching of its other employees at any time that such teaching interfered with the work of those employees or with other work being done." Based upon its findings the Commission concluded, with one member dissenting, that under the Workers' Compensation Act plaintiff was an employee of North State Ford Truck Sales at the time he was injured, and entered an order allowing plaintiff's claim for compensation and medical benefits.

Teague, Campbell, Dennis & Gorham, by George W. Dennis III and Linda Stephens, for plaintiff appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Sumner, for defendant appellants.

PHILLIPS, Judge.

The only question presented by this appeal is whether within the contemplation of our Workers' Compensation Act plaintiff was an employee of defendant North State Ford Truck Sales when the accident happened. This being a jurisdictional question, G.S. 97-2, the facts found by the Industrial Commission, though supported by competent evidence, are not binding upon us. *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965). Nevertheless, after reviewing all the evidence recorded we adopt the findings of fact made by the Full Commission and conclude as it did that plaintiff was defendant North State Ford's employee at the time involved.

The dominant factor in determining whether a hired hand is an employee or an independent contractor is the employer's authority to control how the person hired accomplishes the task to

be done; and if that right to control exists it makes no difference that it is not exercised. *Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944); *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 153 S.E. 591 (1930); *Beal v. Champion Fiber Co.*, 154 N.C. 147, 69 S.E. 834 (1910). Here, as the evidence and findings show, supervisory authority was both retained and exercised by North State Ford. Plaintiff was told when to begin and stop work and when to break for lunch; he was told which trucks to use in instructing defendant's trainees, and to begin "hands-on" training at a certain point. That defendant's employees were not skilled Kansas Jack equipment operators and thus could not control the technical details of plaintiff's work is neither material nor unusual; as it is a rare employer today that does not employ one or more persons to operate computers, word processors and other machines that are beyond his ken. The control that is most significant is the ultimate control of hiring and firing, and under the employment agreement North State had the right to discharge plaintiff at any time, since the instruction period could be terminated any time North State thought that the trainees' progress or lack of progress justified. And plaintiff's manner of compensation was similar to that of North State's other employees as they were paid for the hours worked and plaintiff was paid for the days worked. *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E. 2d 3 (1982). It is also significant, we think, that although plaintiff was engaged in several commercial activities—selling Kansas Jack equipment, selling furniture, and selling electronic equipment—he was not engaged in the independent business of instructing in the use of Kansas Jack equipment; and it was while instructing defendant's mechanics at defendant's plant, for the benefit of defendant's business, that he was injured. Defendant's several arguments are all answered by the findings of fact and answering them again would serve no purpose.

Affirmed.

Judge COZORT concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority in two respects. First, I cannot adopt the findings of fact made by the Full Commission as I do not think they properly reflect the evidence. Second, I would find that the plaintiff was an independent contractor at the time of the injury and not an employee of the defendant North State Ford.

I

Since the determination of whether the plaintiff is an employee or an independent contractor is a jurisdictional question, "[t]he reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E. 2d 257, 261 (1976).

In reviewing all the evidence in this case, I find the following relevant facts: 1) Plaintiff was a salesman who sold Kansas Jack truck frames and measuring equipment in the Atlanta, Georgia area. He was paid on a commission basis. 2) Plaintiff, after selling the equipment, would train the buyer's employees in the use of the equipment. He had done this on at least ten or twelve occasions. 3) On one occasion he conducted a training school in Savannah, Georgia for someone who had purchased the framing equipment from another salesman. 4) Plaintiff was one of three persons in the area capable of teaching the use of the Kansas Jack frame-straightening equipment. 5) Defendant contacted plaintiff and requested plaintiff to travel to Raleigh and train defendant's employees in the use of the Kansas Jack frame equipment. Defendant had purchased the equipment from someone else. 6) Plaintiff offered to conduct the training for a price of $250 a day plus expenses and gave defendant several dates when he could do the training. The parties agreed to begin the training on 23 July 1984 at the rate of $250 per day plus expenses. 7) Plaintiff told defendant that it usually took four to five days to complete the training but that this time could vary. The parties had no agreement as to who would determine when the training was completed. 8) Defendant informed plaintiff of the shop employees' hours and told him that it expected him to do the training during those hours. 9) Defendant requested plaintiff to use a "hands on" approach to teaching by straightening some frames of trucks defendant made available. Plaintiff used his theory and methods of

teaching and conducted the training for defendant in his usual manner. 10) Occasionally, one of defendant's supervisors would come into the teaching area to see how things were going. 11) Plaintiff determined the materials, equipment and assistants needed for the teaching of the course and defendant provided these components at the plaintiff's request. 12) Plaintiff did not use the time cards used by the employees of defendant and no income taxes or social security were withheld from plaintiff's earnings.

II

In determining whether plaintiff is an independent contractor or an employee, it is necessary to determine if the worker has "that degree of independence necessary to require his classification as independent contractor rather than employee." *Hayes v. Elon College*, 224 N.C. 11, 16, 29 S.E. 2d 137, 140 (1944). The *Hayes* Court enumerated several factors that should be used in making this determination:

> The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 16, 29 S.E. 2d at 140. There is no formula for weighing the relative factors but it is clear that the presence or absence of any one factor is not controlling in the determination. The factors are to be "considered along with all other circumstances." *Id.*

My review of the facts in this case convince me that plaintiff had the degree of independence necessary to require his classification as an independent contractor rather than employee. I find the following facts cumulatively decisive: 1) Plaintiff had a special knowledge of Kansas Jack motor vehicle frame-straightening equipment. 2) Plaintiff was engaged in a separate and distinct occupation from that of defendant and furnished this service to

others. 3) The teaching of the use of the Kansas Jack equipment was not a regular part of defendant's business. 4) Plaintiff's work at defendant's business was for a limited period of time. 5) Plaintiff taught the course consistent with his usual method of teaching. 6) Defendant was totally unfamiliar with how to use the equipment. 7) Plaintiff determined the price he was paid for his services. 8) Plaintiff determined the materials, equipment, and assistants needed for the teaching of the course and defendant provided these components at plaintiff's request. 9) Defendant selected the dates of the training from a limited schedule plaintiff provided.

The majority finds the defendant's supervisory authority over the plaintiff, its alleged right to fire the plaintiff, and method of payment determinative of the issue. I find none of these facts inconsistent with my conclusion that plaintiff was an independent contractor. I find the general supervision defendant provided plaintiff to be within reasonable limitations. *See McCraw v. Mills, Inc.*, 233 N.C. 524, 64 S.E. 2d 658 (1951) and *Pumps, Inc. v. Woolworth Co.*, 220 N.C. 499, 17 S.E. 2d 639 (1941). As to the right to fire, I find the evidence unclear and only find there was no agreement on the issue. In any event, the right to fire is not conclusive on the issue of whether the plaintiff is an employee or an independent contractor and is only one of the several elements to be considered. The payment of the plaintiff on a daily basis, although again some evidence of "employee" status, is not conclusive. Furthermore, in this case in addition to a daily rate of payment plaintiff was to also receive his expenses.

III

Therefore, I conclude the Industrial Commission was without jurisdiction over plaintiff's claim and would reverse and remand to the Industrial Commission with the direction that the action be dismissed.

Parker v. Lippard

THOMAS S. PARKER, EXECUTOR OF THE ESTATE OF INA DESKINS HAWKINS, DECEASED v. AMARYLLIS HAWKINS LIPPARD, PERCY G. DESKINS, JACK DESKINS AND WIFE, PHYLLIS DESKINS, RUSSELL DESKINS (WIDOWER), WILLIAM RIPPY, JAMES W. JOHNSTON, LOIS THOMAS, PHILLIP RAY THOMAS, NANCY POWELL, HAROLD A. DESKINS, AND WIFE, MRS. HAROLD A. DESKINS, ROY RAY DESKINS AND WIFE, MRS. ROY RAY DESKINS, J. HOWARD SILVER, HELEN HINTON, PAULINE GARRETT, CHARLES E. (EDDIE) DESKINS, (DIVORCED), FRANCES LORETTA DESKINS SHORR AND HUSBAND, ROBERT SHORR, JEAN REEVES, AND HUSBAND, ERNEST REEVES

No. 8615SC1255

(Filed 1 September 1987)

1. **Attorneys at Law § 7.5; Executors and Administrators § 37— estate sale—defaulting bidder—attorney fees as costs**

The trial court erroneously awarded attorney fees as costs of resale against a defaulting bidder at an estate sale because "costs of resale" under N.C.G.S. § 1-339.30(e) does not expressly include attorney fees; legal fees allowed pursuant to the "common fund" exception or for services rendered in aid of the court's jurisdiction over an insolvent are not paid by the adversary party; there were neither findings nor allegations that there was a complete absence of a justifiable issue of law or fact raised by defendant; and the record reveals nothing indicating that these proceedings require the construction of any will or arose out of petition proceedings. N.C.G.S. § 6-21.

2. **Judgments § 55— estate sale—defaulting bidder—costs of resale—prejudgment interest**

The executor of an estate was entitled to prejudgment interest from a defaulting bidder where the clerk's order confirming the judicial sale constituted a legally binding acceptance of defendant's bid and therefore created a specific contract to purchase; defendant's refusal to comply with the executor's tender of deed and demand for payment constituted a breach of contract; and the executor's damages on that date were ascertainable. Furthermore, the executor was entitled to prejudgment interest on the bid deposit as his compensation for the court's detention of the deposit pending further litigation. N.C.G.S. § 24-5.

APPEAL by Irving Fineberg, a defaulting bidder, from Order entered by *McConnell, Judge.* Order entered 18 September 1985 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 9 April 1987.

Petitioner Thomas S. Parker (hereinafter, the "Executor") conducted a judicial sale of an estate's real and personal property in April 1984 pursuant to N.C.G.S. Sec. 1-339.30 (1986). Irving Fineberg (hereinafter, the "defendant") bid $125,000 at the sale,

which bid was confirmed by the Clerk of Court on 7 May 1984. Although the Executor tendered deed to the property and demanded payment, defendant failed to comply with his bid based on allegations the Executor misrepresented the property's compliance with local flood control ordinances and zoning regulations. On 13 August 1984, Judge Hobgood determined by consent of the parties the defendant's default and the extent of defendant's liability under Section 1-339.30(e). After Judge Hobgood remanded the case to the Clerk, the property was finally sold after seven resale proceedings and payment received on 28 June 1985.

Pursuant to Judge Hobgood's default order, the Clerk assessed defendant certain "costs of resale" and included therein all legal fees incurred by the Executor after defendant's default; however, the Clerk denied the Executor's request for any prejudgment interest after defendant's default. After appeal of the Clerk's order to the Superior Court, Judge McConnell affirmed the Clerk's order in all relevant respects. Defendant appeals from that part of Judge McConnell's order assessing defendant with legal fees incurred by the Executor after defendant's default. The Executor appeals from that part of Judge McConnell's order denying the Executor recovery of prejudgment interest.

Faison, Brown, Fletcher & Brough, by William D. Bernard and M. LeAnn Nease, for appellant and cross-appellee Irving Fineberg.

Ridge & Associates, by Paul H. Ridge and Daniel Snipes Johnson, for appellee and cross-appellant Thomas S. Parker, Executor.

GREENE, Judge.

The issues presented are: 1) whether legal fees incurred as a result of resales under Section 1-339.30(e) or litigation incident thereto are recoverable: (A) as "all costs of resale" under Section 1-339.30(e) or (B) pursuant to certain other statutory or judicial authority; and 2) whether Judge McConnell's order entitled the Executor to prejudgment interest under N.C.G.S. Sec. 24-5 (1969).

I

Since the Legislature's 1879 repeal of certain statues authorizing the award of legal fees as costs, a trial court in this

State may only award legal fees: 1) pursuant to express statutory or contractual authority; 2) pursuant to its exercise of equitable or supervisory powers in limited instances; or 3) to a litigant suing at his own expense to preserve or increase a common fund or common property. *Bowman v. Comfort Chair Co., Inc.*, 271 N.C. 702, 704, 157 S.E. 2d 378, 379 (1968); *Perkins v. American Mut. Fire Ins. Co.*, 4 N.C. App. 466, 468, 167 S.E. 2d 93, 95 (1969); *see also Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 603-05, 344 S.E. 2d 847, 850, *disc. rev. allowed*, 318 N.C. 414, 349 S.E. 2d 592 (1986) (court may award legal fees as punitive sanction under N.C.G.S. Sec. 1A-1, Rule 41(b) (1983) based on inherent power to supervise its proceedings).

A

[1] The Clerk confirmed defendant's bid on 7 May 1984. Judge McConnell awarded the Executor, among other things, "all costs of resale or resales since May 7, 1984" pursuant to Section 1-339.30(e) which provides that:

> A defaulting bidder at any sale or resale is liable on his bid and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid *plus all costs of such resale or resales.* [Emphasis added.]

The court's order then defined such "costs of resale" to include all attorney's fees incurred by the Executor in both litigating defendant's default and conducting the resales ordered by the Clerk.

While no party cites any authority specifically construing "costs of resale" under Section 1-339.30(e), the statute clearly states a well-established measure of recovery against a defaulting bidder after a judicial sale: the "court will enforce [the defaulting bidder's] liability by ordering the property resold . . . and charging him with the deficiency between the amount obtained at the resale and the amount of his original bid, *and with the expense of the sale.*" *Gilliam v. Sanders*, 198 N.C. 635, 638, 152 S.E. 888, 890 (1930) (emphasis added); *see also Wood v. Fauth*, 225 N.C. 398, 399, 35 S.E. 2d 178, 179 (1945) (resale proceedings after bidder's default compared to mortgage foreclosure).

Given the statute's apparent purpose to assess a defaulting bidder with resale "expenses" under *Gilliam*, defendant's liability

for "costs of resale" under Section 1-339.30(e) did not entitle the court to award the Executor attorney's fees incurred after defendant's default. Under the familiar rule stated in *Bowman*, the statute must "expressly" authorize the court to award attorney's fees: "costs of resale" certainly do not "expressly" include attorney's fees. *Cf.* N.C.G.S. Sec. 6-21 (1986) (statute specifically defines "costs" to include attorney's fees in various contexts). Accordingly, we find the court erroneously awarded such fees as "costs of resale" under Section 1-339.30(e).

B

We likewise reject the contention there exists other relevant statutory or judicial authority for Judge McConnell's assessing defendant with the Executor's legal fees. Where the court allows legal fees pursuant to the "common fund" exception or for services rendered in aid of the court's jurisdiction over an insolvent, the fees are paid out of the fund recovered or by the insolvent or insolvent's estate—not by an adversary party. *See generally Horner v. Chamber of Commerce of City of Burlington, Inc.*, 236 N.C. 96, 72 S.E. 2d 21 (1952) (awarding plaintiff taxpayer attorney's fees out of public monies recovered and discussing numerous other examples); *see also State ex rel. Ingram v. All American Assurance Co.*, 34 N.C. App. 517, 525, 239 S.E. 2d 474, 479 (1977) (trial court could order insurance company undergoing court-supervised statutory rehabilitation to pay attorney's fees incurred in aid of court's supervision).

In addition, the record reveals neither findings nor allegations there was "a complete absence of a justifiable issue of either law or fact" raised by defendant in litigating his liability. *Cf.* N.C.G.S. Sec. 6-21.5 (1986) (court must make findings of fact and conclusions of law to support attorney's fee award under that section). Furthermore, the record reveals nothing indicating these proceedings required "the construction of any will" or arose out of partition proceedings such that legal fees might be awarded as costs under Section 6-21. *Cf.* Sec. 6-21(2) (legal fees allowable in proceeding requiring construction of will or trust); Sec. 6-21(7) (legal fees allowable if incurred in sale of property under partition statute). Thus, we conclude there was no express statutory or judicial authority for the court's order that defendant pay legal fees incurred by the Executor after defendant's default.

II

[2] In determining whther the Executor was entitled as a matter of law to prejudgment interest, we note the 4 May 1984 Clerk's order confirming the judicial sale constituted a legally binding acceptance of defendant's $125,000 bid and therefore created a specific "contract of purchase." *See Gilliam*, 198 N.C. at 638, 152 S.E. 2d at 890 (once bid accepted, bidder can be compelled to perform "contract of purchase"). This contract of purchase is secured on behalf of the estate by the "equitable lien held . . . by the court as vendor of the property . . . ." *Id.* Therefore, we reject at the outset defendant's contention that Judge McConnnell's order merely enforced a *statutory* lien for which prejudgment interest is not permitted. *Cf. Dail Plumbing, Inc. v. Roger Baker & Assoc.*, 78 N.C. App. 664, 667, 338 S.E. 2d 135, 137, *disc. rev. denied*, 316 N.C. 731, 345 S.E. 2d 398 (1986) (where claimant-laborer was stranger to contract breached, prejudgment interest denied since only action was to enforce statutory lien under N.C.G.S. Sec. 44-7 *et seq.*). Unlike *Dail*, the instant case involves a breach of contract between the parties and the enforcement of an equitable lien under *Gilliam* rather than a statutory lien as in *Dail*.

When Judge McConnell signed his order on 13 August 1985, N.C.G.S. Sec. 24-5 (1965) provided in relevant part:

> All sums of money due by contract of any kind . . . shall bear interest, and when the jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest . . . .

Cf. Dailey v. Integon General Ins. Corp., 75 N.C. App. 387, 403-04, 331 S.E. 2d 148, 159, *disc. rev. denied*, 314 N.C. 664, 336 S.E. 2d 399 (1985) (statute requires interest issue be decided by jury only in rare instance where evidence of both principal and interest submitted to it). Concerning when interest commences on a judgment for breach of contract, our Supreme Court stated in *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 671, 194 S.E. 2d 521, 540 (1973):

> 'The later cases following the enactment of G.S. 24-5 seem to have established this rule: when the amount of damages in a breach of contract action is ascertained from the contract itself, or from relevant evidence, or from both, interest should be allowed from the date of the breach.'

(quoting *General Metals, Inc. v. Truitt Manuf. Co.*, 259 N.C. 709, 713, 131 S.E. 2d 360, 363 (1963)) (citations omitted).

We have already noted the contract of purchase created on 4 May 1984. The record also reveals the Executor tendered deed to the auctioned property and demanded payment on 30 May 1984. Defendant's refusal to comply with that demand constituted a breach of defendant's contract to purchase the estate property. Since the Executor's damages on that date were ascertainable based on defendant's confirmed bid of $125,000, defendant "could have 'tendered the correct amount and stopped [both] the running of interest'" and the Executor's resale expenditures. *Harris and Harris Constr. Co., Inc. v. Crain and Denbow, Inc.*, 256 N.C. 110, 127, 123 S.E. 2d 590, 602-03 (1962) (interest on ascertainable damages runs from date of demand) (quoting *Miller v. Barnwell Bros., Inc.*, 137 F. 2d 257, 263 (4th Cir. 1943)). Thus, as the Executor's claim was ascertainable on 30 May 1984, the accrual of interest on that claim commenced on that date.

Under Section 1-339.30(d), it is true the court or clerk could order resales whose proceeds might mitigate the Executor's $125,000 claim against defendant; however, such proceedings would not render the Executor's claim incapable of ascertainment since computation of any deficiency after resale is a "simple matter of arithmetic and a purely ministerial duty." *See Walton v. Cagle*, 269 N.C. 177, 183, 152 S.E. 2d 312, 317 (1967) (characterizing determination of defaulting bidder's liability for deficiency and resale costs under Section 1-339.30); *cf. Rose*, 282 N.C. at 671, 194 S.E. 2d at 540 (damages ascertainable so long as subsequent matters are "pure and simply a matter of mathematical calculation").

Thus, under Section 24-5, we must reverse Judge McConnell's order insofar as it denied the Executor prejudgment interest on the deficiency and resale expenses properly computed under Section 1-339.30(e). *See Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 431, 349 S.E. 2d 552, 558 (1986) (where damages ascertainable from contract itself, prevailing party entitled to prejudgment interest as matter of law). As the contract of purchase evidenced by the Clerk's confirmation order does not provide an interest rate, prejudgment interest accruing after 30 May 1984 shall be computed at the legal rate of eight percent under

N.C.G.S. Sec. 24-1 (1986). *See Interstate Equip. Co. v. Smith*, 292 N.C. 592, 602, 234 S.E. 2d 599, 604 (1977).

We reject defendant's argument that no interest should accrue on the $6,250 bid deposit he paid to the Clerk for the original judicial sale. Defendant stipulated at his default hearing that he refused the Executor's tender and demand on 30 May 1984 and requested his deposit be refunded. Pursuant to his determination of defendant's default, Judge Hobgood therefore stated the Executor would hold the deposit "pending *further* order of the Clerk . . . and *subject* to being applied to costs of resale or any damages . . ." (emphasis added). On 18 September 1985, Judge McConnell finally determined the deposit was property of the estate and credited it to defendant's outstanding balance. Therefore, the Executor could not use defendant's deposit as a credit until the entry of Judge McConnell's order. "Interest is the compensation allowed by law, or fixed by the parties, for the use, or forbearance, or detention of money." *Ripple v. Mortgage and Acceptance Corp.*, 193 N.C. 422, 424, 137 S.E. 156 (1927). Accordingly, we conclude the Executor was entitled under Section 24-5 to prejudgment interest on, among other things, defendant's bid deposit as compensation for the court's "detention" of the deposit pending further litigation and resales arising from defendant's default. *Cf. Interest and Usury*, 45 Am. Jur. 2d Sec. 59 (1969) (improper to award interest on judgment where prevailing party not deprived of use of money during period interest accrued).

As we hold the Executor entitled to prejudgment interest under Section 24-5, we need not address the Executor's additional contention the "costs of resale" under Section 1-339.30(e) include prejudgment interest.

III

We reverse the trial court's award of attorney's fees to the Executor. We also reverse the trial court's denial of prejudgment interest to the Executor and remand the case for determination of such interest at the legal rate in accordance with this opinion.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

LEROY D. McNEILL, JR. v. DURHAM COUNTY ABC BOARD AND RONALD D. ALLEN

No. 8514SC1082

(Filed 1 September 1987)

1. Trial § 10.1— remarks by trial judge not prejudicial

Defendant was not prejudiced by the cumulative effect of remarks by the trial judge where many of the remarks were jocular in nature and reflected upon no one; many of the remarks were justified admonishments to keep the trial moving; and the trial judge also admonished plaintiff's counsel and directed several remarks at him, thereby indicating that no favoritism was felt for either side.

2. Assault and Battery § 3.1— civil assault action—issues

In an action to recover for an assault with excessive force on plaintiff by an ABC officer, the trial court did not err in combining issues of whether defendant acted in self-defense and whether plaintiff engaged in an affray with defendant into the single issue of whether defendant assaulted plaintiff.

3. Assault and Battery § 3.1— civil assault action—flashlight as deadly weapon—instructions

In an action to recover for an ABC officer's assault on plaintiff with a flashlight, the trial court properly instructed the jury to consider the characteristics of the flashlight and the way it was used in deciding whether it was a deadly weapon. However, an instruction that the flashlight was a deadly weapon as a matter of law would not have been improper under the facts of this case.

4. Witnesses § 5.2— character evidence by plaintiff

Plaintiff could properly present character evidence in a civil assault case where defendants pled self-defense and alleged that plaintiff assaulted the individual defendant, and where defendants sought to cast doubt on plaintiff's truthfulness by cross-examining plaintiff about his version of the incident as well as about specific misdeeds. N.C.G.S. § 8C-1, Rules 405(a) and 608(a).

5. Evidence § 50.1— expert medical testimony—angle and force of blow

A neurologist who treated plaintiff was qualified to state his opinion as to the angle and force of a blow to plaintiff's head. N.C.G.S. § 8C-1, Rule 703.

6. Constitutional Law § 77; Witnesses § 6— refusal to answer interrogatory—self-incrimination—waiver—cross-examination about reasons for refusal

In a civil assault case in which defendant's refusal to answer an interrogatory on the ground of self-incrimination was sustained by a court order, cross-examination of defendant about why he had refused to answer the interrogatory was properly permitted after defendant testified on direct examination concerning information sought by the interrogatory, since defendant's direct testimony waived his protection against revealing to the jury his invocation of his right against self-incrimination, and his reversal of position about

the incriminating effect of his testimony was a fair target for impeachment as conduct indicating that his earlier claim was not true. N.C.G.S. § 8C-1, Rule 608(b).

7. **Assault and Battery § 3.1— civil assault action—evidence of dismissal of charges against plaintiff**

In a civil action for assault by an ABC officer, the trial court properly admitted evidence that criminal charges against plaintiff for assaulting defendant were dismissed.

8. **State § 4— governmental immunity—waiver by local State agencies—purchase of liability insurance**

Local agencies of the State, including county ABC Boards, can waive their governmental immunity by purchasing liability insurance. Therefore, this civil action to recover for assault by an ABC officer is remanded for a determination as to whether defendant ABC Board has liability insurance and, if so, the amount thereof.

9. **Damages § 11.2; State § 4— punitive damages—no recovery against government agency**

Punitive damages assessed against defendant ABC Board for an assault by an ABC officer must be set aside since punitive damages are not recoverable against a governmental body or agency in the absence of statutory authority.

APPEAL by defendants from *Bailey, Judge*. Judgment entered 6 December 1984 in Superior Court, DURHAM County. Heard in the Court of Appeals 12 March 1986.

Plaintiff sued for personal injuries allegedly sustained when defendant Allen, an agent and employee of defendant Durham County ABC Board, struck him over the head with a flashlight while serving a warrant at the home of plaintiff's mother. Defendants denied plaintiff's main allegations and asserted several different defenses; defendant Allen counterclaimed, alleging that plaintiff assaulted him. It was stipulated that defendant Allen was acting within the scope of his employment and authority on the occasion involved, and the jury in pertinent part found that he committed an assault and battery on plaintiff with excessive force, and that plaintiff did not assault Allen. The jury awarded plaintiff $105,500 in compensatory damages and $7,000 in punitive damages—$5,000 from defendant Board and $2,000 from defendant Allen—and judgment was entered on the verdict.

In gist, *plaintiff's evidence*, presented mostly by him, his mother, and his doctors was to the following effect: Plaintiff and

his mother lived in both halves of a Durham duplex. She had been convicted several times of selling liquor illegally, but plaintiff has never been involved in her criminal activity. At about 9 o'clock on the night of 7 November 1981, plaintiff was preparing to leave the duplex when his mother walked up to the rear of the building with defendant Allen and two other men dressed in plain clothes. Plaintiff did not recognize the men and they did not identify themselves. Plaintiff's mother said the men wanted to search the house and told him to let them in. Before doing so, plaintiff asked for some identification and was preparing to write down the identifying information when defendant Allen struck him a "pretty good blow" on the back of the head with a large, heavy flashlight. The force of the blow knocked him to the floor, rendered him semiconscious, and caused plaintiff's head to bleed. Plaintiff did not have a weapon and there was no weapon in the house. Plaintiff was charged with attacking Allen and taken to jail, where he later became sick and vomited, after which he was taken to Duke Medical Center and treated for a basilar skull fracture and related injuries to the brain.

In substance, *defendants' evidence*, given by defendant Allen and the other two officers, was to the effect that: Defendant Allen and the other two officers had a search warrant authorizing them to search the house where plaintiff and his mother lived. Plaintiff's mother had a history of selling liquor and the house had the reputation as a liquor house. The officers first encountered plaintiff and his mother at a house across the street, where they identified themselves and presented the search warrant to Mrs. McNeill. Then they all went to the back door of the McNeill house and plaintiff entered, but when defendant Allen attempted to follow him into the house plaintiff shoved him and demanded identification. Allen warned plaintiff not to touch him, but plaintiff shoved him again, and as he fell backwards he struck plaintiff a glancing blow with the flashlight.

McMillan, Kimzey, Smith & Roten, by Russell W. Roten and Duncan A. McMillan, for plaintiff appellee.

Haywood, Denny, Miller, Johnson, Sessoms & Haywood, by George W. Miller, Jr., J. A. Webster, III and Sherry R. Dawson, for defendant appellants.

PHILLIPS, Judge.

Defendant appellants pose for consideration eleven main questions and several more sub-questions based on eighty-six assignments of error. To avoid repetition some of the questions and sub-questions will be discussed together.

I.

[1] Defendants first cite as prejudicial error some thirty-seven remarks made during the course of the trial by the presiding judge, James H. Pou Bailey. Most of the remarks were made to or about defense counsel and defendants argue that they showed the jury that the judge was antagonistic toward them and their counsel. Repeating the remarks would serve no purpose, for defendants do not contend that any remark by itself affected the outcome of the case. They contend rather that the cumulative effect of the remarks was prejudicial. We disagree and are of the opinion that no prejudice occurred for several reasons. First, many of the court's remarks were jocular in nature and reflected upon no one. Second, many of the remarks were justified admonishments to keep the trial moving. *Brenner v. Little Red Schoolhouse, Ltd.*, 59 N.C. App. 68, 295 S.E. 2d 607 (1982), *disc. rev. denied*, 307 N.C. 468, 299 S.E. 2d 220 (1983). Third, His Honor also admonished plaintiff's counsel and directed several remarks at him, thereby indicating that no favoritism was felt for either side.

II.

[2, 3] The arrangement, form and content of the issues and jury instructions are the subject of several different contentions, which can be treated together. Defendants contend, *inter alia*, that the trial court erred in combining the distinct issues of whether defendant Allen acted in self-defense and whether plaintiff engaged in an affray with him into the single issue of whether defendant Allen assaulted plaintiff; in misstating the law on these issues and confusing the jury as to the burden of proof; in refusing to submit issues as to various defenses raised by the pleadings and evidence and in failing to instruct the jury thereon; and in charging the jury that the flashlight defendant struck plaintiff with was a deadly weapon, while its nature was a question of fact for the jury. None of these contentions has merit and

we overrule them. The purpose of instructing the jury is to clarify the issues, summarize the relevant evidence, and state the law applicable thereto. *Federated Mutual Insurance Co. v. Hardin*, 67 N.C. App. 487, 313 S.E. 2d 801 (1984); G.S. 1A-1, Rule 51. While the judge must submit to the jury such issues raised by the pleadings and evidence as are necessary to fairly adjudicate the controversy at bar, *Rental Towel and Uniform Service v. Bynum International, Inc.*, 304 N.C. 174, 282 S.E. 2d 426 (1981), the form and number of the issues submitted is within the sound discretion of the trial judge. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). Though hotly contested, this case was a relatively simple one for the court to charge on and the jury to consider; for in essence it resolved down to whether Allen attacked plaintiff or vice versa. The issues that the judge submitted to the jury adequately covered the questions raised by the pleadings and evidence and nothing in the record suggests either that the applicable law was misstated or that the jury was confused by either the issues or the charge. As to the instructions given defendants cite no authority for their claim that they were inaccurate and portions of the instructions challenged in the brief are taken out of context. Read in context and considered as a whole, the instructions were both adequate and accurate. *Hanks v. Nationwide Insurance Co.*, 47 N.C. App. 393, 267 S.E. 2d 409 (1980). The instructions given not only address the primary issue of whether defendant Allen attacked plaintiff but also the defenses of self-defense, good faith, and reasonable force, as well as defendant Allen's claim that plaintiff attacked him. The court's summary of the parties' evidence on all these points was accurate and equal emphasis was given to the contentions of each party. As to the instruction about the flashlight the court did not charge that it was a deadly weapon as a matter of law; instead, the court instructed the jury to consider the characteristics of the flashlight and the way that it was used in deciding whether it was in fact a deadly weapon. But even if the instruction had been given as contended it would not have been prejudicial for two reasons. First, defendant Allen categorically admitted from the witness stand that a flashlight similar to the one he used was a deadly weapon; and second, the exhibit sent here by the trial court is a mace-like implement of hard metal that weighs 2½ pounds and is 14¾ inches long, with a grip or tube about the size of a baseball bat handle and with a head or "business end" that is 7 inches in circumference. Our

Supreme Court has said that an ordinary brick 8 inches long, 4 inches wide, and 2 inches thick is a deadly weapon as a matter of law when used as a club in striking another, *State v. Perry*, 226 N.C. 530, 39 S.E. 2d 460 (1946), and this club-like object is obviously more suitable for destructively clubbing someone over the head with than is an ordinary brick.

III.

Of the several evidentiary rulings that defendants complain of, none of which has merit, we discuss the following:

a.

[4] The contention that the court erred in receiving the testimony of two character witnesses because plaintiff's character was not in issue is without foundation. Evidence of a person's character is admissible when character or a character trait is an essential element of a charge, claim, or defense. G.S. 8C-1, Rule 405(b). In this civil suit for assault and battery, in addition to pleading self-defense and alleging that plaintiff assaulted defendant Allen, defendants sought to cast doubt on plaintiff's truthfulness by rigorously cross-examining him about his version of the incident as well as about specific misdeeds that tended to sully plaintiff's character. Plaintiff had a right to attempt to counteract these reflections upon his veracity and character with evidence as to his reputation for truthfulness, G.S. 8C-1, Rule 608(a), and as to his general character, G.S. 8C-1, Rule 405(a).

b.

[5] The argument that Dr. Radtke, a neurologist who treated plaintiff, was not qualified to give an opinion as to the angle and force of the blow to plaintiff's head is likewise meritless. Dr. Radtke was clearly more capable of drawing inferences as to the force and direction of the blow to plaintiff's head than the jury was and the receipt of his opinion was not error. G.S. 8C-1, Rule 703; *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984).

c.

[6] Prior to trial, by an interrogatory plaintiff asked defendant Allen to describe fully all conversations and non-verbal communication that took place at plaintiff's home on the night in question. Allen refused to answer this interrogatory on his attorney's ad-

vice that it might be incriminating, and the refusal was sustained by court order. Over objection at trial plaintiff's counsel got Allen to admit on cross-examination that he had not answered the interrogatory and to explain why. This was not prejudicial error, as defendants contend, because defendant Allen had provided the same information a few minutes earlier on direct examination. Had he not so testified defendant would have had Fifth Amendment protection against self-incrimination, which has been extended to civil actions where a party's admissions might subject him to punitive damages, *Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964), and the corollary protection against his invocation of right being revealed to the jury at trial, *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975); but by testifying as he did on direct examination defendant clearly waived both protections. *See* 81 Am. Jur. 2d *Witnesses* Secs. 37, 528 (1976). His reversal of position about the incriminating effect of his testimony was a fair target for impeachment as conduct indicating that his earlier claim was not true. G.S. 8C-1, Rule 608(b).

d.

[7] It was not error, as defendants contend, that plaintiff's counsel elicited from defendant Allen on cross-examination that the criminal charges brought against plaintiff for assaulting Allen were dismissed. Since it was in evidence that defendants charged him with a criminal offense and took him to jail, that the charges were dismissed was not irrelevant and we know of no rule that made the evidence inadmissible.

e.

Defendants' further contention that various lay witnesses, including defendant Allen, were erroneously allowed to express opinions as to the ultimate issue is deemed to have been abandoned, since no supporting legal authority was cited for any of the assignments of error involved. N.C. Appellate Rule 28(b)(5).

IV.

[8, 9] Defendant Board moved for a directed verdict on both the liability and punitive damages issues on the grounds of governmental immunity. In denying the motions Judge Bailey expressed the opinion that it was time the Supreme Court took another look at governmental immunity, "particularly in cases of this sort."

Draping the cloak of governmental immunity over activities of the defendant Board in this case does seem incongruous, to say the least. Since it operates what is almost certainly the biggest and most profitable retail mercantile business in Durham County and the product it sells is a drug that harms rather than benefits those that use it, it would seem that this business should bear the full cost of its operation, as other businesses do; and if our Supreme Court had not already intimated or ruled otherwise, we would be inclined to so hold. But as we understand the majority opinion in *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E. 2d 139 (1967), local ABC Boards are not engaged in business within the contemplation of law, their millions in profits each year notwithstanding, and governmental immunity attaches to their investigative and enforcement activities, and this Court is not in position to reexamine that view. But since cities and counties can waive their immunity by purchasing liability insurance, *see* G.S. 160A-485, G.S. 153A-435, we are of the opinion and so hold that local agencies of the State such as the defendant Board can likewise waive their immunity by purchasing such insurance. *See Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 213 S.E. 2d 297 (1975); *Clary v. Alexander County Board of Education*, 286 N.C. 525, 212 S.E. 2d 160 (1975); *Casey v. Wake County*, 45 N.C. App. 522, 263 S.E. 2d 360, *disc. rev. denied*, 300 N.C. 371, 267 S.E. 2d 673 (1980). But here, the record is not conclusive as to whether the defendant Board had such insurance; all that it reveals is that when asked by interrogatory to produce any insurance policies it had the defendant responded "none," and that over a year later defendant Board stipulated that subject to pending motions the court had jurisdiction over it and the subject matter. Though this stipulation might be construed as an admission that sovereign immunity had been waived in some amount, *see, Clary v. Alexander County Board of Education, supra,* under the circumstances, we prefer that it be positively determined by the trial court whether defendant Board had liability insurance and, if so, in what amount. For if the Board had no such insurance the judgment against it must be set aside; but if it had such insurance, governmental immunity was waived in the amount of the coverage and the judgment should so provide. Upon remand the burden will be on defendant Board to show whether it was insured and the amount, if any. In any event the punitive damages assessed against the defendant Board must be and is set aside, since the

rule in this State seems to be that in the absence of statutory authority punitive damages are not recoverable from a governmental body or agency. *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982).

As to defendant Allen—no error.

As to defendant Durham County ABC Board—no error in part; reversed in part; and remanded with instructions.

Judges BECTON and PARKER concur in the result.

PATRICIA L. BEARD, EMPLOYEE, PLAINTIFF v. BLUMENTHAL JEWISH HOME, EMPLOYER AND AETNA LIFE & CASUALTY CO., CARRIER, DEFENDANTS

No. 8610IC799

(Filed 1 September 1987)

Master and Servant § 77.2— workers' compensation—Form 21 agreement not bar to further compensation

A Form 21 agreement for compensation for a stipulated amount to begin on a specified date and "continuing for necessary weeks," signed by the parties and approved by the Industrial Commission, was an interlocutory rather than a final award within the purview of N.C.G.S. § 97-47 and thus did not bar plaintiff's claim for further compensation after disc surgery because the claim was not asserted until more than two years after plaintiff received the last payment for temporary total disability.

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission filed 27 February 1986. Heard in the Court of Appeals 7 January 1987.

On 1 May 1980 plaintiff employee injured her back by accident while assisting a patient of defendant employer, and on 5 May 1980 she came under the care of Dr. Pikula who treated her with medications and bed rest for a probable herniated nucleus pulposus. Under that conservative treatment her back condition improved and on 2 June 1980 Dr. Pikula instructed her on how to lift patients without straining her back and permitted her to return to light work the next day. On 12 June 1980 the parties executed an Industrial Commission Form 21 agreement wherein defendants admitted liability under the Workers' Compensation Act and agreed to pay compensation to plaintiff at the rate of $82.95

per week beginning 12 May 1980 and continuing for "necessary weeks." That agreement was approved by the Commission on 1 July 1980. On 7 July 1980 the Commission received an Industrial Commission Form 28B dated 2 July 1980 wherein the carrier reported that compensation for temporary total disability was paid from 5 May 1980 to 2 June 1980, that plaintiff returned to work on 3 June 1980 at her same average weekly wage, and that the report closed the case including final compensation payment. Although the carrier mailed a copy of the Form 28B to plaintiff, she did not receive it, but she did receive the carrier's last compensation check before August 1980. From 3 June 1980, when she returned to her regular job as a nurse's aide, until 17 December 1983 plaintiff missed no work because of her injury, although at various times during that period her back hurt, sometimes severely. On 19 December 1983 she was admitted to the hospital and subsequently underwent surgery for a ruptured intervertebral disc caused by the 1 May 1980 accident and reached maximum medical improvement from the injury and surgery on 29 March 1984. As a proximate result of the aforesaid accident she now has a 15 percent permanent partial disability of the back. On 2 January 1985 plaintiff asked the Industrial Commission to determine the compensation due her for total disability during the period between her surgery and recovery therefrom, and for her permanent partial disability of the back. Upon hearing the matter and after finding facts to the above effect, Deputy Commissioner Haigh concluded as a matter of law that the Form 21 agreement dated 12 June 1980 covering plaintiff's initial inability to work was a "final award" within the contemplation of G.S. 97-47 and that under the terms of that statute her claim was barred. Upon plaintiff appealing the Full Commission, Commissioner Clay dissenting, affirmed the opinion of the Deputy Commissioner.

Pfefferkorn, Pishko & Elliot, by Robert M. Elliot, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Reid C. Adams, Jr., for defendant appellees.

PHILLIPS, Judge.

None of the above stated facts are in dispute and the only question raised by this appeal is whether the Form 21 agreement

referred to was a final award within the contemplation of G.S. 97-47. If it was, plaintiff's claim for further compensation is necessarily barred, as the Commission ruled, because it was not asserted until more than two years after the last payment for temporary total disability was received in 1980. In pertinent part G.S. 97-47 provides as follows:

> [O]n the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, . . . [N]o such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article . . .

Our Supreme Court has held that the "award" referred to in this statute, which the Industrial Commission may not review after two years from the date of the last payment of compensation thereunder, is a final award, *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 181 S.E. 2d 588 (1971), and that the statute does not apply to an interlocutory award. *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 115 S.E. 2d 27 (1960). Since any agreement to pay workers' compensation benefits when approved by the Commission is an award or its equivalent, *White v. Shoup Boat Corp.*, 261 N.C. 495, 135 S.E. 2d 216 (1964), the Form 21 agreement entered into by the parties in June 1980 and approved by the Commission was certainly an award; but in our opinion it was an interlocutory award beyond the purview and intent of G.S. 97-47. The award was interlocutory because it settled only the preliminary questions of jurisdiction and temporary disability and left unresolved the extent of plaintiff's permanent disability, if any. The Form 21 agreement the parties executed and the Commission approved in substance stated only that: The parties were bound by the Workers' Compensation Act; plaintiff hurt her back by accident on 1 May 1980 and was then disabled; her average weekly wage was $124.43 and defendants would pay her $82.95 per week beginning 12 May 1980 and "continuing for necessary weeks." The agreement said nothing about plaintiff either having or not having a permanent disability. When it was approved the only medical information bearing upon plaintiff's condition that the Commission had was a Form 25 signed by Dr. Pikula, which stated that plaintiff had a "probable herniated nucleus pulposus, L4-5 on the left." Though the form asked the doctor three ques-

tions—Is there any "permanent defect?", "Does this terminate the patient's treatment?", "Can the employee resume work without risk?"—none of these questions were answered. Obviously, the parties were not in position to agree, and did not agree, that plaintiff had no permanent disability; and the Commission had no basis for approving, and did not approve, an agreement that finally resolved plaintiff's rights. Terminating an injured worker's right to compensation for permanent disability is not done in any such manner and on such a basis.

The facts of this case are quite similar to those in *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 115 S.E. 2d 27 (1960). In that case: The claimant suffered a temporarily disabling injury to her coccyx in April 1957 and soon thereafter entered into a Form 21 agreement with the carrier providing for compensation "for legal weeks," which the Commission approved on 20 May 1957; in August, 1957 the claimant's doctor permitted her to return to work at a different, less strenuous job, and submitted to the Commission a Form 25 in which he answered the question whether or not there would be any permanent disability with three question marks; on 19 August 1957 plaintiff received the last payment called for by the Form 21 agreement; in April 1958 her doctor filed a report indicating that she had a permanent partial disability; and on 25 November 1958 plaintiff requested a hearing to determine the compensation due her because of that disability. At the hearing defendants contended that the claim was barred under G.S. 97-47, because it was not asserted within a year after her last payment as the statute then required. When the case finally got there our Supreme Court ruled that the claim was not barred by G.S. 97-47. In doing so the Court noted that the Commission was in no position either to make a proper award or approve an agreement until the extent of plaintiff's permanent disability, if any, was determined, and that the Commission's approval of the Form 21 agreement in the absence of the essential medical information was merely—

> an adjudication that employer was liable for such compensation as employee was entitled to receive under the Act, the date when compensation began, the amount of weekly payments for temporary total disability, and nothing more. It was only a preliminary and interlocutory award. It does not purport to fix and determine the full amount of compensation

> to which employee was entitled . . . The blank spaces in paragraph 7 of the agreement indicate that employee had not returned to work and the extent of partial incapacity and permanent disability, if any, had not been determined. After the approval of the agreement on 31 May 1957 the action was still pending for a final award. 'A claim for compensation lawfully constituted and pending before the Commission may not be dismissed without a hearing and without some proper form of adjudication. No statute of limitations runs against a litigant while his case is pending in court.' (Citation omitted.)

Id. at 720-721, 115 S.E. 2d at 32. As in that case, since plaintiff's claim for further compensation has not been resolved either by an agreement of the parties, a hearing on the merits or any other "proper form of adjudication," it is not barred by G.S. 97-47.

In concluding otherwise the Commission emphasized that at the time Pratt returned to work, a medical report reflected there was still a question as to whether the injury had resulted in any permanent partial disability and that no such report exists in this case. But the *absence* of medical information is hardly a sound basis for concluding that plaintiff agreed to something she manifestly did not agree to or that the Commission's approval of the agreement was based upon a knowledge of plaintiff's condition, as our law requires. Furthermore, the medical report submitted in this case, though not adorned with question marks as in *Pratt, did* raise a question as to plaintiff having a permanent disability; for it stated that plaintiff probably had a "herniated nucleus pulposus," a condition that is known to often result in surgery, a prolonged convalescence and a stiff, disabled back, but contrary to its duty the Commission sought no answer to the question. In deeming the Form 21 agreement a "final" award the Commission also emphasized that plaintiff resumed her regular job and stayed on it for more than three years; but contract terms are fixed and binding, if at all, when they are agreed to, they are not enlarged by accretions of time and later events. What resulted from plaintiff returning to work at the same wages as before was neither an estoppel nor a waiver, but a mere presumption of fact that she was not permanently disabled; a presumption that was overcome by evidence showing that she is in fact disabled, as the Commission found. *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 115 S.E. 2d 27 (1960). Nor is it of any legal significance that the period

of three years went by between the end of plaintiff's temporary total disability and her request to determine the permanent disability question; for pending cases are not resolved by time, they are resolved by agreement or adjudication, and during that long period defendants took no steps to achieve either a final agreement or adjudication. And, of course, the carrier's unilateral effort to close the file and foreclose the adjudication of plaintiff's rights is totally irrelevant to the question presented.

G.S. 97-47 has no application to the circumstances of this case for another reason. As its terms plainly show, it was enacted to address the commonly known fact that injuries which first appear to have little or no permanent effect sometimes turn out to be more disabling than expected, while injuries that initially appear to be totally disabling sometimes improve, or are even overcome entirely by persons with unusual fortitude, strength, or nervous systems. What the statute does and does not do is equally plain! It establishes conditions under which otherwise final disability evaluations can be reviewed and revised when changes occur; it does not establish either a procedure or a limitations period for processing unresolved claims for permanent disability. Thus, determining plaintiff's claim for permanent disability is not forbidden by the statute, and it is absurd to suppose that such a determination would be a "review" under the statute of the earlier interlocutory award. The earlier award for a six weeks period of temporary disability is over and done with; it can neither be reviewed nor revised, and G.S. 97-47 does not relate to it.

In dismissing plaintiff's claim the Full Commission relied primarily on *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 181 S.E. 2d 588 (1971). In that case plaintiff suffered a temporarily disabling injury in May 1967 and the parties signed a Form 21 agreement in which the carrier admitted liability and agreed to pay compensation for "necessary weeks." When plaintiff received his last temporary disability payment on 18 January 1968 he signed a final receipt on Commission Form 28B which stated that no further compensation would be paid unless plaintiff made request for a hearing based on a change of condition within a year. After a year had passed, the statutory period at that time, plaintiff's doctor reported that he was permanently disabled to some extent because of the accident involved, but the Court held that

the claim was barred by G.S. 97-47. The distinctions between *Watkins*, the present case, and *Pratt* are both obvious and significant: In *Watkins*, as the Court emphasized, the claimant received and signed a Form 28B which by its terms closed the case; but in this case plaintiff neither signed nor received the Form 28B defendant mailed, and in *Pratt*, as the Court emphasized, the claimant was not requested to sign a closing receipt. In our view, a case in which a claimant expressly signs his final rights away with the Commission's approval does not control a case in which the claimant made no such agreement. Furthermore, in *Watkins* the medical report that went along with the approved closing receipt stated clearly that plaintiff had no permanent disability; while in this case there was no indication whatever that plaintiff was not disabled, the implication, if anything, being that she might be disabled since the condition reported often does result in disability. Thus, while the Commission had medical grounds for approving the signed closing receipt as a final award in *Watkins*, it had no medical basis whatever for approving the Form 21 agreement in this case as being anything other than an interlocutory award.

Therefore, we reverse the Commission's Opinion and Award holding that the Form 21 agreement entered into in June 1980 was a final award and that plaintiff's claim is thus barred by the provisions of G.S. 97-47; and we remand the matter to the Commission for the entry of a final award in accord with the Commission's determination that plaintiff has a 15 percent permanent partial disability of the back due to the accident referred to, and for a determination of the compensation due for her additional period of temporary total disability following the surgery in December 1983.

Reversed and remanded.

Judges ARNOLD and ORR concur.

NEW BERN ASSOCIATES, PLAINTIFF v. THE CELOTEX CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF v. R. M. SAFFRAN, INDIVIDUALLY AND TRADING AS R. M. SAFFRAN ARCHITECT AND ASSOCIATES; FERDINAND A. HEPPERLE, INDIVIDUALLY AND TRADING AS FERDINAND A. HEPPERLE ARCHITECT AND PLANNER; AND T. A. LOVING COMPANY, A CORPORATION, THIRD-PARTY DEFENDANTS

No. 868SC1322

(Filed 1 September 1987)

1. **Appeal and Error § 6.2— summary judgment for third party defendant—not final to all parties—appealable**

Although a summary judgment for a third party defendant was not final to all parties and claims and the trial court did not certify it for appeal, it was appealable because it affected a substantial right in that summary judgment for this defendant created the possibility of inconsistent verdicts.

2. **Limitation of Actions § 4— leaking roof—third party complaint for negligence—governed by G.S. § 1-50(5)**

In an action to recover damages for a leaking roof where the original plaintiff's action arose from a defective improvement to real property and was governed by N.C.G.S. § 1-50(5), defendant's claim for contribution and indemnification based on a third party defendant's negligence was also governed by N.C.G.S. § 1-50(5).

3. **Limitation of Actions § 4.2— construction dispute—determination of whether willful and wanton negligence alleged unnecessary**

It was not necessary to determine whether a third party plaintiff in an action arising from a leaking roof alleged willful and wanton negligence where the accrual date of the original plaintiff's claim determined which version of the statute of repose was applicable to the third party claim; the evidence was uncontested that the roof began leaking in 1975; and the 1963 version of the statute which was thus applicable did not exclude willful and wanton negligence. N.C.G.S. § 1-50(5).

4. **Limitation of Actions § 4— leaking roof—third party complaint—genuine issue of fact as to date of defendant's last act or omission—summary judgment inappropriate**

Summary judgment was inappropriately granted for a third party defendant in an action arising from a leaking roof where N.C.G.S. § 1-50(5), in the applicable 1963 version, runs from the last act or omission of the defendant and there was a genuine issue of fact as to whether the third party defendant's last act or omission occurred within six years of the date the third party complaint was filed.

APPEAL by third-party plaintiff, The Celotex Corporation, from *Winberry, Judge*. Judgment entered 27 October 1986 in Superior Court, WAYNE County. Heard in the Court of Appeals 12 May 1987.

Stith and Stith, P.A., by F. Blackwell Stith and Susan H. McIntyre, for Defendant and Third-Party Plaintiff, The Celotex Corporation.

Warren, Kerr, Walston & Hollowell, by John H. Kerr, III, for Third-Party Defendant, T. A. Loving Company.

GREENE, Judge.

Plaintiff New Bern Associates ("New Bern"), filed a complaint against defendant Celotex Corporation ("Celotex"), alleging breach of warranties in regard to a building owned by New Bern and roofed with material manufactured by Celotex. New Bern alleged the roof on its building was not watertight and leaked a great deal. Celotex filed a third-party complaint against R. M. Saffran and Ferdinand A. Hepperle, the architects who designed plaintiff's building, alleging their negligence in designing the building, and against T. A. Loving Company, the general contractor for the building, alleging its negligence in constructing the building. Celotex alleged the third-parties' negligent acts as the primary causes of any injury to plaintiff and asked for indemnification from third-party defendants or, in the alternative, for contribution.

Before trial, third-party defendant T. A. Loving filed a motion to dismiss Celotex's third-party complaint for failure to state a claim upon which relief could be granted. N.C.G.S. Sec. 1A-1, Rule 12(b)(6) (1983). T. A. Loving based its motion on the allegation that Celotex had failed to bring its third-party complaint within six years from the date of completion of construction as required by the applicable statute of repose, N.C.G.S. Sec. 1-50(5). Celotex's written ten-year warranty issued to New Bern states the building's completion date was 18 March 1975. Celotex filed its third-party complaint against T. A. Loving on 28 April 1986. The court considered the pleadings, Celotex's written warranty, and correspondence between the parties, found there to be no genuine issue of material fact and granted summary judgment for T. A. Loving pursuant to N.C.G.S. Sec. 1A-1, Rules 12(b) and 56, on the basis that the statute of repose, Section 1-50(5), barred Celotex's third-party complaint. Celotex excepted and appealed.

The issues before us are: 1) whether the judgment is immediately appealable, 2) whether summary judgment was error

because the statute of repose, N.C.G.S. Sec. 1-50(5), does not bar actions for contribution and indemnification, and 3) whether summary judgment was error because there existed genuine issues of material fact.

I

[1] The correct procedure for determining whether a given case is appealable was set out by this Court in *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240, *appeal dismissed*, 301 N.C. 92 (1980). There is a three-step analysis: 1) A judgment which is final to all claims and parties is immediately appealable. 2) If a judgment is not final as to all parties and claims, it is appealable if it is final to a party or issue and has been certified for appeal by the trial court under N.C.G.S. Sec. 1A-1, Rule 54(b). 3) If it is neither final to all claims and parties, nor final to a party or issue and certified for appeal, a judgment is immediately appealable if it affects a substantial right of the parties. *Equitable Leasing Corp.*, 46 N.C. App. at 168-69, 265 S.E. 2d at 245.

The judgment from which Celotex appeals is not final to all parties and claims. Although it is final to T. A. Loving and the question of its liability, the trial court did not certify it for appeal under Rule 54(b). It does, however, affect a substantial right and, on that basis, is appealable.

A "substantial right" is one "which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E. 2d 777, 780 (1983). A judgment which creates the possibility of inconsistent verdicts on the same issue in different trials affects a substantial right. *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E. 2d 405, 408 (1982); *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E. 2d 593, 595 (1982).

Here, the trial court's order granting summary judgment for T. A. Loving creates the possibility of inconsistent verdicts on the issue of T. A. Loving's negligence if it is not immediately appealed. Celotex's written warranty warrants against the roofing contractor's errors or mistakes in workmanship. In this suit, Celotex, as third-party plaintiff, may be held liable under its warranty for negligent work done by T. A. Loving; in a second trial

against T. A. Loving, the jury may find T. A. Loving was not negligent. Thus, Celotex's right to have one jury decide the alleged negligence of T. A. Loving is a substantial right. The trial court's order granting T. A. Loving summary judgment is immediately appealable.

II

[2] Celotex first argues the statute of repose does not bar an action for contribution or indemnification. This argument is without merit.

N.C.G.S. Sec. 1-50(5) governs actions to recover damages for any injury arising out of defective or unsafe improvements to real property. At the time the roof began to leak, this statute (hereinafter "the 1963 statute") provided that it also governed "any action for contribution or indemnity for damages sustained on account of such injury . . . ." N.C.G.S. Sec. 1-50(5) (1969). This statute was amended in 1981 and currently provides:

> b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> * * *
>
> 6. Actions for contribution or indemnification for damages sustained on account of an action described in this subdivision;

N.C.G.S. Sec. 1-50(5)(b)(6) (1983) (hereinafter, "the 1981 statute").

New Bern's action against Celotex rises out of a defective improvement to real property. Thus, since New Bern's action against Celotex would normally be governed by Section 1-50(5), Celotex's claim for contribution or indemnification based on T. A. Loving's negligence, is governed by Section 1-50(5).

III

Summary judgment is appropriate if there is no genuine issue of material fact and any party is entitled to judgment as a matter of law. *Johnson v. Insurance Co.*, 300 N.C. 247, 252, 266 S.E. 2d 610, 615 (1980). Celotex next argues summary judgment was inappropriate for two reasons.

A

[3] Celotex first argues that its cause of action is not barred by the statute of repose because its action is based on wanton and willful negligence and the 1981 statute does not bar such claims. N.C.G.S. Sec. 1-50(5)(e) (1983). The 1981 amendments to Section 1-50(5) became effective 1 October 1981. New Bern's building was built before 1981, in 1974 and 1975. Evidence at the hearing for summary judgment was that the roof began to leak sometime in 1975. New Bern brought suit after 1981 on 15 March 1985. Celotex filed its third-party complaint on 28 April 1986. T. A. Loving contends that the 1963 statute, which, unlike the 1983 statute, bars actions on wanton and willful negligence, governs the actions in Celotex's third-party complaint. We hold that the determination of which statute governs Celotex's third-party complaint depends upon when plaintiff New Bern's cause of action accrued.

For actions between original plaintiffs and defendants, we have held the applicable version of Section 1-50(5) to be that statute in effect when plaintiff's cause of action accrued. *Olympic Products Co. v. Roof Systems, Inc.*, 79 N.C. App. 436, 339 S.E. 2d 432, *disc. rev. denied*, 316 N.C. 553, 344 S.E. 2d 8 (1986); *Starkey v. Cimarron Apartments, Inc.*, 70 N.C. App. 772, 321 S.E. 2d 229 (1984), *disc. rev. denied*, 312 N.C. 798, 325 S.E. 2d 633 (1985).

As explained in II above, the statute applies equally to actions for contribution or indemnification in addition to the original action from which they arise. Celotex contends its cause of action for contribution or indemnification accrued on the date New Bern filed its complaint, 18 March 1985, and the 1981 version governs its cause of action.

The function of a statute of repose is to give a defendant a vested right not to be sued if the plaintiff fails to file within the prescribed period. *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). Section 1-50(5), on its face, gives that right to third-party defendants as well as defendants to an original action. We think it would undermine the function of the statute of repose if a defendant who had a vested right not to be sued by the original plaintiff lost that right in an action for indemnification or contribution by operation of different accrual dates and, thus, different versions of the statute. Therefore,

we hold that the accrual date of the original plaintiff's claim determines which version of the statute of repose is applicable to the defendant's claim for indemnification or contribution against a third party. Thus, if New Bern's cause of action accrued before 1 October 1981, the effective date of the 1981 version, Celotex's third-party complaint is governed by the 1963 version of Section 1-50(5).

A cause of action for physical damage to property accrues when the physical damage becomes "apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C.G.S. Sec. 1-52(16). New Bern's cause of action comes under this statute. *See* N.C.G.S. Sec. 1-50(5)(f); *Condominium Assoc. v. Donald J. Scholz Co.*, 47 N.C. App. 518, 527, 268 S.E. 2d 12, 18, *disc. rev. denied*, 301 N.C. 527, 273 S.E. 2d 454 (1980). Therefore, the date the damage to its building was apparent or ought to have been reasonably apparent is the date New Bern's cause of action accrued.

Evidence that New Bern's roof began leaking in 1975 was uncontradicted at the hearing for summary judgment. Thus, its cause of action for injuries arising from the alleged defects accrued in 1975. That being the case, the version of Section 1-50(5) applicable to Celotex's third-party complaint against T. A. Loving is the 1963 version. Since the 1963 version did not exclude willful and wanton negligence, we do not need to determine whether Celotex alleged willful and wanton negligence.

B

[4] Celotex next contends that the trial court erred by granting T. A. Loving's motion for summary judgment because a genuine issue existed as to when the statute of repose began to run against its claim. N.C.G.S. Sec. 1-50(5) runs not from the date the cause of action accrued but, in the 1963 statute, from the first day "after the performance or furnishing of . . . services or construction." This language, which clearly refers to a defendant's last act or omission, has also been interpreted to mean the date construction was completed. *Condominium Assoc. v. Donald J. Scholz Co.*, 47 N.C. App. 518, 527, 268 S.E. 2d 12, 18, *disc. rev. denied*, 301 N.C. 527, 273 S.E. 2d 454 (1980). We think it means nothing different from the language of the 1981 version in which the statute runs "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." N.C.G.S. Sec. 1-50(5)(a) (1983).

T. A. Loving contends that Celotex's written warranty verifies the building was completed on 18 March 1975 and that it committed no act or omission after that date which gave rise to New Bern's injuries, or if it did, its last act or omission was more than six years before 28 April 1986, the date Celotex filed its third-party complaint. Celotex contends T. A. Loving's last act or omission giving rise to New Bern's injuries was within six years before 28 April 1986, in other words, after 28 April 1980.

Both parties argue from evidence submitted to the trial court at the hearing for summary judgment to support their contentions. The evidence tends to show that T. A. Loving was actively involved in the attempts to repair New Bern's roof through an employee or agent, Cecil Baker, until at least 18 May 1979. The evidence further tends to show that Cecil Baker continued to be actively involved in some manner with the repairs beyond 28 April 1980. However, it does not conclusively show an employee/employer relationship between Baker and T. A. Loving after 18 May 1979. Baker's correspondence concerning the roof is written, up to 18 May 1979, on stationery under the letterhead "T. A. Loving Company." His correspondence after that date is solely on stationery which carries the letterhead "Baker Enterprises." While Celotex did not produce evidence that would conclusively prove Baker was T. A. Loving's agent after 1 April 1980, the burden of proof to show no genuine issue of material fact rests on the movant, T. A. Loving, *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 641, 281 S.E. 2d 36, 40 (1981), and it has not carried that burden. There is a genuine dispute as to whether Baker was acting as T. A. Loving's agent after 28 April 1980.

Since there is a genuine issue of fact as to whether T. A. Loving's last act or omission alleged to give rise to plaintiff's injury occurred within six years of the date Celotex filed its third-party complaint, we cannot determine whether it is barred by the statute of repose. Therefore, summary judgment was inappropriate.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

THE STATE OF NORTH CAROLINA, ON RELATION OF JAMES E. LONG, COMMISSIONER OF INSURANCE OF NORTH CAROLINA v. BEACON INSURANCE COMPANY

No. 8610SC1178

(Filed 1 September 1987)

Insurance § 1— rehabilitation of insolvent insurance company—priority of claims—exclusion of reinsureds

As used in N.C.G.S. § 58-155.15(a)(3), the word "reinsurers" refers to all parties involved in reinsurance transactions, whether as ceding insurers or as assuming insurers. Therefore, the trial court did not err in approving a rehabilitation plan for an insolvent insurer which excluded the claims of "reinsureds" from priority under N.C.G.S. § 58-155.15(a)(3) as "claims for benefits under policies and for losses incurred" and which treated all claims growing out of contracts of reinsurance as claims of general creditors.

APPEAL by intervenors Lancer Insurance Company and Lancer Syndicate, Inc. from *Preston, Judge.* Order entered 24 June 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 1 April 1987.

This appeal arises from a proceeding for the rehabilitation of Beacon Insurance Company (Beacon), an insolvent insurance company organized under the laws of North Carolina. On 20 February 1984, upon petition of the Commissioner of Insurance filed pursuant to provisions of Article 17A of Chapter 58 of the North Carolina General Statutes, and with the consent of Beacon, a Consent Order of Rehabilitation was entered appointing the Commissioner as rehabilitator of Beacon. Subsequently, in October 1984, the Commissioner petitioned for approval of an Interim Plan of Rehabilitation for Beacon. The Interim Plan was approved, including the Commissioner's recommendation with respect to the settlement of pending litigation and the sale of a subsidiary company. The Commissioner was ordered to develop a final plan of rehabilitation as soon as practicable.

In December 1985, a Proposed Plan for Rehabilitation was filed with the court. The Plan contained provisions for, *inter alia,* the payment of claims against Beacon and divided the claimants into five classes. Classes Three and Five are the only classes pertinent to the issue involved in this appeal and were defined by the Plan as follows:

3. Those persons holding a claim or a portion of a claim for benefits under policies issued by Beacon and for losses incurred, including claims of third parties under liability policies issued by Beacon, up to an amount of $300,000.00 per claim, but excluding claims of insurance pools, underwriting associations, *reinsureds or reinsurers*, claims of other insurers for subrogation, and claims of insurers for payments and settlements under uninsured and underinsured motorists coverages, shall be "Class Three Claimants";

. . .

5. General creditors and others who hold claims against Beacon, including claims of insurance pools, underwriting associations, *reinsureds or reinsurers*, the claims of other insurance companies for subrogation, and those portions of claims for benefits under policies and for losses incurred, including claims of third parties under liability policies, in excess of $300,000.00 per claim, and the claims of insurers for payments and settlements under uninsured and underinsured motorists coverages, shall constitute "Class Five Claimants." (Emphasis supplied.)

Lancer Insurance Company and Lancer Syndicate, Inc. (the Lancer companies), insurance companies organized under the laws of the State of New York and having claims against Beacon under contracts of reinsurance, filed objections to the Proposed Plan for Rehabilitation and moved to intervene. As a basis for their objections, the Lancer companies contended that insofar as the Proposed Plan purported to exclude the claims of "reinsureds" from participation as Class Three claimants, it violated G.S. 58-155.15 (a), which establishes the priority to be given claims in the distribution of assets of a domestic insurer in a delinquency proceeding. The trial court entered an order approving the Plan of Rehabilitation, including the classification of claimants as proposed by the rehabilitator. The Lancer companies appealed.

Hunter, Wharton & Howell, by V. Lane Wharton, Jr., for plaintiff-appellee.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Peter M. Foley and Kurt E. Lindquist, II, for intervenors-appellants.

MARTIN, Judge.

The only question presented by this appeal is whether, in the distribution of Beacon's assets, the claims of other insurance companies under reinsurance contracts with Beacon are given a priority by G.S. 58-155.15(a)(3) as "claims for benefits under policies and for losses incurred," or whether such claims are to be treated as claims of general creditors. We must agree with the trial court that claims growing out of contracts of reinsurance with the insolvent insurer are entitled to no higher priority than the claims of general creditors for the purposes of G.S. 58-155.15(a).

In 1947, in order to provide protection for North Carolina policyholders and creditors in the event of the insolvency of an insurer, the North Carolina General Assembly adopted the Uniform Insurers Liquidation Act, G.S. 58-155.10 to 58-155.17. *See Ingram, Comr. of Insurance v. Reserve Insurance Co.*, 303 N.C. 623, 281 S.E. 2d 16 (1981). The Uniform Act, however, did not generally provide for priorities in the payment of claims against the insolvent insurer from its general assets. *See* G.S. 58-155.15 (1982). In 1985, the General Assembly amended G.S. 58-155.15(a) to provide for a priority in which claims will be paid from the assets of an insolvent insurer. G.S. 58-155(a) (1985 Cum. Supp.) provides:

§ 58-155.15. Priority of certain claims.

(a) The following priority of claims in the distribution of the assets of an insurer domiciled in this State is established:

(1) Claims for cost of administration and conservation of assets of the insurer.

(2) Compensation actually owing to employees other than officers of the insurer for services rendered within three months prior to the commencement of a delinquency proceeding against the insurer under this Article, but not exceeding one thousand dollars ($1,000) for each employee. In the discretion of the Commissioner, this compensation may be paid as soon as practicable after the proceeding has been commenced. This priority is in lieu of any other similar priority that may be authorized by law as to wages or compensation of those employees.

(3) Claims or portions of claims for benefits under policies and for losses incurred, including claims of third parties under liability policies, up to an amount of three hundred thousand dollars ($300,000) per claim; but excluding claims of insurance pools, underwriting associations, or reinsurers, claims of other insurers for subrogation, and claims of insurers for payments and settlements under uninsured and underinsured motorists coverages.

(4) Claims for unearned premiums.

(5) Claims of general creditors, including claims of insurance pools, underwriting associations, or reinsurers; claims of other insurers for subrogation; those portions of claims for benefits under policies and for losses incurred, including claims of third parties under liability policies, in excess of three hundred thousand dollars ($300,000) per claim; and claims of insurers for payments and settlements under uninsured and underinsured motorist coverages.

The amendment was ratified on 27 February 1985 and made effective upon ratification. 1985 Sess. Laws, c. 10. All parties agree that G.S. 58-155.15(a), as amended in 1985, applies to this case.

A contract of reinsurance is "a contract whereby one insurer for a consideration agrees to indemnify another insurer, either in whole or in part, against loss or liability, the risk of which the latter has assumed under a separate and distinct contract as insurer of a third party." 1 Couch, *Insurance 2d*, § 1.95, p. 266. Defining "reinsurers" as those insurers assuming risks ceded to them by Beacon, and "reinsureds" as those original insurers who sought indemnity by ceding to Beacon all or part of the risks against which they had insured third parties, the Lancer companies argue that the trial court erred by approving the Plan for Rehabilitation which excluded "reinsureds" as well as "reinsurers" from participation as Class Three claimants in the distribution of Beacon's assets. They contend that G.S. 58-155.15(a)(3) is clear, unambiguous and specific in excluding certain claims from the priority status which it creates, evidencing a legislative intent that only those claims be excluded. Since claims of "reinsurers" are specifically excluded by the statute, but claims of "reinsureds" are not,

appellants reason that claims of "reinsureds" should be accorded Class Three status. Our analysis of G.S. 58-155.15(a)(3) convinces us, however, that the legislature did not intend, by its use of the word "reinsurers," to describe only those insurers to whom a risk is ceded by reinsurance. Instead, we conclude that the General Assembly intended the word "reinsurers" as a comprehensive term, referring to all parties involved in reinsurance transactions, whether as ceding insurers or as assuming insurers.

The controlling principle of statutory construction is that the statute be given the meaning intended by the legislature in enacting it. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1, 25 A.L.R. 3d 1114 (1968). Where words are used which may have more than one meaning, they are to be given that meaning which will give effect to the purpose of the statute. *Fortune v. Commissioners*, 140 N.C. 322, 52 S.E. 950 (1905). None of the provisions of a statute are to be deemed useless if they can reasonably be considered as adding something to the statute which is consistent with its purpose. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972).

Only those claimants having a claim "for benefits under policies and for losses incurred" are included in the class of claimants given a priority status by G.S. 58-155.15(a)(3). After establishing the foregoing requirement for inclusion in the class, the statute specifically excludes such claims for benefits under policies where the claims are made by "reinsurers." If "reinsurers" is construed to mean only those insurers to whom risks have been ceded, however, the exclusion becomes meaningless because, under such a definition, the only claim a reinsurer might ever have against an insolvent insurer would be to recover unpaid premiums. A reinsuring company would have no claim for benefits under a policy issued by the insolvent. We should avoid, if possible, a construction which renders the exclusion meaningless. *State v. Harvey, supra.*

If "reinsurers," as used in G.S. 58-155.15(a)(3) is accorded the comprehensive meaning which we believe the General Assembly intended it to have, the result would be the exclusion of all participants, in a reinsurance agreement from sharing the same priority status in the payment of claims against an insolvent insurer as the insurer's direct policyholders. Such a result would, in our view, be consistent with the broad public policy considera-

tions evident in statutes regulating the insurance industry. The primary purpose of such regulatory laws is protection of the insuring public, requiring that the statutes be liberally construed to achieve that purpose. *State v. Arlington*, 157 N.C. 640, 73 S.E. 122 (1911); 19 Appleman, *Insurance Law and Practice*, § 10324. Statutory regulation of the insurance industry is of vital importance to the consumer, who must rely upon the industry for protection, and yet who clearly does not have equal knowledge or resources at his disposal in his dealings with the business of insurance. *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 58 L.Ed. 1011, 34 S.Ct. 612 (1914).

The public policy considerations favoring protection of policyholders are not as applicable, however, to the business of reinsurance. Unlike transactions between insurers and consumers, insurers who negotiate and enter into reinsurance contracts do so from a substantially more equal bargaining position. Just as there is a reduced need for protection, there is a coextensive reduction in regulation. *See, e.g.*, G.S. 58-54.21(2) (company not required to obtain certificate of authority to transact reinsurance business); G.S. 58-188 (no deposit required of fire insurance company licensed only for reinsurance business); G.S. 58-366(a) (Readable Insurance Policies Act, G.S. 58-364-372, applies only to policies of direct insurance); G.S. 58-131.36 (reinsurance excluded from insurance rates regulation). In light of the reduced protection which the General Assembly has provided for, and the reduced regulation which it has imposed upon, insurers engaged in ceding and assuming risks through the business of reinsurance, we believe it unlikely that the General Assembly intended, in the event of the insolvency of an insurer, that other insurers, who had ceded risks to the insolvent insurer through reinsurance agreements would be treated on a par with those who have claims under policies issued directly by the insolvent insurer.

An interpretation of "reinsurers" as inclusive of all parties to a reinsurance agreement would also be harmonious with other provisions of G.S. 58-155.15(a)(3) that exclude the claims of insurance pools and underwriting associations and the subrogation claims of other insurers from Class Three priority status. Each of these entities could be expected to have a claim "for benefits under policies" of insurance issued by the insolvent insurer, arising through equitable or contractual rights of subrogation or by

reason of loss on a policy issued by the insolvent insurer through a risk sharing plan where the involvent insurer is unable to pay its proportionate share of the loss. All of these claims, however, are excluded from the priority status described by subsection (a)(3), consistent with an intent by the General Assembly that claims by direct policyholders of the insolvent insurer be paid before the claims of other insurers.

We are further of the opinion that had the General Assembly intended to exclude from the priority created by G.S. 58-155.15(a)(3) only those insurers to whom risks are ceded through a contract of reinsurance, rather than all parties to a reinsurance agreement, it would have specifically so provided. The legislature is always presumed to have acted with care and deliberation. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). Where it has been necessary to distinguish between the specific parties to a reinsurance contract, the General Assembly has, in other statutes, used specific terms such as "ceding insurer," "assuming insurer," or "reinsuring company." *See, e.g.*, G.S. 58-72.1, -72.2, -72.3 (1985 Cum. Supp.); G.S. 58-155.1(b) (1985 Cum. Supp.).

Finally, our conclusion that "reinsurers" was intended by the legislature as a comprehensive term, including all parties to a contract of reinsurance, is reinforced by the provisions of 1987 Sess. Laws, c. 864, enacted 14 August 1987. The legislation is entitled "An Act To Make Technical Corrections To The Insurance Law And To Assist Insureds In Replacing Coverage From Insolvent Insurance Companies" and provides, in Section 18, that: "G.S. 58-155.15(a)(3) and G.S. 58-155.15(a)(5) are each amended by substituting 'those arising out of reinsurance agreements' for 'reinsurers.'" The amendment implicitly acknowledges that the word "reinsurers" was inaptly used in the original enactment of the statute and expresses an unequivocal legislative intent that all claims arising out of contracts of reinsurance are to be excluded from the priority created by G.S. 58-155(a)(3) and are to be treated the same as claims of general creditors pursuant to G.S. 58-155(a)(5).

The order approving the Plan of Rehabilitation for Beacon Insurance Company is affirmed.

Affirmed.

Judges ARNOLD and GREENE concur.

ROBY CLAY LEONARD v. DOROTHY LEONARD DILLARD

No. 8722SC49

(Filed 1 September 1987)

1. **Rules of Civil Procedure § 56— construction of will—summary judgment appropriate**

The trial court properly concluded that summary judgment was appropriate in an action to construe a will where the parties placed nothing before the court to prove the intention of the testators other than the will itself.

2. **Wills § 34— devise of property—gift over—devise in fee simple**

Language in a will providing that any portion of devised real estate owned by the devisee at her death should descend to her children did not limit the devisee to a life estate because there was an unrestricted devise of both real and personal property together with an unlimited power of disposition.

3. **Wills § 34— devise of real property—fee simple rather than life estate**

Language in a will which gave the devisee full power to sell or convey devised real estate without any regard whatever for her husband did not manifest the intention to avoid the common law rule of curtesy by the creation of a life estate where the testators clearly knew the meaning of the term "life estate," having used it elsewhere in the will, and would have used "life estate" had they wished to avoid the operation of curtesy by granting a life estate.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 10 September 1986 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 13 May 1987.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker for plaintiff-appellant.

Brinkley, Walser, McGirt, Miller & Smith, by Charles H. McGirt and Stephen W. Coles, for defendant-appellee.

GREENE, Judge.

Plaintiff, Roby Leonard, brought this action seeking a declaratory judgment, under N.C.G.S. Sec. 1-253 *et seq.*, determining

the proper construction of a will. Plaintiff is the brother of defendant, Dorothy Dillard. The will in dispute is the joint will of their maternal grandparents, Henry and Jane Sink. The clauses of the will pertinent to this dispute are:

> 2. It is the specific bequest of each of us, that the survivor, after the death of one of us, shall take all the property of whichever may die first, whether it be personal or real, and that the said survivor shall have a life estate in the realty of the first to die and that as to the personal property of whatever nature or kind it may be, the said survivor shall have full power to dispose of the same in a manner he or she may desire and for his or her own benefit and interet (sic).
>
> 3. That at the death of the last testator, we will devise and bequeath to our daughter Zella May Sink-Leonard all of the property possessed by us, of whatever nature or kind it may be, with full power to sell or convey, the same in any manner or form, and for any purpose she may desire, *without any regard whatever* for her husband, H. C. Leonard: PROVIDED, that if she own the property or any part thereof at her death, the same shall descend to the children born of her body, or the heirs of such children.

Plaintiff and defendant are Zella May Sink-Leonard's only children. She died in 1982, predeceased by both her parents and her husband. An 18.6 acre tract of land, bequeathed to her by her parents via the will in controversy, was in her estate at the time of her death. She left a holographic will purporting to devise that tract to defendant, Dorothy Dillard, stating, "I leave that to her for I have already given my son 18 acres of land and three thousand of dollar (sic) and have not given my daughter, Dorothy Mae Dillard anything as yet."

Plaintiff alleged his grandparents bequeathed his mother a life estate in their property with the power of disposition, the remainder to go to his mother's children in fee simple. Therefore, plaintiff alleged, his mother's bequest to defendant in the holographic will was invalid. Defendant alleged the will gave her mother fee simple title in the property.

Prior to trial, plaintiff moved for summary judgment. The trial court determined there was no genuine issue of material

fact, concluded the Sink will gave Zella May Sink-Leonard a fee simple in her parents' real property and granted summary judgment for defendant. Plaintiff appeals.

[1] 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 judgment as a matter of law." N.C.G.S. Sec. 1A-1, Rule 56(c). "Summary judgment in favor of the non-movant is appropriate when the evidence presented demonstrates that no material issues of fact are in dispute, and the non-movant is entitled to entry of judgment as a matter of law." *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E. 2d 444, 447-48 (1979).

The cardinal rule in the construction and interpretation of wills is the intent of the testator.

> The intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will, as viewed, in the case of ambiguity, in light of the situation of the testator and the circumstances surrounding him at the time it was executed, although technical words are not used; or, as is sometimes said, the testator's intention must be ascertained from the four corners of the will.

Carroll v. Herring, 180 N.C. 369, 373, 104 S.E. 892, 894 (1920). "Two wills of exactly the same wording may be differently construed by reason of the different circumstances surrounding the testator at the time he made the will . . . ." *Morris v. Morris*, 246 N.C. 314, 316, 98 S.E. 2d 298, 300 (1957). However, here, the parties placed nothing before the court to prove the intention of the testators other than the will itself. They dispute the interpretation of the will's language which is a question of law. *Lee v. Barksdale*, 83 N.C. App. 368, 375, 350 S.E. 2d 508, 513 (1986), *disc. rev. denied*, 319 N.C. 404, 354 S.E. 2d 714 (1987); *Wachovia Bank & Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E. 2d 246, 250 (1956) ("The authority and responsibility to interpret or construe a will rest solely on the court."). Thus, the trial court's conclusion that there was no genuine issue of material fact was correct and summary judgment was appropriate. *Accord, Wachovia Bank & Trust Co. v. Livengood*, 306 N.C. 550, 294 S.E. 2d 319 (1982).

Plaintiff contends summary judgment should have been granted in his favor. The issue before us is whether the Sinks bequeathed Zella May Sink-Leonard real property in fee simple or some lesser estate. We hold that the bequest was in fee simple.

N.C.G.S. Sec. 31-38 creates the presumption that any devise of property is a devise in fee simple. N.C.G.S. Sec. 31-38 (Dec. 1984); *YWCA v. Morgan*, 281 N.C. 485, 490, 189 S.E. 2d 169, 172 (1972). The presumption is overcome only by the plain or express words of the will or where the will plainly reflects the testator's intention to convey a lesser estate. N.C.G.S. Sec. 31-38; *Adcock v. Perry*, 305 N.C. 625, 631, 290 S.E. 2d 608, 612 (1982). There are no express words in the will which would convey a lesser estate to Zella May Sink-Leonard. Plaintiff contends the presumption of fee simple is overcome by the plain reflection in the will of the Sinks' intention to convey a life estate.

I

[2] Plaintiff first contends the language found in the will's third paragraph "PROVIDED, that if she own the property or any part thereof at her death, the same shall descend to the children born of her body, or the heirs of such children" shows the testator's plain intention to convey a life estate to Zella May Sink-Leonard. We do not agree.

Rules of construction aid the court in determining the intention of the testator. *Carroll v. Herring*, 180 N.C. 369, 104 S.E. 892 (1920). The rule of construction most applicable to the will before us is stated in *Quickel v. Quickel*, 261 N.C. 696, 698, 136 S.E. 2d 52, 54 (1964):

> [A]n unrestricted or general devise of real property, to which is affixed, either specifically or by implication, an unlimited power of disposition in the first taker, conveys the fee and a subsequent clause . . . purporting to dispose of what remains at his death is not allowed to defeat the devise or limit it to a life estate.

The devise to Zella May Sink-Leonard is an unrestricted devise of both real and personal property together with an unlimited power of disposition. Therefore, by application of this rule of construction, the Sinks devised their real property to Zella May Sink-Leonard in fee simple and the gift over to her children does not

limit that devise to a life estate. Of course, "this rule, as well as all rules of construction, must yield to the paramount intent of the testator as gathered from the four corners of the will." *Taylor v. Taylor*, 228 N.C. 275, 277, 45 S.E. 2d 368, 369 (1947).

II

[3] Plaintiff contends the language giving Zella May Sink-Leonard "full power to sell or convey . . . *without any regard whatever* for her husband," manifests the testators' intent to avoid the common law rule of curtesy that existed when they executed the will in 1923. By operation of curtesy, Zella May's husband might have had a life estate in the real property if Zella May had held it in fee simple because a fee simple estate is an inheritable freehold estate. *See* P. Hetrick, Webster's Real Estate Law in North Carolina, sec. 49(d) at 60 (revised ed. 1981). Plaintiff contends that, together with the gift over to Zella May's children after her death, the language quoted immediately above manifests the testators' intent to give their daughter a life estate because a life estate is not an inheritable freehold estate and therefore not subject to the operation of curtesy. We do not agree.

Testators are presumed to know the law in existence at the time they execute their will. *Whitfield v. Garris*, 134 N.C. 24, 28, 45 S.E. 904, 905 (1903). Therefore, the Sinks are presumed to know that a life estate would defeat the operation of curtesy. The Sinks clearly knew the meaning of the term "life estate" as they used that term in the second paragraph of their will. Had they wished to avoid the operation of curtesy by granting a life estate, they would have used the term "life estate." Their expression vesting their daughter with the power to convey the property without regard for her husband is more likely a mere expression of their desire that she not turn control of the property over to her husband after their death than an attempt to create a life estate to avoid the operation of curtesy.

III

There being neither express words to convey a life estate nor a plain intention in the will that plaintiff's maternal grandparents intended to convey Zella May Sink-Leonard a life estate, the presumption that the devise was in fee simple is unrebutted and the trial court's construction of the will is without error.

Affirmed.

Judges PHILLIPS and COZORT concur.

EDDIE SUMNER BUCHANAN v. HUNTER DOUGLAS, INC., AND ALUMARK CORPORATION, FORMERLY KNOWN AS HUNTER BUILDING PRODUCTS, INC.

No. 879SC5

(Filed 1 September 1987)

Statutes § 11; Actions § 12— repeal of statute—simultaneous passage of new act—survival of action

The trial court erred by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff on 12 March 1985 alleged under Chapter 168 of the North Carolina General Statutes that he had been laid off and not recalled because of his handicap; plaintiff entered a voluntary dismissal without prejudice on 26 August 1985; N.C.G.S. § 168-6 was repealed on 10 October 1985 and Chapter 168A was simultaneously made effective; and plaintiff reinitiated his cause of action against defendants under N.C.G.S. § 168-6 on 21 March 1986. The complaint was sufficient to put defendants on notice of the events or transactions which produced the claim and, even though the General Assembly did not include a savings clause in the repeal of N.C.G.S. § 168-6, the same remedy was immediately available for the same injury in the new act without any intervening period in which plaintiff's claim was without legal redress.

APPEAL by plaintiff from *Johnson, Judge.* Order entered 6 October 1986 in Superior Court, PERSON County. Heard in the Court of Appeals 13 May 1987.

Ronnie P. King for plaintiff appellant.

Maupin, Taylor, Ellis & Adams by James A. Roberts, III, and Thomas A. Farr for defendant appellees.

COZORT, Judge.

The plaintiff appellant, Eddie Sumner Buchanan, alleges in his complaint that due to circumstances surrounding his birth, he is physically handicapped with symptoms that resemble cerebral palsy. Mr. Buchanan was hired by the defendant, Hunter Douglas, Inc., on 19 February 1968. He worked for the defendant in various employment positions until 15 March 1984, at which time the

employment relation between the plaintiff and the defendant was terminated. The plaintiff alleges that he was laid off and not recalled because of his handicap; the defendant counters that the plaintiff was not laid off, but was "discharged by Hunter Douglas as part of a general reduction of force." The plaintiff filed a civil suit on 12 March 1985 against the defendant pursuant to the provisions of Chapter 168 of the North Carolina General Statutes. On 26 August 1985, the plaintiff entered a voluntary dismissal without prejudice.

On 21 March 1986, the plaintiff reinitiated his cause of action against the defendants as authorized by Rule 41(c)(1) of the North Carolina Rules of Civil Procedure. Each of the five claims for relief in this latest complaint are based on N.C.G.S. § 168-6. This statute, however, was repealed by the North Carolina General Assembly on 1 October 1985, which was, as is evident from the foregoing, after this action was first brought and voluntarily dismissed, but before the time allowed to refile by Rule 41 of the North Carolina Rules of Civil Procedure had expired.

The defendants moved the trial court to dismiss the suit on the authority of Rule 12(b)(6), arguing that the repeal of N.C.G.S. § 168-6 by the North Carolina General Assembly, without a saving clause that would allow plaintiff's action to survive, extinguished the plaintiff's ability to pursue the relief he now seeks. The trial court granted the defendant's motion, and this case was dismissed as failing to state a claim upon which relief could be granted. We disagree and remand this case for trial.

Prior to its repeal by Session Laws 1985, c. 714, s. 1, effective 1 October 1985, N.C.G.S. § 168-6 read as follows:

> Handicapped persons shall be employed in the State service, the service of the political subdivisions of the State, in the public schools, and in all other employment, both public and private, on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved.

Although it is unquestioned that this statute was repealed, simultaneous with that repeal, the North Carolina General Assembly made effective 1 October 1985, Chapter 168A, entitled the Handicapped Persons Protection Act. N.C.G.S. § 168A-1, et seq. The

stated purpose of that Act was to legislatively encourage participation by handicapped persons in our State's work force and to prohibit any discriminatory practices by individuals within the section's statutory definition. N.C.G.S. § 168A-2.

Any handicapped person that is aggrieved by a discriminatory practice prohibited by the act is therein authorized to bring a civil action to "enforce rights granted or protected by this Chapter." N.C.G.S. § 168A-11(a). Under this new law, it is a discriminatory practice when

> [a]n employer fail[s] to hire or consider for employment or promotion, to discharge, or otherwise to discriminate against a qualified handicapped person on the basis of a handicapping condition with respect to compensation or the terms, conditions, or privileges of employment.

N.C.G.S. § 168A-5(a)(1).

The defendants argue that before a cause of action can survive the repeal of the statute upon which that action is based, "there must be a saving clause in the repealing act or a general saving statute applicable to all cases." *In re Incorporation of Indian Hills*, 280 N.C. 659, 664, 186 S.E. 2d 909, 912 (1972). They contend further that "[w]hen statutes providing a particular remedy are unconditionally repealed the remedy is gone." *Spooner's Creek Land Corporation v. Styron*, 276 N.C. 494, 496, 172 S.E. 2d 54, 55 (1970). The appellees conclude their argument with the contention that the Legislature's repeal of § 168-6 did not include a "saving clause," and the plaintiff's complaint thus did in fact fail to state a claim upon which relief could be granted. This argument, although certainly valid in certain circumstances, is not applicable to the facts of this case.

According to N.C.G.S. § 1A-1, Rule 8, a pleading shall contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief . . . ." N.C.G.S. § 1A-1, Rule 8(a)(1). If a plaintiff's claim is mislabeled in his complaint, that fact will not, in and of itself, prove fatal to the action if critical facts are sufficiently pled in the body of the complaint that will give the adverse party notice of the assertions against him.

> The requirements of N.C.R. Civ. P. 8(a) are met when a pleading "gives sufficient notice of the events, or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial." *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E. 2d 161, 164 (1970). We note also that N.C.R. Civ. P. 54(c) requires that every final judgment, with the exception of judgments rendered by default, "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Thus when the allegations in the complaint give sufficient notice of the wrong complained of an incorrect choice of legal theory should not result in dismissal of the claim *if the allegations are sufficient to state a claim under some legal theory.*

Stanback v. Stanback, 297 N.C. 181, 201-02, 254 S.E. 2d 611, 624-25 (1979) (emphasis added). The court in *Stanback* cautioned that "[i]n order to survive a motion to dismiss, however, the allegations of a mislabeled claim must reveal that plaintiff has properly stated a claim under a different legal theory." *Id.* at 202, 254 S.E. 2d at 625.

First, it is clear that the complaint was sufficient to put the defendants on notice of the events or transactions which produced this claim. Second, even though the General Assembly did not include a saving clause in the repeal of § 168-6, the same remedy was immediately available to the plaintiff for the same injury in the new act, without any intervening period in which this plaintiff's claim was without legal redress. *See Indian Hills*, 280 N.C. at 662-64, 186 S.E. 2d at 911-12. It would be a grave injustice for this Court to foreclose the remedy of plaintiff and other similarly situated persons when the North Carolina General Assembly so clearly did not intend this particular cause of action to expire.

In light of the foregoing, we hold that plaintiff is, on the issue presented by these pleadings, entitled to his day in court. Although the statutory designation of the remedy sought has changed since this action was originally filed, it has never ceased to exist.

We therefore reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges PHILLIPS and GREENE concur.

LILLIAN B. LEDFORD AND JOHN B. LEDFORD v. ROSEMARY M. MARTIN, EXECUTRIX FOR THE ESTATE OF DONION R. MARTIN

No. 8717SC33

(Filed 1 September 1987)

1. **Death § 3— wrongful death of stillborn child**

An action could properly be maintained for the wrongful death of a stillborn child.

2. **Death § 3.2— wrongful death of fetus—right to bring action—amendment of complaint**

A claim for the wrongful death of a fetus should not be dismissed because it was not brought by the personal representative of the deceased where the failure to bring the action in the name of the estate administrator was due to the unwillingness of the clerk of court to issue letters of administration for the estate of a fetus. Upon remand, the clerk should appoint an administrator to bring the action, and plaintiffs should be allowed to amend their complaint to substitute the proper party. N.C.G.S. § 28A-18-2(a); N.C.G.S. § 1A-1, Rule 15(a).

3. **Physicians, Surgeons and Allied Professions § 17— negligence in obstetrical care—statement of claim for relief**

A complaint was sufficient to state a claim for negligent obstetrical care of a mother and her baby where it alleged that the death of the mother's stillborn child was the proximate result of defendant physician's failure properly to treat the mother's hypertension, his failure to advise the mother of ways to control her hypertension, his misinterpretation of non-stress tests, and his failure to order more complete tests to ascertain the cause of the mother's extreme abdominal pain.

4. **Damages § 3.4— mental anguish—statement of claim for relief**

Abdominal pain and surgery undergone by the mother of a stillborn child constituted the "physical injury" required to support a claim for negligent infliction of mental suffering, and the mother's complaint stated a claim for mental anguish from defendant obstetrician's negligence in the death of the stillborn child.

Ledford v. Martin

APPEAL by plaintiffs from *Morgan, Judge*. Order entered 25 August 1986 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 2 June 1987.

Plaintiffs filed this action on 28 March 1986 alleging that the negligence of defendant Donion R. Martin, M.D., and Annie Penn Memorial Hospital, caused plaintiffs' baby to be stillborn. Plaintiffs seek recovery for the wrongful death of the stillborn child, the pain and suffering of the plaintiff-wife and the loss of his wife's consortium for plaintiff-husband.

Defendants each filed a general denial and made a motion to dismiss the causes of action pursuant to G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. Subsequently, plaintiffs voluntarily dismissed their claims against the hospital. Defendant Donion Martin died and his wife, as executrix of his estate was substituted as defendant.

The trial court granted the motion to dismiss all of plaintiffs' claims against defendant. Plaintiffs appealed. Prior to the docketing of the appeal in this Court, plaintiff John B. Ledford died. His wife, as executrix of his estate, has been substituted as a plaintiff pursuant to Rule 38(a) of the North Carolina Rules of Appellate Procedure.

Maxwell, Freeman and Beason, P.A., by James B. Maxwell, for plaintiffs-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by Samuel G. Thompson and William H. Moss, for defendant-appellee.

PARKER, Judge.

[1] The disposition of plaintiffs' appeal on their cause of action for the wrongful death of their stillborn child is controlled by the decision of our Supreme Court in *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E. 2d 489 (1987). Accordingly, we reverse the decision of the trial court as to that claim.

[2] Defendant contends that the cause of action for the wrongful death of the fetus should still be dismissed as it was not brought by the personal representative of the deceased as required by G.S. 28A-18-2(a). *See Young v. Marshburn*, 10 N.C. App. 729, 180

S.E. 2d 43, *cert. denied*, 278 N.C. 703, 181 S.E. 2d 603 (1971). However, the failure to bring this action in the name of the administrator of the estate was apparently due to the unwillingness of the clerk of court of Rockingham County to issue letters of administration for a fetus's "estate." The existence of a cause of action for wrongful death is sufficient for the appointment of an administrator, *Vance v. Southern R.R.*, 138 N.C. 460, 50 S.E. 860 (1905), and as the Supreme Court expressly recognized in *DiDonato, supra*, that a wrongful death action exists for a viable fetus, the clerk should now appoint an administrator to bring the action. Plaintiffs should then be allowed to amend their complaint to substitute the proper party. G.S. 1A-1, Rule 15(a). *See McNamara v. Kerr-McGee Chemical Corp.*, 328 F. Supp. 1058 (E.D.N.C. 1971).

Plaintiffs also brought claims for the physical, mental and emotional injuries suffered by Ms. Ledford and for the loss of his wife's consortium suffered by Mr. Ledford. Both of these claims were also dismissed by the trial court. For the purposes of ruling on a motion to dismiss a complaint under Rule 12(b)(6), the allegations of the complaint are taken as true. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). A complaint should not be dismissed for failure to state a claim unless " '*it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' " *Id.* at 185, 254 S.E. 2d at 615 (emphasis in original) (quoting 2A *Moore's Federal Practice*, § 12.08 (2d ed. 1975)). When so viewed, the complaint in this case adequately sets forth a cause of action for both plaintiffs.

Taken as true, the complaint alleges the following facts: Ms. Ledford suffered from hypertension, a known risk factor in causing growth retardation in fetuses. Ms. Ledford became pregnant for the first time at age thirty-seven and chose Dr. Donion R. Martin as her obstetrician. Dr. Martin was aware of plaintiff's hypertension but did nothing to warn plaintiff of the risks it posed to her baby; nor did he properly treat the hypertension or advise Ms. Ledford on ways to control it. In mid-March 1984, approximately seven months into her pregnancy, Ms. Ledford began experiencing severe abdominal pain. The pain was so severe that plaintiff went to the emergency room at Annie Penn Memorial Hospital. The nurse at the hospital contacted Dr. Martin, who ordered a non-stress test for plaintiff. The results of the test were

relayed to Dr. Martin who misinterpreted the results and ordered that Ms. Ledford simply be sent home with medication for the pain.

Plaintiff continued to experience severe abdominal pain. On account of this pain, Ms. Ledford saw Dr. Martin on at least two more occasions. Dr. Martin performed another non-stress test in his office on 30 March which he also misinterpreted and dismissed plaintiff's complaints as being due to nervousness. No other tests were performed. On 2 April, Ms. Ledford contacted Dr. Martin and told him that she no longer felt any fetal movement. Only then were more tests ordered, both in Dr. Martin's office and in the hospital. These tests confirmed that the approximately thirty-four week old fetus was dead. On that same day, plaintiff underwent surgery to remove the fetus from her body.

[3] The complaint alleges that the death of the stillborn child was the proximate result of defendant's negligence in failing to properly treat Ms. Ledford's hypertension, his failure to properly advise her of ways to control her hypertension, his misreading of the non-stress tests, and his failure to order more complete tests to ascertain the cause of plaintiff's episodes of extreme abdominal pain. These allegations are clearly sufficient to make out a claim for the negligent obstetrical care of Ms. Ledford and her baby by Dr. Martin.

When an obstetrician agrees to take on a pregnant woman as a patient, he actually acquires two patients: mother and baby. In *DiDonato, supra*, the Supreme Court concluded that the estate of the stillborn baby may pursue a cause of action for the injuries suffered by the fetus caused by negligence in the administering of obstetrical care. The mother, too, has suffered injury. In this case, Ms. Ledford suffered severe abdominal pain which went untreated; she had to undergo the extremely heart-rending experience of having her dead child surgically removed from her body; and she has endured immeasurable emotional and mental anguish.

[4] Appellee argues that Ms. Ledford should not be allowed any recovery for emotional distress as, in North Carolina, parents may not recover for the pain, suffering or mental anguish caused to the parent as a result of their child's injury or death. *See generally* Byrd, *Recovery for Mental Anguish*, 58 N.C.L. Rev. 435 (1980). However, the rationale for this rule is that such mental

suffering is too remote and unforeseeable to justify a conclusion that defendant's negligent conduct was the proximate cause of the mental anguish. *See Williamson v. Bennett*, 251 N.C. 498, 503, 112 S.E. 2d 48, 52 (1960). In this case, on the other hand, the mental suffering of Ms. Ledford is clearly a foreseeable consequence of negligent obstetrical care. A fetus is connected to its mother in the most intimate of ways. Further, Ms. Ledford's mental suffering is not remote as she suffered physical injury in enduring severe abdominal pain and in having to undergo surgery. This abdominal pain and the surgery are sufficient to constitute the "physical injury" required to support a claim for the negligent infliction of mental suffering. *See Woodell v. Pinehurst Surgical Clinic, P.A.*, 78 N.C. App. 230, 336 S.E. 2d 716 (1985), *aff'd per curiam*, 316 N.C. 550, 342 S.E. 2d 523 (1986). We conclude that plaintiffs' complaint, taken as true, sets forth facts sufficient to support a claim for mental anguish suffered by Ms. Ledford as a proximate result of Dr. Martin's negligent obstetrical care. *See DiDonato*, 320 N.C. at 432, 358 S.E. 2d at 494 n.3.

Additionally, as Ms. Ledford has adequately stated a claim for relief, it follows that Mr. Ledford has an actionable claim for loss of consortium. Loss of consortium damages are recognized in this State as ancillary to a claim for personal injury brought by the spouse of the person seeking loss of consortium damages. *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E. 2d 818 (1980).

The decision of the trial court is reversed in its entirety. Plaintiffs are to be afforded an opportunity to amend their complaint, pursuant to Rule 15 of the Rules of Civil Procedure, to bring the action for the wrongful death in the name of the personal representative of the estate.

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

BARBARA SAPP BEROTH v. THORNTON J. BEROTH

No. 8621DC1269

(Filed 1 September 1987)

1. **Divorce and Alimony § 30— quitclaim deeds before separation—marital property**

The trial court did not err by determining that quitclaim deeds executed by plaintiff wife in favor of defendant husband approximately one year before the separation were not gift deeds, that they represented properties acquired by the husband during the course of the marriage, and that they were therefore marital property.

2. **Divorce and Alimony § 30— quitclaim deeds—evidence and findings as to wife's knowledge of what she was signing—no error**

There was no error in an equitable distribution action from the trial court's receiving evidence and making findings as to plaintiff wife's lack of knowledge about what she was signing when quitclaim deeds were executed before the separation because the evidence was not objected to and was immaterial in any event.

3. **Divorce and Alimony § 30— equitable distribution—failure to credit husband with reducing marital debt—no error**

The trial court did not err in an equitable distribution proceeding by not crediting the husband with reducing the marital debt during the years of separation where the evidence was not clear as to who incurred the debt or how it was reduced. Furthermore, the court had found that an equal distribution was equitable and was not required to make findings of fact regarding liabilities and the other factors listed in N.C.G.S. § 50-20(c).

APPEAL by defendant from *Keiger, Judge.* Judgment entered 7 July 1986 in District Court, FORSYTH County. Heard in the Court of Appeals 8 June 1987.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, Barbara C. Westmoreland, and Robin S. Boden, for plaintiff appellee.

David B. Hough for defendant appellant.

PHILLIPS, Judge.

[1] Plaintiff and defendant married in 1957 and permanently separated in March, 1979. This action for divorce and equitable distribution was brought in May, 1983, and the divorce was granted on 14 August 1985. That same day, in anticipation of the final

equitable distribution award, a hearing was held on the effect of six quitclaim deeds that plaintiff executed in favor of the defendant approximately one year before they separated. Each of the quitclaims covered a tract of land formerly owned by the parties as tenants by the entirety and each stated that its purpose was to dissolve the entirety estate that theretofore existed. Following that hearing Judge Keiger determined that the quitclaim deeds were not gift deeds, that they represented properties acquired by the husband during the course of the marriage, and were therefore marital property under the provisions of G.S. 50-20(b)(1). At the later hearing on plaintiff's motion for equitable distribution Judge Keiger adopted his earlier findings of fact and conclusions of law, found that an equal division of the marital property was equitable, and entered a distributive order accordingly. In appealing defendant's primary contention is that the properties covered by the quitclaim deeds are not marital property because the tenancy by entirety that formerly existed was dissolved by the quitclaims. The contention is a *non sequitur*. Though the conveyances did dissolve the tenancy by the entirety in the parcels of land and vested title thereto solely in defendant, as G.S. 39-13.3(c) provides, he nevertheless acquired title to the property thereunder, not by gift, but during the course of the marriage and before the parties separated, and property so acquired, so the General Assembly has declared, is *ipso facto* marital property. G.S. 50-20(b)(1)(2); *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982). Thus, contrary to defendant's contention, dissolving the tenancy by entirety did not remove the property involved from the ambit of the Equitable Distribution Act and the trial judge did not err in finding and concluding otherwise. *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E. 2d 97 (1984) and *McArthur v. McArthur*, 68 N.C. App. 484, 315 S.E. 2d 344 (1984), relied upon by defendant, are irrelevant to this case; because each of those decisions turned upon the terms of a valid separation agreement that fully disposed of the property rights of the parties involved, whereas, in this case the tenancy by the entirety was dissolved and defendant became the sole title holder of the property unaccompanied by any agreement settling the parties' property rights. Nor are the circumstances of this case controlled by G.S. 52-10, which concerns contracts and releases between husband and wife, and there is a profound distinction between a conveyance and a contract or release.

[2] Defendant also contends, in essence, that the trial judge erred by receiving evidence about and making findings of fact as to plaintiff's lack of knowledge about what she was signing when the quitclaim deeds were executed. This evidence was not objected to and was immaterial in any event; for plaintiff did not plead fraud or seek to invalidate the instruments on the grounds that she did not understand their import or know what they contained, *Sisson v. Royster*, 228 N.C. 298, 45 S.E. 2d 351 (1947), and the thrust of the court's findings was that the conveyances were valid.

[3] Defendant finally contends that the trial court erred by not crediting him with reducing the marital debt during the years of the separation from March, 1979 until July, 1986, and by incorrectly adding the six parcels of quitclaimed land to the marital estate. The latter contention has already been overruled, and as to the former the evidence is not clear as to who incurred the marital debt or how it was reduced. Error is not presumed, it must be shown, *Key v. Woodlief*, 258 N.C. 291, 128 S.E. 2d 567 (1962), and that defendant has failed to do. Furthermore, having found that an equal division was equitable the court was not required to make findings of fact with regard to liabilities and the other factors listed in G.S. 50-20(c). *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E. 2d 100 (1986).

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

EDWARD L. HAPONSKI, EMPLOYEE, PLAINTIFF v. CONSTRUCTOR'S INC., EMPLOYER v. IOWA NATIONAL MUTUAL INS. CO., CARRIER, DEFENDANTS

No. 8610IC1124

(Filed 15 September 1987)

1. Master and Servant § 93.3— workers' compensation—expert opinion testimony—competency

There was no merit to defendant's contention in a workers' compensation proceeding that an expert's testimony as to the cause of plaintiff's depression was elicited in response to an allegedly improper hypothetical question, since

the witness could properly base his opinion on plaintiff's statements made to him for treatment, on plaintiff's own prior testimony, and on another physician's notes made during treatment of plaintiff. Furthermore, the witness could properly testify that plaintiff's depression reduced "whatever [work] capacity" plaintiff had at the time of an earlier hearing, and the witness did not need personal knowledge of plaintiff's capacity to work at the earlier time in order to state his opinion.

2. **Master and Servant § 93.3— workers' compensation—expert opinion not speculative**

There was no merit to defendant's contention in a workers' compensation proceeding that a medical expert's opinion was too speculative to be competent evidence of the relationship between plaintiff's pain and depression.

3. **Master and Servant § 77.1— workers' compensation—change of condition**

Plaintiff in a workers' compensation proceeding established a significant change of condition under N.C.G.S. § 97-47 where he offered competent testimony that his depression subsequent to a 1983 appeal of the case was caused by his compensated 1980 injury and that this depression adversely affected his capacity to work.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 21 May 1986. Heard in the Court of Appeals 11 March 1987.

Pursuant to a hearing conducted on 12 January 1983, the North Carolina Industrial Commission (hereinafter, the "Commission") awarded plaintiff compensation for certain back injuries he sustained in October 1980. In an earlier appeal of that award, *Haponski v. Constructor's Inc.*, 71 N.C. App. 786, 323 S.E. 2d 46 (1984), this Court affirmed the Commission's January 1983 conclusion that the October 1980 injury left plaintiff with a 20% permanent partial disability of his back which reached maximum medical improvement on 17 August 1982.

In January 1984, plaintiff gave notice of an alleged "change of condition" under N.C.G.S. Sec. 97-47 (1985). Based principally on the testimony of plaintiff and plaintiff's medical experts, the hearing commissioner found that, from 6 April 1983 until 16 July 1984, plaintiff could not work due to psychiatric problems caused by his October 1980 injury. The hearing commissioner therefore concluded that the emergence of defendant's psychiatric problems since the Commission's prior final award constituted a significant change of condition under Section 97-47. She awarded plaintiff additional compensation based on her determination that plaintiff

had suffered a temporary total disability. The Full Commission affirmed the hearing commissioner's opinion and award in all respects. Defendants appeal.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Henry N. Patterson Jr. and Jonathan R. Harkavy, for plaintiff-appellee.

Russ, Worth & Cheatwood, by Walker Y. Worth, Jr., for defendant-appellants.

GREENE, Judge.

Our review of the Commission's award is limited to determining whether any competent evidence supported the Commission's findings and whether such findings are legally sufficient to support the Commission's conclusions of law. *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 102, 296 S.E. 2d 456, 459 (1982). The instant case specifically presents the following issues for review: (I) whether any competent evidence supported the Commission's findings (A) where expert testimony on the cause of plaintiff's depression and reduced work capacity was elicited in response to allegedly improper hypothetical questions, and (B) where such testimony was allegedly too uncertain or speculative to support the Commission's findings; and (II) whether the Commission's findings support its conclusion that, under Section 97-47, plaintiff underwent a significant change of condition which was caused by his October 1980 injury.

Strictly speaking, the rules of evidence applicable in our general courts do not govern the Commission's own administrative fact-finding. *Compare* N.C.G.S. Sec. 8C-1, Rule 1101 (1986) (rules of evidence apply to all proceedings in "courts of this state") *with* N.C.G.S. Sec. 97-80(a) (1985) (Commission processes and procedures shall be "as summary and simple as reasonably may be"); *see also Tindall v. American Furniture Co.*, 216 N.C. 306, 310, 4 S.E. 2d 894, 896 (1939) (findings not overturned simply because some evidence offends courtroom rules of evidence); *Maley v. Thomasville Furniture Co.*, 214 N.C. 589, 594, 200 S.E. 438, 441 (1938) (Commission need not conform to court procedure unless required by statute or to preserve justice and due process). However, in determining on review whether any "competent" evidence supports the Commission's findings, we must by definition apply those courtroom evidentiary rules and principles which

embody the legal concept of "competence." *See, e.g., Thompson v. Lenoir Transfer Co.*, 72 N.C. App. 348, 350, 324 S.E. 2d 619, 620-21 (1985) (citing N.C.G.S. Sec. 8C-1, Rules 703 and 705 as basis for concluding expert opinion based on prior testimony was admissible and competent in Commission case); *but cf.* 3 A. Larson, Workmen's Compensation Law Secs. 79.23-24 (1983) (criticizing this "legal residium" standard of review).

I

In determining whether any competent evidence supports the Commission's findings, we note the following disputed findings:

> 4. On 6 April 1983, plaintiff did seek psychiatric help. At this time, plaintiff had depression secondary to pain. He experienced problems sleeping, cried for no reason, and lost weight. In addition, he had a low libido, a poor memory, and very little energy.
>
> 5. From 6 April 1983 until 16 July 1984 when plaintiff returned to work, plaintiff was unable to work. This was due to psychiatric problems which worsened after the previous hearings in this matter, and these problems constituted a change in condition.

We also note that the Commission's "Conclusion of Law" Number "1" states plaintiff's psychiatric problems "were caused by his 20 October 1980 injury by accident . . . ." As determining the cause of plaintiff's psychiatric problems is a mixed question of law and fact, the Commission's designations of "findings" and "conclusions" are not binding on this court. *See Brown v. Charlotte-Mecklenburg Board of Education*, 269 N.C. 667, 670, 153 S.E. 2d 335, 338 (1967). Therefore, we will here examine the competency of any causation evidence and later analyze whether that evidence is legally sufficient to conclude plaintiff's October 1980 injury caused his depression.

Our review of evidence supporting these findings reveals that plaintiff's psychiatrist, Dr. Maltbie, testified he first saw plaintiff on 6 April 1983 and diagnosed certain symptoms of depression. Plaintiff's counsel then asked Dr. Maltbie several long hypothetical questions about the cause and progress of plaintiff's depression and its effect on his earning capacity. In the course of these questions, counsel asked Dr. Maltbie to assume, among

other things, that "following January 12, 1983 [the date plaintiff's original claim was heard] . . ., [plaintiff] bec[a]me more depressed, *as he has testified* . . ." [emphasis added]. Counsel also asked Dr. Maltbie to assume the findings of a "New Orthopedic Note" drafted in December 1982 by Dr. Harrelson, an attending orthopedic surgeon, in which Dr. Harrelson noted plaintiff's "chronic pain."

Counsel then asked Dr. Maltbie whether "there was a substantial deterioration in [the] psychological or emotional component of [plaintiff's] October 20, 1980 injury, from January 13 [sic], 1983 through the date you first saw him on April 6, 1983." Dr. Maltbie responded:

> Yeah, based on these facts, I would say that he did certainly get depressed. He was depressed when I saw him. If he was not before, then he must have gotten depressed since that time [*i.e.*, since the 12 January 1983 hearing on plaintiff's original back injury].

Based on the same hypothetical assumptions, counsel then asked Dr. Maltbie the following questions:

> Q. Did the deterioration in the nature of the severity of the depression substantially reduce further whatever capacity that [plaintiff] had in January 1983 to work and earn wages?
>
> . . .
>
> A. Yes, sir.
>
> . . .
>
> Q. Do you have an opinion as to whether or not the depressive condition you have diagnosed, beginning at least in April 1983, was caused by the physical injury on . . . October 20, 1980 and the pain and impairment that the Industrial Commission . . . found . . . resulted from that injury?
>
> A. I do believe the depression is secondary to the pain which is secondary to the injury.

A

[1] As Dr. Maltbie had no direct personal knowledge of plaintiff's condition *prior* to the 6 April 1983 visit, defendants

first argue the question whether plaintiff's psychological condition deteriorated *after* January 1983 assumed plaintiff became more depressed after January 1983. Defendants assert the question therefore sought to establish a critical fact not in evidence and improperly assumed its own conclusion. *Cf. Goble v. Helms*, 64 N.C. App. 439, 444, 307 S.E. 2d 807, 811, *disc. rev. denied*, 310 N.C. 625, 315 S.E. 2d 690 (1984) (hypothetical question should not assume facts sought to be established).

Although hypothetical questions are no longer required to elicit expert opinion under Rule 705, such questions are nevertheless permitted. An interrogator may form his hypothetical question on any theory which can be deduced from the evidence and may select as a predicate such facts as the evidence reasonably tends to prove. *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 243, 311 S.E. 2d 559, 570 (1984). Whether the expert's opinion is elicited by hypothetical or direct questioning, the opinion need not be based solely on the expert's personal knowledge. *See Booker v. Duke Medical Center*, 297 N.C. 458, 478-79, 256 S.E. 2d 189, 202 (1979) (in response to hypothetical question, doctor could base opinion on plaintiff's prior testimony and medical history obtained from plaintiff or from other treating physician); *Thompson*, 72 N.C. App. at 350, 324 S.E. 2d at 621 (expert's personal knowledge of plaintiff's state of mind deemed irrelevant under Rules 703 and 705 since basis for opinion available in record or upon demand).

Prior to these hypothetical questions, Dr. Maltbie had recounted how plaintiff described his post-January 1983 physical symptoms during plaintiff's initial interview in April 1983. Furthermore, plaintiff had himself previously testified without objection that he became "more depressed" between "the last hearing on January 12, 1983," and the time plaintiff was "first seen" on 6 April 1983. As defendants have not challenged the competency of plaintiff's testimony, plaintiff's testimony must be deemed competent. *See McHargue v. Burlington Indus.*, 78 N.C. App. 324, 332 n.1, 337 S.E. 2d 584, 588 n.1 (1985). Under *Booker*, plaintiff's statements made to Dr. Maltbie for treatment and his own prior testimony reasonably tended to prove the fact of plaintiff's depression after 12 January 1983. Therefore, counsel's hypothetical question could assume that fact for the purpose of eliciting Dr. Maltbie's opinion. *See Ballenger v. ITT Grinnell Indus. Piping,*

Inc., 80 N.C. App. 393, 399-400, 342 S.E. 2d 582, 587, *aff'd in part and rev'd in part on rehearing*, 83 N.C. App. 55, 348 S.E. 2d 814, *modified and aff'd*, 320 N.C. ---, 357 S.E. 2d 683 (1987) (Court of Appeals discusses requirements for hypothetical assumptions after new evidence code).

We recognize the question whether plaintiff's "psychological or emotional component" deteriorated after January, 1983, directed Dr. Maltbie to assume, among other things, plaintiff's testimony that he became "more depressed" after January 1983. Dr. Maltbie answered, "Based on these facts, I would say [plaintiff] did certainly get depressed." The question does not illogically assume its answer: Dr. Maltbie's *medical* opinion of plaintiff's alleged psychological or emotional deterioration after January 1983 was simply based in part on plaintiff's own testimony as well as plaintiff's direct complaints during the April 1983 interview. Dr. Maltbie's opinion was not identical to plaintiff's testimony, but was instead partially based upon it.

Defendants' objection to Dr. Maltbie's assuming the findings of Dr. Harrelson's note is similarly premised on the erroneous notion Dr. Maltbie's opinion could only be based on personal knowledge. As the result of his physical examination of plaintiff and plaintiff's own statements made for treatment, Dr. Harrelson observed in his December 1982 note that plaintiff had a "chronic pain problem." Since the facts and data underlying Dr. Harrelson's note are reasonably relied upon by physicians, counsel could assume the findings in the note regardless of the note's admissibility. N.C.G.S. Sec. 8C-1, Rule 703 (1983). The question did not ask Dr. Maltbie merely to assume the opinion of another doctor who had never treated plaintiff's condition. *Cf. Donovan v. Hudspeth*, 318 N.C. 1, 24, 347 S.E. 2d 797, 811 (1986) (excluding expert opinion based solely on opinion of another non-treating physician).

Defendants also contend the question concerning plaintiff's reduced work capacity was improper because the question offered no assumption about plaintiff's work capacity in January 1983. However, Dr. Maltbie had already testified that his initial interview with plaintiff led him to believe that plaintiff's depressive symptoms interfered "in a major way . . . with [plaintiff's] ability to function . . . in any employment capacity." As plaintiff's initial complaints were statements made for the purpose of treating his

depression, plaintiff's statements were a proper basis for Dr. Maltbie's opinion that plaintiff's depression reduced "whatever [work] capacity" plaintiff had in January 1983. Dr. Maltbie could also answer the question based on plaintiff's prior testimony which itself tended to prove his capacity to work deteriorated after January 1983. Given this evidence of plaintiff's chronic pain, increasing depression and impaired work capacity after January 1983, Dr. Maltbie did not need personal knowledge of plaintiff's capacity to work as of January 1983 in order to state his medical opinion that the effects of plaintiff's depression reduced "whatever" work capacity plaintiff possessed. In passing, we also reject defendant's contention that the hypothetical question posed to Dr. Maltbie improperly asked for a direct answer rather than an "opinion to a reasonable medical certainty." *See Cherry v. Harrell*, 84 N.C. App. 598, 604, 353 S.E. 2d 433, 437 (1987) (expert opinions no longer need be stated to a reasonable medical certainty).

Since the evidence reasonably tended to prove the assumptions underlying counsel's disputed questions, we conclude Dr. Maltbie's answers to those questions were properly admitted and competent.

B

[2] Defendants also note that, during his cross-examination, Dr. Maltbie related plaintiff's complaints of financial difficulties, domestic worries and medication problems. The doctor also testified that depression in general could be caused by stress, medication and heredity. During his direct examination, Dr. Maltbie testified: "It's hard for me to say *at this point* whether the stresses external to Mr. Haponski depress him and have a secondary rise in pain experience or vice versa. I really can't comment on that . . ." (emphasis added). Defendants contend this testimony demonstrates the doctor's opinion was too speculative to be competent evidence of the relationship between plaintiff's pain and depression.

However, defendants misconstrue Dr. Maltbie's statement that it was "hard" for him to say whether "the stresses external to Mr. Haponski depress him and have a secondary rise in pain experience or *vice versa*" (emphasis added). Dr. Maltbie's statement that it was "hard" for him to speak on the issue does not demonstrate the doctor's positive opinion expressed elsewhere was based on sheer guesswork or speculation. *Cf. Ballenger v.*

Burris Indus., 66 N.C. App. 556, 567, 311 S.E. 2d 881, 887, *disc. rev. denied*, 310 N.C. 743, 315 S.E. 2d 700 (1984) ("educated guess" amounted to mere speculation and was thus incompetent). Furthermore, the question posed referred to the period from plaintiff's discharge from the Duke pain program in June 1983 until the day before Dr. Maltbie's testimony. The transcript reveals the doctor was merely *refusing* to speculate whether the financial and domestic stresses previously noted caused plaintiff to "redepress" and experience a "rise in pain" several months *after* the April 1983 interview. *Cf. Buck v. Proctor*, 52 N.C. App. 88, 95, 278 S.E. 2d 268, 273 (1981) (failure to choose single most probable cause was proper refusal to speculate). In addition, Dr. Maltbie's use of the phrase "vice versa" arguably refers only to his refusal to speculate whether plaintiff's pain and depression *after* April 1983 contributed to the stress of plaintiff's financial and domestic difficulties: the statement does not demonstrate Dr. Maltbie was confused whether plaintiff's depression was "secondary" to his chronic pain as of April 1983.

Dr. Maltbie's cross-examination did reveal factors other than plaintiff's pain to which his depression may arguably have been "secondary." However, the existence of other possible causes of plaintiff's depression does not itself negate either the competency or probative value of Dr. Maltbie's explicit opinion that plaintiff's depression was secondary to his pain as of 6 April 1983. *See Cherry*, 84 N.C. App. at 605, 353 S.E. 2d at 437 (existence of other possible causes of plaintiff's ruptured disk could reduce weight of opinion but did not render opinion incompetent under Rules 702 and 705); *Buck*, 52 N.C. App. at 95-96, 278 S.E. 2d at 273 (expert opinion on cause of plaintiff's injury was deemed competent although expert conceded other causes were "equally probable").

Having rejected defendants' challenges to Dr. Maltbie's testimony and having noted plaintiff's own relevant testimony, it is clear the Commission's findings were sufficiently supported by competent evidence: Commission Finding Number Four that plaintiff had "depression secondary to pain" was supported by Dr. Maltbie's previously discussed testimony as well as by his specific statement that, as of 6 April 1983, defendant had chronic pain "with a major factor in his inability to function being a secondary depression." The testimonies of plaintiff and Dr. Maltbie also constituted competent evidence supporting Commission Finding

Number Five that plaintiff's work capacity had been reduced by his psychiatric problems. As to the Commission's statement that plaintiff's "psychiatric problems were caused by his 20 October 1980 injury," we note defendants themselves offered no direct evidence contradicting the competent testimony of either plaintiff or Dr. Maltbie. As trier of fact, the Commission was entitled to accept Dr. Maltbie's opinion on causation and discount defendant's own speculative construction of that testimony. So long as there is "some evidence" supporting the Commission's finding on causation, this Court will not overturn that finding. *See Buck*, 52 N.C. App. at 96, 278 S.E. 2d at 273.

We therefore find ample competent evidence supporting the Commission's disputed findings. As defendants' other factual arguments only contend the Commission should have weighed the evidence differently, we find those arguments meritless.

II

[3] In relevant part, Section 97-47 provides that "on the grounds of a change in condition" the Commission may review any award and end, diminish, or increase the compensation previously awarded. As our Supreme Court stated in *McLean*:

> Change of condition 'refers to conditions different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition . . . [T]he change must be actual, and not a mere change of opinion with respect to the preexisting condition.' [Citation omitted.] Change of condition is a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings.

307 N.C. at 103-04, 296 S.E. 2d at 459 (quoting *Pratt v. Central Upholstery Co.*, 252 N.C. 716, 722, 115 S.E. 2d 27, 33-34 (1960)). The remaining issue is whether Commission Findings Numbers Four and Five and its "Conclusion" Number One legally justified its conclusion that plaintiff's October 1980 injury caused his depression and that this depression constituted a change of condition under Section 97-47.

As to the cause of plaintiff's depression, we find the Commission had ample precedent under these facts to conclude that plaintiff's 1980 injury caused his subsequent psychiatric problems.

E.g., Fayne v. Fieldcrest Mills, Inc., 54 N.C. App. 144, 282 S.E. 2d 539, *disc. rev. denied*, 304 N.C. 725, 288 S.E. 2d 380 (1982); *see also Petty v. Associated Transport, Inc.*, 276 N.C. 417, 430, 173 S.E. 2d 321, 331 (1970).

As to whether plaintiff's depression constituted a "change of condition" under the statute, we have stated "that if an employee receives an injury which is compensable and the injury causes her to become so emotionally disturbed that she is unable to work, she is entitled to compensation for total incapacity under G.S. 97-29." *Fayne*, 54 N.C. App. at 146, 282 S.E. 2d at 540; *see also Hubbard v. Burlington Indus., Inc.*, 76 N.C. App. 313, 317, 332 S.E. 2d 746, 748 (1985) (when Commission originally finds permanent partial disability, later Commission finding based on additional evidence of plaintiff's total disability will support conclusion condition has changed). Dr. Maltbie testified plaintiff's depression subsequent to January 1983 was caused by his compensated 1980 injury and that this depression adversely affected his capacity to work: we therefore hold under *Petty* and *Fayne* that plaintiff established a significant change of condition under Section 97-47. *See Fayne*, 54 N.C. App. at 146, 282 S.E. 2d at 540; *cf. Burrow v. Hanes Hosiery, Inc.*, 66 N.C. App. 418, 422, 311 S.E. 2d 30, 33, *aff'd*, 311 N.C. 297, 316 S.E. 2d 63 (1984) (where experts testified before and after original award that plaintiff's incapacity to earn was based on "pain," finding that "depression" increased after award did not support conclusion condition had changed).

Defendants' remaining assignments of error concern the Commission's awarding plaintiff temporary disability compensation and medical expenses. These arguments restate challenges to the Commission's findings and conclusions which we have already rejected and are therefore meritless.

Affirmed.

Judges ARNOLD and MARTIN concur.

THE ROWAN COUNTY BOARD OF EDUCATION, A PUBLIC BODY POLITIC v. UNITED STATES GYPSUM CO.

No. 8719SC24

(Filed 15 September 1987)

1. **Limitation of Actions § 2— sovereign purpose—statute of limitations inapplicable to State**

The doctrine of *nullum tempus occurrit regi* is not *totally* abrogated in North Carolina, and when the State or its political agencies are pursuing a sovereign (or governmental) purpose, as opposed to a proprietary purpose, statutes of limitation or statutes of repose do *not* apply *unless* the statute expressly includes the State.

2. **Limitation of Actions § 2; Schools § 6— asbestos in plaster in schools—action to recover cost of removal—governmental function—action not barred by statute of limitations**

Plaintiff's action to recover lost tax dollars expended in the preservation and maintenance of school property and necessitated by a potential health hazard (asbestos in acoustical plaster) to school personnel and children was a governmental function exercised in pursuit of a sovereign purpose for the public good on behalf of the State, and the action therefore was not barred by the statute of limitations.

APPEAL by plaintiff from *John, Judge*. Order and Judgment entered 10 October 1986 in Superior Court, ROWAN County. Heard in the Court of Appeals 3 June 1987.

This is a suit brought by plaintiff, the Rowan County Board of Education (the Board), to recover monies spent removing asbestos manufactured by defendant, United States Gypsum Co. (Gypsum), from plaintiff's schools. Defendant was granted summary judgment on the grounds that plaintiff's claims were barred by the statutes of limitation. We reverse.

The record on appeal shows that between 1950-1961 the Board performed construction on seven of its area schools. In the 1980's the Board discovered that acoustical plaster, manufactured by Gypsum and used by the Board in its school construction projects, contained asbestos. In July 1985 the Board brought suit against Gypsum to recover costs incurred for removal of the asbestos from the seven area schools and to require Gypsum to indemnify the Board from any claims arising out of or related to exposure to the asbestos in the schools.

Gypsum moved for summary judgment contending, in pertinent part, that the applicable statute of limitation had run on each of the Board's claims. The trial court granted Gypsum's motion. From the judgment and order dismissing its case, plaintiff appeals.

Woodson, Busby, Sayers, Lawther & Bridges, by Donald D. Sayers; Daniel A. Speights; Blatt & Fales, by Edward J. Westbrook and J. Anderson Berly, III, attorneys for plaintiff-appellant.

Kennedy Covington Lobdell & Hickman, by William C. Livingston; Morgan, Lewis & Bockius, by E. Barclay Cale, Jr., attorneys for defendant-appellee.

ORR, Judge.

I.

On appeal the Board contends that statutes of limitation are not applicable to it, as an agent for the State; therefore, the trial court improperly granted Gypsum's motion for summary judgment.

> 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. Two types of cases are involved: (a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial.

McNair v. Boyette, 282 N.C. 230, 234-35, 192 S.E. 2d 457, 460 (1972); *Harris v. Walden*, 314 N.C. 284, 333 S.E. 2d 254 (1985).

A defendant 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 defendant 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).

The dispositive question on appeal, however, is not whether plaintiff brought its action before the running of the time limitations, but whether the statutes of limitation may serve as a defense to plaintiff's action.

[1] The legal premise upon which the Board bases its contention that statutes of limitation are not applicable to it, is the common law maxim, "*nullum tempus occurrit regi*," which states "the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations." *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132, 82 L.Ed. 1224, 1227 (1938).

> '*Vigilantibus sed non dormientibus jura subveniunt*' is a rule for the subject, but *nullum tempus occurrit regi*, is the King's plea. For there is no reason that he should suffer by the negligence of his officers, or by their contracts or combinations with the adverse party. (5 Bac. Ab., 562, Hob. 347.) Therefore the King is not bound by any statute of Limitations, unless it is made by express words to extend to him. (5 Bac. Ab. 461, Plo. 244.) But the rule of *nullum tempus occurrit regi*, is subject to various exceptions, both at common law and by statute . . . . It seems that the rule *nullum tempus*, etc., is applicable to the States where not restrained by some constitutional provision, legislative enactment, or principle of the common law. (*Kemp v. The Commonwealth*, 1 H. & M., 85.)

Armstrong v. Dalton, 15 N.C. 568, 569 (1834).

Defendant contends that the North Carolina Legislature abrogated *nullum tempus occurrit regi* and ended the State's immunity by enacting what is now N.C.G.S. § 1-30.

In North Carolina prior to 1868 there was no statutory restraint upon the doctrine of *nullum tempus occurrit regi* and it was applicable to the sovereign state. However, in 1868 during Reconstruction, the legislature adopted a new Code of Civil Procedure for the State and included Section 1-30 (formerly in reverse order, C.S., sec. 420, Revisal, sec. 375, the Code sec. 159 and C.C.P., sec. 38), which provides: "The limitations prescribed by

law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties." No legislative history has been found to explain or assist in the interpretation of this section, nor do any of the cases following its adoption shed light on the scope or purpose behind the enactment. In fact, in the cases that followed its adoption Justice Seawell pointed out, "the course of decision has not been entirely consistent . . . ." *Guilford County v. Hampton*, 224 N.C. 817, 818, 32 S.E. 2d 606, 607 (1945). Recognizing the judicial disparity, Justice Seawell continued and said: "We do not attempt to reconcile conflicting authority with regard to the application of the maxim cited, or to follow it further into its ramifications, which might lead only to unprofitable differences." *Id.* at 819, 32 S.E. 2d at 608.

A review of these opinions clearly discloses that N.C.G.S. § 1-30 was intended to abrogate to some extent the maxim "*nullum tempus occurrit regi*"; it is unclear, however, whether the statute was intended to abrogate the maxim in whole or in part.

The Supreme Court's opinions, spanning a period of 119 years and written by greatly divergent courts, are apparently divided into two lines of authority. The first line may be interpreted as holding that N.C.G.S. § 1-30 abrogated the maxim in its entirety. Under this interpretation, the State is to be considered the same as a private citizen when applying a time limitation, unless the pertinent statute contains an express statement *excluding* the State from its strictures.

The first case to address the issue was *Furman v. Timberlake*, 93 N.C. 66 (1885), decided seventeen years after the enactment of the statute. In *Furman* the Court stated that *nullum tempus occurrit regi* was "a maxim which is said to have been founded upon *the great public* policy of preserving the public rights, revenues, and property from injury and loss by the negligence of public officers. But the maxim is no longer in force in this State, having been abrogated by the provisions of The Code, sec. 159 [now N.C.G.S. § 1-30]." *Furman*, 93 N.C. at 67 (emphasis supplied). It is important to note that this case, upon which others have relied, involved a suit by a former Clerk of Court against the current Clerk of Court for monies allegedly earned by the former Clerk while in office.

The next case, *Hospital v. Fountain*, 129 N.C. 90, 39 S.E. 734 (1901), involved a suit by the State Hospital to recover from a patient's guardian money spent by the hospital for the patient's care. The Court held that the hospital's action was barred in part by the statute of limitations under Section 159 (now N.C.G.S. § 1-30).

In *Threadgill v. Wadesboro*, 170 N.C. 641, 87 S.E. 521 (1916), the plaintiff sued to recover damages from the city for trespass on plaintiff's property. The Court made reference to *nullum tempus occurrit regi*, stating that it "no longer obtains here . . . ." *Id.* at 643, 87 S.E. at 522. In support of this conclusion the *Threadgill* Court cited *Furman*, and *Wilmington v. Cronly*, 122 N.C. 388, 30 S.E. 9 (1898). However, in *Wilmington* the Supreme Court said: "No statute of limitations runs against the sovereign unless it is *expressly* named therein." 122 N.C. at 389, 30 S.E. at 11 (emphasis added).

In *Tillery v. Lumber Co.*, 172 N.C. 296, 90 S.E. 196 (1916), a Board of Education sued to recover damages for trees cut on property owned by it. When defendant raised the statute of limitations defense, plaintiff argued that time limitations could not run against it. The Court held for defendant and cited *Threadgill* for the proposition that *nullum tempus occurrit regi* has been abrogated, "and that now, at least in some respects, time does run against the State." *Id.* at 298, 90 S.E. at 197.

Manning v. R. R., 188 N.C. 648, 125 S.E. 555 (1924), referencing C.S. 420 (now N.C.G.S. § 1-30), is the last case in which the Supreme Court appears to conclude that the maxim has been abrogated by the statute, stating:

> The Court has construed this section to mean that the maxim has been abrogated and is not in force in this State unless the statute applicable to or controlling the subject otherwise provides. [Citing *Furman v. Timberlake* and *Threadgill v. Wadesboro*.]

188 N.C. at 665, 125 S.E. at 565. However, the dissent in *Raleigh v. Bank*, 223 N.C. 286, 26 S.E. 2d 573 (1943), noted when considering the *Manning* decision:

> this statement in the *Manning case, supra*, is predicated on the statements in the *Furman* and *Threadgill cases* . . . . But

> reference to the *Furman* and *Threadgill cases, supra,* shows that the question was not before the Court in either case. And even as a *dictum* the principle as there stated is challenged by other and later decisions. In fact, in the *Manning case, supra,* it is stated: 'Whether a distinction may be found in the public policy of preserving the public revenues . . . or in the statute controlling the subject, we need not decide.'

223 N.C. at 305, 26 S.E. 2d at 584-85.

Since *Manning* several cases have skirted around the question but none have directly addressed this issue. At best, from defendant's point of view, these later cases appear to acknowledge that a statute of limitations can run against the State; but, in each case the cause of action was filed in a timely fashion. *See Trustees of Rowan Tech v. Hammond Assoc.*, 313 N.C. 230, 328 S.E. 2d 274 (1985); *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978); *Highway Comm. v. Transportation Corp.*, 226 N.C. 371, 38 S.E. 2d 214 (1946).

We next examine a line of tax cases which take an opposite tack from those previously examined. In these cases the Court follows the law as stated in *Wilmington v. Cronly*, 122 N.C. 383, 30 S.E. 9. There the Court said, "It needs no citation of authority to show that statutes of limitation never apply to the sovereign unless expressly named therein—*nullum tempus occurrit regi* . . . ." *Id.* at 387, 30 S.E. at 10.

The next case reaching this conclusion was *New Hanover County v. Whiteman*, 190 N.C. 332, 129 S.E. 808 (1925), another suit to collect taxes assessed against a defendant's land. In *New Hanover County*, the Court cited *Wilmington v. Cronly*, 122 N.C. 383, 30 S.E. 9, and reiterated that "[s]tatutes of limitations never apply to the sovereign, unless expressly named therein." *New Hanover County v. Whiteman*, 190 N.C. at 334, 129 S.E. at 809. *See also Pipeline Co. v. Clayton, Comr. of Revenue*, 275 N.C. 215, 166 S.E. 2d 671 (1969); *Fertilizer Co. v. Gill, Comr. of Revenue*, 225 N.C. 426, 35 S.E. 2d 275 (1945); *Charlotte v. Kavanaugh*, 221 N.C. 259, 20 S.E. 2d 97 (1942).

We thus have two distinct impressions as to what the law is in North Carolina. Under the line of cases relied upon by defend-

ant, N.C.G.S. § 1-30 totally abrogates the doctrine of *nullum tempus occurrit regi*; consequently the applicable statutes of limitation run against the plaintiff in the case *sub judice*, barring its claims. On the other hand, plaintiff relies on the second line of cases which hold that a statute of limitations runs against the State *only* if the State is named in that particular statute of limitations. Since the statutes of limitation in question do *not* name the State, plaintiff contends it is not barred from bringing this suit. Defendant contends that the distinction between the two lines of cases is that the second line requiring a statute of limitation to specifically name the State, occurrs only in tax cases. We disagree with that distinction.

Instead, we are compelled to adopt the reasoning set forth in a series of cases beginning with *Charlotte v. Kavanaugh*, 221 N.C. 259, 20 S.E. 2d 97, as the basis for reconciling the two lines of authority. In *Charlotte*, the Court, after examining the prior conflicting decisions and N.C.G.S. § 420 (now N.C.G.S. § 1-30), unanimously concluded that a statute of limitations will apply to the state and political subdivisions thereof, "*when the action is not brought in the capacity of its sovereignty.*" *Charlotte*, 221 N.C. at 266, 20 S.E. 2d at 101 (emphasis added). Justice Denny, speaking for the Court said: "The principle laid down and oft repeated in our decisons that 'No statute of limitations runs against the sovereign unless it is expressly named therein,' is sound . . . ." *Id.*

In *Raleigh v. Bank*, 223 N.C. 286, 26 S.E. 2d 573 the Court carried forward this line of reasoning, stating:

> It is contended by the plaintiff that the maxim *nullum tempus occurrit regi* should be applied here, and that the City of Raleigh, exercising the power of sovereignty, should not be barred by the lapse of time in the effort to enforce the lien of a special assessment imposed for a public improvement.
>
> While this ancient maxim has lost much of its vigor by the erosions of time, and by legislative enactment, it is still regarded as the expression of a sound principle of government applicable to actions to enforce the *sovereign rights* of the State. Notwithstanding the inclusive provisions of sec. 420 of the Consolidated Statutes . . . it has been uniformly

> held that no statute of limitations runs against the State, unless it is expressly named therein.

223 N.C. at 293, 26 S.E. 2d at 577 (emphasis added and citations omitted); *State v. West*, 293 N.C. 18, 235 S.E. 2d 150 (1977) (*quoting Raleigh v. Bank* with approval in dicta).

Finally, in *Guilford County v. Hampton*, 224 N.C. 817, 32 S.E. 2d 606, the Court held that: "Uniformly a distinction has been observed between actions brought by the State, counties and municipalities in their *sovereign capacity*, and those brought with respect to *proprietary demands*." 224 N.C. at 820, 32 S.E. 2d at 608 (emphasis added).

We believe this distinction, between sovereign and proprietary demands, is the deciding factor when reconciling the divergent cases upon this subject. Accordingly, we hold that statutes of limitation will run against the State, when its purpose is proprietary, unless it is expressly excluded therein. Statutes of limitation will not run against the State when its purpose is governmental, unless the State is expressly included therein.

Therefore, we conclude that *nullum tempus occurrit regi* is not *totally* abrogated in North Carolina, and hold that when the State or its political agencies are pursuing a sovereign (or governmental) purpose, as opposed to a proprietary purpose, statutes of limitation or statutes of repose do *not* apply *unless* the statute expressly includes the State.

[2] We now turn our attention to the ultimate determination—whether this suit by plaintiff involves a sovereign power or right in pursuit of a governmental purpose rather than a proprietary purpose.

The sovereign immunity held by the State is extended to all State agencies acting on the State's behalf. *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E. 2d 618 (1983); *Stanley v. Retirement and Health Benefits Division*, 66 N.C. App. 122, 310 S.E. 2d 637, *disc. rev. denied and appeal dismissed*, 310 N.C. 626, 315 S.E. 2d 692 (1984).

Furthermore, it is undisputed that a city or county board of education is "a governmental agency, created by statute, for the purpose of performing governmental functions." *Benton v. Board*

of Education, 201 N.C. 653, 656, 161 S.E. 96, 97 (1931); *Board of Education v. Allen*, 243 N.C. 520, 91 S.E. 2d 180 (1956); *Kirby v. Board of Education*, 230 N.C. 619, 55 S.E. 2d 322 (1949); *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 348 S.E. 2d 524 (1986).

A political subdivision of the State is acting in its governmental capacity, "[w]hile acting 'in behalf of the State' in promoting or protecting the health, safety, security or general welfare of its citizens . . . ." *Rhodes v. Asheville*, 230 N.C. 134, 137, 52 S.E. 2d 371, 373 (1949).

Under Art. IX, Sec. 6 of the North Carolina Constitution it is set out that revenues ". . . shall be faithfully appropriated and used exclusively for . . . maintaining . . . free public schools." In addition to this constitutional mandate, N.C.G.S. § 115C-524(b) states in part:

> It shall be the duty of local boards of education and tax-levying authorities, in order to safeguard the investment made in public schools, to keep all school buildings in good repair to the end that all public school property shall be taken care of and be at all times in proper condition for use.

N.C.G.S. § 115C-44(a) also provides in part:

> A local board of education shall institute all actions, suits, or proceedings against officers, persons, or corporations, or their sureties, for the recovery, preservation, and application of all money or property which may be due to or should be applied to the support and maintenance of the schools . . . .

Public revenues and property play an essential part in the present case. The Rowan County Board of Education expended tax dollars to implement necessary construction and repairs to seven public schools. As part of this construction, the Board, in good faith, purchased building materials manufactured by Gypsum for the express purpose of utilizing them on public property and in public schools. Subsequently, the Board learned that asbestos, a substance to which exposure may pose a serious health hazard, was present in the materials used in the prior construction, and in conformity with N.C.G.S. § 115C-524(b), requiring maintenance of safe schools, removed the asbestos laden materi-

als. The Board funded the removal, as it did the initial installation, with tax dollars allocated for education.

We conclude that plaintiff's action to recover lost tax dollars, expended in the preservation and maintenance of school property and necessitated by a potential health hazard to our school personnel and children, is a governmental function exercised in pursuit of a sovereign purpose for the public good on behalf of the State. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *petition to rehear denied*, 281 N.C. 516, --- S.E. 2d --- (1972); *Seibold v. Library*, 264 N.C. 360, 141 S.E. 2d 519 (1965); *Carter v. Greensboro*, 249 N.C. 328, 106 S.E. 2d 564 (1959); *Rhodes v. Asheville*, 230 N.C. 134, 52 S.E. 2d 371.

As previously pointed out, the maxim of *nullum tempus occurrit regi* has "lost much of its vigor by the erosions of time . . . ." *Raleigh v. Bank*, 223 N.C. at 293, 26 S.E. 2d at 577. However, the ancient maxim and its historic public policy of preserving the public rights, revenues and property, still has a limited place in this modern age.

This Court is unpersuaded by defendant's arguments contending that the school board is precluded from pursuing its constitutional and statutory duty to preserve tax revenues and safeguard the property of our North Carolina schools. Instead, this Court is convinced that the Rowan County School Board acted in its sovereign capacity in bringing this action to recover tax dollars spent in the necessary removal of a potential health hazard from its schools, and therefore its action is not barred by the statutes of limitation as contended by Gypsum.

The decision of the trial court in granting defendant's motion for summary judgment is therefore reversed.

Reversed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

NORTH CAROLINA STATE BAR v. PETER J. SPECKMAN

No. 8610NCSB577

(Filed 15 September 1987)

1. **Attorneys at Law § 11— disciplinary proceeding—letter from client to lawyer —admissibility**

The N. C. State Bar Disciplinary Hearing Committee did not err in receiving into evidence a letter from defendant's client to defendant, since, even if the letter were incompetent, its import was established by other competent evidence.

2. **Attorneys at Law § 11— disciplinary proceeding—findings adequately supported by evidence—defendant's proposed findings properly rejected**

Where the Disciplinary Hearing Committee's findings were supported by clear, cogent, and convincing evidence, the Committee was correct in rejecting defendant's proposed and alternative findings of fact.

3. **Attorneys at Law § 11— disciplinary proceeding—misappropriation of client's funds—sufficiency of evidence**

The Disciplinary Hearing Committee did not err in concluding that defendant violated the Code of Professional Responsibility by misappropriating his client's funds where defendant held out to another lawyer that he would collect that lawyer's fee from his client if the lawyer would first send the bill to defendant; the lawyer sent his bill to defendant who then sent it to the client; the client sent the exact amount of the bill to defendant; the check was made out to defendant but included the notation that it was for the other lawyer; defendant endorsed the check but failed to forward any part of it to the lawyer; defendant failed to place the money in his trust account; and defendant appropriated the proceeds of the check to his own use when he knew that the funds were entrusted to him by the client solely for the purpose of paying the other lawyer's bill.

4. **Attorneys at Law § 11— disciplinary proceeding—commingling personal funds in trust account—sufficiency of evidence**

The Disciplinary Hearing Committee did not err by concluding that defendant violated the Code of Professional Responsibility by commingling personal funds with clients' funds in his trust account where defendant claimed that he placed personal funds in his trust account for the sole purpose of making it possible to clear personal injury settlement drafts and checks so that his clients could be paid on the day of settlement, rather than having to wait several days for bank clearance of the funds, but Disciplinary Rule 9-102(A) allowed an attorney to keep personal funds in his trust account for two limited purposes, neither of which was the reason defendant commingled funds.

5. **Attorneys at Law § 11— disciplinary proceeding—refusal to produce documents in response to subpoena**

The Disciplinary Hearing Committee did not err in concluding that defendant's refusal to produce documents in response to a Grievance Committee

subpoena violated N.C.G.S. § 84-28(b)(3), since a subpoena, contrary to defendant's contention, was a "formal inquiry" or "complaint" within the meaning of the statute which defendant was required to answer.

APPEAL by defendant from John B. McMillan, Chairman of the North Carolina State Bar Disciplinary Hearing Committee. Order entered 14 February 1986. Heard in the Court of Appeals on 12 November 1986.

A. Root Edmonson for plaintiff appellee.

Smith, Patterson, Follin, Curtis, James and Harkavy by Norman B. Smith for defendant appellant.

COZORT, Judge.

Plaintiff filed a complaint with the North Carolina State Bar Disciplinary Hearing Committee and alleged that defendant had violated various Disciplinary Rules of the Code of Professional Responsibility. Plaintiff's first claim for relief alleged that defendant improperly converted money sent to him by a client which was intended for another lawyer. The second and fourth claims for relief alleged that defendant failed to respond to subpoenas to produce records by the Grievance Committee of the North Carolina State Bar. The third claim for relief alleged that defendant commingled funds in his trust account. After a hearing, the Disciplinary Hearing Committee concluded that the retention of the client's money and the commingling of funds in his trust account were violations of the Disciplinary Rules of the Code of Professional Responsibility and that the failure to respond to the subpoena to produce records under the fourth claim was a violation of N.C. Gen. Stat. § 84-28(b)(3). The second claim for relief concerning the failure to produce records was dismissed.

As a result of these violations, the Hearing Committee entered an Order of Discipline which suspended defendant from the practice of law in North Carolina for three years. From this order, defendant appeals and contends that the Committee erred (1) in receiving into evidence a letter from defendant's client to defendant, (2) by failing to adopt defendant's proposed and alternate findings of fact, (3) by concluding that retaining a client's check intended for another attorney violated the Code of Professional Responsibility, (4) by concluding that commingling of funds

violated the Code of Professional Responsibility, (5) by concluding that his refusal to produce documents violated N.C. Gen. Stat. § 84-28(b)(3), and (6) by entering an order against him. We find that the defendant's contentions have no merit, and we affirm the order of the Hearing Committee.

Defendant was admitted to the North Carolina State Bar in December 1980, and at all times pertinent to this action maintained a law office in Charlotte, North Carolina. One of defendant's clients, Berdan's Deerfield Beach Art Galleries, Inc. (hereinafter Berdan's), was involved in a civil action brought in Johnston County, North Carolina. In late 1983, defendant employed Robert A. Spence, Jr., of the Johnston County law firm, Spence and Spence, as local counsel to represent Berdan's in that action. Defendant and Spence agreed that Spence would forward all his bills to defendant, who would then submit them to Berdan's. At the conclusion of the lawsuit in Johnston County, Spence sent a bill for $5,150.00 in legal fees to defendant. Defendant advised Irwin J. Sherwin of Berdan's of the amount of the bill. Sherwin forwarded a check dated 7 March 1985 and made payable "To the Order of Peter J. Speckman, Jr., Esq.," to defendant. The notation "For Spence and Spence" also appeared on the face of the check. Defendant endorsed Sherwin's check, but instead of forwarding the proceeds to Spence, he appropriated them for his own use. As a result, Spence sued both defendant and Berdan's, subjecting Berdan's to liability for a second time on the amount of the check.

In August 1984, defendant deposited $70,000.00 into his trust account at Southern National Bank. This money represented the settlement proceeds recovered on behalf of a client, Nadine Starnes. Defendant paid Starnes her share of the proceeds, but allowed the remainder, to which he was entitled as a fee, to remain in the trust account. Between August and October 1985, defendant wrote checks payable to himself or to cash from this trust account to cover office expenses.

Once the allegation of commingling funds was brought to plaintiff's attention, the Chairman of the Grievance Committee issued and served on defendant a Letter of Notice and a Subpoena to Produce Documents or Objects. Defendant appeared at the North Carolina State Bar office on the date directed by the

subpoena; however, he failed to produce the documents requested. The Grievance Committee issued a second subpoena for defendant to produce documents at the next meeting. Defendant appeared at the next meeting, but he again failed to produce the documents requested and filed motions to quash the subpoenas. These motions were denied by the Grievance Committee, and defendant was found in violation of N.C. Gen. Stat. § 84-28(b)(3).

[1] The defendant's first contention on appeal is that the Hearing Committee erred by receiving into evidence a letter to him from Sherwin. The letter was a cover letter which enclosed the $5,150.00 check for Spence's services. Defendant contends that there was no evidence that the original of this letter had either been mailed to or received by him. He argues that the letter's reception into evidence was prejudicial because it was used to support the Hearing Committee's findings of fact that defendant appropriated the proceeds of the check to his own use, when he knew they were intended for Spence. We disagree. The letter provides competent evidence that Sherwin intended the funds for Spence and that defendant knew this when he took the funds for himself. Assuming *arguendo* that the letter was incompetent, its admission was not prejudicial since its import can be established by other competent evidence. *See Bullin v. Moore*, 256 N.C. 82, 122 S.E. 2d 765 (1961). The fact that defendant knew the funds were for Mr. Spence can also be established by the following: (1) the notation on the check indicated that it was "For Spence and Spence"; (2) the check was for the exact amount of Mr. Spence's bill; and (3) the check was made out to defendant only three weeks after Mr. Spence gave his bill to defendant and just eight days after defendant testified he sent the bill to Mr. Sherwin. Therefore, the admission of the letter was not prejudicial, and the defendant's assignment of error is overruled.

[2] The defendant's second and third contentions are that the Hearing Committee erred by failing to adopt his proposed and alternative findings of fact. We disagree. The Hearing Committee acted correctly in not adopting defendant's findings since they were either immaterial or related to matters on which the Committee had already found facts supported by clear, cogent, and convincing evidence. "In a trial without a jury the court's findings are conclusive on appeal if supported by competent evidence. [Citations omitted.] The trial judge is required to make findings on

sufficient material facts to support the judgment, but is not required to make or adopt further findings which are not essential." *Lea Co. v. Board of Transportation*, 57 N.C. App. 392, 405, 291 S.E. 2d 844, 852 (1982), *affirmed*, 308 N.C. 603, 304 S.E. 2d 164 (1983). In attorney discipline and disbarment proceedings, findings of fact must be supported by clear, cogent, and convincing evidence drawn from the whole record. *N. C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E. 2d 320, 323 (1985). The "whole record test" is the standard for judicial review of attorney discipline cases and 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 354, 326 S.E. 2d at 323, *quoting N. C. State Bar v. DuMont*, 304 N.C. 627, 643, 286 S.E. 2d 89, 98-99 (1982). After careful review of the whole record, we conclude that the Hearing Committee's findings were supported by clear, cogent, and convincing evidence. Therefore, we hold that the Hearing Committee was correct in rejecting defendant's proposed and alternative findings of fact.

[3] The defendant's fourth contention on appeal is that the Hearing Committee erred in concluding that he violated the Code of Professional Responsibility[1] by retaining the proceeds of Sherwin's check rather than sending the money to Spence. We disagree. The Hearing Committee concluded that by appropriating the $5,150.00 check to his own use, defendant engaged in illegal conduct involving moral turpitude in violation of Disciplinary Rule 1-102(A)(3) and in conduct involving dishonesty, fraud, deceit, and misrepresentation in violation of Disciplinary Rule 1-102(A)(4).

1. The Code of Professional Responsibility has since been replaced by the Rules of Professional Conduct adopted by the North Carolina State Bar on 26 July 1985 and approved by the Supreme Court of North Carolina on 7 October 1985. All references in this opinion are to rules under the prior code, which governs this action.

The Hearing Committee also concluded that defendant's conduct resulted in a violation of Disciplinary Rules 9-102(A)(1), (A)(3) and (B)(5). These rules provide:

> (A) PRESERVING THE IDENTITY OF CLIENT FUNDS AND PROPERTY, PROHIBITION OF COMMINGLING OF ATTORNEY AND CLIENT FUNDS AND PROPERTY.
>
> (1) Any property received by a lawyer in a fiduciary capacity shall at all times be held and maintained separately from the lawyer's property, designated as such, and disbursed only in accordance with these rules.
>
> * * * *
>
> (3) All money or funds received by a lawyer either from a client or from a third party to be delivered all or in part to a client, except that received for payment of fees presently owed to the lawyer by the client or in reimbursement for expenses properly advanced by the lawyer on behalf of the client, shall be deposited in a lawyer trust account. . . .
>
> * * * *
>
> (B) RECORD KEEPING AND ACCOUNTING OF CLIENT FUNDS OR PROPERTY
>
> * * * *
>
> (5) A lawyer shall promptly pay or deliver to the client or to third persons as directed by the client the funds, securities, or properties belonging to the client to which the client is entitled in the possession of the lawyer.

Amendment to Code of Professional Responsibility, 310 N.C. 771, 772-75 (1984).

Defendant held out to Spence that he would collect Spence's fee from Sherwin, if Spence would first send the bill to defendant. On 14 February 1985, Spence sent his bill to defendant, who then sent it to Sherwin on 27 February 1985. On 7 March 1985, Sherwin sent a check for $5,150.00, the exact amount of Spence's bill to defendant. The check was made out to defendant, but included

the notation "For Spence and Spence." Defendant endorsed the check, but he failed to forward any part of it to Spence or his law firm. He also failed to place the money in his trust account. Instead, defendant appropriated the proceeds of the check to his own use, when he knew that the funds were entrusted to him by Sherwin solely for the purpose of paying the Spence bill. Clearly, defendant's actions were in violation of the disciplinary rules cited above, and he is guilty of the misconduct found by the Hearing Committee. Therefore, we hold that the Committee did not err in concluding that defendant violated the Code of Professional Responsibility by misappropriating his client's funds.

[4] The defendant's fifth contention is that the Hearing Committee erred by concluding that defendant violated the Code of Professional Responsibility by commingling personal funds with client's funds in his trust account. We disagree. The commingling of funds is committed when "a client's funds are intermingled with those of the attorney and their separate identity lost so that they may have been used for the attorney's personal expenses or subjected to the claims of the attorney's creditors." Annot., 94 A.L.R. 3d 846 (1979). Disciplinary Rule 9-102(A) prohibits the commingling of funds and states in pertinent part that:

> (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

The North Carolina State Bar Code of Professional Responsibility, 283 N.C. 783, 847 (1973).

Defendant claims that he placed personal funds in his trust account for the sole purpose of making it possible to clear personal injury settlement drafts and checks so that his clients could be paid on the day of settlement, rather than having to wait several days for bank clearance of the funds. He argues that since his sole motivation was to help his clients receive their settlements sooner and was not to make unauthorized use of the trust account, that he should not be held to have violated the Code. However, defendant's motivation is not pertinent to whether there has been a violation of the Code. Disciplinary Rule 9-102(A) allows an attorney to keep personal funds in his trust account for two limited purposes. Making it possible to clear personal injury settlement drafts and checks for clients is not one of those purposes. The purpose of a trust account is to separate the funds of a client from those of his attorney. *Code of Professional Responsibility*, Ethical Consideration 9-5. Clearly, defendant violated Disciplinary Rule 9-102(A) by allowing his personal funds to be commingled with client funds in his trust account. Therefore, we hold the Hearing Committee did not err in concluding that defendant violated the Code by commingling funds.

[5] The defendant's sixth contention is that the Hearing Committee erred in concluding that his refusal to produce documents in response to a Grievance Committee subpoena violated N.C. Gen. Stat. § 84-28(b)(3), because that statute is not applicable to this situation. N.C. Gen. Stat. § 84-28(b)(3) provides that an attorney may be disciplined for

> [k]nowing misrepresentation of any facts or circumstances surrounding any complaint, allegation or charge of misconduct; *failure to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter*; or contempt of the council or any committee of the North Carolina State Bar. [Emphasis added.]

Defendant claims that a subpoena is not a "formal inquiry" or "complaint" as required by N.C. Gen. Stat. § 84-28(b)(3) (1985). We disagree.

As part of the formal pleading process, the Chairman of the Grievance Committee of the North Carolina State Bar has the power to issue subpoenas to compel the attendance of witnesses

and to compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. *Rules, Regulations and Organization of the North Carolina State Bar*, Article IV, § 12(5). A subpoena issued by the Chairman of the Grievance Committee "shall have the force and effect of a summons or subpoena issued by a court of record . . . ." N.C. Gen. Stat. § 84-29 (1985). The procedure which the Chairman must follow in serving a subpoena reflects its importance as a formal inquiry. A subpoena for the production of documents must describe with sufficient particularity and definiteness the evidence which is required to be produced. *Vaughan v. Broadfoot*, 267 N.C. 691, 149 S.E. 2d 37 (1966). In addition, "[s]ervice of a subpoena for the production of documentary evidence may be made only by the delivery of a copy to the person named therein or by registered or certified mail, return receipt requested." N.C. Gen. Stat. § 1A-1, Rule 45(e) (1983). The subpoena is a type of "formal inquiry" contemplated by the General Assembly in defining the grounds for attorney discipline under N.C. Gen. Stat. § 84-28(b)(3). The defendant failed to produce documents as required and is subject to discipline as a result. Therefore, we hold that the Hearing Committee did not err in concluding that defendant violated N.C. Gen. Stat. § 84-28(b)(3).

Defendant's final contention on appeal is that the Hearing Committee erred by entering a disciplinary order against him. However, the findings of fact and conclusions of law made by the Committee support its Order of Discipline. Therefore, the Committee acted properly in entering an order against defendant.

Based on the foregoing, we hold that the findings of fact, conclusions of law and Order of Discipline entered by the Hearing Committee should be affirmed.

Affirmed.

Chief Judge HEDRICK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JOSEPH LEE KNIGHT

No. 8714SC140

(Filed 15 September 1987)

1. **Criminal Law § 34.4— homicide with firearm—witnesses' seeing defendant with gun—admissibility of testimony**

In a prosecution of defendant for homicide with a firearm, the trial court did not commit prejudicial error by permitting three of the State's witnesses to testify that they had, at unspecified times prior to the crime in question, seen defendant with a gun on the ground that this was evidence of past criminal or wrongful conduct which was offered by the State solely to show his bad character and criminal disposition, since defendant failed to object to similar testimony and thereby waived any objection to subsequent testimony; the testimony of the witnesses did not suggest that defendant's possession of a firearm at any previous time was unlawful, nor did it attribute to him a criminal disposition or a character prone to violence; and there was no reasonable possibility that the jury's verdict would have been any different had the testimony been excluded. N.C.G.S. § 8C-1, Rule 404(b).

2. **Homicide § 21.7— intentional shooting of victim—sufficiency of evidence of second degree murder**

Where there was substantial evidence which tended to show that defendant intentionally shot the victim with a pistol and that the victim died as a result of the wounds, and there was some evidence of self-defense, the jury was permitted, though not compelled, to infer malice and unlawfulness, and the trial court therefore did not err in denying defendant's motion to dismiss the charge of second degree murder.

3. **Criminal Law § 98— defense witness in jail clothing—defendant not entitled to mistrial**

The brief appearance of a defense witness in jail clothing was not such a serious impropriety as to prevent defendant from receiving a fair trial, and defendant therefore was not entitled to a mistrial.

4. **Homicide § 30.3— involuntary manslaughter—defendant not entitled to instruction**

Defendant was not entitled to an instruction on involuntary manslaughter where the evidence tended to show that defendant and the victim struggled; defendant had a pistol in his hand; the victim tried to hold defendant's hand down and to the side; three shots were fired, one from very close range; after the third shot, the victim fell back and defendant fled from the building; and there was no evidence that defendant did not intend to fire the weapon.

5. **Criminal Law § 150— sentence less than presumptive term—sentence supported by evidence—question not reviewable on appeal**

Defendant could not assert on appeal error relating to his sentence for second degree murder where his sentence was less than the presumptive term for such crime. Rather, his remedy was to petition for a writ of certiorari to review that issue. N.C.G.S. § 15A-1444(a1).

APPEAL by defendant from *Battle, Judge.* Judgment entered 18 September 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 1 September 1987.

Defendant was charged with the murder of Eric Nichols and entered a plea of not guilty. The jury returned a verdict finding defendant guilty of second degree murder. After a sentencing hearing, the trial court entered judgment sentencing defendant to an active term of imprisonment less than the presumptive sentence. Defendant appeals.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Leland Q. Towns, for defendant-appellant.

MARTIN, Judge.

In this appeal defendant asserts that the trial court erred by permitting the State to elicit certain testimony from three of its witnesses, by denying his motions for mistrial and for dismissal of the charges, and by refusing to give certain instructions to the jury. He also contends that the court committed error in the sentencing proceeding. We find no prejudicial error.

At trial, the State offered evidence tending to show that on the night of 24 January 1986, a party, organized by some employees of Duke University, was held at the Mary Lou Williams Cultural Center on the university's campus. The party was open to the public; the price of admission was $1.00. The admission fee was collected at a table in a hallway just outside a large room where there was music and dancing. Approximately one hundred and fifty people attended the party.

The State's evidence further tended to show that Eric Nichols arrived at the party and attempted to enter without paying. Defendant, who was standing near the table in order to see that everyone paid admission to enter the party, attempted to stop Nichols and the two men began pushing each other. As they struggled, witnesses observed that defendant had a pistol in his hand and heard gunshots. Nichols fell to the floor and defendant fled. The evidence showed that Nichols sustained three gunshot wounds, at least one of which was a contact gunshot wound, and

died as a result of blood loss due to the wounds. Three .22 caliber pistol bullets were recovered from his body. No weapon was ever recovered from defendant nor was one found on Nichols' body or at the scene of the shooting.

Defendant did not testify but offered evidence, principally through the testimony of Alvin Lorenzo Yates, tending to show that while Nichols and defendant struggled, Nichols was holding defendant's wrist in such a manner that he could not move it, and the pistol was pointed out to the side, away from Nichols. Defendant was pinned against a wall, and Nichols was choking him. Yates heard two shots, but saw no indication that Nichols had been hit. As Nichols pushed defendant down the hallway, Yates saw another person behind Nichols holding a gun. Defendant was trying to push Nichols off of him and Yates heard defendant say, "Someone get this man off of me." Yates heard another shot and saw Nichols fall back. Defendant put the pistol in his pocket and was pushed out of the building by others.

[1] By his first three assignments of error, defendant contends that the trial court committed prejudicial error by permitting three of the State's witnesses to testify that they had, at unspecified times prior to 24 January 1986, seen defendant with a gun. He argues that the testimony was violative of G.S. 8C-1, Rule 404(b) in that it was evidence of past criminal or wrongful conduct and was offered by the State solely to show his bad character and criminal disposition. We find no merit in his argument. Donald Wright, one of the organizers of the party and a friend of defendant, was asked, without objection, if he had ever seen defendant with a gun. His response was affirmative. There was no motion to strike the answer. When similar questions were subsequently asked of two other witnesses, defendant objected and his objections were overruled. However, defendant lost the benefit of these objections as a result of Donald Wright's earlier testimony, to which no objection was made. "When evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Corbett and State v. Rhone*, 307 N.C. 169, 179, 297 S.E. 2d 553, 560 (1982).

Moreover, the testimony of the three witnesses showed only that each of them had seen defendant in possession of a firearm

on some unspecified occasions over a period of years prior to the events giving rise to the present charge. Defendant's argument to the contrary notwithstanding, the evidence does not suggest that defendant's possession of a firearm at any previous time was unlawful nor does it attribute to him a criminal disposition or a character prone to violence.

Finally, we observe that even if the testimony complained of was improperly admitted, the error would not entitle defendant to a new trial. A defendant is entitled to a new trial for errors committed at his trial only upon a showing that he was prejudiced by such errors. *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). In order to show prejudice, defendant must demonstrate "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." G.S. 15A-1443(a). Our review of the entire record convinces us that there is no reasonable possibility that the jury's verdict would have been any different had the testimony of which defendant complains been excluded. Any error in the admission of the testimony was, therefore, harmless and defendant's first three assignments of error must be overruled.

[2] Defendant next argues that the State's evidence was insufficient to withstand his motion to dismiss the charge of second degree murder because the State failed to present substantial evidence that defendant acted with malice in killing Nichols. In a criminal case the test of the sufficiency of the evidence is whether there is substantial evidence of each essential element of the crime alleged in the indictment or of a lesser offense included therein. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). In ruling upon a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference to be drawn therefrom. *Id.* The test of the sufficiency of the evidence is the same whether the evidence is direct, circumstantial, or both. *Id.*

Second degree murder is defined as the unlawful killing of a human being with malice, but without premeditation or deliberation. *State v. Robbins*, 309 N.C. 771, 309 S.E. 2d 188 (1983). Of course, the State has the burden of proving each essential element of the offense beyond a reasonable doubt, but in proving that a killing was unlawful and that it was done with malice, the

State is aided by certain presumptions or inferences, depending upon the circumstances, which arise upon proof that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. *State v. Patterson*, 297 N.C. 247, 254 S.E. 2d 604 (1979). In the absence of evidence of self-defense or that the killing was committed in the heat of passion upon sudden provocation, proof of the intentional infliction of a wound with a deadly weapon proximately resulting in death raises mandatory presumptions that the killing was unlawful and was done with malice. *Id.* Where, however, there is evidence that the killing occurred in the heat of passion, or, as in the present case, there is some evidence of self-defense, the mandatory presumptions of unlawfulness and malice disappear. *Id.* In such cases, the jury is permitted, though not compelled, to infer malice and unlawfulness from the intentional infliction of a wound with a deadly weapon proximately resulting in death. *Id.*

In the present case, there was substantial evidence which, when considered in the light most favorable to the State, tended to show that defendant intentionally shot Nichols with a pistol and that Nichols died as a result of the wounds. From this evidence arises at least an inference that defendant acted unlawfully and with malice. The State is entitled, upon defendant's motion to dismiss, to the benefit of that inference. The motion to dismiss was properly denied.

[3] Defendant's next assignment of error is directed to the denial of his motion for a mistrial. The motion was made after Alvin Lorenzo Yates, a defense witness who was confined in the Durham County jail at the time of defendant's trial, was brought to the courtroom in his jail uniform and handcuffed. Defendant's counsel objected, stating that she had requested the jailers to have Yates dressed in civilian clothing. The trial judge immediately ordered that Yates be removed from the courtroom and declared a recess while Yates was returned to the jail to dress in civilian attire. The court denied defendant's motion for a mistrial.

"[A] mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Calloway*, 305 N.C. 747, 754, 291 S.E. 2d 622, 627 (1982). Whether a motion for a mistrial should be granted is a decision which rests in the sound discre-

tion of the trial judge and his ruling will not be reversed absent an abuse of that discretion. *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). The brief appearance of a defense witness in jail clothing was not, in our view, such a serious impropriety as to prevent the defendant from receiving a fair trial. No abuse of discretion appears from the record before us. This assignment of error is overruled.

[4] By his next assignment of error, defendant contends that the trial court erred by refusing to submit to the jury, upon proper instructions, the issue of defendant's guilt of the lesser included offense of involuntary manslaughter. "Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). The trial court is required to charge on a lesser offense only when there is evidence to support a finding of guilt of the lesser offense. *State v. Hickey*, 317 N.C. 457, 346 S.E. 2d 646 (1986). Defendant argues that the evidence permits an inference that he unintentionally shot Nichols. We disagree.

The evidence in the present case tends to show that while defendant and Nichols were struggling, a witness saw defendant "reach for something." Witnesses then saw that defendant had a pistol in his hand and that Nichols was trying to hold defendant's hand down and to the side. Three shots were fired. Before the third shot, defendant said "Someone get this man off of me." Nichols was shot three times, at least once from very close range. After the third shot, Nichols fell back and defendant fled from the building. There was no evidence that defendant did not intend to fire the weapon, nor does such an inference arise from the fact that defendant and Nichols were engaged in a struggle. The trial court properly declined to instruct the jury on involuntary manslaughter. *See State v. Wingard*, 317 N.C. 590, 346 S.E. 2d 638 (1986); *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984); *State v. Robbins, supra.*

For similar reasons, we reject defendant's contention that the trial court erred by denying his request that the jury be instructed that he would not be guilty of any offense if Nichols'

death resulted from an accident. A homicide will be excused as accidental where (1) the killing was unintentional, (2) the perpetrator acted with no wrongful purpose, (3) the killing occurred while the perpetrator was engaged in a lawful enterprise, and (4) the killing did not occur as a result of culpable negligence. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, 96 A.L.R. 2d 1422, *cert. denied*, 368 U.S. 851, 7 L.Ed. 2d 49, 82 S.Ct. 85 (1961). There is no evidence of an unintentional shooting in this case.

[5] Finally, defendant attempts to assert, on this direct appeal, error relating to his sentence. He is not entitled to do so because the sentence which he received is less than the presumptive term set by G.S. 15A-1340.4(f)(1) for second degree murder, a Class C Felony. G.S. 14-17. G.S. 15A-1444(a1) provides, in pertinent part:

> A defendant who has been found guilty . . . is entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing *only if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4*, and if the judge was required to make findings as to aggravating or mitigating factors pursuant to this Article. Otherwise, he is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari. (Emphasis added.)

No petition has been filed. Therefore, the issue is not properly before us and we decline to consider it.

No error.

Judges WELLS and EAGLES concur.

MICHAEL ZIMMER v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8710IC127

(Filed 15 September 1987)

State § 4.3— suitability of detour—exercise of discretion—waiver of immunity

By enactment of the Tort Claims Act, the State has specifically waived immunity from tort claims falling within the Act without regard to whether the function out of which a claim arises is a governmental function or a proprietary function, and the waiver of immunity is not dependent upon whether the alleged negligent act involves the exercise of discretion; therefore, DOT's motion to dismiss for lack of personal jurisdiction was properly denied where claimant alleged that he suffered serious injury because of the negligence of DOT's employees in providing an unsuitable detour while a highway was closed.

APPEAL by defendant from an Opinion and Award of the North Carolina Industrial Commission entered 19 November 1986. Heard in the Court of Appeals 26 August 1987.

Claimant brought this claim for damages under the provisions of the Tort Claims Act, North Carolina General Statutes Chapter 143, Article 31, alleging that he suffered damages due to personal injuries proximately caused by the negligence of certain employees of the North Carolina Department of Transportation (DOT). In his affidavit filed pursuant to G.S. 143-297, claimant alleged that on the night of 5 March 1985, he was driving a tractor-trailer in an easterly direction along U.S. Interstate Highway 40 (I-40) through Tennessee and towards North Carolina. Earlier that day, a tunnel on the eastbound lanes of I-40, just east of the North Carolina-Tennessee border, had collapsed, and a detour route for eastbound traffic had consequently been designated by DOT. This detour began on U.S. Highway 25-70 in Newport, Tennessee, and continued along that highway easterly into North Carolina until its intersection in Buncombe County with U.S. Highway 19-23. Claimant further alleged that, between Hot Springs, North Carolina and Marshall, North Carolina, the detour was "an extremely treacherous, curvy, narrow, steep mountain roadway," and that it "did not have signs to adequately warn truck drivers of the treacherous nature of said roadway, was not sufficiently wide to handle trucks the size of that driven by Zimmer so that said trucks could remain in their own lane of travel,

had no guardrails, had no shoulders beside the paved roadway, had no reflectors, and was too narrow to handle tractor-trailer truck travel . . . ." Shortly after 11:00 p.m., and approximately one-half mile east of Hot Springs, claimant was ascending a steep grade of road and was rounding a sharp curve, when the rear tires of the trailer dropped off of the pavement, causing a shift in weight distribution in the trailer. The truck overturned and crashed down a steep 450-foot embankment, causing serious injury to claimant. Claimant alleged that the hazardous nature of U.S. 25-70 was known to various named and unnamed employees of DOT and that said employees were negligent in designating U.S. 25-70 as a detour route, in failing to correct the hazardous conditions, and in failing to provide warnings of the hazards which existed on that route. He alleged that such negligence on the part of DOT's employees proximately caused his injuries.

DOT moved for dismissal of the claim pursuant to G.S. 1A-1, Rules 12(b)(2) and (6). This motion was denied by Commissioner William H. Stephenson. DOT appealed the denial of its 12(b)(2) motion to the Full Commission, which affirmed the ruling of Commissioner Stephenson. DOT appeals.

Jones P. Byrd for claimant-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert E. Cansler, for North Carolina Department of Transportation.

MARTIN, Judge.

Relying upon the doctrine of sovereign immunity, DOT contends that the Industrial Commission has no jurisdiction over the person of the State in this case and that its motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(2) should have been granted. On the other hand, claimant contends that no real issue of personal jurisdiction exists and that the order denying DOT's motion is interlocutory and not presently appealable. While we sustain DOT's right to pursue this appeal, we nevertheless affirm the denial of its motion to dismiss the claim for lack of personal jurisdiction.

Whether sovereign immunity is a question of subject matter jurisdiction or personal jurisdiction is an unsettled area of the law in North Carolina. The distinction is important because the denial

of a motion to dismiss for lack of subject matter jurisdiction pursuant to G.S. 1A-1, Rule 12(b)(1) is non-appealable, G.S. 1-277(a), but the denial of a motion challenging the jurisdiction of the court over the person of the defendant pursuant to G.S. 1A-1, Rule 12(b)(2) is immediately appealable. G.S. 1-277(b). *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982).

This Court has held on two occasions that the doctrine of sovereign immunity presents a question of personal jurisdiction. *See Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 269 S.E. 2d 217 (1980); *Sides v. Hospital*, 22 N.C. App. 117, 205 S.E. 2d 784 (1974), *modified and affirmed*, 287 N.C. 14, 213 S.E. 2d 297 (1975). In *Teachy, supra*, however, the North Carolina Supreme Court acknowledged our decisions in *Stahl-Rider* and *Sides* but expressly declined to decide "whether sovereign immunity is a question of subject matter jurisdiction or whether the denial of a motion to dismiss on grounds of sovereign immunity is immediately appealable." *Teachy, supra*, at 328, 293 S.E. 2d at 184. Therefore, we follow the precedent of *Stahl-Rider* and *Sides* and hold that the present appeal is properly before us.

It is a fundamental rule of law that the State is immune from suit unless it expressly consents to be sued. *Great American Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 118 S.E. 2d 792 (1961). By enactment of the Tort Claims Act, G.S. 143-291 *et seq.*, the General Assembly partially waived the sovereign immunity of the State to the extent that it consented that the State could be sued for injuries proximately caused by the negligence of a State employee acting within the scope of his employment. *Teachy, supra.* Jurisdiction to hear such claims was vested in the Industrial Commission. *Id.* G.S. 143-291 provides in pertinent part:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under cir-

cumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

No formal pleadings are required to invoke the jurisdiction of the Industrial Commission under the State Tort Claims Act. *Branch Banking & Trust Co. v. Wilson County Board of Education*, 251 N.C. 603, 111 S.E. 2d 844 (1960). The only requirement is that the claimant file with the Commission an affidavit in duplicate, containing the following information:

(1) The name of the claimant;

(2) The name of the department, institution or agency of the State against which the claim is asserted, and the name of the State employee upon whose alleged negligence the claim is based;

(3) The amount of damages sought to be recovered;

(4) The time and place where the injury occurred;

(5) A brief statement of the facts and circumstances surrounding the injury and giving rise to the claim.

G.S. 143-297; *Branch Banking & Trust Co., supra.* Claimant has complied with these requirements.

DOT argues that while G.S. 136-25 mandates that DOT provide suitable detours while a highway or road is closed, the manner in which its employees select, design, and maintain such detours are "discretionary governmental functions" and that the State has not waived its sovereign immunity from suit for negligence in the exercise of such functions. Therefore, DOT contends, the Industrial Commission has no personal jurisdiction over it in this case. We do not agree.

By enactment of the Tort Claims Act, the State has specifically waived immunity from tort claims falling within the Act without regard to whether the function out of which a claim arises is a governmental function or a proprietary function. *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E. 2d 618 (1983). The waiver of immunity is not dependent upon whether the alleged negligent act involves the exercise of discretion. North Carolina's Tort Claims Act does not create an exception for negli-

gent performance of duties involving discretion. *Cf.* Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1982) (explicitly excluding liability based upon the performance of, or failure to perform, a discretionary function or duty). While the Act must be strictly construed, *Floyd v. Highway Commission*, 241 N.C. 461, 85 S.E. 2d 703 (1955), and its scope may not be enlarged by judicial construction beyond its plain and unambiguous terms, *Alliance Co. v. State Hospital*, 241 N.C. 329, 85 S.E. 2d 386 (1955), the Act will be construed so as to effectuate its purpose of waiving sovereign immunity so that a person injured by the negligence of a State employee may sue the State as he would any other person. *Lyon & Sons v. State Bd. of Education*, 238 N.C. 24, 76 S.E. 2d 553 (1953). North Carolina courts have recognized the jurisdiction of the Industrial Commission to determine whether discretionary acts performed by employees or agents of the State were negligent and whether they proximately caused injury to a claimant. *See Vaughn v. Dept. of Human Resources*, 296 N.C. 683, 252 S.E. 2d 792 (1979) (Industrial Commission had jurisdiction to determine whether County Director of Social Services and his staff were negligent in placement of child in foster home); *Wrape v. Highway Commission*, 263 N.C. 499, 139 S.E. 2d 570 (1965) (whether the Director of Highways and Chief Engineer were negligent in planning and designing relocation of highway); *Phillips v. Dept. of Transportation*, 80 N.C. App. 135, 341 S.E. 2d 339 (1986) (whether DOT employees were negligent in failing to maintain highway shoulder or correct dangerous condition).

DOT cites *Hochheiser v. N.C. Dept. of Transportation*, 82 N.C. App. 712, 348 S.E. 2d 140 (1986), *disc. rev. allowed*, 319 N.C. 104, 353 S.E. 2d 110 (1987), in support of its argument that the Industrial Commission is without jurisdiction to review the discretionary actions of its employees in this case. In our view, DOT's reliance on *Hochheiser* is misplaced. The question of personal jurisdiction over the Department of Transportation under the Tort Claims Act was not before the *Hochheiser* court. The sole question before the Court in that case was whether DOT could be held liable, under the facts found by the Industrial Commission, for the decision of its employees not to erect a guardrail. Stating that discretionary decisions of DOT are not reviewable by the courts or the Industrial Commission unless they are "so clearly unreasonable as to amount to oppressive and manifest abuse," *Id.*

at 718, 348 S.E. 2d at 143, the Court held that neither the evidence nor the Commission's findings of fact supported a conclusion that DOT was negligent in failing to erect a guardrail or that any act or omission on its part proximately caused the accident. Rather than standing for the proposition that the Industrial Commission has no personal jurisdiction over DOT to determine claims alleged to have arisen as a result of a discretionary decision, *Hochheiser* merely holds that a claimant must show an "oppressive and manifest abuse" of discretion in order to prove that an act or omission involving the exercise of discretion was negligent.

We have considered DOT's other arguments and find them without merit. Claimant has alleged that he sustained injuries due to the negligence of certain employees of DOT acting within the course and scope of their employment under circumstances where the State, if a private person, would be liable to him under the law. Whether he can sustain the allegations by proof remains to be seen. The State, by enactment of the Tort Claims Act, has waived its immunity, and the immunity of its agencies, from suit for claims such as this one and has conferred upon the Industrial Commission jurisdiction to determine them. We hold that DOT's motion to dismiss for lack of personal jurisdiction was properly denied.

Affirmed.

Judges BECTON and COZORT concur.

STATE OF NORTH CAROLINA v. THOMAS EDISON LONG

No. 8713SC250

(Filed 15 September 1987)

1. Homicide § 30.2— murder case—failure to instruct on voluntary manslaughter

The trial court properly declined to submit to the jury the issue of defendant's guilt of the lesser offense of voluntary manslaughter where the evidence tended to show that, after disconnecting the telephone wires, defendant waited outside the house where his wife lived until she and a male friend came outside and got into the friend's car; defendant approached the vehicle from the

rear with his pistol drawn; when the victim refused his command to stay inside the vehicle, he pushed her with one hand, raised the other hand in which he held his pistol, and shot her; defendant testified that he did not intend to fire the weapon and intended no harm to his wife; and there was no evidence tending to show that defendant shot his wife in the heat of passion on sudden provocation.

2. Homicide § 21.7— second degree murder—sufficiency of evidence

Evidence was sufficient to support defendant's conviction of second degree murder where it tended to show that defendant, after grabbing his wife with his left hand and pushing her down, raised his pistol and fired it, striking his wife in her chest, and that she died as a result of the wound.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 13 October 1986 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 2 September 1987.

Defendant was charged with the first degree murder of his wife, Annette H. Long, and with assault with a deadly weapon with intent to kill inflicting serious bodily injury upon Cyril Franklin Thomas. He entered pleas of not guilty. A jury returned verdicts finding defendant guilty of second degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury. Judgments were entered imposing consecutive presumptive sentences of imprisonment. Defendant appeals.

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

William R. Shell for defendant appellant.

MARTIN, Judge.

Although defendant gave notice of appeal from both convictions, he brings forward in his brief assignments of error relating only to his conviction of the second degree murder of Annette Long. We conclude, therefore, that defendant has abandoned his exceptions and assignments of error with respect to his conviction of feloniously assaulting Cyril Franklin Thomas. App. R. 28 (a); *State v. Wilson,* 289 N.C. 531, 223 S.E. 2d 311 (1976).

With respect to his conviction of murder, defendant brings forward two assignments of error. First, he contends the trial court erred in denying his request for an instruction as to the lesser offense of voluntary manslaughter. Second, he assigns er-

ror to the denial of his motion to dismiss the homicide charges for insufficiency of the evidence. We have considered each assignment of error and find no merit in either contention.

At trial, the State offered evidence tending to show that in March 1986 defendant and his wife, Annette "Jenny" Long, were separated and Mrs. Long was renting a room at Barbara Lewis's residence in the Olde Towne subdivision in Brunswick County. For about six weeks prior to 25 March 1986, Mrs. Long had been seeing Cyril Franklin "Franky" Thomas. On 25 March 1986, in response to an invitation from Mrs. Long, Thomas went to Barbara Lewis's residence, arriving at about 9:30 p.m. Shortly after 11:00 p.m., Thomas and Mrs. Long left the house and got into Thomas's Bronco, which was parked in the rear of the residence. As Thomas started the vehicle, defendant approached it from the rear on the driver's side. Defendant was holding a .357 caliber revolver in his right hand, but was not pointing it at Thomas. Despite defendant's command for her to stay in the vehicle, Mrs. Long got out of the Bronco and stood beside the passenger door. Defendant walked around the rear of the vehicle and grabbed Mrs. Long's right arm or shoulder with his left hand. Mrs. Long fell back, reaching for and grabbing defendant's left arm as she fell. Thomas, who had remained in the Bronco, saw defendant bending over Mrs. Long and then saw defendant's right arm tighten up and raise about three inches. He heard the gun go off and saw a flash. Thomas backed out of the driveway. As he did so, defendant turned and fired at the Bronco. The shot went through the vehicle's windshield and struck Thomas in his left shoulder.

Mrs. Long died at New Hanover Hospital at approximately 2:00 a.m. on 26 March 1986. Medical testimony tended to show that she died as a result of a gunshot wound to her right chest. Thomas was treated at New Hanover Hospital, where a bullet was removed from his left shoulder.

Defendant testified and offered evidence tending to show that on the night of 25 March 1986 he had drinks with his stepdaughter and her friends and started to his home at Leland. He decided to drive by Barbara Lewis's house to see if Mrs. Long's car was there. When he did so, he saw Thomas's Bronco parked behind the house next to a privacy fence. He knew that Mrs.

Long and Thomas had dated. Defendant parked his truck where it could not be seen from the Lewis residence and walked to the rear of the house. He carried a pistol with him because he knew that Thomas carried a gun in his vehicle. He testified that he was not angry with Thomas or Mrs. Long, but that he wanted to talk with Thomas about not interfering with his efforts at a reconciliation with Mrs. Long.

Waiting for Thomas to leave the Lewis house, defendant walked around the yard and onto the back porch; he sat smoking cigarettes at a picnic table and later in Mrs. Long's car. Afraid he would be reported as a prowler, he disconnected Barbara Lewis's telephone line. After waiting about twenty minutes, he decided Thomas was going to stay all night, and, not wanting to wait that long, he decided to go home. Defendant testified he wanted Thomas to know he had been there so he turned the outside mirrors on Thomas's Bronco to face the front of the vehicle.

As defendant was preparing to leave, Thomas and Mrs. Long came out of the house and got into Thomas's Bronco. Defendant decided to speak to both of them "to stop this before it gets any further." Defendant testified that he went to the driver's side of the Bronco and held his pistol up so that Thomas would know he had a gun. He did not point the pistol at Thomas. He told Mrs. Long to stay in the truck because he wanted her to listen to what he had to say. When she got out of the Bronco, he went around the vehicle and met her just behind the passenger door. He testified that Mrs. Long stumbled and that he reached out and pushed her back toward the door of the Bronco with his left hand and told her to get into the vehicle. He was holding the gun down by his side with his right hand. He did not raise his right arm or point the pistol at Mrs. Long; he did not intend to shoot her. As he pushed her toward the Bronco, she made a turning motion and somehow the pistol discharged. He did not know that Mrs. Long was hit until she said, "Tom, I'm shot." At that point, Thomas started backing the Bronco out of the yard. Defendant, realizing that Mrs. Long needed help, hollered for Thomas to stop and fired his pistol into the air. When Thomas kept going, defendant lowered his pistol and fired in the direction of the Bronco. He testified, however, that he did not intend to shoot Thomas.

[1] The trial court instructed the jury as to first degree murder, second degree murder, and involuntary manslaughter. The jury

was also instructed that defendant would not be guilty of any crime if Mrs. Long died as a result of an accident not involving criminal negligence. The defendant requested that the trial court submit to the jury the issue of his guilt of voluntary manslaughter and assigns error to the court's refusal to do so.

The court is required to instruct the jury as to a lesser included offense only when there is evidence from which the jury could find that such lesser offense was committed. *State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977). Voluntary manslaughter is a lesser included offense of murder and is defined as the unlawful killing of a human being without malice, premeditation or deliberation. *State v. Jones*, 299 N.C. 103, 261 S.E. 2d 1 (1080). Killing another "while under the influence of passion or in the heat of blood produced by adequate provocation" is voluntary manslaughter. *State v. Wynn*, 278 N.C. 513, 518, 180 S.E. 2d 135, 139 (1971). To reduce the crime of murder to voluntary manslaughter, the defendant must either "rely on evidence presented by the State or assume a burden to go forward with or produce some evidence of all elements of heat of passion on sudden provocation." *State v. Robbins*, 309 N.C. 771, 777-78, 309 S.E. 2d 188, 192 (1983). Heat of passion upon sudden provocation may be established if the defendant kills his spouse or spouse's paramour immediately upon discovery of the pair "in the very act of intercourse, or under circumstances clearly indicating that the act had just been completed, or was 'severely proximate.' " *State v. Ward*, 286 N.C. 304, 312-13, 210 S.E. 2d 407, 413-14 (1974), *death penalty vacated by* 428 U.S. 903, 49 L.Ed. 2d 1207, 96 S.Ct. 3206 (1976).

In the present case, there is no evidence tending to show that defendant shot Mrs. Long in the heat of passion on sudden provocation. The State's evidence showed that, after disconnecting the telephone wires, defendant waited outside the house where his wife lived until she and Thomas came outside and got into Thomas's vehicle. He approached the vehicle from the rear with his pistol drawn. When Mrs. Long refused his command to stay inside the vehicle, he pushed her with one hand, raised the other hand in which he held his pistol and shot her.

The defendant testified that he did not intend to fire the weapon and intended no harm to Mrs. Long. He testified that he was not angry with Mrs. Long or with Thomas, that he wanted to

tell Thomas "to leave my wife alone, that I felt like we would work the problems that we had out and we could get back together, that our difficulties were not that serious. It wasn't a matter of adultery or anything like that, that we could work it out. And I wanted him to just get out of the picture." Defendant's testimony, if believed, shows an unintentional homicide, rather than an intentional killing committed in the heat of passion upon sudden provocation. Even defendant's testimony that he observed no lights inside the Lewis house and thought Thomas was going to stay all night raises no more than a suspicion that Mrs. Long and Thomas were engaging in adultery inside the house. "[A] mere suspicion, belief, or knowledge of past adultery . . . will not change the character of the homicide from murder to manslaughter." *State v. Ward, supra* at 313, 210 S.E. 2d at 414.

A killing in the heat of passion upon sudden provocation is not shown by the State's evidence, nor has defendant gone forward with or produced any evidence to reduce the killing from murder to voluntary manslaughter. We hold, therefore, that the trial court properly declined to submit to the jury the issue of defendant's guilt of voluntary manslaughter.

[2] Defendant's next assignment is directed to the denial of his motion to dismiss the charge of murder and all lesser included offenses. He contends that the State failed to present evidence sufficient to show that he shot Mrs. Long intentionally and with malice. We disagree.

When ruling on a motion to dismiss in a criminal trial, the court must consider the evidence in the light most favorable to the State and give to the State the benefit of every reasonable inference which may be drawn from the evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). The motion is properly denied if there is substantial evidence of each essential element of the crime alleged in the indictment or of a lesser offense included therein. *Id.* "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 66, 196 S.E. 2d at 652, *quoting State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980).

There is evidence in this case which tends to show that defendant, after grabbing Mrs. Long with his left hand and pushing her down, raised his pistol and fired it, striking Mrs. Long in her

chest, and that she died as a result of the wound. This evidence is sufficient to support a jury finding that defendant intentionally assaulted Mrs. Long with a deadly weapon, proximately causing her death. Proof of an intentional assault upon a victim with a deadly weapon proximately resulting in death, nothing else appearing, raises presumptions that the killing was unlawful and was done with malice and is sufficient to support a conviction of second degree murder. *State v. Robbins, supra.*

No error.

Judges WELLS and EAGLES concur.

N. C. PRIVATE PROTECTIVE SERVICES BOARD v. GRAY, INC., D/B/A SUPERIOR SECURITY

No. 8710SC31

(Filed 15 September 1987)

1. **Administrative Law § 3; Constitutional Law § 7.1— administrative civil penalties—no per se violation of Constitution**

State ex rel. Lanier v. Vines, 274 N.C. 486, does not hold that all administrative civil penalties are *per se* in violation of Art. IV, § 3 of the North Carolina Constitution; rather, the granting of the judicial power to assess a civil penalty must be "reasonably necessary" to the purposes for which the agency was created and with appropriate guidelines for the exercise of the discretion.

2. **Administrative Law § 3; Constitutional Law § 7.1— administrative civil penalty—reasonable necessity for authority to assess**

The authority of the Private Detective Services Board under N.C.G.S. § 74C-17(c) to assess a civil penalty of up to $2,000 in lieu of revocation or suspension of a license was not an unconstitutional attempt to confer a judicial power on a state agency, since the provision authorizing civil penalties was reasonably necessary to petitioner in fulfilling its duties to require that those who hold themselves out as providing private protective services to citizens must meet high standards of training and professionalism.

APPEAL by plaintiff from *Smith, Judge.* Order entered 17 November 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 11 June 1987.

Attorney General Lacy H. Thornburg by Special Deputies Attorney General Reginald L. Watkins and Daniel F. McLawhorn and Associate Attorney General Teresa L. White for the State, appellant.

Max G. Mahaffee for respondent appellee.

COZORT, Judge.

Gray, Inc., formerly d/b/a Superior Security, is a guard and patrol company that was, at all times relevant to this appeal, licensed by the North Carolina Private Protective Services Board (the Board). On 26 August 1985 Gray was notified by letter from the Board that a hearing was scheduled for 4 October 1985 to look into allegations that Gray had failed to register unarmed guards and armed guards in accordance with Chapter 74C of the North Carolina General Statutes and regulations adopted pursuant to those statutes. The hearing was rescheduled for 18 December 1985. On 18 December 1985 the Board and Gray entered into a stipulation agreement which stated, among other things, that, in 1983, Gray employed six armed guards and twenty-two unarmed guards which were not registered with the Board; and, in 1984, Gray employed twenty-seven armed guards and twenty unarmed guards which were not registered with the Board. Gray and the Board had agreed to all terms of a settlement except for a $2,000.00 "reimbursement" to which Gray objected. On 21 March 1986 the Board issued its final agency decision which, among other things, assessed a civil penalty of $2,000.00 and an order for Gray to submit $1,071.36 in back registration fees and interest for the unregistered guards.

On 28 April 1986 Gray petitioned for judicial review asking that the $2,000.00 assessment be reversed and the matter remanded to the Board for entry of a modified decision. On 17 November 1986, Superior Court Judge Donald L. Smith granted the relief requested by Gray and remanded the case to the Board, ordering that the $2,000.00 civil penalty be stricken, and that the Board reconsider "its final agency decision in light of *State, ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E. 2d 161 (1968)." The Board appeals. We reverse.

The trial court did not state its reasons for modifying the decision of the agency, as is required under the last sentence of N.C.

Gen. Stat. § 150A-51 (1983), which provides: "If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification."[1] By the trial court's reference to *Lanier, id.*, and by the briefs submitted by the Board and Gray, it is evident that the trial court based its decision on a legal conclusion that the authority of the Board to assess a civil penalty, under N.C. Gen. Stat. § 74C-17(c), violated Art. IV, § 3 of the North Carolina Constitution.

That section provides:

> The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

In *Lanier*, our Supreme Court was called upon to consider the constitutionality of statutes which empowered the Commissioner of Insurance to assess a civil penalty of up to $25,000.00, in addition to, or in lieu of, license revocation, against those found in violation of certain insurance laws. In an opinion by Justice Lake, the court found the statute to be in violation of Art. IV, § 3:

> The power to revoke a license granted to an insurance agent by the Commissioner, pursuant to chapter 58 of the General Statutes, is "reasonably necessary" to the effective policing of the activities of such agents so as to protect the public from fraud and imposition, one of the purposes for which the Department of Insurance was established. The power to hold hearings and determine facts relating to the conduct of such agent is "reasonably necessary" to the effective and just exercise of the power to grant and revoke such license. The grant of such judicial power to the Commissioner for that purpose is clearly within the authority conferred upon the Legislature by Art. IV, § 3, of the Constitution.

1. The 1985 rewrite of the Administrative Procedure Act (APA) contains no such requirement. *See* N.C. Gen. Stat. § 150B-51 (1985). The new APA applies to contested cases commenced *on or after* 1 January 1986.

> We find, however, no reasonable necessity for conferring upon the Commissioner the judicial power to impose upon an agent a monetary penalty, varying, in the Commissioner's discretion, from a nominal sum to $25,000 for each violation.
>
> Whether a judicial power is "reasonably necessary as an incident to the accomplishment of a purpose for which" an administrative office or agency was created must be determined in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred. We have before us only the attempted grant to the Commissioner of Insurance of the judicial power to impose upon an insurance agent, for one or more of the violations of law specified in G.S. 58-44.6, a penalty, varying in the Commissioner's discretion from a nominal sum to $25,000. We hold such power cannot be granted to him under Art. IV, § 3, of the Constitution of North Carolina.

Lanier, Comr. of Insurance v. Vines, 274 N.C. at 497, 164 S.E. 2d at 167-68.

[1] Our review of *Lanier* leads us to the conclusion that the trial court below erred in its apparent conclusion that N.C. Gen. Stat. § 74C-17(c) violated Art. IV, § 3 of the N.C. Constitution. We note initially that the trial court's action in striking the penalty in its entirety and remanding the cause to the Board to "reconsider its final agency decision in light of . . . *Lanier* . . . and proceed as *otherwise* is provided or required by Chapter 74C of the General Statutes of North Carolina" (emphasis supplied) is subject to being interpreted as a conclusion by the trial court that *Lanier* stands for the proposition that administrative agencies are constitutionally barred from assessing civil penalties. We do not find *Lanier* to mean that all administrative civil penalties are *per se* in violation of the State Constitution, and we so hold. Rather, the granting of the judicial power to assess a civil penalty must be "reasonably necessary" to the purposes for which the agency was created and with appropriate guidelines for the exercise of the discretion.

[2] Viewing the case at bar in light of Justice Lake's guidelines from *Lanier*, we hold that the authority of the Board under N.C. Gen. Stat. § 74C-17(c) to assess a civil penalty of up to $2,000.00 in

lieu of revocation or suspension of a license is not an unconstitutional attempt to confer a judicial power on a state agency. This case is readily distinguishable from the situation in *Lanier*. In *Lanier*, the Commissioner could assess a fine from a nominal amount up to $25,000.00 for each violation, in his discretion, and in addition to license revocation or suspension. Under N.C. Gen. Stat. § 74C-17(c), the civil penalty is limited to $2,000.00, must be in lieu of license revocation or suspension, and the Board has been given statutory guidance in determining the amount of the penalty: "In determining the amount of any penalty, the Board shall consider the degree and extent of the harm caused by the violation." N.C. Gen. Stat. § 74C-17(c) (1985). We find the provision authorizing civil penalties to be reasonably necessary to the Board in fulfilling its duties to require that those who hold themselves out as providing private protective services to citizens must meet high standards of training and professionalism. The Board's decision was not in violation of any constitutional provisions, and the trial court erred in concluding to the contrary.

We have reviewed the Board's decision under the other five standards set out in N.C. Gen. Stat. § 150A-51 (1983),[2] and we find the decision of the agency should be affirmed. The decision of the Superior Court modifying the Board's decision is reversed, and the matter is remanded to the Superior Court for entry of an order affirming the decision of the Board.

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2. The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification. N.C. Gen. Stat. § 150A-51 (1983).

Reversed and remanded.

Judges BECTON and MARTIN concur.

EMMA JEAN HARRIS, ADMINISTRATRIX OF THE ESTATE OF JAMES ROBERT HARRIS, DECEASED v. JERRY HINSON

No. 8720SC64

(Filed 15 September 1987)

Execution § 16— future earnings—supplemental proceedings not permitted

Proceedings supplemental to execution will not be permitted as to future earnings; therefore, the trial court properly denied plaintiff's petition for the appointment of a receiver to receive defendant judgment debtor's wages, disburse an amount to defendant for the reasonable living expenses of defendant and his family, and apply the balance to the judgment.

APPEAL by plaintiff from *Davis (James C.), Judge.* Order entered 25 October 1986 in Superior Court, ANSON County. Heard in the Court of Appeals 9 June 1987.

Robert E. Little, III, and F. O'Neil Jones for plaintiff appellant.

Henry T. Drake for defendant appellee.

COZORT, Judge.

The plaintiff, Emma Jean Harris, filed a civil action for wrongful death against Jerry Hinson, defendant herein, who shot and killed her husband on 12 August 1979. On 12 October 1983, a jury returned a verdict of $35,000.00 in the plaintiff's favor. On 18 June 1984 an execution was issued to satisfy the judgment. The execution was returned unserved on 14 July 1984, with the deputy sheriff checking the box on the return indicating that he did not locate property on which to levy. In May of 1984, the defendant had filed a motion to have declared exempt his home and personal property. The Clerk of Superior Court issued an order declaring the property exempt from execution. On 5 November 1985, a second execution was issued. The record is silent as to the results of that attempt to satisfy the judgment.

On 27 March 1986, the plaintiff filed a motion to examine the defendant's tax returns and cancelled checks for 1982, 1983, 1984, and 1985. On 16 April 1986, Superior Court Judge H. H. Walker entered an order granting the plaintiff's motion and directing the defendant to appear before the Clerk of Superior Court of Anson County on 24 April 1986 with the documents. On 24 April 1986, the defendant filed an affidavit averring: "1. That he is employed by the Seaboard Railroad as an hourly employee. 2. That he obtains from his employer earnings for his personal services. 3. That the earning record from my employer is necessary for the use of a family supported by my labors. [*sic*]"

On 18 June 1986, the plaintiff filed a verified petition requesting the court to appoint a Receiver to receive the defendant's wages and "to make reasonable disbursement to the defendant for his living expenses and apply the balance to the Judgment herein." In support of the request, plaintiff alleged that the defendant "has the substantial income in excess of $35,000.00 a year, and has an income sufficient to pay the Judgment against the plaintiff [*sic*], but that the defendant is defrauding the plaintiff in expending his income and secreting his income such as to present the appearance of being insolvent, and that the defendant's income greatly exceeds his needed expenses to exist . . . ." The plaintiff further alleged that "unless a Receiver of the same is appointed by this Court the defendant will conceal or dispose of his property and collect and conceal the amounts due to the plaintiff . . . ."

On 25 October 1986, Superior Court Judge James C. Davis entered an order denying the plaintiff's petition to appoint a receiver. The order made no factual findings as to the allegations made by plaintiff in her 18 June 1986 petition or as to the affidavit filed by defendant on 24 April 1986. Instead, the trial court concluded, as a matter of law:

> That the Courts in the State of North Carolina cannot, through supplemental proceedings on execution, order a receiver to receive a person's wages in order to satisfy a judgment rendered in this State.

Plaintiff appeals. Regrettably, we must affirm.

N.C. Gen. Stat. § 1-362 provides:

> The court or judge may order *any property*, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor, to be applied towards the satisfaction of the judgment; *except* that the earnings of the debtor for his *personal services*, at any time within 60 days next preceding the order, *cannot be so applied* when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor. (Emphasis added.)

This statute has been expanded by our Courts to preclude the execution on *any* future earnings to satisfy a judgment. Our Supreme Court has held that "[p]rospective earnings of a judgment debtor are entirely hypothetical. They are neither property nor a debt. *Hill v. Central Trust Co.*, 33 Ohio App. 204, 168 N.E. 768." *Finance Co. v. Putnam*, 229 N.C. 555, 557, 50 S.E. 2d 670, 671 (1948). According to *Putnam* our statutes regarding proceedings supplemental to execution were designed after those of the State of New York, "where it has been steadfastly held . . . that 'future earnings, wages, or salaries to become due, or which become due after service of the order for examination, cannot be reached by supplementary proceedings.'" *Id.* (citation omitted). *Putnam* states that the basis for the rule was set out in *In Re Trustees of Board of Publication and Sabbath School Work*, 22 Misc. 645, 50 N.Y.S. 171 (1898). *Id.* That case held:

> Supplementary proceedings do not affect property acquired after they have been commenced [citations omitted]; and earnings becoming due after the service of the order for examination cannot be reached [citation omitted]; and this is so as to future earnings, though they were to become due under an existing agreement to pay a royalty on goods to be manufactured. [Citation omitted.] If it is doubtful whether the money was earned before or after the order, the debtor is entitled to the benefit of the doubt. [Citation omitted.] So, the salary of a public officer, while in the hands of a disbursing officer in common with other money, cannot be reached. [Citations omitted.] This rule has been observed so strictly that [in one case], it was held that, under an order granted on a certain day, a salary which does not become payable until the close of that day cannot be reached. And . . . it is further

> provided that the statute relating to supplementary proceedings does not authorize the seizure of, or other interferences with, any property which is especially exempt by law from levy and sale by virtue of an execution, and that it does not authorize the seizure of the earnings of the judgment debtor for his personal services rendered within 60 days next before the institution of the special proceeding, when it is made to appear by his oath or otherwise that those earnings are necessary for the use of a family wholly or partly supported by his labor. The intent of the legislature is plain. A debtor's duty to his family is recognized so far that, if he has a family wholly or partly supported by his labor, he may, if necessary, always have 60 days' back earnings exempt; and [it has been] held that this was a humane provision, and should be liberally construed in favor of the debtor.

Sabbath School Work, 50 N.Y.S. at 173. Although the soundness of the principle quoted above was questioned on at least two occasions by the New York courts prior to its adoption in *Putnam* by our highest court, [*see Oriole Textile Co., Inc. v. Robert Silk & Woolen Co., Inc.*, 147 Misc. 524, 265 N.Y.S. 447 (1932); and *Collins v. Connelly, et al*, 125 Misc. 871, 212 N.Y.S. 369 (1925)], the courts of North Carolina have held that wages for personal services to be earned constitute neither property nor debt. *Putnam*, 229 N.C. at 557, 50 S.E. 2d at 671; *see also Elmwood v. Elmwood*, 295 N.C. 168, 182, 244 S.E. 2d 668, 676 (1978). With our highest court having confirmed as recently as 1978 that supplemental proceedings will not be permitted as to future earnings, we must affirm the trial court's conclusion of law, even though the facts as alleged by the plaintiff, if true, would seem to indicate a different result may be more equitable.

Under the law as it now stands in this State, a judgment debtor can receive his salary, and dispose of it in any manner he chooses, regardless of whether it contains an amount of funds in excess of what is required to satisfy his and his family's reasonable living expenses. If the debtor elects to accumulate no property other than that which is exempt from execution, even if he squanders his excess funds with the express intent of avoiding paying a judgment that by all laws of principle and fairness he should be made to satisfy, the judgment creditor is, in this State, helpless to collect his judgment.

The law of this State is clear, and unless and until it is altered by the General Assembly or our highest court, we must follow it. The decision of the trial court is therefore

Affirmed.

Judges BECTON and MARTIN concur.

STATE OF NORTH CAROLINA v. E. A. BRITT

No. 8710SC217

(Filed 15 September 1987)

Embezzlement § 6— conversion of AFL-CIO Credit Union funds—insufficiency of evidence of fraudulent intent

Evidence of fraudulent intent was insufficient to support defendant's conviction for embezzlement where the indictments charged that defendant fraudulently converted AFL-CIO Credit Union funds by using them to buy used cars from the State's Division of Purchase and Contract and selling the cars to Credit Union members, but evidence tended to show that defendant was not aware that funds used in the automobile transactions were Credit Union funds but instead thought they were the personal funds of his brother-in-law, manager of the Credit Union.

APPEAL by the defendant from *McLelland, Judge.* Judgment entered 26 August 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 2 September 1987.

Defendant E. A. Britt was charged in proper bills of indictment with eight counts of embezzlement in violation of G.S. 14-90. At the time of the alleged offenses, defendant was Secretary-Treasurer of the State AFL-CIO and Treasurer of that union's credit union. The indictments charged Britt with fraudulently converting AFL-CIO Credit Union funds, working with his brother-in-law, the manager of the Credit Union, by buying used cars from the State's Division of Purchase and Contract using Credit Union funds and selling them to Credit Union members. Defendant's evidence tended to show that defendant Britt was not aware and had no intent to fraudulently convert the Credit Union funds used in the automobile transactions. At the conclusion of the State's evidence and at the conclusion of all the evidence, defendant

moved to dismiss. The trial court denied the motions to dismiss. From judgment entered upon conviction on all eight charges, defendant Britt appeals.

Attorney General Thornburg, by Assistant Attorney General Michael Rivers Morgan, for the State.

Tharrington, Smith & Hargrove by Roger W. Smith for defendant-appellant.

EAGLES, Judge.

Defendant assigns as error the failure of the trial judge to grant his motion to dismiss. Defendant argues the State failed to put forth any evidence to show that he acted with fraudulent intent. After careful review, we agree.

In ruling upon a motion to dismiss, the trial judge must consider the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference drawn from that evidence. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). The reviewing court must determine whether there is substantial evidence of each essential element of the crime charged. *State v. McKinnon*, 306 N.C. 288, 293 S.E. 2d 118 (1982). To convict of embezzlement, the State must prove that (1) the defendant, older than 16, acted as an agent or fiduciary for his principal, (2) he received money or valuable property of his principal in the course of his employment and through his fiduciary relationship, and (3) he fraudulently or knowingly and willfully misapplied or converted to his own use the money of his principal which he had received in a fiduciary capacity. *State v. Pate*, 40 N.C. App. 580, 253 S.E. 2d 266, *cert. denied*, 297 N.C. 616, 257 S.E. 2d 222 (1979).

The State must prove each element of the offense beyond a reasonable doubt, including the essential element of fraudulent intent. *State v. Thompson*, 50 N.C. App. 484, 274 S.E. 2d 381, *disc. rev. denied*, 302 N.C. 633, 280 S.E. 2d 448 (1981). The intent necessary to convict on a charge of embezzlement is an intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal for purposes for which the property is not held. *State v. Gentry*, 228 N.C. 643, 46 S.E. 2d 863, *cert. denied*, 335 U.S. 818 (1948).

Proof of conversion of the principal's property without fraudulent intent being proven will not sustain a conviction of embezzlement, *State v. Cohoon*, 206 N.C. 388, 174 S.E. 91 (1934). The State's failure to show substantial evidence of fraudulent intent would be sufficient grounds to grant the defendant's motion to dismiss. *State v. Keyes*, 64 N.C. App. 529, 307 S.E. 2d 820 (1983).

By defendant's introduction of evidence, he waived his motion for dismissal at the conclusion of the State's evidence. G.S. 15-173; *State v. Powell*, 74 N.C. App. 584, 328 S.E. 2d 613 (1985). The renewal of the motion to dismiss at the conclusion of all the evidence compels this court to consider the motion in light of all the evidence presented at trial. *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971).

At the trial the evidence tended to show the following: The defendant entered the business of buying and selling cars soon after a wall collapsed in his home during remodeling. At that time, his brother-in-law, George Potter, was manager of the AFL-CIO Credit Union. Defendant Britt knew that his brother-in-law made extra money buying cars through the North Carolina Division of Purchase and Contract and selling them to Credit Union members. Britt asked Potter if he could participate in the car sales business and Potter consented.

Shortly thereafter, Britt began to assist Potter in the buying and selling of automobiles. Prior to buying the first car Britt filled out a loan application and delivered it to Potter. That application was never processed. Britt and Potter went together to the Division of Purchase and Contract to pick out the first car in their joint venture. Seven other cars were later bought from the North Carolina Division of Purchase and Contract and on each of those seven occasions the cars were sold to Credit Union members. Two of the sales to the Credit Union members occurred the same day that Potter and Britt bought the cars. Only a short period of time elapsed between the initial purchase from North Carolina Division of Purchase and Contract and the remaining sales.

The money used to initially purchase the cars was Credit Union money in each instance. In all eight instances Britt titled the cars in his name and either Britt alone or Britt and Potter

together received profits from the sale of the cars. Other than the initial loan application form he had delivered to Potter, Britt did not take out any loan to finance the purchase of the cars and did not enlarge any then outstanding loan to cover the purchase price.

The defendant, in uncontradicted testimony, stated that he had offered to pay Potter one-half the purchase price of the first car. Potter refused the offer indicating that he would use his personal funds because he already had a buyer lined up and the car sold. Potter claimed that he had a waiting list of prospective buyers. Potter, testifying for the State, stated that he did not tell Britt that the funds being used to purchase the cars were Credit Union funds rather than his own personal monies. After this occasion, Potter and Britt never discussed the origin of the funds used to purchase the cars.

In reviewing a motion to dismiss at the conclusion of all the evidence, the court must consider any evidence presented by the defendant which rebuts the inference of guilt so long as it is not contradicted by any of the State's evidence. *State v. Bates*, 309 N.C. 528, 308 S.E. 2d 258 (1983). The record demonstrates that the State presented no evidence which indicated Britt was aware that the purchase of the eight automobiles had been subsidized by the Credit Union. In fact, Britt's uncontradicted evidence shows that he thought the cars were bought with his brother-in-law's money. Potter's testimony that he maintained a waiting list of buyers and evidence that there was a quick turnover time in selling the cars further buttress defendant's testimony. Consequently, we find there was insufficient evidence of defendant Britt's fraudulent intent as required by G.S. 14-90 and that the trial judge erred in denying defendant's motion to dismiss.

Our finding here makes it unnecessary to address the defendant's additional assignments of error. The judgment is vacated and the cause remanded for dismissal of the charges.

Reversed.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. KENNETH MOORE

No. 8718SC20

(Filed 15 September 1987)

1. **Criminal Law § 73.2— hearsay testimony—admission under Rule 804(b)(5)—statements not admissible under another exception—absence of explicit finding—harmless error**

Although the trial court erred in admitting hearsay statements under N.C.G.S. § 8C-1, Rule 804(b)(5) without explicitly stating its conclusion that the hearsay statements were not admissible under any other exception to the hearsay rule, defendant was not prejudiced by such error where such a conclusion was implicit in the court's order admitting the statements.

2. **Criminal Law § 73.2— hearsay testimony—admission under Rule 804(b)(5)—guarantees of trustworthiness—purpose of Rules of Evidence**

In admitting hearsay statements under Rule 804(b)(5), the trial court made sufficient findings to support its conclusion that the statements possessed the requisite "circumstantial guarantees of trustworthiness." Furthermore, the court's conclusion that "the general purpose in the interest of justice will best be served by the admission of these statements into evidence" was a sufficient determination that admission of the statements will best serve the general purposes of the Rules of Evidence.

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

The evidence was sufficient to sustain defendant's conviction of second degree murder under a theory of acting in concert where it tended to show that defendant and his brother arrived at the victim's apartment with a gun; defendant pointed the gun at the victim and a struggle ensued; when the victim ran into a bedroom, defendant's brother took the gun from defendant; both brothers followed the victim into the bedroom; and defendant's brother then shot the victim.

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 7 August 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 31 August 1987.

Defendant was charged in a proper bill of indictment with the second-degree murder of Keith Patrick. Defendant was found guilty and sentenced to a fifteen year term of imprisonment.

At trial, evidence was presented tending to show the following facts. On 21 September 1980, Keith Patrick, Clarence Rudd, and Virginia Moore, defendant's sister, were watching television at Patrick's apartment. Defendant and his brother, Tim Moore, ar-

rived at the apartment with a gun. Virginia Moore met her brothers outside and asked them not to start any trouble. She then went back inside the apartment. Shortly thereafter, the brothers called Patrick outside and asked him something. Patrick gave them a short answer and went back inside the apartment. Defendant and his brother followed him. Defendant pointed the gun at Patrick and a struggle ensued. Rudd ran out the door and Patrick ran into a back bedroom and picked up the telephone. At that point, defendant had the gun. Tim Moore then took the gun from defendant and both brothers followed Patrick to the back bedroom where Tim Moore shot Patrick. Both brothers immediately fled.

Shortly after the shooting, the police arrived. Virginia Moore gave a detailed statement to Officer Hoyle at the apartment and a similar statement to Officer Fuller at the police station. In her statement to Officer Fuller, Virginia Moore stated that, "Both Kenneth and Timothy had knocked Keith down onto the bed somehow, I don't know. At this time, Tim shot Keith. After they shot Keith, they took off and ran to the car and left."

A week later, Virginia Moore gave another statement to the investigator for the public defender's office. This statement was to the effect that defendant attempted to stop the shooting.

At trial, Virginia Moore refused to testify.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

ARNOLD, Judge.

Defendant first contends the trial court erred in admitting Virginia Moore's statements to Officers Hoyle and Fuller under G.S. 8C-1, 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 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.

[1] Defendant specifically argues that the trial court erred in failing to determine whether the hearsay statements were covered by any of the other exceptions and in failing to enter this conclusion on the record. In order for a statement to fall within the 804(b)(5) hearsay "catchall" exception, the statement must not be admissible under any other exception to the hearsay rule. Detailed findings of fact are not required, but the trial judge must enter his conclusion in the record. *Id.*

Although there is no specifically stated conclusion that the statements are not covered elsewhere, such conclusion is inherently implicit. At voir dire, the prosecutor argued that Virginia Moore's statements were admissible under Rules 803(1), 803(2) and 804(b)(5). In its order, the trial court concluded that the statements were admissible under 804(b)(5). This conclusion clearly implies that the statements were not admissible under 803(1), 803(2) or any other exception. While we are compelled to find that the trial court erred in failing to explicitly state its conclusion, we hold that defendant was in no way prejudiced by such error.

[2] Defendant also argues that the statements do not possess the required circumstantial guarantees of trustworthiness. We disagree. The threshold determination of trustworthiness has been called the most significant requirement of admissibility under the residual hearsay exception. *Id.* Findings of fact and conclusions of law as to the trustworthiness requirement must appear in the record. *Id.* After a careful review of the record, we hold that there are sufficient findings to support the trial court's conclusion that the statements possess the requisite "circumstantial guarantees of trustworthiness."

Defendant further argues that the trial court erred in failing to enter a conclusion on the record that the admission of the statements will best serve the general purposes of the rules of evidence.

The trial court concluded that "the general purpose in the interest of justice will best be served by the admission of these statements into evidence. . . ." This is clearly sufficient under the *Smith* inquiry. Defendant's argument is wholly devoid of merit.

[3] Defendant next assigns as error the trial court's failure to grant his motion to dismiss the second-degree murder charge because the evidence was insufficient.

When a defendant moves for dismissal based on insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged, and evidence of defendant being the one who committed the crime. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984).

Defendant was charged with second-degree murder under a theory of acting in concert. A defendant acts in concert with another to commit a crime when he acts in harmony or in conjunction with another pursuant to a common criminal plan or purpose. *State v. Diaz*, 317 N.C. 545, 346 S.E. 2d 488 (1986). However it is not necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979).

The evidence tended to show that the two brothers arrived with a gun. Defendant had possession of the gun and pointed it towards the victim. A struggle ensued and the victim ran into a bedroom. The brothers followed and Tim Moore shot the victim. This evidence was more than sufficient to support the trial court's denial of defendant's motion to dismiss.

Defendant finally contends the trial court committed plain error when it instructed the jury on acting in concert. Defendant failed to object to the instructions at trial and bases his plain er-

ror allegation on his assertion that there is no evidence to support a theory of acting in concert. Having already dealt with the sufficiency of evidence supporting the theory of acting in concert, this contention has been answered. Defendant's contention that the trial court committed plain error when it instructed the jury on acting in concert is without merit.

No error.

Chief Judge HEDRICK and Judge ORR concur.

FIRST AMERICAN SAVINGS & LOAN ASSOCIATION v. G. H. SATTERFIELD, JR., AND WIFE, JOYCE SATTERFIELD

No. 873SC79

(Filed 15 September 1987)

Appeal and Error § 6.2— order setting aside clerk's judgment—appeal premature

Plaintiff's appeal from an order setting aside the clerk's judgment against defendants was premature because the order appealed from was not final, did not affect a substantial right, and would not work injury to plaintiff if not corrected before an appeal from a final judgment, since plaintiff was affected by its inability immediately to appeal the order setting aside the judgment only to the extent that it would be required to establish defendants' liability and the amount thereof by proper evidence, rather than by relying upon defendants' purported confession of judgment.

APPEAL by plaintiff from *Reid, Judge*. Order entered 31 October 1986 in Superior Court, PITT County. Heard in the Court of Appeals 25 August 1987.

On 31 May 1984, plaintiff made a construction/permanent loan in the maximum amount of $5,500,000.00 to Leisure Development of Greenville (Leisure), a North Carolina limited partnership, for the purpose of constructing a hotel upon property located in Greenville, N.C. The loan was secured by a deed of trust encumbering Leisure's real property. In addition, defendants G. H. Satterfield, Jr. and Joyce Satterfield executed an Unconditional Guaranty jointly and severally guaranteeing payment of the loan. The guaranty agreement provided, *inter alia*:

> Each Guarantor hereby authorizes, empowers and appoints Daniel H. Borinsky . . . as its attorney in fact pursuant to Chapter 1A-1, Rule 68.1 of the General Statutes of North Carolina to file with the Clerk of Superior Court of the County in which each Guarantor resides or has real property in the State of North Carolina, a confession of judgment in favor of the Lender, or its successors or assigns, for such amount, including principal, interest, attorneys' fees and costs, as such Guarantor may be liable for to Lender by reason of this Guaranty.

Leisure subsequently defaulted. Plaintiff initiated foreclosure proceedings in August 1985, and the real property was sold in December 1985. An involuntary petition for bankruptcy was filed against Leisure in the United States Bankruptcy Court for the Eastern District of North Carolina and a trustee in bankruptcy was appointed.

On 22 April 1986, defendants sent a letter to plaintiff purporting to revoke the guaranty agreement and the appointment of Daniel Borinsky as their attorney in fact for the purpose of confessing judgment. On 8 May 1986, plaintiff gave written notice to defendants that $844,626.02 remained due and payable on Leisure's note after application of the proceeds of the foreclosure sale. The notice demanded payment of that amount and informed defendants of plaintiff's intention to enforce provisions of the note and guaranty relating to attorney's fees.

On 18 July 1986, a "Statement Authorizing Entry of Judgment" was filed in the office of the Clerk of Superior Court of Pitt County by Daniel H. Borinsky as attorney-in-fact for each of the defendants. The statement recited that it was filed pursuant to G.S. 1A-1, Rule 68.1 and authorized entry of judgment in favor of plaintiff against defendants jointly and severally in the principal amount of $844,626.02, plus attorneys' fees in the amount of $126,693.90, interest at the rate specified in the note from 8 May 1986, and all costs. On the same date the Clerk of Superior Court of Pitt County entered judgment against defendants, jointly and severally, in the above-stated amounts.

On 29 September 1986, defendants moved, pursuant to G.S. 1A-1, Rule 60(b), to set aside the judgment. Plaintiff appeals from

an order allowing defendants' motion and setting aside the judgment.

Wyrick, Robbins, Yates, Ponton & Kirby, by Samuel T. Wyrick, III, and Mark C. Kirby, for plaintiff appellant.

Connor, Bunn, Rogerson & Woodard, P.A., by David M. Connor, for defendant appellees.

MARTIN, Judge.

The question of whether or not an appeal lies from the superior court's order setting aside the judgment has not been presented or argued by either party to this appeal. It is well-established, however, that if the appealing party has no right of appeal, the appellate court should, on its own motion, dismiss the appeal even when the question of appealability has not been raised by the parties. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980). We conclude that plaintiff's appeal is premature and, accordingly, we dismiss it.

The order setting aside the 18 July 1986 judgment against defendants is not a final judgment. The order is interlocutory because further action by the trial court is necessary to settle and determine the entire controversy between the parties. *See Veazey v. City of Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950). Interlocutory orders are immediately appealable only if they affect a substantial right and will work injury to the appellant if not corrected before an appeal from a final judgment. G.S. 1-277(a), G.S. 7A-27(d), *Bailey v. Gooding, supra.* A right is substantial only if it "will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E. 2d 777, 780 (1983).

As stated by our Supreme Court, the " 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 343 (1978). Accordingly, the appellate courts of this State have previously held that an order setting aside

summary judgment in defendant's favor did not affect a substantial right of the defendant and, thus, was not immediately appealable. *Waters v. Qualified Personnel, Inc., supra.* Likewise, it has been held that an order setting aside an entry of default and default judgment did not affect a substantial right and was not appealable. *Bailey v. Gooding, supra. See also Hollingsworth GMC Trucks, Inc. v. Smith,* 249 N.C. 764, 107 S.E. 2d 746 (1959) (order setting aside judgment of nonsuit not appealable); *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879 (1957) (order setting aside clerk's entry of voluntary nonsuit not appealable). Taken together, these cases establish that "avoidance of a rehearing or trial is not a 'substantial right' entitling a party to an immediate appeal." *Blackwelder v. Dept. of Human Resources, supra* at 335, 299 S.E. 2d at 780.

In the present case, no right of plaintiff will be lost by delaying its appeal until after a final judgment. Plaintiff is affected by its inability to immediately appeal the order setting aside the judgment only to the extent that it must establish defendants' liability and the amount thereof by proper evidence, rather than by relying upon the purported confession of judgment. Under the facts of this case, we do not consider the avoidance of having to affirmatively prove one's claim to be a substantial right. *See Bailey v. Gooding, supra; Waters v. Qualified Personnel, Inc., supra.* Moreover, plaintiff's exception to the order preserves its right to assign error to the order setting aside the 18 July 1986 judgment by confession should there be an appeal from the final judgment in the case. *Id.*

Appeal dismissed.

Judges BECTON and COZORT concur.

In re Mitchell

IN THE MATTER OF: TANYA MITCHELL

No. 8712DC104

(Filed 15 September 1987)

1. **Burglary and Unlawful Breakings § 5— first degree burglary—insufficiency of evidence**

Evidence was insufficient to sustain a verdict of first degree burglary where it tended to show that the juvenile entered an occupied dwelling in the nighttime; there was no evidence that she intended to commit larceny; and the intent to steal could not be presumed because there was evidence that the juvenile entered the house because someone was chasing her.

2. **Infants § 20— reasonable standard of proof stated in order—statute complied with**

Though the trial court, at the time of a juvenile delinquency hearing, did not mention the reasonable doubt standard of proof as required by N.C.G.S. § 7A-635 and 637, the statutory requirement was met where the trial court stated in its order that, after hearing all the evidence, it found "the allegations to be true beyond a reasonable doubt."

APPEAL by respondent from *Guy, Judge.* Ordered entered 20 November 1986 in District Court, CUMBERLAND County. Heard in the Court of Appeals 26 August 1987.

Respondent, who was fourteen years old, was charged in juvenile court as being a delinquent juvenile as defined by G.S. 7A-517(12) in that she had committed the offense of first degree burglary. Evidence presented at trial tended to show the following: At approximately five o'clock in the morning, Mr. Ernest Holmes was awakened by the alarm clock in his daughter's room which was located down the hall. He thereafter heard rustling noises in his own room and when he got out of bed to investigate, he found respondent on the floor beside his bed. When he questioned her as to why she was in his house, respondent jumped into a corner between the wall and a dresser and said, "Shh, somebody is chasing me and I'm hiding from them."

Mr. Holmes called for his daughter and they locked respondent in a bathroom until the police arrived. The kitchen window, which had been closed when Mr. Holmes went to bed, was found open and respondent's shoes were found in the yard outside the window.

Respondent presented no evidence at trial. From the trial court's juvenile adjudication order declaring respondent delinquent and placing her on probation, respondent appeals.

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

Assistant Public Defender Elizabeth Manton, for respondent appellant.

ARNOLD, Judge.

[1] Respondent contends that the trial court "erred in concluding that the alleged delinquent act, burglary in the first degree, N.C.G.S. § 14-51, was proven by the State's evidence." We agree.

In order to sustain a conviction, there must be proof of every essential element of the crime charged. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The essential elements of first degree burglary include breaking and entering a dwelling at nighttime, with the intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976).

The felony alleged to have been intended by respondent was that of larceny. In the present case, there was no evidence that respondent intended to commit larceny. Thus, in arriving at the conclusion that respondent was guilty of first degree burglary, the trial court must have relied on the well-established *McBryde* presumption. *McBryde* held that when a party enters the dwelling of another, in the nighttime, while the inmates are asleep, the usual intent is to steal and when there is no explanation or evidence of a different intent, the fact of the nighttime entry, accompanied by flight when discovered, is some evidence of guilt and in the absence of any evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. *State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887).

There was evidence presented in the case *sub judice* that respondent entered the house because somebody was chasing her. This is evidence of other intent and precludes application of the *McBryde* inference. *See State v. Moore*, 62 N.C. App. 431, 303

S.E. 2d 230 (1983); *State v. Lamson*, 75 N.C. App. 132, 330 S.E. 2d 68, *disc. rev. denied*, 314 N.C. 545, 335 S.E. 2d 318 (1985).

We find that there was insufficient evidence to sustain a verdict of first degree burglary. However, there was ample evidence that respondent was guilty of the lesser included offense of misdemeanor breaking or entering under G.S. 14-54(b). The felony charge must be stricken and the case remanded for resentencing on the lesser-included offense of misdemeanor breaking or entering. *See State v. Hankins*, 64 N.C. App. 324, 307 S.E. 2d 440 (1983), *aff'd per curiam*, 310 N.C. 622, 313 S.E. 2d 579 (1984).

[2] Respondent next contends that the trial court erred in failing to state the standard of proof used in making the determination of delinquency as required by G.S. 7A-635, G.S. 7A-637 and the North Carolina and United States Constitutions. We disagree.

G.S. 7A-635 states that "(t)he allegations of a petition alleging the juveniles delinquent shall be proved beyond a reasonable doubt." G.S. 7A-637 provides that "(i)f the judge finds that the allegations in the petition have been proved as provided in G.S. 7A-635, *he shall so state,*" (Emphasis added.) The statutory use of the word "shall" mandates the trial judges to affirmatively state that the reasonable doubt standard was followed. *In re Wade*, 67 N.C. App. 708, 313 S.E. 2d 862 (1984). Failure of the trial judge to follow the clear mandate of the statute is error. *Id.; In re Johnson*, 76 N.C. App. 159, 331 S.E. 2d 756 (1985).

The crux of respondent's contention is that, at the time of the hearing, the trial judge did not mention the reasonable doubt standard of proof required by statute. In the order entered on 20 November 1986, however, the trial court stated that after hearing all of the evidence it found "the allegations to be true beyond a reasonable doubt." This was sufficient to satisfy the requirement in G.S. 7A-635 and G.S. 7A-637. Respondent's contention on this matter is without merit.

Remanded.

Judges JOHNSON and PARKER concur.

BLUE STRIPE, INC. D/B/A ENTRE COMPUTER CENTER v. UNITED STATES FIDELITY AND GUARANTY COMPANY

No. 8710SC132

(Filed 15 September 1987)

Insurance § 142.1— losses discovered during inventory—no coverage

Plaintiff could not recover on an "all risk" insurance policy where the policy provided that defendant would not be liable for loss due to "shortage of property disclosed on taking inventory," and plaintiff's own evidence revealed that its losses were discovered when the general manager took a regular monthly inventory of available stock.

APPEAL by plaintiff from *Smith, Judge.* Judgment entered 18 September 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 1 September 1987.

Boxley, Bolton & Garber, by Ronald H. Garber, for plaintiff appellant.

Walter L. Horton, Jr. for defendant appellee.

BECTON, Judge.

Plaintiff, Blue Stripe, Inc., brought this action seeking to recover damages of $21,610.00 under an "all risk" insurance policy issued by defendant, United States Fidelity and Guaranty Company (USF&G). The matter was tried before a jury, but, after Blue Stripe presented its case, the trial judge granted USF&G's motion for a directed verdict. Blue Stripe appealed. We affirm.

I

Blue Stripe operated a retail computer sales business in Crabtree Valley Mall under the name Entre Computer Center (Entre). Blue Stripe's own evidence showed that in March 1983 Wayne Webster, the store's general manager, took a regular monthly inventory of available stock. He determined that a substantial amount of inventory was missing and notified the police and USF&G. There were no signs of forced entry onto the premises. The USF&G claims adjuster suggested that the loss might be due to employee theft. Entre conducted a detailed inventory of all items placed into and removed from inventory, then filed a claim with USF&G. USF&G denied the claim in November 1983.

One Sunday in January 1984, Webster visited the store and noticed an unauthorized individual on the premises accompanying a cleaning service employee. The following Monday an Entre employee took inventory and discovered another loss. The police were notified. Detective Leffingwell investigated the incident and discovered that the particular cleaning service employee had a long history of criminal conduct, but Detective Leffingwell could not gather sufficient evidence to bring charges against that employee. Entre filed a claim with USF&G, and USF&G paid the claim. Blue Stripe then initiated suit to compel payment on its first claim.

II

Blue Stripe makes two assignments of error which raise one issue on appeal: Did the trial judge err in granting USF&G's motion for a directed verdict?

The insurance policy under which this claim is made is entitled "Special Business Owners Policy," and it is an "all risk" policy. The language establishing coverage reads as follows:

> "This policy insures against all risk of direct physical loss, subject to all the provisions contained herein."

Coverage is limited, however, by the following exclusion:

> Exclusions
>
> The Company shall not be liable for loss: . . .
>
> 14. Due to unexplained or mysterious disappearance of property, or *shortage of property disclosed on taking inventory*; . . . . (emphasis added).

USF&G contends that Blue Stripe's claim is barred by all three of the circumstances described in exclusion 14.

In *Chadwick v. Insurance Co.*, 9 N.C. App. 446, 176 S.E. 2d 352 (1970) this Court held that a similar exclusion was "sufficiently definite to be construed according to its terms." Thus, when it has been conclusively demonstrated that the exclusion applies, the claimant cannot recover. In the instant case, Blue Stripe's own evidence revealed that their losses were "disclosed on taking inventory." We are compelled by *Chadwick* to honor the exclusion without qualification or exception. Blue Stripe points to extensive

authority from other jurisdictions limiting the impact of exclusions in "all risk" policies; however, in view of *Chadwick*, it is beyond this Court's power to adopt such reasoning, notwithstanding its persuasiveness. The judgment is affirmed.

Affirmed.

Judges JOHNSON and PARKER concur.

THE NORTH CAROLINA PRESS ASSOCIATION, INC., AND THE NEWS AND OBSERVER PUBLISHING COMPANY, D/B/A THE NEWS AND OBSERVER AND THE RALEIGH TIMES v. C. D. SPANGLER, JR., PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA AND ARTHUR PADILLA, ASSOCIATE VICE PRESIDENT FOR ACADEMIC AFFAIRS OF THE UNIVERSITY OF NORTH CAROLINA

No. 8710SC105

(Filed 15 September 1987)

Appeal and Error § 9— moot questions

Questions as to whether reports from various chancellors of universities within the U.N.C. system with regard to intercollegiate athletics at their schools were public records under N.C.G.S. § 132-1 and subject to disclosure were rendered moot by appellants' public disclosure of the reports.

APPEAL by defendants from *McLelland, Judge.* Judgment entered 6 November 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 26 August 1987.

Plaintiff-appellees sought an order compelling disclosure of certain reports pursuant to G.S. sec. 132-9. The reports were from the chancellors of several universities within the University of North Carolina system. Defendant-appellant President C. D. Spangler, Jr., acting pursuant to instructions from the Board of Governors of the University, instructed the chancellors to issue the reports to him so he could make appropriate recommendations to the Board of Governors. The reports included information and recommendations from the chancellors regarding intercollegiate athletics at the universities, and emphasizing length of athletic seasons, number of contests, and recruitment practices.

On 6 November 1986, the trial court ordered that the reports be made available for public inspection. From the trial court's order compelling disclosure of the reports, appellants appeal.

Appellants petitioned this Court for a Writ of Supersedeas and a temporary stay pending appeal, which stay was granted by this Court on 7 November 1986. Before this Court could rule on the petition, appellants withdrew the petition and publicly disclosed the chancellors' reports in connection with appellant Spangler's final report to the Board of Governors.

Lacy H. Thornburg, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General, Edwin M. Speas, Jr., Special Deputy Attorney General, and Laura E. Crumpler, Assistant Attorney General, for the State.

Tharrington, Smith & Hargrove, by Wade H. Hargrove, Michael Crowell, and Randall M. Roden, for plaintiff-appellees.

JOHNSON, Judge.

We are met at the threshold with a problem of mootness. At issue was whether the chancellors' reports were public records under G.S. sec. 132-1 subject to disclosure. Appellants excepted to the trial court's finding that the records were made and received pursuant to law in connection with the transaction of public business by the University, a government agency, and that such records are therefore public and subject to disclosure. However, on 14 November 1986, appellants publicly disclosed the chancellors' reports that are the subject of this appeal. Thus, the issue before this Court was rendered moot by appellant publicly disclosing the chancellors' reports.

The doctrine of mootness applies:

> [w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.
>
> Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the

commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.

In re Peoples, 296 N.C. 109, 147-48, 250 S.E. 2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed. 2d 297 (1979) (citations omitted).

Applying the doctrine of mootness to the case *sub judice* we find that the question originally in controversy is no longer at issue. Thus, appellants' appeal is moot and this appeal is

Dismissed.

Judges ARNOLD and PARKER concur.

JAMES E. LONG, COMMISSIONER OF INSURANCE OF NORTH CAROLINA v. BEACON INSURANCE COMPANY

No. 8610SC1192

(Filed 15 September 1987)

Insurance § 1— priority of claims against insolvent insurer

For reasons stated in *State ex rel. Long v. Beacon Ins. Co.*, 87 N.C. App. 72, appellants' contention that their claims against an insolvent insurer should have been placed in class 3 rather than class 5 under N.C.G.S. § 58-155.15 is denied.

APPEAL by intervenors Insurance Corporation of Ireland and Plymouth Insurance Company from *Preston, Judge.* Order entered 24 June 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 5 May 1987.

Hunter, Wharton & Howell, by V. Lane Wharton, Jr., for petitioner appellee.

No brief filed for respondent appellee.

Bode, Call and Green, by Robert V. Bode; and Kroll, Tract, Harnett, Pomerantz & Cameron, Baltimore, Maryland, by Michael L. Cohen, for intervenor appellants.

PHILLIPS, Judge.

Pursuant to the provisions of N.C.G.S. 58-155.1, *et seq.*, the petitioner brought this proceeding to rehabilitate Beacon Insurance Company, an insolvent insurance company organized under the laws of North Carolina. The appellants, Plymouth Insurance Company and Insurance Corporation of Ireland, were permitted to intervene because of claims that they have against Beacon Insurance Company under various contracts of reinsurance. Following developments not questioned by this appeal a final plan for the rehabilitation of the insolvent insurer was approved by the court. In classifying the claims received against the company's assets under G.S. 58-155.15 as amended in February, 1985, the court put the claims of reinsurers and reinsureds in class 5, the least favored group under the statute, which reads as follows:

> (5) Claims of general creditors, including claims of insurance pools, underwriting associations, or reinsurers; claims of other insurers for subrogation; those portions of claims for benefits under policies and for losses incurred, including claims of third parties under liability policies, in excess of three hundred thousand dollars ($300,000) per claim; and claims of insurers for payments and settlements under uninsured and underinsured motorist coverages.

The appellants contend that their claims should have been placed in class 3 under the statute, which reads as follows:

> (3) Claims or portions of claims for benefits under policies and for losses incurred, including claims of third parties under liability policies, up to an amount of three hundred thousand dollars ($300,000) per claim; but excluding claims of insurance pools, underwriting associations, or reinsurers, claims of other insurers for subrogation, and claims of insurers for payments and settlements under uninsured and underinsured motorist coverages.

This identical contention, made in this same proceeding by other intervening insurance companies, was recently considered by another panel of this Court and denied. *State ex rel. Long v. Beacon Ins. Co.*, 87 N.C. App. 72, 359 S.E. 2d 508 (1987). For the reasons stated therein the appellants' contentions are also denied.

Affirmed.

Judges COZORT and GREENE concur.

AUTOMOTIVE RESTYLING CONCEPTS, INC. v. CENTRAL SERVICE LINCOLN MERCURY, INC.

No. 878DC144

(Filed 15 September 1987)

Appeal and Error § 6.3— claim of no personal jurisdiction by Virginia court—action to enforce judgment—appeal interlocutory

Defendant's appeal from an order denying its motion to dismiss for lack of personal jurisdiction is interlocutory and is dismissed where defendant's motion was based on its claim that the Virginia judgment against it, which plaintiff sought to enforce by this action, was void in North Carolina because the Virginia court lacked personal jurisdiction over defendant, but the trial court's *in personam* jurisdiction clearly encompassed defendant, a North Carolina corporation with its principal office in Goldsboro, and whether the Virginia court properly asserted *in personam* jurisdiction over defendant was an issue to be determined by the trial court.

APPEAL by defendant from *Goodman, Judge.* Order entered 29 October 1986 in District Court, WAYNE County. Heard in the Court of Appeals 2 September 1987.

Judson H. Blount, III, attorney for plaintiff-appellee.

Barnes, Braswell, Haithcock & Warren, by Glenn A. Barfield, attorney for defendant-appellant.

ORR, Judge.

Defendant has appealed an order denying its motion to dismiss for lack of personal jurisdiction. The motion, however, is based on defendant's claim that the Virginia judgment against defendant, which plaintiff seeks to enforce by this action, is void in our state because the Virginia court lacked personal jurisdiction over defendant.

Our trial court's in personam jurisdiction clearly encompasses defendant, a North Carolina corporation with its principal office in Goldsboro. *Roberson v. Lumber Co.*, 153 N.C. 120, 68 S.E. 1064

(1910). Whether the Virginia court properly asserted in personam jurisdiction over defendant is an issue to be determined by the trial court.

Therefore, this appeal is interlocutory in nature and does not affect a substantial right which would be lost if not reviewed before final judgment. N.C.G.S. §§ 1-277 and 7A-27.

Appeal dismissed.

Chief Judge HEDRICK and Judge ARNOLD concur.

GEORGE W. MURROW v. DONNA CAMPBELL MURROW

No. 8722DC141

(Filed 15 September 1987)

Divorce and Alimony § 30— equitable distribution—refusal of court to hear oral evidence—error

The trial court in an equitable distribution action erred in ruling that no oral evidence would be taken and that only affidavits would be considered in determining the issues raised. N.C.G.S. § 1A-1, Rule 43(a).

APPEAL by plaintiff from *Fuller, Judge.* Order entered 30 September 1986 in District Court, IREDELL County. Heard in the Court of Appeals 2 September 1987.

The record before us discloses the following: On 20 December 1984 a judgment was entered in Iredell County, North Carolina, absolutely divorcing plaintiff and defendant. On 30 September 1986 the court made findings of fact and conclusions of law and entered an order of equitable distribution. Plaintiff appealed.

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

Pope, McMillan, Gourley, Kutteh & Parker, by David P. Parker, for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff contends the trial court erred in ruling that no oral evidence would be taken in this equitable distribution action and that only affidavits would be considered in determining the issues raised. We agree.

Rule 43(a) of the Rules of Civil Procedure provides:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules.

Nowhere in the Rules of Civil Procedure does it provide otherwise for the taking of evidence in trials of claims for equitable distribution. The trial court may not by rule or otherwise deprive the parties in an equitable distribution trial of the opportunity to present oral testimony in open court. Obviously, the parties may waive their rights to cross examine or present oral testimony in open court in the trial of equitable distribution cases.

The order entered 30 September 1986 must be vacated and the cause remanded for a new trial on the claim of equitable distribution.

Vacated and remanded.

Judges ARNOLD and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 SEPTEMBER 1987

BAIRD v. TNT ALLTRANS No. 8625SC1285	Burke (86CVS104)	Affirmed
GRIFFITH v. GRIFFITH No. 8710DC429	Wake (86CVD9806)	Appeal Dismissed
IN RE BLACK No. 878DC310	Wayne (86J57)	Affirmed
MACON v. CAMPBELL No. 8610SC1075	Wake (84CVS7158)	Affirmed in part; reversed in part
MARCHIANO v. JACKSON BEVERAGE No. 865SC299	New Hanover (82CVS2453)	Affirmed
MEDLIN v. MEDLIN No. 8720DC295	Union (85CVD675)	Affirmed
NEWKIRK v. NEWKIRK No. 8729DC293	McDowell (83CVD480)	Affirmed
PATTERSON v. BURLINGTON INDUSTRIES No. 8610IC1300	Ind. Comm. (I.C. 840010)	Affirmed
PRUITT v. MILLS No. 8719DC355	Cabarrus (86CVD1012)	Affirmed
SOUTHEASTERN SHELTER v. NEWKOR No. 8714SC354	Durham (85CVS01680)	Appeal Dismissed
STATE v. BLUE No. 8712SC330	Cumberland (86CRS52029) (86CRS1993)	No Error
STATE v. HOLLINGSWORTH No. 8712SC279	Cumberland (86CRS3561)	No Error
STATE v. MIDGETT No. 871SC50	Pasquotank (86CRS2660)	Appeal Dismissed
STATE v. POSTON No. 8721SC73	Forsyth (86CRS18794)	No Error
STATE v. WILEY No. 8718SC61	Guilford (85CRS70285) (86CRS25302) (86CRS25331) (86CRS25395) (86CRS43160)	Remanded for resentencing

WILLIAMS v. WILLIAMS No. 872DC318	Beaufort (86CVD150)	Affirmed

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ALLEN v. CHRISTEX CORP. No. 8710IC65	Ind. Comm. (023329)	Reversed and Remanded
BRIDGES v. DOVER YARN MILL No. 8710IC226	Ind. Comm. (950364)	Reversed and Remanded
BROWN v. J. P. STEVENS & CO. No. 8710IC225	Ind. Comm. (980046)	Reversed and Remanded
BROWN v. WOLTZ No. 8721DC325	Forsyth (85CVD5576)	Dismissed
BRYANT v. PITT No. 8721SC123	Forsyth (84CVS5578)	Affirmed
CONNOR v. LEDFORD No. 8625SC1078	Catawba (85CVS56)	Affirmed in part, vacated and remanded in part
HARRELL v. SANDERS No. 8712SC370	Cumberland (85CVS5561)	Affirmed
HIGHTOWER v. D.S.N. ASSOCIATES No. 8710SC125	Wake (84CVS1694)	Reversed and Remanded
KISTLER v. BURLINGTON INDUSTRIES No. 8710IC227	Ind. Comm. (946814)	Reversed and Remanded
NORWOOD v. J. P. STEVENS & CO. No. 8710IC228)	Ind. Comm. (952870)	Reversed and Remanded
OWENS v. ELECTRICAL UTILITIES CAPACITORS No. 8710IC207	Ind. Comm. (019272)	Affirmed in part, vacated in part and remanded
PHARO v. CARLYLE No. 878DC112	Lenoir (84CVD725)	Affirmed
PHELPS v. PHELPS No. 8721DC222	Forsyth (86CVD3093)	Affirmed
PHIPPS v. McGOWAN No. 874SC126	Duplin (86CVS309) (86CVS310)	Affirmed

STATE v. ALSTON No. 8718SC185	Guilford (84CRS15289) (84CRS57048)	No Error
STATE v. BASS No. 8726SC115	Mecklenburg (86CRS17010)	No Error
STATE v. BEST No. 879SC60	Person (84CRS3414)	No Error
STATE v. JOHNSON No. 8716SC252	Robeson (86CRS14478)	No Error
STATE v. LEWIS No. 871SC68	Pasquotank (86CRS1601) (86CRS1602)	No Error
STATE v. LONG No. 8722SC245	Davie (86CRS3504)	Appeal Dismissed
STATE v. LYLES No. 8611SC875	Johnston (85CRS12873)	No Error
STATE v. PIPPIN No. 877SC122	Edgecombe (86CRS1861)	No Error
STATE v. SANDERS No. 8718SC101	Guilford (86CRS47607)	No Error
STATE v. SECHRIST No. 8722SC195	Davidson (85CRS18320) (85CRS18321)	No Error
STATE v. SEVERINE No. 8713SC284	Bladen (86CRS5358)	Appeal Dismissed
STATE v. WELTER No. 873SC275	Carteret (86CRS4628) (86CRS4630)	Dismissed
STATE EX REL. UTILITIES COMM. v. CARTER No. 8710UC72	Utilities Comm. (EC-51, Sub 11)	Affirmed
UMSTEAD v. RODENHIZER No. 8614SC523	Durham (82CVS281)	Vacated and Remanded
WILLIAMS v. JONES No. 8718SC93	Guilford (84CVS6916)	Affirmed

In re Harris

IN THE MATTER OF: CRYSTAL HARRIS, DOB: 8/30/74 AND SIDNELL HARRIS, DOB: 4/19/79

No. 8714DC14

(Filed 6 October 1987)

1. **Parent and Child § 1.6— termination of parental rights—children in foster care for two years—evidence sufficient**

In a termination of parental rights hearing, the evidence was sufficient to show that two incarcerated fathers willfully left their children in foster care for two consecutive years. While incarceration standing alone neither precludes nor requires a finding that respondent willfully left a child in foster care, one respondent here was apparently not incarcerated during the entire two-year period being considered but never attempted to contact DSS or his child, and the other was incarcerated throughout the period, never called DSS, and called his child at her foster home once. N.C.G.S. § 7A-289.32(3).

2. **Parent and Child § 1.6— termination of parental rights—substantial progress in correcting conditions**

The trial court could not terminate respondents' parental rights under N.C.G.S. § 7A-289.32(3) where petitioner did not allege and the trial court did not find that respondents had failed to show substantial progress in correcting the conditions leading to the removal of their children. N.C.G.S. § 7A-289.32(3) requires that petitioner prove the absence of both substantial progress and positive response in order to justify terminating parental rights under subsection (3).

3. **Parent and Child § 1.6— termination of parental rights—positive response to efforts of DSS**

The trial court improperly concluded that respondents failed to show a positive response to the diligent efforts of DSS to encourage each respondent to strengthen his parental relationship or plan for his child's future where the court found only that Evans was presently in prison, that DSS had unsuccessfully written to him, and that efforts by DSS to contact Evans had been futile; and there was no finding showing any DSS attempt to provide services or counsel to Ryals, or even a DSS attempt to locate him. N.C.G.S. § 7A-289.32(3).

4. **Parent and Child § 1.6— termination of parental rights—establishment of paternity**

The trial court in a termination of parental rights proceeding erred by concluding that neither respondent had established paternity of his child prior to the filing of the petition where the record revealed evidence of the respondents' paternity as of one month before the petition was filed, DSS carries the burden to prove the lack of paternity or legitimacy as of the petition's filing date, and the trial court made no findings on the other three circumstances under N.C.G.S. § 7A-289.32(6) by which respondents could legitimize their children or show substantial support or care.

Judge PHILLIPS concurs in the result.

APPEAL by respondents from *Hudson, Judge.* Order entered 3 September 1986 in District Court, DURHAM County. Heard in the Court of Appeals 13 May 1987.

The Durham County Department of Social Services (hereinafter, "DSS") petitioned the court to terminate the parental rights in two minors of their mother (who does not join in this appeal) and their respective putative fathers (the fathers being hereinafter called "respondents," or "Ryals" and "Evans," respectively). Petitioner specifically alleged that respondents had failed to provide the costs of their children's care, had failed to legitimate their children and had willfully abandoned them. After service by publication, Evans and Ryals filed their respective answers on 9 January 1985 and 22 January 1985. On 3 September 1985, the court terminated the mother's parental rights. The court also terminated respondents' respective rights based on statutory grounds set forth at N.C.G.S. Secs. 7A-289.32(3), (6) (1981). In terminating respondents' parental rights, the court made the following relevant findings of fact:

> 3. These children came into the custody of [DSS] in June, 1979 and have remained in the Department's custody since that time. They were adjudicated neglected by their mother.
>
> 13. Neither respondent . . . Evans nor respondent . . . Ryals, prior to the filing of the petition herein, established paternity of their respective children judicially or by affidavit.
>
> 15. As to . . . Evans' contact with [his putative child] from July 22, 1982 through June 16, 1983[,] he provided support through work release in the amount of $562.42. [DSS] was made aware that . . . Evans was in Greensboro at some point and [DSS] wrote to him at the address they were given but were advised that he was no longer at that address and they had no forwarding address. Mr. Evans is presently in prison. Efforts by DSS to contact Mr. Evans have been futile and he's made no effort to get in touch with [DSS] to schedule a visit or any other contact with [his child].
>
> 16. . . . Mr. Ryals went to prison prior to the children being taken into custody. He is presently in prison. Mr. Ryals has had no contact with [DSS] since the children came into

custody . . . . He called [his child's] foster home in May, 1985 and talked to her. The foster mother . . . felt [the call] created tension for [the child] and the foster mother was advised by [DSS] that if he called again to tell him to contact the Department. There is no evidence that he called again. He did not contact the Department and has made no effort to establish parental rights or responsibilities in this matter.

17. Both . . . Evans and . . . Ryals have evidenced a settled purpose and willful intent to forego all parental duties and obligations and to relinquish all parental claims to their respective children in this matter.

18. It is in the best interests of both [children] that the parental rights of their mother and respective fathers be terminated so they can be placed for adoption.

Based on these findings, the court concluded:

2. [G]rounds for termination exist as to parental right[s] of . . . Evans . . . and Ryals . . . under the provisions of G.S. [Section] 7A-289.32 in that they have failed within two years to show positive response to the diligent efforts of [DSS] to encourage them to strengthen the parental relationship to these children or to make and follow through with constructive planning for the future of these children.

3. Also, they have not, prior to the filing of the petition for termination, established paternity judicially or by affidavit.

At the time the DSS petition was filed, Section 7A-289.32 set forth, among others, the following two grounds for terminating parental rights:

(3) The parent has *willfully* left the child in foster care for more than two consecutive years *without showing* to the satisfaction of the court that *substantial progress* has been made within two years in correcting those conditions which led to the removal of the child for neglect, *or without showing positive response* within two years to the *diligent efforts* of [DSS] . . . to encourage the parent to strengthen the parental relationship to the child or to make and follow

through with constructive planning for the future of the child.

(6) The father of a child born out of wedlock has not *prior to the filing of a petition to terminate his parental rights*:

a. Establish[ed] paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Human Resources . . .; or

b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or

c. Legitimated the child by marriage to the mother of the child; or

d. Provided substantial financial support or consistent care with respect to the child and mother.

(Emphasis added.) *Cf.* 1985 N.C. Sess. Laws, ch. 784, sec. 1 (1985) (effective 17 July 1985, petitioner must prove parent left child in foster care "more than eighteen months" without showing "reasonable progress under the circumstances" to terminate under subsection (3)). Excepting to the court's findings of fact and conclusions of law, respondents appeal.

Samuel Roberti for respondent-appellants.

Assistant County Attorney Ruth S. Cohen for petitioner-appellee.

Robert Whitfield for guardian ad litem.

GREENE, Judge.

A finding of any one of the grounds separately enumerated under Section 7A-289.32 is sufficient to support termination of parental rights. *In re Tyson*, 76 N.C. App. 411, 415, 333 S.E. 2d 554, 557 (1985). However, DSS has the burden to prove all the facts justifying the termination ground asserted by clear, cogent, and convincing evidence. N.C.G.S. Sec. 289.30(d)-(e) (1981) (court must adjudicate existence or nonexistence of "any of the circumstances" authorizing termination; petitioner must prove facts by clear, cogent and convincing evidence); *compare* N.C.G.S. Sec.

7A-289.32(3a) (1986) (burden on petitioner to prove facts justifying termination by "clear and convincing" evidence) *with In re Montgomery*, 311 N.C. 101, 109, 316 S.E. 2d 246, 252 (1984) ("clear and convincing" and "clear, cogent and convincing" describe same evidentiary standard).

The instant case therefore presents two issues: (I) Under Section 7A-289.32(3), whether there was clear, cogent and convincing evidence that either Evans or Ryals had (A) "willfully" left his child in foster care for more than two consecutive years without showing either (B) "substantial progress" in correcting the conditions leading to the child's removal or (C) "positive response" to the "diligent efforts" of DSS; and (II) under Section 7A-289.32(6), whether there was clear, cogent and convincing evidence that "prior to the filing of the termination petition," neither respondent had established paternity, legitimated his child or otherwise provided support or care under the statute.

I

A

In order to terminate parental rights under the applicable pre-1985 version of Section 7A-289.32(3), petitioner must prove (a) the parent has "willfully left the child in foster care for more than two consecutive years" without showing (b) "substantial progress" in correcting those conditions that led to the child's removal or (c) "positive response" to the "diligent efforts" of DSS to encourage the parent to strengthen the parental relationship or plan for the child's future. *See In re Wilkerson*, 57 N.C. App. 63, 68-69, 291 S.E. 2d 182, 184-85 (1982) (upholding termination where evidence established all three requirements); *In re Tate*, 67 N.C. App. 89, 92-94, 312 S.E. 2d 535, 538-39 (1984) (upholding separate findings of lack of substantial progress and positive response).

As to the respondents' "willfully" leaving their respective children in foster care, the trial court found both respondents "have evidenced a settled purpose and willful intent to forego all parental duties and obligations and to relinquish all parental claims to their respective children in this matter." Although Section 7A-289.32(3) merely requires proving the parents willfully left their child in foster care for two years, we note the court's finding restates the common definition of the broader concept of

"abandonment." *E.g., In re Maynor*, 38 N.C. App. 724, 726, 248 S.E. 2d 875, 876-77 (1978). Although petitioner alleged "willful abandonment" as a ground for termination, the court did not terminate respondents' rights on the specific ground of abandonment or neglect. *Cf. In re Smith*, 56 N.C. App. 142, 147, 287 S.E. 2d 440, 443, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982) ("abandonment" under N.C.G.S. Sec. 7A-517(21) (1981) supports termination for "neglect" under N.C.G.S. Sec. 7A-289.32(2) (1981)); *see also* N.C.G.S. Sec. 7A-289.32(8) (1986) (adding "willful abandonment" for six months prior to petition as ground for termination). Although the breadth of "willful abandonment" should often encompass "willfully leaving" a child in foster care, the broad finding of willful abandonment is not essential to the more limited determination required under Section 7A-289.32(3).

[1] While their brief is not altogether clear on this point, respondents apparently contend that their periodic incarcerations could preclude finding either respondent "willfully" left his child in foster care for two consecutive years. However, a respondent's incarceration, standing alone, neither precludes nor requires finding the respondent willfully left a child in foster care. *Compare In re Burney*, 57 N.C. App. 203, 206, 291 S.E. 2d 177, 179 (1982) (rejecting argument that periods of incarceration preclude such finding) *with Maynor*, 38 N.C. App. at 726-27, 248 S.E. 2d at 877 (1978) (incarceration alone is insufficient to show willful abandonment). Although he was apparently not incarcerated during the entire two-year period being considered, we note Evans has never attempted to contact DSS or his child during that period. Ryals has been incarcerated throughout the period; he has similarly never contacted DSS, but did call his child once at her foster home in May 1985. In accord with our decision in *Burney*, we think these facts demonstrate respondents' leaving their children in foster care was "willful." *Burney*, 57 N.C. App. at 206, 291 S.E. 2d at 179.

B

[2] Petitioner neither alleged nor did the trial court find that respondents had failed to show substantial progress in correcting the conditions leading to the removal of their children. The trial court apparently misconstrued Section 7A-289.32(3) to allow termination where *petitioner* could show either respondents' lack of

substantial progress or respondents' lack of positive response. A careful reading of the statute reveals Section 7A-289.32(3) requires the petitioner to prove that the *parent* has not shown either substantial progress or positive response; thus, petitioner must prove the absence of *both* substantial progress *and* positive response in order to justify terminating respondents' parental rights under subsection (3). *Cf. Tate*, 67 N.C. App. at 92-94, 312 S.E. 2d at 538-39; *Wilkerson*, 57 N.C. App. at 68-69, 291 S.E. 2d at 184-85; N.C.G.S. Sec. 7A-289.30(d) (1981) (court shall adjudicate existence or nonexistence of "any of the circumstances" authorizing termination under Section 7A-289.32); *see also Burney*, 57 N.C. App. at 206, 291 S.E. 2d at 179 (although discussion limited to affirming finding that respondent lacked "positive response," court noted other findings established respondents' failure to make "substantial progress").

Accordingly, we conclude the court could not terminate respondents' parental rights under Section 7A-289.32(3) absent the necessary additional conclusion and supporting findings that respondents failed to show substantial progress in correcting the conditions leading to the removal of their children.

C

[3] Even had the court found that respondents failed to make the necessary substantial progress under Section 7A-289.32(3), we also hold the court improperly concluded that both respondents failed to "show positive response to the diligent efforts" of DSS to encourage each respondent to strengthen his respective parental relationship or plan for his child's future. The court made only one finding directly relevant to this conclusion: noting Evans was "presently" in prison, the court found that DSS unsuccessfully wrote to Evans in Greensboro and that "efforts by [DSS] to contact . . . Evans have been futile . . . ." There is simply no finding showing any DSS attempt to provide services or counsel to Ryals, or even showing any DSS attempt to locate him: the court only noted that Ryals did not contact DSS after DSS acquired custody of his child. Regardless of any evidence supporting these findings, the findings are themselves legally insufficient to discharge DSS's burden to show, with clear and convincing evidence, its diligent efforts to encourage respondents to strengthen their parental relationships or undertake planning for their children's future. *Cf.*

Wilkerson, 57 N.C. App. at 69, 291 S.E. 2d at 185 (summarizing respondents' lack of positive response to petitioner's diligent efforts which included 6½ years of continuous contact, frequent home visits and counselling attempts); *Tate*, 67 N.C. App. at 93, 312 S.E. 2d at 538-39 (petitioner referred respondent for alcoholism and employment services, assisted securing and maintaining housing, kept abreast of respondent's progress and stayed in touch with other agencies).

We recognize both respondents were incarcerated during part or all of the two-year period under consideration. We note the court did specifically find that "efforts to contact" Evans had been "futile." Assuming *arguendo* that this finding supports the court's conclusion that respondents did not show positive response to DSS's diligent efforts, the finding is not itself supported by competent evidence. The only evidence pertaining to this finding is the case worker's testimony that she sent a letter to Greensboro inviting Evans to a DSS review. The case worker took no further action after the letter was returned. This evidence does not constitute clear and convincing proof that efforts to contact Evans were futile.

In any event, DSS's lone attempt merely to contact Evans hardly approaches the diligent efforts to strengthen family ties approved in *Wilkerson* and *Tate*. Other than the letter to Evans, we find no evidence in the record of any attempt even to contact either respondent other than the DSS affidavit for service by publication under N.C.G.S. Sec. 7A-289.27 (1981). This affidavit may evidence the "due diligence" necessary for service under that statute. *See generally In re Clarke*, 76 N.C. App. 83, 85-87, 332 S.E. 2d 196, 198-200, *disc. rev. denied*, 314 N.C. 665, 335 S.E. 2d 322 (1985). However, petitioner's "due diligence" in serving its petition after 29 December 1983 does not determine whether it made "diligent efforts" to encourage and counsel family relationships for two consecutive years prior to termination under Section 7A-289.32(3).

Although the court made no findings concerning Ryals on this issue, we note the revealing testimony given by the case worker: "I've never offered . . . Ryals a service contract to sign. He has been in jail and it would not make sense to provide him with a service contract . . . . To my knowledge no one has taken

the children out to where . . . Ryals is in jail." As to DSS's "diligent efforts," we hold only that DSS has shown no diligent efforts whatsoever to help respondents; however, we are cognizant Section 7A-289.32(3) must on occasion be applied to a respondent who has been incarcerated during part or all of the two-year (now eighteen-month) trial period. Like DSS, future petitioners may conclude any attempt to contact an incarcerated respondent is "futile." Whether or not such an assessment is reasonable, the respondent's obligation to respond positively to DSS's diligent efforts certainly presupposes *some* stimulus from DSS. Thus, we question whether a court may conclude a respondent failed to respond positively to DSS's allegedly "diligent efforts" under Section 7A-289.32(3) where DSS never actually made contact with respondent in any way. *Cf. Maynor*, 38 N.C. App. at 727-28, 248 S.E. 2d at 877-78 (since abandonment under N.C.G.S. Sec. 48-2(3b) (1976) requires proof of DSS "diligent efforts," insufficient evidence to find abandonment where no DSS contact with respondent).

Respondents also except to the court's finding that they have evidenced a "settled purpose" to relinquish all parental claims to their respective children. Since the court did not terminate respondents' rights for "neglect" under Section 7A-289.32(2), we do not pass on the sufficiency of evidence supporting the court's finding that respondents had, in effect, willfully abandoned their children. However, assuming clear and convincing evidence supports this finding, the court might properly consider terminating respondents' rights for "neglect" under Section 7A-289.32(2). *See Smith*, 56 N.C. App. at 147, 287 S.E. 2d at 443; *see also In re Graham*, 63 N.C. App. 146, 150-51, 303 S.E. 2d 624, 627, *cert. denied*, 309 N.C. 320, 307 S.E. 2d 170 (1983) (incarcerated respondent's lack of involvement with child established neglect under Section 7A-289.32(2)).

II

[4] The court also concluded neither respondent had "established paternity of [his] respective child . . . judicially or by affidavit" prior to the filing of the petition on 29 December 1983; the findings supporting this legal conclusion merely restate it. We must reverse the court's legal conclusion on two grounds. First, the record only reveals evidence of the respondents' paternity as

of one month before the petition was filed. Section 7A-289.32(6) requires that petitioner show respondents have failed to comply with its terms "prior to the filing of a petition to terminate . . . parental rights": Either respondent could have established his paternity or the legitimacy of his child during that one-month period. Since the only logical construction of subsection (6) under *Montgomery* is that DSS carries the burden to prove the lack of paternity or legitimacy as of the petition's filing date, we hold DSS failed to discharge the admittedly difficult evidentiary burden of proving the absence of a fact. *See Montgomery*, 311 N.C. at 109-10, 316 S.E. 2d at 252.

In addition, the court made no findings on the other three circumstances under Section 7A-289.32(6) by which respondents could legitimize their children or show substantial support or care. As with the similarly-phrased provisions of Section 7A-289.32(3), the language of Section 7A-289.32(6) dictates that DSS must prove respondents failed to take, not one, but *any* of the four actions listed in parts (a)-(d) of Section 7A-289.32(6). *See Tyson*, 76 N.C. App. at 416, 333 S.E. 2d at 537 (termination under subsection (6) authorized where court found respondent "never established paternity, legitimated the child, or provided substantial support or care"). While we note a county attorney alleged the respondents' "putative" fatherhood in the DSS affidavit for publication, we reject the contention that the allegation constitutes clear, cogent and convincing evidence that respondents failed to comply with Section 7A-289.32(6). Indeed, the record reveals Ryals provided significant financial support before his incarceration. While his support was less substantial, Evans also provided some funds during his incarceration. Thus, if respondents' parental rights are to be terminated under Section 7A-289.32(6), there must be further fact-finding to determine all the circumstances under parts (a)-(d) of the section.

III

As the trial court's findings are insufficient to terminate respondents' parental rights upon the grounds cited, we vacate the trial court's order terminating respondents' rights and remand the case for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judge COZORT concurs.

Judge PHILLIPS concurs in the result.

IN THE MATTER OF: JAMES CHRISTOPHER WHEELER, AND JOHN ROBERT WHEELER, MINOR CHILDREN

No. 8715DC179

(Filed 6 October 1987)

1. **Parent and Child § 1.6— order adjudging child abuse—res judicata in termination proceeding**

Although an order adjudging that respondent father had sexually abused his children failed to state affirmatively that the allegations of abuse had been proven by clear and convincing evidence as required by N.C.G.S. § 7A-635 and -637, the trial court properly ruled that the prior order was *res judicata* and estopped the parties in a proceeding to terminate respondent's parental rights from relitigating the abuse issue decided in the previous proceeding where no appeal was taken or other relief sought from the prior order.

2. **Parent and Child § 1.6— termination of parental rights—competency of mother's testimony**

In a proceeding to terminate parental rights, opinion testimony by the children's mother concerning where the children should live and whether it would be best for them to be adopted was properly admitted for the limited purpose of evaluating the mother's attitude, understanding of the situation, fitness as a parent, and prospects of regaining custody and did not prejudice respondent father.

3. **Parent and Child § 1.6— termination of parental rights—opinion of guardian ad litem—absence of prejudice**

The erroneous admission of the lay opinion of a guardian ad litem that it was in the best interests of the children for parental rights to be terminated was not prejudicial in view of the abundance of other evidence supporting the trial judge's decision and the remarks of the judge indicating that he did not rely on this testimony.

4. **Parent and Child § 1.6— termination of parental rights—child's statements during therapy—proper basis for opinion testimony**

In a proceeding to terminate parental rights, testimony by the director of a children's home as to statements made to him by one child during therapy concerning sexual abuse by the child's father was properly admitted as a basis for the director's opinions concerning the continued effects of the sexual abuse

on the child and how the child's psychological and behavioral problems related to prospects for adoption.

5. **Parent and Child § 1.6— termination of parental rights—social worker's opinion on adoption possibilities**

The trial court in a proceeding to terminate parental rights impliedly found that a social worker was qualified to render an expert opinion on the position of the two children as candidates for adoption, and the witness was entitled under N.C.G.S. § 8C-1, Rule 703, to rely upon information received from a children's home as a basis for her expert opinion.

6. **Parent and Child § 1.6— termination of parental rights—state of mind of respondent's mother—opinion testimony inadmissible**

The trial court in a proceeding to terminate parental rights erred in allowing the guardian ad litem to testify that respondent father's mother was "torn between loyalty to the boys and loyalty to her son" as a part of the basis for her opinion that it was in the best interests of the children to terminate parental rights since the witness was not qualified as an expert and her personal knowledge of respondent's mother was based on minimal telephone contact. However, evidence of the state of mind of respondent's mother was only minimally relevant to the issues before the court, and respondent was not prejudiced by such evidence.

APPEAL by Respondent, John Gladstone Wheeler, from *Washburn, Judge.* Order entered 25 August 1986 in District Court, ALAMANCE County. Heard in the Court of Appeals 26 August 1987.

Lynn A. Andrews and S. C. Kitchen, for petitioner appellee, Alamance County Department of Social Services.

Jacobs and Livesay, by Robert J. Jacobs, for respondent appellant, John Gladstone Wheeler.

Messick, Messick, and Messick, by Steven H. Messick, for Eleanor Ketchum, guardian ad litem for the minor children, appellees.

BECTON, Judge.

Respondent, John Gladstone Wheeler, appeals from an order of the Alamance County District Court terminating his parental rights to his two sons, James Christopher "Jamie" Wheeler, and John Robert "Robbie" Wheeler, on the grounds of abuse. The mother of the children, Debra Crawford Wheeler Trejo, whose parental rights also were terminated on grounds of abandonment

and failure to provide support, did not contest the termination of her rights and does not appeal. We affirm the decision of the trial court.

I

John G. Wheeler and Debra C. Wheeler Trejo separated in 1982 and were divorced in September 1983. Following their parents' separation, Jamie and Robbie Wheeler lived with their father in the home of Respondent's mother, Hazel Crawford, and Respondent acquired legal custody of the children.

Jamie and Robbie were initially removed from the custody of Respondent and placed in the temporary custody of the Alamance County Department of Social Services (Petitioner) under a non-secure custody order entered by District Court Judge J. Kent Washburn on 20 March 1985, when they were ages 11 and 9 respectively. The order was granted pursuant to a juvenile petition filed 20 March 1985 by Petitioner, alleging that the children were abused and neglected within the meaning of N.C. Gen. Stat. Sec. 7A-517(1) and (21). Following a 29 April 1985 hearing before District Court Judge J. B. Allen, Jr., the children were adjudicated to be abused and neglected and were ordered placed in the legal care, custody and control of Petitioner. The court found as a fact that Respondent had, for several years, performed sexual acts, including oral and anal intercourse, with the children, the most recent of which had occurred 19 March 1985.

On 15 April 1985, Respondent was indicted on several criminal charges, including incest, and on 4 June 1985, he pled guilty, pursuant to a plea agreement, to two counts of felonious incest with his children and one count of indecent liberties with another minor child. For these offenses, he was sentenced to three consecutive ten-year active prison terms.

Efforts were made by Petitioner, after acquiring custody, to assist and prepare the children's mother to provide a home for the boys, but those efforts were unsuccessful. On 17 March 1986 Petitioner filed a petition to terminate the parental rights of both parents, attaching and incorporating in its petition a copy of the 29 April 1985 adjudication of abuse and neglect. Respondent filed an answer, and motions to dismiss and to strike all references to

the incorporated order, challenging Petitioner's authority to file the petition and denying all material allegations in the petition.

A preliminary hearing to determine the issues raised by the petition and response was held 7 July 1986, following which Judge Allen entered an order concluding that Petitioner was authorized, pursuant to N.C. Gen. Stat. Sec. 7A-289.24(3), to petition for termination of parental rights, and that the parties were estopped from relitigating the prior abuse and neglect adjudications by virtue of the doctrine of *res judicata* or collateral estoppel. The court limited the issues for the termination hearing to circumstances existing at the time of the hearing and the best interests of the children.

Hearing on the petition to terminate parental rights was held on 28 July, 4 August, and 25 August 1986 before Judge J. Kent Washburn. Witnesses for the Petitioner included Bill Painter, Director of Grandfather Home for Children in Linville, North Carolina; Nancy Dunham, Social Worker II with Alamance County Department of Social Services; Debra Trejo, mother of the minor children; Dr. Mark Everson, the pediatric psychologist who initially evaluated the children for possible sexual abuse; and the children, Jamie and Robbie Wheeler. The sole witness for Respondent was his mother, Hazel Crawford, who testified that she would like for the children to live with her. Eleanor Ketchum, the court appointed guardian ad litem, testified on behalf of the children that it was in their best interests for parental rights to be terminated.

The court made findings of fact and concluded that grounds for termination of Respondent's rights existed pursuant to N.C. Gen. Stat. Sec. 7A-289.32(2) and that it was in the best interests of the children that his rights be terminated. The findings showed, in part, that since the removal of the children from Respondent's custody, Jamie has been placed with relatives, in two foster homes, and, finally, in the adoption preparation program at Grandfather Home for Children in Linville, North Carolina. Robbie has remained in foster care following a short placement with relatives. Both children have been receiving therapy for significant emotional and behavioral problems.

The Court also found that Respondent will not be eligible for parole before the children reach majority, and that "there is no

reasonable hope that the family within a reasonable period of time will be able to provide for the emotional or physical welfare of these minor children."

II

Respondent brings forward and argues separately on appeal thirty-nine assignments of error. Although we have carefully considered each of them, we limit our discussion to the most significant arguments.

A

[1] Respondent's first and primary contention is that the trial court erred by denying his motion to dismiss and by ruling that the adjudication and dispositional order of 29 April 1985 had a binding *res judicata* or collateral estoppel effect in the termination proceeding. Specifically, he maintains that, because the order adjudging his children abused and neglected failed to state affirmatively that the allegations of abuse and neglect in the juvenile petition had been proven "by clear and convincing evidence" as required by N.C. Gen. Stat. Secs. 7A-635 and -637, the order was invalid and could neither serve as Petitioner's G.S. 7A-289.24(3) authority to file the petition nor bind the Court in the termination proceeding on the issue of abuse.

This Court has held, based upon the mandate of N.C. Gen. Stat. Secs. 7A-635 and -637, that a trial court's failure to state the standard of proof used in making a determination of delinquency constitutes reversible error on appeal. *See In re Walker*, 83 N.C. App. 46, 348 S.E. 2d 823 (1986); *In re Johnson*, 76 N.C. App. 159, 331 S.E. 2d 756 (1985); *In re Wade*, 67 N.C. App. 708, 313 S.E. 2d 862 (1984). Because the same statutes require trial judges to recite the standard of proof applied in a juvenile abuse or neglect proceeding, we agree with Respondent that the Court's failure to do so in this case was error.

However, the proper avenues for Respondent to attack the adjudication of neglect and abuse and the dispositional order granting custody to Petitioner were 1) appeal, pursuant to N.C. Gen. Stat. Sec. 7A-666, or 2) a motion for relief pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 60. Although collateral attack in an independent or subsequent action is a permissible means of seeking relief from a judgment or order which is void on its face for lack

of jurisdiction, *see Stroupe v. Stroupe*, 301 N.C. 656, 273 S.E. 2d 434 (1981); *Hassel v. Wilson*, 301 N.C. 307, 272 S.E. 2d 77 (1981), the error in this case was not a jurisdictional error subject to that kind of challenge. Because no appeal was taken or other relief sought from the 29 April 1985 order, it remained a valid final order which was binding in the later proceeding on the facts regarding abuse and neglect which were found to exist at the time it was entered.

The doctrine of collateral estoppel operates to preclude parties "from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E. 2d 799, 805 (1973). In this case, the issue of Respondent's sexual abuse of his children had been fully litigated and was necessary to the adjudication of abuse. Moreover, "[t]o be valid, a judgment need not be free from error. Normally, no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding *res judicata* and collateral estoppel effect in all courts, Federal and State, on the parties and their privies." *King v. Grindstaff* at 360, 200 S.E. 2d at 808.

In *In re Wilkerson*, 57 N.C. App. 63, 291 S.E. 2d 182 (1982), this Court held that the trial court had properly applied the doctrine of collateral estoppel in ruling that findings included in a prior adjudication of neglect were binding on the Court in a later hearing on a petition to terminate parental rights. And although our Supreme Court has not specifically resolved this collateral estoppel issue, it concluded in *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984) that a prior adjudication of neglect may be admitted and considered by the trial court in a subsequent proceeding to terminate parental rights on the grounds of neglect, and that the treatment of such an order as binding in the termination proceeding will not prejudice the parents if the hearing is properly conducted.

In the present case, the trial court did not rely solely upon the previous order in a way that would impermissibly predetermine the outcome of the termination hearing. Rather, the judge admitted and considered other evidence concerning the family's circumstances and the psychological condition and well-being of the children which was relevant to a determination of "the best

interests of the child[ren] and the fitness of the parent to care for the child[ren] *at the time of the termination proceeding." Ballard* at 715, 319 S.E. 2d at 232 (emphasis in original). Furthermore, the judge did not deny Respondent the opportunity to present any evidence relevant to these issues; he merely prohibited the parties from relitigating whether Respondent had, in fact, sexually abused the children.

Based on the foregoing, we conclude that the trial court did not err by concluding that Petitioner was authorized to file the petition to terminate parental rights and, thus, denying Respondent's motion to dismiss, nor by ruling that the parties were estopped from relitigating the abuse and neglect issues decided in the previous proceeding.

B.

Respondent's next thirteen assignments of error relate to evidentiary rulings of the trial court.

1. Respondent first argues generally that the trial court erred by allowing several witnesses for Petitioner to testify regarding the sexual abuse of the children while restricting Respondent's own scope of inquiry into that issue, the overall effect of which was highly prejudicial to Respondent. We disagree. As we discussed in the preceding section, the court did not err by prohibiting Respondent from relitigating the fact of the abuse. Moreover, having reviewed the transcript, we find that the various pieces of testimony to which Respondent objects were not admitted for the purpose of proving the abuse occurred, but were plainly and carefully limited by the Court to other permissible purposes. This assignment of error is without merit.

2. Four of Respondent's arguments challenge the admission of opinion testimony given by the following four witnesses concerning the best interests of the children with regard to the desirability of terminating parental rights: 1) Bill Painter, Director of Grandfather Home for Children, 2) Dr. Mark Everson, child psychologist, 3) Debra Trejo, mother of the children, and 4) Eleanor Ketchum, guardian ad litem. Respondent contends that such opinion testimony impermissibly invaded the province of the fact finder on an ultimate issue in the case.

According to Rule 704 of the Rules of Evidence, N.C. Gen. Stat. Chapter 8C (1986), testimony in the form of an opinion is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. *State v. Smith*, 315 N.C. 76, 100, 337 S.E. 2d 833, 849 (1985). The test for the admissibility of an opinion of either a lay or expert witness under Rules 701 and 702 respectively is *helpfulness* to the trier of fact. *See* Commentary to Rule 704. *See also Mobley v. Hill*, 80 N.C. App. 79, 341 S.E. 2d 46 (1986) (lay opinion must be helpful to the jury).

We note initially that the assignment of error to the testimony of Dr. Everson is unsupported by any of Respondent's exceptions since the transcript reveals that this witness was not asked nor did he give an opinion on the ultimate issue of the advisability of terminating Respondent's parental rights. Furthermore, the trial court properly ruled that, based on education and experience, Dr. Everson was qualified as an expert in child psychology, especially with respect to sexually abused children, and Mr. Painter was qualified to testify as an expert in the areas of preparation of children for adoption and the effects of sexual abuse on children. In our opinion, the testimony of both experts to which Respondent excepts was within their respective areas of expertise and satisfied the helpfulness test for expert opinion under Rule 702.

[2] On the other hand, it is doubtful whether the lay opinions of Debra Trejo concerning where the children should live and whether it would be best for them to be adopted, were helpful to the court in deciding those questions. She was not qualified, merely by virtue of being mother of the children, to offer an opinion regarding the termination of their father's rights. Nevertheless, the court admitted this testimony, not as directly bearing on the matters to which it related, but in order to better evaluate Ms. Trejo's own attitude, understanding of the situation, fitness as a parent, and prospects of regaining custody. The admission for that limited purpose was proper and did not prejudice Respondent.

[3] Similarly, the helpfulness of the guardian ad litem's lay opinion that it was in the best interests of the children for parental rights to be terminated is questionable. However, in view of the abundance of other evidence supporting the judge's decision and

remarks of the judge indicating that he did not rely on this testimony, we conclude that admission of Ms. Ketchum's opinion, although error, was not prejudicial.

These assignments of error are overruled.

[4] 3. Respondent next contends that the Court erred by allowing the witness Bill Painter to testify regarding various statements made to him by Jamie Wheeler during therapy and relating to the sexual abuse by Jamie's father. Petitioner responds that the statements were properly admitted under the Rule 803(4) hearsay exception for statements made for purposes of medical diagnosis or treatment. We need not decide whether the 803(4) exception applies to the facts of this case. The judge did not allow relitigation of the abuse issue, and the evidence of Jamie's statements about the abuse was not admitted for the hearsay purpose of proving that the sexual abuse occurred. Rather, the statements were a part of lengthy testimony by Mr. Painter regarding Jamie's psychological and behavioral problems as they related to prospects for adoption, and the evidence was properly admitted as a basis for Mr. Painter's opinions concerning the continued effects of the sexual abuse on Jamie.

[5] 4. Nancy Dunham, the social worker for the Wheeler children, was asked on direct examination: "Do you have an opinion as to whether Jamie and Robbie would be good candidates for adoption once they have completed the program at Grandfather Home?" She responded: "Yes, according to Grandfather Home Officials, they see Jamie as developing into a good candidate for adoption. They see him working on his problems. We feel like Robbie is also a good candidate for adoption." Respondent contends this testimony was inadmissible because the opinion was based on hearsay about what another agency thought and not on personal knowledge.

This situation is similar to that in *In re Peirce*, 53 N.C. App. 373, 281 S.E. 2d 198 (1981), in which this Court upheld opinion testimony concerning "good parenting skills" by a social worker employed by Burke County Department of Social Services, despite the fact she had not been formally tendered as an expert. Like the trial judge in that case, Judge Washburn impliedly found the witness in this case to be an expert when he overruled Respondent's objection to Petitioner's question.

Ms. Dunham testified that she had been employed as a social worker by Petitioner for six years, and by Durham County Social Services for a year and a half prior to that. Her work for the latter five years involved permanency planning for children in foster care, and she had been assigned to the Wheeler children's case for the past year. In our view, the evidence supports Judge Washburn's implied finding that Ms. Dunham was qualified to render an expert opinion on the position of Jamie and Robbie as candidates for adoption. Moreover, as an expert, she was entitled, pursuant to Rule 703 of the Rules of Evidence to rely upon information received from Grandfather Home as a basis for her opinion. This assignment of error is overruled.

[6] 5. The guardian ad litem, Eleanor Ketchum, was allowed to testify on cross-examination by Petitioner: "My sense is that Mrs. Crawford is torn between loyalty to the boys and loyalty to her son," as a part of the basis for her opinion that it was in the best interests of the children to terminate parental rights. We have already concluded that the admission of Ms. Ketchum's opinion was error. We also agree with Respondent that the trial court erred in denying his motion to strike this statement. Ms. Ketchum was not qualified as an expert and her personal knowledge of Mrs. Crawford was based on minimal telephone contact. Therefore, this opinion about Mrs. Crawford's state of mind was not helpful.

However, "[i]n a trial by the Court without a jury, the erroneous admission of evidence will not ordinarily be held prejudicial, because it is presumed that the court did not consider the incompetent evidence." *Peirce* at 388, 281 S.E. 2d at 207. Further, the evidence of Mrs. Crawford's state of mind was only minimally relevant to the issues before the court, since a denial of the petition to terminate parental rights would in no way insure that the children would live with her. Therefore, as Respondent has failed to show that he was prejudiced by the admission of this testimony, this assignment of error is overruled.

6. Respondent's other assignments of error relating to evidentiary matters do not require discussion and are also overruled.

C

Respondent's remaining twenty-five assignments of error are to specific findings of fact and conclusions of law as unsupported

by the evidence, and to the final disposition as unsupported by the findings and conclusions. Having carefully reviewed the record, the entire transcript, and each assignment of error, we conclude that all findings of fact necessary to support the order are supported by competent evidence, the findings are adequate to support the conclusions of law, and the court's final disposition of the case is supported by the findings and conclusions. Consequently, these assignments of error are without merit and are overruled.

III

Concluding as we do that none of Respondent's assignments of error involve error sufficiently prejudicial to overturn the order of the trial court terminating Respondent's parental rights, we

Affirm.

Judges MARTIN and COZORT concur.

STATE OF NORTH CAROLINA v. JOSEPH MIDYETTE

No. 8710SC299

(Filed 6 October 1987)

1. **Rape and Allied Offenses §§ 1, 5— three acts with one victim—separate offenses**

Defendant was properly convicted of three charges of second degree rape where the evidence showed that defendant penetrated the victim's vagina with his penis on three distinct occasions and that on each occasion he accomplished the vaginal intercourse by the use of actual and constructive force against the will of the victim. The evidence as to each separate act of forcible intercourse was complete and sufficient to sustain a conviction of second degree rape without resort to the evidence necessary to prove either of the other rape charges.

2. **Criminal Law § 138.27— rape—position of trust or confidence—evidence not sufficient**

The trial court erred when sentencing defendant for second degree rape by finding that he had taken advantage of a position of trust or confidence where the evidence merely showed that the victim was acquainted with de-

fendant and did not show the existence of a relationship between them through which defendant would occupy a position of trust and confidence.

3. **Criminal Law § 138.8— sentencing—victim input session—no confrontation with defendant**

Trial courts should exercise extreme caution in conducting *in camera* "victim input sessions" and insure that all information received by the court relating to punishment is made known to the defendant and his counsel and that he is given the opportunity to explain or refute it.

Judge EAGLES dissenting.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 24 July 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 24 September 1987.

Defendant was charged with second degree sexual offense and three counts of second degree rape, all allegedly committed upon Joyce Still on 29 January 1985. He entered pleas of not guilty. The evidence at trial tended to show that on 29 January 1985 Ms. Still, who was then separated from her husband, was at her Raleigh apartment with her two-year-old son. Shortly after midnight, Ms. Still heard a knock at her door and looked through the peephole, but did not recognize the man she saw. She stepped back from the door without opening it. About a minute later, there was another knock and the man said, "Joyce, this is Joe. Remember me." She looked again and recognized the defendant as a man she and her sister had met on the preceding New Year's Eve and had invited to join them for breakfast at Ms. Still's apartment. Defendant told Ms. Still that he needed to use her telephone. Because it was snowing, Ms. Still admitted defendant and he used the telephone, but told her that he was unable to get an answer. Then defendant walked up behind the chair where Ms. Still was sitting, put his arm around her and his hand over her mouth and forced her to stand. Defendant told Ms. Still not to make any noise and to do as he said if she did not want him to hurt her or her son. He pushed her over to a couch, undressed her, and forced her to perform fellatio upon him. He then forced her to lie down on the sofa and had sexual intercourse with her, penetrating her vagina with his penis. Defendant said that he was uncomfortable and pulled Ms. Still up from the sofa and pushed her down the hall into her bedroom. He pushed her face down onto the bed and inserted his penis into her vagina from the rear.

Ms. Still complained that defendant was hurting her; he pushed her onto her back, got on top of her and forcibly penetrated her vagina with his penis a third time. Ms. Still testified that throughout the commission of these acts, defendant threatened to harm her and her son if she did not do as he wanted.

Defendant presented no evidence. The jury found defendant guilty of second degree sexual offense and three counts of second degree rape. The trial judge sentenced defendant to four consecutive fifteen year terms of imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William P. Hart, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

MARTIN, Judge.

[1] In the only assignment of error directed to the guilt-innocence phase of his trial, defendant contends that the same evidence was used by the State to obtain his conviction of each of the three charges of second degree rape. He argues that the three instances in which he penetrated Ms. Still's vagina with his penis constituted but a single continuous incident and "merge" into one criminal act, so that he can be convicted of only one rape. Therefore, he asserts, his conviction and punishment for three separate rapes is a violation of the double jeopardy provisions of the North Carolina and United States constitutions. We disagree.

Second degree rape is "vaginal intercourse with another person (1) [b]y force and against the will of the other person." G.S. 14-27.3(a)(1). *State v. Hosey*, 79 N.C. App. 196, 339 S.E. 2d 414, *modified and aff'd*, 318 N.C. 330, 348 S.E. 2d 805 (1986). The force necessary to constitute an element of the crime of rape need not be actual physical force. The use of force may be established by evidence that submission was induced by fear, duress or coercion. *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977). "Evidence of the slightest penetration of the female sex organ by the male sex organ is sufficient for vaginal intercourse and the emission of semen need not be shown." *State v. Williams*, 314 N.C. 337, 351, 333 S.E. 2d 708, 718 (1985). *State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190

(1968); *State v. Monds*, 130 N.C. 697, 41 S.E. 789 (1902). Each act of forcible vaginal intercourse constitutes a separate rape. *State v. Dudley*, 319 N.C. 656, 356 S.E. 2d 361 (1987). "Generally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense." *Id.* at 659, 356 S.E. 2d at 363, *quoting* 75 C.J.S. Rape § 4; *State v. Small*, 31 N.C. App. 556, 559, 230 S.E. 2d 425, 427 (1976), *disc. rev. denied*, 291 N.C. 715, 232 S.E. 2d 207 (1977).

In the present case, the evidence showed that defendant penetrated the victim's vagina with his penis on three distinct occasions and that on each occasion he accomplished the vaginal intercourse by the use of actual and constructive force against the will of the victim. The evidence as to each separate act of forcible intercourse was complete and sufficient to sustain a conviction of second degree rape without resort to the evidence necessary to prove either of the other rape charges. Therefore, under *Dudley*, each of the three acts of forcible vaginal intercourse with the victim was a separate rape and defendant was properly convicted and sentenced for all three offenses. This assignment of error is overruled.

[2] Defendant's remaining assignments of error relate to sentencing. In each of the four cases, the trial court found as aggravating factors that defendant had a prior record of convictions for criminal offenses, that he was on parole at the time of the offenses against Ms. Still, and that he took advantage of a position of trust or confidence to commit the offenses against Ms. Still. Defendant assigns error to the latter finding, contending that there was insufficient evidence to show the existence of any relationship of trust or confidence between him and the victim. We agree.

A finding of a relationship of trust or confidence "depends . . . upon the existence of a relationship between the defendant and the victim generally conducive to reliance of one upon the other." *State v. Daniel*, 319 N.C. 308, 311, 354 S.E. 2d 216, 218 (1987) (mother's relationship to newborn child supports finding of the factor). *See also State v. Potts*, 65 N.C. App. 101, 308 S.E. 2d 754 (1983) *disc. rev. denied*, 311 N.C. 406, 319 S.E. 2d 278 (1984) (victim thought of defendant as a brother and stated he knew defendant would not shoot him); *State v. Baucom*, 66 N.C. App. 298, 311 S.E. 2d 73 (1984) (factor might be properly found where

twenty-one-year-old defendant sodomized his ten-year-old brother); *State v. Stanley*, 74 N.C. App. 178, 327 S.E. 2d 902, *disc. rev. denied*, 314 N.C. 546, 335 S.E. 2d 318 (1985) (factor properly found where defendant raped a nineteen-year-old retarded girl who lived with defendant's family and who testified that she trusted and obeyed defendant as an authority figure). *But see State v. Carroll*, 85 N.C. App. 696, 355 S.E. 2d 844, *disc. rev. denied*, 320 N.C. 514, 358 S.E. 2d 523 (1987) (factor not properly found where defendant and victim had met only one and a half days before the murder and decided to take a trip in defendant's car).

In the present case, the evidence showed that Ms. Still had met defendant approximately one month before the events which gave rise to these charges. On that occasion, she had invited him to join her and her sister for an early morning New Year's breakfast at her apartment. After the breakfast, Ms. Still had permitted defendant to sleep on the sofa in her living room because he said that he had consumed too much alcohol to drive home. She had locked her bedroom door and had instructed her sister to do so. Defendant left the apartment without incident the next morning. He had called her on another occasion to invite her to lunch; she had declined his invitation. The evidence shows merely that the victim was acquainted with defendant; it does not show the existence of a relationship between them through which the defendant would occupy a position of trust and confidence. The trial court's error in finding this aggravating factor entitles defendant to a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

[3] Because it is necessary to remand this case for resentencing, we deem it appropriate to briefly discuss defendant's other assignment of error relating to the sentencing hearing. After hearing evidence and the arguments of counsel at the sentencing hearing, the trial judge conducted an *in camera* "victim input session" in his chambers before pronouncing judgment. Only the trial judge, the victim, the prosecutor, defense counsel and the court reporter were permitted to be present. The victim was permitted to make a statement expressing her views concerning the appropriate punishment to be imposed and the reasons therefor. Neither the prosecutor nor defendant's counsel were permitted to examine the victim. From the record, it appears that the trial

judge pronounced judgment immediately after returning to the courtroom without affording the defendant an opportunity to refute any of the matters urged by the victim in her statement.

Trial judges in North Carolina are allowed wide latitude in conducting sentencing hearings, *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980), and are encouraged to seek all relevant information which may be of assistance in determining an appropriate sentence. *State v. Hester*, 37 N.C. App. 448, 246 S.E. 2d 83 (1978). Formal rules of evidence do not apply. G.S. 15A-1334(b). The trial court may properly consider a victim's statement relating to a defendant's sentence. *State v. Clemmons*, 34 N.C. App. 101, 237 S.E. 2d 298 (1977), *disc. rev. denied*, 296 N.C. 412, 251 S.E. 2d 471 (1979). *See* G.S. 15A-825(9) (providing for preparation of victim impact statement for consideration by court).

The latitude and discretion accorded trial judges in the conduct of the sentencing hearing are not, however, without limits. Our Supreme Court has stated:

> Sentencing is not an exact science, but there are some well established principles which apply to the sentencing procedure. The accused has the undeniable right to be personally present when sentence is imposed. *Oral testimony, as such, relating to punishment is not to be heard in his absence. He shall be given full opportunity to rebut defamatory and condemnatory matters urged against him*, and to give his version of the offense charged, and to introduce any relevant facts in mitigation.

State v. Pope, 257 N.C. 326, 334, 126 S.E. 2d 132-33 (1962) (emphasis supplied). "All information coming to the notice of the court which tends to defame and condemn the defendant and to aggravate punishment should be brought to his attention before sentencing, and he should be given full opportunity to refute or explain it." *Id.* at 335, 126 S.E. 2d at 133.

The trial judge's action in conducting the *in camera* "victim input session" in the absence of defendant may have been prompted by a desire to spare the victim further confrontation with defendant, an understandable and laudable motive. Nevertheless, the trial courts should exercise extreme caution in conducting such *in camera* hearings and insure that all information received

by the court relating to punishment is made known to the defendant and his counsel and that he be given the opportunity to explain or refute it.

We conclude that defendant received a fair trial, free from prejudicial error. For the reasons stated, however, we remand these cases to the Superior Court of Wake County for a new sentencing hearing.

No error in the trial, remanded for resentencing.

Judge WELLS concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent from that portion of the majority opinion which holds that three separate convictions and punishments for second degree rape may be sustained on the evidence before us. The majority finds no merit in defendant's claims that the double jeopardy clause of the Constitution of the United States and the Constitution of North Carolina prevents all three convictions being upheld. I disagree with the majority and would vote to vacate one of the three second degree rape convictions.

Defendant argues that the sexual misconduct here consisted of one incident of forced oral sex and one second degree rape, the three vaginal penetrations constituting parts of one occurrence of forced vaginal sexual intercourse. In his brief defendant argues that withdrawal of his penis and his forcible removal of the victim from the living room to the adjoining bedroom where he again vaginally penetrated her twice more were all part of one transaction of sexual misconduct and could be punished only as one rape. Likewise defendant argues that his acts in the bedroom of forcibly vaginally penetrating the victim from the rear and upon her protest withdrawing and immediately re-penetrating her vaginally from the front was but part of a single continuing transaction begun in the living room.

Though defendant's conduct is reprehensible and deserving of serious punishment, the question here is whether defendant

has committed but one second degree rape, as he argues on appeal, or three separate second degree rapes as the majority finds. I agree with the majority that the forcible vaginal penetration of the victim in the living room constitutes a separate offense from the bedroom acts. It was separated from the bedroom acts both as to place (in another room, some 20 to 25 feet away) and as to time (several minutes, the time to walk the 20-25 feet from the living room to the bedroom). However, as to the last two penetrations, I believe that they constitute but one sexual act, and must be punished as one second degree rape.

Our law is clear that second degree rape is "vaginal intercourse with another by force and against the will of the other person." G.S. 14-27.3(a)(1). Equally clear is the rule that to show vaginal intercourse in a rape prosecution there need be proof only of "the slightest penetration." *State v. Johnson*, 317 N.C. 417, 435, 347 S.E. 2d 7, 18 (1986). Nevertheless, each re-penetration, when part of the same act of vaginal intercourse, should not be punished as a separate rape. *Beasley v. State*, 94 Okla. Cr. 353, 236 P. 2d 263 (1951). The majority opinion here would tend to establish a rule that in a rape case where a defendant makes more than one penetration, no matter how close in time and place, each re-penetration automatically would support a separate rape charge and punishment.

The law contemplates that for each act of forcible vaginal intercourse there should be criminal prosecution and imposition of a punishment within the legislatively approved maximum. In the absence of legislative action, punishment for a single act of forcible sexual intercourse should not be increased solely because the act involves re-penetration after the initial forcible penetration, so long as it is part of the same act or transaction and there is no intervening activity.

Harrell v. State, 88 Wis. 2d 546, 277 N.W. 2d 462 (1979), discusses some helpful criteria for determining when sexually assaultive conduct with multiple penetrations should constitute one or more punishable offenses for double jeopardy purposes. Among the factors considered by the Wisconsin court are:

(a) the nature of the act;

(b) time elapsed;

(c) place, meaning the site of the acts as well as "the intimate parts of the victim's body invaded by the sexually assaultive behavior";

(d) intent and whether the lapse of time may indicate a newly formed intent to again seek sexual gratification or inflict abuse;

(e) cumulative punishment; and

(f) number of victims.

Id. at 572-574, 277 N.W. 2d at 472-474. They observed that: "[t]he presence and absence of a single factor or a combination of factors other than the nature of the act is not conclusive of the issue." *Id.* at 572, 277 N.W. 2d at 473.

While there was a separation in time and place of the forcible penetration of the victim in the living room from the later acts in the bedroom, the two vaginal penetrations in the bedroom occurred in close proximity of time, at the same place and with the same intent, i.e. gratification of defendant's sexual desires. In the bedroom, defendant withdrew from the penetration from the rear and after changing the victim's position on the bed immediately re-penetrated her from the front and completed the act of intercourse.

In considering the two bedroom penetrations, the nature of the act was the same, the time elapsed between them was apparently negligible, and the place was the same in both respects. Likewise the intent, defendant's sexual gratification, was the same in both penetrations and so little time elapsed as to negate the likelihood of any newly found intent. Utilizing the *Harrell* evaluation of factors, it is clear that there was but one punishable offense.

The majority relies on *State v. Dudley*, 319 N.C. 656, 356 S.E. 2d 361 (1987) to support the proposition that each act of forcible vaginal penetration constitutes a separate rape. In *Dudley* there were two completed acts of sexual intercourse with one victim. The two completed acts were separated by an unspecified period of time during which the defendant unsuccessfully attempted sexual intercourse with a second victim. Because there were two separate completed acts of intercourse which were separated in

time and by intervening circumstances (the attempted forcible intercourse with the second victim), *Dudley* is distinguishable on its facts.

The majority also cites *State v. Small*, 31 N.C. App. 556, 230 S.E. 2d 425 (1976), *disc. review denied*, 291 N.C. 715, 232 S.E. 2d 207 (1977). In *Small* there were two separate incidents of forcible intercourse with the same victim on the same evening. The first occurred when defendant accosted the victim on the street, threw her on the ground into some bushes, and raped her. The second incident of forcible intercourse occurred between the same defendant and victim on the way from the scene of the first rape to the victim's friend's apartment. The victim was attempting to lure her attacker to her friend's apartment after the first rape so she could get help. Unlike the instant case, the two rapes in *Small* were completed acts of forcible intercourse, substantially separated both in time and place.

Though the majority is correct that "*generally* rape is not a continuous offense," citing 75 C.J.S., *Rape* section 4, the facts and circumstances of the two penetrations in the bedroom show they were very close in time, at the same place, pursuant to the same intent and constitute one offense of rape. Accordingly, I dissent and vote to vacate the third conviction of second degree rape. In all other respects, I concur fully with the majority opinion.

LEWIS R. PITMAN, EMPLOYEE v. THE FELDSPAR CORPORATION, EMPLOYER AND NATIONAL UNION FIRE INSURANCE COMPANY, CARRIER

No. 8710IC148

(Filed 6 October 1987)

1. Master and Servant § 69.1— workers' compensation—total disability—inability to earn wages—sufficiency of findings

Although the Industrial Commission failed to make a specific finding that plaintiff is unable to earn wages at other employment, the Commission's findings that plaintiff has "not been able to work" since leaving employment with defendant and that plaintiff is "totally disabled," when considered with additional findings regarding plaintiff's age, limited education, work experience, worsened physical condition and inability to exert himself, constituted minimally sufficient findings as to defendant's inability to earn wages at any job so as to support its conclusion that plaintiff is totally disabled.

2. Master and Servant §§ 68.1, 94.1— workers' compensation—total disability—occupational and nonoccupational causes—apportionment—insufficient findings

The Industrial Commission erred in failing to make specific findings as to whether any portion of plaintiff's total incapacity to work was caused by conditions unrelated to employment where the evidence was conflicting as to whether plaintiff was totally disabled from silicosis or whether plaintiff also had a chronic obstructive lung disease due to smoking and asthma which contributed to his total disability. The Commission's finding that "The occupational disease silicosis makes a very significant contribution to plaintiff's total disability" was insufficient to support the conclusion that plaintiff is entitled to total disability benefits since the apportionment rule established by *Morrison v. Burlington Industries*, 304 N.C. 1, 288 S.E. 2d 458 (1981), applies to this case.

APPEAL by defendants from opinion and award of the Industrial Commission entered 28 August 1986. Heard in the Court of Appeals 3 September 1987.

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

Teague, Campbell, Dennis, and Gorham, by George W. Dennis, III and Linda Stephens for defendant appellants.

BECTON, Judge.

This action involves a claim for benefits under the Workers' Compensation Act, N.C. Gen. Stat. Chapter 97 (1985). The defendants stipulated that plaintiff, Lewis R. Pitman, contracted the occupational disease silicosis under compensable circumstances, and voluntarily paid benefits to him for 104 weeks pursuant to N.C. Gen. Stat. Sec. 97-61.5. The matter then came before the Industrial Commission for a determination of what, if any, further benefits plaintiff was entitled to receive for total or partial disability.

After hearing testimony and reviewing medical reports, Deputy Commissioner Shuford found facts and awarded plaintiff total disability benefits. Defendants appealed to the Commission which filed a decision on 28 August 1986, affirming and adopting as its own Commissioner Shuford's opinion and award. Defendants appeal. We vacate the award and remand for further findings of fact.

I

The evidence before the Commission included testimony by plaintiff, three reports of the Advisory Medical Committee, and deposition testimony and medical reports from Dr. Douglas G. Kelling, Jr.

Plaintiff was employed as a mechanic by defendant, Feldspar Corporation, for 23 years. The job involved heavy work and lifting, and exposed plaintiff to substantial amounts of silica dust.

Plaintiff stopped working in April 1982 when silicosis was diagnosed. His testimony tends to show that he has been unemployed since that time due to shortness of breath and chest pain associated with exertion such as carrying groceries or climbing steps. He stated that he does no house or yard work and that he knows no other jobs he could get and perform.

The impression of the Advisory Medical Committee in its first report dated 25 March 1982 was that the plaintiff had "silicosis, Grade II with 40% disability." That report was revised in a second report, dated 4 March 1983, to "silicosis, Grade II, with 70% disability." The Committee's third and final report, dated 2 April 1984, concluded that plaintiff had "Silicosis, Grade II, 100% disability." Each report concluded that plaintiff should have no further exposure to silica.

Plaintiff was seen by Dr. Kelling once, in December 1983. Dr. Kelling disagreed with the Medical Committee's conclusion of total disability, believing that plaintiff was capable of performing certain jobs. It was his opinion that plaintiff had silicosis, *and* an obstructive lung disease possibly due to cigarette smoking and/or asthma; that as a result, plaintiff suffered a 30 to 40 percent pulmonary impairment; and that approximately 50 percent of the overall respiratory impairment was neither caused, aggravated, nor accelerated by exposure to silica dust.

In his Opinion, Deputy Commissioner Shuford recited the stipulations of the parties and then made the following additional findings of fact:

> 1. Plaintiff was examined by the Advisory Medical Committee to the Industrial Commission consisting of Dr. Hillis L. Seay, Dr. O. L. Henry, Jr., and Dr. H. F. Easom on two occa-

sions, the last examination being on or about 2 April 1984. Plaintiff was also examined on 20 December 1983 by Dr. Douglas C. Kelling, Jr. The findings and opinions of such doctors have been received as evidence in this case.

2. Plaintiff was born on 6 June 1926 and has a sixth-grade education. His last job was with defendant-employer where he worked for 23 years. Plaintiff was a mechanic and engaged in repairing pumps and other heavy equipment which involved heavy lifting. Plaintiff last worked on 15 April 1982 and he has not been able to work since that time. Plaintiff's physical condition has worsened since he quit work and he is now unable to exert himself.

He feels he has "got no breath to do anything" and knows of no job that he would be able to perform. Plaintiff just sits around his home and engages in no cleaning or yard work. He does not take oxygen because he is afraid that if he would do so he would be unable to "get off" oxygen.

3. Plaintiff is totally disabled because of his pulmonary condition. The occupational disease silicosis makes a very significant contribution to plaintiff's total disability.

Based upon these findings, he then concluded as a matter of law that "Plaintiff is totally disabled by reason of his pulmonary condition and the disease silicosis from which he suffers makes a significant contribution to Plaintiff's disability," and awarded plaintiff $184.00 per week "until such time as Plaintiff has a change of condition."

II

The scope of judicial review of decisions of the Industrial Commission is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the findings justify the legal conclusions and the award. *E.g., Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676 (1980); *Guy v. Burlington Industries*, 74 N.C. App. 685, 329 S.E. 2d 685 (1985). Findings of fact made by the Commission are conclusive and binding on appeal when supported by any competent evidence. *McLean v. Railway Express, Inc.*, 307 N.C. 99, 296 S.E. 2d 456 (1982); *Robinson v. J. P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E. 2d 144 (1982). The findings must be specific with respect to each material

fact upon which the plaintiff's right to compensation depends, *e.g.*, *Guy* at 689, 329 S.E. 2d at 688, and if they are insufficient to enable the Court to determine the rights of the parties upon the matters in controversy, the cause must be remanded to the Commission for proper findings, *e.g.*, *Moore v. J. P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E. 2d 159, *disc. rev. denied*, 301 N.C. 401, 274 S.E. 2d 226 (1980).

In ascertaining the right to compensation in cases involving occupational diseases such as silicosis, the Industrial Commission must ordinarily determine 1) whether the plaintiff in fact has an occupational disease, 2) whether, and to what extent, the plaintiff is disabled within the meaning of N.C. Gen. Stat. Sec. 97-54, and 3) to what degree any such disability is caused by the occupational disease. In the case before us, because the existence of the occupational disease silicosis under compensable circumstances is undisputed, the issues are limited to the degree of disability and causation.

A

[1] Although conceding that, due to his silicosis, plaintiff should not or cannot perform his former work, defendants contend that the Commission erred by failing to make sufficiently specific findings regarding plaintiff's present ability to perform *other* jobs to support its conclusion that plaintiff is totally disabled. Defendants further except to the findings that plaintiff "has not been able to work" since April 1982, that he is "now unable to exert himself," and that he "is totally disabled because of his pulmonary condition," contending that they are unsupported by the evidence. We disagree.

"Disablement," in silicosis cases, means "becoming actually incapacitated because of . . . silicosis to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to . . . silicosis," N.C. Gen. Stat. Sec. 97-54, and is equivalent to "disability" as defined by N.C. Gen. Stat. Sec. 97-2(9). *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E. 2d 374, 378 (1986). In *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982), the Supreme Court stated that:

> . . . [i]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Id. at 595, 290 S.E. 2d at 683. The Court applied the same standard to an occupational disease case in *Hendrix.*

In this case, it is undisputed that plaintiff is unable to earn the same or any wages in his previous employment. Defendants apparently object to the lack of a specific finding stating that plaintiff is unable to earn wages at other employment. The Commission did, however, find that plaintiff has "not been able to work" since leaving his employment at Feldspar Corporation, and that plaintiff is "totally disabled." Although these findings should have been stated more definitively in terms of the *Hilliard* standard, we conclude that, taken together with the additional findings regarding plaintiff's age, limited education, work experience, worsened physical condition, and inability to exert himself, the findings of fact support a conclusion that plaintiff is unable to earn wages at any job, and are "minimally sufficient" to satisfy the *Hilliard* test. See *Hendrix* at 187, 345 S.E. 2d at 379. See also *Mabe v. N.C. Granite Corp.*, 15 N.C. App. 253, 189 S.E. 2d 804 (1972).

Moreover, defendants are incorrect in their assertion that *undisputed* evidence shows plaintiff capable of earning wages in other employment. Although Dr. Kelling opined that plaintiff "could perform truck driving, security work, or working in a supermarket or convenience food store, production line or sales jobs, and other jobs not including heavy lifting," that evidence was contradicted by plaintiff's own testimony regarding his age, education, shortness of breath, incapacity to work, and the effect that physical exertion has upon him, all of which is competent evidence. *See Singleton v. D.T. Vance Mica Co.*, 235 N.C. 315, 69 S.E. 2d 707 (1952). Furthermore, the Advisory Medical Committee's final "impression" of "Silicosis, Grade II, 100% disability" was clearly a fulfillment of the statutory requirement that its written

report include the Committee's opinion, expressed in percentages, of the impairment of the employee's ability to perform labor or earn wages in the same or any other employment, *see* N.C. Gen. Stat. Secs. 97-61.1 and 97-61.4, and, therefore, could be properly interpreted by the Commission as a conclusion that plaintiff is unable to earn wages in any type of employment. We conclude the findings are supported by competent evidence, and consequently, the Commission did not err in concluding that plaintiff is totally disabled.

B

[2] Defendants next contend that only a portion of plaintiff's disability is compensable and that the Commission erred by failing to make specific findings regarding whether any portion of plaintiff's total incapacity to work was caused by conditions unrelated to employment. We agree, and therefore, we remand the case for further findings.

The testimony and report of Dr. Kelling tended to show that the plaintiff had, *in addition* to silicosis, a chronic obstructive lung disease which was, in his opinion, due to smoking and possibly to asthma. He also stated that a significant portion of plaintiff's total respiratory impairment (50%) was unrelated to the silicosis. On the other hand, plaintiff testified to a negligible smoking history, and none of the Advisory Medical Committee reports indicated the existence of a second pulmonary ailment. Rather, the Medical Committee's final impression of "Silicosis, Grade II, 100% disability" suggests that plaintiff was completely incapacitated for work by reason of silicosis.

Defendants plainly raised in this proceeding the issue whether plaintiff's disability was wholly caused by his occupational disease. They correctly contend that it was the duty of the Industrial Commission to weigh and evaluate the evidence on that question and to make findings resolving any conflicts. The sole finding of fact with respect to the cause of plaintiff's incapacity for work, by which the Commission apparently believed it had adequately resolved that issue, states: "The occupational disease silicosis makes a very significant contribution to plaintiff's total disability." Based on that finding, and citing *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983), the Commission concluded that plaintiff was entitled to total disability benefits. In our

opinion, the Commission misapplied *Rutledge*, utilized an inappropriate legal standard for causation, and consequently, failed to resolve crucial issues of fact affecting plaintiff's right to compensation.

The issue in *Rutledge*, simply stated, was whether a single disabling disease, chronic obstructive lung disease, which is caused in part by conditions of employment but also caused in part by non-work-related factors, could properly be considered an occupational disease. The court resolved the causation question by concluding that the disease may be considered an occupational disease if the worker's occupational exposure to cotton dust "significantly contributed to, or was a significant causal factor in, the disease's development." *Id.* at 101, 301 S.E. 2d at 369-70.

In the case *sub judice*, the parties having stipulated that plaintiff has an occupational disease, the causation issue is whether that disease is solely responsible for Plaintiff's incapacity to earn wages. In *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981), the Supreme Court stated the rule that "[w]hen a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational disease and the remainder of that incapacity for work is not caused, accelerated, or aggravated by an occupational disease, the Workers' Compensation Act of North Carolina requires compensation only for that portion of the disability caused, accelerated, or aggravated by the occupational disease." *Id.* at 18, 282 S.E. 2d at 470. *See also Hansel v. Sherman Textiles*, 304 N.C. 44, 54-55, 283 S.E. 2d 101, 107 (1981).

We are aware that, as plaintiff points out in his brief, there is some authority for the proposition that *Rutledge* implicitly overruled the result in *Morrison*, and its progeny, at least in cases involving byssinosis as a component of chronic obstructive lung disease. *See Rutledge* at 109, 301 S.E. 2d at 374 (J. Meyer, dissenting); Note, *Workers' Compensation—Rutledge v. Tultex Corp./King's Yarn: Leaving Precedent in the Dust?* 62 N.C.L. Rev. 573 (1984); Note, *Workers' Compensation—Dual Causation of Occupational Disease—Rutledge v. Tultex Corp.*, 19 W.F.L. Rev. 1137, 1154 (1983). However, the Supreme Court in *Rutledge* distinguished, rather than overruled its decisions in *Morrison* and *Hansel*, and this court has continued to recognize the validity of

the *Morrison* rule in post-*Rutledge* cases. *See e.g. Parrish v. Burlington Industries, Inc.*, 71 N.C. App. 196, 321 S.E. 2d 492 (1984). Moreover, in the recent case of *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 54 S.E. 2d 477 (1987), the Supreme Court held that an employee whose total disability was due in part to a compensable heart attack and in part to other non-work-related infirmities or injuries was entitled to an award for total disability under N.C. Gen. Stat. Sec. 97-29, but that "the award *must be apportioned* to reflect the extent to which claimant's permanent total disability was caused by the compensable heart attack." *Id.* at 253-54, 354 S.E. 2d at 484 (emphasis added).

We find no persuasive authority in support of plaintiff's contention that the apportionment rule established by *Morrison* is inapplicable to a silicosis case in which there is some evidence of the existence of a non-work-related disease or condition which *independently* contributes to the employee's incapacity to earn wages. Thus, we conclude that the *Morrison* rule of causation controls this case, and we must remand for specific findings as to what extent plaintiff's silicosis caused his incapacity for work.

On remand, the Commission, as the sole judge of the credibility of witnesses and the weight to be given to their testimony, may, of course, properly refuse to believe particular evidence. *Harrell v. J. P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E. 2d 830, 835, *disc. rev. denied*, 300 N.C. 196, 269 S.E. 2d 617 (1980). It may accept or reject all or part of the testimony of Dr. Kelling or any other witness, and need not accept even uncontradicted testimony. *See id.; Morgan v. Thomasville Furniture Industries, Inc.*, 2 N.C. App. 126, 127-28, 162 S.E. 2d 619, 620 (1968). However, having concluded that plaintiff is totally disabled because of his pulmonary impairment, the Commission must, on remand, determine 1) whether, in fact, plaintiff has a second disease in addition to silicosis which contributed to his respiratory impairment and, thus, to his complete incapacity for work, 2) whether such disease, if any, is also an occupational disease, and 3) if not, what portion of plaintiff's total disability has been caused, accelerated, or aggravated by the occupational disease silicosis. The Commission should make specific findings with regard to these issues, hearing additional medical testimony, if necessary, and award plaintiff total or partial benefits according to whether it finds part or all

of the disability to have been caused, accelerated, or aggravated by an occupational disease.

III

The Commission's conclusion that plaintiff is totally disabled is supported by sufficient findings of fact which are, in turn, supported by competent evidence. However, for the reasons stated, the award is vacated and the cause is remanded to the Industrial Commission to make more definitive findings and conclusions regarding the causal link between plaintiff's occupational disease and his total disability, and to enter the appropriate order.

Vacated and remanded.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. KENNETH LEE SMITH

No. 8718SC198

(Filed 6 October 1987)

1. **Obscenity § 1— dissemination of obscenity—constitutionality of statute**

The statute pertaining to the dissemination of obscenity, N.C.G.S. § 14-190.1, is not unconstitutionally vague and overbroad.

2. **Obscenity § 3— instructions on community standard**

The trial court in an obscenity case sufficiently instructed the jury that patent offensiveness must be judged by the standards of the average adult in the community rather than by their own personal standards.

3. **Obscenity § 3— patent offensiveness—insufficiency of sexual conduct alone—refusal to instruct**

The trial court did not err in failing to give defendant's requested instruction that sexual conduct alone is not sufficient to establish patent offensiveness and obscenity since it is unlikely that the jury could have concluded that depiction of sexual conduct alone contravened the law in light of the court's instruction that material is obscene if it "depicts or describes in a patently offensive way sexual conduct as that term is defined in the North Carolina statute."

4. Obscenity § 3— inability to determine community standard—necessity for acquittal—implicit instruction

The trial court in an obscenity case implicitly gave defendant's requested instruction that it must acquit if it could not determine the contemporary community standard that it was to apply.

5. Obscenity § 3— effect of materials on young people—refusal to instruct

The trial court in an obscenity case did not err in failing to give defendant's requested instruction that it should not consider the effect of the materials in the present case on young people but should consider the effect exclusively with reference to adults where the court charged the jury several times that it must consider the materials with reference to adults.

6. Obscenity § 3— occurrences at adult bookstores—expert testimony—harmless error

Any error in the admission of testimony by the State's expert witness in an obscenity case that he understood that solicitation and "other things" went on in adult bookstores was not prejudicial in light of the overwhelming evidence of defendant's guilt of the crimes charged.

7. Obscenity § 3— knowledge of contents of movies—sufficient evidence

The State's evidence in a prosecution for dissemination of obscenity was sufficient to permit the jury to find that defendant knew the contents of the two movies in question where defendant was the only employee working in an adult bookstore on each occasion that officers visited the store; the store disseminated pornographic magazines and books and sexual devices; the video booths from which the movies in question were taken were festooned with photographic collages of males and females engaged in oral, vaginal and anal sex; and defendant sold the tokens needed to operate the video booths.

8. Obscenity § 1— dissemination of obscenity—knowledge of contents of materials

The statute prohibiting the dissemination of obscenity, N.C.G.S. § 14-190.1, does not require proof that defendant knew or believed that the materials in question were obscene and does not impose a strict liability for disseminating obscenity; rather, the statute requires proof that defendant knew the nature and content of the materials purveyed.

9. Obscenity § 1— seized materials—absence of prompt adversary hearing on obscenity

The absence of a right in N.C.G.S. § 14-190.1 to an adversary hearing on the obscenity of seized materials prior to trial does not constitute an unconstitutional prior restraint and denial of due process.

10. Obscenity § 3— value of materials—reasonable man standard

The trial court erred in instructing the jury in a prosecution for disseminating obscenity that it should apply a community standard rather than the reasonable man standard in deciding the question of a work's value. However, such error was harmless since no rational juror could have found value in the materials in question.

State v. Smith

APPEAL by defendant from *Walker, Judge.* Judgment entered 22 August 1986 in GUILFORD County Superior Court. Heard in the Court of Appeals 2 September 1987.

Defendant Kenneth Lee Smith was indicted on three counts of disseminating obscenity in violation of N.C. Gen. Stat. § 14-190.1(a) and on three counts of possession with intent to disseminate obscenity in violation of N.C. Gen. Stat. § 14-190.1(e). The defendant was tried and convicted of all the charges. The trial court consolidated each count of dissemination with its possession counterpart and sentenced the defendant to three years on each of the three consolidated counts.

Defendant appeals.

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

Smith, Patterson, Follin, Curtis, James and Harkavy, by Michael K. Curtis, Martha E. Johnston, and Charles A. Lloyd, for defendant-appellant.

WELLS, Judge.

Defendant brings forward thirteen assignments of error. We overrule all assignments and find no prejudicial error in the trial. The basic facts are not in dispute. Defendant was the manager of Dude's Adult Book Store in Greensboro, when on 22 October 1985, he sold two magazines, one entitled "Anal Girls Who Take It All" and the other entitled "Foxy Blondes Who Take It All—SEKA," to Detective A. G. Lee of the Greensboro Police Department. These magazines contain photographs of couples and trios engaged in various sexual acts, including cunnilingus, anal intercourse, fellatio, and ejaculation of sperm. There is very little text.

On 23 October 1985, Detective Lee came back to Dude's Adult Book Store and arrested the defendant. When Detective Lee returned to Dude's on 24 October he found defendant again working as manager and sole employee. On this occasion Detective Lee entered the video booth area at the rear of the store and watched a film that showed acts of anal and vaginal intercourse as well as oral sex. The next day Detective Lee returned to Dude's and charged the defendant a second time.

Subsequently, on 30 October, defendant was arrested a third time for disseminating obscenity.

At trial the defendant presented several witnesses who testified that in their opinion the materials did not affront community standards of decency. One witness claimed the materials had political value.

In rebuttal the State offered two witnesses, one of whom stated that in his opinion the materials lacked any scientific or medical value.

[1] Defendant attacks his convictions on several fronts. By his first assignment of error he contends that the obscenity statute under which he was convicted is unconstitutionally vague and overly broad. Our appellate courts recently sustained N.C. Gen. Stat. § 14-190.1 in the face of precisely this challenge in *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305, *aff'd*, 320 N.C. 485, 358 S.E. 2d 383 (1987). This assignment is overruled.

[2] By assignments of error two through five the defendant attacks various portions of the trial court's instructions to the jury. He contends first that the trial court erred in failing to explain that patent offensiveness must be judged by community standards. We find that the trial court adequately explained this point. After having charged on each prong of the tripartite obscenity test, the court summarized as follows:

> Now, ladies and gentlemen, contemporary community standards must be interpreted as the current standards here in Guilford County. All of these tests of obscenity that I have related to you must be considered and judged *with reference to the average adults in this community rather than by the most tolerant or by the most prudish.* (Emphasis added.)

This instruction adequately informed the jury that they were to apply not their own personal standards but rather those of the average adult in the community.

We further find no error in the trial court's explanation of *how* the patent offensiveness test should be applied.

[3] Defendant next contends that the trial court erred in failing to instruct the jury, as requested, that sexual conduct alone is not sufficient to establish patent offensiveness and obscenity. We

disagree. The charge to the jury included the following line: "Now, members of the jury, . . . material is obscene if . . . [it] depicts or describes in a *patently offensive way* sexual conduct *as that term is defined in the North Carolina statute.*" (Emphasis added.) In the light of this instruction, it is unlikely that the jury could have concluded that depiction of sexual conduct alone contravenes the law.

[4] Next, defendant contends that the trial court erred in refusing to charge the jury, as requested, that it must acquit if it could not determine the contemporary community standard with reference to adults. This argument too is without merit. For even though the jury instructions do not expressly so charge, they do so implicitly.

> For example, at one point the jury was instructed as follows:
>
> In addition to considering all the evidence presented, *a juror* is entitled to draw on his or her own understanding and knowledge of the views of the average person in this community and of the tolerance of the average person in this community *in making the required determinations which are necessary for the resolution of these cases.* (Emphasis added.)

This instruction adequately charged the jury that it could not reach the question of defendant's guilt or innocence unless and until it first determined itself capable of assessing what the community standard was that it would apply.

[5] Next, defendant argues that the trial court erred in failing expressly to instruct the jury, as requested, that it should not consider the effect of the materials in the present case on young people but should consider it exclusively with reference to adults. However, the transcript of the trial shows that the court charged the jury not once but several times that it *must* consider the materials in reference to *adults.* By so emphasizing, through repetition, the court effectively removed the danger that the jury might judge the materials in question with reference to young people.

With respect to assignments of error two through five, although the instruction of the trial court was not in the exact language requested, we hold that the instructions given were adequate. More is not required. Where the court's charge fully in-

structs the jury on all the substantive areas of the case, and adequately defines and applies the law thereto, it is sufficient. *State v. Mayes*, 86 N.C. App. 569, 359 S.E. 2d 30 (1987); *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, *cert. denied*, 450 U.S. 915, 67 L.Ed. 2d 339, 101 S.Ct. 1356 (1981).

For the reasons indicated above assignments of error two through five are overruled.

[6] By his sixth assignment of error, defendant contends the trial court committed prejudicial error in refusing to strike the testimony of the prosecution's expert witness that he understood that solicitation and "other things" went on in adult book stores. We disagree. An error is not prejudicial unless a different result would have been reached at the trial if the error in question had not been committed. N.C. Gen. Stat. § 15A-1443.

While this testimony was arguably inadmissible, the defendant here has not persuaded us that there exists any reasonable possibility that the outcome of the trial would have been any different had the testimony not been allowed. The evidence of defendant's guilt was overwhelming. The trial court's error, if any, was harmless.

[7] By his seventh assignment of error, defendant asserts that the trial court erred in denying his motion to dismiss based on the State's failure to present sufficient evidence that defendant knowingly disseminated the two movies in evidence.

The rule in criminal cases governing motions to dismiss on the basis of insufficiency of evidence is well settled. The court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, and then determine if there is substantial evidence to support a finding that the defendant has committed the offense for which he is charged. *State v. Greer*, 308 N.C. 515, 302 S.E. 2d 774 (1983). In the case at bar, defendant complains that there is no direct evidence to show that he had any knowledge of the two movies in question. However, our North Carolina courts have held that the test of the sufficiency of the State's evidence to withstand a motion to dismiss is the same whether that evi-

dence is direct or circumstantial. *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1980).

The circumstantial evidence in this case that defendant knew the contents of the two movies in question is more than substantial. On every occasion when law enforcement officers visited Dude's Adult Book Store defendant was the only employee working there. The State established that Dude's disseminated not only pornographic magazines and books but also sexual devices such as dildos, vibrators, and lubricating gels and oils.

Defendant sold the tokens which were needed to operate the video booths. The booths from which the movies in question were taken were festooned with photographic collages of males and females engaged in oral, vaginal, and anal sex. These advertisements conveyed the character and content of the movies shown within. All this evidence, taken together, was more than sufficient to allow a reasonable inference that defendant knew the contents of the movies he disseminated. Therefore, defendant's seventh assignment of error is overruled.

[8] By assignments of error eight and nine, defendant argues that the trial court erred in not instructing the jury, as requested, that in order to convict him they must find that he *knew* or *believed* that the materials in question were obscene. The trial court charged the jury that the State need only prove that defendant *knew the nature and content* of the materials. We agree with the trial court's determination of the *scienter* requirement of N.C. Gen. Stat. § 14-190.1.

Ruling on a similar challenge to federal obscenity laws in *Hamling v. United States*, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887 (1974), the Supreme Court observed that a specific intent requirement would be practically unenforceable:

> It is constitutionally sufficient that the prosecution show that a defendant *had knowledge of the contents* of the materials he distributed, and that he *knew the character and nature* of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming he had not brushed up on the law. (Emphasis added.)

Applying the *scienter* requirement laid down by *Hamling* for federal obscenity statutes, we hold that N.C. Gen. Stat. § 14-190.1 is neither a specific intent statute requiring proof that the defendant knew the legal status of the materials he disseminated; nor, on the other hand, does it impose strict liability for disseminating obscenity. Instead, the statute requires just the intermediate level *scienter* proof that the trial court in this case instructed: proof that defendant knew the nature and content of the materials purveyed.

It follows that defendant's assignments of error eight and nine must be overruled.

By his tenth assignment of error defendant argues that if N.C. Gen. Stat. § 14-190.1 does not require actual knowledge of the legal status of the materials, then the statute is unconstitutionally overbroad. This argument cannot succeed. As indicated above, the constitutionality of the statute is no longer in doubt after *Cinema I Video*. This assignment is overruled.

By his eleventh assignment of error the defendant asserts that N.C. Gen. Stat. § 14-190.1 is unconstitutionally overbroad in that it prohibits non-commercial, private dissemination of sexually explicit materials in the home, thereby impermissibly invading the zone of privacy carved out in *Stanley v. Georgia*, 394 U.S. 557, 22 L.Ed. 2d 542, 89 S.Ct. 1243 (1969). The defendant in the case *sub judice* not having been charged with non-commercial private dissemination in the home of obscene materials, we need not, and do not, decide whether such conduct is punishable under the statute.

[9] By his twelfth assignment of error defendant argues that the absence of a statutory requirement for an adversary hearing on the issue of the obscenity of the seized materials constitutes an unconstitutionally impermissible prior restraint and denial of due process. This issue was addressed and resolved in *Cinema I Video*. It was held there that the State need not write into its obscenity statute a statutory right to a post-seizure hearing. Therefore, this assignment is overruled.

[10] By his final assignment of error defendant asserts that the court's instruction on the value prong of the obscenity test was erroneous in the light of the recent decision of the United States

Supreme Court in *Pope v. Illinois*, 481 U.S. ---, 95 L.Ed. 2d 439, 107 S.Ct. --- (1987). In *Pope* the Illinois trial court charged the jury that it should apply community standards in deciding the question of a work's value. However, on appeal the Supreme Court held that the value question must be determined not in the light of community standards, but rather with reference to a reasonable man standard. In the case at bar the trial court gave the very instruction held erroneous in *Pope*.

Obviously, the instruction of our trial court on the third prong of the tripartite obscenity test is in conflict with the Supreme Court's decision in *Pope*. The question arises whether defendant is therefore entitled to a new trial or whether the erroneous instruction may be found harmless. The Supreme Court, confronted with exactly this question in *Pope*, decided that the appealed convictions should stand "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines." *Id.* at ---, 95 L.Ed. 2d at 447, 107 S.Ct. at --- (1987).

We have examined the materials introduced into evidence in this case and have concluded that no rational juror, properly instructed, could find value in them. Therefore, we conclude that the trial court's error was harmless and, hence, that defendant's thirteenth assignment of error must be overruled.

In summation, we find that defendant's challenges to the constitutionality of N.C. Gen. Stat. § 14-190.1 cannot succeed and that defendant received a fair trial, free of prejudicial error.

No error.

Judges EAGLES and MARTIN concur.

FIRST AMERICAN SAVINGS BANK, F.S.B. v. CALVIN O. ADAMS, PEGGIE D. DICKSON, AND CECIL D. DICKSON

No. 8718SC118

(Filed 6 October 1987)

1. **Guaranty § 1— change of lender's name—identity of corporation not affected—enforceability of guaranty**

There was no genuine issue of material fact as to plaintiff's identity as lender or as to plaintiff's right to bring suit for enforcement of a guaranty where plaintiff was known as First American Savings and Loan Association when the loan was made and subsequently changed its name to First American Savings Bank, F.S.B. N.C.G.S. § 1A-1, Rule 56(e).

2. **Guaranty § 2— alleged discharge of guarantors—summary judgment for plaintiffs proper**

In an action against the guarantors of a note on a construction loan, there was no genuine issue of material fact as to the lack of any binding agreement between plaintiff and the principal debtor by which defendants were discharged where defendants alleged that they had been discharged by virtue of an extension of time given to the principal debtor and there was no indication in the record that the guarantors' rights against the principal debtor were in any way impaired by the alleged extensions.

3. **Guaranty § 2— impairment of collateral—summary judgment for plaintiffs proper**

In an action against the guarantors of a note on a construction loan, there was no evidence of unjustifiable impairment of collateral where defendants had close ties with a debtor corporation; application of the proceeds from the sale of condominium units and use of rent monies were decisions made by the corporation, of which defendant Dickson was president; defendant Adams was negotiating for purchase of the stock and chose to guarantee repayment of the corporation's debt; plaintiff was not the debtor in possession; and the deed of trust permitted but did not require the lender to accelerate the debt or to enforce the assignment of rents clause. N.C.G.S. § 25-3-606.

APPEAL by defendants Calvin O. Adams and Peggie D. Dickson from *Albright, Judge*. Judgment entered 4 September 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 August 1987.

Defendants are guarantors on a note executed by Dickson Construction Co. for a construction loan of $400,000 from plaintiff. Dickson Construction Co. was wholly owned by defendants Peggie D. Dickson and Cecil D. Dickson, who were president and secretary, respectively. Defendant Calvin O. Adams had allegedly

entered into an agreement with Cecil Dickson to buy Dickson's stock in the corporation. The note was signed on 26 April 1983, payable to "First American Savings and Loan Company." Since that date, plaintiff has changed its name to "First American Savings Bank, F.S.B." The purpose of the loan was to allow Dickson Construction Co. to build townhomes on land in Cleveland County, and $389,540.13 of the $400,000 was used for that purpose. The note was secured by a deed of trust on that property and the townhomes constructed thereon.

Payments under the note were to be for interest only until 31 January 1984 when the principal amount was due to be repaid. Dickson Construction Co. made the periodic interest payments until December 1983 when it defaulted on its obligations under the note. On 23 February 1984, after the note had matured, plaintiff applied the remaining $10,459.87 of the original face amount of the loan to the past due interest, and an additional $15,000 payment from Dickson Construction Co. was also applied to interest.

In June 1984, plaintiff approved the sale of three of the townhomes and executed release deeds, releasing those units from the coverage of the deed of trust securing the note. Part of the purchase prices of these units was applied to the outstanding loan balance according to a schedule adopted by First American in August 1983. Between June 1984 and July 1985, no action was taken by plaintiff to collect the remaining balance, nor were any payments made by Dickson Construction Co. or defendants. In July 1985, plaintiff began sending a series of demand letters to Dickson Construction Co., threatening to accelerate the loan and foreclose on the remaining townhomes if payment in full was not made by 15 October 1985. In September 1985, another unit was sold and released from the deed of trust, with a part of the purchase price being applied to the loan.

On 22 October 1985, plaintiff simultaneously filed this action against the guarantors on the note and began foreclosure proceedings on the townhomes. The foreclosure sale took place on 3 January 1986, with plaintiff submitting the high bid of $245,000. In this action, a default judgment was entered against defendants Peggie and Cecil Dickson. Superior Court Judge Joseph R. John later granted the motion of defendant Peggie Dickson to set aside the default, but denied a like motion by defendant Cecil Dickson.

(Defendant Cecil Dickson did not appeal that ruling, nor is he a party to this appeal.)

Plaintiff filed a motion for summary judgment against the two remaining defendants with supporting documents. Plaintiff contended that defendants were liable for a deficiency of $130,587.65 plus interest. Defendants filed materials opposing summary judgment on the grounds that genuine issues of material fact existed as to whether plaintiff had, by its conduct, lost the right to enforce the note against defendants as guarantors. The trial court concluded that no issue of material fact existed and summary judgment was entered against defendants, jointly and severally, for the amount claimed by plaintiff. Defendants appeal.

Brooks, Pierce, McLendon, Humphrey and Leonard by Edward C. Winslow, III, Reid L. Phillips and James R. Saintsing for plaintiff-appellee.

Tuggle Duggins Meschan and Elrod, P.A., by J. Reed Johnston, Jr., and Frederick K. Sharpless for defendant-appellant Calvin O. Adams.

Brenda S. McLain for defendant-appellant Peggie D. Dickson.

PARKER, Judge.

Defendants assign as error the entry of summary judgment for plaintiff. On this appeal, defendants contend that genuine issues of material fact existed as to the following questions: (i) whether "First American Savings Bank, F.S.B." has the authority to enforce a note made payable to "First American Savings and Loan Association"; (ii) whether plaintiff lost its right to enforce the note against the guarantors by extending the time for repayment by the maker without the express consent of the guarantors; and (iii) whether plaintiff lost its right to enforce the note against the guarantors by impairing the security for the debt. We find no genuine issue of material fact and affirm the summary judgment.

On motion for summary judgment, the burden is on the moving party to show that there is no genuine issue of triable fact and that they are entitled to judgment as a matter of law. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The court must consider the pleadings and all discovery material on

file together with any affidavits submitted in support of or in opposition to the motion for summary judgment. Only if those materials affirmatively show the lack of any triable issue of fact and that the moving party is entitled to judgment as a matter of law should the motion for summary judgment be granted. *Id.*

[1] The first argument made by defendants is that the change of plaintiff's name somehow prevented it from enforcing this note. This argument is meritless. In its complaint, plaintiff alleged that it was "First American Savings Bank, F.S.B. (formerly First American Savings and Loan Association) . . . ." Defendants in their separate answers denied the allegation of plaintiff's identity for lack of information and belief. In its answers to interrogatories submitted by defendant Adams, plaintiff asserted that it was the lender on the note and that it was formerly known as First American Savings and Loan Association. Defendants cannot rely on general denials in their unverified answers to defeat the showing by plaintiff that First American Savings Bank, F.S.B., is the same corporate entity as First American Savings and Loan Association. G.S. 1A-1, Rule 56(e).

A change in a corporation's name does not affect the rights and libilities of that corporation. 18A Am. Jur. 2d *Corporations* § 288 (1985). Where a corporate name change does not affect the identity of the corporation, the corporation's rights under a guaranty are not abrogated. 38 Am. Jur. 2d *Guaranty* § 32 (1968). Even where a successor corporation takes over the assets of an old corporation to which a guaranty has been given, the new corporation may enforce the guaranty. *Trust Co. v. Trust Co.*, 188 N.C. 766, 125 S.E. 536, 37 A.L.R. 1368 (1924). Actions brought by a corporation after it has changed its name should be brought under the new name, even if such actions are brought for the enforcement of rights already existing at the time the change was made. 19 Am. Jur. 2d *Corporations* § 2217 (1986). Therefore, we conclude that there was no genuine issue of material fact as to plaintiff's identity as lender or as to plaintiff's right to bring suit for enforcement of the guaranty executed by defendants prior to the name change.

[2] Defendants next argue that they, as guarantors, were discharged by virtue of an extension of time given to the principal debtor to repay its obligations under the note. As a general

rule, material alteration of the contract between the principal debtor and the creditor without the guarantor's consent will operate to discharge a guarantor. G.S. 25-3-606; *Trust Co. v. Creasy*, 301 N.C. 44, 57, 269 S.E. 2d 117, 125 (1980). If the creditor enters into a binding agreement to extend the time of payment or performance, there has been a material alteration sufficient to discharge a guarantor. *Id.* In order to be binding, the agreement must be supported by consideration and must set a definite time for repayment. *Id.*

From the record, it appears that the note was due and payable in full on 31 January 1984. On 12 January 1984, plaintiff mailed a letter to the principal debtor demanding payment of past due interest and "all sums due as of the date you pay" by 12 February 1984. In April, another letter was sent giving the debtor until 6 May 1984 to pay "all sums due as of the date you pay." No action was taken, and much later another letter was sent giving the debtor until 11 August 1985 to cure the default. Finally, attorneys for plaintiff sent by certified mail a letter to the debtor giving it until 15 October 1985 to cure the default in order to avoid foreclosure. No payment was made and acceleration finally occurred on 15 October 1985. From this record, we conclude that extensions of time were granted by plaintiff with definite due dates. However, these extensions were not binding agreements which prevented the guarantors from paying the debt and pursuing their rights against the principal debtor, as the extensions were not supported by consideration.

In March of 1984, representatives of plaintiff met with defendant Dickson to discuss payment of delinquent interest and possible restructuring of the loan. The parties agreed that the principal debtor, Dickson Construction Co., would pay $15,000 in delinquent interest. In addition, the remaining loan proceeds would be applied to past due interest. Defendant Dickson stated in her affidavit in opposition to plaintiff's motion for summary judgment that it was her understanding "that [on] payment of the $25,000 to First American, First American would extend the terms of the Note and continue to allow the Corporation to make monthly payments equal to the accrued interest and not hold the Corporation in default on the Note." However, payment of the $25,000 could not have represented consideration for a new binding agreement to extend the time of payment, as it was a pay-

ment for an antecedent debt, namely delinquent interest on the original loan. *See Penn Compression Moulding, Inc. v. Mar-Bal, Inc.*, 73 N.C. App. 291, 326 S.E. 2d 280, *aff'd per curiam*, 314 N.C. 528, 334 S.E. 2d 391 (1985) (payment for an antecedent debt cannot be consideration for alteration of an existing contract). Defendant Dickson states in her brief that further sums were advanced by plaintiff to the principal debtor which she contends represented consideration for an extension agreement. However, nothing appears in the record on appeal about these additional sums, and plaintiff contends that it was simply exercising its rights under the deed of trust to maintain hazard insurance on the property securing the debt and that those sums had been advanced to Dickson Construction Co. to pay for such insurance.

In any event, there is no indication that the guarantors' rights against the principal debtor were in any way impaired by the alleged extensions. A guarantor is discharged when the debtor and lender enter into a binding agreement to extend the time for repayment on the theory that the guarantor's right to repay the debt and proceed against the debtor for repayment has been impaired by the agreement. *See Construction Co. v. Ervin Co.*, 33 N.C. App. 472, 235 S.E. 2d 418 (1977). Nothing in the record indicates that the guarantors' right to pay the debt and proceed against the debtor was in any way impaired. We conclude that there is no genuine issue of material fact as to the lack of any binding agreement between plaintiff and the principal debtor by which defendants were discharged.

[3] The final question presented by this appeal is whether defendants were discharged from their obligations as guarantors by reason of plaintiff's unjustified impairment of the collateral securing the loan. Defendants contend that the collateral was impaired in two ways. First, defendants assert that plaintiff applied insufficient funds from the proceeds of the sales of several townhomes to the loan prinicpal before releasing those units from the coverage of plaintiff's deed of trust on the project. Second, defendants contend that plaintiff unjustifiably failed to collect the rents from leased townhomes by its delay in accelerating the loan and after it had accelerated the loan. The note and deed of trust gave plaintiff the authority to collect those rents in the event of default and apply them to principal and interest on the loan.

In making this argument, defendants rely on General Statute 25-3-606, which provides:

> (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
>
> . . .
>
> (b) unjustifiably impairs any collateral for the instrument
> . . . .

This section requires that the impairment of collateral be unjustifiable. From our review of the record, we find no evidence of any unjustifiable impairment of collateral. Defendants' argument overlooks the close ties which defendants had with the debtor corporation. Application of the proceeds from sale of condominium units and use of rent monies were decisions made by the corporation of which defendant Dickson was president. Defendant Adams was negotiating for purchase of the stock and chose to guarantee repayment of the corporation's debt. *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). Moreover, plaintiff was not the debtor in possession. Although the deed of trust permitted, it did not require the lender to accelerate the debt or to enforce the assignment of rents clause.

The guaranty signed by defendants was typed at the bottom of the note and stated simply:

> For value received, we, both jointly and severally, guarantee payment of principal and interest of the foregoing Note.
>
> WITNESS our hands and seals this the 26th day of April, 1983.

This language created an absolute guaranty of payment which obligated the guarantors to pay the debt if the debtor corporation failed to pay. *See Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 338 S.E. 2d 601, *disc. rev. denied*, 316 N.C. 374, 342 S.E. 2d 889 (1986). In our view, accepted as true, defendants' statements in their affidavits in defense of plaintiff's claim would not as a matter of law bar plaintiff's recovery on the guaranty. Plaintiff, having met its burden of showing no genuine issue of material fact, was entitled to judgment as a matter of law.

Affirmed.

Judges ARNOLD and JOHNSON concur.

HAROLD E. MASSENGILL AND ILA LEE MASSENGILL v. MARTIN STARLING D/B/A MARTIN AUTO SALES, LURAY BROGDEN AND EASTERN AUTO AUCTION, INC.

No. 878SC13

(Filed 6 October 1987)

1. **Automobiles and Other Vehicles § 50.3; Negligence § 29— brake failure—auction company's failure to test—sufficient evidence of negligence**

In an action to recover for injuries received by plaintiff when he was struck by a car being driven by defendant auction company's employee when the brakes failed, plaintiff's evidence was sufficient for the jury to find that defendant was negligent in failing to inspect the car or test its brakes before driving it into the auction garage where it tended to show that defendant's employee applied the brakes as she approached the auction garage; the car did not stop but struck plaintiff who was standing behind the car then being auctioned; the owner of the car had towed it onto defendant's lot to have it sold at auction; the owner of the car knew it had "weak brakes" but told defendant only that the car was to be sold "as is"; defendant often got cars from used car dealers that had serious mechanical defects; and defendant's employee did not test the brakes to see if they would stop the car before she drove it to the auction garage.

2. **Automobiles and Other Vehicles § 90.11; Negligence § 37— sudden emergency —instruction not required**

In an action to recover for injuries received by plaintiff when he was struck by a car being driven by defendant auction company's employee when the brakes failed, the trial court properly refused to instruct the jury on the doctrine of sudden emergency where plaintiff's theory of the case was that defendant was negligent in failing to inspect the car or test its brakes before driving it, not that defendant's employee was negligent in her reactions when she realized that the car she was driving had no brakes.

3. **Automobiles and Other Vehicles § 44.1; Negligence § 6.1— facts shown at trial —res ipsa loquitur inapplicable**

In an action to recover for injuries received by plaintiff when he was struck by a car being driven by defendant auction company's employee when the brakes failed, the trial court committed prejudicial error in instructing the jury on the doctrine of *res ipsa loquitur* where all of the relevant facts and circumstances leading to plaintiff's injuries were testified to by the witnesses at the trial.

ON writ of certiorari to the Superior Court, WAYNE County. Judgment entered 5 May 1986 by *Llewellyn, Judge*. Certiorari allowed 25 November 1986. Heard in the Court of Appeals 25 August 1987.

Plaintiff Harold Massengill was injured when he was struck by a car driven by defendant Luray Brogden in her capacity as employee of defendant Eastern Auto Auction, Inc. The car had been brought to defendant Eastern by defendant Martin Starling to be sold at auction.

Plaintiff operates a used car business and was attending an auction at Eastern Auto Auction. At the time of the accident, plaintiff was standing behind a car being auctioned, preparing to make a bid on it. Defendant Brogden was driving the car brought in by defendant Starling. She was bringing the car up to the auctioneer's table to be the next car auctioned. She testified that when she got in the car and started it, the brakes held the car in place when she put the car in gear. This was the only time she checked the brakes on the car. She drove the car from the parking lot toward the building containing the auctioneer's table at around seven to eight miles per hour. At a point approximately forty-seven feet from the building, she stepped on the brake in order to slow the car. The brakes did not work, nor did the emergency brake. The car struck plaintiff and crushed his legs between it and the car being auctioned.

Plaintiffs instituted this action seeking damages for the personal injury to Harold Massengill and the accompanying loss of consortium suffered by his wife. (The wife's claim is not involved in this appeal; therefore, "plaintiff" refers only to Harold Massengill.) At trial, defendants' motion for a directed verdict was denied and the case was submitted to the jury. The jury found that plaintiff had been injured by the negligence of defendants and that plaintiff had not contributed to his injuries through his own negligence. Judgment was entered on the verdict against defendants Eastern Auto Auction and Martin Starling in the amount of $150,000. Defendant Eastern Auto Auction, Inc. appeals.

H. Jack Edwards and George K. Freeman, Jr., for plaintiff-appellee Harold Massengill.

Dees, Smith, Powell, Jarrett, Dees and Jones, by William W. Smith, for defendant-appellant Eastern Auto Auction, Inc.

PARKER, Judge.

[1] By its first assignment of error, defendant Eastern Auto Auction, Inc. contends that the trial court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict. Defendant argues that the evidence presented at trial failed to show that it was negligent in any way which contributed to plaintiff's injuries. We disagree.

The test to be applied in ruling on a defendant's motions for a directed verdict or for judgment notwithstanding the verdict is the same. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). That test is whether the evidence, viewed in the light most favorable to the nonmovant, establishes that the plaintiff cannot recover upon any view of the facts. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678, 90 A.L.R. 3d 525 (1977). In this case, the evidence viewed in the light most favorable to plaintiff showed that defendant Starling towed the subject car onto defendant Eastern's lot to have it sold at an auction conducted by defendant Eastern. Starling knew the car had "weak brakes" but did not inform anyone at Eastern of this fact. Starling said only that the car was to be sold "as is." Eastern often got cars from used car dealers which had serious mechanical defects. Defendant Brogden, in her capacity as an employee of defendant Eastern, got into the car and started it for the purpose of driving to the garage where the auction was being conducted. She did not test the brakes to see if they would stop the car. No one working for Eastern had checked the car for mechanical problems. As defendant Brogden approached the garage, she applied the brakes but the car did not stop and it ran into plaintiff who was standing behind the car then being auctioned. This evidence was sufficient to raise a jury question as to whether defendant Brogden, as an employee of defendant Eastern, was negligent in not testing the brakes of the car and as to whether defendant Eastern was negligent in failing to inspect the car in light of the fact that many of the cars brought to defendant Eastern to be auctioned have mechanical defects. The assignment of error is overruled.

[2] By its next assignment of error, defendant Eastern contends that the trial court erred in refusing to give an instruction to the jury on the doctrine of sudden emergency. Defendant's request for such an instruction was denied by the court. The doctrine of

sudden emergency applies when a defendant is confronted by an emergency situation not of his own making and requires defendant to act only as a reasonable person would react to similar emergency circumstances. *Rodgers v. Carter*, 266 N.C. 564, 146 S.E. 2d 806 (1966). The defendant is not to be held liable for failure to act as calm, detached reflection at a later date would dictate. *Id.*

An examination of the pleadings and evidence, however, leads us to conclude that the doctrine of sudden emergency was not applicable to this case. Plaintiff's theory of the case was not that defendant Brogden was negligent in her reactions once she was confronted with an emergency situation, when she realized that the car she was driving had no brakes. Rather, plaintiff alleged and his evidence showed that the negligence of defendants, if any, came in failing to inspect the car or to test its brakes before driving it. The trial court was correct in refusing to instruct the jury on the doctrine of sudden emergency and the assignment of error is overruled.

[3] By its third assignment of error, defendant Eastern argues that the trial court committed prejudicial error in instructing the jury on the doctrine of *res ipsa loquitur*. The principle underlying *res ipsa loquitur* is that when an instrumentality which caused an injury to plaintiff is shown to be under the exclusive control and operation of defendant, and the accident is one which, in the ordinary course of events, does not happen absent negligence, plaintiff should be able to rely on the occurrence itself as some evidence that it arose from want of care on the part of defendant. *See, e.g., Kekelis v. Machine Works*, 273 N.C. 439, 160 S.E. 2d 320 (1968). In order for the doctrine to apply, a plaintiff must present evidence that the instrumentality which caused the injury was in the exclusive control of defendant and that the accident was of a kind which does not ordinarily occur unless someone was negligent. *Greene v. Nichols*, 274 N.C. 18, 161 S.E. 2d 521 (1968). *See generally* 58 Am. Jur. 2d *Negligence* § 480 (1971).

However, *res ipsa loquitur* does not apply in every case where the above-stated requirements are met. In *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251 (1929), our Supreme Court set out several situations in which the doctrine would not apply regardless of the existence of the initial requirements for application of *res*

ipsa loquitur. One of those situations is "when all the facts causing the accident are known and testified to by the witnesses at the trial . . . ." *Id.* at 242, 148 S.E. at 252. *See also Lewis v. Piggott*, 16 N.C. App. 395, 192 S.E. 2d 128 (1972). The rationale underlying this rule is that the doctrine of *res ipsa loquitur* is intended to provide a plaintiff with a way of proving a *prima facie* case of negligence when the exact facts and circumstances are not known or are in the exclusive control of the defendant. *See McPherson v. Hospital*, 43 N.C. App. 164, 167, 258 S.E. 2d 410, 412 (1979). Thus, when all of the facts are known and testified to, there is no need for a plaintiff to resort to the doctrine as nothing is left to inference. *See generally* 58 Am. Jur. 2d *Negligence* § 489 (1971).

In this case, all of the relevant facts and circumstances leading to plaintiff's injuries were testified to before the jury. Defendant Starling testified that he towed the car onto the lot of defendant Eastern and left it there to be auctioned. He knew that it had "weak brakes" but did not inform anyone of this fact. The evidence established that no employee of defendant Eastern inspected the car. Defendant Brogden testified that she used the brakes to hold the car in place when putting it in gear, but did not test the brakes to see if they could stop a moving vehicle. The car was idling high so that she did not have to press the accelerator to move the car. She testified that she drove the car at a slow speed of seven to eight miles per hour and that when she attempted to apply the brakes to stop the car at the auction building, the pedal went all the way to the floor and the car did not stop. She did not pump the brakes, but she did attempt to engage the emergency brake and to shift into park. She tried the horn to warn plaintiff and others in the garage, but it didn't work either. She did not attempt to swerve to avoid plaintiff because there were people all around. Finally, she screamed "look out," but it was too late and the car struck plaintiff.

All of these facts were known by plaintiff and testified to at trial. There is no room for inference. We conclude that it was error for the trial court to instruct the jury on the evidence of *res ipsa loquitur*. Not all erroneous instructions warrant a new trial, however, and we must examine the instructions as a whole in order to determine whether defendant was prejudiced by the inclu-

sion of the instruction on *res ipsa loquitur. See Nash v. Mayfield,* 59 N.C. App. 521, 297 S.E. 2d 185 (1982).

The material facts in this case are uncontroverted. As to defendant Eastern, the central question for the jury presented by these facts was whether the failure of defendant's agent to test the brakes of the car before driving it into the auction garage amounted to a lack of due care under the circumstances. In the instructions on negligence, the trial court stated:

> Negligence is the lack of ordinary care. It is a failure to do what a reasonably careful and prudent person would have done or the doing of something which a reasonably careful and prudent person would not have done considering all the circumstances existing on the occasion in question. Negligence is not to be presumed from the mere fact of injury.

At the conclusion of the instructions, the jury was excused and the attorneys were given an opportunity to object to the instructions. Plaintiff's attorney objected to the omission of instructions on direct and circumstantial evidence and on *res ipsa loquitur.* The jury was called back in and the trial court gave the instructions. In the instructions on *res ipsa loquitur,* the trial court stated:

> Now, in this case the plaintiff Harold E. Massengill relies upon circumstantial evidence under the doctrine known as *res ipsa loquitur* to establish the negligence of the defendant Eastern Auto Auction, Inc. Under this doctrine, the law provides that in some instances the circumstances on which the injury occurred may provide evidence from which negligence may be inferred because the mere fact of the injury speaks for itself. In order for this doctrine to apply, however, it must first be established that the instrumentality, as in this case the automobile, which causes injury is in the exclusive control of a person and then it must be shown that the circumstances surrounding the occurrence of the injury are of such a nature that in the ordinary course of event, [sic] such injury would not have occurred if the person having control of the instrumentality had used reasonable care under the circumstances then existing. Upon such showing, the law permits, but does not require you to infer that the person having control of the instrumentality was negligent. In order to pre-

vail on this theory, the plaintiff Harold E. Massengill has the burden of proving by the greater weight of the evidence the following things:

One, that the plaintiff Massengill received injury and that the instrumentality which caused the injury was in the exclusive control of Eastern Auto Auction, Inc. By and through its agent Mrs. Woolsey.

Second, that the injury sustained is of the type which does not ordinarily occur in the absence of some negligent act or omission.

And third, the instrumentality involved proximately caused Harold E. Massengill's injury.

So finally I instruct you that if Harold E. Massengill has proved by the greater weight of the evidence that he sustained leg injuries which were caused by the automobile in question in this case and that said automobile was in the exclusive control of Eastern Auto Auction, Inc. By and through its agent Mrs. Woolsey and that Eastern Auto Auction, Inc. was negligent in the control of the instrumentality in that the circumstances of the automobile striking the plaintiff Massengill were such that in the ordinary course of events the injury would not have occurred if reasonable care had been exercised by Eastern Auto Auction, Inc. By and through its agent Mrs. Woolsey and if the plaintiff Massengill has further proved by the greater weight of the evidence that such negligence was a proximate cause of Massengill's injury, it would then by [sic] your duty to answer this issue, yes, in favor of Harold E. Massengill.

On the other hand, if after considering all the evidence you fail to so find or you are unable to say what the truth is, it would be your duty to answer this issue, no, in favor of Eastern Auto Auction, Inc., the defendant.

In our view, this instruction, given extra emphasis by virtue of being read to the jury after all the other instructions had been given, operated to the prejudice of defendant Eastern Auto Auction. In allowing the jury to infer a lack of due care on the part of defendant Eastern by the mere fact of injury, the erroneous instruction tipped the balance heavily in favor of plaintiff on the

central question left unresolved by the evidence: whether the conduct of defendant's agent amounted to a lack of due care.

We conclude that, as to defendant Eastern Auto Auction, Inc., there must be a

New trial.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. CLIFFORD DEAN KERLEY

No. 8722SC196

(Filed 6 October 1987)

1. **Criminal Law § 73.4— arson—statement of occupant of building—hearsay—excited utterance**

The trial court did not err in an arson prosecution by admitting a statement made at the scene to a highway patrolman where the statement fell within the excited utterance exception to the hearsay rule in that it related to a startling event or conclusion, and, even though defendant alleged that the statement was made fifteen minutes after the fire started, the trooper's uncontradicted testimony showed that the declarant continued to be upset and excited for a considerable time after telling him how the fire started. N.C.G.S. § 8C-1, Rule 803(2).

2. **Constitutional Law § 65— admission of out-of-court statement—no showing of good faith effort to produce witness**

The trial court violated defendant's Sixth Amendment right to confrontation in an arson prosecution by admitting an out-of-court statement where the witness was not present at trial and the State produced only a statement by a detective that he had been told that the witness was in Broughton Hospital with a head injury. The testimony did not show what steps were taken to produce the witness at trial, and did not show that he was unable to testify.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 15 October 1986 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 2 September 1987.

Defendant was charged in a proper bill of indictment with first-degree arson. He was convicted of that offense, and sentenced to thirty years imprisonment, from which he appeals.

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

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

ORR, Judge.

On 2 January 1986 while on patrol, Trooper Tom Brooks of the North Carolina State Highway Patrol, was dispatched at 5:47 p.m. to the scene of a fire on East Main Avenue in Taylorsville. He arrived on the scene minutes later to find the house fire extinguished and a smouldering mattress laying in the front yard.

Brooks was familiar with the house and described it in his testimony as a residence frequently occupied by street people. After a brief conversation with the fire chief in the front yard, Brooks proceeded toward the front steps of the house.

At that moment Howard Warren ran up to Brooks. According to the trooper:

> Howard [who Brooks knew frequently occupied the house] was extremely excited. . . . He told me that Clifford Kerley [defendant] had tried to burn him while he was inside asleep. . . . He said that he had been inside the residence; that he had gone to sleep; and that Clifford Kerley had poured some fuel oil . . . and set it on fire and had left.

Although the State did not produce the declarant Howard Warren at trial, it sought to admit Brooks' testimony about what Warren had told him, in order to establish the origin of the fire.

[1] Defendant claims the trial court erred by admitting Warren's out-of-court statement to Trooper Brooks without presenting Warren at trial for cross-examination. The statement, according to defendant, constituted prejudicial hearsay and should have been excluded under N.C.G.S. § 8C-1, Rule 802. Moreover, defendant claims the trial court denied his right to confront the witness against him guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

We now address defendant's argument that Howard Warren's out-of-court statement should have been excluded as inadmissible hearsay.

The statement complained of by defendant clearly qualifies as hearsay. It was made by someone other than the declarant while testifying at trial and offered in evidence to prove defendant intentionally started the fire. Thus, it is inadmissible unless encompassed by an exception to the hearsay rule. N.C.G.S. § 8C-1, Rules 801(c), 803, 804 (1986).

When the trial court admitted Warren's out-of-court statement it did not specify which exception applied. The State now contends both the present sense impression and the excited utterance exceptions apply. We hold that Warren's statement falls within the excited utterance exception. This exception provides:

> Excited Utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

N.C.G.S. § 8C-1, Rule 803(2) (1986).

Warren's statement satisfies the first requirement for admission as an excited utterance; it was a statement relating to a startling event or condition, in this case, escaping from a burning building. We conclude the second requirement was also met; it was made under the stress of excitement caused by the event.

Defendant argues that the second requirement was not satisfied. He states that more than fifteen minutes transpired between the time the fire started and Warren's statement to Trooper Brooks. (The State maintains only eight minutes passed.) This fifteen minute delay, according to defendant, precluded the possibility that the statement was made spontaneously under the stress of excitement caused by the event. Defendant contends Warren calmed down during this delay, thus making the statement a narrative that was not so spontaneous as to preclude the likelihood of reflection and fabrication.

We acknowledge the critical importance of the time factor in determining whether a statement was made under the stress of excitement caused by an event or condition. The Official Commentary to N.C.G.S. § 8C-1, Rule 803(2) states:

> With respect to the time element . . . the standard measurement is the duration of the state of excitement. 'How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.'

In this case we cannot conclude that Warren no longer acted under the stress of excitement caused by the fire, when he made the statement to Brooks.

Warren was apparently asleep in the house when defendant allegedly poured fuel oil or kerosene throughout the residence, including the mattress where Warren slept, and ignited the oil. Moreover, Trooper Brooks' uncontradicted testimony showed Warren continued to be very upset and excited for a considerable time after telling Brooks how the fire started.

> The entire time until I got him in my patrol car, he was very excited. I had to tell him to calm down and take a minute; that I wanted to get a statement from him, 'and write it exactly down the way you give it to me.' At that time I told him to just sit there. I got out of my patrol car and came back; and, at that point, he was calm enough for me to get a written statement from him.

Under these circumstances, Warren's out-of-court statement to Brooks falls squarely within the excited utterance exception to the hearsay rule regardless of whether it was made fifteen or eight minutes after the fire started.

[2] In his final argument defendant contends the trial court denied his Sixth Amendment right of confrontation by admitting Warren's out-of-court statement without presenting Warren as a witness at trial. We agree.

The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The United States Supreme Court has, however, recognized an exception to this rule. Hearsay is admissible against a criminal defendant provided the declarant is unavailable to testify and the statement is attended by adequate indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L.Ed. 2d 597, 608 (1980).

"[A] witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a *good faith effort* to obtain his presence at trial. *Barber v. Page*, 390 U.S. at 724-25, 20 L.Ed. 2d at 260 (emphasis added)." *State v. Grier*, 314 N.C. 59, 65, 331 S.E. 2d 669, 673 (1985). Whether the prosecutor has made a good-faith effort to produce the witness is a question of reasonableness. *California v. Green*, 399 U.S. 149, 189, n. 22, 26 L.Ed. 2d 489, 514, n. 22 (1970) (Harlan, J., concurring); *State v. Grier*, 314 N.C. at 65, 331 S.E. 2d at 674.

After thoroughly examining the transcript and record, we find no evidence of a good-faith effort to produce Howard Warren at trial. The only reference to Warren's whereabouts during the trial was made by State's witness Detective Ray Warren during direct examination.

Q. Do you know, of your own knowledge, where Howard Warren is today?

A. In the Broughton State Hospital.

Q. Do you know why he is there?

MR. PARKER [defense counsel]: Objection.

COURT: Overruled.

A. He suffered an injury to his head and was taken first to Baptist Hospital and then was transferred to Broughton Hospital.

Q. And do you know, of your own knowledge, what his condition is?

MR. PARKER: Objection.

COURT: Overruled.

A. Only what I have been told by the medical staff there.

COURT: Objection sustained.

This testimony does not show what steps were taken, if any, to produce Howard Warren at trial. Nor does it show that he was unable to testify. It shows only that Howard Warren was in Broughton Hospital with a head injury. We do not know how

critical an injury he suffered, how long he was hospitalized, and whether he was physically or mentally capable of testifying.

The State maintains that evidence of Howard Warren's physical and mental condition was kept out of evidence as a result of defendant's objections to certain questions intended to provide an explanation. This is not a sufficient basis. The testimony Detective Warren was prepared to offer concerning what he had been told by doctors treating Warren was properly excluded.

In order to use Brooks' testimony about Warren's statements, the State has the burden of showing it took reasonable measures in a good-faith effort to produce Warren at trial. *State v. Grier*, 314 N.C. at 65, 331 S.E. 2d at 673-674. It must do so with competent evidence. Testimony from Warren's treating physician or other health care provider with adequate personal knowledge of Warren's condition could have satisfied the State's burden, if in fact Warren was unable to testify.

The admission of this testimony into evidence was clearly prejudicial to defendant's case. Although there was some additional evidence from which a jury could have convicted defendant, the incriminating testimony of an eyewitness as retold by a highway patrolman could have substantially affected the outcome of this trial. Defendant is entitled to the right to cross-examine the witness against him unless the State clearly shows an unsuccessful good-faith effort to produce the witness.

Because no evidence was presented to show that the State made such a good-faith effort to produce Howard Warren at trial, we are compelled to hold that portion of Trooper Brooks' testimony as inadmissible. The judgment of the trial court is hereby vacated and the cause is remanded for a new trial.

Remanded for a new trial.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. ROGER DALE PHILLIPS AND DANIEL HOOPER JOHNSON

No. 8730SC263

(Filed 6 October 1987)

1. **Assault and Battery § 14.3; Robbery § 4.3— deadly weapon—sufficiency of evidence**

The evidence was sufficient for the jury to infer that the victim was struck with a deadly weapon so as to support defendants' conviction of assault with a deadly weapon with intent to kill and armed robbery where the victim testified that one defendant hit the victim on the head and shoulders with some object; the victim's neighbor testified that the victim was bleeding profusely and had a "board print" on the side of his face; and the victim was taken to a hospital where he was diagnosed as having a broken cheekbone and was treated for bruises and lacerations.

2. **Criminal Law § 101.4— incidents involving jury—absence of prejudice**

Defendants were not entitled to a new trial because the victim's wife was in the jury room before the opening of court one day, the sheriff took coffee cups to the jury in the jury room, the sheriff talked to one juror in the hall outside the courtroom, and three jurors were outside the jury room during some of the deliberations where the trial judge investigated these incidents and determined that defendants were not prejudiced by them.

3. **Criminal Law § 66.4— lineup procedure not suggestive**

The evidence supported the trial court's determination that an assault and robbery victim's lineup identification of one defendant was not inherently incredible and that the lineup procedure was not impermissibly suggestive.

4. **Criminal Law § 113.7— charge on acting in concert**

The trial court in an assault and armed robbery case did not err in instructing the jury on acting in concert where there was evidence tending to show that the two defendants were together talking with a third person before the crimes and were together in the same car after the crimes when one of them gave the third person $1,000 of the money taken in the robbery.

5. **Criminal Law § 102.6— jury argument unsupported by evidence—absence of prejudice**

The trial court did not err in finding that defendants were not prejudiced by unsupported statements in the prosecutor's jury argument that he and the jury had heard defense witnesses in the audience and that a photograph contradicted the testimony of a defense witness.

APPEAL by defendants from *Allen, Judge.* Judgments entered 24 October 1986 in Superior Court, CLAY County. Heard in the Court of Appeals 23 September 1987.

This is a criminal action in which defendants were charged in proper bills of indictment with assaulting Robert Hogsed with a deadly weapon with intent to kill in violation of G.S. 14-32(a) and with robbing Robert Hogsed with a dangerous weapon in violation of G.S. 14-87.

The State's evidence tends to show: On 11 August 1985, the victim, who was remodeling his house, went with one Frankie Carpenter to see defendants and to hire them to put siding on his house. Defendants went with the victim and Carpenter to the victim's house and received a down payment of $600 for the work they were to do. Defendants saw that the victim had a large amount of cash.

The victim, who had been drinking, then drove Carpenter back to Carpenter's house. While the victim and Carpenter were standing outside, a maroon Chevrolet arrived. Defendants were inside the car, which belonged to defendant Phillips' wife. Carpenter spoke to defendants for 10 or 15 minutes, and Johnson asked Carpenter when the victim was going home.

After the victim and Carpenter returned to the victim's house, Carpenter got into his truck and left. The victim then entered his unlocked house. After he turned on the light, he saw defendant Phillips come from the bedroom. Defendant Phillips hit the victim on the head and shoulders with some object. The victim fell unconscious. After regaining consciousness, he drove to his neighbors' house. The victim was bleeding profusely and had a "board print" on his face. He was taken to the hospital where he stayed for two days. He had a broken cheekbone, several large bruises and lacerations on his face and head.

Ten or 15 minutes after the attack, defendants arrived at Carpenter's house in the maroon Chevrolet. One defendant handed Carpenter $1,000 and defendants left in the automobile.

Sheriff Tony Woody and SBI Agent Jim Shook began an investigation. When they arrived at the victim's house on 12 August 1985, they found Carpenter and some other men, including defendant Johnson, working on the house. They found dried blood on the floor, but they could find no object which appeared to be the weapon used.

On 13 August 1985 the victim viewed a lineup at the sheriff's office composed of bearded white men in their twenties or thirties, all about six feet tall and in work clothes. The victim, who was not wearing his glasses and had a swollen eye, picked out defendant Johnson and said he was not the man who hit him because he was working on his house. He then picked defendant Phillips as the man who hit him.

Defendants denied involvement in the attack and offered evidence that tends to show they were at their homes at the time of the offense. They also presented evidence that Carpenter had admitted he hit the victim. Carpenter, who testified for the State, had already pled guilty to being an accessory after the fact in common law robbery of the victim.

Defendants were convicted as charged. Defendants' motion to set aside the verdict was denied. Each was sentenced to 14 years imprisonment. Defendants appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Herbert L. Hyde and G. Edison Hill for defendants, appellants.

HEDRICK, Chief Judge.

[1] Defendants first contend the trial court erred in "failing to direct verdicts of 'not guilty' and in refusing to set aside the verdicts on the grounds the evidence was insufficient to sustain verdicts of guilty." This assignment of error purports to be based on exceptions to the denial of defendants' motions for a "mistrial" and to "set aside the verdicts." These exceptions do not support the assignment of error. Indeed, defendants do not argue that the court erred in not directing a verdict of not guilty or that the court erred in not setting aside the verdicts or ordering a mistrial. Defendants simply argue that the evidence, when considered in the light most favorable to the State, is not sufficient to show victim was assaulted with a "deadly weapon." Defendants' contentions in this regard are without merit.

A deadly weapon is any article, instrument or substance which is likely to produce death or great bodily harm. *State v. Wiggins*, 78 N.C. App. 405, 337 S.E. 2d 198 (1985). Whether a

weapon is deadly can be inferred from the wound of the victim. *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965).

The victim testified that defendant Phillips "come out of my bedroom door right here with something in his hand." He further testified that "he hit me." The victim's neighbor, Tim Reynolds, testified that the victim had what "looked like a board print on the side of his face," and that "he was bloody and his eyes was bleeding. . . ." The victim went to the hospital where he was diagnosed as having a broken cheekbone and where he was treated for bruises and lacerations. This evidence is clearly sufficient to raise an inference that defendant Phillips struck the victim with a weapon which could produce great bodily harm.

[2] Defendants next contend the court erred by failing to set aside the verdicts and grant a new trial because of the actions of witnesses, interested parties and jurors. Irregularities contended by defendants include: 1) the victim's wife was in the jury room before the opening of court on one day, 2) the Sheriff took coffee cups to the jury in the jury room, 3) the Sheriff talked to one of the jurors in the hall outside the courtroom, and 4) three jurors were outside the jury room during some of the deliberations.

Upon investigating these instances, the trial judge found that the conduct may have been improper, but concluded "there was nothing of any prejudicial nature which occurred during the course of the trial with regard to these proceedings." The trial judge is given large discretionary power as to control of the trial. *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985). This includes investigation of improprieties concerning the jury. *State v. Selph*, 33 N.C. App. 157, 234 S.E. 2d 453 (1977). Unless the rulings of the court are clearly erroneous or amount to manifest abuse of discretion, they will not be disturbed. *State v. Johnson*, 295 N.C. 227, 244 S.E. 2d 391 (1978). This assignment of error has no merit.

[3] Defendants' next assignment of error is set out in the record as follows: "The court erred in allowing in evidence the testimony of Robert Hogsed's picking out defendant Roger Dale Phillips, from a lineup, as the person who hit him in his home on the night of 11 August 1985, on the grounds that such testimony was inherently incredible and violated the due process rights of defendants." This assignment purports to be an exception to the trial judge's ruling after voir dire: "Based upon these foregoing finding

of facts the Court concludes that the identification of the accused by the witness is not inherently incredible, and that the pre-trial identification procedure involving the defendant was not so impermissively suggestive as to violate the defendant's right to due process of law and Orders that the objection is overruled." Defendants cite no authority in support of their argument. Defendants do not make it clear in their brief whether they are objecting to "in court" or "out of court" identification by victim of defendant Phillips. In any event, we have reviewed the findings of fact upon which the trial judge entered his order overruling the objection and find that the order is supported by the evidence and facts found. This assignment borders on the frivolous.

Defendants next argue based on Assignment of Error No. 6 that the court erred in instructing the jury it could find defendant Johnson guilty of assault with a deadly weapon. This assignment of error is not supported by an exception duly noted in the record. These contentions are based on Argument I. Argument I has no relation to this assignment of error.

[4] Defendants next assign error to the trial court's instruction that the jury could find defendants guilty if they acted in concert. Defendants cite no authority, but argue that there was no evidence that defendants acted together. The record indicates that evidence tends to show Phillips and Johnson were together talking to Frankie Carpenter before the crime and together in the same car after the crime when one of them gave Carpenter $1,000. To support an instruction of acting in concert, it is only necessary for the State to present sufficient evidence that the defendant was present at the scene of the crime and that he acted together with another who did the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. *State v. Robinson*, 83 N.C. App. 146, 349 S.E. 2d 317 (1986). We hold that the evidence is sufficient to find defendants acted in concert, and the court properly instructed the jury.

[5] Finally, defendants contend the court erred in overruling objections to the prosecutor's closing argument. In his closing argument, the prosecutor stated the jury had heard defense witnesses in the audience and then he said, "I have." The prosecutor also referred to a photograph which he said showed the porch of the victim was painted when a defense witness testified she was

there, contradicting her testimony. Defendants claim both statements were prejudicial, and there was no evidence to support the prosecutor's statement about the picture. Defendants cite no cases in support of their argument.

Argument of counsel is left largely to the control and discretion of the presiding judge. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). In this case, the trial judge found no prejudice due to the statements, and defendants have failed to show any prejudice due to the court's finding. This assignment of error has no merit.

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

No error.

Judges ARNOLD and ORR concur.

JOHN CHARLES LAY, III v. DEBORAH A. MANGUM

No. 8714SC4

(Filed 6 October 1987)

1. **Malicious Prosecution § 11.1; Evidence § 15— malicious prosecution and intentional infliction of emotional distress—attempt to bribe witness—admissible**

In an action for malicious prosecution and intentional infliction of emotional distress arising from a nonsupport warrant sworn out by defendant against plaintiff, the trial court did not err by allowing a biomedical laboratory employee to testify concerning plaintiff's alleged attempts to bribe the witness to tamper with the blood grouping test results. The testimony was not being introduced to prove plaintiff's character, and it was not extrinsic evidence in the form of testimony collaterally related to plaintiff's credibility, but was highly relevant noncollateral evidence of plaintiff's knowledge surrounding the particular facts and circumstances of the case. Moreover, a defendant in an action for malicious prosecution may gather and utilize all of the evidence which tends to show plaintiff's guilt of the crime for which he was prosecuted when defendant challenges plaintiff's allegation that the prosecution was instituted without probable cause. N.C.G.S. § 8C-1, Rules 404(b) and 608(b).

2. **Rules of Civil Procedure § 16— pretrial order—documents not listed as exhibits—not admitted**

In a prosecution for abuse of process and malicious prosecution arising from a criminal nonsupport warrant sworn out against plaintiff by defendant,

the trial court did not abuse its discretion by not admitting plaintiff's indictment for soliciting perjury and an order quashing the indictment where plaintiff did not list the documents as known exhibits in the pretrial order. N.C.G.S. § 1A-1, Rule 16.

3. **Trespass § 2— intentional infliction of emotional distress—directed verdict for defendant proper**

The trial court did not err by granting defendant's motion for a directed verdict on plaintiff's claim for intentional infliction of emotional distress arising from a nonsupport warrant sworn out by defendant where plaintiff failed to present evidence of the requisite element of "extreme and outrageous conduct."

4. **Malicious Prosecution § 14— requested instruction denied—no error**

The trial court did not err in an action for malicious prosecution by denying plaintiff's request for an instruction regarding the presumption of the legitimacy of a child born in wedlock.

APPEAL by plaintiff from *Battle, Judge*. Judgment entered 21 August 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 25 August 1987.

This is a civil action instituted 5 August 1985 to recover damages for malicious prosecution and intentional infliction of emotional distress.

On 10 August 1984, defendant appeared before a Durham County magistrate and swore out a warrant against plaintiff charging him with nonsupport of an illegitimate child born unto defendant 22 May 1984. On 17 August 1984, plaintiff was arrested on this warrant. On 7 May 1985, blood samples were taken from plaintiff, defendant and the minor child at the Duke University Medical Center for the purpose of obtaining a scientific determination of the probability that plaintiff is the father of the minor child. On 29 May 1985, Dr. Wendell F. Rosse and Dr. Emily G. Reisner, by affidavit, certified their opinions, formed on the basis of the blood testing done at Duke University Medical Center, that plaintiff is not the father of the minor child. Thereafter, on 31 May 1985, the criminal charges against plaintiff were terminated in plaintiff's favor by the State taking a voluntary dismissal in the case. Thereupon, plaintiff instituted this action to recover damages for the alleged malicious prosecution and alleged intentional infliction of emotional distress.

At the close of all the evidence, the trial court granted defendant's motion for a directed verdict on plaintiff's claim for the

intentional infliction of emotional distress. The jury returned a verdict in favor of defendant on plaintiff's claim for malicious prosecution. Plaintiff appeals.

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

Everette, Hancock, Nichols & Calhoun, by M. Jean Calhoun, for defendant appellee.

JOHNSON, Judge.

[1] Plaintiff first contends that the trial court erred by allowing defendant's witness Sprenger, a biomedical laboratory employee, to offer testimony concerning plaintiff's alleged attempts to bribe the witness to tamper with the blood grouping laboratory test results which were used to prove plaintiff's non-paternity. We disagree. Plaintiff's argument is based upon an erroneous interpretation of two rules of evidence, to wit: G.S. 8C-1, Rule 608(b) and G.S. 8C-1, Rule 404(b). G.S. 8C-1, Rule 608(b) provides in pertinent part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. . . ."

We find that this testimony in question was not introduced for the purpose of attacking the witness' credibility as provided in Rule 608 but instead was offered for the purpose of showing the course of conduct taken by the plaintiff to affect the results of the blood test which would determine the outcome of the claim for child support levied against the plaintiff. The witness Sprenger's testimony was highly relevant to rebut the plaintiff's claim that the defendant instituted a child support action without probable cause. If plaintiff would attempt such extreme measures to alter the blood grouping tests, he most probably had some reason to be convinced of the validity of the underlying claim and the existence of probable cause for instituting the action. Therefore, this testimony was not extrinsic evidence in the form of testimony collaterally related to the plaintiff's credibility, but was rather highly relevant noncollateral evidence of the plaintiff's knowledge surrounding the particular facts and circumstances of this case.

In addition, *Mooney v. Mull*, 216 N.C. 410, 5 S.E. 2d 122 (1939), provides that a defendant in an action for malicious prose-

cution may gather and utilize all the evidence which tends to show plaintiff's guilt of the crime for which he was prosecuted, when, as here, the defendant challenges plaintiff's allegation that the prosecution was instituted without probable cause. The court states:

> To hold otherwise would make it possible for a guilty person, who through some fortuitous circumstances has been acquitted, to vex his prosecutor with a suit for malicious prosecution merely because the prosecutor was not advertent to all the incriminating facts at the time he instituted the prosecution, and to recover damages for a prosecution that was justified upon all the facts.

Mooney, 216 N.C. at 412, 5 S.E. 2d at 123.

In turn, G.S. 8C-1, Rule 404(b) was similarly misinterpreted by plaintiff. It provides in pertinent 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." The clear language of the statute verifies its inapplicability to the case at bar and the authority of *Mooney, supra*, clearly supports the admissibility of the testimony.

The evidence in question of the plaintiff's attempt to bribe the witness and subornate perjury was not being introduced to prove the plaintiff's character in order to show conformity as provided in Rule 404(b). In fact, the testimony in dispute cannot accurately be classified as character evidence at all. "Character comprises the actual qualities and characteristics of an individual, '[t]he peculiar qualities impressed by nature or by habit on the person, which distinguish him from others; these constitute *real* character. . . .' " 1 Brandis on North Carolina Evidence, sec. 102, at 383 (1982), *quoting Bottoms v. Kent*, 48 N.C. 154, 160 (1855). The testimony of defendant's witness Sprenger is simply not evidence of a "distinct, independent, and separate offense" whose introduction is prohibited by the "McClain Rule," as this testimony on the alleged offense arose out of the particular facts of this case. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

[2] Plaintiff next contends that the trial court erred by sustaining defendant's objection to the introduction of two pieces of documentary evidence concerning plaintiff's indictment for soliciting perjury. *State v. John Charles Lay*, Durham County Superior Court File No. 85CRS6730, and an order quashing said indictment, dated 11 September 1985. The indictment arose in connection with plaintiff's alleged attempts to bribe defendant's witness Sprenger to tamper with the blood tests taken upon plaintiff John Charles Lay in order to distort the results. We find no abuse of discretion by the trial court in not admitting the documents into evidence.

Plaintiff attempted to offer into evidence a copy of the indictment and an order quashing said indictment at the close of defendant's case. This was done without advance notice to the defendant as the plaintiff did not list the documents as two of their known exhibits in the pretrial order. As a result, the defendant was unable to conduct discovery to ascertain the reason why the indictment was quashed, to rebut the probable inference that the quashing proved the plaintiff's innocence. A pretrial order "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. . . ." G.S. 1A-1, Rule 16.

Plaintiff alleges that he is entitled to rebut the evidence offered by witness Sprenger pursuant to the guidance of *Highfill v. Parrish*, 247 N.C. 389, 100 S.E. 2d 840 (1957). On that claim, we are in accord. However, we do not agree that the plaintiff may rebut the evidence with exhibits which were not listed on the pretrial order to the prejudice of the defendant as the trial court has determined in the exercise of its discretion.

[3] Plaintiff's third Assignment of Error addresses whether the plaintiff presented sufficient evidence at trial to withstand defendant's motion for a directed verdict on plaintiff's claim for intentional infliction of emotional distress. "The question presented by a defendant's motion for a directed verdict is whether all the evidence, which supports the plaintiff's claim, when taken as true, considered in the light most favorable to the plaintiff and given the benefit of every reasonable inference in the plaintiff's favor which may legitimately be drawn therefrom, is sufficient for submission to the jury." *Tripp v. Pate*, 49 N.C. App. 329, 332-33, 271 S.E. 2d 407, 409 (1980). We find that the court, having applied this

standard, committed no error when it granted the defendant's motion, concluding, as a matter of law, that plaintiff had failed to present evidence of the requisite element of "extreme and outrageous conduct" to require submission of the evidence to the jury.

[4] Finally, we find no merit in plaintiff's argument that the trial court committed prejudicial error when it denied plaintiff's request for an instruction regarding the presumption of the legitimacy of a child born in wedlock. We have considered the court's instructions to the jury and find that the instructions given were sufficient.

In an action for paternity, a jury instruction on the presumption of legitimacy is highly relevant. However, the action before us is not one to determine paternity, but rather to determine, in this claim for malicious prosecution, whether the defendant Deborah A. Mangum had probable cause for instituting the criminal child support action against the defendant. We find that such an instruction requested by the plaintiff would have been surplusage which could only serve to confuse the jury on the pertinent issues.

Affirmed.

Judges ARNOLD and PARKER concur.

CRAVEN COUNTY AND THE CITY OF NEW BERN v. CLAUD C. HALL AND WIFE, GUYOLA ARTHUR HALL

No. 873SC128

(Filed 6 October 1987)

1. Eminent Domain § 6.4— tax valuations of condemned property—admission against county

Evidence of real property valuations made by a county for ad valorem tax purposes was admissible against the county in an eminent domain proceeding as an admission of a party opponent even though the valuations had not yet become effective on the date the condemnation complaint was filed.

2. Eminent Domain § 6.6— value—opinion testimony by landowners' son

The trial court in a condemnation proceeding erred in refusing to permit defendant landowners' son to testify as to his opinion of the fair market value of defendants' entire property before the condemnation and of the remainder after the condemnation where the witness exhibited a great deal of familiarity with the property in question and testified that he was familiar with neighboring properties and the values of those properties and other tracts of similar size in the general area of the county.

APPEAL by defendants from *Small, Judge.* Judgment entered 4 September 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 22 September 1987.

On 6 September 1985, plaintiffs filed a complaint, pursuant to the provisions of Chapter 40A of the North Carolina General Statutes, to acquire by condemnation a portion of defendants' 175.68 acre tract of land located in Craven County. The property to be taken, consisting of a 30.76 acre tract located along Brices Creek, a 1.22 acre island in Brices Creek, and the right of way of a proposed road known as the "Quick Trip" Road, was sought by plaintiffs for a clear zone approach to Runway No. 4 at the Simmons-Nott Airport in New Bern. Defendants filed an answer which did not challenge plaintiffs' right to condemn the property, but sought only a determination of just compensation for the taking.

A jury awarded defendants $87,450.00 as just compensation for the condemned property. From a judgment entered upon the verdict, defendants have appealed.

Sumrell, Sugg & Carmichael, by James R. Sugg and Rudolph A. Ashton, III; and Dunn and Dunn, by Raymond Dunn and Raymond E. Dunn, Jr., for plaintiffs-appellees.

Sam L. Whitehurst, Jr., for defendants-appellants.

MARTIN, Judge.

Defendants bring forward two assignments of error in this appeal. They contend that the trial court erred by excluding evidence of Craven County's appraisal of a portion of their property for ad valorem tax purposes, and by excluding the opinion testimony of their son as to the value of the subject property. Both contentions have merit.

[1] Defendants first assign error to the trial court's ruling *in limine* excluding evidence of the assessed value of the subject property for ad valorem tax purposes. On 22 April 1981, defendants recorded in the office of the Register of Deeds of Craven County a map of a subdivision, known as the "Ladies Knee" subdivision. The subdivision initially consisted of four lots, comprising approximately 2.27 acres, situated within the 30.76 acre tract condemned by plaintiffs. The four lots were subsequently listed for ad valorem tax purposes separately from defendants' larger tract. In the fall of 1985, defendants were notified by plaintiff Craven County that the four lots had been appraised at $19,000.00 each for ad valorem tax purposes, effective 1 January 1986. The property was never actually taxed at this value because, as of 1 January 1986, title had been acquired by plaintiffs and the property was, therefore, exempt from taxation. G.S. 105-278.1(b)(2) & (3). Defendants sought, but were not permitted, to introduce the notice of revaluation as evidence of the fair market value of the lots. Defendants should have been allowed to present this evidence to the jury.

Ad valorem tax records have historically been held incompetent as evidence of value of real property. *Star Mfg. Co. v. Atlantic Coast Line R.R.*, 222 N.C. 330, 23 S.E. 2d 32 (1942); *Bunn v. Harris*, 216 N.C. 366, 5 S.E. 2d 149 (1939). In *R.R. v. Land Co.*, 137 N.C. 330, 49 S.E. 350 (1904), the plaintiff sought to introduce the tax list to show the value of the land condemned for a railroad right of way. The Supreme Court upheld the exclusion of the tax list for that purpose and stated the reason for the rule as follows:

> Where the mere listing of the land is the act sought to be shown, the tax lists are admissible, because the lister is the actor; but the rule is essentially different where the value of the land is sought to be proved thereby, because the valuation is the act of the assessors, and therefore *res inter alios acta* as between the parties to this proceeding. As was said by the Court, through *Pearson, C.J.*, in *Cardwell v. Mebane*, 68 N.C. 485: "The 'tax lists' were not competent evidence to show the value of the land, as the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the jury."

R.R. v. Land Co., supra, at 332-33, 49 S.E. at 351. *See also Bunn, supra; Peterson v. Tidewater Power Co.*, 183 N.C. 243, 111 S.E. 8 (1922); *Hamilton v. Seaboard Air Line Railway Co.*, 150 N.C. 193, 63 S.E. 730 (1909). The rule is different with respect to the admissibility of tax records to prove the value of personal property; in such cases the records have been held admissible. *Star Mfg. Co. v. Atlantic Coast Line R.R., supra.*

> The difference in the rule with regard to the competency of the tax list as to the value of real estate and the value of personal property doubtless has its origin in the fact that the owner is required by the Machinery Acts to list his real estate by acreage, dimensions or other physical description, together with location, while he is required to list the "amount and value" of his personal property. In real estate listments the value is fixed by the tax authorities; in personal property listments the value is fixed, or, at least, "given in" by the owner, hence the values in the former would not be statements made by the owner in contradiction of subsequent statements made by him at variance therewith, they being *res inter alios acta,* whereas in the latter the reverse would be true.

Id. at 332-33, 23 S.E. 2d at 36.

In the present case, the valuation of defendants' real property for ad valorem tax purposes is not *res inter alios acta* as between the plaintiff Craven County and defendants because the act of fixing the value of defendants' property was performed by the county through its agents. Therefore, the traditional reason for excluding the tax records as evidence of value is not present in this case.

"Statements of a party to an action, spoken or written, have long been admissible against that party as an admission if it is relevant to the issues and not subject to some specific exclusionary statute or rule. This is still the case under the new Rules of Evidence." *Karp v. University of North Carolina,* 78 N.C. App. 214, 216, 336 S.E. 2d 640, 641 (1985) (citations omitted). G.S. 8C-1, Rule 801(d) provides in pertinent part: "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made dur-

ing the existence of the relationship . . . ." The instant case falls squarely within this exception.

We note that valuations for ad valorem tax purposes are required by law to reflect, as nearly as possible, the "true market value" of the property. G.S. 105-283. The Rules of Evidence, and, in our view, fundamental fairness, allow defendants to present to the jury evidence of the value that plaintiff Craven County placed upon part of the condemned land. Therefore, we hold that evidence of real property valuations made by the county for ad valorem tax purposes are admissible against the county in an eminent domain proceeding as an admission of a party opponent.

Plaintiffs argue that the tax valuations are not relevant because they were to be effective on 1 January 1986, rather than on the date plaintiffs filed the complaint for condemnation, which is the date upon which the fair market value of the property must be determined. Their argument has no merit. The effective date of the revaluation of the property's fair market value for tax purposes was reasonably close in time to the condemnation. "In determining the fair market value of property taken in condemnation, it is generally regarded as competent to show the value of the property within a reasonable time before and/or after the taking as bearing upon its value at the time of the appropriation." *Highway Comm. v. Hartley*, 218 N.C. 438, 440, 11 S.E. 2d 314, 315 (1940).

[2] Defendants also contend that the trial court erred when it refused to allow their witness, Claud C. Hall, Jr., to testify as to his opinion of the fair market value of defendants' entire property before the condemnation and of the remainder after the condemnation. "Even though not an expert, a witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property with which he is familiar." *Huff v. Thornton*, 287 N.C. 1, 6, 213 S.E. 2d 198, 202 (1975). It is required only that the witness have such knowledge and experience and such familiarity with the property to be valued as will enable him to intelligently estimate its value. *Knott v. Washington Housing Authority*, 70 N.C. App. 95, 318 S.E. 2d 861 (1984). In the instant case, the witness, who was the defendants' son, exhibited a great deal of familiarity with the property in question. He also testified that he was familiar with neighbor-

ing properties, and was "familiar with the values of those properties as well as other tracts of similar size in the general area in Craven County[.]" This court has previously held that the son of a landowner, although he had no training in appraisal, and although he had neither bought nor sold land in the vicinity, was nevertheless competent to give an opinion as to the value of the land due to his familiarity with it. *Highway Comm. v. Fry*, 6 N.C. App. 370, 170 S.E. 2d 91 (1969). Thus, we hold that defendants' son should have been permitted to give his opinion as to the value of the property before and after the condemnation.

Defendants are entitled to a new trial on the issue of just compensation for the taking of their property.

New trial.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. BERNARD WILLIAMS

No. 8726SC155

(Filed 6 October 1987)

Searches and Seizures § 11— stop and search of automobile—evidence admissible

The trial court in a prosecution for felonious breaking or entering and felonious larceny properly denied defendant's motion to suppress all of the evidence against him where officers investigating a break-in by four young black males stopped an automobile containing four black males, including defendant; officers checked the identification of all of the occupants and allowed the vehicle to proceed; the officers learned through radio communication with other officers at the scene of the crime that some of the items reported stolen had been found between the location of the break-in and the place where the officers had stopped the automobile and that one of the occupants of the car had been arrested the preceding year for burglary; officers followed the automobile into the parking lot of a convenience store and asked the occupants to wait there for another officer to come and question them; after that officer arrived, the officers asked the men to step out of the car and they then observed items in the car which matched the description of items reported stolen. The circumstances created a reasonable suspicion of criminal activity, and a brief stop of an individual in order to maintain the status quo while obtaining more information does not violate either the fourth amendment or our case law.

State v. Williams

APPEAL by defendant from *Gray, Judge.* Order entered 3 October 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 September 1987.

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

Dozier, Brackett, Miller, Pollard & Murphy, by Richard S. Gordon and Timothy H. Graham, for defendant appellant.

BECTON, Judge.

Defendant, Bernard Williams, was convicted of felonious breaking or entering and felonious larceny and sentenced to six years imprisonment following a plea of guilty. Before entering the plea of guilty, defendant filed a motion to suppress all the evidence against him on the ground that it was acquired as a result of his having been seized without probable cause in violation of his rights under the Fourth Amendment to the United States Constitution and N.C. Gen. Stat. Sec. 15A-401(b)(2) (1986). The trial judge denied the motion. Defendant appeals. We find no error.

I

The trial judge found the following facts, and defendant did not take exception to any of them. On the morning of 18 April 1986 Officers Helms and Everhardt were dispatched to the area of Spicewood Drive in Charlotte to search the area in connection with a break-in that had just occurred. The officers were told that the suspects were four young black males. Upon arriving at the area the officers met a Pontiac automobile containing four black males, one of whom was defendant. The officers stopped the vehicle and checked the identification of all the occupants; then, finding no irregularities, allowed the vehicle to proceed. Shortly thereafter the officers learned through radio communication with other officers, who were at the scene of the crime, that some of the items reported stolen had been found in an area between the location of the break-in and the place where the officers stopped the Pontiac, and that one of the occupants of that car had been arrested the preceding year for burglary. The officers then followed the Pontiac into the parking lot of a local convenience store. The officers asked the occupants to wait there for another officer, Detective Graham, to come and question them. Several minutes

later, after Detective Graham arrived, the officers asked the men to step out of the car so they could be questioned. Immediately after occupant McCorkle got out of the right front seat, Officer Helms saw a ring under the car seat. After further observation, he saw a silver watch and a black pouch which contained a gun. He then spoke with officers at the scene of the break-in and learned that these items matched the description of items reported stolen. All four men were then placed under arrest and taken to the police station. After he was taken to the police station and given the *Miranda* warnings, defendant issued an incriminating statement to the police.

II

A

Defendant contends that the second stop of the Pontiac in which he was travelling constituted an unlawful arrest without probable cause, and that his subsequent statement to the police was the fruit of that unlawful arrest and should be suppressed. Both the Fourth Amendment to the United States Constitution and N.C. Gen. Stat. Sec. 15A-401(b)(2) (1986) in compliance therewith provide that no arrest shall be made except upon probable cause that the individual has committed a crime. However, law enforcement officers may temporarily detain persons and conduct a spontaneous search for weapons, without offending the Fourth Amendment or our case law, if from the totality of the circumstances, the officer forms a reasonable suspicion that criminal activity may be afoot. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889 (1968), *accord State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975). In determining whether the officer's conduct was proper, we must examine the "objective and articulable facts known to the officer" at the time he stopped the vehicle, *State v. Tillett and State v. Smith*, 50 N.C. App. 520, 523, 274 S.E. 2d 361, 363 (1981); and "the circumstances surrounding the seizure must be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by experience and training." *State v. Harrell*, 67 N.C. App. 57, 61, 312 S.E. 2d 230, 234 (1984), *citing State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776, *cert. denied*, 444 U.S. 907, 62 L.Ed. 2d 143 (1979).

This court found reasonable suspicion in *State v. Harrell*, 67 N.C. App. 57, 312 S.E. 2d 230 (1984) when the circumstances

known to the officer were that a security guard at Cannon Mills called police at 2:30 a.m. to report a suspected drug transaction in the parking lot and described one of the cars involved as a Chevrolet. The Cannon Mills parking lot was a known high crime area. When the officer arrived, he saw an occupied Chevrolet in the parking lot and stopped to investigate. In *State v. Adams*, 55 N.C. App. 599, 286 S.E. 2d 371 (1982) this court found reasonable suspicion when a police car was hailed at the scene of a convenience store robbery at 1:30 a.m. by a man who told the officer that he had just observed a white car exit an apartment complex across the street with its headlights turned off and that the car was then 300 yards away, about to enter the highway. As the officer looked up, he saw headlights alighting on a white car. He then stopped the car to investigate.

In the instant case, the circumstances known to officers Helms and Everhardt when they stopped defendant's car the second time were:

1. A house located within 200 to 400 yards of the place where they initially saw defendant had been burglarized 20 minutes earlier;

2. Four young, black males had been seen fleeing the area of the burglarized house;

3. Defendant and his companions matched that general description;

4. One of defendant's companions was arrested the previous year for housebreaking; and

5. Some of the allegedly stolen items had just been found in a field located between the burglarized house and defendant's initial location.

We hold that these circumstances created a reasonable suspicion of criminal activity, thus justifying a brief investigatory stop.

B

In addition to being based on reasonable suspicion, an investigatory stop must be brief. *See Harrell.* Defendant, relying on *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983), argues that the circumstances surrounding the second stop took on the

character of a full blown arrest. In *Freeman* a minor, who had been questioned earlier by police in the company of his mother, was picked up later and taken to police headquarters for three hours of questioning. The court held that the second seizure constituted an arrest. The intrusion on defendant's freedom in the case *sub judice* is fundamentally distinct from *Freeman* because defendant and his companions, all of whom were adults, were detained in a public place and remained in and around their own automobile for no more than six or seven minutes to await Officer Graham's arrival. A brief stop of an individual in order to maintain the status quo while obtaining more information does not violate the Fourth Amendment nor our case law. *See Harrell.*

The officers' discovery of allegedly stolen items in plain view after defendant and his companions got out of the car provided the critical ingredient to establish probable cause for arrest. Defendant was then taken into custody and advised of his "*Miranda* rights" before he issued the incriminating statement.

We find no error.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. ELVIN FRANKS

No. 873SC174

(Filed 6 October 1987)

Automobiles and Other Vehicles § 126.3— breathalyzer results—failure to establish operator's qualifications

The trial court in a DWI case committed reversible error in admitting testimony concerning the results of a breathalyzer test administered to defendant where the evidence showed only that the breathalyzer operator had a "certificate" to operate a Smith & Wesson Model 900 Breathalyzer but there was no evidence that he possessed a permit issued by the Department of Human Resources on the date he administered the breathalyzer test to defendant. N.C.G.S. § 20-139.1(b).

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 30 September 1986 in Superior Court, CARTERET County. Heard in the Court of Appeals 22 September 1987.

Defendant was convicted by a jury of operating a motor vehicle while subject to an impairing substance, in violation of G.S. 20-138.1. The court determined that Level Five punishment should be imposed and entered judgment imposing a fine and suspended sentence. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

L. Patten Mason, P.A., by L. Patten Mason, for defendant-appellant.

MARTIN, Judge.

Defendant contends that the trial court committed reversible error by allowing into evidence testimony concerning the results of the breathalyzer test administered to him without first requiring the State to establish a proper foundation for such testimony. His contention has merit, entitling him to a new trial.

G.S. 20-139.1(b) provides:

> Approval of Valid Test Methods; Licensing Chemical Analysts.—A chemical analysis, to be valid, must be performed in accordance with the provisions of this section. The chemical analysis must be performed according to methods approved by the Commission for Health Services by an individual possessing a current permit issued by the Department of Human Resources for that type of chemical analysis. The Commission for Health Services is authorized to adopt regulations approving satisfactory methods or techniques for performing chemical analyses, and the Department of Human Resources is authorized to ascertain the qualifications and competence of individuals to conduct particular chemical analyses. The Department may issue permits to conduct chemical analyses to individuals it finds qualified subject to periodic renewal, termination, and revocation of the permit in the Department's discretion.

This statute imposes two requirements which must be satisfied before the results of a breathalyzer test may be admitted into evidence: (1) the test must be "performed according to methods approved by the Commission for Health Services," and (2) it must be performed by someone "possessing a current permit issued by the

Department of Human Resources." *Id.*; *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706, *reh'g denied*, 285 N.C. 597 (1973) (decided under a former version of the statute, which placed regulatory authority in the State Board of Health).

In order to satisfy the second of these requirements, it is not obligatory that a copy of the necessary permit be introduced into evidence. *State v. Powell*, 10 N.C. App. 726, 179 S.E. 2d 785, *aff'd*, 279 N.C. 608, 184 S.E. 2d 243 (1971). The requirement can be satisfied:

> (1) by stipulation between the defendant and the State that the individual who administers the test holds a valid permit issued by the Department of Human Resources; or (2) by offering the permit of the individual who administers the test into evidence and in the event of conviction from which an appeal is taken, by bringing forward the exhibit as a part of the record on appeal; or (3) by presenting any other evidence which shows that the individual who administered the test holds a valid permit issued by the Department of Human Resources.

State v. Mullis, 38 N.C. App. 40, 41, 247 S.E. 2d 265, 266 (1978). The State failed in this case to show compliance with G.S. 20-139.1 (b) by any of these three methods.

On direct examination, Lt. Kent Overby, the officer who administered the breathalyzer test to defendant, was questioned, and answered, as follows:

> Q. And do you, in fact, sir, have a certificate to operate a Smith & Wesson Breathalyzer Model 900 that was in effect on the 3rd day of February 1986 [the date on which the breathalyzer test was administered]?
>
> A. Yes, sir, I do.

The State then attempted to introduce into evidence a permit to perform breath analysis tests issued to Lt. Overby by the N.C. Department of Human Resources. The court sustained defendant's objection to introduction of the permit as the permit showed that it was not issued until 10 March 1986, and therefore was not valid when Lt. Overby administered the test to defendant.

After a short recess, the following colloquy took place:

Q. (by Mr. Crowe [the prosecutor]) Mr. Overby, sir, you testified that you had had training with respect to a breathalyzer, is that correct, sir?

A. Yes, sir, that's correct.

Q. And state for the Court whether or not you had a permit that was in effect that was issued by the North Carolina Department of Human Resources to operates [sic] a Breathalyzer Model 900 Smith & Wesson on the date of February 3, 1986.

MR. MASON: Your Honor, under the circumstances, I would object on the grounds that the Best Evidence Rule would be the certificate itself. May counsel be heard?

THE COURT: Overruled.

Q. All right, sir. And how many breathalyzer tests have you ran [sic] in your career, sir?

The record does not reflect that Lt. Overby gave any answer to the prosecutor's question concerning whether he possessed a permit issued by the Department of Human Resources on the date he administered the breathalyzer test to defendant.

Thus, all that is shown by the evidence in the record before us is that on 3 February 1986, Lt. Overby had a "certificate" to operate a Smith & Wesson Model 900 Breathalyzer instrument. We find no evidence to show who issued the "certificate" to Lt. Overby. Therefore, it was error to admit Lt. Overby's testimony concerning the results of defendant's breathalyzer test, *State v. Mullis, supra*; *State v. Caviness*, 7 N.C. App. 541, 173 S.E. 2d 12 (1970); and such error entitles defendant to a new trial.

We have examined defendant's other assignments of error and find them without merit.

New trial.

Judges WELLS and EAGLES concur.

JEANNETTE M. CORNELIUS v. WILLIAM EARL CORNELIUS

No. 8723DC146

(Filed 6 October 1987)

1. **Rules of Civil Procedure § 13; Divorce and Alimony § 30— equitable distribution—reply did not constitute counterclaim—no answer required**

The trial court did not err in an equitable distribution action by admitting testimony concerning whether certain property acquired during the marriage was separate property or marital property where plaintiff's complaint generally listed items considered to be marital property; defendant's answer and counterclaim referred to all household goods, all monies, and all stocks, bonds and retirement accounts; and plaintiff did not reply to the counterclaim. Defendant's response was virtually identical to plaintiff's claim for equitable distribution and did not constitute a counterclaim which demanded a reply.

2. **Divorce and Alimony § 30— equitable distribution—oral agreement between the parties**

The trial court erred in an equitable distribution proceeding by failing to note specifically, consider and distribute savings accounts and stock owned by the parties where the record did not reflect compliance with the standards articulated by *McIntosh v. McIntosh*, 74 N.C. App. 554, regarding oral agreements.

APPEAL by defendant from *Gregory, Judge.* Judgment entered 20 October 1986 in District Court, YADKIN County. Heard in the Court of Appeals 2 September 1987.

Plaintiff, on 21 July 1986, filed her complaint seeking an absolute divorce based on one year's separation and seeking equitable distribution. Defendant's response, styled as an answer and counterclaim, also sought an absolute divorce based on one year's separation and equitable distribution. No further pleadings were filed. Prior to the trial for equitable distribution, the parties received an absolute divorce.

On 2 October 1986 the claims for equitable distribution came on to be heard. Testimony could not be completed in a single day and the trial was continued to 20 October 1986. Before testimony resumed on 20 October 1986 the parties entered into an oral stipulation. Based upon the oral stipulation the trial court entered an order dividing the marital property. From that order defendant appeals.

Carl F. Parrish for plaintiff-appellee.

Walter Lee Zachary, Jr., for defendant-appellant.

EAGLES, Judge.

Defendant presents five assignments of error. Because we agree with the second assignment of error, we vacate the judgment and remand the case for further proceedings.

[1] Defendant first assigns as error the trial court's admission of testimony concerning whether certain property acquired during the marriage was separate property or marital property. Defendant argues that plaintiff's failure to reply to allegations listed in a counterclaim constituted a judicial admission conclusively establishing those allegations as fact. We disagree.

Defendant's counterclaim for equitable distribution is virtually identical to plaintiff's claim for equitable distribution. The only significant difference in the two claims, and the basis of this issue on appeal, is that defendant's counterclaim alleges ". . . *all* household furnishings contained in said homeplace, *all* monies located in various checking and savings accounts; *all* stocks and bonds and retirement accounts . . ." (emphasis added), rather than generally listing items considered to be marital property as plaintiff's complaint alleged.

The Rules of Civil Procedure provide that allegations in a pleading are deemed admitted where a responsive pleading is required and not made. G.S. 1A-1, Rule 8(d); *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E. 2d 794 (1971). On the other hand, where the answer requires no reply, any allegations in the answer are deemed denied. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977).

The question, then, becomes whether defendant's allegations constitute a counterclaim demanding a reply. Defendant's claim contends that *all* the property listed is marital property. Though denominated a counterclaim, defendant's allegations, in effect, do no more than deny plaintiff's allegations that only the property listed in the complaint is marital property. Consequently, a reply is not required. *Trust Co. v. Morgan-Schultheiss*, 33 N.C. App. 406, 235 S.E. 2d 693, *disc. rev. denied*, 293 N.C. 258, 237 S.E. 2d 535, *cert. denied*, 439 U.S. 934 (1977). *See also Eubanks v. Insur-*

ance Co., 44 N.C. App. 224, 261 S.E. 2d 28 (1979) (allegations designated as counterclaim constituted an affirmative defense and a reply was not required).

To find that the mere inclusion of the word "all" three times in the answer and counterclaim mandates a reply on the part of plaintiff smacks of hyper-technicality. Our determination is consistent with the goal that notice pleading eliminate the formalism seen in pleading prior to the introduction of the Rules of Civil Procedure. W. Shuford, North Carolina Civil Practice & Procedure (2nd Ed. 1981) Section 7-3. Accordingly, we overrule defendant's first assignment of error.

[2] Defendant next assigns as error the failure of the trial judge specifically to consider and distribute savings accounts and stock owned by the parties at separation and, generally, the division of the marital property. For the reasons set forth below, we agree.

The initial obligation of the trial court in any equitable distribution action is to identify the marital property in accordance with G.S. 50-20 and the appropriate case law. *Mauser v. Mauser*, 75 N.C. App. 115, 330 S.E. 2d 63 (1985). The trial court's order here failed to list or determine the status of the following significant items of property: Two bank accounts in plaintiff's name in the amounts of $203.28 and $184.59, respectively; plaintiff's RJR Employees' Savings and Investment Plan; plaintiff's RJR Stock Purchase Plan; and plaintiff's RJR Nabisco Stock Bonus Plan. A distribution order failing to list all the marital property is fatally defective, *Little v. Little*, 74 N.C. App. 12, 327 S.E. 2d 283 (1985), and, further, marital property may not be identified by implication. *Id.*

The trial court must also order the division and distribution of all the marital property. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). The division and distribution of marital property need not lie solely within the province of the trial court. The parties themselves may determine the distribution of the marital property through written agreement, G.S. 50-20(d); *Case v. Case*, 73 N.C. App. 76, 325 S.E. 2d 661, *disc. rev. denied*, 313 N.C. 597, 330 S.E. 2d 606 (1985), or by oral agreement, *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E. 2d 600 (1985). In the trial below the parties made an oral agreement as to the division of the ma-

jority of their marital property but neglected to guard against subsequent misunderstandings of their oral stipulation.

The *McIntosh* court prescribed certain procedures for the trial court in the event that oral stipulations were entered into between the parties. There Judge Johnson said:

> [I]t must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into. It should appear that the court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement, and agreed to abide by those terms of their own free will.

McIntosh at 556, 328 S.E. 2d at 602. These rules were articulated, not to discourage oral stipulations, but rather to fully protect the rights of the parties. *Id.* The record here does not reflect compliance with the standards prescribed by *McIntosh* regarding the parties' oral stipulation. Accordingly, we sustain defendant's second assignment of error.

Our disposition of the second assignment of error makes it unnecessary to address defendant's other assignments of error. The judgment of the trial court is vacated and the case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges WELLS and MARTIN concur.

DOUGLAS DEAN MARTIN v. CITY OF ASHEVILLE

No. 8728SC145

(Filed 6 October 1987)

Municipal Corporations § 19.5; Negligence § 59.1— county ambulance attendant on city property—licensee—city not liable for simple negligence

Where a city permitted county medical assistance personnel to park county ambulances in city fire stations and to use fire station facilities, plaintiff ambulance attendant was a mere licensee while on the premises of a city fire station, and the city was not liable for injuries received by plaintiff when he

slipped and fell in diesel fuel which had leaked from a fire engine since the city was not guilty of willful and wanton negligence.

APPEAL by plaintiff from *Saunders, Judge*. Order entered 16 September 1986 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 2 September 1987.

Plaintiff Douglas Dean Martin instituted this civil action on 29 August 1986, seeking damages from injuries sustained in a fall. The defendant, City of Asheville, answered in apt time and moved the court to dismiss the complaint pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure. By consent of the parties the court reviewed discovery materials and treated defendant's motion as one for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. The court granted defendant's motion, and plaintiff appeals.

Gum, Hillier and McDaniels, P.A., by Howard Gum; and Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for plaintiff-appellant.

Brock & Drye, P.A., by Floyd D. Brock, for defendant-appellee.

WELLS, Judge.

The question presented is whether the trial court's order of summary judgment in favor of defendant was proper. It is elementary that summary judgment is appropriate only where the pleadings and discovery materials leave unresolved no genuine issue of material fact. Our Supreme Court has held:

> A defendant is entitled to summary judgment only if he can produce a forecast of evidence which, when viewed most favorably to plaintiff, would, "if offered by plaintiff at the trial, without more, . . . compel a directed verdict" in defendant's favor. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 473, 251 S.E. 2d 419, 423 (1979). In other words, if the forecast of evidence available for trial, as adduced on the motion for summary judgment, demonstrates that plaintiff will not at trial be able to make out at least a prima facie case, defendant is entitled to summary judgment. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). In such cases there is no gen-

> uine issue of material fact. *Moore v. Fieldcrest Mills, Inc., supra.*

Mims v. Mims, 305 N.C. 41, 286 S.E. 2d 779 (1982).

Plaintiff in this lawsuit was an emergency ambulance attendant in the employ of Buncombe County. At the time of plaintiff's injury, there was in effect between the City of Asheville and Buncombe County an oral agreement whereby emergency medical assistance personnel used various fire stations owned and maintained by the City as bases of operation. Medical assistance personnel were permitted to park county ambulances in city fire stations and to use fire station facilities. The County made no lease payments to the City for this accommodation.

On the day of his injury, plaintiff returned to fire station No. 3 at approximately 6:39 p.m. and waited in the lounge area until his relief crew arrived. At about the same time as the relief crew arrived, an emergency call was received. Realizing he still had the keys to the ambulance medical chest in his pocket, plaintiff exited the lounge and hastened across the bay area, empty because the fire engine was gone, towards the far east side of the station where the ambulance was parked and where the relief crew was waiting for him to bring the keys. As plaintiff crossed this empty bay area, he slipped and fell on a pool of diesel fuel located directly beneath where fire engine No. 3 had been parked earlier that day. Plaintiff claims that fire engine No. 3 had a history of fuel leak problems.

Plaintiff urges us to reverse the trial court's order for two reasons. First, he contends that there exists a genuine issue of material fact with respect to his status—whether invitee or licensee—on defendant's premises. Naturally, plaintiff insists that he was an invitee when he injured himself on city property and therefore is entitled to the concomitant heightened standard of care. We do not agree. We hold that plaintiff was a licensee as a matter of law while on defendant's premises.

Our Supreme Court has carefully elaborated the difference between licensees and invitees in *Mazzacco v. Purcell*, 303 N.C. 493, 279 S.E. 2d 583 (1981), as follows:

> The distinction between an invitee and a licensee is determined by the nature of the business bringing a person to the

> premises. A licensee is one who enters on the premises with the possessor's permission, express or implied, *solely for his own purposes* rather than the possessor's benefit. An invitee is a person who goes upon the premises in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself. [Emphasis supplied.]

The distinction between licensee and invitee depends on the purpose of plaintiff's business on defendant's property. One who enters upon the premises of another solely to advance his own interests cannot be an invitee. In the case at bar, the City of Asheville was permitting Buncombe County employees to utilize city fire stations for their own purposes and solely as a matter of accommodation. The County was paying no rent to the City for this privilege. Ambulances and emergency medical assistance personnel were the gratuitous guests of the City of Asheville, not its customers.

Plaintiff secondly contends that even if the Court should hold him to have been, as a matter of law, a mere licensee, he is nevertheless entitled to a jury trial. We disagree. It is settled law in North Carolina that a licensee can recover only for negligence which is willful, wanton, and reckless. As this Court stated in *Briles v. Briles*, 43 N.C. App. 575, 259 S.E. 2d 393 (1979):

> In order for a licensee to recover, he must prove defendant's negligence was willful or wanton or that the owner of the premises is affirmatively and actively negligent in the management of his property, as a result of which the licensee is subjected to increased danger causing injury to him.

Since plaintiff candidly concedes in his brief that the City was not guilty of willful or wanton misconduct towards him, he cannot proceed. Plaintiff invites us to reconsider the position we took in *Briles*. We decline to do so.

In summation, since plaintiff was a licensee when he fell on defendant's premises, and since defendant's negligence, if in fact there was any, concededly did not rise to the level of willful or wanton misconduct so as to breach any duty of care owing to a licensee, defendant was entitled to judgment as a matter of law. The judgment of the trial court must be and is

Affirmed.

Judges EAGLES and MARTIN concur.

MARIE T. ASSAAD v. COLIN G. THOMAS, JR.

No. 8615SC1201

(Filed 6 October 1987)

Physicians, Surgeons and Allied Professions § 17— medical malpractice—no expert testimony for plaintiff—directed verdict for defendant proper

The trial court did not err by directing a verdict for defendant in a medical malpractice action where plaintiff produced no expert testimony to support her allegations as to defendant's breach of the standard of care.

APPEAL by plaintiff from *Battle, Judge.* Judgment entered 24 March 1986 in Superior Court, ORANGE County. Heard in the Court of Appeals 21 September 1987.

This is a civil action wherein plaintiff seeks to recover damages for personal injuries due to alleged medical negligence of defendant.

In her complaint, plaintiff alleges defendant was negligent when he performed a thyroidectomy on her on 27 February 1980. She further alleges she suffered dysfunctions of her vocal cords as well as other disorders as a result of this negligence. In support of these claims, she alleged defendant "failed to comply with the standards of surgery existing on the date of the said operation," and that he failed to comply with her informed consent and with precautionary measures. She made further allegations concerning defendant's actions and asked for damages.

Defendant filed an answer denying the material allegations of the complaint and alleging that plaintiff assumed the risk of surgery and was contributorily negligent.

At trial, plaintiff offered evidence tending to show that while she was studying medicine in Egypt she developed Grave's disease, a disorder of the thyroid. After undergoing a subtotal thyroidectomy in Paris, France, plaintiff began attending the University of North Carolina at Chapel Hill. There she developed

problems associated with hyperthyroidism. Subsequent drug therapy proved unsuccessful. Plaintiff then chose to have another subtotal thyroidectomy, and she was referred to defendant.

After consulting with defendant, plaintiff signed an authorization stating that all complications and risks had been explained. On 27 February 1980 the surgery was performed by defendant. Plaintiff experienced complications from the surgery. Plaintiff produced no expert testimony to support her allegations as to defendant's breach of the standard of care.

Testimony at trial further indicates defendant proceeded with the surgery in accordance with the standard of practice. Testimony also indicates plaintiff's complications were under control and that her voice was such that no laryngeal nerves could have been severed as she alleged.

Defendant's motion for a directed verdict at the close of plaintiff's evidence was allowed and plaintiff appeals from a judgment directing a verdict for defendant.

No counsel for plaintiff, appellant.

Yates, Fleishman, McLamb & Weyher, by Beth R. Fleishman and Barbara B. Weyher, for defendant, appellee.

HEDRICK, Chief Judge.

The record filed in this case consists of 14 pages, the transcript is made up of over 700 pages, plaintiff's brief consists of 106 pages and there are numerous exhibits. Plaintiff has failed to follow the Rules of Appellate Procedure in that she has failed to set out her assignments of error and exceptions in her brief's "argument" section. Rule 28(b)(5) provides that "[e]xceptions not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." Additionally, in her brief, she has attempted to advance many immaterial and irrelevant arguments. We have nevertheless considered the record, transcript and brief in order to evaluate her appeal which essentially boils down to one question—that is, whether the trial court erred in directing a verdict for defendant.

Where there is a motion made for a directed verdict, the trial judge must determine whether the evidence, taken in the light

most favorable to the plaintiff and giving it the benefit of every reasonable inference which can be drawn therefrom, was sufficient to withstand the defendant's motion. *Younts v. State Farm Mut. Auto. Ins. Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972). In making such a ruling, the court must resolve any discrepancies in favor of the party against whom the motion is made. *Odell v. Lipscomb*, 12 N.C. App. 318, 183 S.E. 2d 299 (1971).

In medical malpractice actions, the burden is on the plaintiff to offer evidence of failure of a physician to meet certain requirements:

> (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patients.

Hunt v. Bradshaw, 242 N.C. 517, 521, 88 S.E. 2d 762, 765 (1955).

N.C.G.S. 90-21.12 further provides:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

Because of the nature of the present case, and the technical nature of medical testimony, jurors cannot decide ultimate issues of negligence without the help of expert witnesses. Generally, there must be expert testimony that tends to show a deviation from a normal standard of care. *Beaver v. Hancock*, 72 N.C. App. 306, 324 S.E. 2d 294 (1985).

Applying foregoing principles, we find no evidence in the record as to what this defendant did or failed to do in perform-

ance of duties to plaintiff. Therefore, the court was obligated to direct a verdict for defendant. In the superior court, we find no error.

Affirmed.

Judges ARNOLD and ORR concur.

STATE OF NORTH CAROLINA v. JOHNNY DOUGLAS POUCHER

No. 8629SC1246

(Filed 6 October 1987)

1. **Criminal Law § 106.5— sufficiency of evidence—accomplice testimony**

An accomplice's testimony was sufficient to establish the identity of defendant as a perpetrator of a second degree burglary.

2. **Criminal Law § 162— belated objection to evidence—absence of exception and motion to strike**

Defendant cannot complain on appeal about the introduction of evidence where defendant objected too late after the witness had twice answered and there was no exception and no motion to strike when an objection was finally made.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 24 June 1986 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 21 September 1987.

This is a criminal action wherein defendant was charged in a proper bill of indictment with second-degree burglary in violation of G.S. 14-51. The State's evidence tends to show the following: On 14 September 1985 around 9 p.m., defendant and a woman, Lynn Teague, entered the home of Hugh Gillespie through an unlocked door. Defendant and Teague went through the rooms of the house and found a jar of coins and some rolled pennies, which they placed in a bag and which Teague took out to their car. After Teague reentered the house, she saw lights approaching, and she told defendant to leave the house. She also tried to leave the house, but Gillespie, who had just arrived home, saw her. After discovering the money was missing, Gillespie called the police and Teague admitted her actions. Defendant was not seen

by Gillespie and Teague did not implicate defendant until a later date.

The jury found defendant guilty of second-degree burglary, and from a judgment imposing a sentence of 30 years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lemuel W. Hinton, for the State.

Assistant Appellate Defender Gayle L. Moses for defendant, appellant.

HEDRICK, Chief Judge.

Defendant assigns error to the trial court's denial of his motion to dismiss the charge at the close of all evidence. When there is a motion for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the charged offense, and of the defendant being the person who committed the crime. *State v. Massey*, 316 N.C. 558, 342 S.E. 2d 811 (1986). If substantial evidence is present, the trial court must deny the motion and submit the issue to the jury for decision. *State v. Hyatt*, 32 N.C. App. 623, 233 S.E. 2d 649, *disc. rev. denied*, 292 N.C. 733, 235 S.E. 2d 786 (1977).

[1] Defendant admits that "the evidence tends to establish the existence of the essential elements of second degree burglary." Defendant only contends the evidence does not establish the identity of defendant as perpetrator of the crime. When the trial court considers sufficiency of evidence to survive a motion to dismiss, the evidence, considered in the light most favorable to the State, is deemed to be true and inconsistencies are disregarded. *State v. Hyatt*, 32 N.C. App. 623, 233 S.E. 2d 649, *disc. rev. denied*, 292 N.C. 733, 235 S.E. 2d 786 (1977). The question for the court's determination is whether a reasonable basis exists for the jury to find defendant was the perpetrator of the crime charged. *Id.* In this case, the testimony of Lynn Teague tends to show defendant did commit the crime charged, and this evidence is substantial enough to withstand a motion to dismiss. This assignment of error has no merit.

[2] Defendant also argues the trial court erred in allowing the State to elicit testimony from Lynn Teague concerning defend-

ant's intention to steal property from a doctor's office. Teague testified that she and defendant had intended to break into a doctor's office, but they decided to break into the Gillespies' house instead. Defendant contends the testimony was elicited to show defendant's bad character and to show he acted in conformity with that bad character on the night of the burglary. If the State elicited the testimony for this purpose there would be a violation of Rule 404(b) of the North Carolina Rules of Evidence under which "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."

Teague's testimony was as follows:

Q. Who had arranged this meeting?

A. Me and him.

Q. Had you discussed why you were meeting?

A. Yes, sir.

Q. Why were you meeting?

A. We were going to break into something.

Q. Do you recall what it was you were going to break and enter?

A. Yeah.

Q. What was it?

A. A doctor's office.

The testimony continued, but no objection was made until after the prosecutor asked, "Now, what were you going to do—had you discussed what you were going to do after you broke and entered the doctor's office?" When Teague began to answer, "We were going to take the stuff and—," defendant objected.

Assuming *arguendo* that the testimony was inadmissible evidence of other crimes, defendant objected too late after allowing the prosecutor to ask about the intention to break in the doctor's office and after allowing the witness to answer twice. There was no exception and no motion to strike when an objection was finally made. Defendant, therefore, cannot complain about the intro-

duction of this evidence on appeal. *State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982). This assignment of error is likewise without merit.

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

No error.

Judges ARNOLD and ORR concur.

STATE OF NORTH CAROLINA v. GEORGE ODELL BENGE

No. 8727SC67

(Filed 6 October 1987)

Homicide § 21.9— involuntary manslaughter erroneously submitted—defendant discharged

A judgment of guilty of involuntary manslaughter was vacated and defendant discharged where the evidence showed without contradiction that defendant intentionally shot the victim at close range with a deadly weapon likely to cause death in the circumstances; nothing in the evidence suggested that the shooting was inadvertent or not felonious or dangerous to human life; there was evidence of self-defense; the issue of involuntary manslaughter was erroneously submitted to the jury; and defendant was acquitted of other, larger charges covered in the indictment by the verdict of the jury.

APPEAL by defendant from *Downs, Judge*. Judgment entered 24 September 1986 in Superior Court, GASTON County. Heard in the Court of Appeals 24 August 1987.

Attorney General Thornburg, by Special Deputy Attorney General Robert G. Webb, for the State.

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

PHILLIPS, Judge.

Indicted under G.S. 14-17 for second degree murder in the death of Howard James Anderson and tried for voluntary manslaughter, defendant, who did not testify, was convicted of

involuntary manslaughter. Anderson's death was caused by defendant shooting him in the abdomen with a shotgun while visiting in Anderson's home. Defendant's only contention here is that the evidence does not support the involuntary manslaughter verdict. Involuntary manslaughter, a lesser included offense of murder and voluntary manslaughter, is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971); *State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963).

According to *State v. Greene*, 314 N.C. 649, 336 S.E. 2d 87 (1985), that the killing in an involuntary manslaughter case was unlawful can be proved by showing either that the killing was caused by an unlawful act not amounting to a felony, or that it was the result of criminally negligent or culpable conduct. Neither cause was established by the evidence presented in this case, which in pertinent part was as follows: During the night involved Anderson's sister, who lived next door, heard noises from Anderson's house indicating a scuffle and a gunshot, and after trying to phone him and getting a busy signal she called the Gastonia police; the officers found Anderson lying on a couch wounded in the abdomen and with a .25 caliber automatic pistol ready to fire in his pocket. Anderson later told an emergency medical technician, "He shot me with my own gun"; and his hospital record shows that he had a blood alcohol level of 0.15. A prostitute testified that during the afternoon following the shooting defendant came to her motel room with a shotgun (which she and a friend later sold for money to buy narcotics and was recovered by the police and identified as belonging to Anderson) and told her that: "Mr. Anderson had invited him in for a drink and that someone had been prowling around his house and that he gave Mr. Benge this gun and said if anyone tried to break in to shoot him . . . that Mr. Anderson also had a gun in his hand and that he had been drinking a little bit, and he had pointed the gun toward George [defendant], and George asked him to put it down, and so he did, but then he brought the gun back up, and George asked him to put it down again, and he wouldn't, and that's when George said he shot him."

While this evidence is sufficient to support a conviction of voluntary manslaughter, or even of second degree murder, *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980), it certainly does not support a conviction of involuntary manslaughter; for it shows without contradiction that defendant intentionally shot Anderson, at close range, with a deadly weapon likely to cause death under the circumstances, and nothing in the evidence even suggests that the shooting was inadvertent or not felonious and dangerous to human life. Since there was evidence of self-defense—that the intoxicated decedent, after being twice asked not to do so, continued to point a loaded pistol at defendant—and the court instructed the jury thereon, this case is governed by *State v. Ray, supra.* In that case, our Supreme Court held that in a homicide case where self-defense is in issue and there is no evidence of involuntary manslaughter that it is prejudicial error to charge on involuntary manslaughter. In this case since there is no evidence of involuntary manslaughter and the issue was erroneously submitted to the jury, the judgment must be vacated; and since by the verdict of the jury defendant has been acquitted of the other, larger charges covered by the indictment, he must be discharged. Under similar circumstances and for the same reason the defendant in *State v. Brooks*, 46 N.C. App. 833, 266 S.E. 2d 3 (1980) was also discharged.

Thus, the judgment of the trial court is vacated and the defendant is hereby ordered discharged.

Vacated.

Chief Judge HEDRICK and Judge ORR concur.

SHERROD PAUL HACKWORTH v. SHIRLEY D. HACKWORTH

No. 8725DC90

(Filed 6 October 1987)

Appeal and Error § 16.1; Divorce and Alimony § 23— child custody—modification pending appeal of visitation order

The district court had no jurisdiction to enter an order modifying child custody while an appeal from a child visitation order was pending, and the

court thus also lacked authority to find defendant mother in contempt for failing to comply with the modification order. N.C.G.S. § 1-294.

APPEAL by defendant from *Tate, Judge* and *Vernon, Judge*. Orders entered 31 October 1986 and 3 November 1986 in District Court, CALDWELL County. Heard in the Court of Appeals 21 September 1987.

Herbert H. Pearce, attorney for plaintiff-appellee.

Wilson and Palmer, P.A., by W. C. Palmer, attorney for defendant-appellant.

ORR, Judge.

This appeal arises out of a custody dispute between plaintiff-father and defendant-mother for the primary custody of one minor child.

After the parties separated in 1984 the trial court, in an order entered 10 July 1985, awarded primary custody of the child to defendant and permitted plaintiff visitation rights.

On 10 January 1986, plaintiff appeared in district court with a motion in the cause requesting that primary custody of the child be removed from defendant and awarded to plaintiff. The trial court, in a hearing held 26 February 1986, denied plaintiff's motion, finding there was no substantial change of circumstances relating to the child's welfare compelling such a change.

However, in the 5 March 1986 order arising out of the custody hearing, the trial court determined that substantial evidence presented at the hearing justified a significant expansion of plaintiff's visitation rights with the child. From the 5 March 1986 order extending visitation rights, defendant appealed on 17 March 1986. *Hackworth v. Hackworth*, 85 N.C. App. 170, 354 S.E. 2d 774 (1987).

In May 1986, while defendant's appeal of the prior visitation order was pending, plaintiff filed a second motion in the cause again requesting primary custody of the child. After hearing plaintiff's motion, the trial court concluded that although defendant had been a most fit and proper custodial parent, the relationship between plaintiff and the child had substantially

strengthened making it in the child's best interest to award primary custody to plaintiff.

In a 31 October 1986 order, the trial court awarded plaintiff primary custody of the child to begin 1 November 1986. When plaintiff attempted to take the child on this date, defendant prevented the transfer of custody and was subsequently found to be in contempt of court on 3 November 1986.

From the 31 October 1986 order awarding plaintiff primary custody and the 3 November 1986 order finding defendant in contempt of court, defendant appeals.

The dispositive issue is whether defendant's appeal of the 5 March 1986 order removed from the district court jurisdiction to hear and to issue orders pertaining to plaintiff's later motions for custody of the minor child.

We find that the district court lacked the authority to issue the 31 October 1986 and 3 November 1986 orders, and, conclude that these orders are null and void for the following reason.

N.C.G.S. § 1-294 states in part:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

It is established that "[v]isitation privileges are but a lesser degree of custody." *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E. 2d 129, 142 (1978). As a result, the 5 March 1986 order, extending visitation rights, appealed by defendant is directly related to and will affect the 31 October 1986 and 3 November 1986 orders determining custody, issued by the trial court. Therefore, N.C.G.S. § 1-294 removed jurisdiction on the issue of custody from the district court in the present case.

Furthermore, the Supreme Court in *Joyner v. Joyner*, 256 N.C. 588, 124 S.E. 2d 724 (1962), specifically addressed the question of who has jurisdiction over a minor child when a custody matter is pending on appeal. In *Joyner*, the Court concluded that

"North Carolina cases fit into the general rule that appeal removes the entire proceeding to the [appellate] Court and leaves the [lower] court *functus officio* until the cause is remanded." *Joyner*, 256 N.C. at 592, 124 S.E. 2d at 727. *Accord, Webb v. Webb*, 50 N.C. App. 677, 274 S.E. 2d 888 (1981); *Collins v. Collins*, 18 N.C. App. 45, 196 S.E. 2d 282 (1973).

Consequently, under both statute and case law the district court lost jurisdiction over all custody matters in the present case when defendant appealed the 5 March 1986 visitation order. N.C. G.S. § 1-294 (1983); *Joyner v. Joyner*, 256 N.C. 588, 124 S.E. 2d 724; *Webb v. Webb*, 50 N.C. App. 677, 274 S.E. 2d 888; *Collins v. Collins*, 18 N.C. App. 45, 196 S.E. 2d 282. Since the district court lacked the authority to modify the prior custody award on 31 October 1986, it also lacked the authority to find defendant in contempt on 3 November 1986 for failing to comply with the 31 October 1986 order.

For this reason, we vacate the 31 October 1986 order and the 3 November 1986 order.

Vacated.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. ANGELA AUSTIN DANIELS

No. 8719SC88

(Filed 6 October 1987)

1. Homicide § 21.9— involuntary manslaughter—evidence sufficient

Evidence in a homicide prosecution that the victim's death was caused by defendant inadvertently stabbing him in the chest while not attempting or intending to do so was sufficient to prove involuntary manslaughter; the evidence did not establish that defendant acted in self-defense because defendant's own testimony tended to show that she did not believe it was necessary to kill the victim; and the denial of defendant's motion to set aside the verdict as against the greater weight of the evidence was within the judge's discretion.

2. Homicide § 28— instruction on self-defense—involuntary manslaughter conviction—any error not prejudicial

There was no prejudicial error in a homicide prosecution from the judge's instruction on self-defense where defendant was convicted of involuntary manslaughter, to which self-defense is not a defense.

APPEAL by defendant from *Long, James M., Judge.* Judgment entered 24 September 1986 in Superior Court, CABARRUS County. Heard in the Court of Appeals 24 August 1987.

Indicted and tried for second degree murder in the death of Vernon Lee Kennedy, defendant was convicted of involuntary manslaughter. Kennedy's death was caused by defendant sticking a boning knife into his chest to a depth of three or four inches. The incident occurred in a Kannapolis apartment that defendant and Kennedy had been living in for several months, and before moving there in 1986 they had lived together in High Point for three years.

Except for the physical facts the evidence pertinent to the killing consists almost entirely of defendant's testimony and what she told various Kannapolis police officers. *Defendant testified* in effect that: Kennedy had a violent temper, had beaten her on several different occasions, and in June, 1985 broke her arm; on the night involved he became angry for no sensible reason and after throwing some things at her and slapping her about the face, he hit her twice with his fist, knocking her to the floor and against the wall; when she told him that he would not hit her like that if she were a man, he dragged her by the hair into the kitchen, took the knife from a drawer, handed it to her, and told her to fight like a man; "I stuck at him, trying to get him away from me"; she did not intend to either stab or hurt Kennedy, but "was pushing mainly at him"; when she realized that he was seriously hurt she attempted to help him and then ran for help to their neighbors, one of whom called an ambulance and the police; in the struggle with Kennedy her head, face, arm and toe were injured; later that day she was treated for those injuries in the emergency room of the Cabarrus Hospital; and that photographs showing her with a bruised eye, a bruised elbow and a bandaged toe accurately represented her appearance at that time. *One police officer or another testified* in substance that: Upon arriving at the apartment they asked the several people standing outside what hap-

pened and defendant told them she had stabbed Kennedy; a boning knife 9½ inches long with a 6½-inch blade and human blood on it was found on the kitchen table; in the several statements, oral and written, that defendant made about the incident she said that she had not meant to hurt Kennedy, that he gave her the knife and told her if she wanted to be a man she could fight like one and that she stabbed him one time in the chest; and that defendant's eye was swollen.

Attorney General Thornburg, by Associate Attorney General Melissa L. Trippe, for the State.

Griggs, Scarbrough & Rogers, by James E. Scarbrough and William F. Rogers, Jr., for defendant appellant.

PHILLIPS, Judge.

[1] Based upon four assignments of error defendant makes three different contentions concerning the evidence, as follows: That it does not support the finding of involuntary manslaughter and thus the court erred in charging the jury thereon and in not setting the verdict against her aside; that it shows that the killing was in self-defense as a matter of law; and that its greater weight is against the verdict. Redundancy can be avoided by discussing these contentions, neither of which has merit, together. Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971). One way of proving involuntary manslaughter, according to *State v. Greene*, 314 N.C. 649, 336 S.E. 2d 87 (1985) and *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980), is to present evidence which indicates that the killing was the result of an act done in a culpable or criminally negligent way. Evidence indicating that Kennedy's death was caused by defendant inadvertently stabbing him in the chest while not attempting or intending to do so clearly meets that requirement. Nor does the evidence necessarily establish that defendant acted in self-defense; because an element of self-defense is that the defendant reasonably believed it was necessary to kill the assailant in order to avoid being killed or seriously injured, *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982), and defendant's own testimony tends to show that she did not believe it was necessary

to kill Kennedy, since she did not intend to either stab or hurt him. As to the contention concerning the greater weight of the evidence, defendant's motion upon that ground was addressed to the judge's sound discretion, and in denying it we see no abuse.

[2] Defendant's only other contention is that the judge improperly charged the jury regarding self-defense. Since this ground was waived by her failure to timely object to the instruction, Rule 10(b)(2), N.C. Rules of Appellate Procedure, pursuant to her request we have considered the contention under the "plain error" rule set out in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), and find no prejudicial error, "plain" or otherwise, for two reasons. First, the charge was in accord with *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981); and second, since self-defense is not a defense to a charge of involuntary manslaughter, *State v. Teel*, 65 N.C. App. 423, 310 S.E. 2d 31 (1983), and the jury found defendant not guilty of the charges to which self-defense was applicable, the error in charging thereon, if any, could not have been prejudicial.

No error.

Chief Judge HEDRICK and Judge ORR concur.

JOE WORLEY GRIFFEY, JR., EMPLOYEE, PLAINTIFF v. TOWN OF HOT SPRINGS, EMPLOYER, AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8710IC203

(Filed 6 October 1987)

Master and Servant § 91— filing of claim—conclusion of Commission that filing not timely—no prejudice

Although the opinion of the Chief Deputy Commissioner, adopted by the full Industrial Commission, that plaintiff's workers' compensation claim was not timely filed and that he was injured in May 1981 rather than in March 1982 was manifestly erroneous, there was no prejudice because there was evidence to support the finding that plaintiff failed to prove that he was injured while making an arrest in March 1982 in that the person arrested testified that the violent incident described never happened and that plaintiff later told her he injured his back in falling from a tractor.

Griffey v. Town of Hot Springs

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission filed 27 August 1986. Heard in the Court of Appeals 25 September 1987.

Shuford, Best, Rowe & Brondyke, by James Gary Rowe, for plaintiff appellant.

Morris, Golding, Phillips & Cloninger, by John C. Cloninger, for defendant appellees.

PHILLIPS, Judge.

Plaintiff's appeal is from an Opinion and Award of the North Carolina Industrial Commission denying his claim for benefits under the Workers' Compensation Act. The appeal has no merit and we affirm the Commission's decision. The pertinent facts follow:

On or about 28 December 1983 plaintiff appellant, a police officer employed by the defendant Town, filed a claim for workers' compensation benefits alleging that he was injured in the town on 21 March 1982 while struggling with "a suspect," who he arrested for being drunk and disruptive. His later testimony established that the suspect was Brenda Sue Goforth Ricker. After hearing the evidence in the case Chief Deputy Commissioner McCrodden filed an Opinion and Award dismissing the claim on the ground that it was not filed within two years of the injury by accident, as required by G.S. 97-24. This conclusion was based upon a finding that plaintiff fell and injured his back while attempting to arrest Brenda Ricker in May 1981, rather than in March 1982, as plaintiff claimed. Upon appeal the Full Commission, after receiving additional evidence and adding a finding of fact that "[p]laintiff failed to prove that he sustained any injuries making an arrest in March 1982," adopted and affirmed the Opinion and Award of the Chief Deputy Commissioner.

First, we note that the conclusion of the Chief Deputy Commissioner, adopted by the Full Commission, that plaintiff's claim was not timely filed, is manifestly erroneous. For plaintiff does not claim that he was injured in May 1981, and he disputes the Commission's finding to the contrary; his claim, the claim upon which the case is based and which his testimony tends to support, is that he was injured in March 1982 while arresting Brenda Sue

Goforth Ricker and it was filed well within the authorized two-year period. Even so, this error is harmless. For the Full Commission had the authority to make additional findings of fact, *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976), and the fact found, that plaintiff had failed to prove that he was injured while making an arrest in March 1982, is supported by competent evidence, *Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308 (1963), and thus leaves plaintiff's case without a foundation. A recital of plaintiff's evidence on this point is unnecessary, since the additional fact found is amply supported by Brenda Ricker's testimony that the violent incident plaintiff described never happened and that he later told her he injured his back in falling from a tractor. In not accepting plaintiff's contrary version of the event involved the Commission but exercised its prerogative under the law to determine the credibility and weight of the evidence presented. *Searcy v. Branson*, 253 N.C. 64, 116 S.E. 2d 175 (1960).

Affirmed.

Judges COZORT and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 OCTOBER 1987

DUNN ENTERPRISES v. WELLONS No. 8711SC113	Harnett (85CVS0501)	Affirmed
HANCOCK v. BRAY'S RECAPPING SERVICE No. 8710IC573	Ind. Comm. (546932)	Affirmed
IN RE SIMMONS No. 8725DC339	Catawba (86SPC406)	Affirmed
KATOPODIS v. ANTONUCCI, INC. No. 8726DC407	Mecklenburg (86CVM14898) (86CVD8676)	Affirmed
LONG v. B & W AUTO No. 879DC265	Vance (85CVD765)	Reversed & Remanded
MACK v. O'NEAL No. 8718SC418	Guilford (85CVS5409) (85CVS6403)	Affirmed
MOORE v. FEDERAL PAPER No. 8710IC180	Ind. Comm. (998716)	Reversed
SOUTHERN NATIONAL BANK v. WILLIAMS No. 8716SC44	Robeson (84CVD2093)	Affirmed
STATE v. BARHAM No. 8718SC417	Guilford (85CRS58090) (85CRS58091) (85CRS63020)	No Error
STATE v. BARNES No. 8723SC425	Wilkes (86CRS8214) (86CRS8215)	No Error
STATE v. BROWN No. 8717SC500	Rockingham (86CRS9945) (86CRS10516)	No Error
STATE v. BYNUM No. 8727SC385	Lincoln (85CRS7414)	No Error
STATE v. COLLINS No. 877SC386	Nash (86CRS8315)	No Error
STATE v. COX No. 8719SC409	Randolph (86CRS3856) (86CRS3857)	No Error

STATE v. ENSLEY No. 8730SC448	Swain (86CR74)	No Error
STATE v. GALBRETH No. 8716SC456	Robeson (86CRS16258) (86CRS16259)	No Error
STATE v. GARDNER No. 8725SC513	Catawba (86CRS14977)	No Error
STATE v. HOWELL No. 8730SC484	Haywood (86CRS4200)	No Error
STATE v. HUGHES No. 8715SC471	Alamance (85CRS11634)	No Error
STATE v. JOHNSON No. 8717SC360	Stokes (86CRS129) (86CRS344)	Affirmed
STATE v. LEA No. 8717SC480	Caswell (86CRS1182)	No Error
STATE v. LEE No. 8715SC485	Chatham (86CRS8133)	Reversed
STATE v. SATTERFIELD No. 8715SC373	Alamance (84CRS4956) (84CRS4957)	No Error
STATE v. SPURBECK No. 875SC352	New Hanover (84CRS2730) (84CRS2812) (84CRS2813) (84CRS3038) (84CRS3039)	No Error
STATE v. WALKER No. 8726SC344	Mecklenburg (86CRS6116)	No Error
STATE v. WALLS No. 8717SC399	Rockingham (79CRS9980)	No Error
STATE v. WARDLOW No. 8715SC416	Alamance (86CRS12839)	No Error
STATE v. WARLICK No. 8729SC381	McDowell (86CRS4483)	No Error
STATE v. WASHINGTON No. 8719SC534	Rowan (86CRS13197)	No Error
STATE v. WHITE No. 871SC478	Pasquotank (86CRS3094)	No Error

STATE v. WHITE No. 8710SC324	Wake (83CRS53909)	No Error
STATE v. WILLIAMS No. 877SC440	Edgecombe (86CRS6267)	No Error
STATE v. WOODARD No. 874SC452	Duplin (86CRS4923) (86CRS4927) (86CRS4928) (86CRS5061) (86CRS5062) (86CRS5063)	No Error
STATE v. WOXMAN No. 872SC278	Beaufort (86CRS1740)	Affirmed

UNITED LABORATORIES, INC., A DELAWARE CORPORATION v. WILLIAM DOUGLAS KUYKENDALL, AND SHARE CORPORATION, A WISCONSIN CORPORATION

No. 8628SC1204

(Filed 20 October 1987)

1. **Contracts § 7.1; Master and Servant § 11.1— covenant not to compete—invalidity under Illinois law**

Under Illinois law, a provision for forfeiture of benefits for breach of a covenant not to compete in a 1983 supplementary compensation agreement between a manufacturer of chemical cleaning products and its sales representative was not enforceable because plaintiff manufacturer did not have a legitimate protectable business interest either (1) on the basis of a near-permanent relationship with its customers or (2) on the basis that information about its customer lists obtained by defendant sales representative constituted trade secrets or confidential information where all of the evidence established that plaintiff's customers were generally short-term, impermanent customers whose business was solicited by defendant through his own efforts, plaintiff's customers frequently changed chemical suppliers, and the identity of plaintiff's customers could easily be discovered by reference to telephone directories or industry publications.

2. **Contracts § 7.1; Master and Servant § 11.1— employment contract—covenant not to compete—protection of legitimate business interest**

Before a covenant not to compete in an employment contract can be found reasonably necessary for the protection of a legitimate business interest, it is necessary to find that the employee, as a result of his employment, acquired intimate knowledge of the nature and character of the employer's business which was not otherwise generally available to the public.

3. **Contracts § 7.1; Master and Servant § 11.1— covenant not to compete—failure to protect legitimate business interest**

A covenant not to compete in a 1982 sales representative agreement between plaintiff manufacturer of chemical cleaning products and defendant was not enforceable under North Carolina law because it does not protect a legitimate business interest of plaintiff employer where there was no evidence that defendant received any information about plaintiff's business, other than pricing information, not available to the general public; defendant's knowledge about the buying habits and special needs of plaintiff's customers and the cyclical nature of their orders was acquired through the efforts of defendant; there was no protectable interest in plaintiff's pricing information because this information changed frequently; and there was no evidence that defendant used this information to his advantage.

4. **Contracts § 34— employment terminable at will—hiring not tortious interference with contract**

Where the parties were engaged in the competitive business of selling cleaning chemicals, defendant was not guilty of tortious interference with con-

tract when it hired an employee of plaintiff whose employment contract was terminable at will.

5. **Unfair Competition § 1— unfair trade practices—unenforceable covenants not to compete—demand for new trial**

The trial court erred in entering a directed verdict for plaintiff in an unfair trade practices action against plaintiff's former employee and his present employer on the basis of unenforceable covenants not to compete; however, the cause is remanded for a new trial to determine whether other alleged actions by defendants constituted unfair or deceptive trade practices.

Judge PHILLIPS dissenting.

APPEAL by defendants from *Fountain, Judge.* Judgment entered 25 June 1986 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 5 May 1987.

Petree, Stockton & Robinson, by Jackson N. Steele, and Simon & Welnhofer, by Paul G. Simon, for plaintiff-appellee.

Brock & Drye, by Michael W. Drye, and Fox, Carpenter, O'Neill & Shannon, by Bruce C. O'Neill, for defendant-appellants.

GREENE, Judge.

Plaintiff filed suit seeking injunctive relief requiring defendant Kuykendall to comply with the noncompetition provisions in two agreements and requiring defendant Share Corporation to refrain from interfering with those agreements and using information acquired by the breach of the noncompetition provisions. Plaintiff also requested damages and attorney's fees.

Kuykendall was at one time employed by plaintiff as a sales representative. At the time the complaint was filed, he was a sales representative for defendant Share Corporation, one of plaintiff's competitors in the cleaning chemical business. On 8 January 1986, the trial court entered a preliminary injunction against Kuykendall and "all persons in active concert or participation with him . . . ." Plaintiff's action for a permanent injunction and damages was tried before a jury.

Plaintiff manufactures chemical cleaning products which it retails through sales representatives. Plaintiff's method of selling its products is typical of the cleaning chemical business: each sales representative is given designated territories. Some terri-

tories are exclusive, while others are designated as "open-registered."

During its case, plaintiff offered evidence tending to show that it first employed Kuykendall as a sales representative in 1971. It trained Kuykendall in customer services. In 1979, Kuykendall left plaintiff's employ and began working for a competitor in the same sales territory which he had previously covered for plaintiff. Shortly thereafter, plaintiff rehired Kuykendall as a regional sales manager. In 1982, Kuykendall returned to his former position as one of plaintiff's sales representatives. Plaintiff provided sales literature, samples, supplies and information as to potential customers in Kuykendall's assigned sales territory in western North Carolina. At that time, he and plaintiff entered into a "Sales Representative Agreement" (hereinafter the "1982 agreement"). In 1983, Kuykendall enrolled in plaintiff's profit sharing plan for sales representatives and signed a "Supplementary Compensation Agreement" (hereinafter the "1983 agreement").

The 1982 and the 1983 agreements were admitted into evidence. They both contained noncompetition clauses. The 1982 agreement stated that North Carolina law would apply to its interpretation and enforcement. The 1983 agreement designated Illinois law as controlling. Although entitled "Supplementary Compensation Agreement," the 1983 agreement contained the following provision: "This Agreement contains all of the terms agreed upon by the parties with respect to the subject matter hereof and supersedes all prior agreements, arrangements and communications between the parties dealing with such subject matter, whether oral or written."

Sometime around August 1985, Kuykendall left plaintiff's employ to work for Share Corporation. He then began calling on some of the same customers he had called on when he worked for plaintiff. Plaintiff presented evidence that Share Corporation was aware of the 1982 and 1983 agreements and that Share told Kuykendall it would pay the cost of any lawsuit plaintiff might bring against Kuykendall for breach of the noncompetition provisions. Plaintiff also introduced evidence that, after Kuykendall was employed by Share Corporation, plaintiff's gross sales to the customers Kuykendall had originally serviced decreased by $5,804 per

month. After the close of plaintiff's evidence, defendants made motions for directed verdicts which the trial court denied.

Defendants offered evidence tending to show the cleaning chemical business is very competitive and sales representatives must compete not only with representatives from other companies, but often also with representatives from their own company. Territories in which they must compete with other representatives from their own company are called "open-registered accounts." In an "open-registered" territory, a customer account becomes "registered" to a particular sales representative once that sales representative makes a sale to the customer. No other representative from the "registered" representative's employer may call on that customer until the "registered" sales representative fails to make a sale to that customer for a specified period of time. Plaintiff's period of time was nine months.

Defendants' evidence also tended to show that after his initial employment with plaintiff in 1971, Kuykendall was not provided with any customer information or sales leads. He had to develop his own customers within the territories assigned to him. When he went back into sales in 1982, plaintiff did not provide him with any customer information or accounts. Some of the sales territories Kuykendall received in 1982 were "open-registered" territories.

Defendants also presented evidence that in 1985 Kuykendall began looking for other work because he was dissatisfied with his employment with plaintiff. In February 1985, he saw an advertisement in a local newspaper that Share Corporation was seeking a chemical sales representative. He subsequently interviewed with Share Corporation and agreed to work for the company. Kuykendall testified that had he not gone to work with Share Corporation, he nevertheless would have left plaintiff's employ.

At the end of all the evidence, the trial court ruled that the 1982 agreement was superseded by the 1983 agreement, allowed plaintiff's motions for directed verdict on the issues of whether Kuykendall violated the 1983 agreement, whether Share Corporation had interfered with plaintiff's contractual rights, and whether the defendants' actions constituted unfair and deceptive trade practices in violation of N.C.G.S. Sec. 75-1.1. The trial court denied defendants' motions for directed verdict and submitted the

issues of damages and attorney's fees to the jury. The jury returned a verdict awarding plaintiff $77,477.77 in damages and $47,522.23 in attorney's fees. Plaintiff agreed to a remittitur of the damages. On 21 July 1986, the trial court trebled the damages pursuant to N.C.G.S. Sec. 75-1.16 and entered a judgment and permanent injunction. The court ordered that plaintiff recover from defendants jointly and severally the sum of $116,216.67 for damages and $47,522.23 in attorney's fees. The injunction restrained defendants from violating the provisions of the noncompetition agreement. Defendants appeal.

The issues we must determine are: 1) whether the 1983 agreement is enforceable, 2) whether the 1982 agreement is enforceable, 3) whether it was error for the trial judge to direct a verdict against defendant Share Corporation for interference with the agreements, and 4) whether it was error for the trial court to direct a verdict against defendants for their alleged violation of N.C.G.S. Sec. 75-1.1.

I

[1] The 1983 agreement was executed in Illinois. The parties agreed it would be construed and governed by Illinois law. The courts of this State will give effect to such contractual provisions. *Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E. 2d 655, 656 (1980).

The introductory paragraph to the 1983 agreement stated that:

> The Company, desiring to assure itself of the benefit of Representative's special knowledge and sales ability in the future, including the period after termination of Representative's agreement to solicit orders for the Company's products, has proposed a Supplementary arrangement whereunder benefits will be made available to Representative for a specified period following retirement of Representative.

The agreement provided that Kuykendall would provide consulting services to plaintiff after his retirement and would "hold in a fiduciary capacity . . . all secret or confidential information, customer lists, or other data of the Company not generally known within the Company's trade which has been divulged in confidence to him or otherwise acquired by him during the Representation or during Retirement . . . ." The agreement also provided

that Kuykendall would not, for eighteen months after leaving plaintiff's employ,

> engage in or be connected or concerned in any manner, directly or indirectly, with the operation or conduct within the Territory of any business, other than the Company's, which engages in the manufacture, storage, distribution, sale or other disposition of any product or service which is in competition with any product manufactured, stored, distributed, sold or otherwise disposed of by the Company or any service provided by the Company and he shall not take part in any activity detrimental to the Company's business.

The agreement further stated that should Kuykendall commit an act in violation of the restrictive covenants, "the Company shall not thereafter be obligated to make any distribution of benefits" provided for in the agreement.

Unlike North Carolina, Illinois defines "restraints of trade" to include agreements in which an employee agrees to forfeit particular benefits in the event he engages in competition with his former employer. *Compare Johnson v. Country Life Ins. Co.*, 12 Ill. App. 3d 158, 300 N.E. 2d 11 (1973) *and Parenti v. Wytmar & Co.*, 49 Ill. App. 3d 860, 364 N.E. 2d 909 (1977) *with Hudson v. Insurance Co.*, 23 N.C. App. 501, 209 S.E. 2d 416 (1974), *cert. denied*, 286 N.C. 414, 211 S.E. 2d 217 (1975). Under Illinois law, the 1983 agreement is a covenant in restraint of trade. As such, it is enforceable "only if the time and territorial limitations are reasonable and the restrictions are reasonably necessary to protect a legitimate business interest of the employer." *Reinhardt Printing Co. v. Feld*, 142 Ill. App. 3d 9, 15, 490 N.E. 2d 1302, 1307 (1986).

Defendants contend plaintiff is not entitled to enforce the 1983 "Supplementary Compensation Agreement" because it failed to establish the existence of a legitimate business interest sought to be protected by the agreement. A legitimate business interest arises in two situations under Illinois law:

> (1) [W]here, by the nature of the business, plaintiff has a near-permanent relationship with its customers and but for his or her employment, defendant would not have had contact with them; or (2) where the former employee learned trade secrets

or acquired other confidential information while in plaintiff's employ and subsequently attempted to use it for his or her own benefit.

Reinhardt Printing Co., 142 Ill. App. 3d at 16, 490 N.E. 2d at 1307. Factors that bear on whether a near-permanent relationship exists include "the time, cost and difficulty involved in developing and maintaining the clientele, the parties' intention to remain affiliated for an indefinite period, and the continuity as well as the duration of the relationship." *Id.* (citing *McRand Inc. v. van Beelen*, 138 Ill. App. 3d 1045, 486 N.E. 2d 1306 (1985)).

Plaintiff did not specifically allege in its complaint that its relationships with its customers are near-permanent, though it alleged nearly all the factors which bear on that question. We conclude, however, that plaintiff does not have a legitimate protectable business interest in its customers on the basis of a near-permanent relationship with them. Plaintiff's employee, Eric Frazier, testified that some of its customers would buy from more than one chemical company at the same time. He further stated that, if a sales representative had been unable to make a sale to a customer within nine months of the last sale, the customer was either no longer buying chemical products or was purchasing them from another sales representative. Defendant Kuykendall testified that no customer he sold to while a sales representative for plaintiff bought chemical products exclusively from plaintiff. Evidence from both plaintiff and defendants was that plaintiff's type of chemical business is very competitive and that a sales representative for a company like plaintiff acquires knowledge of potential customers by consulting readily available sources such as telephone directories. In addition, while plaintiff alleged it expended substantial amounts of time and money in "developing customers" and in training sales representatives to aid in that development, the evidence does not support its allegations even when viewed in the light most favorable to it. We find all the evidence establishes that plaintiff's customers are generally short-term, impermanent customers whose business was solicited by defendant Kuykendall through his own efforts on plaintiff's behalf.

Having so found, we must next inquire whether plaintiff had a legitimate business interest in trade secrets or confidential in-

formation. A trade secret is "a plan or process, tool, mechanism, compound, or informational data utilized by a person in [an employer's] business operations and known only to him and such limited other persons to whom it may be necessary to confide it and . . . must relate to something held in secret or confidence and to the operations of a particular trade or business." *Reinhardt Printing Co.*, 142 Ill. App. 3d at 17, 490 N.E. 2d at 1308 (citations omitted).

Plaintiff alleges it supplied Kuykendall with customer lists and information concerning customer needs and that these were valuable trade secrets. Kuykendall testified that when he was first hired by plaintiff in 1971, he was shown how to identify potential customers by looking in the yellow pages of the telephone directory. After two weeks of training to familiarize him with plaintiff's products and ordering procedure, he developed customers in his territories. Other than the testimony that plaintiff had given defendant copies of plaintiff's customer invoices in 1971, plaintiff presented no evidence that it had ever developed or maintained a customer list. It did not submit any customer list into evidence; even if it had, such information does not qualify as a trade secret or confidential information since the list could easily be duplicated by reference to telephone directories or industry publications. Further, where the customers on such a list do business with more than one company or otherwise frequently change businesses, the customers' identities are readily available to the employer's competitors. *Reinhardt Printing Co.*, 142 Ill. App. 3d at 19, 490 N.E. 2d at 1308-09.

The uncontradicted evidence is that plaintiff's customers frequently changed chemical suppliers and that their identity could easily be discovered by reference to telephone directories. Therefore, any customer list of plaintiff's could be easily duplicated. Thus, defendant has shown that plaintiff does not have a legitimate business interest in a customer list or trade secret to which he was privy.

Even when viewed in the light most favorable to plaintiff, the evidence shows that plaintiff did not have permanent relationships with its clients, and did not share trade secrets or other confidential information with Kuykendall. The 1983 benefits agreement therefore attempts to protect interests of plaintiff

which are not legitimate protectable business interests. Therefore, it is unenforceable against Kuykendall and the trial court erred in entering a directed verdict for plaintiff on the issue. The trial court should have entered directed verdict for defendant Kuykendall. Having made this determination, we need not address defendant's alternative contention that the time and territory limitations of the 1983 agreement are unreasonable.

II

The time and territory restrictions in the 1982 agreement between plaintiff and Kuykendall were not as restrictive as those in the 1983 agreement. At the close of all the evidence, the trial court ruled that the 1982 "Sales Representative Agreement" was superseded by the 1983 "Supplementary Compensation Agreement." Plaintiff cross-assigns error to this ruling and argues that if the noncompetition clause of the 1983 agreement is unenforceable, those in the 1982 agreement are nonetheless valid and enforceable. Plaintiff argues the 1983 agreement did not supplant the 1982 agreement but merely supplemented it and that the provisions of the 1982 agreement are not made invalid by the invalidity of the provisions of the 1983 agreement.

"A new contract consistent with, or supplementary to, a prior contract does not discharge the prior contract." *Turner v. Turner*, 242 N.C. 533, 539, 89 S.E. 2d 245, 249 (1955). The "subject matter" of the 1983 "Supplementary Compensation Agreement" by its very title deals with defendant's supplementary compensation upon his retirement. The 1982 "Sales Representative Agreement," on the other hand, concerns defendant's compensation during his employment. Since the two agreements concern different subject matter, we find the 1983 agreement supplementary to the 1982 agreement and therefore the 1982 agreement was not discharged by the later contract. However, we find that, even standing alone, the noncompetition provisions of the 1982 agreement are invalid because they do not protect a legitimate business interest.

The 1982 agreement designates North Carolina law as controlling its interpretation and enforceability. As noted above in I, North Carolina distinguishes between agreements which provide for forfeiture of benefits by an employee for breach of noncompetition promises and employment agreements containing a

covenant not to compete. Under North Carolina law, the latter is an agreement in restraint of trade, the former is not. *Hudson v. Insurance Co.*, 23 N.C. App. 501, 209 S.E. 2d 416 (1974), *cert. denied*, 286 N.C. 414, 211 S.E. 2d 217 (1975). Unlike the 1983 agreement, the violation of the noncompetition provisions in the 1982 agreement were not tied to the forfeiture of some benefit. Therefore, under North Carolina law, the 1982 agreement is an agreement in restraint of trade.

In North Carolina, agreements between employers and employees which restrain trade are valid and enforceable if they are: 1) in writing, 2) made a part of the employment contract, 3) based on valuable consideration, 4) designed to protect the legitimate interests of the employer and 5) reasonable in respect to both time and territory. *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 541, 320 S.E. 2d 693, 696, *disc. rev. denied*, 312 N.C. 495, 322 S.E. 2d 558 (1984). The question of whether an agreement meets these criteria is a matter of law for the court to decide. *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 663, 158 S.E. 2d 840, 843 (1968). Covenants not to compete ancillary to employment contracts are subjected to a more stringent test of reasonableness than the test applied to restrictive covenants ancillary to the sale of a business. *Id.*

The elements for an enforceable employment agreement in restraint of trade are frequently quoted in conjunction with those elements required for an enforceable covenant having to do with the sale of a business. However, few North Carolina opinions have focused on the fourth element: "legitimate interests of the employer." Several cases prior to 1985 separate the element and refer to it as requiring "fairness to the parties" and "not against public policy." *Exterminating Co. v. Griffin*, 258 N.C. 179, 181, 128 S.E. 2d 139, 140-41 (1962); *Starkings Court Reporting Serv. Inc. v. Collins*, 67 N.C. App. 540, 541, 313 S.E. 2d 614, 615 (1984); *Sales & Serv. v. Williams*, 22 N.C. App. 410, 413, 206 S.E. 2d 745, 747 (1974). Our review of several long-standing cases leads us to the conclusion that in North Carolina a legitimate business interest is a business interest, not fictitious, which, when weighed against the public's interest in a free economic arena, is worthy of protection in order to encourage and stimulate business efforts and innovations. *See Welcome Wagon International, Inc. v. Pender*, 255 N.C. 244, 120 S.E. 2d 739 (1961); *Kadis v. Britt*, 224 N.C. 154,

158-64, 29 S.E. 2d 543, 546-49 (1944); *Beam v. Rutledge*, 217 N.C. 670, 672-73, 9 S.E. 2d 476, 477-78 (1940).

[2] Plaintiff contends it sought to protect its legitimate business interests by entering into the 1982 agreement. It contends that under North Carolina law it had a legitimate business interest in trade secrets and confidential information as well as in its customer relationships. The determination of whether an alleged business interest is a legitimate one must be accomplished on a case by case basis with attention to the particular facts and circumstances of each case. *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 663, 158 S.E. 2d 840, 843 (1968). Before a covenant can be found reasonably necessary for the protection of a legitimate business interest, we hold that it is first necessary to find the employee, as a result of his employment, acquired intimate knowledge of the nature and character of the business which was not otherwise generally available to the public. *See A.E.P. Indus. v. McClure*, 308 N.C. 393, 302 S.E. 2d 754 (1983) (the names and addresses of the employer's customers were not generally known in the trade and were confidential—covenant held valid); *Harwell Enter., Inc. v. Heim*, 276 N.C. 475, 173 S.E. 2d 316 (1970) (employee acquired knowledge of valuable trade and technical processes, customer lists, price information, and research and development information—covenant held valid); *Exterminating Co. v. Griffin*, 258 N.C. 179, 128 S.E. 2d 139 (1962) (employee acquired not only a list of plaintiff employer's customers, but also confidential information as to the employer's secret methods and processes—covenant held valid); *Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543 (1944) (no evidence that retail clothing salesman used confidential information from old job in his new employment—covenant held invalid); *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 155 S.E. 154 (1930) (employee was manager and obtained intimate knowledge of business—covenant held valid); *Keith v. Day*, 81 N.C. App. 185, 343 S.E. 2d 562, *disc. rev. allowed*, 318 N.C. 416, 349 S.E. 2d 596 (1986), *rev. dismissed as improvidently allowed*, 320 N.C. 629, 359 S.E. 2d 466 (1987) (defendant gained knowledge of hardware store's business and inner workings, including general business practices—covenant held valid); *Manpower of Guilford County, Inc. v. Hedgecock*, 42 N.C. App. 515, 257 S.E. 2d 109 (1979) (employee was manager and gained knowledge of employer's customers, specialized business techniques and ac-

quired intimate knowledge of the employer's business—covenant held invalid because it exceeded reasonable territorial limitations).

[3] In this case, the type of business in which the plaintiff was engaged, chemical sales, is a highly competitive business. Many companies sell the same or similar type products and customers are matters of common knowledge and can easily be ascertained from public documents. The customer base was essentially developed by Kuykendall. While it is true the plaintiff trained Kuykendall as a sales representative, the training was aimed at developing the employee's skills in creating and maintaining customer relationships. There is no evidence that Kuykendall received any information about plaintiff's business, other than pricing information, that was not generally available to the public. Kuykendall's knowledge about the buying habits of the customers, the cyclical nature of their ordering, and the special needs of the customers, were all pieces of information acquired through the efforts of Kuykendall, not plaintiff.

In summary, those customers plaintiff seeks to enjoin Kuykendall from contacting were solicited by Kuykendall not because of his association with plaintiff, but rather through his own efforts on plaintiff's behalf. Furthermore, even if we make the questionable assumption that plaintiff's pricing information is confidential, there is still no protectable interest because this information changes frequently. Additionally, there is no evidence that Kuykendall used this information to his advantage.

Construing the evidence in the light most favorable to plaintiff, we conclude Kuykendall acquired no intimate knowledge as to the nature and character of plaintiff's business which was not otherwise generally available to the public at large. "All that clearly appears is that he [the employee] undertook to use in his new employment the knowledge he had acquired in the old. This . . . is not unlawful, for equity has no power to compel a man who changes employers to wipe clean the slate of his memory." *Kadis v. Britt*, 224 N.C. 154, 162, 29 S.E. 2d 543, 547-48 (1944) (quoting *Peerless Pattern Co. v. Pictorial Review Co.*, 147 N.Y. App. Div. 715, 717 (1911)). We therefore find that the 1982 agreement was not reasonably necessary to protect any legitimate interest of plaintiff and is therefore unenforceable. The trial court conse-

quently erred in denying defendant's motion for a directed verdict as to the 1982 agreement.

III

[4] Defendant Share Corporation also contends the trial court erred in directing a verdict against it on the issue of its interference with the contract. We agree. An action in tort for interference with contract lies against an outsider who "knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party." *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E. 2d 176, 181 (1954), *reh'g denied*, 242 N.C. 123, 86 S.E. 2d 916 (1955). The tort of interference with contract has five elements: 1) a valid contract between the plaintiff and a third person which confers upon the plaintiff some contractual right against the third person, 2) the defendant knows of the contract, 3) intentionally induces the third person not to perform the contract, 4) and in so doing acts without justification, 5) resulting in actual damages to plaintiff. *Childress*, 240 N.C. at 674, 84 S.E. 2d at 181-82.

Since the noncompetition provisions in both the 1982 agreement and the 1983 agreement are unenforceable, interference with these provisions cannot be the basis of plaintiff's claim. However, with the restrictive covenants removed, there still remained a valid contract between Kuykendall and United, although it was one terminable at will by either party. Our Supreme Court has held that a party to a terminable at will employment contract may sue a third person who intentionally induces another party to the contract not to perform. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976) (terminable at will employment contract of plaintiff manager of auto dealership did not give defendant manufacturer the right to exert economic pressure upon dealership to terminate employment contract if actions in doing so not reasonably related to legitimate business interest of manufacturer). However, this Court has recently declined to extend the cause of action in the "context of a competitive business setting wherein a competitor recruited the competition's employees whose contracts were terminable at will." *Peoples Security Life Ins. Co. v. Hooks*, 86 N.C. App. 354, 356, 357 S.E. 2d 411, 413 (1987). *See also Childress*, 240 N.C. at 676, 84 S.E. 2d at 183 (dictum) (indicating that if plaintiff was in competition with defendants, defendants

were justified in interfering with contract terminable at will). On a first reading, the *Peoples Security* holding may seem to conflict with an earlier case from this Court which held that a competitor is not privileged to interfere wrongfully with contractual rights. *Overall Corp. v. Linen Supply, Inc.*, 8 N.C. App. 528, 174 S.E. 2d 659 (1970). After a study of the record in *Overall*, however, it is apparent that the contracts in that case were for fixed terms and therefore any interference with them was an interference with future performances to which the plaintiff was legally entitled. Like *Peoples Security*, our case concerns a contract terminable at will of which the plaintiff has no legal assurance, but merely an expectancy. As well, the parties here were engaged in the competitive business of selling cleaning chemicals. Therefore, Share's actions did not constitute a tortious interference with contract. In so deciding, we do not address the case where a terminable at will employment contract contains valid noncompetition provisions. *Cf.* Restatement (Second) of Torts Sec. 768 comment i (1979) (employment contract may be only partially terminable at will so that competitor might induce employee to quit job but would not be justified in hiring employee to work for him in activity that violates the noncompetition agreement). The tortious interference with contract action is remanded for entry of directed verdict for Share against United.

IV

[5] The remaining issue is whether Share's and Kuykendall's actions constituted unfair or deceptive trade practices under N.C.G.S. Sec. 75-1.1 which entitled plaintiff to treble damages and attorney's fees. The record reveals that the trial court relied on the stricken noncompetition provisions of the agreements to determine that the actions of Share and Kuykendall were unfair. That holding was in error. However, the complaint alleged actions in addition to the noncompetition provisions as bases for unfair or deceptive trade practices. From the record before us, we cannot determine whether the plaintiff's evidence was sufficient to make out a case under Section 75-1.1. In any event, it is a jury question as to whether the alleged acts were committed by defendants; it is a question of law for the trial court as to whether the facts proved constitute a violation of Section 75-1.1. *See Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). Therefore, we remand the case for a new trial on the unfair or deceptive trade practice

claim with the trial court submitting factual issues to the jury where appropriate.

V

The parties assigned other errors which, because of our holdings above, we need not address. The trial court's entry of directed verdict in favor of plaintiff as to the 1983 agreement is reversed and remanded with directions that the trial court enter directed verdict in favor of defendant Kuykendall. The trial court's denial of defendant Kuykendall's motion for directed verdict as to the 1982 agreement is reversed and remanded for entry of directed verdict for defendant Kuykendall. The trial court's entry of directed verdict for plaintiff against defendant Share concerning the interference with contract claim is reversed and remanded for entry of directed verdict in favor of defendant Share. The trial court's entry of directed verdict for plaintiff with respect to the alleged Section 75-1.1 violations of Kuykendall and Share is reversed and remanded for a new trial to determine whether defendants' acts constituted unfair or deceptive trade practices.

Reversed and remanded.

Judge COZORT concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion (1) except for the finding that the 1983 contract superseded the 1982 agreement, the trial court's several findings and rulings were correct; (2) the 1983 contract supplemented the 1982 agreement; (3) the provisions of each contract are legally enforceable; (4) the verdict against the defendants is correct; and (5) the judgment appealed from should be affirmed.

STATE OF NORTH CAROLINA v. DANNY ALEXANDER WHITE

No. 8726SC156

(Filed 20 October 1987)

1. **Searches and Seizures § 23— application for warrant—probable cause**

In a prosecution for felonious possession of stolen property, there was a substantial basis for the magistrate's finding of probable cause for a search of defendant's residence where the application and supporting affidavits plainly described and implicated the premises to be searched, the property believed to be located on the premises, and the relationship of that property to a crime; the information supplied by the informant and set forth in the affidavit established that the informant had firsthand knowledge that property stolen from residences in the South Mecklenburg High School area was being stored by defendant at defendant's residence; defendant was using the property for his own use and had been in possession of the stolen property for approximately one and one-half months; eleven days before the application for a search warrant was made, defendant's vehicle was found in the parking lot at South Mecklenburg High School containing stolen property; and the informant had implicated himself as being involved in the various house breakings and larcenies.

2. **Searches and Seizures § 40— possession of stolen property—items not on warrant—illegally seized**

The trial court erred in a prosecution for possession of stolen property by admitting stolen property found in defendant's residence but not listed on the search warrant where the evidence clearly indicated that the officers' discovery of the items listed in the incident reports but not on the warrant was not inadvertent. N.C.G.S. § 15A-253.

3. **Receiving Stolen Goods § 1— possession of stolen property—possession begun on different dates—different counts**

The trial court did not err in a prosecution for possession of stolen property by not reversing judgment on seven of the eight cases in which defendant was found guilty where defendant was found to be in simultaneous possession of various items of stolen property but the State's evidence showed that each residence was burglarized on a separate date and that defendant remained in possession of the property until it was seized by officers. Defendant's possession of the property began on the various dates he stole the property, thus constituting separate offenses.

4. **Receiving Stolen Goods § 5.1— possession of stolen property—evidence sufficient**

The trial court properly denied defendant's motion to dismiss charges of possession of stolen property where an accomplice testified that he and defendant stole the property, the stolen property was recovered from defendant's residence, and defendant testified that he took possession of the property when he should have known that it was stolen.

5. Criminal Law § 92.4— possession of stolen property—joinder of offenses—proper

The trial court did not err in a prosecution for possession of stolen property by granting the State's motion for joinder of the charges for trial where there was a clear transactional connection between the offenses as well as a discernible common scheme or plan. N.C.G.S. § 15A-926.

APPEAL by defendant from *Ferrell, Judge.* Judgments entered 18 September 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 September 1987.

Defendant was indicted and tried in Mecklenburg County on eleven counts of felonious possession of stolen property. Two of the charges were dismissed at the close of the State's evidence. On the remaining charges, the jury returned verdicts of guilty to two counts of misdemeanor possession of stolen property (86CRS 4863 and 4888); verdicts of guilty to six counts of felonious possession of stolen property (86CRS4902, 4916, 4924, 53468, 53472, 53473); and a verdict of not guilty in 86CRS4935. From judgments imposing active sentences, defendant appeals.

Attorney General Lacy Thornburg, by Assistant Attorney General John F. Maddrey, for the State.

Grant Smithson, for defendant.

JOHNSON, Judge.

I

Prior to jury selection the State's motion to join all charges for trial was allowed over defendant's objection. Defendant's motion to suppress as evidence those items seized by law enforcement officers from defendant's residence was denied.

For purposes of this opinion the evidence may be summarized as follows. Additional evidence is set forth with respect to the various issues.

The State's evidence tends to show the following. In case 86 CRS4863 Jeffrey C. Collins testified that on 23 December 1985, his residence at 3378 Heathstead Place, Mecklenburg County was broken into and two large televisions, one portable television, two VCR's, videotapes, several brass items and clothes were stolen.

In case 86CRS53473 Evelyn Grain testified that on 16 October 1985, her residence on 2400 Haverty Road, Mecklenburg County was broken into and one Mitsubishi television, one Sony television, two jewelry boxes, wrestling medals, one alarm clock, a wedding ring and other jewelry were stolen.

In case 86CRS4935 James McSwain testified that his residence at 9419 South Vicksburg Court, Mecklenburg County was broken into on 1 December 1985, and a Seiko travel alarm clock, a diamond ring, two pistols, a 35mm camera and lenses were stolen.

In case 86CRS53468 Carl S. Sawyer, Jr. testified that on 30 October 1985, his residence at 441 Westbury Road, Mecklenburg County was broken into and two 19" portable televisions, a video cassette recorder, tapes, an alarm clock, a camera and jewelry were stolen.

In case 86CRS4902 Christine Alterio testified that on 2 January 1986, her residence at 9328 South Vicksburg Park Court, Mecklenburg County was broken into and a stereo, a 19" television, money, certificates, coins and jewelry were stolen.

In case 86CRS53472 James D. Hoagland testified that on 13 December 1985, his residence at 10912 Carmel Crossing Road, Mecklenburg County was broken into and a microwave oven, a television, golf clubs, coins, and a stereo system with two speakers and headphones were stolen.

In case 86CRS4916 Larry Lindberg testified that on 28 November 1985, his residence at 9920-D Plum Creek Lane, Mecklenburg County was broken into and a large screen television, one VCR, a microwave oven, a pistol, jewelry, silverware, a radio and a JVC 65 watt stereo system were stolen.

In case 86CRS4888 Billy Posey testified that on 4 January 1986, his residence at 2717 New Hamlin Way, Mecklenburg County was broken into and a rifle, a video cassette recorder, a television and jewelry were stolen.

On 4 January 1986, Officers I. L. Pryor, K. W. Grier and G. A. Blackburn of the Mecklenburg County Police Department observed a 1970 lime green Ford station wagon parked in the parking lot at South Mecklenburg High School. The vehicle had a paper license tag with the number ATL-2708. The vehicle con-

tained a cable converter, a rifle and an assortment of other items. Billy Posey who was also in the parking lot at the time identified some of the items as property stolen from his residence.

A check of the license tag number led to Elzy Eugene Neely who testified that in 1985 he owned a 1970 beige Ford station wagon with a license tag number ATL-2708 and that he sold the vehicle to defendant.

On 15 January 1986 Officer D. A. Bailey secured a search warrant for defendant's residence at 512 West Worthington Avenue, Charlotte, North Carolina. Officer Bailey executed the search warrant on 16 January 1986. The only item listed on the search warrant which was found and seized in the defendant's residence was the JVC stereo component set.

In case 86CRS4916 Larry Lindberg testified that the JVC stereo component set seized from defendant's residence was the unit stolen from Lindberg's residence 28 November 1985. In cases 86CRS4863, 4888, 4902, 4924, 53468, 53472, and 53473, several other items of property seized from defendant's residence were identified by the witnesses as property stolen from their respective residences. Andre Mobley also identified the JVC stereo component set and the other items of property as property he and the defendant stole from the various residences and carried to defendant's residence.

Defendant testified in his own behalf and denied breaking into any place or stealing property. Defendant testified that the property was taken to his residence by his nephew Andre Mobley and two other persons; that he accepted the property in pawn; that he should have known the property might have been stolen but that he never inquired. Defendant also testified that he did not know how his 1970 Ford station wagon came to be parked at South Mecklenburg High School; that he thought his car was at a garage for repairs. Defendant further testified that Andre Mobley had keys to the Ford station wagon as well as to defendant's residence.

Defendant's motion to dismiss the nine charges at the close of the evidence was denied.

II

Defendant first argues that the trial court erred in denying his pretrial motion to suppress as evidence items seized by law enforcement officers at his residence because (1) no probable cause existed for the issuance of the search warrant by which defendant's residence was searched; (2) the law enforcement officers' conduct did not satisfy the good faith reliance standard established by the United States Supreme Court; and (3) defendant argues, that even if the search warrant was valid, the seizure of items of stolen property not listed in the warrant was improper and should have been suppressed.

A

PROBABLE CAUSE

[1] Defendant contends that under both the Fourth and Fourteenth Amendments to the Federal Constitution and the Constitution of North Carolina the information contained in the affidavit was insufficient to create probable cause for the issuance of the search warrant.

The affidavit for the search warrant set forth the following pertinent information:

APPLICATION FOR SEARCH WARRANT

I, Quintin McMurray, Patrolman Mecklenburg County Police Department, being duly sworn, request that the court issue a warrant to search the place described in this application and to find and seize the property described in this application. There is probable cause to believe that (see Attachment No. 1 for described property to be seized) constitutes evidence of a crime and the identity of a person participating in a crime, breaking, entering and larceny—G.S. 14-52, 72, and is located in the following premises 512 West Worthington Avenue, a white wood frame dwelling duplex with the number 512 in black letters painted on side wall.

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: See Attachment No. 2.

s/D.A. Bailey, Jr. 207
Signature of Applicant

(Sworn and subscribed to before me)
Date
Signature

In addition to the affidavit included above this application is supported by additional affidavits attached, made by D.A. Bailey and Q. McMurray (MCPD). In addition to the affidavit included above, this application is supported by sworn testimony, given by D.A. Bailey, Jr. This testimony has been reduced to writing.

Attachment No. 1 set forth the following:

The confidential informant has first hand knowledge that the occupant at 512 West Worthington Avenue (Danny Alexander White), that said suspect White has removed serial number identification from various property including stereos and VCR's [sic] that have been reported stolen in the South Mecklenburg High School area. The confidential informant states that suspect White has been in possession of said stolen property for approximately one and a half months which is consistent with the time period these breaking and enterings occurred.

The property to be searched for consists of:

1. One Smith and Wesson .357 Magnum pistol, Blue Steel, 6".

2. One Harrington and Richardson .38 caliber revolver, spray painted black—victim: James Doreas McSwain, Jr., case number: 85-12-01-2353-96M.

3. One JVC stereo component set.

4. One men's black Gucci watch—victim: Larry Douglas Lindberg, case number: 85-11-28-0703-79M.

Information concerning the above property was obtained from a confidential informant who has implicated himself as being involved in these, and other breaking and enterings in the area. Information supplied by the confidential informant has been verified and is known to be true.

s/C.M. Wolf	s/D.A. Bailey, Jr. MCPD207
Magistrate	Applicant
1-15-86	15 Jan. 86

Attachment No. 2 set forth the following:

> Information has been received from a confidential source who knows that stolen property taken as a result of B. and E.'s [sic] near South Mecklenburg High School, off Park Road is being stored at the residence of Danny Alexander White, AKA "Danny Boy." The confidential source's information has been checked and found to be reliable. The confidential source has seen the property described in this search warrant in the residence of Danny Alexander White, and also knows that Danny Alexander White is using the stolen property for his (Danny A. White) own use. A 1970 Ford station-wagon, VIN: 0A40F206631 was found in the parking lot of South Mecklenburg High School on January 4, 1986 which belongs to Danny A. White that contain [sic] stolen property consisting of one RCA VCR, an Emerson T.V., and a Japanese rifle, serial number: 877946. The stolen property is listed under case number 86-01-04-2110-19M.
>
> s/C.M. Wolf — s/D.A. Bailey MCPD 207
> Magistrate — Applicant
> 1-15-86 — 1-15-86

In order to validate the warrant issued, probable cause must be established in the affidavit upon which the warrant rests. *Dumbra v. United States*, 268 U.S. 435, 45 S.Ct. 546, 69 L.Ed. 1032 (1925); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972).

> Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender.

Campbell, at 128-29, 191 S.E. 2d at 755 (citing *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971)).

Our Supreme Court has adopted the "totality of the circumstances" test enunciated in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), for determining whether probable cause exists for the issuance of a search warrant. *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984).

Under the totality of circumstances test,

> [t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Gates, supra, 462 U.S. at 238-39, 103 S.Ct. at 2332, 76 L.Ed. 2d at 548.

Under the totality of circumstances test to be applied, we find there to be a substantial basis for the magistrate's finding of probable cause in the case *sub judice*. The application and supporting affidavits plainly described and implicated the premises to be searched, the property believed to be located on the premises, and the relationship of that property to a crime. The information supplied by the informant and set forth in the affidavit establishes that the informant had firsthand knowledge that property stolen from residences in the South Mecklenburg High School area was being stored by defendant at defendant's residence; that defendant is using the property for his own use and has been in possession of the stolen property for approximately one and one-half months. The affidavit also contained information that eleven days before the application for a search warrant was made, defendant's vehicle was found in the parking lot at South Mecklenburg High School containing stolen property consisting of a VCR, T.V. and rifle. Additionally, the applicant states that the informant has implicated himself as being involved in the various house breakings and larcenies.

We believe that the above information set out in the application when considered as a whole, creates a strong inference that the defendant possessed and was continuing to possess stolen property which would be searched for at the residence described in the application.

The reliability of the informant's information is enhanced by the fact that the informant has implicated himself in the various

house breakings and larcenies. In *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1971), the Court held that

> [A]dmissions of crime, like admissions against [one's own] proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search.

Id. at 583, 91 S.Ct. at 2082, 29 L.Ed. 2d at 734.

We hold that the information supplied by the informant and set forth in the application is sufficient to supply a reasonable ground to believe that the proposed search would reveal the presence of the stolen property (described in the application) upon the implicated premises. The trial court properly upheld the magistrate's finding of probable cause to issue the search warrant.

B

GOOD FAITH RELIANCE

Next, defendant argues that the law enforcement officers' conduct did not satisfy the "good faith" reliance standard established by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984) and later adopted by our Supreme Court in *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789 (1986).

Having held that the trial court properly upheld the magistrate's finding of probable cause to issue the search warrant, it is not necessary for us to consider whether the officers conducting the search "acted in objectively reasonable reliance on the warrant so as to require the application of the good faith exception to the exclusionary rule . . ." *Arrington*, at 642, 319 S.E. 2d at 260.

C

SCOPE OF THE SEARCH

[2] Defendant also contends that the scope of the search warrant was exceeded in that items were seized which were not specified in the warrant.

The property described in the warrant for which defendant's residence would be searched included in its entirety:

(1) One Smith and Wesson .357 Magnum pistol, Blue Steel, 6".

(2) One Harrington and Richardson .38 caliber revolver, spray painted black—victim: James Doreas McSwain, Jr., case number: 85-12-01-2353-96M.

(3) One JVC stereo component set.

(4) One mens' black Gucci watch—victim: Larry Douglas Lindberg, case number: 85-11-28-0703-79M.

The State argues that the law enforcement officers, being lawfully present at defendant's residence pursuant to the magistrate's search warrant, were entitled to search for the items specified in the warrant and, in the course of that search, seize any other items in "plain view" which were evidence of crime.

To prevent law enforcement officials from engaging in general searches, the fourth amendment to the United States Constitution requires that the warrant particularly describe the items to be searched for and seized. *See Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927). N.C.G.S. Sec. 15A-253 provides in part that "[t]he scope of the search may be only such as is authorized by the warrant and is reasonably necessary to discover the items specified therein. . . . If in the course of the search the officer *inadvertently* discovers items not specified in the warrant which are [instrumentalities, fruits, or evidence of crime] . . ., he may also take possession of the items so discovered." (Emphasis added.) This exception to the fourth amendment's warrant requirement is commonly known as the "plain view" doctrine. In addressing the "plain view" exception, the United States Supreme Court held in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564, *reh'g denied*, 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed. 2d 120 (1971), that law enforcement officers may seize without a warrant the instrumentalities, fruits, or evidence of crime which is in "plain view" if three requirements are met: *First*, the initial intrusion which brings the evidence into plain view must be lawful. *Second*, the discovery of the incriminating evidence must be inadvertent. *Third*, it must be immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are otherwise subject to seizure. *Id.* at 465-69, 91 S.Ct. at 2037-40, 29 L.Ed. 2d at 582-85. If all three requirements are not met, the seizure cannot

stand constitutional scrutiny. *Coolidge, supra.* Our Supreme Court applied the three requirements in deciding *State v. Williams*, 315 N.C. 310, 338 S.E. 2d 75 (1986).

The first requirement of the "plain view" doctrine regarding the initial intrusion is met, where in the course of a search pursuant to a warrant authorizing a search for specific items, the police officer discovers other evidence. *Williams*, at 318, 338 S.E. 2d at 80, *citing Coolidge*. The second requirement, that the discovery of the evidence be inadvertent, is met when it is not anticipated that the evidence will be found. The police officer must be without probable cause to believe that the evidence would be discovered. There must be no intent on the part of the police officer to search for and seize the contested items not named in the warrant. *Id.* at 319, 338 S.E. 2d at 81, *citing Coolidge*. The third requirement of "immediately apparent" is met where the police officer has probable cause to associate the property with criminal activity. *Id.* at 319, 338 S.E. 2d at 81, *citing Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed. 2d 502 (1983).

In the case *sub judice*, the first requirement is met; the initial intrusion was lawful as the police officers were conducting a search pursuant to a valid warrant. The third requirement is also met. Officer Bailey and another officer executing the search warrant testified that the other property was seized only after they determined that the items suspected to be stolen property matched specific items listed on incident reports filed by victims of various house breakings and larcenies.

It is because of the second requirement, that the discovery by inadvertent, that the seizure of the stolen property from defendant's residence, other than the JVC stereo component set, cannot withstand constitutional scrutiny.

On *voir dire* examination Officer Bailey testified that the informant advised him that he and the defendant had broken into several houses in the South Mecklenburg High School area and stolen property therefrom. The informant identified the various homes broken into and described various items of property he and defendant had stolen. He also informed Officer Bailey that the stolen property was stored at defendant's residence and was being used by defendant. Officer Bailey testified at trial that when he went to execute the warrant on 16 January 1986, the of-

ficers carried with them some fifteen Mecklenburg County Police incident reports of reported house breakings and larcenies. The reports were taken for the specific purpose of comparing property listed in the reports with property in defendant's residence. The only item of property seized from defendant's residence listed in the search warrant was item number (3), the JVC stereo component set.

Other items of stolen property seized from defendant's residence matched property listed in the incident reports. These items of stolen property seized from defendant's residence comprised some three pages of inventoried property and were used at trial to prove the State's case in 86CRS4863, 86CRS53473, 86CRS 4935, 86CRS53468, 86CRS4902, 86CRS53472, and 86CRS4888.

The evidence clearly demonstrates that the officers' discovery of the items of stolen property listed in the incident reports was not inadvertent. The officers believed that the stolen property listed on the incident reports would be discovered at defendant's residence. They had more than a mere suspicion that discovery would occur. The officers carried the incident reports with them for the specific purpose of searching for and seizing items found in defendant's residence that comported with items listed in the reports.

For the foregoing reasons, we conclude that the stolen property seized from defendant's residence and not listed in the search warrant was illegally seized and the trial court erred in not suppressing it.

III

[3] By his next Assignment of Error, defendant contends that the trial court committed reversible error by not arresting judgment in seven of the eight cases in which he was found guilty. Defendant argues that at most, he committed one criminal offense of possession because he was discovered to be in simultaneous possession of the various items of stolen property belonging to several different persons. Additionally, defendant contends that he had ineffective assistance of counsel because his trial attorney failed to move for arrest of judgment. We disagree as to both contentions.

Unlike the crime of receiving stolen goods where a *single* act of receiving stolen property is punishable as one crime, possession of stolen property is a continuing offense, beginning at the time of receipt, and ending at the time of divestment. *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981); *State v. Andrews*, 52 N.C. App. 26, 277 S.E. 2d 857 (1981), *aff'd*, 306 N.C. 144, 291 S.E. 2d 581, *cert. denied*, 459 U.S. 946, 103 S.Ct. 263, 74 L.Ed. 2d 205 (1982).

The State's evidence showed that of the charges submitted to the jury, each residence was burglarized on a separate date over a three month period of time; that defendant and Andre Mobley were the individuals who broke into these residences and stole the property. The evidence further showed that defendant remained in possession of the property until 16 January 1986 when the officers seized the property from his residence; defendant's possession of the property, under the facts of the case, began on the various dates defendant and Mobley stole the property, thus constituting separate offenses of possessing stolen property. *Accord, State v. White*, 82 N.C. App. 358, 346 S.E. 2d 243 (1986) (where this Court upheld defendant's convictions on five separate counts of possession of stolen property arising from the seizure of such property pursuant to a single search of defendant's automobile). We find no merit to the Assignment of Error. Accordingly, defendant's contention of ineffective assistance of counsel based upon the same Assignment of Error is also overruled.

IV

[4] Defendant contends the trial court erred in denying his motion to dismiss all charges at the close of the State's evidence. We disagree.

It is well settled that when a defendant moves for dismissal in a criminal case, the trial judge must consider the evidence in the light most favorable to the State, take the evidence as true, and give the State the benefit of every reasonable inference to be drawn from the evidence. If there is evidence from which the jury could find that the offense charged had been committed and that defendant committed it, the motion to dismiss is properly denied. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

The evidence in the instant case was sufficient to support defendant's convictions. Andre Mobley testified that he and defend-

ant stole the property and the stolen property was recovered from defendant's residence. Although defendant denied participating in any break-ins, defendant testified that he took possession of the property when he should have known that the property was stolen. We find no merit to this Assignment of Error.

V

[5] By his final Assignment of Error, defendant contends the court erred in granting the State's motion for joinder of the charges for trial.

N.C.G.S. 15A-926 allows for the joinder of two or more offenses

> when the offenses, . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

When defendant objects to joinder or moves to sever, the trial court must then determine whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial. *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981). The trial judge's decision to allow a joinder of offenses is discretionary and will not be disturbed except upon a showing of abuse of discretion. *Id.*

There was a clear transactional connection between the offenses, as well as a discernible common scheme or plan that justified the trial court's decision to join the offenses for trial. We find no abuse of discretion.

In summary, we hold that in case number 86CRS4916 (possession of stolen property, to wit: a JVC stereo component set) defendant received a fair trial free from prejudicial error. In the remaining cases defendant is entitled to a new trial because of the admission of evidence illegally seized from defendant's residence.

In view of the fact that the consolidated sentence of ten years imposed in 86CRS4916, 4902 and 4924 was ordered to begin at the expiration of the consolidated sentence imposed in 86CRS 4863 and 4888, the judgment in 86CRS4916 must be vacated and

the cause remanded for formal entry of a new judgment. *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983).

86CRS4916: No error. (Remand for entry of judgment.)

86CRS4888: New trial.

86CRS53468: New trial.

86CRS4902: New trial.

86CRS53472: New trial.

86CRS4863: New trial.

86CRS53473: New trial.

86CRS4924: New trial.

Judges BECTON and PARKER concur.

CAROL ANN ZINN v. PHILIP E. WALKER

No. 8715SC91

(Filed 20 October 1987)

1. **Contracts § 12.4— offer to purchase real estate—resale profits agreement—incorporation into one contract**

In an action arising from an arrangement whereby plaintiff real estate developer provided money for the purchase of land by plaintiff and defendant real estate agent, a Resale Profits Agreement which required defendant to pay plaintiff 20% of the profit from the resale of his land was enforceable where the Resale Profits Agreement was signed contemporaneously with the Offer to Purchase and became incorporated into that document to comprise the overall contract.

2. **Evidence § 32.2— parol evidence rule—extrinsic evidence—considered despite merger clause**

An Offer to Purchase real estate, Resale Profits Agreement and Design Agreement were to be construed together, a merger clause in the Offer to Purchase notwithstanding, where the three writings were signed together

within the same transaction and plaintiff told defendant that she would not sign the Offer to Purchase without his signing the Resale Profits and Design Agreements. When the parties' conduct indicates their intent to include collateral agreements or writings despite the existence of the merger clause and the parol evidence is not markedly different, if at all, from the written contract, the parties' intentions should prevail.

3. Contracts § 19— novation and substitution—no distinction

North Carolina courts have used the term substitution and novation interchangeably and, although other authorities have drawn distinctions between the two terms, they are held to be one and the same under North Carolina law.

4. Contracts §§ 18.1, 19— purchase of real estate—contract modified rather than substituted—parol evidence

In a case arising from the purchase of real estate, the contract between the parties was not substituted but was modified where the parties' intent as construed from their conduct and the circumstances surrounding the 15 July 1983 closing was to carry out the transaction contemplated on 24 May 1983; plaintiff purchased the 36 acres and the option she had bargained for on 24 May; defendant likewise purchased the same tract he had contemplated, with plaintiff producing the front money which deferred his payment obligations; and only the financing terms and the means by which plaintiff and defendant obtained title to the property differed from the original agreement.

5. Contracts § 19— burden of proof—instruction

In an action by a real estate developer to enforce a resale profits agreement against a real estate broker, the trial court correctly instructed the jury that the burden of proof for substitution is by clear and convincing evidence.

6. Process § 19— abuse of process—directed verdict proper

The trial court properly directed a verdict for defendant on defendant's counterclaim for abuse of process arising from plaintiff's misuse of *lis pendens* in a dispute arising from the sale of real estate where plaintiff held only a contractual interest in the resale profits and there was no real property interest which she could claim. *Lis pendens* may be filed only where a legitimate interest in real property may lie if neither a foreclosure nor attachment order is involved. N.C.G.S. § 1-116(a) (1983).

APPEAL by plaintiff and defendant from *Stephens, Judge.* Judgment entered 14 July 1986 in ORANGE County Superior Court. Heard in the Court of Appeals 1 September 1987.

The evidence at trial showed the following circumstances and events: In mid-April 1983 defendant real estate broker in need of cash for the purchase of land approached plaintiff real estate developer about buying the property (Bennett property) using plaintiff's money primarily to help finance the deal. Plaintiff viewed the property with defendant in April and throughout their discus-

sions understood that defendant wanted plaintiff to put up "front money" which would allow defendant the opportunity to buy the property. Plaintiff subsequently agreed to buy 36 acres of the tract with rights to an option to purchase an additional 36 acres adjacent to what would become plaintiff's property. Plaintiff also told defendant that in view of the enhancement of and increase in defendant's property value which would result from plaintiff's development of her own property, she would agree to the deal only if defendant signed a resale profits agreement. On 24 May 1983 plaintiff and defendant signed three agreements: Resale Profits Agreement, Design Review Agreement, and Offer to Purchase and Contract. Plaintiff indicated to defendant that she would not sign the Offer to Purchase and Contract until the other two agreements were signed. The first of these agreements, the Resale Profits Agreement, and the second, the Design Review Agreement, were as follows:

Resale Profits Agreement

May 24, 1983

We agree to enter into a contractual agreement concerning resale of the Bennett property. The land included in our contract will be the total +/- 86 acres to be purchased July 1, 1983 excluding the +/- 36 acres to be conveyed to Carol Ann Zinn and the +/- 10 acres conveyed to Phil Walker.

The terms of the contract will be to share resale profits 80% to Walker, 20% to Zinn (or designates). Profits are defined as net sales proceeds. Costs of sales to be deducted from gross sales price will include pro-rata shares of outstanding principal, interest (accrued & deferred), survey and legal, commissions and other reasonable expenses associated with sales.

s/PHILIP E. WALKER	5/24/83
(Phil Walker)	(Date)
s/CAROL ANN ZINN	5/24/83
(Carol Ann Zinn)	(Date)

Design Review Agreement

May 24, 1983

This document will outline areas of agreement concerning development of the +/− acres being purchased from Harvey Bennett and family by Phil Walker and by Carol Ann Zinn:

Criteria for development will be reviewed by a committee composed of Phil Walker, Carol Ann Zinn, and Bruce Ballantine. The committee will review the compatibility of design, location, and use of the development proposed within the +/− acre tract. Each member will have one vote. All decisions will be made within five working days of written request by a majority of the members. Upon approval of the other two members, a successor to a member may be named. The committee will disband December 31, 1994, and upon a vote of the members may disband at an earlier date.

s/PHILIP E. WALKER	5/24/83
(Phil Walker)	(Date)
s/CAROL ANN ZINN	5/24/83
(Carol Ann Zinn)	(Date)

The third document signed after the above two documents was a standard Offer to Purchase and Contract form approved by the N.C. Bar Association and the N.C. Association of Realtors. Defendant's attorney had deleted several preprinted clauses but had retained the form merger clause. The contract also incorporated by reference plaintiff's option rights agreement regarding the additional 36 acres. The financing requirements, also contained in the contract, provided that plaintiff would make one-half downpayment plus additional cash at closing and annual payments up through 31 December 1987. Until plaintiff completed the annual payments, defendant had no further financial obligations except those required at closing. Since defendant had dealt primarily with the third party sellers (the Bennetts), the Offer to Purchase also stated that it was contingent on the successful consummation of the Bennett sales transaction. Conspicuously absent, however, were the Resale Profits and Design Review Agreements or any references thereto.

Shortly after 24 May 1983, the development of new information necessitated some changes in the transaction's structure. A survey conducted of the Bennett tract showed the property to be 14 acres smaller than was earlier believed. The Bennetts also objected to defendant's method of financing and insisted that the required annual payments be increased to reflect the true value of the financing and price. Ultimately the transaction was closed on 15 July 1983 with both plaintiff and defendant taking title directly from the Bennetts and each paying the Bennetts directly; however, the substance of the initial financing arrangement remained unchanged and plaintiff was to continue making the annual payments as per the 24 May contract.

After the 15 July closing, plaintiff obtained the necessary subdivision permits and began logging and cutting roads on her tract. Later that October, defendant approached plaintiff on several occasions to inform her of potential buyers for his property and the amount of money involved. Each time both plaintiff and defendant agreed that more money could be obtained for the property. Defendant also suggested at one point that fall that he and plaintiff create a limited partnership from which he would receive 40% of the profits and plaintiff 10% or the same ratio stated in the Resale Profits Agreement.

Finally, defendant received an offer from Martin Development Group (Martin) which more than doubled his investment. Again, defendant returned to plaintiff to report the potential profits of the deal and as well the construction design plans from Martin. Plaintiff responded favorably saying she knew their work and would agree to their development. Moreover, plaintiff pointed out that she would be entitled to $100,000 of the $500,000 profit per the Resale Profits Agreement. Defendant responded that he thought she should "think" about the resale profits issue again and that the $100,000 "was a lot of money for her." Plaintiff responded, "There's nothing to think about. We have a contract and I'm entitled to this money." Subsequently, defendant signed an Option Agreement to Purchase Real Estate with Martin in early January 1984.

Learning of the Martin sales contract, plaintiff filed a prior action and a notice of *lis pendens* on defendant's property in March 1984. Defendant, believing that the *lis pendens* would in-

terfere with the Martin deal, negotiated an escrow agreement with plaintiff which would be governed by the outcome of this litigation. Among other terms, the agreement provided for the escrow of twice the amount of money which would be owed plaintiff should the Resale Profits Agreement prove enforceable.

After the agreement's execution, the plaintiff withdrew the prior action and the notice of *lis pendens*. Plaintiff brought this action in April 1985, seeking recovery of her alleged share of the profits from the resale to Martin.

At trial, two issues were put to the jury and were answered as follows:

> 1. Did the Plaintiff, Carol Ann Zinn, and the Defendant, Philip E. Walker, enter into a contract which included a binding term and condition that Plaintiff would be entitled to receive 20% of the net resale profits from any resale by Defendant of a specified tract of land previously owned by Harvey Bennett and deeded to the Defendant, without regard to whether or not development of Plaintiff's property actually enhanced the resale value of this tract of land?
>
> ANSWER: YES.
>
> 2. Did the parties thereafter by words and conduct substitute a new contract for the contract they had originally made, which new contract eliminated any contract term for the Plaintiff to receive 20% of the net resale profits described in issue number 1?
>
> ANSWER: NO.

From judgment entered for plaintiff on the jury's verdict, defendant appeals.

On defendant's counterclaim for abuse of process for plaintiff's improper filing of the *lis pendens*, the trial court directed the verdict and awarded $4,800 to defendant. Plaintiff appeals the directed verdict and also cites as error the failure of the trial court to include in the judgment the foreclosure provision contained in the escrow agreement.

Faison, Brown, Fletcher & Brough, by O. William Faison and Reginald B. Gillespie, Jr., for plaintiff-appellant/appellee.

Bagwell & Associates, by O. Kenneth Bagwell, Jr. and Philip S. Adkins, for defendant-appellant/appellee.

WELLS, Judge.

Defendant's Appeal

Defendant brings forward four assignments of error each of which concern the enforceability of the Resale Profits Agreement.

[1] In his first assignment of error defendant contends that the evidence does not support the jury's answer to the first issue regarding the enforceability of the Resale Profits Agreement. Relying on *Housing, Inc. v. Weaver*, 305 N.C. 428, 290 S.E. 2d 642 (1982) and *Boyce v. McMahan*, 285 N.C. 730, 208 S.E. 2d 692 (1974), defendant argues that the Resale Profits Agreement constituted nothing more than an agreement to agree. "A contract to enter into a future contract must specify all its material and essential terms." *Boyce* at 734, 208 S.E. 2d at 695. "If any portion of the proposed terms is not settled, or no mode agreed upon by which they may be settled, then there is no agreement." *Boyce, supra, quoted* in *Weaver, supra*, at 444, 290 S.E. 2d 652. *See also Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E. 2d 584 (1980). ["An offer to enter into a contract in the future must, to be binding, specify all of the essential and material terms and leave nothing to be agreed upon as a result of future negotiations." *Id.* at 657, 267 S.E. 2d at 586, *citing Smith v. House of Kenton Corp.*, 23 N.C. App. 439, 209 S.E. 2d 397 (1974).]

The *Weaver* court's analysis both of *Boyce* and its own case noted two common denominators: (1) The original agreements recited that they were preliminary agreements subject to final resolution by later agreements and (2) the agreements specified only the parties' *intentions* not their actual agreement.

In the present case, if the Resale Profits Agreement were the only writing or agreement in evidence, we might agree with the defendant's argument. The terms of the agreement itself suggest that it was an agreement to agree in the future: "We agree to enter into a contractual agreement concerning resale of the

Bennett property . . . ." However, while we might find, on the basis of the evidence presented, that the Resale Profits Agreement, taken alone, is an agreement to agree and not an enforceable contract, we do not believe this to be determinative. Instead, we believe the controlling contract to be the Offer to Purchase and Contract. We hold that the Resale Profits Agreement, being contemporaneously signed with the Offer to Purchase, became incorporated into the same to comprise the overall contract. We overrule the defendant's first assignment of error.

Contemporaneously signed writings may be incorporated together to divine the meaning and purpose of the contractual whole. *Yates v. Brown*, 275 N.C. 634, 170 S.E. 2d 477 (1969). Moreover, the parties' intentions which are controlling in contract construction, *Cordaro v. Singleton*, 31 N.C. App. 476, 229 S.E. 2d 707 (1976), may be construed from the terms of the writings and the parties' conduct. *Heater v. Heater*, 53 N.C. App. 101, 280 S.E. 2d 19 (1981). The defendant, by his own testimony, admits that he and plaintiff had discussed the resale profits before 24 May 1983. In fact, defendant sent a letter to his attorney, dated May 23, 1983, which specified the terms of what became the resale agreement. Additionally, that the Resale Profits Agreement was signed in conjunction with the Offer to Purchase Agreement, indicates the parties' intention to include the Resale Profits Agreement in the overall contract. *Yates, supra.*

Furthermore, the parties' own conduct and words the following fall (1983) indicates even more clearly that both believed the Resale Profits and the Design Review Agreements to be in force and effect. The record shows that defendant sought plaintiff's approval several times that fall regarding potential buyers and a design scheme created by Martin. Defendant also suggested that he and plaintiff form a limited partnership in which plaintiff would receive 10% of the profits while defendant would receive 40%. These terms matched proportionately those terms set out in the Resale Profit Agreement (80%/20%). Finally, plaintiff and defendant both testified that plaintiff told defendant she would not sign the Offer to Purchase Contract until both the Resale Profits Agreement and Design Review Agreement were signed.

The foregoing facts adduced at trial overwhelmingly support the conclusion that the parties intended the incorporation of the Resale Profits Agreement into this resulting contract.

[2] The defendant argues that the merger clause contained in the preprinted Offer to Purchase Contract excludes, as a matter of law, all other agreements not expressed in the Offer to Purchase Contract. We disagree. The merger clauses were designed to effectuate the policies of the Parol Evidence Rule; i.e., barring the admission of prior and contemporaneous negotiations on terms inconsistent with the terms of the writing. North Carolina recognizes the validity of merger clauses and has consistently upheld them. *Hotel Corporation v. Overman*, 201 N.C. 337, 160 S.E. 289 (1931); *Cable TV, Inc. v. Theatre Supply Co.*, 62 N.C. App. 61, 302 S.E. 2d 458 (1983); *Smith v. Central Soya of Athens, Inc.*, 604 F. Supp. 518 (E.D.N.C. 19). Merger clauses create a rebuttable presumption that the writing represents the final agreement between the parties. Generally, in order to effectively rebut the presumption, the claimant must establish the existence of fraud, bad faith, unconscionability, negligent omission or mistake in fact. *Smith, supra* at 526; White & Summers, *Uniform Commercial Code*, § 2-12 (2d ed. 1980).

Nevertheless, this Court has recognized an exception to this general rule. Where giving effect to the merger clause would frustrate and distort the parties' true intentions and understanding regarding the contract, the clause will not be enforced: ". . . to permit the standardized language in the printed forms, . . . to nullify the clearly understood and expressed intent of the contracting parties would lead to a patently unjust and absurd result . . . ." *Loving Co. v. Latham*, 20 N.C. App. 318, 201 S.E. 2d 516 (1974).

The distinction between the application of the two rules lies in the parties' overall intended purposes of the transaction in each case and whether admission of parol evidence will contradict or support those intentions as expressed in the writing(s). In the case of *Neal v. Marrone*, 239 N.C. 73, 79 S.E. 2d 239 (1953) the court noted that defendant had failed to plead fraud or mistake and sought to introduce parol agreements which evidenced an *entirely different contract* from that written. *Neal, supra. See also Cable TV, Inc., supra*, when parol evidence which contradicted the express terms of a written contract as well as the parties' intentions was properly excluded. ("Tar River's problem is simply that they wanted more than they contracted for." 62 N.C. App. at 65, 302 S.E. 2d at 460.)

When, however, as in the present case, the parties' conduct indicates their intentions to include collateral agreements or writings despite the existence of the merger clause and the parol evidence is not markedly different, if at all, from the written contract, the parties' intentions should prevail. *Loving Co., supra.* Moreover, " 'separate contracts relating to the same subject matter and executed simultaneously by the same parties may be construed as one agreement,' " and this is true even where one contract states that there are no other agreements between the parties. 3 *Corbin on Contracts* § 578 (1960 & Supp. 1984) p. 648, *citing Williams v. Mobil Oil Corp.*, 83 A.D. 2d 434, 445 N.Y.S. 2d 172 (1981). *See also, Dynamics Corp. of America v. International Harvester Co.*, 429 F. Supp. 341 (S.D.N.Y. 1977); *Flemington National Bank & Trust Co. v. Domler Leasing Corp.*, 410 N.Y.S. 2d 75, 65 A.D. 2d 29 (1978); 17 Am. Jur. 2d *Contracts*, § 224, p. 668 (1964).

That the three writings were signed together within the same transaction and that plaintiff told defendant she would not sign the Offer to Purchase Agreement without his signing the Resale Profits and Design Agreements supports the conclusion that all three were to be construed together, the merger clause notwithstanding.

Defendant further assigns as error the trial court's denial of defendant's Motion in Limine requesting exclusion of any prior or contemporaneous agreements as violative of the Parol Evidence Rule. Defendant specifically assails the admission of the Resale Profits and Design Review Agreements and other oral testimony regarding the parties' preliminary negotiations. We note at the outset that the two agreements are admissible as separately signed writings which should be construed together to comprise one contract. *Yates v. Brown, supra; Dynamics Corp. of America, supra*; 17 Am. Jur. 2d *Contracts*, § 224, p. 668 (1964). Lastly, defendant contends that allowing plaintiff to testify that her agreement to enter into the Offer to Purchase constituted consideration for the Resale Profits Agreement violated the Parol Evidence Rule. Since we have already decided that the Resale Profits Agreement, construed to have been incorporated into the Offer to Purchase, constitutes an enforceable contract, we have decided this point against defendant.

[3] As his second assignment of error, the defendant contends that the parties' conduct following 24 May 1983 which culminated in the 15 July 1983 closing constituted a novation as a matter of law. Again, the facts and law of this case require a different conclusion.

The most noticeable feature of defendant's argument is defendant's own substitution of the word "novation" for the trial court's term "substitution" as the issue was put to the jury. Defendant's confusion of terms necessitates further analysis of the meaning of substitution and novation under North Carolina law. Our review of North Carolina case law and authorities persuades us that our courts have used the terms substitution and novation interchangeably, rendering them definitionally one and the same. Both substitution and novation require the substitution of a new contract for an old one which is thereby extinguished. *Equipment Co. v. Anders*, 265 N.C. 393, 144 S.E. 2d 252 (1965); *Tomberlin v. Long*, 250 N.C. 640, 109 S.E. 2d 365 (1959); *Walters v. Rogers*, 198 N.C. 210, 151 S.E. 188 (1930). We are aware that other authorities have found distinctions between the two terms; *see* Restatement (Second) of Contracts §§ 277-250 (1981) (and *see* 17 C.J.S. Contracts § 10 (1963)). But for the purpose of consistency under North Carolina law we hold that substitution and novation are one and the same. Nevertheless, defendant fails to persuade us either that the contract was novated or substituted.

[4] Substitution of a contract may be effected only by acts or words wholly inconsistent with the material terms of the old contract. 17 C.J.S. Contracts § 10 (1963); 17A C.J.S. Contracts § 395 (1965). Whether a new contract between the same parties discharges or supersedes a prior agreement depends upon their intention as ascertained from the instrument, the relation of the parties and the surrounding circumstances. *Tomberlin v. Long, supra.*

In the present case, the parties' intention as construed from their conduct and the circumstances surrounding the 15 July 1983 closing was to carry out the transaction contemplated on 24 May 1983. Plaintiff purchased the 36 acres and the option she had bargained for on 24 May. The defendant likewise purchased the same tract he had contemplated, with plaintiff producing the "front money" which deferred his payment obligations until 31

December 1987. Only the financing terms and the means by which plaintiff and defendant obtained title to the Bennett property differed from the original agreement. Moreover, the making of a second contract dealing with the same subject matter does not necessarily abrogate the former contract between the same parties. *Turner v. Turner*, 242 N.C. 533, 89 S.E. 2d 245 (1955). We therefore hold that the contract was not substituted but *modified.* A contract may be modified by parol or subsequent conduct of the parties. *Yamaha Corp. v. Parks*, 72 N.C. App. 625, 325 S.E. 2d 55 (1985); *Son-Shine Grading v. ADC Construction Co.*, 68 N.C. App. 417, 315 S.E. 2d 346 (1984); *Biggers v. Evangelist*, 71 N.C. App. 35, 321 S.E. 2d 524 (1984). (Defendant's argument that the former contract was "abandoned" likewise is not persuasive for the reasons outlined above. *Hayes v. Griffin*, 13 N.C. App. 606, 186 S.E. 2d 649 (1972); *Campbell v. Blount*, 24 N.C. App. 368, 210 S.E. 2d 513 (1975).)

[5] Defendant finally contends that the trial court's instruction on the burden of proof for substitution of contract was error. The trial court instructed the jury that defendant's burden of proof on the issue of substitution was by clear and convincing evidence. Relying on *Equipment Co. v. Anders, supra,* defendant contends that in that case the court set forth the burden of proof for novation—specifically that novation must be proved to the jury's satisfaction—the equivalent of the preponderance of the evidence. Nevertheless, for reasons that follow, we do not believe *Anders* to be dispositive on this point.

North Carolina case law is sparse on the issue of the requisite burden of proof for novation, *Anders* apparently being the only North Carolina case even remotely on point. However, there is authority in other jurisdictions which supports a clear and convincing standard for novation. *Spering v. Sullivan*, 361 F. Supp. 282 (D. Del. 1973); *Dunlop Tire & Rubber Corp. v. Thompson*, 273 F. 2d 396 (8th Cir. 1959). It is also well settled that proof of contract modification must be clear and convincing. *Lambe-Young, Inc. v. Cook*, 70 N.C. App. 588, 320 S.E. 2d 699 (1984); *Tile and Marble Co. v. Construction Co.*, 16 N.C. App. 740, 193 S.E. 2d 338 (1972). It follows that it is only logical that the complete eradication of a contract as by substitution or novation should require a standard of proof at least as high as that required for modification of the same contract. Additionally, it is telling that abandon-

ment of a contract, a point defendant asserts within his novation argument, requires clear and convincing evidence. *Bixler Co. v. Britton*, 192 N.C. 199, 134 S.E. 488 (1926); *Hayes v. Griffin, supra.* If abandonment of a contract which discharges an earlier agreement, as do substitution and novation, requires a clear and convincing burden of proof, novation and substitution should be treated in like fashion. We therefore hold that the trial court correctly instructed the jury that the burden of proof for substitution is by clear and convincing evidence.

Plaintiff's Appeal

[6] Plaintiff appeals the directed verdict for the abuse of process claim and the resulting judgment. Plaintiff's argument fails to persuade us because, as a matter of law, defendant was entitled to a directed verdict for plaintiff's misuse of the *lis pendens*. N.C. Gen. Stat. § 1-116(a) (1983) makes clear that if neither a foreclosure nor attachment order are involved, a *lis pendens* may be filed only where a legitimate interest in real property may lie. *See also Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 166 S.E. 2d 849 (1969). Plaintiff argues that she was attempting to impose a constructive trust on the property for her share in the resale profits; however, plaintiff only held a contractual interest in the resale profits. There was *no* real property interest which she could claim. Therefore we affirm the trial court's decision and award of $4,800 against the plaintiff.

Finally, plaintiff contends that the judgment failed to include her rights to the resale profits in the event of foreclosure or other similar contingency. We agree that the judgment should incorporate the terms of the escrow agreement and, in any event, insure plaintiff's rights to 20% of the resale profits in whatever form they take. Therefore, we remand for an amendment to the judgment in accordance with this opinion.

No error; remanded for amendment of judgment.

Judges EAGLES and MARTIN concur.

E. BROWN CROSBY v. WILLIAM H. BOWERS AND GARY R. KUZMA

No. 8728SC34

(Filed 20 October 1987)

1. **Partnership § 6— action against partners—partnership agreement as express personal contract upon which to sue**

Though a partner generally may not sue another partner until there has been a complete settlement of the partnership affairs and a balance struck, an exception to the rule is that a partner may maintain an action against his co-partner on claims upon express personal contracts between the partners; therefore, plaintiff could maintain an action against defendants because the partnership agreement upon which the action was based was an express personal contract between the partners.

2. **Partnership § 6— actions as breach of partnership agreement—materiality—willfulness**

Whether plaintiff's actions constituted an antecedent breach of a partnership agreement, whether the alleged breach was material, and whether defendants' actions constituted a willful breach, were issues of fact which should be submitted to the jury.

3. **Partnership § 6— partnership agreement—meaning of "termination"—enforcement of non-competition clause**

The parties in their partnership agreement intended the word "termination" to refer to dissolution, and the plaintiff, pursuant to the terms of the agreement, could enforce the non-competition clause upon dissolution of the partnership.

4. **Partnership § 6— dissolution action—findings unsupported by evidence**

The trial court erred in finding as a fact that plaintiff's filing of the complaint was an expression of his will to dissolve the partnership in question, since the evidence was that plaintiff filed the complaint with the clear intention of dismissing defendants from the partnership and then dissolving the partnership.

5. **Partnership § 6— dissolution action—instructions on breach of partnership agreement improper**

The trial court erred in giving the jury instructions which implied that any breach of a partnership agreement by defendants, whether or not the breach was material, precluded defendants from obtaining a judicial dissolution.

6. **Partnership § 6— dissolution action—instructions on breach of partnership agreement improper**

The trial court's instructions which implied that plaintiff must have breached the partnership agreement as a prerequisite to judicial dissolution were erroneous. N.C.G.S. § 59-62(a)(3) and (4).

Crosby v. Bowers

APPEAL by plaintiff and defendants from *Ferrell, Judge.* Judgment entered 12 June 1986 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 31 August 1987.

Plaintiff E. Brown Crosby and defendants William H. Bowers and Gary R. Kuzma are partners in the Asheville Hand Center, a medical partnership. They are also partners in a real estate partnership called ALOK. ALOK obtained its funds from the Asheville Hand Center and spent those funds on the real estate affairs of the Asheville Hand Center.

In 1975, plaintiff opened a hand surgery practice and later hired James S. Thompson, another hand specialist. Thompson eventually entered into a partnership with plaintiff which became the Asheville Hand Center. Plaintiff and Thompson were also partners in ALOK. In 1982, defendants Bowers and Kuzma became partners in the Asheville Hand Center. Pertinent sections of the partnership agreement between the four men are as follows:

> 10. Each partner shall, at his own expense, unless mutually agreed otherwise, pay for books, publications, gifts, entertainment expenses, dues, home telephone, expenses of his home office. . . .
>
> 11. (a)(2) The managing partner shall receive 2% of annual net profits. This shall be treated as a regular partnership expense.
>
> . . . .
>
> 13. The managing partner shall maintain or cause to be maintained such books of account and other necessary financial records which will accurately reflect all the transactions and business of the partnership. Such records shall be kept in the partnership's offices and shall be at all times available for inspection or examination by any partner or his duly authorized agent. . . .
>
> 14. All partnership monies and funds shall be promptly deposited in [the] partnership account(s). Each partner's signature shall be an authorized signature on partnership accounts. However, it is recognized that to properly run the partnership one partner should be responsible for managing

partnership affairs. Thus, unless designated otherwise by the managing partner, the managing partner shall sign all checks, drafts, etc., on the partnership accounts. Any check payable to or for the benefit of a partner, individually shall be co-signed by all partners or, in the absence of a partner, that partner's legal representative.

15. The partners shall mutually consult with each other in all matters of partnership policies, procedures and business. E. Brown Crosby is designated the managing partner. Equipment or other items purchased by the partnership shall belong to the partnership.

In 1985, Thompson withdrew from the partnership. Shortly thereafter, serious disputes arose between the remaining partners concerning personnel policies, salary and operating expenses of the Asheville Hand Center.

On 14 August 1985, defendants suspended plaintiff's authority as managing partner and cancelled his authority to write checks on the partnership accounts. Defendants advanced as a justification for this action that plaintiff had 1) used partnership funds to pay non-partnership expenses, 2) overpaid himself for honorariums inconsistent with the partnership agreement, 3) used partnership assets in pursuit of personal gain, and 4) taken action on behalf of the Asheville Hand Center without authorization.

Plaintiff then notified defendants that they had breached the partnership agreement and were subject to dismissal under section 20 of the agreement which states:

A partner shall be dismissed from the partnership if he ceases to be licensed to practice medicine in the State of North Carolina, or if, by gross negligence or wilfullness, breaches any condition of this Agreement, or if he declares or is adjudged bankrupt or enters into an arrangement for the benefit of creditors, or if he attempts to assign his partnership interest or if his partnership interest is attached or levied upon by a creditor.

* * * *

Upon termination of the partnership, all partnership records, books of account, case histories and patient lists, and the telephone number(s) shall remain the property of Crosby.

Upon termination for reasons of a partner's permanent disability or retirement, the partnership shall purchase his disabled or retiring partner's interest in the same manner and upon the same terms as though that partner had died.

Upon termination for reasons other than a partner's death, disability or retirement, the partnership shall purchase the partner's interest in the same manner and upon the same terms as though the partner had died.

Any termination for whatever reason or subsequent purchase shall not release any partner of his responsibilities and liabilities as set forth in Paragraph 9 of this Agreement.

It is a condition of this Agreement that in the event any partner leaves the partnership, voluntarily or involuntarily, by mutual cancellation or otherwise, such partner shall not engage in the practice of medicine, whether as a sole proprietor, partner, employee or otherwise, within a 100 mile radius of the City of Asheville, North Carolina, for a period of three (3) years after the date of such termination. This condition has been effective since July 1, 1976, and shall continue during this Agreement and for a three (3) year period after termination of the partnership.

Plaintiff filed the present action seeking specific performance of the partnership agreement and the enforcement of the non-competition clause in section 20. Defendants filed an answer and a counterclaim seeking a declaratory judgment determining the rights of the partners in the partnerships and also sought a judicial dissolution pursuant to G.S. 59-62(a).

The case came on for trial before Judge Ferrell sitting with a jury. At the close of plaintiff's evidence, the trial judge granted defendants' motion for a directed verdict. The remainder of the trial concerned defendants' counterclaim. At the close of all the evidence, the following issues were submitted to and answered by the jury:

1. Has E. Brown Crosby committed such conduct as tends to affect prejudicially the carrying on of the business of the Asheville Hand Center partnership?

   Answer: No

2. Has E. Brown Crosby willfully committed breaches of the partnership agreement?

   Answer: No

3. Has E. Brown Crosby persistently committed breaches of the partnership agreement?

   Answer: No

4. Has E. Brown Crosby conducted himself in matters relating to the partnership business of the Asheville Hand Center such that it is not reasonably practicable for William H. Bowers and Gary R. Kuzma to carry on the business in partnership with him?

   Answer: No

An estoppel issue requested by plaintiff was not reached.

Subsequently, a separate proceeding was held with respect to the propriety of entering a dissolution of the Asheville Hand Center and ALOK pursuant to G.S. 59-62(a)(6). However, the trial court determined that defendants were not entitled to a dissolution of the partnerships pursuant to that statute.

On 12 June 1986, the trial court entered a judgment stating that it had "considered a determination of the relative rights of the Partners in ALOK and Asheville Hand Center." The judgment included the following findings of fact:

3. The filing of the Complaint on August 23, 1985 by the Plaintiff was an expression of the will of the Plaintiff to dissolve Asheville Hand Center since the relief sought by the Complaint would have resulted in a dissolution of the Partnership.

4. The filing of the Answer and Counterclaim by the Defendants was an expression of the will of the Defendants to dissolve ALOK and Asheville Hand Center since the relief sought would have resulted in a dissolution of the Partnerships.

   . . . .

6. The provisions of the Asheville Hand Center Partnership Agreement prohibiting a Partner from engaging in the

practice of medicine within a one hundred (100) miles radius of the City of Asheville, North Carolina, for a period of three (3) years after the date of termination of the Partnership, did not provide that such provisions would inure to the benefit of any Partner following the dissolution of the Partnership or would be binding on any Partner following dissolution of the Partnership.

The Court then concluded as a matter of law:

THAT Asheville Hand Center and ALOK were Partnerships at will and that the filing of the Complaint on August 23, 1985 was an expression of the will of the Plaintiff to dissolve Asheville Hand Center consistent with the provisions of N.C.G.S. 59-61(1)(b); and that the filing of the Answer and Counterclaim was an expression of the will of the Defendants to dissolve the Partnership, ALOK, consistent with the provisions of N.C.G.S. 59-61(1)(b); and that the filing of the Answer and Counterclaim was a concurrence by the Defendants in the Plaintiff's expression of will to dissolve Asheville Hand Center; and that both of said Partnerships should be dissolved; and it is further concluded that neither the Plaintiff or the Defendants should be prohibited from the practice of medicine within a one hundred (100) mile radius of the City of Asheville, North Carolina, for a period of three (3) years following the dissolution of the Partnership; and it is further concluded that upon termination of the Partnership, all Partnership records, books of account, case histories and patient lists and the telephone number(s) of Asheville Hand Center Partnership shall remain the property of the Plaintiff; and it is further concluded that Asheville Hand Center and ALOK should be terminated in accordance with the provisions of Chapter 59 of the North Carolina General Statutes.

From the judgment of the trial court, both plaintiff and defendants appeal.

Ronald W. Howell; and Long, Parker, Payne & Warren, by Robert B. Long, Jr., for plaintiff.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, by John W. Ervin, Jr. and Sam J. Ervin, IV, for defendants.

ARNOLD, Judge.

Both plaintiff and defendants attack various aspects of the trial and judgment in this case. Assignments of error by both parties have merit and demand that we reverse the judgment of the trial court and remand the case for a new trial.

I.

Plaintiff contends that the trial court erred in granting defendants' motion for a directed verdict. We agree.

A motion for a directed verdict presents the question whether the evidence, when considered in the light most favorable to the nonmoving party, is sufficient for submission to the jury. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). At trial, plaintiff presented evidence that defendants breached the partnership agreement when they suspended his authority as managing partner, suspended his management fee and cancelled his authority to write checks on the partnership accounts. This evidence is sufficient for submission to a jury for a determination of whether defendants willfully breached the partnership agreement.

Defendants, however, assert that the directed verdict was properly granted and list the following alternative reasons in support of their position: 1) plaintiff lacked standing to sue defendants; 2) plaintiff was unable to prosecute the action individually; 3) there was an antecedent breach of the agreement by plaintiff; and 4) there was insufficient evidence of a *willful* breach by defendants.

[1] With respect to the issue of plaintiff's standing to sue, *Pugh v. Newbern*, 193 N.C. 258, 136 S.E. 707 (1927), is controlling. In *Pugh*, our Supreme Court stated the general rule that one partner cannot sue another partner at law until there has been a complete settlement of the partnership affairs and a balance struck. The Court added, "[T]here are, however, well established exceptions to the general rule. A partner may maintain an action at law against his copartner upon claims growing out of the following state of facts: . . . 3. Claims upon express personal contracts between the partners." *Id.* at 261, 136 S.E. at 708-09. The partnership agreement in the present case is an express personal contract between the partners. Thus, plaintiff has the requisite

standing to maintain an action against defendants. Furthermore, defendants' position that plaintiff was unable to prosecute the action individually is untenable.

[2] Regarding the alleged antecedent breach of the agreement by plaintiff, the general rule governing contracts requires that if either party commits a material breach of the contract, the other party should be excused from the obligation to perform further. *Coleman v. Shirlen*, 53 N.C. App. 573, 281 S.E. 2d 431 (1981). Whether plaintiff's actions in the present case constitute a breach of the agreement, and whether the alleged breach was material, is an issue of fact that should be determined by the jury on remand if defendants assert antecedent breach as a defense to plaintiff's claim. Additionally, the question whether defendants' actions constitute a *willful*, i.e. intentional, breach is a question of fact for the jury. *See id.*

If the jury finds that defendants willfully breached any condition of the agreement, the trial court must then apply section 20 of the agreement in order to determine the rights of the parties. Section 20 provides that a partner shall be dismissed from the partnership if he willfully breaches any condition of the agreement. It further provides that "[u]pon termination for reasons other than a partner's death, disability or retirement, the partnership shall purchase the partner's interest in the same manner and upon the same terms as though the partner had died." Section 19 of the agreement provides a formula for the surviving partners to purchase a deceased partner's interest.

[3] Under the Uniform Partnership Act, "termination" is used to designate the point in time when all the partnership affairs are wound up. 2 Cavitch, *Business Organizations* § 29.01 (1984). It is clear that the parties in the case *sub judice* did not use the word "termination" in its technical sense because it would be impossible for a partnership to take any action once it has been terminated. Accordingly, it is obvious that the parties intended "termination" to refer to dissolution.

It is a general rule of contract law 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. *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 320 S.E. 2d 892 (1984), *disc. rev. denied*, 312 N.C. 797, 325 S.E. 2d

631 (1985). With this in mind, section 20 of the agreement is unambiguous and provides that upon dissolution the partnership shall purchase the interest of the withdrawing partner. Therefore, if the jury finds that defendants willfully breached the agreement, plaintiff should be permitted to dismiss defendants from the partnership and purchase their interests pursuant to the agreement. At that point, the partnership would then be dissolved since a partnership consisting of one person cannot continue to exist. G.S. 59-36(a). Under these circumstances, the non-competition covenant would become effective.

Even if the jury finds that defendants did not breach the agreement and that plaintiff did not commit an antecedent breach, the inquiry varies only slightly. Since "termination" as used in the agreement actually refers to dissolution, it is clear that defendants could have dissolved the partnership at any time but that they would have been subject to the terms of section 20. Thus, in this situation (unless the trial court dissolves the partnership under G.S. 59-62) plaintiff would also be allowed to purchase defendants' interests and enforce the non-competition clause.

Plaintiff's remaining assignments of error concern the judgment entered by the trial court. Without addressing each assignment individually, we hold that the portion of the judgment in which the trial court made findings of fact and conclusions of law in determining the rights of the partners cannot stand.

[4] The trial court found as a fact that "[t]he filing of the Complaint . . . by the Plaintiff was an expression of the will of the Plaintiff to dissolve Asheville Hand Center since the relief sought by the Complaint would have resulted in a dissolution of the Partnership." Findings of fact made by the trial court have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979). The above finding of fact, however, is not supported by evidence in the record. Plaintiff filed the complaint with the clear purpose and intent of dismissing defendants from the partnership. There is no evidence that plaintiff's act of filing the complaint expressed his will merely to dissolve the partnership. Plaintiff intended that the partnership be dissolved *only after* dismissing defendants from the partnerships.

Therefore, in light of the fact that the directed verdict was improperly granted and in view of the above, the portion of the judgment in which the court made a determination of the rights of the partners is reversed.

II.

[5] The court submitted issues to the jury concerning defendants' counterclaim and concluded that defendants were not entitled to a judicial dissolution. Defendants contend that the trial court erred "by instructing the jury that any breach of the partnership agreement on the part of [defendants] precluded judicial dissolution of the Asheville Hand Center and ALOK since the instruction in question was not an accurate statement of the law arising upon the evidence." We agree.

As stated previously, the general rule governing contracts requires that if either party commits a *material* breach of the contract, the other party should be excused from the obligation to perform further. *Coleman*, 53 N.C. App. at 573, 281 S.E. 2d at 431.

The trial court instructed the jury as follows:

> Before Bowers and Kuzma can prevail, they must satisfy you, the jury, by the greater weight of the evidence that one or more of the causes provided by North Carolina statutes or law for dissolution by judicial decree exists, and that they, themselves, have fully and fairly performed the partnership agreement, because one who has not has no standing in court to enforce any rights under the agreement.

This instruction implies that any breach of the agreement by defendants, whether or not the breach was material, precludes defendants from obtaining a judicial dissolution. Defendants were prejudiced by this instruction. On retrial, the trial court shall instruct the jury that a breach by defendants must be material before defendants are precluded from obtaining a judicial dissolution.

[6] Defendants also contend that the trial court erred "by instructing the jury that it could not answer the first or fourth issues in the affirmative unless it found by the greater weight of the evidence that Crosby had breached the partnership agreement since the trial court's instruction did not constitute an ac-

curate statement of the law arising upon the evidence." We agree.

G.S. 59-62(a)(3) and (4) state:

> On application by or for a partner the court shall decree a dissolution whenever:
>
> (3) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,
>
> (4) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

The trial court's instructions implied that the first and fourth issues submitted to the jury required a breach of the partnership agreement by plaintiff. The statute does not require a breach of the partnership agreement as a prerequisite to judicial dissolution. On retrial, the jury instructions shall be altered to reflect this.

Concerning defendants' remaining assignments of error, we have examined them and have determined them to be without merit.

Accordingly, upon remand if the trial court concludes that the facts as determined by the jury entitle defendants to a judicial dissolution under G.S. 59-62, plaintiff would not be able to enforce section 20 even if the jury also finds that defendants willfully breached the agreement. In other words, the only means by which defendants can circumvent section 20 is for the trial court to judicially dissolve the partnership. Otherwise, section 20 governs the rights of the parties. Therefore, the judgment of the trial court is reversed and the case is remanded for a new trial on both parties' claims.

As a final note, the broadside attacks by counsel on each other within their briefs are improper. "The function of all briefs . . . is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon." App. R. 28(a). We caution counsel that personal attacks and trivial

verbiage are inappropriate in appellate briefs and should not be repeated.

Reversed and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. DOROTHY MAE KEYS

No. 872SC349

(Filed 20 October 1987)

1. **Constitutional Law § 67— identity of informant—failure to show participation in crime**

In a prosecution for trafficking in heroin by possession, defendant failed to show that a confidential informant was a participant in the crime so as to require the State to disclose his identity where the evidence showed that two informants gave police information used to obtain a search warrant for defendant's premises; the discovery of heroin in defendant's pocketbook occurred in the ordinary course of the search of defendant's premises and was not facilitated at the time of the search by any other person; and the information given in advance by either informant did not indicate that one of the informants was or might have been a participant in the crime charged.

2. **Constitutional Law § 67— identity of informant—failure to show necessary to defense**

Defendant failed to show that the disclosure of the identity of a confidential informant was material to the preparation of her defense on the ground that the informant, if present at her arrest, may have evidence favorable to her, where defendant failed to show what this favorable evidence might be, and where defendant knew and recognized the four persons who were present at the time of her arrest and could have gained the evidence necessary for her defense by subpoenaing such persons to testify.

3. **Searches and Seizures § 24— affidavit for search warrant—current information—implication of premises to be searched**

An affidavit contained sufficiently current information and sufficiently implicated the premises to be searched to establish probable cause for the issuance of a warrant to search defendant's residence where it was based on one informant's statement that he had seen defendant selling packets of heroin at a specified address within the past forty-eight hours and on a second informant's statement that defendant was selling heroin in the Washington area and was bringing the heroin to Washington from out of state.

4. **Narcotics § 3.1— irrelevant evidence—harmless error**

Assuming an officer's testimony that he had surveyed the address where heroin was found for some nine to twelve months and had observed defendant at that address prior to her arrest was irrelevant in this prosecution for trafficking in heroin by possession, the erroneous admission of such testimony was not prejudicial to defendant.

5. **Narcotics § 4.6— trafficking by possession of heroin—amount of heroin possessed—instructions**

In a prosecution for trafficking in heroin by possession of more than four but less than fourteen grams of heroin, the trial court's instructions in substance stated all the relevant and legally correct propositions requested by defendant concerning the amount of heroin which defendant must have possessed to be found guilty of the crime charged.

6. **Narcotics § 4.3— possession of heroin found in pocketbook—sufficiency of evidence**

The State's evidence was sufficient to show that defendant possessed heroin found in a pocketbook in her residence so as to support her conviction of trafficking in heroin by possession where it tended to show that defendant was sitting alone on a couch in her living room when the police entered her residence; a woman's pocketbook was lying next to her on the couch; upon request, defendant handed the pocketbook to an officer without disclaiming ownership; and a search of the pocketbook revealed a large quantity of heroin and two identification cards and a charge account card issued in defendant's name.

7. **Narcotics § 2— trafficking in heroin by possession—amount of heroin—indictment not fatally defective**

An indictment for trafficking in heroin by possession was not fatally defective because it charged that defendant possessed "more than four but less than fourteen grams of heroin" rather than "four grams or more, but less than 14 grams of heroin" as stated in N.C.G.S. § 9-95(h)(4)a, since the amount stated in the indictment, while excluding a prosecution for exactly four grams as allowed by the statute, was clearly within the confines of the statute.

APPEAL by defendant from *Lewis (John B., Jr.), Judge.* Judgment entered 2 December 1986 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 28 September 1987.

Defendant Dorothy Mae Keys was arrested and indicted for felonious trafficking in heroin by possession, in violation of N.C.G.S. § 90-95(h)(4).

At trial the State's evidence tended to show the following.

On 1 July 1986 Agent Malcolm McLeod, relying upon information obtained from two reliable confidential informants, applied for and received a warrant authorizing a search of the premises

at 120 West 7th Street, Washington, North Carolina, and for defendant's person. The search warrant was also executed on 1 July 1986.

While searching the residence at 120 West 7th Street, Agent McLeod examined the contents of a woman's pocketbook he found sitting next to defendant on the living room couch. In the pocketbook Agent McLeod discovered a large quantity of white powder, cash, and three identification cards issued in defendant's name. A subsequent chemical analysis of the white powder disclosed it contained heroin.

Defendant presented no evidence in her own behalf.

After deliberation, a jury found defendant guilty of trafficking in heroin by possession of more than four grams but less than fourteen grams. The trial court sentenced defendant to an active term of sixteen years. After judgment was entered, defendant made motions to set aside the judgment and for a new trial, which were denied. Defendant appeals from this judgment.

Attorney General Lacy H. Thornburg, by Associate Attorney General James A. Wellons, for the State.

Mary K. Nicholson and Mark V. L. Gray, for defendant appellant.

ORR, Judge.

I.

Defendant first assigns error to the trial court's denial of her motion to suppress the State's evidence obtained by the search warrant. She contends the State, by refusing to disclose (1) the identity of one of its two informants, and (2) whether that informant was present at the time of her arrest, prevented her from formulating a defense with which to challenge the proffered evidence and, thus, deprived her of due process.

"Nondisclosure of an informant's identity is a privilege justified by the need for effective law enforcement . . . ." *State v. Grainger*, 60 N.C. App. 188, 190, 298 S.E. 2d 203, 204 (1982), *disc. rev. denied*, 307 N.C. 579, 299 S.E. 2d 648 (1983).

This Court in *State v. Gilchrist*, 71 N.C. App. 180, 321 S.E. 2d 445 (1984), *disc. rev. denied*, 313 N.C. 332, 327 S.E. 2d 894 (1985), clearly stated the law in North Carolina on this question holding:

> The prosecution is privileged to withhold the identity of an informant unless the informant was a participant in the crime or unless the informant's identity is essential to a fair trial or material to defendant's defense. *State v. Beam*, 45 N.C. App. 82, 262 S.E. 2d 350 (1980). A defendant must make a sufficient showing that the particular circumstances of his case mandate disclosure before the identity of a confidential informant must be revealed. *State v. Watson*, 303 N.C. 533, 279 S.E. 2d 580 (1981). When the defendant fails to make a sufficient showing of need to justify disclosure of the informant's identity he acquires no greater rights to compel disclosure of details about the informant than he initially had. *State v. Beam*, 45 N.C. App. 82, 262 S.E. 2d 350 (1980).

71 N.C. App. at 182, 321 S.E. 2d at 447-48.

[1] On appeal defendant first asserts that one of the State's two informants may have been a participant in the crime she is charged with, and hence that informant's identity was discoverable.

Defendant was charged and convicted, pursuant to N.C.G.S. § 90-95(h)(4)a, of trafficking in heroin by possession of more than four grams but less than fourteen grams. This crime has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount of heroin. *State v. Weldon*, 314 N.C. 401, 403, 333 S.E. 2d 701, 702 (1985); *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E. 2d 919, 922 (1977). The defendant need not interact in any way with another individual to facilitate the commission of this crime.

In the present case, the information justifying the issuance of the search warrant was obtained from two informants prior to the police entry into 120 West 7th Street. Agent McLeod's discovery and examination of the pocketbook occurred in the ordinary course of the search of the premises and was not facilitated at the *time* of the search by any other person.

Therefore, the information given in advance by either informant in no way indicates that one of the informants was or might

have been a participant in the crime charged. No other evidence was introduced that would lead to a conclusion that either informant was a participant. For this reason, we find no grounds to conclude that the activity displayed by either informant in this case was that of a participant. Defendant's argument is rejected.

[2] Next defendant contends disclosure of the informant's identity is material to the preparation of her defense.

"[A] defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E. 2d 580, 582 (1981); *State v. Gilchrist*, 71 N.C. App. 180, 321 S.E. 2d 445.

Defendant argued at the voir dire hearing that the informant, if present at defendant's arrest, may have evidence favorable to defendant. Defendant failed, however, to tell the trial court what this favorable evidence might be. More importantly four persons —defendant's father, defendant's brother, an adult female, and an adult male, all of whom were known and recognized by defendant —were present at the time of her arrest. Through her discovery, defendant knew prior to trial that the State did not intend to call any of these persons as witnesses. Therefore, defendant could have subpoenaed one or all of these persons to testify at trial on her behalf and thereby gain the evidence necessary for her defense.

We find defendant failed to make a sufficient showing that disclosure of the informant's identity was essential to her defense.

[3] Next, defendant argues her motion to suppress was improperly denied because the search warrant, under which the evidence was gathered, lacked probable cause.

Relying on *State v. Goforth*, 65 N.C. App. 302, 309 S.E. 2d 488 (1983), defendant asserts that the affidavit offered in support of the search warrant contained stale information and failed to implicate the premises to be searched.

In *Goforth* our Court said to test the timeliness of a search warrant,

> [t]he general rule is that no more than a 'reasonable' time may have elapsed. The test for 'staleness' of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. *Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138 (1932); *State v. King*, 44 N.C. App. 31, 259 S.E. 2d 919 (1979).

Goforth, 65 N.C. App. at 307, 309 S.E. 2d at 492, *quoting, State v. Lindsey*, 58 N.C. App. 564, 565-66, 293 S.E. 2d 833, 834, *disc. rev. denied*, 306 N.C. 747, 295 S.E. 2d 761 (1982).

Furthermore in *Goforth* we held that "to show probable cause, an affidavit must establish reasonable cause to believe that the proposed search for evidence of the designated offense will 'reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender.' " *Goforth*, 65 N.C. App. at 307-08, 309 S.E. 2d at 493, *quoting in part, State v. Campbell*, 282 N.C. 125, 129, 191 S.E. 2d 752, 755 (1972).

The affidavit offered to justify a finding of probable cause and now challenged by defendant, stated:

> On 7-1-86 a confidential and reliable source of information who in the past has provided information that led to arrest of three persons in violation of the controlled substance act contacted this applicant and advised that with in [sic] the past 48 hours he had been to the above described location and had seen Dorthy [sic] Keys selling small packets containing white powder that Dorthy [sic] Keys represented to be heroin.
>
> Beaufort County ABC Officer William Boyd advised this applicant that he had received information from another confidential informant who has given reliable drug information in the past that Dorthy [sic] Keys was selling heroin in the Washington area and was bring [sic] the heroin to Washington from out of state.

As the affidavit recounts, the information justifying the search warrant was received from two reliable sources. The first informant relayed the information to Agent McLeod within forty-eight hours after gathering it. This information consisted of the informant's eyewitness statement that he was present and saw

defendant sell packets of white powder identified by defendant as heroin. The second informant's statement to ABC Officer William Boyd affirmed that defendant's actions were ongoing and that the incident reported by the first informant was not an isolated occurrence.

Statements in the affidavit made by the informants not only identified defendant as selling heroin in the Washington, North Carolina area, but the first informant also specifically designated 120 West 7th Street as the premises from which defendant was conducting her transactions and where the heroin she possessed could be found.

The information in the affidavit justifying the search warrant related timely facts and circumstances sufficient to identify defendant as a heroin dealer and to implicate the premises at 120 West 7th Street as a place where drugs were being sold. Therefore, we find that probable cause existed for the issuance of the search warrant.

This Court concludes the trial court properly denied defendant's motion for suppression and overrules this assignment of error.

II.

[4] Defendant assigns as her second error the admission of Officer William Boyd's testimony that he had surveyed 120 West 7th Street for nine to twelve months and had personally observed defendant at that address prior to arresting her. On appeal defendant argues this testimony was irrelevant.

Assuming arguendo that defendant is correct and this testimony was irrelevant, "the admission of irrelevant evidence is generally considered harmless error and not reversible error unless it is of such a nature as to mislead the jury." *State v. Wingard*, 317 N.C. 590, 599, 346 S.E. 2d 638, 645 (1986); *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983). "The defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Alston*, 307 N.C. at 339, 298 S.E. 2d at 644; *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981). "Defendant has the burden of showing that he was prejudiced by the admission of the evidence." *State v. Wingard*, 317 N.C. at 599-600, 346 S.E. 2d at 645; N.C.G.S. § 15A-1443 (1983). To

meet this burden defendant must show "that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (1983).

In the present case defendant argues only that the evidence was irrelevant and never addresses the effect of the error on her conviction. Therefore, we find defendant has failed to show she was prejudiced by the admission of the evidence and overrule this assignment of error.

III.

[5] Defendant's third assignment of error contends the trial court erred in instructing the jury concerning the amount of heroin which defendant must possess to be found guilty of the crime charged.

The record discloses that defendant failed to object to the jury instructions at trial. She is, therefore, precluded from raising the issue on appeal unless the trial court's charge was plain error. *State v. Bennett*, 308 N.C. 530, 302 S.E. 2d 786 (1983); *State v. Abbitt*, 73 N.C. App. 679, 327 S.E. 2d 590 (1985).

It is well established that a defendant is not entitled to have her requested instructions given verbatim as long as they are given in substance. *State v. Green*, 305 N.C. 463, 290 S.E. 2d 625 (1982); *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968).

After reviewing the record, we find that the trial court's instruction in substance stated all the relevant and legally correct propositions requested by defendant. Further, the instruction given was a correct statement of the law as set forth in *State v. Willis*, 61 N.C. App. 23, 300 S.E. 2d 420, *modified and affirmed on other grounds*, 309 N.C. 451, 306 S.E. 2d 779 (1983). *See also State v. Tyndall*, 55 N.C. App. 57, 284 S.E. 2d 575 (1981). We overrule this assignment of error.

IV.

[6] In her fourth assignment, defendant contends the State's evidence was insufficient to show she possessed the heroin found in the pocketbook by police on 1 July 1986. Consequently, she argues, the trial court should have granted her motion to set aside the verdict and to order a new trial.

"Motions to set aside the verdict and for a new trial based upon insufficiency of the evidence are addressed to the discretion of the trial court and refusal to grant them is not reviewable on appeal in the absence of abuse of discretion." *State v. Hamm*, 299 N.C. 519, 523, 263 S.E. 2d 556, 559 (1980); *State v. Jenkins*, 311 N.C. 194, 317 S.E. 2d 345 (1984); *State v. Charles*, 53 N.C. App. 567, 281 S.E. 2d 438 (1981). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E. 2d 450, 465 (1985); *State v. Brown*, 314 N.C. 588, 336 S.E. 2d 388 (1985).

A review of the record disclosed the following evidence of defendant's possession of the heroin. When police entered the house at 120 West 7th Street, defendant was sitting alone on the couch in the living room. Laying next to her on the couch was a woman's pocketbook. Upon request, defendant handed the pocketbook to Agent McLeod without disclaiming ownership. Inside the pocketbook Agent McLeod found the heroin upon which defendant's conviction was based. In addition, he found a Piedmont identification card and a Mastercard, each issued in defendant's name, and a New York identification card bearing defendant's name and picture.

In *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972), the Supreme Court clarified the element of possession, holding that:

> [An accused] has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a . . . motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'

281 N.C. at 12-13, 187 S.E. 2d at 714 (citations omitted).

The proximity of the pocketbook to defendant's person and the presence of defendant's identification within the pocketbook

were sufficient to give rise to an inference of defendant's possession of the heroin.

Therefore, based upon the law and the facts discussed above, we conclude a rational basis existed for the trial court's denial of defendant's motions to set aside the verdict and to order a new trial, and overrule this assignment of error.

V.

[7] Finally, defendant contends that the indictment failed to specify the quantity of heroin necessary for conviction under the crime charged and was fatally defective.

Two indictments were filed in this action charging defendant with possession of heroin. The first indictment, filed in July 1986, did not specify the amount of heroin required for conviction. The second indictment, returned 29 September 1986, did include the requisite amount of heroin necessary for conviction. Further, the second indictment, pursuant to N.C.G.S. § 15A-646, superseded the first indictment and controls in the present case. N.C.G.S. § 90-95(h)(4)a, the offense charged, makes it a Class F felony to possess "*four grams or more*, but less than 14 grams" of heroin. In contrast, the indictment charged defendant with possessing "*more than four* but less than fourteen grams of heroin."

This variance, defendant asserts, rendered the indictment fatally defective. In support of her contention defendant relies on *State v. Goforth*, 65 N.C. App. 302, 309 S.E. 2d 488. In *Goforth* three defendants were indicted and convicted of feloniously conspiring "to commit the felony of trafficking in *at least* 50 pounds of marijuana G.S. 90-95(h) . . . ." *Goforth*, 65 N.C. App. at 304, 309 S.E. 2d at 491 (emphasis added). The language of N.C.G.S. § 90-95(h)(1), however, makes it a felony to possess "*in excess* of 50 pounds . . . of marijuana." This Court arrested defendant's convictions under N.C.G.S. § 90-95(h)(1), after finding that possession of *exactly* 50 pounds of marijuana, while included in the wording of the indictment, did not constitute trafficking in marijuana under the statute. Therefore, the indictment was fatally at variance with the statute.

In the present case, the indictment excludes from criminal prosecution the possession of exactly four grams, whereas the statute includes the possession of exactly four grams. The indict-

ment, while limiting the scope of defendant's liability, is clearly within the confines of the statute. Consequently, *Goforth* is inappropriate on these facts.

We conclude, therefore, that the indictment stated the essential elements of trafficking in heroin and overrule this assignment of error.

For the above reasons this Court finds that defendant received a fair trial, free from prejudicial error and affirms the judgment of the trial court.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

DONALD B. STEGALL AND WIFE, KATHERYN STEGALL; JOHN NEWTON AND WIFE, ESTINE NEWTON; JOSEPHINE J. RUSHER; JAMES HOLLOWAY AND WIFE, VIRGINIA HOLLOWAY; BEN M. WASHBURN AND WIFE, VIE WASHBURN; AND WILBUR THOMPSON AND WIFE, MONTINE THOMPSON, PETITIONERS AND PLAINTIFFS v. THE ZONING BOARD OF ADJUSTMENT OF THE COUNTY OF NEW HANOVER, NORTH CAROLINA, RESPONDENT; AND OLEANDER MEMORIAL GARDENS, INC., INTERVENING RESPONDENT

No. 875SC147

(Filed 20 October 1987)

1. **Municipal Corporations § 30.19— zoning—special use permit—permission to construct building—authority of building inspector**

According to the provisions of the New Hanover County Zoning Ordinance, a cemetery corporation's inquiry concerning whether it would be permitted to construct facilities prohibited by the terms of its special use permit was a question "arising in connection with the enforcement" of the Zoning Ordinance and was a proper subject for decision by the building inspector.

2. **Municipal Corporations § 30.19— cemetery—proposed construction of above-ground burial facilities—no enlargement of nonconforming use**

A cemetery corporation's proposal to construct above-ground burial facilities did not amount to an unlawful enlargement of its nonconforming use of property as a cemetery.

3. **Municipal Corporations § 30.19— cemetery—proposed construction of sales office—unlawful enlargement of nonconforming use**

Construction of an administration, security and sales office building upon cemetery property would amount to an unlawful enlargement of a cemetery corporation's nonconforming use of property as a cemetery.

4. **Municipal Corporations § 30.19— cemetery—proposed construction of above-ground burial facilities—special use permit not required—corporation not estopped from making assertion**

A cemetery corporation was not estopped to assert that no special use permit was required for construction of above-ground burial facilities because it had previously operated pursuant to the conditions of a special use permit and had failed to seek judicial review of those conditions since the cemetery corporation was entitled to use its property for cemetery purposes as a lawful nonconforming use without a special use permit, acceptance of the special use permit thus provided the corporation with no benefit to which it was not otherwise entitled, and above-ground facilities are not an unlawful extension of its nonconforming use.

APPEAL by Oleander Memorial Gardens, Inc., intervening respondent, from *Tillery, Judge*. Judgment entered 18 December 1986, in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 2 September 1987.

This case came before the superior court upon its issuance of a writ of certiorari to review a decision of the New Hanover County Zoning Board of Adjustment rendered 28 July 1986. The record discloses that Oleander Memorial Gardens, Inc. (OMG) is the owner of a 32-acre tract of land in New Hanover County which has been dedicated for use, and actually used, as a perpetual care cemetery since 1967. On 15 December 1969, OMG's property became subject to the provisions of the New Hanover County Zoning Ordinance and was zoned for residential use. Under the provisions of the zoning ordinance, a cemetery is not a permitted use in any zone, but may be allowed in residential zones under the terms of a validly issued special use permit. The Ordinance specifically provided, however, for the continuation of nonconforming uses of property which preexisted its effective date, even though such uses would otherwise be prohibited. Thus, OMG lawfully continued to use its property for cemetery purposes without the necessity for a special use permit.

Upon the effective date of the Zoning Ordinance, all interments at OMG's cemetery had been below-ground, with the exception of one above-ground crypt, or "companion mausoleum,"

which held the remains of two persons. Additional "companion mausoleums" were installed after the effective date of the Ordinance. In 1972, OMG obtained a building permit and constructed a mausoleum capable of entombment of the remains of approximately 180 persons. In 1979, OMG began installation of a number of lawn crypts at its cemetery. The New Hanover County building inspector issued a stop work order and advised OMG that a special use permit was required to complete the work. OMG applied for a special use permit, which was issued on 11 April 1980 by the New Hanover County Board of Commissioners. The permit authorized OMG to continue to operate its cemetery but restricted the interment of bodies to burial below the natural surface of the ground and prohibited the construction of additional buildings upon the property. OMG did not seek judicial review of that decision.

In 1985, OMG sought a modification of its special use permit to obtain authority to construct facilities for above-ground burial and to build an administrative office building on the cemetery grounds. Except for granting authority to install three above-ground crypts, the New Hanover County Board of Commissioners denied OMG's requests. OMG did not seek judicial review.

In May 1986, S. D. Conklin, Inspections Director for New Hanover County, acting in response to an inquiry from OMG, rendered a decision that OMG would be permitted to install and construct "lawn crypts, above-ground crypts, mausoleums, and such other above and below-ground facilities for the burial of the dead . . . and an administration, security and sales office building" upon its cemetery property, notwithstanding the restrictions contained in OMG's special use permit. Petitioners, who are residents of property adjoining OMG's cemetery property, appealed to the New Hanover County Zoning Board of Adjustment, which affirmed Mr. Conklin's decision. A writ of certiorari was issued by the superior court on 18 September 1986.

Upon review, the superior court concluded that the construction of above-ground burial facilities and an office building would violate the New Hanover County Zoning Ordinance as unlawful extensions of a nonconforming situation. The superior court also concluded that OMG was estopped to engage in conduct other than as authorized by its special use permit. From an order re-

versing the Board's decision and remanding the case to the Board for entry of a decision consistent with the court's order, OMG appeals.

Carr, Swails, Huffine & Crouch, by James B. Swails and Auley M. Crouch, III, for petitioners-appellees.

Rountree & Seagle by George Rountree, III, J. Harold Seagle and Chas. M. Lineberry, Jr. for intervening respondent-appellant.

MARTIN, Judge.

I

[1] We initially consider appellees' cross-assignment of error, through which they contend that the building inspector had no authority to consider OMG's inquiry and issue a decision with respect thereto. Section 108-1 of the New Hanover County Zoning Ordinance provides:

> It is the intention of this Ordinance that all questions arising in connection with the enforcement of this Ordinance shall be presented first to the Building Inspector and that such questions shall be presented to the Board of Zoning Adjustment only on appeal from the Building Inspector; and that from the decision of the Board of Adjustment recourse shall be to courts as provided by law.

OMG's inquiry concerning whether it would be permitted to construct facilities prohibited by the terms of its special use permit was clearly a question "arising in connection with the enforcement" of the Zoning Ordinance and was a proper subject for decision by the building inspector.

II

A

Judicial review of a decision of a county board of adjustment by proceedings in the nature of certiorari is provided for in G.S. 153A-345(e). In conducting such a review the superior court sits as an appellate court. *Coastal Ready-Mix Concrete Co., Inc. v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379, *reh'g denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980).

> The matter is before the Court to determine whether an error of law has been committed and to give relief from an order of the Board which is found to be arbitrary, oppressive or attended with manifest abuse of authority.

Godfrey v. Zoning Board of Adjustment, 317 N.C. 51, 54-5, 344 S.E. 2d 272, 274 (1986), *quoting In re Campsites Unlimited*, 287 N.C. 493, 498, 215 S.E. 2d 73, 76 (1975). The superior court is not the fact-finder; its function is to determine, *inter alia*, whether the board's decision is affected by legal error and whether the evidence before the board supports its decision. *Coastal Ready-Mix Concrete, supra.* A decision of a board of adjustment may be found to be arbitrary where it is not supported by substantial evidence. *Godfrey, supra.*

B

While the New Hanover County Zoning Ordinance provides for the continuation of preexisting nonconforming uses of property, Section 44-1 prohibits "an increase in the extent of nonconformity of a non-conforming situation." Section 44-4 provides: "Where a non-conforming situation exists the equipment or processes may be changed if these or similar changes amount only to changes in degree of activity rather than changes in kind and no violations of other paragraphs of this Section occur."

C

[2] The primary question presented to the Zoning Board of Adjustment by petitioners' appeal of Mr. Conklin's decision was whether OMG's proposal to construct above-ground burial facilities amounted to an unlawful enlargement of its nonconforming use of the property as a cemetery. The evidence before the Board on this issue was not in conflict; it showed the extent to which facilities for above-ground burials had existed at the cemetery before and after the effective date of the Zoning Ordinance and the extent to which such facilities existed at other cemeteries within New Hanover County. OMG's plans for construction of those facilities were also before the Board. Where the evidence is not in conflict, the question of whether a particular activity will be deemed a permissible continuation, or an impermissible expansion, of a nonconforming use is a question of law. *In re Tadlock*, 261 N.C. 120, 134 S.E. 2d 177 (1964).

The Board found that OMG's use of the property as a cemetery was a legitimate nonconforming use and that "above ground burial is a fundamental aspect of cemeteries." Based on those findings, the Board affirmed the building inspector's decision permitting OMG to construct facilities for above-ground burial facilities. Although the Board's decision could have been more artfully worded, it was essentially a determination that the construction of above-ground burial facilities would not amount to a "change in kind" of activity conducted at OMG's cemetery and was, therefore, not a prohibited enlargement of a nonconforming situation. The Board's decision is legally sound.

As we interpret the Zoning Ordinance, an increase in the intensity of the nonconforming activity is permissible; a change in the kind of activity conducted on the land is prohibited. We believe that this interpretation conforms with that ordinarily given zoning ordinances which proscribe a change of use. *See* 1 Anderson, American Law of Zoning 3d, § 6.38 (1986). OMG's land was dedicated and used for cemetery purposes at the time the zoning ordinance became effective; the nonconforming activity conducted upon the property was interment of the remains of deceased persons. The definition of "cemetery" contained in G.S. 65-48(3) includes:

"a. A burial park, for earth interment.

b. A mausoleum.

c. A columbarium."

Whether interment is accomplished by burial below the natural surface of the ground or through the use of lawn crypts, mausoleums or columbariums relates to the processes by which the nonconforming activity is conducted and the intensity of the nonconforming use of the land as a cemetery. It does not amount to a change in the nature and kind of use to which the property was devoted. Therefore, we reverse that portion of the superior court's judgment holding that the construction and installation of above-ground facilities for the dead amount to an unlawful extension of a nonconforming situation.

D

[3] The Board also determined that OMG would be permitted to build an administration, security and sales office building upon its

cemetery property. Its decision was based upon a finding that "administrative offices are required by law and therefore allowed." There is no evidence in the record to support such a finding and the Board's decision cannot stand.

The Board's finding was apparently based on the provisions of G.S. 65-60, which require that a cemetery company keep certain records and make such records "available at the licensee's *principal place of business*." (Emphasis added.) The statute does not, however, require that a licensee's office be located upon the site of its cemetery. Moreover, uncontradicted evidence before the Board disclosed that OMG had, for several years, maintained a sales office at an old house located on the cemetery property, but that use of the house had been discontinued and it had been removed from the property and not replaced. The Zoning Ordinance prohibits replacement or reconstruction of a structure used in a nonconforming manner unless a building permit is obtained within one year of the time the original structure was destroyed. New Hanover County Zoning Ordinance, § 44-8. We therefore affirm that portion of the superior court's judgment which vacates the Board's decision with respect to construction of an administration, security and sales office building.

E

[4] The superior court made findings of fact with respect to OMG's applications, in 1980 and 1985, for special use permits relating to the operation of its cemetery and its failure to seek judicial review of the decisions of the New Hanover County Commissioners denying certain of its requests. The court concluded that because OMG had obtained a special use permit in 1980, had operated pursuant to the terms and conditions thereof, and had failed to seek judicial review of those conditions, it was estopped to engage in conduct other than as specified in the special use permit. We reverse.

It is true that one who derives a benefit from exercising privileges granted by a statute or ordinance is estopped to deny the validity of terms fixed as conditions for the exercise of such privileges. *See Convent of the Sisters of Saint Joseph v. City of Winston-Salem*, 243 N.C. 316, 90 S.E. 2d 879 (1956); *Goforth Properties, Inc. v. Town of Chapel Hill*, 71 N.C. App. 771, 323 S.E. 2d 427 (1984). One cannot be estopped, however, due to his accept-

ance of a benefit to which he is entitled in any event, or where acceptance is induced by mistake as to the facts involved. 28 Am. Jur. 2d, Estoppel and Waiver, § 60. OMG's use of its property for cemetery purposes was protected by its status as a lawful nonconforming situation under the Zoning Ordinance without the necessity of obtaining a special use permit. It was entitled to conduct the very activities for which it sought the permit. Acceptance of the special use permit provided OMG with no benefit to which it was not otherwise entitled. OMG is not estopped, therefore, from asserting that no special use permit is required for the construction and installation of facilities for above-ground burial because such facilities are not an unlawful extension of its nonconforming use of its cemetery property. *See Lewis-Clark Memorial Gardens v. City of Lewiston*, 99 Idaho 680, 587 P. 2d 821 (1978).

III

In summary, we hold that OMG is permitted to construct and install facilities for above-ground burial at its cemetery property in conjunction with its lawful nonconforming use of that property and without the necessity of a special use permit. Insofar as the judgment of the superior court is inconsistent with this holding, it is reversed. OMG may not, however, construct an administrative, security and sales office building upon its cemetery property and the judgment of the superior court so holding is affirmed.

Affirmed in part; reversed in part.

Judges WELLS and EAGLES concur.

EBB CORPORATION (DARE CONCRETE, INC.) v. NANCY GLIDDEN AND NANCY GLIDDEN T/A FIRST FLIGHT CONCRETE

No. 861SC1347

(Filed 20 October 1987)

Frauds, Statute of § 5.1— mother's promise to pay son's debt—original promise —contract not in violation of statute of frauds

Evidence that defendant promised to pay her son's debt to plaintiff in exchange for plaintiff's keeping collection personnel away from her son was sufficient to support the trial court's finding that the parties' oral contract was

supported by adequate consideration and its conclusion that the contract was not in violation of the statute of frauds. N.C.G.S. § 22-1.

Judge BECTON dissenting.

APPEAL by defendant from *Llewellyn, Judge.* Judgment entered 3 September 1986 in Superior Court, DARE County. Heard in the Court of Appeals 2 June 1987.

Aycock & Spence by W. Mark Spence for plaintiff appellee.

Trimpi, Thompson & Nash by C. Everett Thompson and John G. Trimpi for defendant appellant.

COZORT, Judge.

This case involves an action by a corporation to enforce an oral promise made by an individual to take over her son's debt to the corporation. Ebb Corporation, plaintiff herein, is a company whose stock is totally owned by B. R. Evans, an individual. Ebb Corporation is the parent company of Dare Concrete. Jimmy Godwin is the president and manager of Dare Concrete. Nancy Glidden, defendant herein, is the mother of Bobby Gale Glidden, a debtor of Dare Concrete.

In February of 1984, Dare Concrete began supplying, on a thirty-day account, ready-mix concrete to Bobby Gale Glidden, the sole proprietor of First Flight Concrete. By May 1984, this account was $15,000 to $18,000 past due.

According to plaintiff's evidence, Dare Concrete was preparing to turn Bobby Gale Glidden's account over to its attorneys for collection when the defendant intervened and convinced the plaintiff to forbear by orally promising that she would make good any debts incurred by First Flight if plaintiff would abandon its planned course and continue to do business with her son. Plaintiff agreed, subject to the condition that the defendant or her son make some effort to begin to bring the delinquent account current. A $3,000 check, drawn on Wachovia Bank, paid for out of the defendant's personal funds, was applied to First Flight's debt on 2 November 1984. The plaintiff then resumed doing business with Bobby Gale Glidden, d/b/a First Flight, but only on a cash-on-delivery basis, with the cash discount amount being applied toward the reduction of the original debt. Soon after, however,

Bobby Gale Glidden filed a petition of bankruptcy without having paid the full amount due Dare Concrete. The defendant denied ever making an oral promise to be responsible for the account.

The case was tried without a jury. Judge James D. Llewellyn entered judgment for the plaintiffs for $18,357.89 on 3 September 1986, after finding that the oral contract was supported by adequate consideration and concluding that the oral contract was not in violation of the statute of frauds. N.C. Gen. Stat. § 22-1. Defendant appeals. We affirm.

N.C. Gen. Stat. § 22-1 provides in pertinent part:

> No action shall be brought whereby . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

Defendant contends that, even if plaintiff's evidence is taken as true, the oral promise of defendant was a contract of guaranty which, to be enforceable, must be in writing, in accordance with N.C. Gen. Stat. § 22-1. Plaintiff contends that the oral contract was a separate and enforceable agreement between defendant and plaintiff.

Interpreting this portion of the statute of frauds, which is in force in many jurisdictions, has caused courts much difficulty. *See generally* 72 Am. Jur. 2d *Statute of Frauds* §§ 179-197 (1974). Chief Justice Stacy opined for our Supreme Court that the question of when a writing was required to enforce the promise of an individual to pay the debt of another was not a novel one, but was "old and vexatious" with decisions "hopelessly in conflict." *Newbern v. Fisher*, 198 N.C. 385, 386, 151 S.E. 875, 876 (1930) (citations omitted). The court continued:

> The only uniformity found among the decisions relates to a matter of terminology. The "special promise," mentioned in the statute, is regarded as meaning an express promise, and contracts held to be outside the statute, and, therefore, unaffected by it, are usually termed "original" or "independent,"

while those which fall within its provisions are spoken of as "collateral."

Id. Simply put, if "[t]he cause of action alleged in the complaint is based upon an original promise of defendant to pay . . . [it] does not come within the provisions of the statute, G.S. 22-1, and is not required to be in writing and signed." *Pegram-West v. Insurance Co.*, 231 N.C. 277, 282, 56 S.E. 2d 607, 611 (1949) (citation omitted). Thus, an original promise is viewed as one between the party promising indemnification and the creditor. In other words, the creditor is being told to substitute the new promisor for the original debtor and look instead to the new promisor for satisfaction of the obligation. The difficulty is in determining into which category, original or collateral, a certain promise fits. *Dozier v. Wood*, 208 N.C. 414, 416, 181 S.E. 336, 337 (1935). Once the promise is properly categorized, the question of whether a writing is required is easily answered.

As with all forms of contract, the bargaining parties' intent is key. What they meant to accomplish with their promises and exchange of consideration governs whether a promise was original and direct or, on the other hand, collateral to the first promise. A reading of the cases indicates that such determination, perhaps because of its difficulty, is generally left to the trier of fact. *Id.* "Where the intent [of the parties] is doubtful, the solution usually lies in summoning the aid of a jury." *Goldsmith v. Erwin*, 183 F. 2d 432, 435 (1950); *see* Annot., 20 A.L.R. 2d 240, 244 and 253 (1951). *See also, New Amsterdam Casualty Co. v. Waller*, 233 N.C. 536, 64 S.E. 2d 826 (1951).

In the case below, Judge Llewellyn found as fact:

> 6) At the end of June, 1984, Jimmy Godwin went to talk to Bobby Glidden at the place of business for Ocean Island, Inc., which business was owned or operated by the defendant, Nancy Glidden, and Nancy Glidden's husband.
>
> 7) That during the conversation with the defendant, Jimmy Godwin was assured by the defendant, Nancy Glidden, that if he would not turn the past due account over to his attorneys and not cut her son off from further deliveries of ready mixed concrete, she would insure that the account would be paid in full.

8) That Jimmy Godwin's employer, Mr. E. R. Evans, owner of Ebb Corporation, said that if Nancy Glidden would stand for the bill, credit would be extended to Bobby Glidden.

9) That at a later time near the end of the month of June, 1984, Mr. E. R. Evans, owner of Ebb Corporation, went to speak to Mrs. Glidden about the past due account and he was assured that he need not worry about the account; that she would pay the account.

10) That for some time thereafter up to September of 1984 concrete was delivered to Bobby G. Glidden based upon the defendant, Nancy Glidden's, assurance to the plaintiff that the account would be paid and satisfied in full.

11) That in September 1984, Mrs. Glidden was again approached about the past due account by Jimmy Godwin, and sometime after that a check in the amount of $3,000.00 written on a check procurred [*sic*] by the defendant, Nancy Glidden, from her personal funds was sent to the plaintiff to apply to the account.

From the above factual findings, the trial court made the following conclusions of law:

1) That the oral promise by Nancy Glidden to pay the debt of her son, Bobby G. Glidden, with Ebb Corporation (Dare Concrete, Inc.) and the acceptance of that promise and forebearance [*sic*] of litigation and extension of credit worked to form a valid enforceable contract at law.

2) That said oral contract was enforceable and not in violation of the Statute of Frauds in that defendant, Nancy Glidden, had a direct, immediate and pecuniary interest in the transactions between the plaintiff and Bobby G. Glidden.

We find that the evidence here fully supports the crucial facts found by the trial court.

Godwin and Evans testified that Mrs. Glidden bargained to keep collection personnel away from her son. In exchange therefor, she promised that plaintiff would be paid. Findings of fact that are supported by competent evidence are conclusive on ap-

peal. *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 547, 206 S.E. 2d 155, 159 (1974).

"[W]here there is some new and original consideration of benefit or harm moving between the party to whom the debt to be paid is due, and the party making the promise to pay the same, such case is not within the statute [of frauds] . . . ." *Whitehurst v. Hyman*, 90 N.C. 487, 489 (1884). As Professor Farnsworth stated in his treatise on contracts:

> Like other provisions of the statute, the suretyship provision serves an evidentiary function. Indeed Williston suggested that the circumstance that "the promisor has received no benefit from the transaction . . . may make perjury more likely, because while in the case of one who has received something the circumstances themselves which are capable of proof show probable liability, in the case of a guaranty nothing but the promise is of evidentiary value."

E. Allan Farnsworth, *Contracts*, 379 (1982). Here the trial judge, sitting as trier of fact, found that adequate consideration passed between the parties when Nancy Glidden promised to take over her son's debt in exchange for the creditor's agreement not to pursue its legal remedy. Thus, the evil against which the statute is designed to protect is absent because the defendant, Nancy Glidden, received consideration.

"When . . . the promisor has a personal, immediate, and pecuniary interest in the transaction in which the third party is the original obligor, the courts will *always* give effect to the promise as an original and direct promise to pay." *Waller*, 233 N.C. at 538-39, 64 S.E. 2d at 828 (emphasis added). But, when the question is as here, a closer one, the trier of fact must decide if the obligation undertaken was original and direct and a writing required. *See* Annot., 20 A.L.R. 2d 240, 253 (1951); 13 A.L.R. 4th 1153, 1167 (1982). In this case the trier of fact has decided that the obligation was a direct one; there is competent evidence to support that finding. Therefore, the decision of the trial court is

Affirmed.

Judge MARTIN concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Even if Ebb Corporation's evidence is taken as true, I do not believe defendant Nancy Glidden's oral promise formed a valid, enforceable contract. I, therefore, dissent.

Our Statute of Frauds, N.C. Gen. Stat. Sec. 22-1 provides:

> No action shall be brought whereby . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

As an initial matter

> the mere fact that there may be a new consideration for the oral promise of a defendant to pay the subsisting debt of another is not sufficient of itself to take the promise out of the prohibition of the Statute of Frauds. "To say that any consideration will take a promise based thereon out of the statute is to make the statute useless. For if there is no consideration the promise is invalid without the statute. The statute is aimed at what were valid contracts; that is to say, it makes invalid contracts not in writing which would otherwise have been valid."

Myers v. Allsbrook, 229 N.C. 786, 791, 51 S.E. 2d 629, 632 (1949), *quoting Martin v. Harrington*, 174 Mo. App. 707, 710, 161 S.W. 275, 276 (1913). Only when an oral promise extinguishes the debt of the primary obligor and itself becomes an original, as opposed to a collateral undertaking, will an oral promise be enforceable. Nancy Glidden's oral promise was collateral; her son remained the primary obligor. Ebb Corporation's own witnesses testified that Nancy Glidden said she would pay her son's account and that she would stand behind her son. Further, Ebb Corporation sent the bill to Bobby Glidden, not to Nancy Glidden. Moreover, the trial court found as a fact that credit was extended to Bobby Glidden, not to Nancy Glidden.

In *Britton v. Thrailkill*, 50 N.C. 330 (1858), a father promised to pay all his son's debts if the creditors agreed not to take out

bail warrants and to allow the son to leave the state. Holding that the father's promise was not an original undertaking and that the oral promise was merely "superadded" to the original, unreleased debt, our Supreme Court barred the plaintiffs from recovering because the oral promise was within the Statute of Frauds. *Id.* at 331. Even a "continuing guaranty" is a guaranty required by the Statute of Frauds to be in writing. *Novelty Co. v. Andrews*, 188 N.C. 59, 123 S.E. 314 (1924).

More recently, in *Burlington Industries v. Foil*, our Supreme Court said:

> There must be either a present or prospective liability of a third person for which the promisor agrees to answer. If the promisor becomes himself primarily, and not collaterally, liable, the promise is not within the statute, though the benefit from the transaction accrues to a third person. If, for instance, two persons come into a store and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you, I will," this is a collateral undertaking, and must be in writing; but if he says, "Let him have the goods, and I will pay," or "I will see you paid," *and credit is given to him alone, he is himself the buyer and the undertaking is original. In other words, whether the promise in such a case is within the statute depends on how the credit was given. If it was given exclusively to the promisor, his undertaking is original; but it is collateral if any credit was given to the other party.* (Emphasis in original.)

284 N.C. 740, 754, 202 S.E. 2d 591, 600-01 (1974), *quoting* Clark on Contracts at 67-68 (2nd Ed. 1904).

Finally, I find no facts or equities warranting a change in the clear and settled law that the parent-child relationship is not sufficient in and of itself to take an oral promise by a parent to pay a child's debts outside the Statute of Frauds by applying the main purpose doctrine. *See, Britton v. Thrailkill, supra,* in which an oral promise by a father to his son's creditors was held to be within the Statute of Frauds and unenforceable.

Considering the foregoing, I vote to reverse.

CARLA ANN HALL SMITHWICK AND PATRICIA S. HALL v. WAYNE CRUTCHFIELD AND VEORA HALL CRUTCHFIELD

No. 8718SC133

(Filed 20 October 1987)

1. **Courts § 9.4— review of another superior court judge—judgment on the pleadings and summary judgment**

Though the trial court, in entering judgment for defendants, was not bound by another superior court's judgment denying defendants' motion for judgment on the pleadings, the court was bound by another superior court's order denying defendants' motion for summary judgment, since the present proceeding, though denominated a "trial" by the court and the parties, nevertheless constituted a rehearing of defendants' motion for summary judgment.

2. **Compromise and Settlement § 1.1— automobile accident—release executed by defendant—action dismissed**

A plaintiff may not maintain an action for injuries or damages sustained in an automobile accident while, at the same time, relying upon a complete release given by the defendant to defeat defendant's counterclaim for damages arising out of the same accident, and there was no merit to plaintiffs' contention that the rule did not apply to them because the release executed in this case contained express language denying their liability and reserving their rights to pursue their claims for personal injury or property damage.

APPEAL by plaintiffs from *Walker, Judge.* Judgment entered 3 November 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 September 1987.

Robert S. Cahoon for plaintiff appellants.

Henson, Henson, Bayliss, and Coates, by Perry C. Henson, Jr. for defendant appellees.

BECTON, Judge.

This action arises out of a 12 December 1978 automobile accident in which a Datsun automobile belonging to Plaintiffs, Carla Ann Hall Smithwick and Patricia S. Hall, and driven by Ms. Smithwick, collided with a Dodge automobile driven by Defendant Wayne Crutchfield and owned by his mother, Defendant Veora Crutchfield. Plaintiffs appeal from a 3 November 1986 judgment of the trial court which dismissed their claims on the ground that, by pleading a release signed by Defendants in bar of Defendants' counterclaim, Plaintiffs had ratified the compromise settle-

ment made by their liability insurance carrier. For the reasons that follow, and especially considering Defendants' cross-assignment of error, we conclude that Plaintiffs' action is barred as a matter of law.

I

Plaintiffs originally filed suit on 9 December 1981, alleging that Wayne Crutchfield negligently caused the accident, and seeking damages for personal injuries to Ms. Smithwick and property damage to their vehicle. Defendants answered, and counterclaimed for property damages to their automobile. In an amended reply, Plaintiffs pled in bar of the counterclaim a release of all claims obtained from Defendants on 1 August 1979 by Plaintiffs' liability insurance carrier. Based on the release, the trial court dismissed the counterclaim.

Defendants then moved for judgment on the pleadings, claiming that by pleading the release, Plaintiffs had ratified the compromise settlement, thus barring their own right to recover. The motion was denied, after a hearing, by an order of Superior Court Judge Hamilton H. Hobgood entered 30 May 1984. The case then proceeded to trial but ended in a mistrial, following which Plaintiffs filed notice of voluntary dismissal without prejudice.

Plaintiffs reinstituted this action on 10 June 1985. Defendants answered and moved for summary judgment, again contending that Plaintiffs' claims were barred by the pleading of the release in the first action. Hearing on the motion was held before Superior Court Judge Julius A. Rousseau, who denied the motion by order entered 4 September 1985.

Defendants next filed a motion to sever and try separately the issues relating to their defense of ratification of the release. The motion was granted without objection by Plaintiffs, and the parties waived trial by jury of the ratification issue.

At trial before Judge R. G. Walker, Jr., Defendants offered as evidence the entire file in the first lawsuit, and Plaintiffs offered as evidence the entire file in the current suit. After considering the evidence and arguments of counsel, the court made findings of fact and entered judgment for Defendants, concluding that Plaintiffs' claims were barred as a matter of law by the pleading of the release. From that judgment, Plaintiffs now ap-

peal to this Court, contending that 1) Judge Walker's judgment erroneously reversed and overruled the orders entered by Judges Hobgood and Rousseau denying Defendants' motions for judgment on the pleadings and summary judgment, which orders Plaintiffs claim are "the law of this case" and *res judicata*, and 2) because Plaintiffs expressly reserved their rights to bring suit against Defendants, pleading the release did not bar their claims.

II

[1] We first consider Plaintiffs' argument that the prior rulings by Judge Hobgood and Judge Rousseau were binding upon Judge Walker and rendered his judgment for Defendants improper. The principle which governs the resolution of this issue is not the "law of the case" doctrine or *res judicata*, as Plaintiffs assert, but, rather, the well established rule that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E. 2d 484, 488 (1972).

In our opinion, neither Judge Rousseau nor Judge Walker was bound by Judge Hobgood's 31 May 1984 order denying Defendants' motion for judgment on the pleadings. That order was rendered at a different stage of the proceeding, the materials considered by Judge Hobgood were not the same, and the motion for judgment on the pleadings did not present the same question as that raised by the later motion for summary judgment. *Compare Barbour v. Little*, 37 N.C. App. 686, 247 S.E. 2d 252, *disc. rev. denied*, 295 N.C. 733, 248 S.E. 2d 862 (1978) (denial of Rule 12(b)(6) motion to dismiss did not prevent same or different Superior Court judge from allowing subsequent motion for summary judgment) *and Alltop v. J. C. Penney Co.*, 10 N.C. App. 692, 179 S.E. 2d 885, *cert. denied*, 279 N.C. 348, 182 S.E. 2d 580 (1971) (same), *with State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12 (1971) (trial judge may not grant motion to dismiss previously denied by another judge) *and Stines v. Satterwhite*, 58 N.C. App. 608, 294 S.E. 2d 324 (1982) (same—summary judgment).

On the other hand, based on the nature of the proceeding before Judge Walker, we conclude that Judge Rousseau's order

denying Defendants' motion for summary judgment was conclusive on the legal question presented for Judge Walker's review. The law is clear that one Superior Court judge may not reconsider and grant a motion for summary judgment previously denied by another judge. *See Stines; Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 272 S.E. 2d 374 (1980), *disc. rev. denied*, 302 N.C. 217, 276 S.E. 2d 914 (1981); *Biddix v. Kellar Construction Corp.*, 32 N.C. App. 120, 230 S.E. 2d 796 (1977). The record plainly shows that Judge Walker did not reach the merits nor did the parties waive jury trial of the liability and damage issues in the case; that the sole issue before Judge Walker—the consequences of pleading the release—was precisely the same question of law as that previously decided by Judge Rousseau; and that the materials and arguments considered by Judge Walker were substantially the same as those considered by Judge Rousseau. In our view, the proceeding constituted, for all intents and purposes, a rehearing of Defendants' motion for summary judgment. The fact that it was denominated a "trial" by the court and the parties did not change its essential nature nor authorize Judge Walker to correct any error of law of Judge Rousseau on the question of whether Plaintiffs' claims were barred. Accordingly, we conclude that the imposition of judgment dismissing Plaintiffs' claims based on ratification of the release violated the principle that one Superior Court judge may not overrule another.

This legal conclusion gives Plaintiffs only a chimerical victory because we further conclude that Plaintiffs are not entitled to relief on this appeal. The ratification issue on which this case turns is properly before this court on Defendants' cross-assignment of error to Judge Rousseau's order denying summary judgment. From our review of the record and for the reasons discussed hereafter, we conclude that Judge Rousseau erred in denying Defendants' motion for summary judgment and that Plaintiffs' action is barred as a matter of law.

III

A

[2] The rule is well-established in this state that a plaintiff may not maintain an action for injuries or damages sustained in an automobile accident while, at the same time, relying upon a complete release given by the defendant to defeat the defendant's

counterclaim for damages arising out of the same accident. *See Keith v. Glenn*, 262 N.C. 284, 136 S.E. 2d 665 (1964); *Bradford v. Kelly*, 260 N.C. 382, 132 S.E. 2d 886 (1963); *Snyder v. Kenan Oil Co.*, 235 N.C. 119, 68 S.E. 2d 805 (1952); *Leach v. Robertson*, 49 N.C. App. 455, 271 S.E. 2d 405 (1980); *Lyon v. Younger*, 35 N.C. App. 408, 241 S.E. 2d 407 (1978); *Fowler v. McLean*, 30 N.C. App. 393, 226 S.E. 2d 867, *disc. rev. denied*, 290 N.C. 776, 229 S.E. 2d 32 (1976); *Johnson v. Austin*, 29 N.C. App. 415, 224 S.E. 2d 293, *disc. rev. denied*, 290 N.C. 308, 225 S.E. 2d 829 (1976); *Jones v. Pettiford*, 24 N.C. App. 546, 211 S.E. 2d 455 (1975); *McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E. 2d 585, *cert. denied*, 283 N.C. 665, 197 S.E. 2d 874 (1973); *White v. Perry*, 7 N.C. App. 36, 171 S.E. 2d 56 (1969). The logic behind the rule is simple:

> By a compromise settlement between parties to an automobile collision each party effectively "buys his peace" respecting any liability created by the collision. The settlement constitutes an acknowledgment, as between the parties, of the liability of the payor and the nonliability, or at least a waiver of the liability, of the payee.

McKinney at 283, 196 S.E. 2d at 587. *See also Snyder* at 120, 68 S.E. 2d at 806. A settlement made by a *liability* insurance carrier with the assent or subsequent ratification of the insured constitutes an admission of liability because the carrier is under no obligation to pay unless the insured is legally liable. *See Keith* at 286, 136 S.E. 2d at 667.

The most recent judicial pronouncement recognizing and explaining this rule was made in *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 347 S.E. 2d 369 (1986), in which our Supreme Court stated:

> In the context of a single automobile collision, the reason for the rule that ratification of a settlement of claims against the insured bars the insured's claim is obvious. If the plaintiff has ratified a settlement paying the defendant for injuries allegedly resulting from the plaintiff's negligence, it would be factually inconsistent for the plaintiff then to be allowed to recover against the defendant in a jurisdiction where contributory negligence is a total bar to recovery.

Id. at 626-27, 347 S.E. 2d at 371.

B

Plaintiffs contend that the general rule does not apply to them because the release agreement executed in this case contained express language denying their liability and reserving their rights to pursue their claims for personal injury or property damage. They maintain that, by pleading the release, they merely ratified the reservation of their right to sue and that, accordingly, their claims are not barred.

We find no authority in support of an exception which would allow a party to contractually opt out of the rule that ratification of a settlement constitutes an admission of liability. As the Supreme Court recognized in *Bolton Corp.*, it would be factually inconsistent to allow Plaintiffs to benefit from the settlement by their liability insurance carrier of Defendants' claims, and yet deny that they are liable.

The materials in the record present no issue of fact concerning whether Plaintiffs actually pleaded the release. Moreover, we note, although Plaintiffs have not argued otherwise, that the voluntary dismissal and refiling of the lawsuit did not constitute a revocation of the Plaintiffs' ratification so as to prevent the application of the rule requiring dismissal of their case. *See Fowler* (plaintiff's withdrawal, following voluntary dismissal, of plea of release did not revoke ratification).

For the reasons stated, we hold that, by pleading the release in bar of Defendants' counterclaim, Plaintiffs ratified the settlement by their insurance carrier and therefore lost the right to pursue their claims as a matter of law. Therefore, although Judge Walker had no authority to overrule Judge Rousseau on the facts of this case, Plaintiffs, nevertheless, cannot prevail. Deciding this matter on Defendants' cross-assignment of error, we hold that the order of Judge Rousseau denying Defendants' motion for summary judgment is

Reversed.

Judge JOHNSON concurs.

Judge PARKER concurs in the result only.

STATE OF NORTH CAROLINA v. CHERYL CATHERINE RICH

No. 8710SC171

(Filed 20 October 1987)

1. **Narcotics § 4.3— constructive possession of cocaine—sufficiency of evidence**

Evidence of defendant's constructive possession of cocaine was sufficient to support her convictions for possession of more than one gram of cocaine and possession with intent to sell and deliver where such evidence tended to show that defendant was seen on the premises the evening before; on the night of her arrest, defendant was cooking dinner at the house when agents arrived and found cocaine; women's casual clothes and undergarments were found in the bedroom and in the dresser where the cocaine was found; letters with defendant's name on them were also found in the room; and other mail addressed to defendant, including an insurance policy listing the house as her residence, was found in the house.

2. **Narcotics §§ 1.3, 5— possession of more than one gram of cocaine—possession of cocaine with intent to sell or deliver—conviction for both improper**

Double jeopardy barred defendant's conviction and punishment both for possession of more than one gram of cocaine and for possession of cocaine with intent to sell or deliver.

3. **Narcotics § 4— manufacturing cocaine—sufficiency of evidence**

Evidence was sufficient to sustain defendant's conviction for manufacturing cocaine where it tended to show that law officers discovered in defendant's home a bag containing 17 grams of diluted cocaine, a smaller bag containing over 3 grams of cocaine of a greater purity, tools commonly used in repackaging and selling cocaine, a bag of inositol which is a white powder used for diluting cocaine, and over a hundred small plastic bags. N.C.G.S. § 90-87(15).

4. **Narcotics § 4— maintaining dwelling used for keeping or selling controlled substances—sufficiency of evidence**

Evidence showing that defendant resided in a house, that she was cooking dinner there when cocaine was discovered, and that she possessed cocaine and materials related to the use and sale of cocaine was sufficient to allow conviction under N.C.G.S. § 90-108(a)(7) for maintaining a dwelling used for the keeping or selling of controlled substances.

Judge WELLS dissenting.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 18 September 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 22 September 1987.

Defendant was indicted on one count each for: possession of more than one gram of cocaine; possession of cocaine with the intent to sell and deliver; keeping and maintaining a dwelling

resorted to by persons using controlled substances and used for the keeping and selling of controlled substances; and manufacturing cocaine. At trial, only the State offered evidence. It showed that on 6 February 1986 agents for the Alcoholic Control Board of Wake County executed a search warrant at 303 Redwood Drive in Raleigh, North Carolina. Just prior to approaching the house, the agents seized Mr. Dalton Griffin, the person named in the warrant. Defendant was cooking dinner when the agents knocked on the back door of the house. Defendant opened the door, let the agents in, and waited while they searched the house.

The search uncovered approximately 20 grams of cocaine in the largest of the house's two bedrooms. Some of the cocaine was found in a tin can on top of a bedside dresser. A small spoon was also inside the tin can. Also found on top of the dresser was a mirror with a white powder residue on it, a razor blade, a straw, and a small tin sifter. Inside the dresser's top drawer, the agents found a small glass vial; another plastic bag containing cocaine; a plastic bag containing 46 grams of inositol, a white powder which is commonly used for diluting cocaine; and over 100 small plastic bags. Next to the dresser, inside a suitcase, the agents found a set of triple beam scales. Men's and women's clothing were found inside the dresser. On the dining room table, the agents found an insurance policy, issued in January 1985, listing defendant as the insured and her residence as 303 Redwood Drive. Other mail with defendant's name on it was seized from the bedroom.

At the close of the State's evidence, defendant's motions to dismiss each of the charges were denied. The jury returned guilty verdicts on all four charges. The trial court vacated the conviction for possession of more than one gram of cocaine, consolidated the other three convictions for sentencing, and imposed a three year suspended sentence. Defendant appeals.

Attorney General Thornburg, by Assistant Attorney General Charles H. Hobgood, for the State.

Gerald L. Bass for the defendant-appellant.

EAGLES, Judge.

Defendant argues that the evidence was insufficient on all charges and that, consequently, the trial court erred in failing to grant her motions to dismiss. We find no error.

In ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving it the benefit of all reasonable inferences which can be drawn therefrom. *State v. Rasor*, 319 N.C. 577, 356 S.E. 2d 328 (1987). If there is "substantial evidence" of each element of the charged offense, the motion should be denied. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). Substantial evidence is that amount of evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981).

[1] Defendant contends that there is insufficient evidence to show she possessed any of the cocaine. We disagree. A person is in "possession" of a controlled substance within the meaning of G.S. 90-95 if they have the power and intent to control it; possession need not be actual. *State v. Baize*, 71 N.C. App. 521, 323 S.E. 2d 36 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E. 2d 33 (1985). The State is not required to prove that the defendant owned the controlled substance, *State v. Pevia*, 56 N.C. App. 384, 289 S.E. 2d 135, *cert. denied*, 306 N.C. 391, 294 S.E. 2d 218 (1982), or that defendant was the only person with access to it. *State v. Roseboro*, 55 N.C. App. 205, 284 S.E. 2d 725 (1981), *disc. rev. denied*, 305 N.C. 155, 289 S.E. 2d 566 (1982).

The State's evidence showed that defendant was seen on the premises the evening before, that on the night of her arrest she was cooking dinner at the house when the agents arrived, that women's casual clothes and undergarments were found in the bedroom, and that mail addressed to defendant, including an insurance policy listing the house as her residence, was found in the house. This is sufficient to show defendant had nonexclusive control of the premises. *See State v. McLaurin*, 320 N.C. 143, 357 S.E. 2d 636 (1987); *State v. Allen*, 279 N.C. 406, 183 S.E. 2d 680 (1971). Where control of the premises is nonexclusive, however, constructive possession may not be inferred "without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E. 2d 585, 589 (1984). Here, the evidence established more than defendant's mere residence in the house. The evidence showed that defendant was present on the premises when the cocaine was found, that women's clothes and undergarments were in the room and in the dresser where the cocaine was found, and that letters with defendant's name on them were also found in the room. This is evidence of other incriminating circumstances, sufficient to

allow the jury to infer that defendant was in constructive possession of the cocaine. *See State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); *State v. Roseboro, supra.* Likewise, evidence showing the amount of cocaine, the presence of packaging materials and a chemical which the evidence showed is commonly used to dilute cocaine is sufficient to show defendant's intent to sell and deliver. *See State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983); *State v. Roseboro, supra.*

The recent decision in *State v. McLaurin, supra*, is factually distinguishable. There, the court reversed a conviction for possession of drug paraphernalia where, although the evidence established the defendant's nonexclusive control of the premises, there were no other incriminating circumstances. In *McLaurin*, the defendant apparently was not present at the time the paraphernalia was found. There was no evidence that she had entered or left the premises at all on the day of the search. Moreover, there was no evidence that the paraphernalia was found in an area of the house directly linked to the defendant. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss the charges of possession of more than one gram of cocaine and possession with the intent to sell and deliver.

[2] We note that principles of double jeopardy bar defendant's conviction and punishment for possession of more than one gram of cocaine and possession of cocaine with intent to sell or deliver. *See State v. McGill*, 296 N.C. 564, 251 S.E. 2d 616 (1979). Accordingly, the trial judge properly vacated the charge of possession of more than one gram of cocaine. The appropriate procedure, however, was to instruct the jury to first consider the offense of possession with intent to sell and deliver, and then, if and only if they found defendant not guilty of that offense, to consider the possession charge. *Id.*

[3] We also find no error in the trial court's denial of defendant's motion to dismiss the charge of manufacturing cocaine. G.S. 90-87 (15) defines "manufacture" as including "any packaging or repackaging" except that done "by an individual for his own use." G.S. 90-87(15). Evidence showing the presence of a bag containing 17 grams of diluted cocaine, a smaller bag containing over 3 grams of cocaine of a greater purity, tools of a type which the State's evidence showed were commonly used in repackaging and selling

cocaine, the bag of inositol, and over a hundred small plastic bags, is sufficient to sustain defendant's conviction for manufacturing cocaine. *See State v. Roseboro, supra.*

[4] The State's evidence was also sufficient to show defendant violated G.S. 90-108(a)(7) which makes it unlawful for any person:

> [t]o knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article.

Here, the State failed to produce evidence to show that the house was "resorted to by persons using controlled substances." *Id.* While the evidence established that defendant and Mr. Griffin both resided in the house, we do not believe the General Assembly intended "resorted to," as used in this statute, to include persons who live in the dwelling. The statute, however, also allows conviction upon evidence that the defendant maintained the dwelling, using it for the keeping or selling of controlled substances. The evidence showing that defendant resided in the house, that she was cooking dinner, and that she possessed cocaine and materials related to the use and sale of cocaine, is sufficient to allow conviction under G.S. 90-108(a)(7) for maintaining a dwelling used for the keeping or selling of controlled substances.

We note that the trial court instructed, in relevant part, that:

> in order for you to find the defendant guilty of knowingly maintaining a building which is resorted to by persons using controlled substances unlawfully and used for the purpose of unlawfully keeping or selling controlled substances, the State must prove two things to you beyond a reasonable doubt. First, that the defendant maintained a residence at 303 Redwood Drive here in the City of Raleigh which was resorted to by persons using cocaine unlawfully. Cocaine is a controlled substance and that the snorting or sniffing of cocaine which is unlawful or used for the purpose of unlawfully keeping or selling cocaine. And cocaine, again, is a controlled substance, the keeping or selling of which is unlawful in this State. The second thing the State must prove to you beyond a reasona-

> ble doubt is that the defendant did this knowingly. So, I charge that if you find from the evidence beyond a reasonable doubt that on or about February 6th of 1986 the defendant knowingly kept a building or a residence which was resorted to by persons using or sniffing cocaine unlawfully and used for the unlawful keeping or selling of cocaine, then it would be your duty to find a verdict of guilty of knowingly maintaining a building which was resorted to by persons using controlled substances unlawfully and used for the unlaw[ful] keeping or selling of controlled substances.

While the jury instruction is not a model of clarity, it is free of prejudicial error. In addition, defendant has not argued that the instruction is insufficient to allow her conviction for maintaining a dwelling used for the keeping or selling of the cocaine. Therefore, any possible error in that respect is waived. *See* App. R. 28(a); *State v. Edwards*, 49 N.C. App. 547, 272 S.E. 2d 384 (1980).

No error.

Judge MARTIN concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

In *State v. McLaurin*, 320 N.C. 143, 357 S.E. 2d 636 (1987), our Supreme Court held that where the defendant's control of the premises was nonexclusive, there must be other incriminating circumstances (such as close proximity to the contraband found on the premises) to establish constructive possession. The only distinction I can discern between the essential facts in *McLaurin* and the facts in this case is that in this case defendant was physically present on the premises when the contraband was found. I am not persuaded that this is a sufficient difference for us to distinguish this case from *McLaurin*. Taking the position that the evidence was insufficient to show constructive possession by defendant, I vote to vacate defendant's convictions.

CLERK OF SUPERIOR COURT OF GUILFORD COUNTY v. GUILFORD BUILDERS SUPPLY CO., INC., AND BENJAMIN D. HAINES

No. 8718DC261

(Filed 20 October 1987)

Attorneys at Law § 7.1— contingent fee agreement—issue as to whether attorney was discharged—summary judgment improper

In an action by an attorney to recover against his client under the terms of a contingent fee contract and to enforce an attorney's charging lien upon funds paid to the clerk of court by the client's debtor, summary judgment was improper where a genuine issue of fact existed as to whether the attorney was discharged by the client after judgment against the debtor was obtained but before any part of the account was actually collected, or whether he had never been discharged, and resolution of the disputed question was required before it could be determined whether the attorney was entitled to one-third of the judgment collected from the debtor, or to the reasonable value of his services as of the date of the discharge, or to an attorney's charging lien on the amounts paid into the clerk's office by the debtor.

APPEAL by defendant Guilford Builders Supply Co., Inc., from *Morton, Judge.* Judgment entered 16 January 1987 in District Court, GUILFORD County. Heard in the Court of Appeals 30 September 1987.

This case involves a dispute between an attorney and his client arising out of a contingent fee agreement. From the pleadings and discovery materials, it appears that for several years prior to 1978, defendant Haines, an attorney, had represented defendant Guilford Builders Supply Co., Inc. (Guilford) in connection with the collection of Guilford's past-due accounts receivable. Under the terms of an oral agreement between the parties, Haines was compensated for these collections on a contingent fee basis; he was paid one-fourth of all amounts he collected without filing suit and one-third of amounts collected in the event suit was necessary.

In January 1978, Haines filed suit on behalf of Guilford against Charles R. Hayes to recover a past-due account. Hayes retained counsel and defended the action. After a non-jury trial, a judgment in the amount of $14,457.92 was entered against Hayes and in favor of Guilford. Execution was issued on the judgment and was returned unsatisfied. Thereafter, Haines conducted supplemental proceedings before the Clerk of Superior Court and ex-

amined Hayes under oath concerning his property and assets. After determining that Hayes, at that time, owned no property from which the judgment might be satisfied, Haines advised Guilford of the information obtained through the supplemental proceeding and that the judgment would remain valid for ten years. He took no further action with respect to collection of the Hayes account.

In December 1982, Guilford employed the law firm of Tuggle Duggins Meschan and Elrod, P.A., to enforce collection of the judgment against Hayes. From September 1983 until January 1985, a total of $4,065.30 was paid into the office of the Clerk of Superior Court of Guilford County to be applied toward satisfaction of the judgment. In April 1986, Hayes paid the sum of $17,666.58 directly to Guilford in full satisfaction of the judgment. Both Guilford and Haines asserted claims to the $4,065.30 on deposit in plaintiff's office, Haines contending that he is entitled to an attorney's charging lien upon the funds.

Plaintiff brought this action requesting that Guilford and Haines be required to interplead and that their respective rights to the funds be determined. By his responsive pleading, Haines sought to recover against Guilford under the terms of the contingent fee contract and to enforce an attorney's charging lien upon the funds in plaintiff's hands. Guilford sought to recover the funds held by plaintiff, cancellation of its judgment against Hayes, and a declaratory judgment that Haines is entitled to compensation only for the reasonable value of his services rendered in connection with the suit against Hayes. Both Guilford and Haines moved for summary judgment. The trial court denied Guilford's motion, granted Haines' motion, and entered judgment for Haines in the amount of one-third of Guilford's recovery against Hayes. The judgment also directed that the funds held by plaintiff be disbursed to Haines in partial discharge of the judgment against Guilford. Guilford appeals.

Tuggle Duggins Meschan & Elrod, P.A., by Thomas S. Thornton, Jr., Joseph F. Brotherton, and Robert A. Ford for defendant-appellant.

Benjamin D. Haines pro se.

MARTIN, Judge.

Summary judgment is appropriate only in those cases where the materials before the court show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). An issue of fact is material if its resolution "would affect the result of the action." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E. 2d 190, 193 (1980), *quoting Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E. 2d 897, 901 (1972). Although Haines and Guilford both claim to be entitled to summary judgment in the present case, their contentions clearly illustrate the existence of a genuine issue of fact. Guilford contends that Haines is not entitled to recover a contingent fee for collection of the Hayes account because he was discharged as Guilford's attorney before any part of the account was actually collected. According to Guilford's forecast of evidence, Haines was advised in December 1978 that Guilford had employed new counsel and that his services were no longer required. On the other hand, Haines testified at his deposition that he had never been discharged as Guilford's counsel in connection with the Hayes collection. He contends that, pursuant to the contingent fee agreement, he is entitled to one-third of the amount which Guilford collected from Hayes. In our view, the disputed question of whether Guilford discharged Haines as its attorney before collecting any part of the Hayes account is material to the resolution of this case and precludes disposition of the case by summary judgment.

The use of contingent fee contracts for compensation of attorneys has been expressly approved in North Carolina, *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378, 19 A.L.R. 391 (1921), except when such a fee contract would be in direct contravention of the public policy of this State. *Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E. 2d 315 (1984), *rev'd on other grounds and remanded*, 313 N.C. 313, 328 S.E. 2d 288 (1985) (domestic action). In *High Point Casket Co., supra*, the Court held that a contingent fee contract amounted to, "at least, an equitable assignment of the judgment *pro tanto*," *Id.* at 462, 109 S.E. at 380, 19 A.L.R. at 393-94, but the attorney's equitable interest has been held not to attach until the case is "prosecuted to a favorable judgment or settled *by the contracting attorney*." *Covington v. Rhodes*, 38 N.C. App. 61, 65, 247 S.E. 2d 305, 308 (1978), *disc. rev.*

denied, 296 N.C. 410, 251 S.E. 2d 468 (1979) (emphasis original), *quoting Potts v. Mitchell*, 410 F. Supp. 1278, 1282 (W.D.N.C. 1976). In the present case, however, Haines' entitlement to an attorney's fee was not contingent upon obtaining a judgment in favor of Guilford. Haines was employed to effect collection of Guilford's past due accounts receivable. "[T]he primary objective of a suit on a money demand is the collection of the debt. The obtaining of judgment is merely a necessary step to that end." *Harrington v. Buchanan*, 222 N.C. 698, 700, 24 S.E. 2d 534, 536 (1943). The contingent fee contract provided for compensation only in the event of collection; neither party contends otherwise. Thus, Haines is not entitled to enforce the contract merely because he obtained a judgment on behalf of Guilford; he could acquire no equitable rights thereunder until collection actually occurred.

In *Covington v. Rhodes, supra*, a panel of this Court adopted the modern rule that an attorney employed pursuant to a contingent fee contract who is discharged before completion of the matter for which he was employed can recover only the reasonable value of his services as of the date of discharge, regardless of whether the discharge is with or without cause. *Id.* The Court explained that the special relationship of trust and confidence which must exist between attorney and client demands that the client must be able to terminate the relationship at will, with or without cause. "Such a discharge does not constitute a breach of contract for the reason that it is a basic term of the contract, implied by law into it by reason of the special relationship between the contracting parties, that the client may terminate the contract at will." *Id.* at 65, 247 S.E. 2d at 308, *quoting Fracasse v. Brent*, 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 389, 494 P. 2d 9, 13 (1972). *See also O'Brian v. Plumides*, 79 N.C. App. 159, 339 S.E. 2d 54, *cert. denied*, 318 N.C. 409, 348 S.E. 2d 805 (1986). The court noted as well that a client's discharge of his attorney "on the courthouse steps" after completion of all but a minor part of the work required might justify a finding that the reasonable value of the attorney's services was equal to the entire fee to which he would have been entitled under the contract. *Covington, supra*, at 66, 247 S.E. 2d at 309. Under the foregoing rules, if Haines was, in fact, discharged after obtaining a judgment for Guilford, but prior to its satisfaction, he would be entitled to recover, upon Guilford's subsequent collection of the debt evidenced by the judgment, the

reasonable value of the services which he rendered in Guilford's behalf.

The outcome is different, however, if Haines was not actually discharged by Guilford. If he was not so discharged, then the attorney-client relationship continued to exist up to and including the time during which Hayes made payments in satisfaction of the judgment against him. This being the case, and because Hayes was making payments to satisfy a judgment obtained by Haines, the contingency would have occurred during the existence of the attorney-client relationship and Haines' equitable rights under the contingent fee contract would attach. *High Point Casket Co., supra; Covington, supra.* Accordingly, Haines would be entitled to recover his full fee under the contingent fee contract. A determination of whether or not Haines was discharged, then, is a material issue of fact in determining the amount to which Haines is entitled by reason of his representation of Guilford in connection with the Hayes account.

We reject Guilford's argument that, because he completed his last work under the contract in 1978, Haines' claim is barred by the three-year statute of limitations. G.S. 1-52(1). Obviously, if Haines was never discharged by Guilford, no cause of action for his fee could accrue until the occurrence of the event upon which the fee was contingent. Moreover, we agree with the holding of the California Supreme Court in *Fracasse v. Brent, supra,* that the attorney's action for the reasonable value of his services upon termination of employment under a contingent fee contract does not accrue until the occurrence of the contingency stated in the contract. The California Court stated two reasons for its holding:

> First, one of the significant factors in determining the reasonableness of an attorney's fee is "the amount involved and the result obtained." [citation omitted] It is apparent that any determination of the "result obtained" is impossible, and any determination of the "amount involved" is, at best, highly speculative [citation omitted] until the matter has finally been resolved. Second, and perhaps more significantly, we believe it would be improper to burden the client with an absolute obligation to pay his former attorney regardless of the outcome of the litigation. The client may and often is very likely to be a person of limited means for whom the con-

> tingent fee arrangement offers the only realistic hope of establishing a legal claim. Having determined that he no longer has the trust and confidence in his attorney necessary to sustain that unique relationship, he should not be held to have incurred an absolute obligation to compensate his former attorney. Rather, since the attorney agreed initially to take his chances on recovering any fee whatever, we believe that the fact that the success of the litigation is no longer under his control is insufficient to justify imposing a new and more onerous burden on the client. Hence, we believe that the attorney's action for reasonable compensation accrues only when the contingency stated in the original agreement has occurred . . . . It follows that the attorney will be denied compensation in the event such recovery is not obtained.

Id. at 792, 100 Cal. Rptr. at 390, 494 P. 2d at 14. Accordingly, whether he was discharged or not, Haines' right to recover under the contingent fee contract did not accrue until occurrence of the contingency, i.e., the collection of monies due on the Hayes account, which was within three years of filing suit.

A determination of whether or not Haines was discharged is also material to a determination of whether he is entitled to assert an attorney's charging lien on the amounts paid into the Clerk's office by Hayes. There is little North Carolina authority concerning the attorney's charging lien; only two cases appear to have dealt with the subject at all. *See Dillon v. Consolidated Delivery,* 43 N.C. App. 395, 258 S.E. 2d 829 (1979); *Covington v. Rhodes, supra.* "The charging lien is an equitable lien which gives an attorney the right to recover his fees 'from a fund recovered by his aid.' " *Covington, supra,* at 67, 247 S.E. 2d at 309, *quoting* 7 Am. Jur. 2d, Attorneys at Law § 324. "It is said that an attorney's charging lien attaches to the fruits of his skill and labor. If the attorney's work is sterile and produces no fruit, then he has no lien." 7 Am. Jur. 2d, Attorneys at Law § 339 (citations omitted). As we have already noted, until money was actually collected from Hayes, Haines' work had not "borne fruit" and he had no right to recover any fee from Guilford. There was nothing, therefore, to which Haines' lien could attach until Hayes paid on the judgment. It follows, then, that if Haines was not discharged by Guilford and the attorney-client relationship continued, a

charging lien to the extent of his fee could attach to the money paid into the Clerk's office by Hayes. On the other hand, if Haines was discharged before occurrence of the contingency, no lien could have attached because "an attorney cannot attach a lien to a fund recovered after his discharge or withdrawal, since at that time the fund would not be '"recovered by his aid" (Cite omitted.)'." *Dillon, supra,* at 396, 258 S.E. 2d at 830, *quoting Covington, supra,* at 67, 247 S.E. 2d at 309.

Because a genuine issue of material fact exists, summary judgment was improperly entered for Haines. This case must be remanded for resolution of the issue of whether, and at what point in time, Guilford actually discharged Haines, and a determination, based thereon, of the amount of compensation to which Haines is entitled.

Reversed and remanded.

Judges WELLS and EAGLES concur.

FRANCES B. SLOAN v. NORMAN L. SLOAN

No. 8721DC106

(Filed 20 October 1987)

1. Divorce and Alimony § 24.1— child support—determining amount—exclusion of children's tax returns improper

The trial court in an action for child support erred in refusing to receive into evidence the individual income tax returns filed by plaintiff on behalf of the three minor children of the parties, since the trial court did not give "due regard" to the estates and earnings of the children, as required by N.C.G.S. § 50-13.4(c), when it refused to receive into evidence the only information concerning these matters.

2. Divorce and Alimony § 24.1— child support—determining amount—failure to determine estates of the parties

The trial court in an action for child support erred in failing to make findings of fact as to the value of the estates of each of the parties, and it was not enough that there was ample evidence in the record about the estates of both parties.

3. Divorce and Alimony § 24.1— child support—determining amount—gift labeled as income improper

The trial court in an action for child support erred in finding that $15,000 was a "gift" from defendant's parents and should be considered income where the parents gave the money in exchange for a non-interest bearing demand note.

4. Divorce and Alimony § 24.1— child support—determining amount—food and car expenses of parties—court's unequal treatment of parties

The trial court in an action for child support did not err in determining that defendant's food costs were $100 per month less than he claimed, but the court did err in disallowing defendant's $156 per month car payment as an expense because it would be paid off within the year while allowing plaintiff a $250 per month allowance for "auto payment/replacement" for a car on which no money was owed, since the expenses were virtually the same and to allow one but not the other would result in unequal treatment of the parties.

5. Divorce and Alimony § 24.1— child support—determining amount—parties' contributions—consideration of income tax consequences

The trial court in a child support action did not err in calculating the value of defendant's monetary contributions to the support of the children, and the court properly made adjustments based on income tax consequences; furthermore, defendant could not complain that there was no evidence to support a finding that plaintiff was in the 50% tax bracket when defendant omitted from the record the relevant evidence underlying the finding.

6. Divorce and Alimony § 24.9— child support—retroactive order—failure to find ability to pay

The trial court did not err in determining that defendant should pay retroactive child support where the court made specific findings as to the actual amount expended by plaintiff for support of the children and these findings were amply supported by the evidence; however, the court erred in making no finding that defendant had the present means with which to pay the lump sum retroactive award on or before a named date.

APPEAL by defendant from *Hayes, Judge.* Judgment entered 29 October 1986 in District Court, FORSYTH County. Heard in the Court of Appeals 26 August 1987.

Plaintiff wife and defendant husband were married on 21 August 1971. Three children were born of the marriage. On or about 22 April 1985, the parties separated. In July of 1985 plaintiff filed an action for child custody and support. A trial was had only on the issue of child support. Defendant was ordered to pay $1,189.00 per month prospective child support and $8,907.50 in retroactive child support. From this judgment and order, defendant appeals.

Womble, Carlyle, Sandridge & Rice, by Jim D. Cooley and F. Lane Williamson, for plaintiff appellee.

Randolph and Randolph, by Clyde C. Randolph, Jr. and Rebekah L. Randolph, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in refusing to receive into evidence the 1984 individual income tax returns filed by plaintiff on behalf of the three minor children. We agree.

G.S. 50-13.4(c) states:

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

This Court cannot conclude that the trial court gave "due regard" to the estates and earnings of the children when the trial court refused to receive into evidence the only information concerning these matters. Whether or not the trial court would have attached significance to the evidence is another question. However, such evidence should at least have been admitted for consideration. The trial court erred in refusing to admit the children's tax returns into evidence.

[2] Defendant next assigns as error the trial court's failure to make findings of fact as to the value of the estates of each of the parties. In order to comply with G.S. 50-13.4(c), the trial court is required to make findings of fact with respect to the factors listed in the statute. *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E. 2d 581 (1986); *Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863 (1985). It is not enough that there may be evidence in the record sufficient to support findings which could have been made. *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). The trial court must make findings of fact on the parents' incomes, estates, and present reasonable expenses in order to determine their relative ability to pay. *Newman v. Newman*, 64 N.C. App. 125, 306 S.E. 2d 540 (1983).

Such findings are required in order for the appellate court to determine whether the trial court gave "due regard" to the factors listed. *Boyd v. Boyd*, 81 N.C. 71, 343 S.E. 2d 581 (1986). *See Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E. 2d 47 (1985).

In the present case, the only finding with respect to the estates of the parties is the balance sheet of the corporation wholly owned by defendant. Although other findings allude to additional assets held by the parties, no finding is made regarding the value of their respective estates. At the very least, a trial court must determine what major assets comprise the parties' estates and their approximate value. *See Newman v. Newman*, 64 N.C. App. 125, 306 S.E. 2d 540 (1983). Such a finding is necessary in determining the ability to pay.

Although there was ample evidence contained in the record about the estates of both parties, that is not sufficient. *See Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). The trial court must determine what pertinent facts are established by the evidence before it. *Id.* In the case *sub judice*, the findings of fact are insufficient to determine whether the trial court gave due regard to the estates of the parties and the case must be remanded for further findings on this matter.

[3] Defendant next argues that the trial court erred in determining his income. More specifically, defendant contends that the trial court erred in including in defendant's income what the court termed a "gift" in the amount of $15,000.00 from defendant's parents. Defendant argues there is no evidence to support such a finding. We agree.

The $15,000.00 is evidenced by a promissory note dated 20 February 1985. The mere fact that the transaction is in the form of a non-interest bearing demand note from defendant's parents and the fact that no demand has been made, does not render it a gift. Since the record is absent of any evidence of intent of defendant's parents to relinquish or abandon their claim on the amount of the note, the court's finding that the transaction was a gift is erroneous. Even assuming *arguendo* that the $15,000.00 was a gift to defendant, it would still be error to include such a gift as income for purposes of calculating child support since there is no evidence that such generosity on the part of defendant's parents will be reoccurring.

[4] Defendant next assigns as error the trial court's findings as to defendant's reasonable living expenses. Defendant first contends that the trial court erred in reducing his allowance for food from $300.00 per month to $200.00 per month based on the finding that the defendant spends no more than $200.00 per month on food. We disagree.

During the trial defendant testified that he spent $300.00 per month on food. However, all the receipts and records of payment in the preceding year that could have possibly been spent on food amounted to only $2,405.96.

"A finding of fact that defendant's average monthly expenses are a certain amount requires only that the trial judge resolve any conflicts in the evidence and state what he finds to be true." *Plott v. Plott*, 313 N.C. 63, 74, 326 S.E. 2d 863, 870 (1985). In the present case, there is sufficient evidence to support the finding. Defendant's contention is without merit.

Defendant next contends the trial court erred in disallowing his $156.00 car payment as an expense because it would be paid off within the year, while allowing plaintiff a $250.00 allowance for "auto payment/replacement" for a car on which no money was owed. We agree.

In determining child support, the parties should be treated equally. It is a "question of fairness to all parties." *Beall v. Beall*, 290 N.C. 669, 679, 228 S.E. 2d 407, 413 (1976).

While this Court is not convinced that defendant's car payment, ending within a year, and plaintiff's "auto payment/replacement" figure, for an automobile on which nothing is currently owed, are appropriate expenses to consider in determining child support, the important concern here is that both parties were not treated equally. The expenses are virtually the same and the trial court erred in allowing one and not the other.

Defendant next assigns as error the trial court's finding of fact that the reasonable needs and expenses of the children total $4,840.00. Defendant contends that the trial court measured his obligation against a standard of living that he was never financially able to provide, even during the marriage. The record is full of evidence and testimony (including that of the defendant) relating to actual past expenditures on behalf of the children, present ex-

penses of the children, and the children's accustomed standard of living throughout the marriage. The evidence more than adequately supports the trial court's finding. Furthermore, the amount of child support ordered to be paid by defendant was computed according to a formula which took into account that defendant's income is substantially less than plaintiff's income. This assignment of error is totally without merit.

[5] Defendant next contends that the trial court erred in calculating the value of defendant's monetary contributions to the support of the children. During the period of separation, defendant had been making the entire mortgage payment on the jointly owned residence. Consequently, he took the entire mortgage interest deduction on his individual income tax returns. In offsetting the retroactive child support due with the mortgage payments paid, the trial court reduced the value of such payments by the value of one-half the interest deduction to plaintiff had she been allowed to claim such deduction on her individual income tax returns.

Defendant contends there is no authority to support such computations. While there is no express authority for adjustments based on income tax consequences, there is implied authority. G.S. 50-13.4(c) provides: "Payments ordered . . . shall be in such amount as to meet the reasonable needs of the child . . . , having due regard to . . . , and *other facts of the particular case*." (Emphasis added.) In addition to the factors enumerated in the statute, a court should take into account any other facts relevant to the case. *Warner v. Latimer*, 68 N.C. App. 170, 314 S.E. 2d 789 (1984); *McCall v. McCall*, 61 N.C. App. 312, 300 S.E. 2d 591 (1983). In the present case, the trial court did not err in computing the value of defendant's monetary contributions to child support.

Concerning this same issue, defendant further contends there is no evidence supporting a finding that plaintiff is in a 50% tax bracket. While the full tax returns of the plaintiff were admitted into evidence at trial, defendant only included the first pages of the tax return in the record presented to this Court. Therefore, on the federal return there is no way of determining what plaintiff's taxable income was or what marginal tax bracket she was in. It is the appellant's duty to insure that the record is properly

prepared and transmitted. *Tucker v. Telephone Co.*, 50 N.C. App. 112, 272 S.E. 2d 911 (1980). The defendant cannot be allowed to allege as error that there is no evidence in the record to support a finding of fact when he has omitted from the record the relevant evidence underlying the finding.

[6] Defendant next contends that the trial court erred in its conclusion of law that defendant should pay retroactive child support. We disagree.

An award for retroactive child support should be vacated when there is no evidence or finding as to the actual amount expended for the support of the children for which reimbursement is sought. *Hicks v. Hicks*, 34 N.C. App. 128, 237 S.E. 2d 307 (1977). In the present case, the trial court made specific findings as to the actual amount expended by plaintiff and these findings are amply supported by the evidence. The amount of the lump sum award is properly based upon these findings concerning the amounts actually expended. *See Warner v. Latimer*, 68 N.C. App. 170, 314 S.E. 2d 789 (1984). Defendant's contention is without merit.

The defendant next contends that there is no finding of fact that defendant has the present means with which to pay the lump sum retroactive award on or before 31 December 1986. We agree.

A trial court must make specific factual findings to support not only an award of future support, but also to support an award of reimbursement for past support. *Buff v. Carter*, 76 N.C. App. 145, 331 S.E. 2d 705 (1985). As mentioned earlier, the trial court has failed to make findings as to the estates of the parties. Therefore, there are no findings to support the defendant's ability to comply with the order.

Upon remand, the trial court shall make findings of fact concerning the estates of the parties and defendant's ability to comply with the order.

We have examined defendant's remaining contentions and have determined them to be without merit.

Reversed and remanded for further proceedings as directed in this opinion.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. TONY ALLEN WILSON

No. 8725SC165

(Filed 20 October 1987)

Rape § 19— taking indecent liberties with child—"purpose of arousing or gratifying sexual desires"—no fatal variance between indictment and instructions

There was no fatal variance between an indictment which charged that defendant took indecent liberties with his daughter by willfully committing a lewd and lascivious act upon her and the trial judge's instructions which included language not in the indictment that the indecent liberty was taken "for the purpose of arousing or gratifying sexual desires." N.C.G.S. § 14-202.1.

APPEAL by defendant from *Sitton, Judge.* Judgment entered 26 September 1986 in Superior Court, BURKE County. Heard in the Court of Appeals 1 September 1987.

Defendant was tried upon an indictment, proper in form, charging him with the commission of a first degree sexual offense and with the taking of indecent liberties with his daughter, then four years old. The jury found defendant not guilty of the first degree sexual offense and guilty of taking indecent liberties with a minor child. The trial judge sentenced defendant to nine years' imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Donald W. Laton, for the State.

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

PARKER, Judge.

Defendant's sole contention in this appeal is that a variance between the language of the indictment and the trial judge's charge to the jury constituted reversible error.

The North Carolina statute prohibiting the taking of indecent liberties with children provides:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either

sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(b) Taking indecent liberties with children is punishable as a Class H felony.

G.S. 14-202.1. The indictment upon which defendant was tried and convicted states the following:

TAKING INDECENT LIBERTIES WITH CHILDREN

And the jurors for the State upon their oath present that on or about the _____ day of October, 1985, in the county named above the defendant named above unlawfully, willfully and feloniously did commit and attempt to commit a lewd and lascivious act upon the body of [the victim], who was under the age of 16 years at the time. At the time, the defendant was over 16 years of age and at least five years older than that child. This act was in violation of N.C.G.S. 14-202.1.

In response to defendant's request for a bill of particulars, the State specified that the alleged offense "occurred sometime in the Fall, probably in the month of October, and all the available information is October 28, 1985"; that the location of the alleged offense was the defendant's and the victim's shared residence; and that the alleged sexual act was "inserting a foreign object into the child's vagina."

At the close of all evidence, the trial judge instructed the jury as follows:

As to count two, the defendant is charged with the offense of taking indecent liberty with a child. Now, I charge that for you to find the defendant guilty of taking indecent liberty with a child, the State must prove three things to you beyond a reasonable doubt.

First, that the defendant, Tony Wilson, committed a lewd or lascivious act upon a child, [the victim], or took an in-

> decent liberty with a child for the purpose of arousing or gratifying sexual desires. An indecent liberty is an immoral or indecent touching or act by the defendant upon a child or an inducement by the defendant of an immoral or indecent touching by the child.
>
> Second, that the child had not reached her sixteenth birthday at the time in question and third, that the defendant was at least five years older than the child and had reached his sixteenth birthday at that time.

Defendant failed to object to the charge, although given an opportunity out of the presence of the jury to do so. Hence, error, if any, to afford defendant relief must be "plain error." Rule 10(b)(2), N.C. Rule App. Proc. and *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

The general rule is that a defendant must be convicted, if he is convicted at all, of the particular offense with which he was charged in the bill of indictment. *State v. Muskelly*, 6 N.C. App. 174, 176, 169 S.E. 2d 530, 532 (1969). The portion of the trial judge's jury charge not included in the indictment was the language "for the purpose of arousing or gratifying sexual desires," language that appears in G.S. 14-202.1(a)(1). We hold that the inclusion of this language in the charge to the jury did not cause a fatal variance between the indictment and the charge and does not constitute plain error.

The original version of G.S. 14-202.1, enacted in 1955, was captioned, "An Act to provide for the protection of children from sexual psychopaths and perverts." 1955 N.C. Sess. Laws Ch. 764. The statute was written in order to afford broader protection to children than provided by the then-existing laws. *State v. Harward*, 264 N.C. 746, 749, 142 S.E. 2d 691, 694 (1965); *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E. 2d 574, 575 (1981). The impetus for the statute was a law review article, *The Law of Crime Against Nature*, 32 N.C.L. Rev. 312 (1954), which advocated a revision of North Carolina's criminal law regarding crimes against nature, and included a section covering child molesting. *State v. Harward*, 264 N.C. at 748-749, 142 S.E. 2d at 694; *State v. Whittemore*, 255 N.C. 583, 585, 122 S.E. 2d 396, 398 (1961). The statute specifically proposed by the article made a felony the taking of "any immoral, improper, or indecent liberties with" or,

alternatively, the committing of "any lewd or lascivious act upon or with the body, or any part of [sic] member thereof" of any child under sixteen years of age. Spence, *The Law of Crime Against Nature*, 32 N.C.L. Rev. 312, 324 (1954). Each of these theories required "the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both." *Id.*

As originally enacted, G.S. 14-202.1 consisted of a single paragraph making a felony "any immoral, improper, or indecent liberties" or "any lewd or lascivious act" with a child, and required the "intent to commit an unnatural sexual act" as to each alternative. Our current substantive version of G.S. 14-202.1 was enacted in 1975. This version divided the offense into two alternative subsections, (1), prohibiting "any immoral, improper, or indecent liberties," and (2), prohibiting "any lewd or lascivious act." This version also eliminated the required "intent to commit an unnatural sexual act," and included the requirement as to each alternative that the offense be "willful." Finally, the General Assembly added the phrase "for the purpose of arousing or gratifying sexual desire" to subsection (1), containing the "immoral, improper, or indecent liberties" language. The phrase was not added to subsection (2), which contained the "lewd or lascivious act" language.

The General Assembly's reason for adding the phrase to one subsection and not to the other is not clear. However, it may be logically assumed that acts described as "lewd" and "lascivious" are committed "for the purpose of arousing or gratifying sexual desire." The word "lewd" has been defined as "inciting to sensual desire or imagination"; the word "lascivious" has been defined as "tending to arouse sexual desire." Webster's Third New International Dictionary (1971). Moreover, our Supreme Court, in *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981), after setting out the substantive portion of G.S. 14-202.1 in its entirety, stated, "The offense of taking indecent liberties with children requires proof that the crime be willful and that it be for the 'purpose of arousing or gratifying sexual desire' "; the Court did not distinguish between the alternative subparts of the statute. 303 N.C. at 514, 279 S.E. 2d at 596.

On the facts of the case before us, the State could have charged defendant under G.S. 14-202.1(a)(1), but was not required

to do so. The evidence presented at trial supported either theory. Therefore, we must conclude that the trial judge's inclusion in the charge of language involving "the purpose of arousing or gratifying sexual desires" did not constitute a fatal variance between the indictment and the charge. The language of the indictment together with the bill of particulars gave defendant fair notice both of the events giving rise to the charge and of the crime with which he was accused, taking indecent liberties with a child.

In any event, defendant has failed to show the instruction was plain error.

North Carolina Rule of Appellate Procedure 10(b)(2) provides the following, in relevant part:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

In exceptional cases, however, where the claimed instructional error is a fundamental one having a probable impact on the jury's finding of guilt, the improper instruction will justify reversal of a criminal conviction although no objection was made in the trial court under the "plain error rule" adopted by our Supreme Court in *State v. Odom, supra.* In order to show the existence of plain error in the trial court's charge to the jury, defendant must establish that absent the erroneous charge the jury probably would have reached a different verdict. *State v. Ramey,* 318 N.C. 457, 463, 349 S.E. 2d 566, 570 (1986); *State v. Walker,* 316 N.C. 33, 39, 340 S.E. 2d 80, 83 (1986); *State v. Odom,* 307 N.C. at 661, 300 S.E. 2d at 378-379. Defendant has failed to meet this burden in the case before us.

At trial, the only direct evidence presented by the State tending to show that defendant had committed the crime of taking indecent liberties was the victim's testimony that defendant had placed the handle of a knife, a fork, a spoon, and his finger "inside" the victim "where [she] went to the bathroom." Defendant denied that he had committed these acts. If the jurors be-

lieved the victim's testimony, they correctly found that he committed a lewd or lascivious act upon the body of the child pursuant to G.S. 14-202.1(a)(2) and consistent with the indictment. There is nothing in the record to indicate that the additional language in the trial judge's charge to the jury caused the jury to reach its verdict.

Therefore, for the reasons stated above, we find

No error.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. JIMMY CHRISCOE

No. 8722SC375

(Filed 20 October 1987)

Criminal Law § 128.2— mistrial improperly entered over defendant's objection— double jeopardy plea granted

In a prosecution of defendant for committing sexual offenses against his stepdaughter, the trial court in his first trial erred in entering a mistrial over defendant's objection when the prosecuting witness refused to testify, since there was no testimony from anyone to suggest that the witness was influenced improperly and no other evidence of any misconduct; therefore, defendant's plea of former jeopardy must be granted.

APPEAL by defendant from *Freeman, Judge.* Order entered 9 December 1986 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 29 September 1987.

Attorney General Lacy H. Thornburg, by Associate Attorney General L. Darlene Graham for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gayle L. Moses for defendant appellant.

BECTON, Judge.

Defendant, Jimmy Chriscoe was convicted of Second Degree Sexual Offense and sentenced to 10 years imprisonment. He appeals. We reverse.

I

Defendant's first trial began on 23 July 1986. He was accused of engaging in sexual relations with his stepdaughter who was then a minor, and who had been characterized by social workers as "mildly retarded." The State called the alleged victim to testify. After giving her name and answering several general questions, she refused to respond to further questioning by the prosecutor or the trial judge. The prosecutor moved for a mistrial, and the following colloquy occurred between the prosecutor (Mr. Morris), the trial judge, and defense counsel (Mr. Cunningham).

COURT: Do you want to make a motion, Mr. Morris?

MR. MORRIS: Motion for a mistrial, based upon the fact that this week when this witness was interviewed by an assistant in our office, there was no problem with her telling what happened and the nature of the criminal offense; and we proceeded to select a Jury and impanel that Jury and start with the case, and now she won't testify. I would argue to the Court there has been some misconduct either inside or outside this courtroom between the time that we talked with the prosecuting witness, the main witness in the case, and the time she came to be called as a witness in this Courtroom and testify. That has resulted in prejudice to the State's case. I feel like there is sufficient grounds for the State to ask for a mistrial in this case.

COURT: She did testify in District Court?

MR. MORRIS: She did testify in the Probable Cause Hearing in District Court and was under oath at that time.

COURT: And she has given statements to the social worker?

MR. MORRIS: Yes, sir, and to the police officer, and she has further shown them with the anatomically-correct dolls what happened to her between she and this Defendant.

COURT: Is that all you want to say about it?

MR. MORRIS: Yes, sir.

COURT: I assume you want to object to that?

MR. CUNNINGHAM: Yes, sir, I'd like to object. The District Attorney can make any assertion he wants to in this Courtroom, and I think the Court has to consider the evidence. I'm not saying that the District Attorney is incorrect as far as his allegations of misconduct, but I think if he has any proof of misconduct, I think he is going to have to present it to the Court for the Court to consider it for grounds for mistrial. I think the State is in the position that it can't proceed because it doesn't have a competent witness, and I would ask the Court to dismiss the charges.

MR. MORRIS: Just a very short response. It is very hard to prove misconduct outside of this Courtroom when we are in here trying a case; but I'll say to the Court that the police officer—and if you need her sworn—Ms. Harris observed the mother of the prosecuting witness, the prosecuting witness and the brother, going to the jail following the Defendant as he was led out of the Courtroom yesterday; and then I see the three of them—without the Defendant, of course—walking through town, and that is kind of unusual conduct during the course of a Jury trial, for the prosecuting witness where there is an allegation of some sexual offense, in the presence of the Defendant on his way back to the jail.

COURT: The Court will find as a fact under this motion that the Defendant is charged with second-degree sexual offense; and that the Jury was selected and impaneled Wednesday, yesterday; and that some testimony was presented from one witness at that time; that the prosecuting witness, the alleged victim of the crime, was present in the Court with her mother at that time. The Court was recessed until 9:30 this morning, at which time the prosecuting witness and her mother did not appear for Court. Did they finally show, or did you have to send the officer after them?

MR. MORRIS: The officer had to call and find out why they weren't here, but an officer was not sent after them, Your Honor.

COURT: That after being called by the officers, they later showed up approximately at 10:45 a.m. The prosecuting witness testified under oath at the Probable Cause Hearing; that she gave statements to the social workers, the police and the

District Attorney out of the presence of her mother; that she made statements to them indicating that a crime had taken place; and that she gave illustration with an anatomically-correct doll; that the prosecuting witness has been living in the custody and in the presence of the mother the entire period of time.

Further find that upon being called as a witness, the prosecuting witness refused to answer questions or testify.

The Court will further find as a fact that the Department of Social Services intends at this time to take out a petition to remove the prosecuting witness from the custody of her mother.

There is substantial reason for mistrial, and there is manifest necessity for a mistrial, and it would be in the best interest of justice that a mistrial be granted, and the Court will allow the motion for a mistrial in this case.

Defendant was convicted at a second trial on 8 December 1986. On appeal he assigned three errors: (1) the trial judge erred in denying defendant's motion to dismiss for former jeopardy because a mistrial was erroneously ordered at the first trial; (2) the trial judge erred in failing to conduct a *voir dire* hearing out of the jury's presence to determine the competency of the prosecutor's chief witness and in failing to make findings of fact and conclusions of law regarding her competency; and (3) the trial judge erred in denying defendant's motion to dismiss at the close of the evidence because the State did not present competent substantial evidence of his guilt.

II

We first consider defendant's contention that the trial judge erred in ordering a mistrial in his case on 24 July 1986. To obtain a mistrial, the prosecutor must show "manifest necessity." *Arizona v. Washington*, 434 U.S. 497, 505, 54 L.E. 2d 717, 728 (1978). Although this requirement "[does] not describe a standard that can be applied mechanically," it does establish that the prosecutor's "burden is a heavy one." *Id.* at 506, L.E. 2d at 728. More specifically, N.C. Gen. Stat. Sec. 15A-1063(1) (1983) provides that the trial judge may declare a mistrial "if it is impossible for the trial to proceed in conformity with the law." And to "protect [the

accused] from sudden and arbitrary judicial action," N.C. Gen. Stat. Sec. 15A-1064 (1983) requires the trial judge to make findings of fact with respect to the grounds for the mistrial. *State v. Jones*, 67 N.C. App. 377, 382, 313 S.E. 2d 808, 812 (1984).

The State cites several cases in which North Carolina courts have affirmed declarations of mistrial under section 15A-1063(1). In those cases, mistrials were ordered as a result of some incapacity of either a member of the court, a juror or an attorney, or evidence of jury tampering. *See State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966) (illness of defendant's attorney); *State v. Boykin*, 255 N.C. 432, 121 S.E. 2d 863 (1961) (illness of judge); *State v. Cooley*, 47 N.C. App. 376, 268 S.E. 2d 87, *appeal dismissed*, 301 N.C. 96, 273 S.E. 2d 300 (1980) (evidence of jury tampering, but no showing that defendant was responsible); and *State v. Ledbetter*, 4 N.C. App. 303, 167 S.E. 2d 68 (1969) (illness of juror). The State argues that the rationale in *Cooley* is applicable to the instant case because proof of jury misconduct was particularly difficult to demonstrate, and that the victim in this case, much like the jurors who were allegedly tampered with in *Cooley*, could not be expected to admit that misconduct occurred. Therefore, it would have been fruitless for the State to seek the victim's testimony.

We recognize that the prosecutor was placed in a difficult position when his key witness suddenly refused to cooperate. However, the record here is devoid of *any evidence* of misconduct. There is no testimony from anyone to suggest that the witness was influenced improperly. The Court's power to declare a mistrial must be "exercised with caution and only after careful consideration of all available evidence and only after making the requisite findings of fact on the basis of evidence before the Court at the time judicial inquiry is made." *State v. Jones*, 67 N.C. App. 377, 382, 313 S.E. 2d 808, 812 (1984), *quoting State v. Crocker*, 239 N.C. 446, 452, 80 S.E. 2d 243, 248 (1954). The record here contains innuendo and suspicion only. Although the court followed the mandate to make findings, there is no evidence on which those findings could be based.

When a mistrial is improperly ordered over defendant's objection, a plea of former jeopardy must be granted. *See Washington.* The order of the lower court is reversed.

Because we reverse defendant's conviction on the basis of his first assignment of error, we need not and do not address his remaining arguments.

Reversed.

Judges JOHNSON and PARKER concur.

ANGELIA BAXTER v. BOWMAN GRAY SCHOOL OF MEDICINE AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8721SC281

(Filed 20 October 1987)

Master and Servant § 108.1 — employee lying down at work — failure to record on time card — employee fired — employee not disqualified from receiving employment compensation

Where petitioner was fired because she failed to record on her time card that she lay down for forty-five minutes while on duty because of a dizzy spell, the trial court erred in determining that petitioner was disqualified from receiving unemployment insurance benefits for an appropriate period because her dismissal was due to "substantial fault" on her part, since not recording a temporary period when an employee was available for work but not working had been approved by the employer, through its supervisors, on two previous occasions; the practice was neither inherently wrong nor injurious to the employer, as petitioner was available for duty and subject to call at all times; and the practice violated no rule of the employer or any custom followed by the other employees. N.C.G.S. § 96-14(2A).

APPEAL by petitioner from *Morgan, Judge.* Judgment entered 9 December 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 1 October 1987.

Legal Aid Society of Northwest North Carolina, Inc., by J. Griffin Morgan and Ruth Norcia Morton, for petitioner appellant.

No brief filed for respondent appellee Bowman Gray School of Medicine.

T. S. Whitaker and Kathryn S. Aldridge for respondent appellee Employment Security Commission of North Carolina.

PHILLIPS, Judge.

On Monday, March 17, 1986, petitioner, who had worked as a licensed practical nurse in the respondent school's family practice clinic for three years, was fired because on the preceding Saturday she did not record on her time card that she laid down while on duty for forty-five minutes because of a dizzy spell. Her application for unemployment insurance benefits was denied by the Employment Security Commission and affirmed by Superior Court Judge Melzer A. Morgan, Jr. on the ground that she was disqualified from receiving benefits for an appropriate period under the provisions of G.S. 96-14(2A) because her dismissal was due to "substantial fault" on her part. The correctness of this legal conclusion is the only question raised by this appeal, for the findings of fact upon which it rests are not disputed.

In substance the Commission found the following facts: The respondent school operates its family practice clinic with a full staff each weekday from 8 a.m. until 5 p.m. and with a reduced, volunteer staff on Saturdays for half a day. Each employee's daily time on duty is recorded on a time card by the employee either punching in and out on the time clock or by writing the times involved on the card. No nursing supervisor is on duty in the clinic on Saturdays and the nurses who work then customarily work out their nursing duties among themselves. Petitioner was off from work the five days preceding Saturday, 15 March 1986, because she had the flu, and while on duty that day she began to feel faint. She knew that light-headedness can be experienced while recovering from the flu, but did not seek medical treatment because in her opinion there was nothing a doctor could do about it; and she told the other nurse on duty of her dizzy spell and that she was going to lie down for awhile in an adjacent examination room. It was understood between the two nurses that the co-worker would call the petitioner if she was needed to perform any clinic service; and during the forty-five minutes or so that petitioner laid down in the examination room she was within hearing distance of her co-worker, was available to help with the services if needed, and the employer's clinical services were not impaired. On a previous occasion when petitioner did not feel well her supervisor permitted her to lie down during the work period, and on a similar occasion the supervisor of petitioner's co-worker permitted her to do the same thing. On both such occasions "the

claimant and the co-worker were still 'on the clock' while they were lying down." Clinic employees had been told to record times when they are away from the work area eating lunch or attending to personal affairs, but "[n]o employer policy was introduced regarding how employees are to record the time during which they are temporarily incapacitated and there is no supervisor on duty to give them permission to lie down without clocking out."

These facts, in our opinion, do not support the conclusion that in not recording on her time card the forty-five minutes that she was dizzy and laid down petitioner was substantially at fault within the purview of G.S. 96-14(2A) or for that matter that she was at fault to any extent. Fault to any degree requires an improper act or omission, Black's Law Dictionary 738 (rev. 4th ed. 1968), or a "deviation from prudence, rectitude, or duty," 35 C.J.S. *Fault* p. 961 (1960); and an employee who does only what her employer had previously approved and apparently had never disapproved or forbidden cannot be said to have acted improperly or to have deviated from prudence, rectitude, or duty. Not recording a temporary period when an employee was available for work but not working had been approved by the employer, through its supervisors, on two previous occasions; the practice was neither inherently wrong nor injurious to the employer, as petitioner was available for duty and subject to call at all times, and it violated no rule of the employer or any custom followed by the other employees. The Commission's argument that the rule requiring employees to clock out when they leave work for lunch and to attend to personal business applied to petitioner's situation has no basis. A rule directed at personal activities of an employee away from the work premises cannot be construed to apply to employees who in the work area are temporarily incapacitated or inconvenienced; for an employee away from the work place in a restaurant, beauty shop or dentist's office, eating lunch or having her hair set or teeth cleaned, cannot serve her employer if needed, while an employee on the work premises who is not disabled though under a temporary handicap can serve the employer as needed. That petitioner did no work during the forty-five minutes involved is not decisive, since she arranged for the employer's services to continue while she was temporarily not working and so far as the evidence indicates there was no work she needed to do during that time. Nor, as the Commission finally argues, did

either honesty or prudence require the employee to report her illness and temporary inactivity to her supervisor on Monday. If it had been shown that periods of temporary illness that occur on Saturdays when no supervisor is present are usually reported to a supervisor at the first opportunity later, or that temporary periods of employee inactivity due to illness are "on the clock" only when expressly approved by a supervisor, or that some such periods had not been so approved, the argument *might* be valid, but under the circumstances recorded it is not.

None of the decisions relied upon by the Commission and the trial court apply to the circumstances recorded here. *Smith v. Spence & Spence*, 80 N.C. App. 636, 343 S.E. 2d 256, *disc. rev. denied*, 317 N.C. 707, 347 S.E. 2d 440 (1986) and *Yelverton v. Kemp Furniture Industries, Inc.*, 51 N.C. App. 215, 275 S.E. 2d 553 (1981) involved employee misconduct that was detrimental to the employer's business, while this petitioner did nothing that was either wrong or had been forbidden and her employer suffered no harm whatever. *In re Williams v. SCM Proctor Silex*, 60 N.C. App. 572, 299 S.E. 2d 668, *disc. rev. denied*, 308 N.C. 544, 304 S.E. 2d 243 (1983) involved an employee that falsified production records in order to obtain an overpayment, whereas this petitioner had no production quota to meet and instead of falsifying her time recorded it precisely as the employer, through its supervisors, had approved on at least two previous occasions. And *Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 349 S.E. 2d 842 (1986) involved an employee who left work early three days in a row without notifying his supervisor and intentionally falsified his time records to indicate that he stayed until the designated time each day.

The judgment appealed from is therefore reversed and the matter is remanded to the Commission for the entry of an order awarding petitioner the benefits that the record and this opinion show that she is entitled to.

Reversed and remanded.

Judges COZORT and GREENE concur.

THELMA H. McLAURIN, WIDOW, AND ELEANOR RUTH McRORIE, WIDOW v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY, A CORPORATION; SEABOARD SYSTEM RAILROAD, INC., A CORPORATION; AND LANDON A. SCARBOROUGH

No. 8720SC188

(Filed 20 October 1987)

1. **Courts § 4— land worth $18,000—ownership disputed—action properly transferred to superior court**

In an action to determine ownership of two tracts of land, the trial court did not err in transferring the case from the district court to the superior court division, since N.C.G.S. § 7A-243 provides that the superior court is the proper division for the trial of all civil actions in which the amount in controversy exceeds $10,000, and one defendant asserted that another defendant offered to buy from it the disputed property for $18,000, thus indicating that defendant would sustain a loss substantially in excess of the $10,000 requirement should plaintiffs prevail on their adverse possession claim.

2. **Railroads § 1— railroad sheltered from adverse possession claims—plaintiffs' claim improperly dismissed**

N.C.G.S. § 1-44 shelters a railroad from claims of adverse possession only where the railroad uses, or plans in good faith to use, the land for a public purpose set forth in the statute; therefore, the trial court erred in dismissing plaintiffs' adverse possession claim for failure to state a claim upon which relief could be granted on the ground that railroad held interests in land, properly acquired, may never be extinguished by adverse possession.

3. **Appeal and Error § 4— notice of appeal in open court**

Plaintiffs gave proper notice of their appeal when they did so by giving oral notice of appeal "in open court" on the same day their action was dismissed for failure to state a claim. Appellate Rule 3(a)(1); N.C.G.S. § 1-279.

APPEAL by plaintiffs from *Davis, James C., Judge.* Orders entered 16 October 1986 in ANSON County Superior Court. Heard in the Court of Appeals 24 September 1987.

Plaintiffs commenced this action in the Anson County District Court on 13 August 1986 seeking damages and a declaration that they were fee simple owners, through adverse possession, of two tracts of land. Defendant Seaboard System Railroad, Inc., neither filed an answer nor otherwise answered, and the Clerk entered default against it on 29 September 1986. Defendants Winston-Salem Southbound Railway Company (WSSB) and Landon A. Scarborough (Scarborough) answered in apt time and filed duplicate motions to transfer to Anson County Superior Court

pursuant to N.C. Gen. Stat. § 7A-258 and to dismiss for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The Honorable James C. Davis, Superior Court Judge, heard arguments on 13 October 1986. He granted the motions to transfer in open court on 13 October but took under advisement the motions for dismissal.

On 16 October Judge Davis signed, in open court, both an order to transfer reciting the ruling of 13 October and an order granting defendants' motions to dismiss. After having been served with plaintiffs' proposed record on appeal defendants moved to dismiss plaintiffs' appeal for non-compliance with Rule 3 of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 1-279.

On 26 January 1987 the Honorable F. Fetzer Mills, Superior Court Judge, heard arguments and two days later signed an order denying defendants' motions to dismiss plaintiffs' appeal. Defendants appealed this order and gave notice that they would act both as appellees and cross-appellants.

Henry T. Drake for plaintiff-appellants.

Craige, Brawley, Liipfert and Ross, by William W. Walker, for defendant-appellant/appellee Winston-Salem Southbound Railway Company; and Thomas, Harrington and Biedler, by John T. Burns, for defendant-appellant/appellee Landon A. Scarborough.

WELLS, Judge.

This case calls upon us to review for errors of law three orders entered below: (1) an order to transfer, (2) an order to dismiss for failure to state a claim, and (3) an order denying motions to dismiss an appeal. We will review the three orders *seriatim*.

[1] 1. Plaintiffs contend that the trial court erred in transferring the case from the district court to the superior court division. We disagree. In pertinent part, N.C. Gen. Stat. § 7A-243 provides that the superior court is the proper division for the trial of all civil actions in which the amount in controversy exceeds $10,000. G.S. § 7A-243(3) provides, *inter alia*, that where the relief sought would establish right or title, the value of the right or title is in controversy. G.S. § 7A-243(5) provides as follows: "Where the

value of the relief to a claimant differs from the cost thereof to an opposing party, the higher amount is used in determining the amount in controversy." We construe the term "cost," as used in the above-quoted statute, to mean value of loss, whether monetary or non-monetary. Defendant WSSB asserted in its answer and counterclaim that defendant Scarborough offered to buy from WSSB the disputed property for approximately $18,000. Thus, if plaintiffs prevail in their attempt to wrest ownership of the property from WSSB through adverse possession, WSSB will sustain a loss substantially in excess of the $10,000 amount in controversy requirement. It follows that the trial court's order transferring the cause to the superior court division was proper.

[2] 2. The trial court's dismissal order apparently was based upon its interpretation of N.C. Gen. Stat. § 1-44, which provides as follows:

> No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right-of-way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right-of-way, depot, station house or place of landing, by any statute of limitation or by occupation of the same by any person whatever.

Defendants urge us, as they successfully urged the trial court, to construe the above statute to the effect that, as a matter of law, railroad-held interests in land, properly acquired, may *never* be extinguished by adverse possession. Plaintiffs, on the other hand, contend that G.S. § 1-44 is a *use* statute, and that if a railroad does not *use* the land for any of the purposes spelled out in the statute, it forfeits the statute's protection. We agree with plaintiffs. Plaintiffs alleged in their complaint that defendant WSSB "has never used that said property for any right-of-way, depots, station house, or place of landing."

The language of the statute supports plaintiffs' construction. The statute shelters interests in land "obtained for [a railroad's] *use*, as a right-of-way, depot, etc." (Emphasis added.) Plaintiffs point out that companion statute G.S. § 1-44.1 provides that if a railroad removes its tracks from a right-of-way and neither replaces them nor makes any use of that right-of-way within seven years, the interest is presumed abandoned. If G.S. §§ 1-44

and 1-44.1 are read in *pari materia*, it becomes apparent that defendants' construction of § 1-44 leads to an absurd result. The General Assembly cannot logically have intended that a railroad can lose an interest in land through abandonment, but can never forfeit an interest in land that it has never put to any use at all.

Defendants rely principally on *Withers v. Manufacturing Co.*, 259 N.C. 139, 129 S.E. 2d 886 (1963). We find that this case supports plaintiffs' position rather than defendants.' In *Withers* the Court decided that the railroad-held land was protected against loss by adverse possession because it had been *"held . . . for railroad purposes"* and because the railroad company had *"used* the property in its public transportation business." (Emphasis added.)

We hold that G.S. § 1-44 shelters a railroad from claims of adverse possession only where the railroad uses, or plans in good faith to use, the land for a public purpose set forth in the statute. The order dismissing plaintiffs' suit for failure to state a claim is reversed.

[3] 3. Finally, defendants contend that the trial court erred in denying their motions to dismiss plaintiffs' appeal. We disagree. Rule 3(a)(1) of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 1-279 provide that appeal may be taken by giving oral notice "at trial." The commentary to Rule 3(a)(1) advises that "at trial" has always been equated with "in open court." In the case at bar, Judge Mills found as a fact that plaintiffs' counsel gave oral notice of appeal "in open court" on 16 October, which is the day the nonsuit order was rendered by Judge Davis. Although it does appear that defendants' counsel was not present when Judge Mills ruled on defendants' Rule 12(b)(6) motion, we nevertheless hold that plaintiffs gave proper notice of their appeal. The order denying defendants' motion to dismiss plaintiffs' appeal is affirmed.

Subsequent to the docketing of plaintiffs' appeal, defendants filed a motion in this Court to dismiss plaintiffs' appeal. For the reasons stated above, we deny that motion.

Affirmed in part; reversed and remanded in part.

Judges EAGLES and MARTIN concur.

SANDRA L. HOOVER, PATRICIA PHILLIPS, JUDITH A. HOOVER & IRITA L. MURRAY v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

No. 8710IC219

(Filed 20 October 1987)

State § 8.4— school bus accident—no negligence of defendant or employees

In an action under the Tort Claims Act to recover for injuries sustained in a school bus accident, the Industrial Commission did not err in making findings and conclusions that defendant was in no way negligent in the maintenance, repair, or operation of the school bus.

APPEAL by plaintiffs from the North Carolina Industrial Commission. Decision and order entered 21 October 1986. Heard in the Court of Appeals 28 September 1987.

This is an action instituted before the North Carolina Industrial Commission under the Tort Claims Act wherein plaintiffs seek to recover damages for personal injuries arising from a school bus accident. The Commission made the following findings of fact:

1. On 19 November 1975 one of defendant's school buses was driven upon its regular route along 28th Street in the City of Charlotte by Charles Warren McMurray. Mr. McMurray was a school bus driver who was paid by State funds. The school bus which he drove was Number 306.

2. After the school bus had been driven approximately one hour on its regular route and after approximately thirty-five (35) children had been picked up, the bus was driven across railroad tracks on 28th Street in Charlotte. Up until such time the bus had operated normally.

3. After crossing the railroad tracks and after stopping for a traffic signal at the next intersection, the school bus driver increased the speed of the bus to approximately twenty (20) miles per hour. At such time the bus started shaking and a clicking noise was heard. Almost immediately thereafter a loud noise was heard and the rear wheel assembly came off of the bus. The school bus driver immediately applied the brakes of the bus and the brakes did not operate. The bus went off the street and as a result of such accident

certain of the children on the bus, including plaintiffs, received injuries.

4. The rear wheel assembly of the school bus was attached to the bus by the use of "U" bolts. One or more of the "U" bolts had for some unknown reason sheered off causing the separation between the chassis of the school bus and the rear wheel assembly and thus caused the school bus to wreck.

5. The school bus driver drove the school bus in a proper manner and had no warning or indication of the fact that the rear wheel assembly was about to come off of the bus until it occurred. The school bus driver acted the same as a reasonably prudent person would have done under the same or similar circumstances and there was no negligence upon his part.

6. The school bus involved in the accident giving rise hereto was a 1969 Chevrolet. Mr. Donald Baucom, as Director of the defendant's transportation system, was in charge of the general maintenance and servicing of the school buses operated by defendant. A regular monthly inspection was conducted on the bus here involved as well as all other buses operated by defendant and at least once a year a major inspection was conducted on all the buses. Such inspection involved removing the wheels and axles of the bus for inspection. There had been no indication in the previous inspections that there was any defect in the school bus rear wheel assembly which would cause such wheel assembly to be separated from the bus.

7. The Director of Transportation of defendant acted the same as a reasonably prudent person would have done under the same or similar circumstances and there was no negligence upon his part.

Based on these findings, the Commission concluded:

There has been no showing of negligence upon the part of any of the employees of defendant while acting within the scope and course of their employment. This is fatal to plaintiffs' claims and they must, therefore, be denied. . . .

In an opinion filed 21 October 1986, the Commission denied plaintiffs' claims. Plaintiffs appealed.

Wm. Benjamin Smith for plaintiffs, appellants.

Attorney General Lacy H. Thornburg, by Associate Attorney General Randy Meares, for defendant, appellee.

HEDRICK, Chief Judge.

In their first assignment of error, plaintiffs contend that Findings of Fact Nos. 2, 3 and 5 of the Commission's decision and order are not supported by evidence in the record. On that basis, plaintiffs also contend the conclusion of law is not supported by sufficient findings of fact and that the Commission's decision and order is not supported by evidence in the record.

The Industrial Commission's findings of fact are binding on appeal if supported by competent evidence even though there is also evidence which would support a contrary finding. *Tanner v. Dept. of Correction*, 19 N.C. App. 689, 200 S.E. 2d 350 (1973). The testimony of the bus driver, Charles McMurray, found in the record, supports each of the three findings challenged by the exceptions noted in support of these assignments of error. While there is some testimony in the record contrary to that of the bus driver, the Commission's findings are amply supported by competent evidence in the record. The conclusion is therefore supported by sufficient findings of fact, and the decision and order is supported by competent evidence. There is no merit to this assignment of error.

Plaintiffs next argue that Findings of Fact Nos. 6 and 7 are not supported by evidence in the record. The testimony of defendant's director of transportation, Donald Baucom, supports a finding that there was no negligence on his part and there is no evidence to the contrary. The Industrial Commission's findings and conclusion are therefore binding on this Court, and we hold these assignments of error to have no merit.

Finally, plaintiffs contend the Commission erred in not finding the doctrine of *res ipsa loquitur* to apply. The Commission found and concluded "[t]here has been no showing of negligence upon the part of any of the employees of defendant while acting within the scope and course of their employment." From the rec-

ord we cannot determine whether the doctrine was considered. Suffice it to say, however, there is nothing in the record to indicate the Commission did not consider all the evidence, the doctrine of *res ipsa loquitur* or otherwise, in making findings and conclusions that defendant was in no way negligent in the maintenance, repair or operation of the school bus.

The decision of the Industrial Commission is affirmed.

Affirmed.

Judges ARNOLD and ORR concur.

W. S. CLARK & SONS, INC. v. JOHN RUIZ AND KATHY RUIZ

No. 874SC142

(Filed 20 October 1987)

1. **Accounts § 1; Contracts § 12.1— wife's signing of credit application—liability on husband's account**

In an action to recover on an account where defendant wife claimed that she signed a credit application intending only to give plaintiff permission to check her credit, the trial court did not err in failing to submit to the jury a question as to the liability of defendant wife on the account of defendant husband, since the credit application signed by both parties clearly stated that the "[a]pplicant acknowledges receipt of a copy of this credit application and agreement, and agrees to the terms disclosed herein"; the language of the credit application and agreement was not ambiguous; and the only issue remaining therefore was the amount the husband and wife were indebted to plaintiff.

2. **Attorneys at Law § 7.4— credit application—provision for attorney fees**

Where the credit application signed by defendants provided that they agreed to pay reasonable attorney fees incurred as a result of default not to exceed 15% of the balance due, but the agreement did not specify an exact amount, N.C.G.S. § 6-21.2 governed, and the trial court properly allowed plaintiff to recover reasonable fees amounting to 15% of the outstanding balance owed on defendants' account.

APPEAL by defendants from *Barefoot, Judge*. Judgment entered 29 August 1986 in Superior Court, DUPLIN County. Heard in the Court of Appeals 2 September 1987.

In 1983, John Ruiz had an account for goods, wares and merchandise with plaintiff which was due and payable in December of 1983. Ruiz did not pay his account until February 1984. Plaintiff did not allow John Ruiz credit for the next farming season until he and his wife submitted a financial statement and a credit application. Defendant John Ruiz testified that he was told it was necessary for him to get his wife's signature in order to check his and her credit. Kathy Ruiz testified that when she signed the credit application, she only intended to give plaintiff permission to check her credit. The application was approved and goods were sold and delivered.

On 3 April 1985, plaintiff filed a complaint seeking payment of an outstanding balance on defendants' account and requesting attorney fees.

At trial, the judge instructed the jury that the issue for determination was the amount that John and Kathy Ruiz were indebted to W. S. Clark and Sons, Inc. The jury returned a verdict in favor of plaintiff in the amount of $32,000. From the judgment of the trial court, defendants John and Kathy Ruiz appeal.

R. Michael Bruce for plaintiff appellee.

N. Leo Daughtry for defendant appellants.

ARNOLD, Judge.

[1] Defendants contend that the trial court erred in failing "to submit to the jury the questions of fact as to the liability of the defendant Kathy Ruiz on the account of John Ruiz."

The credit application signed by both parties clearly stated that the "[a]pplicant acknowledges receipt of a copy of this credit application and agreement, and agrees to the terms disclosed herein." Beneath both parties' signatures on the application appears the words "Applicant's Signature."

The trial court was correct to conclude as a matter of law that the language of the credit application and agreement was not ambiguous and to instruct the jury that the issue remaining was the amount that Kathy and John Ruiz were indebted to plaintiff. If the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law for the court.

Kent Corporation v. Winston-Salem, 272 N.C. 395, 158 S.E. 2d 563 (1968). Defendants' contention is without merit.

[2] Defendants also contend that the trial court committed reversible error by allowing attorney fees to plaintiff. We disagree.

G.S. 6-21.2 states:

> Obligations to pay attorneys' fees upon any note, conditional sale contract *or other evidence of indebtedness*, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> . . . .
>
> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness. (Emphasis added.)

The term "evidence of indebtedness" as used in this section refers to any printed or written instrument signed or otherwise executed by the obligor(s) which evidences on its face a legally enforceable obligation to pay money. *Four Season Homeowners Assoc., Inc. v. Sellers*, 72 N.C. App. 189, 323 S.E. 2d 735 (1984). A formal credit agreement executed by the parties prior to the establishment of an open account is evidence of indebtedness; and if such an agreement contains a provision for attorney's fees it will be legally enforceable pursuant to G.S. 6-21.2. *Supply, Inc. v. Allen*, 30 N.C. App. 272, 227 S.E. 2d 120 (1976).

The credit application signed by both parties provided the following language concerning attorney fees: "I(We), the undersigned, do hereby . . . agree to pay reasonable attorney fees incurred by W. S. Clark & Sons, Inc. (or any subsidiary company) as a result of default, but not to exceed fifteen percent (15%) of balance due." Since the agreement only mentioned reasonable at-

torney fees and did not specify an exact amount to be paid, G.S. 6-21.2 governs and the trial court properly allowed the plaintiff to recover reasonable fees amounting to 15% of the outstanding balance owed on defendants' account.

No error.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. DARRYL HEWETT

No. 8713SC415

(Filed 20 October 1987)

1. **Robbery § 4.3— armed robbery—sufficiency of evidence**

Evidence was sufficient to convict defendant of armed robbery where it tended to show that during the course of robbing a taxi driver of his money, watch, and gold ring, defendant pointed a loaded pistol at the victim's head and threatened to use it and did the same thing with a shotgun.

2. **Robbery § 5.4— armed robbery—instructions on lesser offenses not required**

The trial court in an armed robbery prosecution was not required to instruct on lesser included offenses where the State's evidence tended to show only that defendant robbed with a firearm; defendant's evidence tended to show only that when the crime was committed, he was elsewhere playing basketball; and there was no evidence that defendant was guilty either of assault with a deadly weapon or of simple assault.

3. **Robbery § 3— armed robbery—loaded gun—evidence not prejudicial**

The trial court in a prosecution for armed robbery did not err in failing to strike testimony of defendant's accomplice that a shotgun defendant used in the robbery was loaded because the accomplice admittedly did not see it loaded, since the testimony, even if erroneously received, was harmless.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 18 December 1986 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 30 September 1987.

Attorney General Thornburg, by Assistant Attorney General Robert E. Cansler, for the State.

Fairley, Jess & Isenberg, by William F. Fairley, for defendant appellant.

PHILLIPS, Judge.

In appealing from his conviction of armed robbery defendant contends that the court erred in three respects: In not dismissing the indictment because the evidence was insufficient to convict; in not charging the jury on the lesser included offenses of assault with a deadly weapon and simple assault; and in not striking the testimony of his accomplice, Galloway, that a shotgun defendant used in the robbery was loaded, because Galloway admittedly did not see it loaded. None of these contentions has merit and we overrule them.

[1-3] *First*, the State's evidence, clearly sufficient to meet the requirements of G.S. 14-87(a) as interpreted by our Supreme Court in *State v. Davis*, 301 N.C. 394, 271 S.E. 2d 263 (1980) and many other cases, tends to show, in brief, that during the course of robbing a Shallotte taxi driver of his money, watch and gold ring, defendant pointed a loaded pistol at the victim's head and threatened to use it and did the same thing with a shotgun. *Second*, the trial judge was not required to charge on the lesser included offenses because our Supreme Court has held many, many times that a lesser included offense need not be charged on unless there is evidence that the lesser included offense was committed, e.g. *State v. Allison*, 280 N.C. 175, 184 S.E. 2d 857 (1971), and in this case there was no evidence that defendant was guilty of either assault with a deadly weapon or simple assault. For the State's evidence tended to show only that defendant robbed with a firearm, and defendant's evidence tended to show only that when the crime was committed he was elsewhere playing basketball. And, *finally*, Galloway's testimony that the shotgun was loaded, even if erroneously received, was harmless. Contrary to defendant's argument, striking the testimony would not establish either that the shotgun was unloaded or that the State did not prove that the victim's life was endangered or threatened by the use of a firearm or other dangerous weapon, as G.S. 14-87(a) requires. Because there was no evidence that the shotgun was not loaded, only that the witness did not see it loaded; there was evidence that defendant used a loaded pistol in accomplishing the robbery; under the circumstances the State was not required to prove that either firearm was loaded in any event. For our law is that when the evidence shows that a firearm, or what appeared to be a firearm, was used in accomplishing a robbery and, as in this case,

there is no evidence that the firearm was incapable of endangering or threatening the victim's life, the jury may infer, if it is not required to find, that the victim's life was endangered or threatened by the weapon. *State v. Joyner*, 312 N.C. 779, 324 S.E. 2d 841 (1985).

No error.

Judges COZORT and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 OCTOBER 1987

ARMSTRONG v. CONE MILLS No. 8710IC193	Ind. Comm. (864679)	Reversed and Remanded
BORLAND v. BORLAND No. 8714DC459	Durham (86CVD1385)	Remanded for additional findings
BURKE v. FRITO-LAY No. 8726SC622	Mecklenburg (87CVS0618)	Affirmed
CALDWELL v. CALDWELL No. 8730DC254	Haywood (84CVD535)	Affirmed
CIRCLE BUSINESS v. KEN WILSON FORD No. 8728SC162	Buncombe (86CVD0826)	Affirmed
COUGLE v. CAPITAL SUPPLY No. 8714DC183	Durham (86CVD2726)	Dismissed
IN RE HEIMANN v. HEIMANN No. 8712DC294	Cumberland (86CVD3745)	Affirmed
IN RE McCONNIHEAD No. 8725DC208	Caldwell (85J34)	Reversed and Remanded
IN RE MELTON No. 8726DC204	Mecklenburg (84J233)	Affirmed
MacRAE v. MacRAE No. 875DC109	New Hanover (85CVD2353)	Affirmed
NATIONAL SHAMROCK v. STERLING INVESTMENT No. 8610SC1337	Wake (85CVS636)	No Error
PATOMAC LEASING v. LOHR No. 8726SC150	Mecklenburg (84CVS10070)	No Error
SOMERS v. SOMERS No. 8717DC379	Rockingham (85CVD322)	Vacated and Remanded
STATE v. COLLINS No. 8712SC366	Cumberland (86CRS3393)	No Error
STATE v. DAVIS No. 874SC374	Onslow (86CRS12678)	No error in the trial. Remanded for correction of the judgment.
STATE v. FLEMING No. 8725SC297	Burke (81CRS1921) (81CRS1922)	No Error

STATE v. FRIDAY No. 8726SC319	Mecklenburg (86CRS033568)	No Error
STATE v. GRADY No. 875SC327	New Hanover (86CRS19450)	Affirmed
STATE v. GRIGG No. 8727SC189	Gaston (86CRS8070) (86CRS8071) (86CRS8076) (86CRS25480)	No Error
STATE v. MITCHELL No. 8721SC266	Forsyth (86CRS18807)	No Error
STATE v. RANKIN No. 8718SC296	Guilford (86CRS31648)	Affirmed
UNITED MAINTENANCE v. INTEGON No. 878DC18	Wayne (85CVD545)	Affirmed
WILKES COUNTY VOCATIONAL WORKSHOP v. UNITED SLEEP No. 8723DC239	Wilkes (85CVD0858)	Affirmed

RELIANCE INSURANCE COMPANY v. LEXINGTON INSURANCE COMPANY

No. 8714SC121

(Filed 3 November 1987)

1. **Rules of Civil Procedure § 56.7— denial of motion for summary judgment—trial on the merits—appeal moot**

An appeal from the denial of a motion for summary judgment was moot where a decision on the merits was reached through trial.

2. **Insurance § 85— action between two insurance companies to determine coverage—borrowed fire truck**

In an action between two insurance companies to determine the order of payment on policies for a settlement arising from a collision involving a County owned fire truck driven by a City employee, the City employee was an additional insured under the City policies where the dispositive issue was whether the City had borrowed the County's fire truck; the City and County had had an oral agreement that the City would man and maintain the truck with the County reimbursing the City for expenses; the City controlled the truck in every aspect of its workday; the City determined who would man the truck and when it would go out; and the County did not exercise any control over the vehicle until it arrived at the scene of a County fire.

3. **Insurance § 93— three insurance policies—excess insurance—rule of mutual repugnance**

In an action between insurance companies to determine the order of payment of a settlement after a collision between a private vehicle and a fire truck owned by the County and driven by a City employee, plaintiff's first policy was a primary policy and was to pay its full face amount, while plaintiff's second policy and defendant's policy, which were both excess policies, were to pay half the remaining amount under the rule of mutual repugnance. It was not necessary to decide whether plaintiff's second policy and defendant were to share pro rata according to maximum policy limits or simply share the judgment equally because the result would be the same under either rule.

APPEALS by plaintiff and defendant from *Battle, Judge.* Judgment entered 9 September 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 September 1987.

The City of Durham (City) and the County of Durham (County) have had an oral agreement by which the single County owned fire truck was housed and maintained at a City fire station and operated by City employees. Under the agreement, the City could use the fire truck in fighting fires within the City so long as it was not needed in fighting a fire within the County's jurisdiction.

This agreement was in effect on 9 December 1982 when Robert Perera, a City employee driving the County's fire truck to a fire in the County, collided with a pickup truck driven by Mr. Thomas Richards and his wife. Mr. and Mrs. Richards sustained severe injuries as a result of the collision. The Richards both sued the City and the County but subsequently dismissed their complaint against the City with prejudice. They settled their claim against the County and Robert Perera through a consent judgment in their favor for $675,000.

The insurance companies insuring the City and County disagreed among themselves as to their respective obligations and, particularly, the order of payment among the policies to satisfy the judgment. A brief synopsis of each insurance policy follows:

On 1 February 1982 plaintiff Reliance Insurance Company (Reliance) wrote the first of two liability insurance policies (Reliance #1) insuring the City, its vehicles and its employees in the course and scope of their employment with the City. The maximum amount of coverage for any accident or loss was $500,000. Titled a "Business Auto Policy," the policy covered the City and the City's vehicles. The policy also covered those vehicles the City "own[ed], hire[d], or borrow[ed]." Additionally, the policy provided that for any covered vehicle not owned by the City, the insurance coverage was excess to any other collectible insurance.

On 2 February 1982 plaintiff Reliance wrote a second liability policy (Reliance #2) for the City. The policy, denominated an "excess-umbrella" policy, insured the City and its employees in the course and scope of their employment for losses in excess of $500,000 up to a maximum of $5,000,000. Reliance limited its liability under this policy through a limit of liability clause which stated that:

> The company shall only be liable for the ultimate net loss the excess of either
>
> (a) the amount applicable under the underlying insurances as set out in Item 3 of the Declarations,
>
> or
>
> (b) the amount of ultimate net loss stated in Item 4 of the Declarations in respect of each occurrence not covered by said underlying insurances.

Item 3 of the Declarations listed the Reliance #1 policy.

On 12 February 1982, South Carolina Insurance Company (South Carolina) wrote a liability policy insuring the County and its employees. The maximum amount of coverage afforded by South Carolina's policy was $100,000. All parties stipulated that South Carolina's policy was primary. Consequently, South Carolina paid its maximum coverage into the settlement pool and is not involved in this litigation.

On 19 October 1982 the County further insured itself through Lexington Insurance Company (Lexington). Lexington wrote a liability insurance policy, denominated an "umbrella liability" policy, covering the County and its employees for losses in excess of $250,000 up to a maximum of $5,000,000. Just as Reliance had limited its liability under Reliance #2, Lexington limited its liability in the following limit of liability clause:

> The Company shall be liable only for the ultimate net loss in excess of the Insured's retained limit defined as the greater of:
>
> (1) the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other underlying insurance collectible by the insured; or
>
> (2) the amount stated in Item 3A2 of the Declarations as the result of any one occurrence not covered by such underlying policies or insurance. . .

The South Carolina policy was listed in Schedule A.

South Carolina, Reliance, and Lexington each paid sums into a pool to satisfy the Richards' claims. South Carolina paid the full amount of its policy, $100,000. Reliance paid $500,000 into the settlement pool and Lexington paid the remaining $75,000. Reliance and Lexington reserved their rights against each other as to the amount due from each and the order of payment from among the insurance policies.

Reliance brought this action seeking indemnification from Lexington for the sums it paid in satisfaction of the judgment. In the pre-trial order, the parties stipulated that the County was the named insured under the South Carolina and the Lexington poli-

cies. Robert Perera was an additional insured under those same policies with respect to this accident. The County was not insured under either Reliance policy. Reliance argued that Robert Perera was not an additional insured under either of its policies because the County-owned fire truck he was driving was not a vehicle which the City hired or borrowed.

Thereafter, plaintiff moved for summary judgment on two issues: whether the City had either hired or borrowed the County fire truck and the order of payment among the insurance policies. The trial court denied summary judgment as to the first issue. Determining that the second issue was a question of law, Judge Battle's order "concluded that all three policies are excess policies, [and] that payment of the amount in excess of $250,000.00 should be prorated among the policies. . . ." The case then proceeded to trial. At the conclusion of plaintiff's evidence, defendant moved for a directed verdict on the "hired or borrowed vehicle" issue which was denied. At the conclusion of all the evidence, both parties moved for a directed verdict. The trial court denied plaintiff's motion and granted defendant's motion. Plaintiff appeals the denial of its summary judgment motion, the granting of defendant's directed verdict motion, the denial of its directed verdict motion, and the judgment as to the order of payment. Defendant appeals the court's judgment concerning the order of payment among the policies.

Faison, Brown, Fletcher & Brough by O. William Faison, Reginald B. Gillespie, Jr. and Thomas N. Cochran for the plaintiff-appellant.

Womble Carlyle Sandridge & Rice by Hada V. Haulsee and Allan R. Gitter for the defendant-appellant.

EAGLES, Judge.

This case involves three insurance policies and two insurance companies and determination of their respective rights and obligations among themselves for previously paid damages. There are three issues raised on appeal: (1) was plaintiff's summary judgment motion properly denied; (2) was the trial court's grant of defendant's directed verdict motion correct; and (3) what is the order of payment among the three remaining insurance policies.

The summary judgment issue is moot. As to the directed verdict issue, the trial court correctly granted a directed verdict in favor of defendant on the "borrowed" vehicle issue. The trial court erred as to the order of payment among the policies and, accordingly, we reverse as to that issue.

A

[1] Plaintiff assigns as error the trial court's denial of its summary judgment motion. We note that denial of a summary judgment motion is interlocutory and that the proper method of review before appeal of the case is through a writ of certiorari. *Carr v. Carbon Corp.*, 49 N.C. App. 631, 272 S.E. 2d 374 (1980), *disc. rev. denied*, 302 N.C. 217, 276 S.E. 2d 914 (1981). The purpose of summary judgment is to reach an early decision on the merits where there is no genuine issue of fact and the movant is entitled to judgment as a matter of law, *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972). Once a decision on the merits is reached through a trial, review of the denial of summary judgment is improper. *Harris v. Walden*, 314 N.C. 284, 333 S.E. 2d 254 (1985). Accordingly, plaintiff's first assignment of error is without merit.

B

[2] Plaintiff's second assignment of error concerns the trial court's granting a directed verdict in favor of the defendant. The defendant's motion for directed verdict presents whether the evidence is sufficient for submission to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Furthermore, a directed verdict may be granted when facts are no longer at issue, *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971), and the issue submitted is a question of law. *Jones v. Development Co.*, 16 N.C. App. 80, 191 S.E. 2d 435, *cert. denied*, 282 N.C. 304, 192 S.E. 2d 194 (1972). In ruling on defendant's motion, the evidence must be considered in the light most favorable to the plaintiff. *Kelly*, 278 N.C. at 153, 179 S.E. 2d at 396.

The issue here is whether the truck was "borrowed" as that term is used in Reliance #1. Robert Perera is an additional insured under Reliance #1 only if the fire truck can be considered to be owned, hired, or borrowed by the City. The County, not the City, owns the fire truck. The parties neither briefed nor argued the "hired" issue and, therefore, it is waived. N.C.R. App. Proc.

10(a). The dispositive issue, then, is whether the City "borrowed" the County's fire truck. When a term, such as "borrowed," is not specifically defined in the contract itself, the meaning of language in an insurance policy is a question of law. The term must be given the meaning most favorable to the insured consistent with its use in ordinary speech. *Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970).

Webster's Third New International Dictionary defines "borrow" to mean:

> 1. to receive temporarily from another, implying or expressing the intention either of returning the thing received or of giving its equivalent to the lender: obtain the temporary use of. . . .

This implies that when something is borrowed the borrower assumes control of the object. *F & M Schaefer Brewing v. Forbes Food Division*, 151 N.J. Super. 353, 376 A. 2d 1282 (1977).

The basic facts here are not in dispute. The County owned this particular fire truck, which was known as Engine 13. The oral agreement between the City and County provided that the City would man and maintain the truck. In exchange, the County agreed to reimburse the City for the expenses incurred in this arrangement. The City trained and clothed the fire fighting crews. The County reimbursed the City for the training and uniforms of those crews manning Engine 13. The County never knew which of the City's personnel were manning its fire truck. The City decided all personnel questions of this type. Additionally, the City dispatcher issued all initial orders to each of the fire trucks, including Engine 13. The County fire marshal or the appropriate volunteer fire chief directed Engine 13 and its crew once it arrived at the scene of a fire within the County's jurisdiction. No city fire department supervisors responded to calls in the County. Engine 13 responded to fires within the City limits when necessary and when available.

Since no critical facts were disputed and the question was one of law, the trial judge properly refused to submit this issue to the jury. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). Further, the trial court's determination that the County's fire truck, Engine 13, was borrowed by the City is adequately supported by

the evidence. Though the County owned the truck, the City controlled Engine 13 in every aspect of its workday. The City determined who would man the truck and when it would go out. While the truck could be released by the County from its obligation to go to a County fire before it arrived, it was not until Engine 13 arrived at the scene of a County fire that the County exercised any control over the vehicle. Accordingly, Robert Perera is an additional insured under both Reliance policies.

C

[3] Both Reliance and Lexington assign as error the trial court's determination of the order of payment among the three remaining excess insurance policies. The contracts of insurance here were not made between plaintiff and defendant, but between each of them and third parties. Each policy is a contract between the respective parties involved; the parties' intent must be examined in order to properly construe each policy. Consequently, each policy must be construed separately and irrespective of the others to determine their effect on each other. *Allstate Insurance Co. v. Shelby Mutual Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967) (hereinafter *Allstate*).

To begin we consider the first policy written, Reliance #1. This Reliance policy, by its own terms, was primary insurance for the City and its vehicles. The policy's "other insurance" clause converted the coverage to excess in the event that the covered vehicle was one not owned by the City, but rather one which the City hired or borrowed. Generally, excess coverage "provides that if other valid and collectible insurance covers the occurrence in question, the 'excess' policy will provide coverage only for liability above the maximum coverage of the primary policy or policies." *Horace Mann Insurance Co. v. Continental Casualty Co.*, 54 N.C. App. 551, 555, 284 S.E. 2d 211, 213 (1981) (quoting 8A Appleman, Insurance Law and Practice Section 4909 (1981)).

The next policy written, Reliance #2, was written the following day. This policy differed from Reliance #1 in that Reliance #2 was titled an excess-umbrella policy. Further, Reliance #2 covered the City and its employees for general liability purposes, not simply the City's vehicles and their drivers. The risks insured were different.

Reliance #2's "other insurance" clause provided that in the event any other valid and collectible insurance was available to the City, this coverage (Reliance #2) was excess. Reliance #1 was excess coverage because the fire truck was "borrowed." Reliance #2 contained a limit of liability clause which exempted Reliance #2 from liability for losses to the extent covered by any policies set out in a referenced schedule. The Reliance #1 policy was set out as one of the underlying policies.

Later in February, the County contracted with South Carolina for a liability policy for the County, its vehicles and its employees. The maximum amount payable in one accident under the policy was $100,000. Both parties to this action acknowledge that South Carolina's policy was the primary policy in the underlying case and that South Carolina has promptly and properly paid $100,000 into the settlement pool.

Just as the City had done previously, the County then contracted for further liability protection. They contracted with Lexington for another liability insurance policy, an umbrella policy which would cover losses in excess of $250,000, but no more than $5,000,000. Just as Reliance had done in Reliance #2, Lexington limited its liability under the policy through its other insurance clause and through a limit of liability clause. Lexington's "other insurance" clause, substantially identical in language to Reliance #2, converted its policy to excess coverage in the event other valid and collectible insurance was available. Lexington's limit of liability clause, again substantially identical in language to Reliance #2, included the South Carolina policy on the appropriately referenced schedule.

Our research discloses but one North Carolina case which addresses the order of payment between competing excess clauses, *Alliance Mutual Insurance Co. v. New York Central Mutual Fire Insurance Co.*, 70 N.C. App. 140, 318 S.E. 2d 524 (1984) (hereinafter *Alliance*). There the court recognized that where two policies contain identical excess clauses, the rule of mutual repugnancy should control. The court stated that where the excess clauses were identical and no determination could be made as to whether one policy was primary, then the clauses were mutually repugnant and that coverage should be prorated between the policies. *Id. Alliance* is persuasive because the contrary result, giving full effect to identical excess clauses, would make

neither insurer liable since there is no way to determine from the documents which should pay first.

In other jurisdictions, the general rule, whether the excess clauses are identical or not, is "[w]here two or more policies provide coverage for the particular event and all the policies in question contain excess insurance clauses, it is generally held that such clauses are mutually repugnant and must be disregarded, rendering each insurer liable for a pro rata share of the judgment or settlement." Couch on Insurance 2d, Section 62:80 (1983).

A panel of the New York Supreme Court overruled a trial court's use of this general rule in a case strikingly similar to the present case. *State Farm Fire & Cas. Co. v. LiMauro*, 103 A.D. 2d 514, 418 N.Y.S. 2d 90 (1984), *aff'd on other grounds*, 65 N.Y. 2d 369, 482 N.E. 2d 13, 492 N.Y.S. 2d 534 (1985). *LiMauro* involved the order of payment among three policies written by State Farm Mutual Automobile Insurance Company (State Farm Mutual), Aetna Casualty and Surety Company (Aetna), and State Farm Fire and Casualty Company (State Farm Fire) respectively. The State Farm Mutual policy was determined to be primary coverage and paid its maximum coverage amount. The remaining two policies were both excess: Aetna's was excess because the vehicle involved was a non-owned vehicle, and State Farm Fire's was excess because of its other insurance clause which said the policy was excess if there were any other valid and collectible insurance. The court pointed out that Aetna's policy was excess only because of the circumstance of the insured driving a non-owned vehicle. Aetna bargained for and insured a primary/secondary risk; coverage that was intended, generally, to pay first in the event of liability. On the other hand, State Farm Fire bargained for and insured a contingent excess liability; coverage that was intended to pay only after a primary policy was exhausted. Further evidence of the differing risks insured was the significant difference in premium paid for the policy. The court ruled that where differing excess policies insured "different or several tiers of excess coverage" the general rule should not apply, *id.*, 103 A.D. 2d at 519, 481 N.Y.S. 2d at 93, and ordered that the Aetna policy be exhausted before State Farm Fire's policy should begin payment. This is consistent with the North Carolina rule of construing insurance policies independent of one another. *See Allstate*, 269 N.C. at 341.

As between Reliance #1 and Reliance #2, the only reasonable intent to be drawn from the insurance contracts was that Reliance #1 would be exhausted before Reliance #2 would pay any judgments or losses. The Reliance #2 policy demonstrates this proposition by listing Reliance #1 as an underlying policy under its limit of liability clause. Additionally, the only reasonable intent to be drawn from Lexington's contract with the County was that Lexington would pay claims only at some point after South Carolina's policy was exhausted. Lexington's limit of liability clause lists the South Carolina policy as an underlying policy.

Though each of the three policies was excess, they did not cover the same risk. The dissimilar premiums paid for each policy make this point dramatically. Reliance #1 commanded a larger premium as it was anticipated that, generally, it would be a primary policy. Only as to any vehicle the City hired or borrowed would the policy be excess. On the other hand, both Reliance #2 and Lexington insured a larger risk specifically contingent on another policy first paying. Both Reliance #2 and Lexington were written to protect against the possibility of liability losses up to five million dollars. Both policies were to take effect only upon losses or a judgment reaching a certain minimum level. The losses below this minimum level were to be covered by the underlying insurance policies set out in each policy's limit of liability clause. Reliance #2 and Lexington insured the same kind of risk—contingent excess liability. Reliance #1 insured a primary/secondary risk.

Consequently, we hold that among the three policies here at issue, Reliance #1 should pay first as Reliance #1 insured a risk which Reliance knew would have to be paid before Reliance #2 came into effect. Further, since there are no essential differences between Reliance #2 and Lexington, we hold that Reliance #2 and Lexington should be treated equally. Under Reliance #1, Reliance shall pay its full face amount, $500,000. The remaining portion of the judgment shall be paid $37,500 by Reliance #2 and $37,500 by Lexington. Since the result is the same under either rule, we decline to decide here whether Reliance #2 and Lexington share prorata according to maximum policy limits or simply share the judgment equally. The judgment below must, therefore, be reversed and the case remanded for the entry of a judgment consistent with this opinion.

Reversed and remanded.

Judges WELLS and MARTIN concur.

MOSLEY & MOSLEY BUILDERS, INC. v. LANDIN LTD., AND CARL W. JOHNSON

No. 8718SC231

(Filed 3 November 1987)

1. **Evidence § 32.7— ambiguous lease provision—parol evidence**

Where a written lease agreement gave defendants the right to relocate plaintiff's store within Phase I of a mall project but contained conflicting descriptions of the property included within Phase I, and plaintiff refused to relocate as directed by defendants on the ground that the new location designated by defendants was not within Phase I, extrinsic evidence was admissible to establish the intent of the parties as to the meaning of "Phase I" as used in the lease agreement.

2. **Contracts § 26; Landlord and Tenant § 6.1— construction of lease—competency of evidence**

In an action to recover damages for breach of a lease agreement which gave defendants the right to relocate plaintiff's store within Phase I of a mall project, a letter from the mall developer's architect to plaintiff, a building permit for Phase I of the mall project, and architectural drawings submitted with the application for a building permit were relevant to show that Phase I consisted of the first floors of two buildings and did not include the basement area of one building where defendants attempted to relocate plaintiff's store.

3. **Landlord and Tenant § 13— refusal of tenant to relocate—eviction—breach of lease—sufficiency of evidence**

Plaintiff's evidence was sufficient for the jury in an action for breach of a lease when defendants evicted plaintiff's store from a shopping mall because plaintiff refused to move the store to a basement location where it tended to show that the lease agreement gave defendants the right to relocate plaintiff's store within Phase I of the mall project; the lease itself was uncertain with respect to the area included within Phase I; and plaintiff and the original lessor intended Phase I to include only the first floors of two buildings.

4. **Contracts § 28; Trial § 33— instructions—construction of lease provision—failure to explain applicable law**

In an action for breach of a lease provision giving defendants the right to relocate plaintiff's store within Phase I of a shopping mall based on defendants' eviction of plaintiff from the mall because plaintiff refused to move its store to a basement location, the trial court erred in refusing to give defendants' requested instruction declaring and explaining the law with respect to

the jury's determination of the meaning intended by the parties of the term "Phase I" as used in the relocation provision of the lease.

5. **Damages § 13.2— breach of lease—lost profits—profits by replacement lessee**

In an action to recover for breach of a lease when defendants evicted plaintiff's Nuts N' Such business from a shopping mall and rented plaintiff's former space to a Peanut Shack franchise, the trial court did not err in permitting sales by the Peanut Shack franchise to be used as a basis for determining plaintiff's lost profits where plaintiff's Nuts N' Such business and the Peanut Shack franchise sold similar merchandise, and evidence of Peanut Shack's sales from plaintiff's former location was thus relevant to show the sales which plaintiff might reasonably have expected to make had it not been evicted.

6. **Damages § 3.5— breach of lease—lost profits for entire unexpired term**

If defendants breached a lease by evicting plaintiff's store from a shopping mall, plaintiff is entitled to recover its lost profits for the entire unexpired term of the lease irrespective of whether plaintiff continued to operate its store at another location.

7. **Rules of Civil Procedure § 15.1— denial of motion to amend complaint—unfair trade practices**

In an action for breach of a lease agreement, the trial court did not abuse its discretion in the denial of plaintiff's motion, made at the close of all of the evidence, to amend the complaint to allege that the defendants had engaged in unfair and deceptive trade practices and to ask for treble damages where plaintiff's counsel had expressly stated during the trial that plaintiff was not seeking treble damages, and it thus does not appear that such issue was tried with the implied consent of the parties. N.C.G.S. § 1A-1, Rule 15(b).

APPEAL by defendants and cross-appeal by plaintiff from *Hyatt, Judge.* Judgment entered 15 September 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 September 1987.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Joseph W. Moss and George W. Jarecke, for plaintiff appellee.

Douglas, Ravenel, Hardy, Crihfield & Lung, by Robert D. Douglas, III and John W. Hardy, for defendants appellants.

MARTIN, Judge.

This is an action for damages for breach of a lease. By written lease agreement dated 16 February 1981, plaintiff leased from Pomona Associates certain retail store premises located "on the 1st floor of Building No. 1 (one) of the Project known as Pomona Factory Outlet Mall, Phase I . . ." (now Greensboro Outlet Mall)

in Greensboro, N.C. Plaintiff operated Nuts N' Such, a retail store selling nuts, candies and similar products in the leased premises. The term of the lease was for five years commencing in May, 1981; plaintiff was given an option to renew the lease for an additional five year term. Paragraph 28 of the lease agreement provided:

> 28. Landlord shall have the right to relocate Tenant, at Landlord's cost and expense, within Pomona Factory Outlet Mall, Phase I, upon sixty (60) days notice to Tenant, which relocation shall in no way affect the obligations and duties of either party hereunder. In the event Tenant refuses to accept the new location designated by Landlord, Landlord at its option may cancel and terminate this Lease by an additional thirty (30) days written notice to Tenant.

On 30 August 1981, defendants purchased the mall from Pomona Associates.

On 29 June 1983, defendants notified plaintiff that it would be required to move its retail store from the leased premises near the entrance to the mall to a space located in the basement of Building No. 1. Plaintiff was advised that its lease would be terminated if it refused to relocate to the new space. Plaintiff refused to move, objecting to the relocation on the grounds that the new space was not within Phase I of the mall. On 4 October 1983, defendants evicted plaintiff from the premises. Plaintiff leased space in a shopping mall in Durham and operated its business in that location until it sold the business in January 1986. The space formerly occupied by plaintiff at the Greensboro Outlet Mall was leased by defendants to a Peanut Shack franchise, which sells products substantially similar to those sold by plaintiff. There was evidence tending to show that defendants had entered into negotiations with the Peanut Shack franchisee for the space leased by plaintiff prior to giving plaintiff notice to relocate.

At the close of all the evidence, plaintiff moved to amend the complaint to allege that defendants had engaged in unfair and deceptive trade practices in violation of G.S. 75-1.1 and to pray for treble damages pursuant to G.S. 75-16. The motion was denied. The jury found that defendants had breached the lease agreement and awarded damages of $120,000.00 to plaintiff. De-

fendants' post-verdict motions were denied and judgment was entered on the verdict.

Defendants appeal, assigning error to a number of the trial court's evidentiary rulings and to its refusal of their request for jury instructions. By cross-appeal, plaintiff contends that the trial court erred by denying its motion to amend to conform its complaint to the evidence and by refusing to allow evidence of damages for the period following the 1986 sale of its Nuts N' Such business. Because the court's instructions on the issue of defendants' breach of the lease were incomplete, and because plaintiff was prevented from presenting competent evidence of all of its damages, we order a new trial.

Paragraph 28 of the lease agreement gave defendants the right to relocate plaintiff's store within Phase I of the mall. Plaintiff refused to relocate as directed by defendants on the grounds that the new location designated by defendants, in the basement of Building No. 1, was not within Phase I. Paragraph 1.(a) of the lease agreement described the leased premises by reference to a floor plan and a site plan of the Pomona Factory Outlet Mall, both of which were attached to, and incorporated in, the lease. The site plan showed two buildings and was marked with the legend "Phase One Building Area—78760 SF." Testimony at the trial indicated that the first floor area of both buildings totalled approximately 78,760 square feet. Paragraph 7 of the lease agreement, however, provided for allocation of real property taxes on a percentage basis, calculated "by dividing the number of square feet of the Leased Premises by the number of leaseable square feet in Phase I of Pomona Factory Outlet Mall." For the purposes of allocating real property taxes, the lease agreement acknowledged that the "[t]otal leaseable square feet in Phase I of Pomona Factory Outlet Mall" consisted of 130,000 square feet. There was testimony indicating that the 130,000 square foot area included the basement of Building No. 1. No other provision of the lease agreement described "Phase I."

[1] Defendants contend that the trial court erred by admitting the testimony of plaintiff's president, William Sanders Mosley, and of Bobby Slate, a leasing agent for Pomona Associates, concerning the meaning of the relocation provision contained in Paragraph 28 of the lease agreement. The testimony of both wit-

nesses tended to show that, during negotiations leading up to the lease agreement, Slate had specifically told Mosley that plaintiff could be relocated only to other space on the first floor of Building No. 1 or Building No. 2. Mosley testified, in addition, that Slate had represented to him that the relocation provision would not be applicable after the mall had opened. Defendants contend that such testimony contradicts the terms of the written lease and violates the parol evidence rule. We disagree.

"The general rule is that when a written instrument is introduced into evidence, its terms may not be contradicted by parol or extrinsic evidence, and it is presumed that all prior negotiations are merged into the written instrument." *Root v. Allstate Ins. Co.*, 272 N.C. 580, 587, 158 S.E. 2d 829, 835 (1968). However, " 'if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement between the parties.' " *Id.* at 590, 158 S.E. 2d at 837, *quoting Cumming v. Barber*, 99 N.C. 332, 5 S.E. 903 (1888). In the present case, the written lease contained conflicting descriptions of the property included within Phase I of the mall project, leaving uncertain the extent to which defendants could require plaintiff to relocate under Paragraph 28. Thus, extrinsic evidence was admissible to establish the intent of the parties as to the meaning to be given "Phase I" as used in the lease agreement. "An interpretation given a contract by the parties themselves prior to the controversy must be given consideration by the courts in ascertaining the meaning of the language used." *Shoaf v. Shoaf*, 14 N.C. App. 231, 235, 188 S.E. 2d 19, 22, *rev'd on other grounds*, 282 N.C. 287, 192 S.E. 2d 299 (1972).

[2] Defendants advance similar assignments of error to the admission of four exhibits offered by plaintiff as evidence that Phase I of the mall did not include the basement area to which defendants attempted to relocate plaintiff's store. Plaintiff's Exhibit 29 was a letter from Pomona Associates' architect to Mosley, stating that Phase I consisted of 78,760 square feet on the ground floors of both buildings and that other floors were to be completed in subsequent phases. Plaintiff's Exhibit 48 was the building permit issued by the City of Greensboro Building Inspection Department for Phase I of Pomona Factory Outlet Mall. Plaintiff's Exhibit 9B consisted of architectural drawings submit-

ted to the City of Greensboro in connection with Pomona Associates' application for a building permit, and Exhibit 9C consisted of architectural drawings for the basement area of Building No. 1 and are entitled "Ground Floor Plan, Phase III." According to the testimony of the architect, the drawings contained in Exhibit 9C were prepared for defendants after they had purchased the mall from Pomona Associates.

We note initially that neither Exhibit 9B nor Exhibit 9C are included in the record before us. As appellants, defendants have the responsibility to see that the record is complete and that it includes such exhibits as may be necessary for an understanding of the errors assigned. App. R. 9(d); *State v. Milby*, 302 N.C. 137, 273 S.E. 2d 716 (1981). "[T]he admission of an exhibit cannot be held to be prejudicial error when the exhibit complained of or a description of same, [sic] does not appear of record in some fashion." *Id.* at 141, 273 S.E. 2d at 719.

Defendants argue that even if the exhibits were not barred by the parol evidence rule, they were not relevant to the question of the parties' intent at the time they entered into the lease. We disagree. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." G.S. 8C-1, Rule 401. The architect for Pomona Associates testified that the site plan contained in Exhibit 9B was identical to the site plan attached to plaintiff's lease. It showed that Phase I of the mall totalled 78,760 square feet and consisted of the first floors of Buildings One and Two and a connecting corridor. The building permit was issued on the basis of these drawings approximately two weeks before plaintiff entered into the lease agreement. The architect also testified that drawings for expansion into the basement of the project had not been prepared when the building permit was issued. In our view, this evidence was relevant to show Pomona Associates' intent to develop the mall in phases and to show that the first phase consisted of the first floors of the two buildings. The architect's letter to Mosley is corroborative of his testimony at the trial. These assignments of error are overruled.

[3] Defendants also assign error to the denial of their motions for directed verdict and for judgment notwithstanding the ver-

dict. The question presented by both the G.S. 1A-1, Rule 50 motions for directed verdict and for judgment notwithstanding the verdict is the same: whether the evidence, considered in the light most favorable to the nonmovant, giving him the benefit of all reasonable inferences and resolving all conflicts in the evidence in his favor, is sufficient to take the case to the jury. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). The motion should be denied unless it appears, as a matter of law, that the plaintiff is not entitled to a recovery upon any view of the facts reasonably established by the evidence. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977).

Applying the foregoing standard to the evidence in the present case, we conclude that defendants' motions were correctly denied. The issue is whether defendants breached the lease by terminating plaintiff's lease after plaintiff refused to relocate its store to the basement of Building No. 1 of the mall. Resolution of the issue depends upon whether defendants had the right to require such a move pursuant to paragraph 28 of the lease, which limited the landlord's right of relocation to another space within Phase I. The lease itself is uncertain and ambiguous with respect to the area included within Phase I of the project. When considered in the light most favorable to plaintiff, there was sufficient evidence to permit a jury to find that at the time they entered into the lease, plaintiff and Pomona Associates mutually intended and understood Phase I to include only the first floors of the two buildings. Whether defendants had the right to relocate plaintiff's store and to evict plaintiff upon its refusal to relocate was properly an issue for the jury.

[4] Defendants submitted a timely written request for instructions, including a request that the jury be instructed with respect to its duty to determine, from the evidence, the meaning which the parties intended to give to the term "Phase I" as used in the lease. The trial court refused the request, and, with respect to the issue of defendants' breach of the lease, simply defined the terms "contract" and "breach of contract." Defendants assign error; their exception is well taken.

Where, as in the present case, parol evidence is admissible to explain the meaning of ambiguous language used in a contract, it is for the jury, under proper instructions, to determine what

meaning the parties intended to give to the language. *Root v. Allstate Ins. Co., supra; Parker Marking Systems, Inc. v. Diagraph-Bradley Industries, Inc.*, 80 N.C. App. 177, 341 S.E. 2d 92, *disc. rev. denied*, 317 N.C. 336, 346 S.E. 2d 502 (1986). Though the trial court is no longer required to explain the application of the law to the evidence, G.S. 1A-1, Rule 51(a) (1985), it remains the duty of the court to instruct the jury upon the law with respect to every substantial feature of the case. The meaning which the parties intended to give the term "Phase I" as used in the relocation provision of the lease agreement, and the manner in which the jurors were to determine that meaning, were substantial features in this case. By their requests for instructions, defendants called to the attention of the trial court the necessity that the jurors be provided with legal guidance in their determination of the meaning of the disputed provisions of the lease. "The heart of a contract is the intention of the parties and is to be ascertained from the language used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Peaseley v. Virginia Iron, Coal and Coke Co.*, 282 N.C. 585, 597, 194 S.E. 2d 133, 142 (1973). The failure of the trial court to declare and explain the law with respect to the issue was prejudicial error, entitling defendants to a new trial.

Notwithstanding our award of a new trial, we deem it appropriate to address assignments of error brought forward by both parties with respect to the admission and exclusion of evidence on the issue of plaintiff's damages, inasmuch as these matters are likely to recur at retrial.

[5] As damages for breach of the lease, plaintiff sought to recover lost profits. Testimony by plaintiff's president, Mr. Mosley, tended to show that the operation of its store at defendants' mall had been profitable in 1981 and 1982 and that net sales had increased for each month in 1983 as compared with the same month in 1982. Over defendants' objection, Mosley was permitted to give testimony as to the amount of profits lost by plaintiff from the time of its eviction in October 1983 until it ceased business in its Durham location in January 1986. Mosley calculated plaintiff's lost profits by comparing plaintiff's actual sales at the Durham location to actual sales by the Peanut Shack franchise at plaintiff's former location, and applying to the difference the percentage of profit which plaintiff had experienced on its sales

prior to being evicted by defendants. Defendants contend that because plaintiff's marketing and management practices differed substantially from those of the Peanut Shack franchise, it was unreasonably speculative to allow the latter's sales to be used as a basis for determining plaintiff's lost profits. We disagree.

Damages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach. *Perkins v. Langdon*, 237 N.C. 159, 74 S.E. 2d 634 (1953). To prove lost profits, the injured party "must prove as part of his case both the amount and cause of his loss. Absolute certainty, however, is not required, but both the cause and the amount of loss must be shown with reasonable certainty." *Cary v. Harris*, 178 N.C. 624, 628, 101 S.E. 486, 488 (1919), *quoting Nance v. Western Union Tel. Co.*, 177 N.C. 313, 98 S.E. 838 (1919). If an established business is wrongfully interrupted, the damages can be proved by showing the profitability of the business for a reasonable time before the wrongful act. *Id.* It is only "when prospective profits are conjectural, remote, or speculative, they are not recoverable." *Perkins v. Langdon, supra*, at 173, 74 S.E. 2d at 645. *Accord Weyerhaeuser Co. v. Godwin Building Supply Co., Inc.*, 292 N.C. 557, 234 S.E. 2d 605 (1977).

Evidence that plaintiff's Nuts N' Such store had been profitable up until the time of the alleged breach, and that its sales had increased as new stores had opened in the mall, showed that the business "had been successfully conducted for such length of time that the profits thereof were reasonably ascertainable." *Perkins v. Langdon, supra*, at 174, 74 S.E. 2d at 646. Peanut Shack and Nuts N' Such sold similar merchandise; evidence of Peanut Shack's sales from plaintiff's former location was relevant to show the sales which plaintiff might reasonably have expected to make had it not been evicted. Differences in marketing techniques between the two stores went only to the weight to be given such evidence by the jury; these differences were not such as to render the evidence unreasonably remote or speculative upon the issue of plaintiff's opportunity to make future profits had it not been evicted.

[6] Apparently because plaintiff sold its Nuts N' Such store in Durham in 1986 and ceased business, the trial court refused to permit plaintiff to offer evidence of projected lost profits from the

time of the sale through the expiration of its lease in 1991. We hold that the exclusion of such evidence was error. Plaintiff relocated its store to the Durham mall only after being evicted from defendants' mall. While the business had made a profit at defendants' mall, the Durham location proved unprofitable. If, by evicting plaintiff from the Greensboro mall, defendants breached the lease, plaintiff is entitled to recover all damages actually and proximately resulting from the breach, including lost profits for the entire unexpired term of the lease, irrespective of whether it continued to operate its store at another location.

The excluded evidence consisted, in part, of the testimony of a certified public accountant as to his projections of profits which could have been realized by plaintiff during the remaining term of the lease. The accountant's projections were based upon plaintiff's actual past operating expenses, adjusted yearly to account for inflation; its rental expense as provided by the lease; the cost of its inventory based upon a fixed percentage of its projected sales; and Peanut Shack's actual 1985 sales from plaintiff's former location in defendants' mall. We hold that the proffered evidence provided a method of calculating plaintiff's loss of prospective profits which was not unreasonably speculative or remote and provided a basis for the measurement of plaintiff's damages with sufficient certainty as to be competent and admissible.

[7] Plaintiff also assigns error to the denial of its motion, pursuant to G.S. 1A-1, Rule 15(b), to amend its pleading to allege that defendants had engaged in unfair and deceptive trade practices in violation of Chapter 75 of our General Statutes and to seek treble damages and attorneys' fees. While such amendment of pleadings may be made, even late in the trial or after judgment, in order to conform the pleadings to the evidence and raise issues tried by the express or implied consent of the parties, *Peed v. Peed*, 72 N.C. App. 549, 325 S.E. 2d 275, *cert. denied*, 313 N.C. 604, 330 S.E. 2d 612 (1985), the trial court's ruling upon such a motion is not reviewable absent an abuse of discretion. *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 347 S.E. 2d 473 (1986).

In the present case, plaintiff's motion to amend came at the close of all of the evidence. During the course of the trial, plaintiff's counsel had expressly stated to the court that plaintiff was not seeking treble damages. Thus, even though plaintiff subse-

quently developed evidence which could arguably support a claim under Chapter 75 of the General Statutes, it does not appear that the issue was tried with the implied consent of the parties. Plaintiff has shown no abuse of discretion. We hasten to add, however, that our holding does not preclude plaintiff from moving to amend its pleadings upon remand and prior to a new trial. In the event of such an amendment, there could be no confusion concerning the issues before the court at retrial.

For the reasons stated, we remand this case to the Superior Court of Guilford County for a new trial.

New trial.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. CHARLES LEONARD

No. 8722SC304

(Filed 3 November 1987)

1. **Criminal Law § 138— no written findings—minimum sentence**

There was no error in a conviction for trafficking in marijuana where the trial court entered a judgment which stated that the court made no written findings of fact because the prison term was imposed pursuant to a plea agreement. Written findings were unnecessary since defendant received the minimum sentence possible under N.C.G.S. § 90-95(h)(1)(a) (1985).

2. **Narcotics § 3.1— identification of house as defendant's residence—not prejudicial**

There was no prejudicial error in a prosecution for trafficking in marijuana from the admission of testimony identifying the residence in question as "Mr. Leonard's house," a fact not within the witness's knowledge, where the statement was made to clarify the witness's testimony regarding the geographical setting rather than in an attempt to establish ownership of the residence; the witness's lack of personal knowledge was plain from the witness's testimony as a whole, so that reliance on the statement by the jury was unlikely; and two officers both properly testified from personal knowledge that defendant resided at the house.

3. **Searches and Seizures § 13— trafficking in marijuana—search without warrant—scope of consent**

The trial court did not err in a prosecution for trafficking in marijuana by admitting testimony concerning the contents of a washtub covered by a

blanket where defendant had consented to a search of his house for an escaped convict and, while one officer testified that the escapee could not have been under the cover, another testified that the bedspread covered a large enough area for a person to hide under and that he raised it to look for the escapee. Furthermore, there was ample evidence of marijuana apart from the washtub evidence.

4. Searches and Seizures § 23— search warrant for defendant's house—affidavit sufficient to show probable cause

An affidavit established probable cause to issue a warrant for the search of defendant's house for marijuana where the affidavit described the place to be searched as "a wood frame house and outbuildings," included directions to the location and stated that the officer had gone to the location a half hour earlier to search for Kenneth Leonard and saw during the search a green vegetable matter that appeared to be marijuana. Although defendant contended that the affidavit described the circumstances establishing probable cause with insufficient particularity, inadequately defined the area to be searched, and failed to disclose that the affiant was capable of identifying marijuana, a trained law enforcement officer need not swear to his ability to recognize an illegal substance in order for his observation to be deemed reliable by the issuing magistrate, any areas of the house or outbuildings might reasonably be viewed as possible repositories for additional marijuana, and the officer clearly made a good faith effort to afford defendant his constitutional rights by procuring a warrant and acted under a good faith belief that his direct observations established probable cause.

5. Narcotics § 4.3— trafficking in marijuana—evidence of possession—sufficient

The trial court properly denied defendant's motion to dismiss charges of trafficking in marijuana and felonious possession of marijuana where there was ample evidence that the premises in which the marijuana was found were under the control of the defendant; it was not necessary for the State to establish that defendant owned or leased the premises; two officers both testified from personal knowledge that defendant had resided there for over a year; defendant was present on the premises when the marijuana was first found; defendant exercised control over the premises by granting permission to search for an escaped prisoner, by denying permission to search for marijuana, by ordering officers off the premises, and by locking the door when he left; some of the marijuana was in plain view in a room heavy with the odor of marijuana; no one other than defendant's wife was observed on the premises; defendant exercised direct control over the marijuana when he entered the room where it was located, replaced the cover over the washtub and suitcases, and ordered the officers from the room; no one was observed entering or leaving the house prior to the warrant search; and the positions of the containers were not altered.

6. Criminal Law § 128.1— motion for a mistrial—improper testimony and inadmissible evidence—denial proper

The trial court did not abuse its discretion in a prosecution for trafficking in marijuana by denying defendant's motion for a mistrial based on improper testimony and the introduction of improper evidence where the court in each

instance properly allowed defendant's motions to strike and directed the jury to disregard the improper evidence.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 29 October 1986 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 24 September 1987.

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

Barnes, Grimes, and Bunce, by Jerry B. Grimes for defendant appellant.

BECTON, Judge.

Defendant, Charles Leonard, was indicted and tried for maintaining a dwelling for the use, storage, or sale of marijuana; manufacturing marijuana; possession of marijuana with intent to sell or deliver; trafficking in marijuana by possession, and felonious possession of marijuana. At the conclusion of the State's evidence, defendant's motion to dismiss the charges was granted as to the first three offenses. The jury returned a verdict of guilty of trafficking in marijuana by possession, and judgment was entered on the verdict imposing the minimum mandatory sentence of five years imprisonment and a $5,000 fine. Defendant appeals, bringing forward sixteen assignments of error relating to evidentiary matters, jury instructions, and the denial of various motions. We find no error.

I

The evidence for the State, in pertinent part, tended to show the following.

On 10 July 1985, Sergeant Ralph Willard and two other officers of the N. C. Department of Corrections went to Davidson County, where they were assisted by Sergeant R. L. Gilley of the Davidson County Sheriff's Department in a search for defendant's son, Kenneth Leonard, who had escaped from prison. The officer began checking the addresses on Kenneth's visitor and correspondence list, and, after an unsuccessful visit to the home of a girlfriend, arrived at the home of defendant and his wife at approximately 11:30 p.m.

Sergeants Gilley and Willard went to the door, and defendant answered. Gilley explained that Kenneth had escaped and re-

quested permission to search the residence for him. With defendant's consent, the four officers proceeded to search the house room by room. The only other person present, defendant's wife, was in one of the bedrooms.

During the search, Sgt. Gilley entered a back room, along with Sgt. Willard and Officer Otis Foster. There Gilley observed a shopping bag on the floor containing stems and leaves of marijuana in plain view. A strong odor of marijuana filled the air. A bedspread or cover was draped over the bed, concealing three large lumps. Bits of green vegetable matter clung to the cover. Sgt. Gilley pulled down the cover, revealing two large suitcases and a washtub which contained a quantity of marijuana and seeds.

Defendant entered the room and remarked that Kenneth could not fit into the tub. He looked into the tub calling, "Ken, Ken, are you in there," then placed the cover back over the tub and ordered the officers from the room. About that time, defendant's wife began crying from the other room that she was having a heart attack, and defendant said he wanted to take her to the hospital, refusing Sgt. Gilley's offer to arrange transportation for her. Sgt. Gilley requested permission to search the house for more marijuana, but defendant refused and ordered the officers out of the house and off the property. When they were all outside, defendant locked the door and left with his wife.

Sgt. Gilley then called Lieutenant Henry Oliver of the Sheriff's Department, who came to the residence and watched by the driveway with Sgt. Willard for approximately 30 minutes to an hour while Sgt. Gilley procured a search warrant and returned with Officer G. E. Lewallen. During that time, no one left or entered by the driveway. During the subsequent search, Officers Gilley, Oliver, and Lewallen discovered and seized packaging materials and over 80 pounds of marijuana in various paper bags and containers, including the suitcases, a garbage can, and a plastic trash bag which were all located in the same position in which they were observed during the earlier search.

Defendant presented no evidence.

II

[1] By his first assignment of error, defendant contends that the trial court erred by entering a judgment which states that the

Court made no written findings of fact because the prison term was imposed pursuant to a plea arrangement. That notation is plainly a mere clerical error which has not prejudiced defendant. Written findings were unnecessary since defendant received the minimum sentence possible under N. C. Gen. Stat. Sec. 90-95 (h)(1)(a) (1985), which overrides the presumptive term established for a Class H felony by N. C. Gen. Stat. Sec. 15A-1340.4(f)(6) (1983). This assignment of error is overruled.

III

[2] Defendant next assigns error to the admission of testimony by Sgt. Willard identifying the residence in question as "Mr. Leonard's house," a fact that was not within the witness's personal knowledge. He argues that because control of the premises had to be proven in order to establish possession of the marijuana by defendant, the denial of his motion to strike this statement was prejudicial error. We disagree.

First, the challenged statement was not made in an attempt to establish ownership of the residence but rather to clarify Sgt. Willard's testimony describing the geographic setting. Further, the witness's lack of personal knowledge was plain from Sgt. Willard's testimony as a whole, so that reliance on the statement by the jury was unlikely. Finally, Officers Oliver and Lewallen both properly testified from personal knowledge that defendant resided at the house in question. Under these circumstances, the failure to strike the statement, if error, was not prejudicial to defendant. This assignment of error is overruled.

IV

[3] Defendant next contends that the court erred by admitting testimony regarding the contents of the washtub because, by lifting the cover which concealed the tub, Sgt. Gilley exceeded the scope of the consent given to search for defendant's son.

Before this testimony was admitted, a *voir dire* was conducted to determine the legality of the search. Sgt. Willard gave his opinion that the container, or whatever was under the cover, probably could not have held the escapee. On the other hand, Sgt. Gilley testified that the cover was approximately seven feet by two and a half feet, 14 to 18 inches high, and covered three large lumps; that he believed it covered an area large enough for a per-

son to hide under; and that he raised the cover to look for the escapee. The trial judge found facts consistent with Sgt. Gilley's testimony and concluded that the scope of defendant's consent was not exceeded.

The consent given entitled Sgt. Gilley to search anywhere that he reasonably believed Kenneth Leonard might be concealed. Because conflicting evidence was offered regarding whether the escapee could have hidden under the cover where the washtub was found, it was the duty of the trial court to resolve the conflict by findings of fact, *see, e.g., State v. Chamberlain*, 307 N.C. 130, 297 S.E. 2d 540 (1982), and these findings are conclusive on appeal if supported by competent evidence. *Id.*

In our opinion, the trial court's findings and conclusions are adequately supported by competent evidence in the record, and thus, the challenged testimony was properly admitted. Furthermore, there is ample other evidence in the record of the presence of marijuana to support the conviction, apart from the washtub evidence.

This assignment of error is overruled.

V

[4] In his next two assignments of error, defendant challenges the validity of the search warrant and the admission of the evidence seized, on the grounds that the affidavit of Sgt. Gilley, offered in support of the warrant application, failed to establish probable cause. The affidavit described the place to be searched as "a wood frame house and outbuildings" and included directions to the location. The facts stated to establish probable cause were that Officer Gilley had gone to the location a half hour earlier to search for Kenneth Leonard and, during the search, saw in plain view "a green vegetable matter" that appeared to be marijuana. Defendant contends that the affidavit described the circumstances establishing probable cause with insufficient particularity, inadequately defined the area to be searched, and failed to disclose that the affiant was capable of identifying marijuana. These arguments are without merit.

An affidavit upon which a search warrant is issued is deemed sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon

the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. *E.g., State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984). The direct personal observation by the officer/affiant or his fellow officers is plainly a reliable basis for issuance of a warrant. *See State v. Horner*, 310 N.C. 274, 311 S.E. 2d 281 (1984); *State v. Moore*, 79 N.C. App. 666, 340 S.E. 2d 771 (1986), *disc. rev. denied*, 319 N.C. 393, 354 S.E. 2d 228 (1987). Moreover, in our opinion, a trained law enforcement officer need not swear to his ability to recognize an illegal substance in order for his observation to be deemed reliable by the issuing magistrate.

Defendant suggests that because Sgt. Gilley did not specify precisely where on the premises the marijuana was seen and limit the area to be searched accordingly, the warrant was invalid. Although defendant correctly maintains that a warrant must designate the place to be searched with reasonable certainty, *see* N. C. Gen. Stat. Sec. 15A-246(4), we conclude that the designation of location in this case is adequate. Based on Sgt. Gilley's personal observation of marijuana in plain view on the premises, any areas of the house or outbuildings might be reasonably viewed as possible repositories for additional marijuana. *See, e.g., Moore; State v. Mavrogianis*, 57 N.C. App. 178, 291 S.E. 2d 163, *disc. rev. denied*, 306 N.C. 562, 294 S.E. 2d 227 (1982); *State v. Trapper*, 48 N.C. App. 481, 269 S.E. 2d 680 (1980); *State v. Eutsler*, 41 N.C. App. 182, 254 S.E. 2d 250, *cert. denied*, 297 N.C. 614, 257 S.E. 2d 438 (1979).

Moreover, Sgt. Gilley clearly made a good faith effort to afford defendant his constitutional rights by procuring the warrant, and acted under a good faith belief that his direct observations established probable cause. Under the circumstances, although the facts establishing probable cause might have been stated with greater precision in the affidavit, we conclude that the officers reasonably relied upon the warrant in conducting the search. *See United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677, *reh. denied*, 468 U.S. 1250, 82 L.Ed. 2d 942 (1984) (upholding admission of evidence seized in reasonable reliance on invalid warrant). Accordingly, we uphold the trial court's determination that the search was valid and that the seized evidence was admissible.

VI

[5] Defendant also assigns error to the denial of his motion to dismiss the charges of trafficking in marijuana by possession and felony possession of marijuana. Citing *State v. McLaurin*, 320 N.C. 143, 357 S.E. 2d 636 (1987) and *State v. Guffey*, 252 N.C. 60, 112 S.E. 2d 734 (1960), defendant claims that there was insufficient evidence that he had actual or constructive possession of the marijuana or the other items seized, particularly in view of evidence that defendant's wife, children, and other people stayed in the residence from time to time.

A defendant's motion to dismiss is properly denied if there is substantial evidence that the offense charged was committed and that the accused was the perpetrator of the crime. *See State v. Perry*, 316 N.C. 87, 340 S.E. 2d 450 (1986). In ruling on the motion, the court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

In a prosecution for possession of contraband materials, the State is not required to prove actual physical possession. Proof of constructive possession is sufficient and that possession need not always be exclusive. *Perry* at 96, 340 S.E. 2d at 456. *See also, State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983); *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Allen*, 279 N.C. 406, 183 S.E. 2d 680 (1971). As the Supreme Court stated in *Harvey*:

> An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused "within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession."

281 N.C. at 12-13, 187 S.E. 2d 714 (citations omitted). However, "[a]lthough it is not necessary to show that an accused has exclusive possession of the premises where contraband is found, where possession of the premises is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E. 2d 585, 588-89 (1984). *See also McLaurin* at 146, 357 S.E. 2d at 638.

In the case *sub judice* there is ample evidence that the premises in question were under the control of defendant. It was not necessary, as defendant contends, for the State to establish that defendant *owned or leased* the premises. Officers Oliver and Lewallen both testified from personal knowledge that defendant had resided there for over a year. Furthermore, unlike the defendants in *Guffey* and *McLaurin*, the cases relied on by defendant, he was *present* on the premises when marijuana was first found. He exercised control over the premises by granting permission to search for his son, by denying permission to search for marijuana, by ordering the officers off the premises, and by locking the door when he left.

Although evidence suggests defendant's control of the premises was nonexclusive, there were additional circumstances which buttress the inference of defendant's knowledge, intent, and power to control the illegal substance. Some of the material was in plain view in a room heavy with the odor of marijuana. No one other than defendant's wife was observed on the premises. Defendant exerted direct control over the marijuana when he entered the room where it was located, replaced the cover over the washtub and suitcases, and ordered the officers from the room. Moreover, no one was observed entering or leaving the house prior to the warrant search, nor were the positions of the containers altered.

We hold that the foregoing is sufficient evidence to support a reasonable inference that defendant was in possession of the marijuana, and, therefore, that the motion to dismiss was properly denied.

VII

[6] Defendant moved for mistrial at the close of the State's evidence based on 1) improper testimony by Sgt. Gilley that he had a

paper from the light company indicating defendant had lived at the residence in question since 1963, and 2) the State's exhibition to the jury, and introduction of testimony about, a "vibrations analyzer" which was later ruled inadmissible. He assigns as error the denial of the motions.

The decision to grant or deny a motion for mistrial is within the sound discretion of the trial judge. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982). Furthermore, "a mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict." *Id.*

In this case, the trial court, in each instance complained of, properly allowed defendant's motions to strike and directed the jury to disregard the improper evidence. From our review of the record, we conclude the curative instructions adequately protected defendant against any consideration the jury may have given the evidence, and we find no abuse of discretion by the trial court in denying the motions for mistrial.

VIII

Four of defendant's assignments of error relate to the jury charge. Having carefully considered the exceptions upon which these assignments of error are based, we conclude that the instructions, considered as a whole, were proper and that the court correctly declined to give the specific instructions requested by defendant.

IX

The remainder of defendant's assignments of error are formal ones, asserting error in the denial of his motions to set aside the verdict, for arrest of judgment, and to vacate the judgment. For the reasons previously stated, these assignments of error are overruled.

No error.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. LEROY E. McKNIGHT

No. 8714SC280

(Filed 3 November 1987)

1. **Criminal Law §§ 34.1, 60.2— admissibility of fingerprint card**

The admission of a fingerprint card made pursuant to a prior, unrelated arrest and an officer's testimony that fingerprint cards are made when a person is arrested on a serious misdemeanor charge did not violate N.C.G.S. § 8C-1, Rule 404(b) where the fingerprint card was introduced for the sole purpose of identifying a latent fingerprint lifted from a credit application given to an employee of the store where the crime occurred.

2. **Criminal Law § 34.1— defendant as suspect in other crimes—erroneous testimony—failure to object**

A police officer's testimony that defendant has been the prime suspect in several cases he has investigated violated N.C.G.S. § 8C-1, Rule 404(b). However, defendant waived his right to raise this error on appeal by failing to object or note an exception to such evidence at the trial, and the admission of such evidence did not constitute "plain error" entitling defendant to a new trial even though he failed to object. App. Rule 10(a).

3. **Criminal Law § 34.5— defendant known as "jewelry person"—erroneous testimony—absence of prejudice**

An officer's testimony in a larceny case that defendant was known to the police as a "jewelry person" whose normal mode of operation was removing items by lifting countertops was not admissible under the identity exception of N.C.G.S. § 8C-1, Rule 404(b) where there was no evidence that defendant had in fact committed any prior offense. However, the admission of such testimony over objection was not prejudicial error since (1) similar testimony had previously been admitted without objection; (2) there was no reasonable possibility that a different verdict would have been reached if such testimony had not been admitted; and (3) defendant "opened the door" to such testimony by asking the witness whether his statement to a fellow officer that the larceny in question appeared to be the work of defendant was not a figment of his imagination.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 14 August 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 3 September 1987.

Defendant was tried on a bill of indictment proper in form with felonious larceny. At trial the State presented evidence which tended to show the following: On 29 April 1986, defendant entered Bailey, Banks, and Biddle, a jewelry store located in Northgate Mall, Durham, North Carolina. Defendant approached one of four employees in the store and requested a credit applica-

tion. Upon receiving the application, defendant sat in front of a glass case jewelry counter in which Rolex watches were displayed and proceeded to fill out the application. At this time, the glass in the counter was intact and nothing was missing. The store policy was to assist customers in completing credit applications; however, defendant refused any assistance and stated that he wanted to do it himself. Defendant was left alone to complete the application. Defendant appeared to be nervous and three times when employees of the store approached him, defendant got up from his seat at the jewelry counter and met the employees. Defendant was seated at the jewelry counter approximately 15-20 minutes completing the application. After defendant completed the application, gave it to an employee, and was told that it would take approximately one hour to process, defendant left the store. No other customer was at the counter from the time defendant entered the store through the time defendant left and the time the property was discovered missing. Within 30 seconds of defendant's departure, an employee noticed that the glass in the counter where defendant had been sitting was out of place and two Rolex watches having a combined value in excess of $12,000.00 were missing. The employees of the store and a customer visiting the store at the time identified defendant as the person in the store prior to the discovery of the missing watches. Defendant's fingerprints were lifted from the application and it was also determined that the name and address defendant wrote on the application were false.

Defendant presented no evidence. The jury returned a verdict of guilty and from an active sentence of 10 years, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Barbara A. Shaw, for the State.

Malcolm Ray Hunter, Jr., Chief Appellate Defender, by Assistant Appellate Defender Gayle L. Moses, for defendant.

JOHNSON, Judge.

We note at the outset, that defendant has not brought forward three Assignments of Error. We deem the assignments abandoned and decline to review them. "Questions raised by assignments of error in appeals from trial tribunals but not then

presented and discussed in a party's brief, are deemed abandoned." N.C.R. App. P. 28(a). Each of the defendant's remaining three Assignments of Error deal with the admission of evidence. Defendant contends that as to each issue the trial court committed prejudicial error in the admission of evidence concerning possible prior unrelated criminal acts committed by defendant. The admission of this evidence, defendant argues, violated the longstanding general rule in North Carolina that:

> [T]he State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. (Citations omitted.)

State v. McClain, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954). This rule is subject, however, to the exceptions stated in Rule 404(b) which codifies the general rule and reads as follows:

> 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.

N.C.G.S. Sec. 8C-1, Rule 404(b) (1986).

[1] In the first instance of which defendant complains, Officer Larry Russell of the Durham Police Department was allowed to identify State's Exhibit No. 10, a fingerprint identification card. Officer Russell testified that on 27 January 1982 he took defendant's fingerprints; that State's Exhibit No. 10 is one of three fingerprint cards taken by his department when a person is arrested on a serious misdemeanor charge. Defendant's objection and motion to strike this testimony were overruled.

We find no merit to defendant's contention that the admission of this evidence violated Rule 404(b). The State did not offer defendant's 1982 fingerprint identification card into evidence to show the character of defendant or to show that defendant had committed any other crime. As identity was an important issue in the case, the State offered the exhibit for the sole purpose of identifying the latent fingerprints taken from the credit application completed by the individual suspected of the larceny and submitted in the name of a Larry F. McKinney. Officer Rodney

Sawyer, the identification officer with the Durham Police Department, later testified that he compared the latent fingerprints lifted from the credit application with defendant's fingerprints on defendant's fingerprint card, State's Exhibit No. 10.

The only evidence admitted before the jury which relates the fingerprint identification card to another criminal offense was Officer Russell's statement that the fingerprint identification cards are printed when someone is arrested on a serious misdemeanor charge.

In *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973), our Supreme Court addressed the identical question raised here, to wit: the admissibility of a fingerprint identification card made pursuant to a prior, unrelated arrest. There, the Court found no prejudicial error in the admission of a fingerprint identification card made pursuant to a prior, unrelated arrest, and introduced for the sole purpose of identifying, as in the instant case, a latent fingerprint lifted at the scene of the crime for which defendant was being tried. In so holding, the Court stated that any inference arising from testimony that fingerprinting is customary when someone is arrested was not of such force as to prejudicially influence the jury.

This Court, in applying *Jackson, supra*, reached a similar result in *State v. Scober*, 74 N.C. App. 469, 328 S.E. 2d 590 (1985). There, the Court held that the admission of a fingerprint identification card made pursuant to a prior, unrelated arrest did not violate the "longstanding general rule in North Carolina that 'in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense.' " *Id.* at 472, 328 S.E. 2d at 592 (*quoting State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954)).

We likewise hold in the instant case that the admission of defendant's 1982 fingerprint identification card and the testimony regarding same did not violate the longstanding general rule of practice in this State, now codified in Rule 404(b).

[2] In the second instance, during cross-examination of Detective A. J. Carter of the Durham Police Department, the following colloquy took place:

Q. Mr. Carter, how long have you known Leroy McKnight?

A. I still don't know him, sir.

Q. Prior to April 29 had you ever had a conversation with him?

A. Prior to what date is that now?

Q. April 29, 1986?

A. No, sir, I have not had a conversation with him that I can recall, however, I have—

Q. I merely ask you if you had a conversation.

COURT: Let him finish his answer. You may complete your answer. [EXCEPTION NO. 3] NO OBJECTION STATED AT TRIAL

A. However, I have had occasion to investigate several times where he was the prime suspect.

[No objection noted at trial]

Defendant failed to object, move to strike or except to Detective Carter's testimony that defendant has been the prime suspect in several cases he has investigated. This testimony clearly violated Rule 404(b). It does not fall within any of the exceptions of the Rule. The evidence does not show that defendant had, in fact, committed any other crimes. It simply showed that defendant was a suspect and relates only to possible character. Therefore, the evidence was inadmissible. However, by failing to object or to note an exception to the evidence when presented and admitted at trial, defendant has waived his right to raise this error on appeal, *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *accord*, Rule 10(a), N.C.R. App. P., unless defendant can show that the alleged error constitutes "plain error." *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983).

In *State v. Walker*, 316 N.C. 33, 340 S.E. 2d 80 (1986), our Supreme Court stated that:

> Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must de-

termine that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant.

Id. at 39, 340 S.E. 2d at 83, *citing State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983); *State v. Black*, *supra*.

From our required review of the entire record, *State v. Black*, *supra*, we are led to conclude that this error does not rise to the level of "plain error." We are convinced that absent this error, the jury probably would not have reached a different verdict. The evidence showed that defendant entered the store to complete a credit application. Defendant appeared to be nervous. After receiving the application, defendant sat at a glass case jewelry counter to complete the application and refused an employee's offer of assistance to help him complete it. The jewelry case where defendant was seated contained Rolex watches. The glass jewelry case was intact and not any property was missing from within the jewlery case at the time. On three separate occasions when an employee of the store walked toward defendant, defendant got up and met the employee before the employee reached the area where defendant was seated. Each time, after conversing with the employee momentarily, defendant returned to his seat at the jewelry counter. Defendant sat at the counter approximately 15-20 minutes completing the application. After defendant completed the application, he gave it to an employee, inquired as to how long it would take to approve it, and left the store. Within 30 seconds after defendant left the store, it was discovered that the glass top of the jewelry case where defendant had been sitting had been lifted from its seal and was resting in a "catercornered" position and two Rolex watches were missing from within the jewelry case. From the time defendant entered the store and sat at the counter, until store employees discovered that the watches were missing, no other customer was in the vicinity of the jewelry counter. Also, as heretofore noted, defendant completed the application with a false name and address.

Based upon this evidence, we do not believe that the error complained of here "tilted the scales," causing the jury to find defendant guilty. Defendant has not carried his burden of showing "plain error."

[3] By his final Assignment of Error defendant contends that the trial court erred in the admission of testimony that defendant is

known as a "jewelry person," and that his normal mode of operation was lifting countertops, removing items and replacing the countertops without shattering them.

On further cross-examination of Detective Carter the following colloquy occurred:

Q. Officer, my question is, you say that you have had occasion to investigate crimes, or alleged crimes, that Mr. McKnight [defendant] was a suspect in?

A. That is correct.

Q. Now, sir, in approximately how many of those have you investigated?

A. Three or four, sir.

Q. In the three or four crimes that you have investigated in which you say that Mr. McKnight was a prime suspect, has he ever been charged, tried, or convicted of any of those crimes?

A. Yes, sir, in Raleigh. I assisted the Raleigh officers on a case they had against Mr. McKnight in which they charged him, so if you are asking if I charged him, then the answer is no, but if you ask me if I have assisted, then yes, I have.

Q. Was Mr. McKnight convicted of any crime there?

A. I am unable to advise.

Q. So of all the cases you say you have been involved in that you say Mr. McKnight was a prime suspect in, in none of them do you know of any conviction, do you?

A. I guess not, sir.

Q. So now your statement to your fellow officer that the mere theft from Bailey, Banks & Biddle on April 29 appeared to you to be the work of Mr. McKnight was a pure figment of your imagination?

A. No, sir.

. . . . . .

On redirect examination of Detective Carter by the State the following colloquy occurred:

Q. Tell the members of the jury why this was not a figment of your imagination that you suspected Mr. McKnight.

A. Mr. McKnight is known to the Durham Police Department as a jewelry person, one of his major—

OBJECTION;

OVERRULED.

COURT: You opened that door, Mr. Malone, you may proceed.

A. He [defendant] is known to the Durham Police Department as a jewelry person, and his normal MO, mode of operation, or the way that he does things is by lifting the counter tops and removing the items and it is known that he is good enough to replace it without shattering the top of it.

The burden is on defendant to not only show error but also to show that the error was prejudicial, that is, that without the error it is likely that a different result would have been reached. *State v. Loren*, 302 N.C. 607, 276 S.E. 2d 365 (1981); N.C.G.S. 15A-1443.

The State argues that defense counsel "opened the door" for the testimony defendant objected to; that the testimony was relevant and probative on the question of identity; and further, that defendant has failed to show that the admission of the testimony was prejudicial.

We do not agree with the State that the testimony objected to was admissible on the question of identity under the exception to Rule 404(b).

In the general rule stated in *State v. McClain*, *supra* (now codified in Rule 404(b)), the Court stated,

> Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, *evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged.* (Emphasis added.)

240 N.C. at 175, 81 S.E. 2d at 367. In the case *sub judice*, as pointed out by defendant, there is no evidence that defendant

had, in fact, committed any prior offense. At best, the evidence only showed that defendant was a suspect in prior larcenies which were similar to the offense committed at Bailey, Banks and Biddle. Because there was no evidence that defendant had committed any of the prior offenses he was suspected of, the testimony objected to was inadmissible.

Although we hold that the testimony was improperly admitted, we also hold that its admission was harmless error. It is well settled that where evidence is admitted over objection, and the same or similar evidence has been previously admitted or is later admitted without objection, the benefit of objection is lost. *State v. Whitley,* 311 N.C. 656, 319 S.E. 2d 584 (1984); 1 Brandis on North Carolina Evidence, sec. 30 (1982).

Defendant raised no objection at trial when Detective Carter, in his direct testimony, testified to the effect that when he was informed of the larceny from Bailey, Banks and Biddle and that the larceny was accomplished by someone lifting the casing of the jewelry countertop, he told Detective Taylor that, "that fit the description of the type of work that Leroy McKnight does." This testimony, in effect, is the same as the testimony defendant objected to during redirect examination by the State. Having failed to object when the testimony was presented and admitted on direct examination, the benefit of defendant's subsequent objection to its admission at a later time was lost. *State v. Whitley, supra.* Nonetheless, we do not believe that there is a reasonable possibility that a different verdict would have been reached if the trial court had not allowed the testimony in over defendant's objection. Defendant was not prejudiced by the admission of this testimony into evidence, over objection, where defendant allowed the same evidence to come in earlier without objection.

Also, as to this assignment of error, defense counsel's question to Detective Carter that Carter's statement that the theft from Bailey, Banks and Biddle was a "pure figment of your [Carter's] imagination?" was as this Court stated in *State v. Neely,* 4 N.C. App. 475, 166 S.E. 2d 878 (1969), "calculated to elicit the very response which was given. [The witness] had a right to explain his answer and defense counsel 'opened the door' for such an explanation." *Id.* at 477, 166 S.E. 2d at 879. *See, State v. Williams,* 255 N.C. 82, 120 S.E. 2d 442 (1961); *see also, State v.*

Burgin, 313 N.C. 404, 329 S.E. 2d 653 (1985); *State v. Brown*, 64 N.C. App. 637, 308 S.E. 2d 346 (1983).

Defendant does not argue that the admission of this evidence on direct examination constitutes "plain error." Nor has defendant, as required by *State v. Oliver, supra*, alerted this Court in his brief that defendant failed to take action at the trial level to the admission of the evidence on direct examination. *See also, State v. Walker, supra.*

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

No error.

Judges BECTON and PARKER concur.

THOMPSON CADILLAC-OLDSMOBILE, INC. v. SILK HOPE AUTOMOBILE, INC., CLINTON McLAURIN, HOWARD C. McLAURIN, SHELBY C. McLAURIN, D. WAYNE HOOD, D/B/A HOOD'S USED CARS, COLUMBUS COUNTY AUTO AUCTION, INC., GEORGE TURNER, R. E. DOWDY, WILLIAM S. HIATT

No. 8610SC1318

(Filed 3 November 1987)

1. Public Officers § 9— allegations of mere negligence—public official—immunity

A complaint against defendant Hiatt as Commissioner of Motor Vehicles and defendant Dowdy as an inspector for the Division of Motor Vehicles alleged mere negligence and failed to state a claim upon which relief could be granted because both Hiatt and Dowdy exercised some portion of the sovereign power of the State and so were public officers rather than State employees. A public official is immune from liability for mere negligence. N.C.G.S. § 20-39; N.C.G.S. § 20-49.

2. Automobiles and Other Vehicles § 5.1— sale of stolen cars—transfer of title admitted—title warranted on transfer form

In an action to recover damages incurred by plaintiff when it had to reimburse customers for stolen automobiles purchased from defendant Columbus County Auto Auction, the trial court did not err by granting summary judgment against defendant on a contract claim where defendant admitted transferring title to the automobiles to plaintiff. The title transfer forms provided by the Division of Motor Vehicles which must be used contain a clearly stated warranty of title. N.C.G.S. § 20-72(b).

PLAINTIFF, Thompson Cadillac-Oldsmobile, Inc., and defendant Columbus County Auto Auction appeal from *Farmer, Judge.* Judgment entered 13 August 1986 in Superior Court, WAKE County. Heard in the Court of Appeals on 12 May 1987.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General Jane P. Gray and Assistant Attorney General Victor H. E. Morgan, Jr., for defendant appellees Hiatt and Dowdy.

Ragsdale and Kirschbaum by William L. Ragsdale for plaintiff appellant-appellee.

Williamson & Walton by Benton H. Walton, III, and Carlton F. Williamson for defendant appellant Columbus County Auto Auction, Inc.

COZORT, Judge.

On 13 March 1986 plaintiff, Thompson Cadillac-Oldsmobile, Inc., a retail automobile dealer, filed this action to recover damages incurred when the plaintiff had to reimburse customers who purchased automobiles from plaintiff when it was learned that the automobiles had been stolen and the vehicle identification numbers had been changed. Plaintiff sued Columbus County Auto Auction, Inc. (CCAA), the corporation who sold the stolen cars to plaintiff, and two business entities who were involved in transferring title of the stolen automobiles to CCAA. The claims against CCAA alleged negligence and breach of contract of warranty of title. Plaintiff also sued William S. Hiatt, the State Commissioner of Motor Vehicles, and R. E. Dowdy, an inspector in the Division of Motor Vehicles. Plaintiff alleged Hiatt was negligent in failing to adopt regulations for the inspection of vehicles and in failing to adequately supervise personnel. Plaintiff alleged Dowdy was negligent in failing to determine that the serial numbers of certain vehicles had been altered.

Defendants Hiatt and Dowdy filed a motion to dismiss on 11 April 1986, urging the trial court to dismiss the complaint against them pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2) and 12(b)(6). On 13 August 1986 the trial court dismissed the action against defendants Hiatt and Dowdy, stating in the Order that it found a lack of jurisdiction over the subject matter of the

complaint and over the person of these two defendants. Plaintiff timely appealed the order of dismissal.

On 11 June 1986 plaintiff filed a motion for summary judgment on the contract claim against CCAA. On 23 July 1986 CCAA filed a response and two affidavits opposing plaintiff's motion for summary judgment. On 13 August 1986, the trial court entered an order granting plaintiff's motion for summary judgment, ordering CCAA to pay plaintiff $175,450.00. Defendant CCAA timely appealed the order.

We affirm both orders.

[1] We first address plaintiff's appeal of the trial court's order dismissing the action against defendants Hiatt and Dowdy. Plaintiff contends that the court erred because the complaint stated a cause of negligence against state employees individually; therefore, the plaintiff would not have to proceed against a state agency under the State Tort Claims Act. Defendants Hiatt and Dowdy contend that they are state officers, not state employees, and are thus not liable for mere negligence not arising to culpable and gross negligence, or reckless, arbitrary, willful, wanton and malicious acts. Our review of the complaint below and the applicable law leads us to the conclusion that Hiatt and Dowdy are state officers and that the trial court correctly dismissed the action.

"An employee of a governmental agency . . . is personally liable for his negligence in the performance of his duties proximately causing injury to the property of another . . . ." *Givens v. Sellars*, 273 N.C. 44, 49, 159 S.E. 2d 530, 534-35 (1968) (citations omitted). "[A] 'public official' is immune from liability for 'mere negligence' in the performance of [his] duties, but he is not shielded from liability if his alleged actions were 'corrupt or malicious' or if 'he acted outside of and beyond the scope of his duties.' " *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E. 2d 39, 43 (1985) (citations omitted). Plaintiff's allegations against defendants Hiatt and Dowdy allege nothing more than mere negligence. There are no allegations of corrupt or malicious actions, actions outside the scope of defendants' duties, or gross negligence. Thus, if defendants Hiatt and Dowdy are public officers or officials rather than employees, the complaint has failed to state a claim for which relief can be granted.

> To constitute an office, as distinguished from employment, it is essential that the position must have been created by the constitution or statutes of the sovereignty . . . .
>
> An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power.

State v. Hord, 264 N.C. 149, 155, 141 S.E. 2d 241, 245 (1965) (citations omitted).

Defendant Hiatt was duly appointed by the Secretary of the Department of Transportation to administer the Division of Motor Vehicles, in accordance with N.C. Gen. Stat. § 20-2. Among the many duties assigned to the Commissioner are those set forth in N.C. Gen. Stat. § 20-39:

> (a) The Commissioner is hereby vested with the power and is charged with the duty of administering and enforcing the provisions of this Article and of all laws regulating the operation of vehicles or the use of the highways, the enforcement or administration of which is now or hereafter vested in the Division.
>
> (b) The Commissioner is hereby authorized to adopt and enforce such rules and regulations as may be necessary to carry out the provisions of this Article and any other laws the enforcement and administration of which are vested in the Division.
>
> (c) The Commissioner is authorized to designate and appoint such agents, field deputies, and clerks as may be necessary to carry out the provisions of this Article.

There can be little doubt that Hiatt, as Commissioner of Motor Vehicles, exercises some portion of the sovereign power of the State. Accordingly, we find defendant Hiatt to be a public officer, and we hold that the complaint alleging mere negligence fails to state a claim against Hiatt upon which relief can be granted.

Defendant Dowdy is an inspector for the Division of Motor Vehicles, and his duties include the power:

(1) Of peace officers for the purpose of enforcing the provisions of this Article and of any other law regulating the operation of vehicles or the use of the highways.

(2) To make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of this Article or other laws regulating the operation of vehicles or the use of the highways.

(3) At all times to direct all traffic in conformance with law, and in the event of a fire or other emergency or to expedite traffic or to insure safety, to direct traffic as conditions may require, notwithstanding the provisions of law.

(4) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this Article or of any other law regulating the operation of vehicles to require the driver thereof to stop and exhibit his driver's license and the registration card issued for the vehicle, and submit to an inspection of such vehicle, the registration plates and registration card thereon or to an inspection and test of the equipment of such vehicle.

(5) To inspect any vehicle of a type required to be registered hereunder in any public garage or repair shop or in any place where such vehicles are held for sale or wrecking, for the purpose of locating stolen vehicles and investigating the title and registration thereof.

(6) To serve all warrants relating to the enforcement of the laws regulating the operation of vehicles or the use of the highways.

N.C. Gen. Stat. § 20-49.

We find these duties provide for defendant Dowdy to exercise some portion of the sovereign power of the State, and consequently we find Dowdy to be a public officer. This conclusion is consistent with prior rulings of this Court and the Supreme Court finding to be public officers, the following:

(1) School Trustees and Park Commissioners, *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E. 2d 783, 787 (1952);

(2) Chief building inspector, *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E. 2d 39, 43 (1985);

(3) State Banking Commissioner, *Sansom v. Johnson*, 39 N.C. App. 682, 684, 251 S.E. 2d 629, 630 (1979);

(4) Chief of police and policeman, *State v. Hord*, 264 N.C. 149, 155, 141 S.E. 2d 241, 245 (1965).

We find the complaint subject to dismissal under Rule 12(b)(6) for failure to state a claim upon which relief would be granted. The trial court's having erroneously stated in its order as a basis for dismissal Rules 12(b)(1) and 12(b)(2) worked no prejudice to the plaintiff. *See Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E. 2d 453, 454 (1981). The order of dismissal as to defendants Hiatt and Dowdy is affirmed.

[2] We now address defendant CCAA's contention that the trial court erred in granting summary judgment against CCAA on the contract claim. CCAA contends there is a genuine issue of fact regarding whether CCAA issued a warranty of title when the automobiles were sold to plaintiff. We disagree.

In claim two of the plaintiff's complaint, the contract claim, the plaintiff alleged that "[e]ach and every vehicle sold by defendants to plaintiff were [*sic*] sold pursuant to a contract with a warranty of title." In its answer, defendant CCAA generally denied that allegation. However, in its answer, CCAA admitted transferring title to the automobiles to plaintiff. In response to plaintiff's motion for summary judgment, CCAA alleged that "no warranty [was] executed by the Defendant in connection with the title." CCAA did not, however, deny transferring title to the plaintiff.

Our review of the record below and the applicable law leads us to the conclusion that by admitting that it transferred title to plaintiff, defendant CCAA admitted that it warranted title to the automobiles sold.

N.C. Gen. Stat. § 20-72(b) provides:

> (b) In order to assign or transfer title or interest in any motor vehicle registered under the provisions of this Article, the owner shall execute in the presence of a person authorized to administer oaths an assignment and warranty of title on the reverse of the certificate of title in form approved by

> the Division, including in such assignment the name and address of the transferee; and no title to any motor vehicle shall pass or vest until such assignment is executed and the motor vehicle delivered to the transferee.

The parties failed to include in the record on appeal copies of the titles assigned from CCAA to plaintiff when the automobiles were sold to plaintiff. However, this Court takes judicial notice of the language of the form provided by the Division of Motor Vehicles which *must* be used when title of a motor vehicle is transferred or assigned. Following the requirements of N.C. Gen. Stat. § 20-72(b) is not within the discretion of automobile buyers and sellers; the requirements are mandatory. *Insurance Co. v. Hayes*, 276 N.C. 620, 638, 174 S.E. 2d 511, 522 (1970).

The title transfer forms provided by the Division of Motor Vehicles which must be used contain a clearly stated warranty of title. In the form provided for transfer by the registered owner of the vehicle, this language appears:

> FOR VALUE RECEIVED, THE UNDERSIGNED HEREBY SELLS, ASSIGNS OR TRANSFERS THE VEHICLE DESCRIBED ON THE REVERSE SIDE OF THIS CERTIFICATE UNTO THE PURCHASER WHOSE NAME APPEARS IN THIS BLOCK AND HEREBY WARRANTS THE TITLE TO SAID VEHICLE AND CERTIFIES THAT AT THE TIME OF DELIVERY THE SAME IS SUBJECT TO THE LIENS OR ENCUMBRANCES NAMED IN THE PURCHASER'S APPLICATION FOR NEW CERTIFICATE OF TITLE AND NONE OTHER.

In the form provided for the reassignment by licensed automobile dealers, this language appears:

> FOR VALUE RECEIVED, THE UNDERSIGNED HEREBY TRANSFERS THE VEHICLE DESCRIBED ABOVE TO THE PURCHASER(S) WHOSE NAME(S) APPEARS IN THIS BLOCK AND HEREBY WARRANTS THE TITLE TO SAID VEHICLE AND CERTIFIES THAT AT THE TIME OF DELIVERY THE SAME IS SUBJECT TO THE LIENS OR ENCUMBRANCES NAMED IN THE PURCHASER'S APPLICATION FOR NEW CERTIFICATE OF TITLE AND NONE OTHER.

Thus, it would have been impossible for CCAA to transfer title to plaintiff without warranting the title. CCAA admits transferring title. It must follow that CCAA has admitted warranting the title, and plaintiff was entitled to summary judgment on its

contract claim based on the warranty. Summary judgment is appropriate where any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c).

The orders of the trial court are

Affirmed.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. GROVER W. SMITH, D.M.D.

STATE OF NORTH CAROLINA v. MICHAEL G. SMITH, D.M.D.

No. 8710SC364

(Filed 3 November 1987)

1. **Criminal Law § 91— speedy trial—open-ended continuance orders—time not excluded**

No time was excluded from the 120-day speedy trial period by continuance orders which did not refer to a new trial date or specify an ending date for the period to be excluded under N.C.G.S. § 15A-701(b)(7).

2. **Criminal Law § 91— speedy trial violation—dismissal with prejudice—insufficient findings of statutory factors—remand not required**

Although the trial court failed to make detailed findings of fact concerning the factors set forth in N.C.G.S. § 15A-703(a) in deciding to dismiss charges with prejudice for failure of the State to comply with the Speedy Trial Act, the case need not be remanded for reconsideration of the issue of prejudice where there was evidence and argument concerning each of the statutory factors, and where it is clear from the record that the trial court carefully considered the statutory factors.

3. **Criminal Law § 91— speedy trial—dismissal with prejudice**

The trial court did not abuse its discretion in deciding that medical assistance provider fraud charges should be dismissed with prejudice for failure of the State to comply with the Speedy Trial Act.

APPEAL by the State from *Herring, Judge*. Order entered 1 December 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 29 September 1987.

This is an appeal by the State from the dismissal of criminal charges for failure to comply with G.S. 15A-701 *et seq.*, the

Speedy Trial Act. The evidence at the hearing tended to show the following. On 30 September 1985, defendants were each indicted on 42 counts of violating G.S. 108A-63, medical assistance provider fraud. Defendants Grover Smith and Michael Smith are father and son respectively, each engaged in the practice of dentistry. On 5 October 1985 defendants were served with orders for their arrest. Defendants' trial was initially delayed due to numerous discovery motions and several continuances.

On 10 March 1986, the court granted another continuance motion. The order did not specify a new trial date or list an ending date for the period of excusable delay allowable under G.S. 15A-701(b)(7). After the continuance was granted, the prosecutor set a new trial date of 14 April 1986. On 4 April 1986, however, defendants obtained a new continuance, setting 28 April 1986 as the new trial date and excluding the time from 14 April 1986 to 28 April 1986 from the running of the 120 day period of G.S. 15A-701(a).

The case was not tried on 28 April 1986. Instead, the State tried 12 of the 42 counts against Michael Smith beginning on 12 May 1986. On 21 May 1986, the jury returned verdicts acquitting defendant on all 12 counts. On that date, the court issued another continuance order for all remaining counts against both defendants. Like the 10 March order, it failed to refer to a new trial date or specify an ending date for the period to be excluded under G.S. 15A-701(b)(7).

Thereafter, the State attempted to negotiate a mutually convenient trial date with defendants' attorney, but was unable to do so. Finally, in early October 1986, the State calendared the case for trial on 17 November 1986, without the agreement of defendants' counsel. Three days before trial, however, defendants moved to dismiss all charges with prejudice for failure of the State to comply with the Speedy Trial Act. After a hearing, the trial court found that several periods of delay were not excludable, including the period of 10 March 1986 to 14 April 1986 (a 35 day period) and all time after 23 May 1986, the last day of the week in which the 12 counts against defendant Michael Smith were tried (a 175 day period). The trial court concluded the State had failed to comply with the time provisions in G.S. 15A-701. Pursuant to G.S. 15A-703(a), the trial court dismissed all remaining charges with prejudice. The State appeals.

Attorney General Thornburg, by Special Deputy Attorney General J. Michael Carpenter, for the State.

Kirby, Wallace, Creech, Sarda, Zaytoun & Cashwell, by Robert E. Zaytoun, for the defendant-appellees.

EAGLES, Judge.

I

[1] Subject to certain periods which may be excluded pursuant to G.S. 15A-701(b), G.S. 15A-701(a1)(1) requires the State to bring a defendant to trial within 120 days of arrest, indictment, waiver of indictment, or service of criminal process, whichever occurs last. In this dispute, the 120 day time period began to run from 5 October 1985, the date that defendants were served with criminal process. G.S. 15A-701(b)(7) provides, in relevant part, for the exclusion of delays "resulting from a continuance granted by any judge." This case turns on the effect of the open-ended continuances of 10 March and 21 May. The 21 May 1986 motion and order for continuance, which except for the date is essentially identical to the order of 10 March 1986, reads as follows:

MOTION

The undersigned moves to continue the trial of these charges
From (Date) 5-12-86
Through (Date)
for the reasons checked below.

[X] The trial of other cases prevented the trial of this case during this session.

Date: 5-21-86

Signature
Prosecutor—Associate Attorney General

ORDER

Considering the factors set forth in G.S. 15A-701(b)(7), the Court finds as a fact that the ends of justice served by granting the continuance outweigh the best interests of the public and defendant in a speedy trial and therefore grants

the continuance for the reasons above. The Court orders that the following time be excluded in determining whether a trial has been held within the time limits established by G.S. 15A-701.

Time Period (From) 5-12-86

Time Period (Through)

Date: 5-21-86

Signature of Judge

In computing periods of exclusion for continuances, the trial court refused to give any effect to the 10 March 1986 and 21 May 1986 orders. We hold that, since the orders did not contain an ending date or time from which the trial court could have computed periods excludable under G.S. 15A-701(b)(7), they exclude no time from the 120 day computation and the trial court properly found a violation of G.S. 15A-701(a1)(1).

The State contends that, rather than finding that the two continuances had no effect for purposes of excluding time from the 120 day computation, the trial court should have considered the ending date for the excludable period to be the date the parties subsequently agreed to as a mutually convenient trial date. If no date were agreed to, the State argues that the ending date should be the date the prosecutor discovered she would be unable to agree with defense counsel on a trial date. Otherwise, the State argues, it will be penalized for attempting to cooperate in reaching an agreement with defendants' counsel. The State argues that cooperation and calendaring by agreement should be encouraged as a matter of public policy. While we agree that cooperation between the prosecutor and a defendant's attorney is to be encouraged where it does not conflict with the public policy which requires prompt trials, the State's approach here is neither workable nor consistent with the purpose of the Speedy Trial Act.

In determining what time is excludable as having resulted from a continuance order, the trial court should be able to determine the excluded period from the face of the order or with reference to easily obtainable, undisputed facts. *See State v. Bare,* 77 N.C. App. 516, 335 S.E. 2d 748 (1985), *disc. rev. denied,* 315 N.C. 392, 338 S.E. 2d 881 (1986) (continuance excluding time through

"July Term 1984" controlled period of delay even though extrinsic evidence indicated date agreed to may have been 9 July 1984). It is not appropriate to leave a continuance open ended, thereby requiring the trial court to hear and consider extrinsic evidence to determine whether and to what extent the intervening time should be excluded for Speedy Trial Act purposes.

More importantly, allowing an open-ended continuance order to exclude from the 120 day period essentially all time thereafter is not compatible with the purposes of the Speedy Trial Act. The statute's purpose is to provide for the effective administration of justice through a prompt determination of an accused's guilt or innocence. *State v. Marlowe*, 310 N.C. 507, 313 S.E. 2d 532 (1984). A defense under the statute is a technical one, independent of a defendant's right to a speedy trial under the Constitution of the United States. *Id.* The legislature has determined that there is a public interest in bringing an accused to a speedy trial, independent of the interest of either the prosecutor or the defendant.

The State has also argued that the trial court's failure to exclude any time pursuant to the two continuances is tantamount to either overruling the judges who issued them, or treating the orders as void. We disagree. The determination that the continuances excluded no time under G.S. 15A-701(b)(7) was merely a refusal by the trial court to read into the continuance orders an ending date that is not explicitly stated. The State's reliance on *State v. Sams*, 317 N.C. 230, 345 S.E. 2d 179 (1986) is, therefore, misplaced.

II

[2] The State next argues that the trial court erred in failing to make sufficient findings of fact and conclusions of law as to whether the dismissal should be with prejudice. The State argues that we should remand for a *de novo* review. We disagree.

G.S. 15A-703(a) provides that upon finding a violation of G.S. 15A-701(a), the trial court must dismiss the charges. Although the statute gives the trial court discretion in determining whether to dismiss with or without prejudice, it requires the trial court to consider, among other factors, (1) the seriousness of the offense; (2) the facts and circumstances which led to the dismissal; and (3) the impact of reprosecution on the administration of the Speedy

Trial Act and on the administration of justice. *State v. Washington*, 59 N.C. App. 490, 297 S.E. 2d 170 (1982); G.S. 15A-703(a).

In *State v. Moore*, 51 N.C. App. 26, 275 S.E. 2d 257 (1981), this court, in dicta, stated that trial courts should make detailed findings of fact and conclusions of law to "demonstrat[e] compliance with the mandate of G.S. 15A-703 that the factors set forth therein be considered" in deciding whether to dismiss with prejudice. *Id.* at 29, 275 S.E. 2d at 260. In *State v. Smith*, 70 N.C. App. 293, 319 S.E. 2d 647 (1984), this court, citing *State v. Moore, supra*, found insufficient a trial court's conclusory statement that it had considered "the matters alleged in the bills of indictment and the provisions of the General Statutes Section 15A-703, Paragraph (a)." Significantly, the court in *Smith* also found that the defendant had not been allowed to make a record on the issue of prejudice.

Here, the trial court's order stated, in part, that:

> BASED UPON THE FOREGOING FINDINGS OF FACT, CONCLUSIONS OF LAW and upon careful consideration of the record, arguments of counsel, and further upon careful consideration of each of the factors mandated in Section 15A-703, the Court CONCLUDES FURTHER AS A MATTER OF LAW that, notwithstanding the dictates and diligence of the State, and the facts and circumstances of the case which led to the dismissal, the Court in its discretion concludes that the seriousness of the offenses, impact of reprosecution on the administration of Article 35 of Chapter 15A and on the administration of justice, and fundamental fairness do not mandate continued criminal prosecution of these Defendants.

While this recitation is more than the trial court's statement in the *Smith* case, it does not comport with the better practice of making specific findings and conclusions. However, we see no need to remand this case for reconsideration of the issue of prejudice. The evidence at the hearing was essentially uncontradicted. It showed that the combined total of the amounts for which defendants were alleged to have made false claims was about $2,600 as to Grover Smith and only about $200 as to Michael Smith. The evidence also showed that the negative publicity from the charges had resulted in severe financial hardship to defendants' dental practices and had forced Michael Smith to relocate to another

town. Moreover, the trial of 12 of the 42 counts against Michael Smith, which the prosecutor testified were among the strongest of the charges, had ended in acquittal.

Therefore, while the trial court failed to make detailed and specific findings of fact on that evidence, it is clear from the record that there was evidence and argument as to the relative seriousness of the offenses, the import of the proceedings on the defendants, the facts and circumstances leading to the dismissals, and the import of reprosecution on the administration of justice and on the administration of the Speedy Trial Act, Article 35. Since it is clear from the record that the trial court already has carefully considered the statutory factors in G.S. 15A-703(a) and determined that dismissal with prejudice is appropriate, this case need not be remanded.

III

[3] Finally, the State argues that the trial court abused its discretion in dismissing the charges with prejudice. A trial court's ruling may be reversed for abuse of discretion only when it appears so arbitrary that it could not have been the result of a reasoned decision. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, --- U.S. ---, 93 L.Ed. 2d 166, 107 S.Ct. 241 (1986). Because there is evidence in the record to support the trial court's decision, we find no abuse of discretion.

Affirmed.

Judges WELLS and MARTIN concur.

In re Foreclosure of Lake Townsend Aviation

IN THE MATTER OF: THE FORECLOSURE OF THE DEED OF TRUST FROM LAKE TOWNSEND AVIATION, INC. TO W. SCOTT BRANNAN, SUBSTITUTE TRUSTEE RECORDED IN DEED OF TRUST BOOK 2416, PAGE 14 IN THE OFFICE OF THE REGISTER OF DEEDS OF GUILFORD COUNTY, NORTH CAROLINA

IN THE MATTER OF: THE FORECLOSURE OF THE DEED OF TRUST FROM LAKE TOWNSEND AVIATION, INC. TO W. SCOTT BRANNAN, SUBSTITUTE TRUSTEE RECORDED IN DEED OF TRUST BOOK 2487, PAGE 187, IN THE OFFICE OF THE REGISTER OF DEEDS OF GUILFORD COUNTY, NORTH CAROLINA

Nos. 8718SC66
8718SC69

(Filed 3 November 1987)

1. **Mortgages and Deeds of Trust § 21— foreclosure action—statute of limitations—time lapse and actual possession**

In order for foreclosure of a mortgage or deed of trust to be barred under N.C.G.S. § 1-47(3), two events must occur: (1) the lapse of ten years after the forfeiture or after the power of sale became absolute or after the last payment, and (2) actual possession by the mortgagor during the entire ten-year period.

2. **Mortgages and Deeds of Trust § 21— foreclosure statute of limitations—subsequent purchasers**

The protection offered by the ten-year statute of limitations of N.C.G.S. § 1-47(3) is not limited to the original mortgagor or grantor but also extends to subsequent purchasers.

3. **Mortgages and Deeds of Trust § 21— foreclosure—statute of limitations—actual possession**

Where an action to foreclose a deed of trust was brought more than ten years after the note became due, foreclosure would be barred under N.C.G.S. § 1-47(3) if the trial court should find that a purchaser of the property was in actual possession of the land for the requisite ten-year period.

4. **Mortgages and Deeds of Trust § 21— foreclosure—statute of limitations—acceleration clause not exercised**

An action to foreclose a deed of trust was not barred by N.C.G.S. § 1-47(3) where the foreclosure cause of action accrued on 1 June 1976, the day the last payment on the note was due, and plaintiff initiated foreclosure proceedings on 11 March 1986, which was within the ten-year limitations period. Two collection letters sent to the debtor did not constitute an exercise of the note's acceleration clause so as to begin the running of the statute of limitations prior to the time the final payment was due.

APPEAL by respondent, Aero Associates, from *Albright, Judge.* Orders entered 17 September 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 25 August 1987.

Max D. Ballinger for Aero Associates, Limited, appellant.

Tuggle, Duggins, Meschan & Elrod by David F. Meschan, Paul M. Dennis, Jr., and Harold A. Lloyd for appellee.

COZORT, Judge.

Respondent appeals from two orders authorizing foreclosure under two deeds of trust. The two proceedings have been consolidated for opinion. We remand for additional findings by the trial court on the foreclosure under the first deed of trust, and we affirm the foreclosure under the second deed of trust.

On 22 January 1969, Lake Townsend Aviation, Inc. (Lake Townsend), executed an $8,000 note payable to James H. Williams. The note was secured by a deed of trust on a tract of property owned by Lake Townsend. The terms of the note, which were incorporated by reference into the deed of trust, required payment in six months, or on 22 July 1969. However, Lake Townsend never made any payments on this note.

On 22 May 1970, Lake Townsend executed a $12,000 note payable to James H. Williams. This note was also secured by a deed of trust on the same tract of land. The terms of repayment, as set forth in the note and incorporated by reference into the deed of trust, provided that Lake Townsend would repay the sum of $12,000 at the rate of six percent per annum as follows:

> Interest on the unpaid balance at the rate hereinafter specified shall be paid on the 1st day of June, 1971.
>
> The sum of $232.00 shall be paid on the 1st day of July, 1971, and a like amount on the first day of each month thereafter, until both principal and interest are fully paid; said payments to be applied first to interest on the unpaid balance and the residue in reduction of the principal sum.
>
> If any payment of principal or interest, or any part of either, shall not be paid within ten (10) days after the same is due, the holder of this Note may declare the entire sum due and payable . . . .

Under these terms, the last payment on the note was due 1 June 1976. However, Lake Townsend never made any payments on this note.

On 16 March 1972, Aero Associates, Limited (Aero), purchased from Lake Townsend the tract of property subject to the aforementioned deeds of trust. Lake Townsend, however, failed to inform Aero that the tract was subject to the deeds of trust, and the deeds of trust were not recited in the deed from Lake Townsend to Aero.

On 25 September 1973, Williams' attorney wrote Lake Townsend and demanded that it begin payment on the $12,000 note. The letter further stated:

> Unless a satisfactory reply is received by 15 October, Mr. Williams will have no choice but to declare the entire balance of the note due and to proceed with a foreclosure of the Deed of Trust.

Lake Townsend never responded to this letter, and on 23 August 1974, Williams had his attorney write Lake Townsend again to demand payment of the $12,000 note. This letter stated:

> Unless satisfactory arrangements are made to settle this obligation by Friday, 30 August, foreclosure proceedings will be instituted on that date.

Lake Townsend never responded to this letter and never made any payment on the note.

On 22 January 1986, Aero received a letter from Williams' attorney informing Aero that Williams was the holder of two notes secured by deeds of trust on the land Aero had purchased from Lake Townsend. The letter demanded that Aero pay the $20,000 due on the two notes, plus interest, or Williams would initiate foreclosure proceedings. Aero never made any payments on either note, and on 11 March 1986 the substitute trustee under the deeds of trust filed a Petition For Authorization To Foreclose On Real Property. Aero responded by filing a motion to dismiss the petition on the grounds that foreclosure under both deeds of trust was barred by the statute of limitations.

After a hearing, the clerk of superior court ruled: (1) that foreclosure under the first deed of trust was barred by the statute of limitations; and (2) that the foreclosure under the second deed of trust could proceed. Both Williams and Aero appealed. Superior Court Judge W. Douglas Albright entered orders allowing the foreclosure under each deed of trust to proceed. From those two orders, Aero appeals.

N.C. Gen. Stat. § 45-21.12(a) provides:

> Except as provided in subsection (b), no person shall exercise any power of sale contained in any mortgage or deed of trust, or provided by statute, when an action to foreclose the mortgage or deed of trust, is barred by the statute of limitations.

The applicable statute of limitations for foreclosure proceedings is N.C. Gen. Stat. § 1-47(3), which provides that an action must be commenced within ten years:

> For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

[1] In order for a foreclosure to be barred under this section, two events must occur: (1) the lapse of ten years after the forfeiture or after the power of sale became absolute or after the last payment, and (2) the possession of the mortgagor during the entire ten-year period. These two requirements must be coexistent. *Ownbey v. Parkway Properties, Inc.*, 222 N.C. 54, 56, 21 S.E. 2d 900, 901 (1942). In addition, possession for the ten-year period must be *actual* possession. *Id.*

In the first deed of trust, the time lapse requirement of N.C. Gen. Stat. § 1-47(3) has been satisfied. The cause of action for foreclosure under this deed of trust accrued on 22 July 1969, the day the $8,000 note became due. Under the provisions of N.C. Gen. Stat. § 1-47(3), the noteholder had an outside time limit of 10 years, or until 22 July 1979, in which to bring an action to foreclose on the property. The noteholder, however, did not institute his action for foreclosure until 11 March 1986, nearly seven years after the statute of limitations had run. Therefore, the requirement as to lapse of time has been met.

[2] Williams, the noteholder, argues, however, that the second requirement of N.C. Gen. Stat. § 1-47(3) has not been satisfied, because that statute protects only the original mortgagor or grantor, not subsequent purchasers. A purchaser of land, however, acquires all the rights, titles and equities of its grantor. *Pearce v. Watkins*, 219 N.C. 636, 14 S.E. 2d 653 (1941). When a purchaser acquires land which is subject to a deed of trust, he

also acquires the mortgagor/grantor's equity of redemption in the land. A purchaser of the equity of redemption is entitled to all of the defenses available to the mortgagor, including the defense that foreclosure is barred by the ten-year statute of limitations set forth in the Code, § 152, subsection 3 (now N.C. Gen. Stat. § 1-47(3)). *Stancill v. Spain*, 133 N.C. 76, 79-80, 45 S.E. 466, 467 (1903). Therefore, we hold that the protection offered by N.C. Gen. Stat. § 1-47(3) is not limited to the original mortgagor or grantor, but also extends to subsequent purchasers. Construing the statute in this manner is in no way detrimental to the mortgagee. The mortgagee still has ten years to bring an action for foreclosure, regardless of who owns the land.

[3] In the case *sub judice*, however, there is no evidence that Aero was in *actual* possession of the land for the requisite ten-year period. Therefore, we are unable to determine whether the second requirement of N.C. Gen. Stat. § 1-47(3) has been satisfied. Accordingly, we remand to the trial court for further findings on the issue of actual possession. Should the trial court find that Aero was in actual possession of the land for ten years before this action was initiated, it must hold that foreclosure is barred pursuant to N.C. Gen. Stat. § 1-47(3). If, however, Aero was not in actual possession for the ten-year period, then the proposed foreclosure would not be barred by the statute.

[4] As to the second deed of trust, the time lapse requirement of N.C. Gen. Stat. § 1-47(3) has not been satisfied. The cause of action for foreclosure under this deed of trust accrued on 1 June 1976, the date the last payment on the $12,000 note was due. Williams had ten years from that date, or until 1 June 1986, to bring a foreclosure action. Since Williams initiated foreclosure proceedings on 11 March 1986, the action was filed within the limitations period.

Aero argues that Williams' collection letters, dated 25 September 1973 and 23 August 1974, accelerated the maturity of the note, so that the power of sale became absolute and the statute of limitations began to run on one of these two dates. Since foreclosure proceedings were not initiated until 11 March 1986, Aero contends that the ten-year statute of limitations had already passed. We disagree.

The terms of repayment of the $12,000 note, as set forth in the note and incorporated by reference into the Deed of Trust provided that:

> If any payment of principal or interest, or any part of either, shall not be paid within ten (10) days after the sum is due, the holder of this Note may declare the entire sum due and payable.

Since no payments were ever made on the principal or interest by Lake Townsend or anyone else, Williams had the right to accelerate payment on the entire amount of the note. We find that Williams never exercised this right.

Neither of the two collection letters sent by Williams' attorney contained any provision accelerating the maturity of the note, nor did they contain a demand for payment in full. The first letter merely requested that Lake Townsend begin payment, and the second letter requested that it make satisfactory payment arrangements. Since neither of these letters was an exercise of the note's acceleration clause, the statute of limitations did not begin to run until 1 June 1976, the day the last payment on the $12,000 note was due. Because foreclosure proceedings were initiated on 11 March 1986, within the ten-year statute of limitations, N.C. Gen. Stat. § 1-47(3) will not bar this action.

Having determined that the time lapse requirement of N.C. Gen. Stat. § 1-47(3) has not been met, the issue of actual possession for the ten-year period is irrelevant.

Based on the foregoing, we hold that the trial court was correct in allowing foreclosure to proceed on the $12,000 note.

In summary, in case No. 8718SC66, the order is vacated and the cause remanded for further proceedings; in case No. 8718SC69, the order is affirmed.

Affirmed in part, vacated and remanded in part.

Judges BECTON and MARTIN concur.

THOMAS S. PARKER, EXECUTOR OF THE ESTATE OF INA DESKINS HAWKINS, DECEASED v. AMARYLLIS HAWKINS LIPPARD, PRECY G. DESKINS, JACK DESKINS AND WIFE, PHYLLIS DESKINS, RUSSELL DESKINS (WIDOWER), WILLIAM RIPPY, JAMES W. JOHNSTON, LOIS THOMAS, PHILLIP RAY THOMAS, NANCY POWELL, HAROLD A. DESKINS AND WIFE, MRS. HAROLD A. DESKINS, ROY RAY DESKINS AND WIFE, MRS. ROY RAY DESKINS, J. HOWARD SILVER, HELEN HINTON, PAULINE GARRETT, CHARLES E. (EDDIE) DESKINS (DIVORCED), FRANCES LORETTA DESKINS SHORR AND HUSBAND, ROBERT SHORR, JEAN REEVES AND HUSBAND, ERNEST REEVES

No. 8615SC1255

(Filed 3 November 1987)

Judgments § 55— judicial sale—defaulting bidder—prejudgment interest on amount of bid

Where defendant defaulted on his bid at a judicial sale, a prior Court of Appeals opinion awarding prejudgment interest to plaintiff executor only on the resale expenses and "deficiency" after resale unintentionally diminished the executor's right to prejudgment interest on defendant's full $125,000 bid, and such interest accrued so long as, and to the extent that, any portion of the executor's claim to the $125,000 and allowable resale expenses remained unpaid or unmitigated.

APPEAL by Irving Fineberg, a defaulting bidder, from Order entered by *McConnell, Judge.* Order entered 18 September 1985 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 9 April 1987. Plaintiff-cross-appellant's Petition to Rehear allowed 20 October 1987 for the limited purpose of determining whether an earlier opinion erroneously deprived him of certain prejudgment interest.

Faison, Brown, Fletcher & Brough, by William D. Bernard and M. LeAnn Nease, for appellant and cross-appellee Irving Fineberg.

Ridge & Associates, by Paul H. Ridge, Daniel Snipes Johnson and David K. Holley, for appellee and cross-appellant Thomas S. Parker, Executor.

GREENE, Judge.

In an opinion filed earlier in this matter and styled *Parker v. Lippard,* 87 N.C. App. 43, 359 S.E. 2d 492 (1987), this Court addressed, *inter alia,* the issue whether the trial court erroneously

denied the plaintiff-cross-appellant (hereinafter, the "Executor") prejudgment interest under N.C.G.S. Sec. 24-5 (1969) after a series of resales arising from defendant's failure to comply with his bid at a judicial sale under N.C.G.S. Sec. 1-339.30 (1986). We found that the Executor's claim against defendant was ascertainable on 30 May 1984, the day defendant refused to comply with his $125,000 bid. Under Section 24-5, we concluded that prejudgment interest began to accrue on the Executor's claim against defendant on 30 May 1984 and reversed the court's order denying the Executor prejudgment interest.

However, we stated, "Thus, under Section 24-5, we must reverse Judge McConnell's order insofar as it denied the Executor prejudgment interest *on the deficiency and resale expenses properly computed under Section 1-339.30(e).*" 87 N.C. App. at ---, 359 S.E. 2d at 496 (citation omitted) (emphasis added). Our awarding prejudgment interest only on the resale expenses and "deficiency" after resale unintentionally diminished the Executor's right to prejudgment interest on defendant's full $125,000 bid. Such interest accrued so long as, and to the extent that, any portion of the Executor's claim to the $125,000 and allowable resale expenses remained unpaid or unmitigated. *See Parker*, 87 N.C. App. at ---, 359 S.E. 2d at 496; *see also Ripple v. Mortgage & Acceptance Corp.*, 193 N.C. 422, 424, 137 S.E. 156, 157 (1927) (interest is compensation for use, forbearance, or detention of money). Our prior opinion must accordingly be modified to correct this error.

We also note the Executor asserts in his "Petition to Rehear" that:

> Interest should be applied on the $125,000 bid amount, from the date of 30 May 1984 . . . to June 28, 1985, *the date of resale.* Following *that date*, from June 28, 1985 through September 18, 1985, the date of judgment, interest is computed on the deficiency and cost of resale. [Emphasis added.]

This assertion is not technically correct. The Clerk's Order Confirming Sale filed 3 June 1985 states the last resale of the property was actually conducted on 18 May 1985. FUMA Corporation bid $122,585 at the 18 May 1985 resale. The subsequent Clerk's Order Assessing Costs reveals that *closing* of this sale occurred on 28 June 1985. However, the prior Clerk's Order filed 3 June

1985 also required "that the $5,885 deposit made by FUMA Corporation with the court . . . be disbursed to the Executor and retained by the Executor and applied upon [sic] purchase price . . . ."; the Order then provided that the Executor tender his deed "upon receipt of the balance of [sic] purchase price . . . ." Thus, it appears the $5,885 deposit was credited against the Executor's claim *prior to* the 28 June 1985 closing; however, the actual dates these monies were so credited must be determined on remand.

It is nevertheless clear from the record that prejudgment interest actually accrued on the full $125,000 only from 30 May 1984 until the Clerk's disbursement of the $5,885 deposit to the Executor pursuant to the Clerk's Order Confirming Sale filed 3 June 1985. Thereafter, prejudgment interest accrued on the entire $119,115 balance ($125,000 minus $5,885) only until the Executor received the balance of FUMA Corporation's purchase price. While this date must be determined on remand, it appears this occurred at the closing on 28 June 1985. Prejudgment interest thereafter accrued on the remaining $2,415 "deficiency" (the defendant's $125,000 bid minus the $122,585 received from FUMA Corporation) until the court's final judgment on 18 September 1985. The sum of these computations represents the Executor's allowable prejudgment interest as to the $125,000 bid. As to the allowable resale expenses, prejudgment interest accrued on those expenditures from the time they were incurred until the date of final judgment.

Therefore, we affirm our prior decision in every respect save the sentence quoted above. That sentence is now superseded by our above discussion of computing prejudgment interest. As so modified, we affirm our prior decision and remand the case for computation of prejudgment interest in accordance with our opinion as modified and affirmed.

Modified and affirmed.

Judges PHILLIPS and COZORT concur.

G. REID DUSENBERRY, III v. SUE BROWN DUSENBERRY (NOW FOWLER)

No. 8715DC255

(Filed 3 November 1987)

Rules of Civil Procedure § 59— motions to amend or alter judgment—bare bones—untimely

Plaintiff's motions under N.C.G.S. § 1A-1, Rule 59(e) to amend or alter an order distributing marital property were properly denied where one was a bare bones motion which stated neither the grounds nor specified the relief sought, the other was served sixteen days after the equitable distribution order was entered and was therefore untimely, and the initial bare bones motion was ineffective to toll the running of the appeal clock. N.C.G.S. § 1A-1, Rule 7(b)(1).

APPEAL by defendant from *Allen, J. B., Jr., Judge.* Orders entered 7 May 1986, 27 June 1986, and 9 October 1986 in ALAMANCE County District Court. Heard in the Court of Appeals 30 September 1987.

Plaintiff filed this equitable distribution action on 25 February 1983. Upon entry of an order of distribution on 19 April 1984, defendant appealed to this Court on the sole issue of whether fault was a factor to be considered in determining the distribution of marital property. On review, we pointed out that we had held, in cases decided subsequent to entry of the lower court's order, that fault may not be considered in determining an equitable distribution of marital property. We therefore vacated the order below and remanded for a new order to be based solely on relevant findings. *Dusenberry v. Dusenberry,* 73 N.C. App. 177, 326 S.E. 2d 65 (1985). On discretionary review, the North Carolina Supreme Court modified and affirmed our decision and remanded for proceedings consistent with *Smith v. Smith,* 314 N.C. 80, 331 S.E. 2d 682 (1985).

The district court entered its second distribution order on 7 May 1986. This second order did not provide for payment of post-judgment interest to defendant. Defendant then served on plaintiff on 15 May 1986 a Motion to Amend or Alter Judgment and on 23 May an Amended Motion to Alter or Amend Judgment. By order filed 27 June 1986 the district court denied both motions. On 5 July defendant served notice of appeal from the court's orders of 7 May and 27 June. In response, plaintiff moved on 24

September to dismiss plaintiff's appeal for purported failure to comply with the North Carolina Rules of Appellate Procedure.

By order dated 9 October the district court granted plaintiff's Motion to Dismiss defendant's appeal based on findings to be indicated below. From this order of dismissal the defendant appeals.

Holt, Spencer, Longest & Wall, by James C. Spencer, Jr.; and Hunter, Wharton & Howell, by John V. Hunter, III; for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Carole S. Gailor, for defendant-appellant.

WELLS, Judge.

The defendant asks us to review three orders entered by the district court below: (1) an equitable distribution order that failed expressly to provide for payment of post-judgment interest on the marital property awarded, (2) an order denying two N.C. Gen. Stat. § 1A-1, Rule 59(e) of the Rules of Civil Procedure, motions to alter or amend a judgment, and (3) an order dismissing an appeal. Of these three orders we need only deal with the latter two, inasmuch as our affirmance of them precludes review of the equitable distribution award.

As indicated above, the district court's second Order Distributing Marital Property of 7 May 1986 made no express provision for payment of post-judgment interest to defendant. On 15 May defendant served on plaintiff a Motion to Amend or Alter Judgment, which read in its entirety as follows:

> NOW COMES the Defendant, by and through Counsel, who moves this Honorable Court pursuant to Rule 59(e) to alter or amend the judgment entered by this Court in its Order dated May 7, 1986.
>
> This is the 15th day of May, 1986.

On 23 May the defendant served on plaintiff an Amended Motion to Alter or Amend Judgment. In this second motion defendant expressly requested the court to amend the 7 May judgment to provide for post-judgment interest. As stated above, on 27 June the

district court signed an order denying both of defendant's Rule 59(e) motions.

Plaintiff contends that the 15 May motion was properly denied because it failed to comply with Rule 7(b)(1) of the Rules of Civil Procedure. We agree. Rule 7(b)(1) provides, in pertinent part: "An application to the court for an order shall be by motion which . . . shall be made by writing, *shall state the grounds therefor, and shall set forth the relief or order sought.*" [Emphasis added.] A bare-bones motion like that of 15 May, which neither states the grounds nor specifies the relief sought, fails to inform either the court or the adverse party of what the movant wants. Such complete failure to give notice cannot fairly be passed off as a technical defect, as defendant would persuade us. For where court and adverse party cannot comprehend the basis of a motion, they are rendered powerless to respond to it.

Defendant's Amended Motion to Alter or Amend Judgment of 23 May was served 16 days after the equitable distribution order was entered and was therefore untimely. It follows that the trial court's denial was proper. In sum, we affirm the trial court's order denying both of defendant's Rule 59(e) motions.

The district court dismissed defendant's appeal because counsel for defendant had not, within ten days of entry of the 7 May distribution order, either given proper notice of appeal or filed "a *proper* Rule 59(e) motion . . . *adequate* to suspend the finality of the Court's May 7, 1986 Order or stay the running of the appeal time." [Emphasis added.] Apparently, the trial court reasoned that if a Rule 59(e) motion fails to comply with the requirements of Rule 7(b) of the Rules of Civil Procedure, it is *ipso facto* ineffective to suspend the running of the appeal time. We agree. Rule 59(c) provides as follows: "A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment." In order to suspend the running of the appeal clock, a Rule 59(e) motion must not only be timely served, it must also meet the demands of Rule 7(b). In the present case, since defendant's first Rule 59(e) motion failed either to state the grounds or set forth the relief sought, it was ineffective to toll the running of the appeal clock. Therefore, the trial court's dismissal of defendant's appeal is affirmed.

As indicated above, because of our affirmance of the trial court's order denying defendant's Rule 59(e) motions, we cannot

reach the merits of defendant's claim for post-judgment interest dating from 19 April 1984, the date of the first distribution order subsequently vacated. However, we note that, as plaintiff candidly concedes in his brief, defendant is entitled to interest on $78,627.85 from the date of the distribution order of 7 May 1986 until paid, and we remand for amendment of that order to reflect this entitlement.

Affirmed as modified and remanded.

Judges EAGLES and MARTIN concur.

LENA L. COLEY, ADMINISTRATRIX OF THE ESTATE OF ALBERT LEE COLEY v. PRESTON FRANKLIN GARRIS AND DOROTHY GARRIS WHITEHURST

No. 878SC353

(Filed 3 November 1987)

1. **Automobiles and Other Vehicles § 46— opinion testimony as to speed—physical evidence and statements of others as basis**

The trial court erred in permitting an officer to state his opinion that the speed of plaintiff's motorcycle was 75 miles per hour based on physical evidence at the accident scene and statements of persons who had witnessed the accident. Furthermore, such error was prejudicial where defendants' theory of plaintiff's contributory negligence was that plaintiff operated the motorcycle at an excessive and unlawful speed which deprived him of proper control and the ability to avoid the collision, and the jury found that plaintiff was contributorily negligent.

2. **Appeal and Error § 24— objection to question—motion to strike answer not required**

Where plaintiff entered a timely objection to a question eliciting an opinion as to the speed of plaintiff's motorcycle, a further motion to strike the answer of the witness was not required in order to assign error to the admission of the opinion testimony.

APPEAL by plaintiff from *Wright, Judge.* Judgment entered 26 November 1986 in Superior Court, WAYNE County. Heard in the Court of Appeals 22 October 1987.

Plaintiff brought this action to recover damages for the wrongful death of Albert Lee Coley, who died on 10 September 1981 as a result of injuries sustained when his motorcycle collided

with an automobile driven by defendant Garris and owned by defendant Whitehurst. Evidence at trial tended to show that Coley was operating his motorcycle south on Rural Paved Road 1709 in the vicinity of Eastern Wayne Junior High School in Wayne County. Defendant Garris was attempting to enter the highway from the driveway of a country store across from the school. The speed limit at the time and place of the collision was 45 miles per hour. The plaintiff offered evidence tending to show that as Coley approached the driveway, Garris pulled the front part of the car out into Coley's lane of travel. Coley lost control of the motorcycle and slid sideways down the highway, striking the front of Garris' car. According to the testimony of Bobby Bill Body, an eyewitness, the collision occurred in Coley's lane of travel. In Body's opinion, Coley was travelling about 45 miles per hour.

The defendants' evidence tended to show that as Garris attempted to enter the highway, he pulled up to the edge of the road, stopped, and saw a car approaching from his right. After the car had passed, Garris looked to his left and saw Coley and the motorcycle sliding toward him, out of control. Jack Newsome, also an eyewitness to the collision, testified that, in his opinion, the motorcycle was travelling between 45 and 50 miles per hour. He also testified that Garris' automobile had not entered the roadway at the time of the collision.

The accident was investigated by Trooper J. D. Booth of the North Carolina Highway Patrol, who testified that when he arrived at the scene, all four tires of Garris' automobile were in the driveway and only a portion of the car's right front corner extended into the roadway. Over plaintiff's objection, Trooper Booth was permitted to state his opinion that the speed of Coley's motorcycle had been approximately 75 miles per hour. His opinion was based upon his observation of gouge marks, scuff marks and other physical evidence at the scene, as well as statements of persons who had witnessed the collision.

The jury determined that Garris had been negligent and that Coley had been contributorily negligent. The trial court entered judgment upon the verdict and dismissed the action. Plaintiff appeals.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by Wright T. Dixon, Jr., for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and Susan K. Burkhart, for defendants appellees.

MARTIN, Judge.

[1] By her first assignment of error, plaintiff contends that Trooper Booth's opinion as to the speed of Coley's motorcycle should have been excluded because it was not based upon his personal observation of the events in question. We agree.

It has long been the rule in North Carolina that "one who did not see a vehicle in motion will not be permitted to give an opinion as to its speed." *Tyndall v. Hines Co.*, 226 N.C. 620, 623, 39 S.E. 2d 828, 830 (1946).

> A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require.

Shaw v. Sylvester, 253 N.C. 176, 180, 116 S.E. 2d 351, 355 (1960). *Accord Johnson v. Yates*, 31 N.C. App. 358, 229 S.E. 2d 309 (1976). The foregoing rule has not been changed by the adoption of G.S. 8C-1, Rule 702. *Hicks v. Reavis*, 78 N.C. App. 315, 337 S.E. 2d 121 (1985), *cert. denied*, 316 N.C. 553, 344 S.E. 2d 7 (1986). *See, however*, 1 H. Brandis on North Carolina Evidence, § 131, n. 78 (1986 Cum. Supp.).

[2] Defendants concede that Trooper Booth's testimony was inadmissible, but argue that the error does not entitle plaintiff to a new trial for two reasons. First, defendants contend that plaintiff failed to preserve her objection to the improper testimony because she did not move to strike it. We disagree. G.S. 8C-1, Rule 103(a)(1) requires "a timely objection *or* motion to strike . . ." in order to assign error to a ruling admitting evidence. (Emphasis added.) "No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or ob-

jection clearly presented the alleged error to the trial court." *Id.* In the present case, plaintiff entered a timely objection to the question eliciting Trooper Booth's opinion as to the speed of the motorcycle; a further motion to strike his answer was not required.

[1] Next, defendants argue that the erroneous admission of the testimony was not prejudicial to the plaintiff's case and does not require that she be granted a new trial. We also reject this argument. A review of the transcript reveals that defendants' theory of Coley's contributory negligence was based, in large part, on their contention that he had operated the motorcycle at an excessive and unlawful speed, depriving him of proper control and the ability to avoid the collision. The two eyewitnesses to the collision testified that the motorcycle was travelling at, or slightly in excess of, the speed limit. Trooper Booth's testimony placing the speed of the motorcycle at 75 miles per hour was, without question, material to the defense which defendants sought to establish. Moreover, Trooper Booth "was a State employee whose duty it was to make a disinterested and impartial investigation of the accident. In so doing he was a representative of the State. His testimony should, and no doubt did, carry great weight with the jury." *Tyndall, supra,* at 623, 39 S.E. 2d at 830.

In view of our disposition of plaintiff's first assignment of error, we find it unnecessary to discuss the other assignments of error brought forward in her brief. For the reasons stated, she is entitled to a new trial.

New trial.

Judges EAGLES and PARKER concur.

E-B TRUCKING COMPANY, INC. v. EVERETTE TRUCK LINE, INC.

No. 877SC262

(Filed 3 November 1987)

Carriers § 10— steel exposed to rain while loading—indemnity clause in trip lease —bill of lading presumption

Summary judgment was properly granted for plaintiff in an action by plaintiff to recover $10,009.87 withheld by defendant under a contract by which defendant trip leased a tractor and trailer from plaintiff, the lease agreement contained a clause requiring indemnification of the lessee for losses resulting from the use of the leased vehicle or equipment, the steel became wet during loading onto the truck and was rejected, there was no evidence that plaintiff or its driver assumed the duty to insure that the load remained dry during loading, and, although a signed bill of lading creates a presumption that the goods were in the condition described thereon, that presumption was easily overcome here because the evidence that the steel became wet during loading was undisputed.

APPEAL by defendant from *James M. Long, Judge.* Judgment entered 27 October 1986 in Superior Court, NASH County. Heard in the Court of Appeals 1 October 1987.

Fields, Cooper, Henderson, and Cooper, by Milton P. Fields for plaintiff appellee.

McMullan and Knott, by Lee E. Knott, Jr. for defendant appellant.

BECTON, Judge.

Plaintiff E-B Trucking Company, Inc. (E-B Trucking) brought this action to recover $10,009.87 which was withheld under a contract with defendant Everette Truck Line, Inc. (Everette). The trial judge granted E-B Trucking's motion for summary judgment, awarding it $10,008.96 and interest. Everette appeals. We affirm.

I

On 2 May 1985, E-B Trucking trip-leased a tractor and trailer to Everette Trucking for the purpose of transporting a load of steel from J. K. Warehouse in Baltimore, Maryland to Coil Metals Industries in New Brunswick, New Jersey. The following facts are not in dispute.

Everette's dispatcher instructed E-B Trucking's driver, Cloman Harrison, to pick up a load of steel at J. K. Warehouse. Coil Metals had agreed to pay J. K. Warehouse to store and load the steel. Although the dispatcher did not tell Harrison so, he knew that the steel should not be allowed to get wet. It was raining as J. K. Warehouse's agents loaded the steel. Harrison observed the loading and noticed that the paper covering over the first three bundles was torn, exposing the steel to the rain. He covered each of the twelve bundles of steel with his tarpaulin as they were placed onto the truck bed. Each bundle of steel was placed on a wooden pallet that prevented it from getting wet from underneath. After the steel was loaded, Harrison secured the tarpaulin and obtained a bill of lading. He then delivered the load to Coil Metals. Coil Metals' agent refused to accept the load, and made the notation "wet" on the bill of lading. All 12 bundles were damaged. Coil Metals filed a claim with Everette for $10,009.87. Everette paid the claim, then retained $10,008.96 from the trip-lease funds it owed E-B Trucking.

Under the trip-lease agreement, E-B Trucking, the lessor, was to receive 75% of the proceeds from a job, and Everette, the lessee, was to receive 25% as compensation for arranging the job. The trip-lease agreement was in writing and contained the following provision: "Lessor further agrees to reimburse and otherwise indemnify lessee any and all losses sustained by lessee resulting from the use of the leased vehicle equipment."

II

Summary judgment is appropriate when the pleadings, depositions, interrogatories and admissions on file, together with affidavits show no genuine issue of material fact so that a party is entitled to judgment as a matter of law. N.C. Gen. Stat. Sec. 1A-1, Rule 56 (1983). *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Three of Everette's four assignments of error are joined in the following assignment: that the trial judge erred in failing to find as a fact that Harrison was negligent and in failing to give effect to the trip-lease indemnification clause. Consequently, Everette appears to argue that it, not E-B Trucking, was entitled to judgment as a matter of law. We disagree.

The trial judge found as a fact, and Everette concedes, that the steel became wet during loading. Yet nowhere does the trip-

lease agreement impose a duty on E-B Trucking or its driver to supervise the loading of the steel. The contractual provision on which Everette relies permits indemnification for losses "resulting from the *use of the leased vehicle equipment*" only. When the language of a contract is plain and unambiguous, it must be enforced as written. *Nationwide Mutual Insurance Co. v. Edwards*, 67 N.C. App. 1, 4, 312 S.E. 2d 656, 659 (1984), *citing Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970). E-B Trucking leased a tractor and trailer, not loading equipment. There is not any evidence that E-B Trucking or its driver, Harrison, assumed the duty to insure that the load remained dry during loading.

Everette's remaining contention is that E-B Trucking is bound by Harrison's representation in the bill of lading that the steel was in good condition when he received it. Although a signed bill of lading creates a presumption that the goods were in the condition described thereon, *Brown v. Southeastern Express Co.*, 192 N.C. 25, 133 S.E. 414 (1926), *accord American Home Products Corp. v. Howell's Motor Freight, Inc.*, 46 N.C. App. 276, 264 S.E. 2d 774 (1980), that presumption was easily overcome in the instant case because the evidence that the steel became wet during loading was undisputed. This assignment is also overruled.

Judgment is affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. BELYNDA MAE MORRIS, JULIA HICKS AND RUSSELL WAYNE IRVING

No. 874SC341

(Filed 3 November 1987)

1. Prostitution § 3— promoting prostitution of minor—sufficient evidence

The State's evidence was sufficient to support defendants' conviction of promoting prostitution of a minor in violation of N.C.G.S. § 14-190.18 where it tended to show that defendants told a fifteen-year-old girl "the ropes" about prostitution by advising her not to quote prices, to use a false name if arrested, where to find and take her customers, and to give money she made to one of the defendants so that the male defendant could save it and buy her nice things. Evidence of actual acts of prostitution by the minor was not required to support such a conviction.

2. Criminal Law § 163— omission from instructions—issue not presented on appeal

Defendants failed properly to raise on appeal the issue of the court's failure to instruct the jury that defendants must have acted "knowingly" where they made no objection at the trial and do not assert that such omission constituted "plain error."

APPEAL by defendants from *Barefoot, Judge.* Judgments entered 10 December 1986 in Superior Court, ONSLOW County. Heard in the Court of Appeals 28 September 1987.

Defendants were indicted on 4 November 1986 and charged with violating G.S. 14-190.18, promoting prostitution of a minor. Defendants were tried and convicted and each was sentenced to a term of six years in prison. From these judgments, defendants appeal.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Robert G. Webb, for the State.

Bailey & Raynor, by Edward G. Bailey, for defendant appellants.

ARNOLD, Judge.

Defendants first contend that the evidence presented by the State was insufficient as a matter of law to be submitted to the jury. We disagree.

Before the issue of a defendant's guilt may be submitted to the jury, the trial court must be satisfied that substantial evidence has been introduced tending to prove that defendant committed each essential element of the crime charged. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984). All of the evidence must be considered in the light most favorable to the State, leaving any contradiction or discrepancies in the evidence to be resolved by the jury. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The question for the trial court is whether a reasonable inference of the defendant's guilt may be drawn from the evidence. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978).

G.S. 14-190.18(a) states "[a] person commits the offense of Promoting prostitution of a minor if he knowingly: (1) Entices, forces, encourages, or otherwise facilitates a minor to participate in pros-

titution." It is clear after careful review of the present case that there was ample evidence of defendants' guilt to submit to the jury.

[1] The State presented the following evidence: Defendant Irving had given a fifteen-year-old girl his phone number and told her to call him. After she telephoned Irving, he invited her to spend the night at his house, which she did. While there, Irving introduced the minor to defendants Belynda Mae Morris and Julia Hicks. Irving and Morris initiated a conversation with the fifteen-year-old in which Morris and Hicks "told her the ropes" about prostitution. They told her not to quote prices and to use a false name if she was arrested. She was taught that customers could be found at the bus station on Court Street and that she could take her customers to a house on Poplar Street. She was also informed that she was to give Morris, Hicks or Irving the money that she made and that Irving would save the money and buy her nice things.

Defendants argue that since there is no evidence that the minor actually engaged in acts of prostitution that they cannot be convicted under G.S. 14-190.18(a). This argument is totally without merit.

The purpose of G.S. 14-190.18(a) is the protection of minors. Violation of the statute occurs when a party knowingly, "[e]ntices, forces, encourages, or otherwise facilitates" a minor to engage in acts of prostitution. It is the attempt to corrupt a minor with which this statute is concerned. The statute never states or implies that actual acts of prostitution must be committed by the minor. The evidence presented by the State in the case *sub judice* more than sufficiently permits the question of defendants' guilt to be submitted to the jury.

[2] Defendants also contend that the trial court committed prejudicial error in failing to charge the jury that defendants must have acted "knowingly."

Immediately following the charge to the jury, the trial court asked counsel for defendants, "[d]o you have any corrections or additions to this charge?" Counsel for defendants responded, "[n]one for the defendant, Your Honor."

Defendants did not object to the jury charge at trial and have waived the opportunity to make such an exception on appeal unless such an omission by the trial judge constitutes "plain error." App. R. 10(b)(2). *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

Where no action was taken by counsel at trial, the burden is on the party alleging error to establish its right to review by asserting in its brief how the exception is preserved by rule or law or, when applicable, how such error constitutes "plain error." *Id.* Since defendants made no objection at trial and do not assert that the trial court's omission of the term "knowingly" from the jury instruction constituted "plain error," they have failed to properly raise the issue before this Court. *Id.*

No error.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. MARTIN WATERS

No. 8720SC56

(Filed 3 November 1987)

1. **Criminal Law § 99.2— judge's questions—no prejudice**

The defendant in a prosecution for first degree arson did not show that he was prejudiced by questions asked by the trial judge. N.C.G.S. § 15A-1222.

2. **Criminal Law § 138.22— arson—aggravating factor—knowingly created risk of death to more than one person—inappropriate**

The trial judge erred by finding as an aggravating factor for first degree arson that defendant knowingly created a risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. This is not an appropriate aggravating factor for first degree arson.

3. **Criminal Law § 138.29— arson—two-year-old child inside house—aggravating factor that defendant involved a person under the age of sixteen—inappropriate**

The trial judge erred by finding as an aggravating factor for first degree arson that defendant involved a person under the age of sixteen in the commission of the crime where a two-year-old child was inside the house when defendant set it ablaze. The legislative intent behind this aggravating factor

concerned situations where children are encouraged and actually used in the commission of a crime. N.C.G.S. § 15A-1340.4(a)(1)(l).

APPEAL by defendant from *Walker, Judge.* Judgment entered 20 August 1986 in Superior Court, UNION County. Heard in the Court of Appeals 21 September 1987.

Defendant was indicted for first degree arson for burning the occupied dwelling of his girlfriend Libby Marsh. The State presented evidence at trial which tended to show the following: Defendant and Ms. Marsh were seen arguing on the porch of Ms. Marsh's house on the evening of the fire. Defendant threatened Ms. Marsh and told her that if she did not get back together with him, that he would burn down her house. A neighbor testified that a few minutes after the argument, she saw a man she thought was defendant carrying a milk jug containing a clear liquid. She saw him walk across the porch of Ms. Marsh's house and throw the liquid on a chair which subsequently burst into flames.

Soon thereafter, Ms. Marsh and her two-year-old child were awakened by her roommate yelling that the house was on fire. Ms. Marsh and her child jumped out of a window from a stairway in the hall to escape injury.

Defendant presented evidence which tended to show that he could not have set the fire because he was in the company of friends at the time of the incident.

Defendant was convicted of first degree arson and sentenced to a term of twenty years in prison, five years above the presumptive term.

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

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

ARNOLD, Judge.

[1] Defendant first contends that he is entitled to a new trial "because the trial judge conveyed prejudicial opinions to the jury through his persistent questioning of witnesses." We disagree.

G.S. 15A-1222 prohibits a trial judge from expressing "during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." The trial judge may not "indicate in any manner his opinion as to the weight of the evidence or the credibility of any evidence properly before the jury." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E. 2d 245, 248 (1985). The Supreme Court further stated in *Blackstock*:

> [I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence of a witness's credibility that prejudicial error results. In this connection it is well settled that it is the duty of the trial judge to supervise and control the course of a trial so as to assure justice to all parties. In so doing the court may question a witness in order to clarify confusing or contradicting testimony. (Citations omitted.)

Id.

The burden rests upon the defendant to show that the remarks of the trial judge deprived him of a fair trial. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). After a careful examination of the transcript, we hold that defendant has in no way shown that he was prejudiced by questions asked by the trial judge. Defendant's contention is without merit.

Defendant next contends that the trial court erred in that two out of the three aggravating factors used in his sentencing were improper. We agree.

[2] The trial court found as an aggravating factor that "the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." In *State v. Jones*, 310 N.C. 628, 315 S.E. 2d 698 (1984), the Supreme Court held that this is not an appropriate aggravating factor to be considered when a defendant is convicted of violating G.S. 14-67 (attempting to burn dwelling houses and certain other buildings). With this holding in mind, we can only conclude that this factor is not an appropriate aggravating factor to be used when a defendant is convicted of first degree arson. The trial court improperly applied it as such.

[3] The trial court also found as an aggravating factor that "the defendant involved a person under the age of 16 in the commission of the crime." The trial court here was referring to Ms. Marsh's two-year-old child who was inside the house when defendant set it ablaze. The legislative intent behind this statutory aggravating factor, G.S. 15A-1340.4(a)(1)(l), concerned situations where children are encouraged and actually used *in the commission* of a crime. The fact that the victim of a particular crime falls below the age of sixteen is not included within the meaning of G.S. 15A-1340.4(a)(1)(l). The trial court erred in using this factor to aggravate defendant's sentence. Upon remand, the two factors discussed above shall not be considered as aggravating factors.

Remanded for resentencing.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. EDWIN BRENT WARRICK

No. 8712SC311

(Filed 3 November 1987)

Criminal Law § 138.29— perjury shown by jury verdict—improper aggravating factor

The trial court erred in finding as an aggravating factor that "the jury by its verdict found that the defendant committed perjury" since a verdict of guilty does not *ipso facto* mean that a testifying defendant committed perjury, and a finding that the jury has determined a fact is not a finding that the trial judge has made the same determination from a preponderance of the evidence as N.C.G.S. § 15A-1340.4(a) requires.

APPEAL by defendant from *Hight, Judge*. Judgment entered 19 November 1986 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 25 September 1987.

Attorney General Thornburg, by Associate Attorney General Gerald M. Swartzberg, for the State.

Russ, Worth & Cheatwood, by Jerome P. Trehy, Jr., for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of breaking and entering a building occupied by a pawn shop business, a Class H felony in violation of G.S. 14-54, the presumptive term for which is three years. G.S. 15A-1340.4. The only question raised by defendant's appeal is the validity of the probationary ten-year prison sentence that was imposed. The validity of the sentence depends upon the validity of a non-statutory factor in aggravation—that "[t]he jury by its verdict found that the defendant committed perjury"—which the court found and deemed to outweigh two factors found in mitigation.

A finding of perjury by the defendant as an aggravating factor is not forbidden by the Fair Sentencing Act, and can be properly made if "the finding meets the requirements of the statute," so our Supreme Court held in *State v. Thompson*, 310 N.C. 209, 227, 311 S.E. 2d 866, 876 (1984). The requirements of the statute for finding a factor in aggravation are that the *judge* find that the factor is "proved by the preponderance of the evidence," and that the factor be "reasonably related to the purposes of sentencing." G.S. 15A-1340.4(a). In this case the court's finding in aggravation does not meet the requirements of the statute and a recital of the State's evidence and of defendant's testimony that conflicted with it would serve no purpose. For the judge did not find from a preponderance of the evidence that the defendant committed perjury in testifying in his own defense; instead he found from a preponderance of the evidence *that the jury by its verdict had found* that the defendant committed perjury. Even if the jury verdict could be so construed, and we do not believe that it can, a finding for sentencing purposes that the jury has determined a fact is not a finding that the judge has made the same determination, as the statute requires. As Judge Butzner noted in *United States v. Moore*, 484 F. 2d 1284 (4th Cir. 1973), a verdict of guilty means only that guilt has been proved beyond a reasonable doubt; it does not *ipso facto* mean that a testifying defendant committed perjury. Too, though proper findings of perjury by a testifying defendant are permissible, in *State v. Thompson, supra*, our Supreme Court took pains not to encourage such findings; and to equate a jury verdict of guilty of breaking or entering with a finding of perjury by a testifying defendant would be such encourage-

ment. Thus, the judgment appealed from must be vacated and the matter remanded to the trial court for resentencing.

Vacated and remanded.

Judges COZORT and GREENE concur.

MARY ALENE STRICKLAND, EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. 8610IC1273

(Filed 3 November 1987)

Master and Servant § 69— workers' compensation—permanent disability to lungs —no findings on wage earning capacity

The Industrial Commission erred in a workers' compensation proceeding in which plaintiff was found to have suffered a permanent disability to her lungs by failing to consider or make findings of fact as to whether plaintiff's disability affected her wage earning capacity under either N.C.G.S. § 97-29 or N.C.G.S. § 97-30.

THIS action was originally heard in the North Carolina Court of Appeals on 8 June 1987, *Strickland v. Burlington Industries, Inc.*, 86 N.C. App. 598, 359 S.E. 2d 19 (1987), and on 21 September 1987 plaintiff petitioned for a rehearing. The petition for rehearing was allowed with review limited to that portion of the original opinion, filed on 18 August 1987 and certified on 7 September 1987, in which this Court held that the Industrial Commission need not consider and make findings of fact as to the effect of plaintiff's permanent disability on her wage earning capacity when determining its award. That portion of the original opinion is hereby superseded by this opinion.

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-appellees.

ORR, Judge.

Plaintiff contends that since the Industrial Commission made a finding of permanent disability, it should have also made findings regarding her loss of wage earning capacity under N.C.G.S. §§ 97-29 or 97-30 and then made an award. Often an award under N.C.G.S. § 97-29, and by implication N.C.G.S. § 97-30, 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 (1983).

In the present case, after finding that plaintiff had suffered a permanent disability to her lungs, the Industrial Commission compensated her under N.C.G.S. § 97-31. In making this award the Industrial Commission failed to consider or make findings of fact as to whether plaintiff's disability affected her wage earning capacity under either N.C.G.S. § 97-29, total incapacity, or N.C.G.S. § 97-30, partial incapacity. This was in error.

Our Supreme Court has now held in *Gupton v. Builders Transport*, 320 N.C. 38, 357 S.E. 2d 674 (1987), that where a disability affects wage earning capacity a worker may elect between the fixed compensation under the scheduled injury provisions of N.C.G.S. § 97-31 or in the alternative for actual wage loss compensation (total or partial) under N.C.G.S. § 97-29 or N.C.G.S. § 97-30.

The Industrial Commission's failure to make any findings on the question of plaintiff's loss of wage earning capacity prevented her from electing to recover under N.C.G.S. §§ 97-29 or 97-30, if she was so entitled. Therefore, we remand to the Industrial Commission for additional findings on the issue of wage earning capacity.

Except as above modified, the prior decision rendered by this Court is hereby confirmed.

Affirmed.

Judges PHILLIPS and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 NOVEMBER 1987

ALLAN MILES COMPANIES v. REALTY WORLD No. 8719SC541	Cabarrus (85CVS955)	Dismissed
BLOXTON v. HOBBS No. 879DC332	Vance (86CVD685)	Vacated
BROWN v. RAWLS No. 8710IC259	Ind. Comm. (536990)	Appeal Dismissed
BRYANT v. BRYANT No. 8724DC221	Mitchell (85CVD188)	Affirmed
CARSON v. CARSON No. 873DC488	Pitt (79CVD528)	Order vacated & remanded
CRABTREE v. 315 SOUTH ACADEMY No. 8710DC518	Wake (86CVD9934)	Affirmed
ELLER v. ELLER No. 8725DC433	Caldwell (86CVD17)	Affirmed in part. Reversed in part.
FOUNTAIN v. BEAUVAIS No. 8714DC138	Durham (79CVD83)	Vacated & remanded in part; affirmed in part.
GRANT v. NASH GENERAL No. 877SC202	Edgecombe (86CVS625)	Affirmed
HINCHER v. HINCHER No. 8723DC467	Yadkin (85CVD104)	No Error
HOUCK v. JOHNSON No. 8723DC455	Wilkes (85CVS871)	Affirmed
IN RE McKNIGHT No. 8720DC315	Union (86J129)	Appeal Dismissed
IN RE SNOW No. 8712DC154	Cumberland (86CVD1147)	Remanded
METTS v. PIVER No. 874SC41	Onslow (86CVS646)	Affirmed in part & reversed in part.
OLIVER v. OLIVER No. 8728DC580	Buncombe (86CVD3311) (87CVD0585)	Dismissed
PICKARD v. PICKARD No. 8714DC512	Durham (82CVD1642)	Affirmed

STATE v. ABBOTT No. 8722SC591	Alexander (86CRS2497)	No Error
STATE v. BARNES No. 8716SC388	Robeson (86CRS2210)	No Error
STATE v. BROOME No. 8726SC499	Mecklenburg (86CRS85631)	No Error
STATE v. BUNDY No. 872SC525	Martin (86CRS2985)	No Error
STATE v. BUTTS No. 871SC530	Pasquotank (86CRS3416) (86CRS3417)	No Error
STATE v. CLARK No. 8720SC434	Anson (86CRS240)	No Error
STATE v. CLARK No. 8721SC473	Forsyth (86CRS38279)	No Error
STATE v. COOK No. 8725SC289	Catawba (86CRS7156)	Remanded
STATE v. DAVIDSON No. 873SC454	Pitt (86CRS9062)	No Error
STATE v. DAYE No. 8715SC505	Alamance (82CRS15951)	No Error
STATE v. DOVER No. 874SC191	Onslow (85CRS21417) (85CRS21418)	No Error
STATE v. FORD No. 8726SC506	Mecklenburg (86CRS053479) (86CRS053480)	No Error
STATE v. HENSLEY No. 8728SC516	Buncombe (86CRS27375)	No Error
STATE v. HERRING No. 875SC524	New Hanover (86CRS17185) (86CRS17186)	No Error
STATE v. HILL No. 8728SC419	Buncombe (86CRS3120)	No Error
STATE v. HOLLOWAY No. 8715SC445	Alamance (86CRS6820)	No Error
STATE v. HOOD No. 8724SC286	Watauga (85CRS4953) (85CRS4954) (85CRS4955) (85CRS4956) (85CRS4957)	 New Trial Judgment Vacated New Trial Judgment Arrested by trial court. Judgment Vacated

STATE v. JARRETT No. 8727SC570	Gaston (86CRS24828)	No Error
STATE v. JOHNSON No. 8727SC394	Lincoln (86CRS924)	Appeal Dismissed
STATE v. JOHNSON No. 8728SC497	Buncombe (86CRS21002) (86CRS21003) (86CRS21004)	Affirmed
STATE v. JOYCE No. 8717SC492	Rockingham (86CRS11286)	Affirm
STATE v. LILLY No. 8712SC630	Cumberland (86CRS23164)	No Error
STATE v. McNATT No. 8712SC553	Cumberland (86CRS27278)	No Error
STATE v. OVERTON No. 871SC470	Pasquotank (86CRS3862)	No Error
STATE v. PARK No. 8715SC466	Alamance (84CRS15287)	Affirmed
STATE v. RAIFORD No. 8726SC424	Mecklenburg (86CRS10352)	No Error
STATE v. WARDLOW No. 8715SC450	Orange (86CRS3357) (86CRS3358) (86CRS3359) (86CRS5005)	 New Trial Judgment Arrested New Trial New Trial
STATE v. WINGATE No. 8726SC504	Mecklenburg (86CRS68884)	No Error
STATE v. ZELLARS No. 8712SC414	Cumberland (85CRS36820)	Affirmed and Remanded
STEWART v. STEWART No. 8728DC229	Buncombe (85CVS0219)	Affirmed in part, reversed in part & remanded in part.
TANT v. MANTRAP No. 8710IC437	Ind. Comm. (513888)	Affirmed
TEETER v. BROWDER No. 8726SC405	Mecklenburg (85CVS9364)	Affirmed
WALKER v. CITY OF STATESVILLE No. 8722SC463	Iredell (86CVS1143)	Appeal Dismissed

LYNDELL ROBINSON, GUARDIAN OF CLARA ROBINSON HUTCHINS, AND TIMOTHY ALLEN HUTCHINS v. SEABOARD SYSTEM RAILROAD, INC., NATIONAL RAILROAD PASSENGER CORPORATION, ARCHIE DONALD BROOKS AND SOUTHERN RAILWAY COMPANY

No. 8710SC258

(Filed 17 November 1987)

1. **Railroads § 5.6— railroad crossing—testimony concerning near misses—relevant**

In an action arising from the collision of a train with an automobile close to Central Prison in Raleigh, the testimony of a prison guard concerning several near misses was relevant to prove the dangerous nature of the crossing and that Seaboard and Southern had notice of the hazard.

2. **Evidence § 48— railroad crossing accident—expert on system safety—testimony admissible**

The trial court did not err in a case arising from an accident at a railroad crossing by admitting the testimony of an expert witness in the field of system safety even though his experience had been primarily in the aviation and aerospace industries, where his education, knowledge, and experience in the field were clearly such as to enable him to assist the jury in understanding the evidence with respect to Southern's own safety rules and in relating that evidence to this accident.

3. **Evidence § 49— railroad crossing accident—testimony of highway engineer regarding signalization—admissible**

The trial court did not err in an action arising from a railroad crossing accident by admitting the testimony of a Department of Transportation engineer regarding signalization of railroad crossings where the testimony was relevant to the issue of whether or not Southern exercised due care with respect to the crossing and the opinion was given in response to a proper hypothetical question describing the crossing.

4. **Evidence § 48— railroad crossing accident—testimony of expert on human behavior—admissible**

The trial court did not err in an action arising from a railroad crossing accident by admitting the testimony of a psychologist as an expert witness in the field of human behavior.

5. **Railroads § 5.2— railroad crossing accident—evidence of willful and wanton negligence—sufficient**

In an action arising from a railroad crossing accident, the trial court properly denied defendants' motions for a directed verdict and judgment n.o.v. with respect to the issues of willful and wanton negligence and punitive damages, and plaintiff was not barred from recovery by her own contributory negligence, where defendant Southern's Operating Rule 103(e) required that railroad cars left standing on tracks be located at least 100 feet from a public or private crossing; cars could be placed more closely to a crossing only with

the approval of a supervisory officer and only if it did not affect safe use of the crossing; when placing cars more closely to a crossing than 100 feet resulted in restricted visibility by motorists using the crossing, precautions such as a flagman or a reduction in speed were required; defendant Southern's supervisor was aware of the requirements of Operating Rule 103(e), and was aware of the use of this crossing, but gave approval to the placement of railway cars on the storage track approximately 30 feet from the crossing and permitted them to remain at that location for at least two days before the accident; two of defendant's employees placed cars on the passing track approximately 30 feet from the crossing the night before the accident; both men were aware of Operating Rule 103(e) but made no effort to determine that their placement of the cars on the passing track complied therewith; the supervisor acknowledged at trial that the location of the cars created a dangerous situation; and the supervisor had not required placement of a flagman or other safety precautions at the crossing.

6. Husband and Wife § 9; Damages § 11.1— loss of consortium—punitive damages

The trial court did not err in a negligence action by submitting the issue of punitive damages in connection with plaintiff husband's claim for loss of consortium. Rather than being punished twice for a single wrong, defendant Southern is being punished for separate wrongs to separate victims.

7. Trial § 11.1— railroad crossing accident—counsel's comments in closing argument—no prejudice

Although remarks by plaintiff's counsel in his closing argument in a railroad crossing case based on his personal experience and a suggestion that defense witnesses had been coached were inappropriate and beyond proper bounds of vigorous argument, the improprieties were not so flagrant as to influence the jury's verdict.

8. Railroads § 6.2; Trial § 32.1— railroad crossing accident—duty of railroad to give warning—instructions—no prejudicial error

There was no prejudicial error in an action arising from a railroad crossing accident from the trial court's erroneous instruction that the railroad had the duty to give a reasonable and timely warning by the blowing of a whistle or a horn, ringing a bell, *and* some other device. The trial court subsequently used *or* in its original instruction and in response to the jury's request for a reinstruction.

9. Railroads § 6.2; Trial § 32.2— railroad crossing accident—gates or other warning devices—instructions on railroad's duty of care—no prejudicial error

The trial court in a case arising from a railroad crossing accident did not err in its instruction on the defendant's duty of care where the court instructed the jury that the exercise of due care on the part of the railroad *required* erection of gates or signal devices. When considered contextually, the trial court's instructions provided an adequate explanation of the railroad's duty of care.

10. Trial § 38.1— railroad crossing accident—requested instruction on violation of internal safety rule—given in substance

The trial court did not err in an action arising from a railroad crossing accident where defendant railroad requested an instruction that a violation of internal safety rules was not negligence *per se* and the court gave the substance of the requested instruction by instructing the jurors that "obstructions in themselves do not constitute negligence . . . ."

11. Trial § 33— railroad crossing accident—requested instructions on application of law to evidence—no error

The trial court did not err in an action arising from a railroad crossing accident by refusing defendant's requested instructions consisting of explanations of the law's application to the evidence in this case. Such instructions are no longer required and the court's instructions adequately define the law with respect to each substantive feature of the case.

12. Trial § 13— exhibits allowed in jury room without consent of both parties—no prejudice

There was no prejudice in an action arising from a railroad crossing accident where the jury was allowed to take into the jury room a memorandum and photographic exhibits without the consent of both parties. Parties asserting error must demonstrate that they have been prejudiced thereby. N.C.G.S. § 1A-1, Rule 61.

13. Evidence § 18— railroad crossing accident—audio experiments—admissible

The trial court did not err in an action arising from a railroad crossing accident by admitting testimony of an expert in the field of acoustics who had conducted certain tests or experiments at the crossing in an attempt to determine the audibility of the train horn. Substantial similarity existed between conditions at the time of the accident and those at the time of the experiment, and the dissimilarities complained of by plaintiffs were sufficiently explained as to enable the jury to evaluate the differences and determine the proper weight to be given the evidence.

14. Evidence § 26— railroad crossing accident—testimony concerning position of radio volume control knob after accident—admissible

The trial court did not err in a railroad crossing accident case by permitting the investigating police officer to testify as to the position in which he found the volume control knob of plaintiff's car radio two days after the accident where the wrecker operator who removed the vehicle from the scene of the accident testified that he had not manipulated the controls nor, to his knowledge, had anyone in his place of business; an expert testified that the knob had such slight mass that it would not likely have been moved or affected by the collision; and the plaintiff's father testified that it was her habit to play the car radio at a low volume. The bare possibility that the position of the knob may have been disturbed by the activities of rescue personnel bears upon the weight rather than the admissibility of the evidence.

APPEAL by plaintiffs and defendant Southern Railway Co. from *Farmer, Judge.* Judgment entered 13 June 1986 in Superior

Court, WAKE County. Heard in the Court of Appeals 30 September 1987.

On the morning of 3 October 1983, Clara Robinson Hutchins was struck by a National Railroad Passenger Corporation (Amtrak) train as she attempted to drive her automobile across railroad tracks at a crossing located just north of Central Prison in Raleigh. Defendant Brooks, an employee of defendant Seaboard System Railroad, Inc. (Seaboard), was the engineer of the Amtrak train. The crossing at which the accident occurred was marked by a crossbuck on one side but had no lights, gates, or other devices to warn motorists of approaching trains. A dirt road running parallel to the tracks is located to the south of the crossing; to the north is a parking lot for the North Carolina Department of Correction from which one may gain access to Morgan Street. Although it was not a public crossing, the "prison crossing" had been used by members of the public for several years because the Boylan Avenue bridge over the railroad tracks had been closed since 1978.

The "prison crossing" traversed four sets of railroad tracks. Mrs. Hutchins was attempting to cross the tracks from the south side to the north side. The four sets of tracks, proceeding from south to north, consisted of a storage track, a passing track, the northbound mainline and the southbound mainline. The passing and storage tracks were controlled by defendant Southern Railway (Southern) and the two mainlines were jointly controlled by Southern and Seaboard and were operated pursuant to Seaboard's timetable. On the morning of the accident, there were boxcars standing on the passing and storage tracks on both sides of the crossing, having been placed there by Southern employees. The cars standing on the storage and passing tracks to the west of the crossing, the direction from which the Amtrak train approached, were located within thirty feet of the crossing, obstructing vision of the mainline tracks to the west of the crossing. Southern's Operating Rule 103(e) required that cars or engines left standing on tracks must, if possible, be located at least one hundred feet from a public or private crossing.

Officer J. S. Murray, a guard at Central Prison, witnessed the accident from his post on a guard tower at the prison. He testified that Mrs. Hutchins stopped before crossing each set of

tracks. He also testified that he heard the train's horn sound three times as it approached the crossing. Defendant Brooks testified that he saw the front of Mrs. Hutchins' car coming out from behind the parked railroad cars when it was approximately three to four hundred feet in front of the locomotive. He applied the emergency brakes but was unable to stop the train which was travelling at approximately forty-five miles per hour.

Mrs. Hutchins was severely and permanently injured in the collision. She and her husband, Timothy Hutchins, brought this suit to recover for her personal injuries and for Mr. Hutchins' loss of consortium. Following a judicial determination that Mrs. Hutchins was mentally incompetent, her father, Lyndell Robinson, was appointed as her general guardian and was made a party plaintiff. Plaintiffs submitted to a voluntary dismissal of the action as to Amtrak. A jury returned a verdict finding that Mrs. Hutchins' injuries were proximately caused by the negligence of Seaboard and Southern, that she had been contributorily negligent, and that Southern's negligence amounted to willful and wanton negligence. The jury awarded Mrs. Hutchins $1,773,340.00 in compensatory damages and $100,000.00 in punitive damages. Mr. Hutchins was awarded $5,000.00 in compensatory and $5,000.00 in punitive damages. From entry of judgment accordingly, plaintiffs and defendant Southern have appealed.

Thorp, Fuller & Slifkin, P.A., by William L. Thorp and Anne R. Slifkin for plaintiff-appellant Lyndell Robinson, Guardian of Clara Robinson Hutchins.

Thompson & McAllaster, by Carolyn McAllaster for plaintiff-appellant Timothy Allen Hutchins.

Hunton & Williams, by Odes L. Stroupe, Jr. and Julius A. Rousseau, III, for defendant-appellant Southern Railway Company.

Maupin, Taylor, Ellis & Adams, P.A., by John T. Williamson and John C. Millberg for defendant-appellee Seaboard System Railroad, Inc.

MARTIN, Judge.

Southern Railway Company's Appeal

The primary question raised by the twenty-one assignments of error brought forward and argued in the appellant's brief filed by Southern is whether the evidence was sufficient to warrant submission of the issues of willful and wanton negligence and punitive damages to the jury. Although the question is a close one, we conclude that the issues were appropriately submitted. We have also reviewed carefully Southern's other contentions and find no prejudicial error.

[1] Southern has assigned error to several of the trial court's evidentiary rulings. The first of these evidentiary assignments of error is directed to the admission of testimony by Correctional Officer Murray that from 1980 until the date of the accident, he had witnessed several incidents in which vehicles travelling from south to north over the "prison crossing" had nearly been struck by trains. Citing *Martin v. Amusements of America, Inc.*, 38 N.C. App. 130, 247 S.E. 2d 639, *disc. rev. denied*, 296 N.C. 106, 249 S.E. 2d 804 (1978), Southern argues that plaintiffs failed to show that these "near misses" occurred under circumstances sufficiently similar to Mrs. Hutchins' accident to render the evidence relevant. In our view, however, the evidence was relevant, not to show that Mrs. Hutchins' accident occurred under circumstances similar to the "near misses," but as tending to prove the dangerous nature of the crossing and that Seaboard and Southern had notice of the hazard, especially in light of the increased public use of the crossing.

[2] Southern also contends that the trial court erred in admitting the expert opinion testimony of C. O. Miller, who was permitted to testify as an expert witness in the field of "system safety." Southern argues that because Mr. Miller's experience had been primarily in the aviation and aerospace industries, rather than in the railroad industry, he was not qualified to express opinions with respect to the adequacy of Southern's safety program.

The trial judge is afforded broad discretion in determining whether to allow expert testimony; his decision will not be disturbed unless there is no evidence to support it. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370, 45 A.L.R. 4th 1147 (1984). "It is not

necessary that an expert be experienced with the identical subject area in a particular case or that the expert be a specialist, licensed, or even engaged in a specific profession." *Id.* at 140, 322 S.E. 2d at 376, 45 A.L.R. 4th at 1158. In the present case, Mr. Miller's testimony revealed an extensive background of education and experience in the fields of safety and management which included, *inter alia,* teaching courses in safety management and system safety, employment as Director of the Bureau of Aviation Safety of the National Transportation Safety Board, and experience as a consultant in the field of system safety and safety management. He testified that the same principles of system safety applicable to those industries in which he had actual experience were also applicable to railroads. His education, knowledge, and experience in the field were clearly such as to enable him to assist the jury in understanding the evidence with respect to Southern's own safety rules and in relating that evidence to the accident in which Mrs. Hutchins was injured. *See* G.S. 8C-1, Rule 702. Moreover, the testimony given by Mr. Miller was within the scope of his expertise and Southern's contentions to the contrary are overruled.

[3] Southern's next assignments of error are directed to the testimony of Ernest Mallard, whose responsibilities as an engineer employed by the North Carolina Department of Transportation include the signalization of railroad crossings. Mr. Mallard was permitted, over objection, to state his opinion that crossing gates would be the preferred manner of signalization of the "prison crossing." Southern contends that because the "prison crossing" was not a public crossing and had not been evaluated by the Department of Transportation, Mr. Mallard's testimony was speculative and irrelevant. We disagree. Mr. Mallard's testimony was relevant to the issue of whether or not Southern exercised due care with respect to the "prison crossing."

His opinion was given in response to a proper hypothetical question describing the crossing. He specifically qualified his opinion, stating, "if the Board of Transportation had ruled that signalization was required and it was my job to select [the] type of signalization required, I would select gates." Although Mr. Mallard testified as to the various factors considered by the Department of Transportation in determining the need for signalization of crossings, he did not state any opinion with respect to whether

the "prison crossing" required signalization. We see no reasonable possibility that the jury could have been misled or confused by Mr. Mallard's testimony to Southern's prejudice and its assignments of error with respect thereto are overruled.

[4] Southern next assigns error to certain testimony elicited from Dr. Robert Cunitz, a psychologist who was permitted to testify, without objection, as an expert witness in the field of human behavior. Southern contends that Dr. Cunitz's testimony exceeded the area of his expertise. Without repeating all of the testimony to which Southern objects, and mindful of the rule that the admissibility of expert testimony is within the sound discretion of the trial court, *State v. Bullard, supra,* we conclude that the opinions expressed by Dr. Cunitz were within his area of expertise and we find no abuse of discretion in the trial court's rulings with respect thereto. This assignment of error is overruled.

[5] Contending that there was no evidence that Mrs. Hutchins was injured as a result of any willful and wanton negligence on its part, Southern assigns error to the denial of its motions for directed verdict and judgment notwithstanding the verdict with respect to the issues of willful and wanton negligence and punitive damages. In addition, Southern argues that because there was no evidence of willful and wanton negligence, Mrs. Hutchins is barred from recovery by her own contributory negligence.

It is well established that a party's contributory negligence will not preclude recovery for injuries proximately caused by another's willful and wanton negligence. *Fry v. Southern Public Utilities Co.*, 183 N.C. 282, 111 S.E. 354 (1922). Moreover, punitive damages are properly recoverable where injury results from willful or wanton conduct. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393, 62 A.L.R. 2d 806 (1956). The concept of willful and wanton negligence was explained by our Supreme Court in *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929):

> An act is done wilfully when it is done purposely and deliberately in violation of law (citations omitted), or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. (Citation omitted). "The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the

person owing it has assumed by contract, or which is imposed on the person by operation of law." (Citation omitted).

An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. (Citations omitted). A breach of duty may be wanton and wilful while the act is yet negligent . . . . (Citation omitted).

In *Wagoner v. North Carolina Railroad Co.*, 238 N.C. 162, 168, 77 S.E. 2d 701, 706 (1953), the Court stated:

To constitute willful injury there must be actual knowledge, or that which the law deems to be the equivalent of actual knowledge, of the peril to be apprehended, coupled with a design, purpose, and intent to do wrong and inflict injury. A wanton act is one which is performed intentionally with a reckless indifference to injurious consequences probable to result therefrom. Ordinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and willful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly, or intentionally indifferent to the results.

Applying these definitions to the present case, and viewing the evidence in the light most favorable to plaintiff, as is required upon a defendant's challenge to its sufficiency, we are unable to say that plaintiff cannot recover for Southern's willful and wanton negligence under "any reasonable reading of the facts as established by the evidence . . . ." *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E. 2d 796, 800 (1987). Thus, we hold that the issue of Southern's willful and wanton negligence and the issue of punitive damages were properly submitted to the jury.

In order to prove Southern's negligence, plaintiffs relied upon the theory that Southern, by leaving railroad cars standing in the storage and passing tracks in close proximity to the "prison crossing," had rendered the crossing unusually hazardous, giving rise to a duty on its part to take proper precautions to protect persons using the crossing and to warn such persons of the approach of a train. Plaintiffs contended that Southern was negligent in failing to take any such precautions or protective meas-

ures and that Mrs. Hutchins' injuries proximately resulted from such negligence. It was upon this theory that the trial court instructed the jury with respect to the issue of Southern's ordinary negligence. It follows that a finding of willful or wanton negligence must necessarily be predicated upon the same negligent acts.

The evidence tended to show that Southern's Operating Rule 103(e) required that railroad cars left standing on tracks be located at least one hundred feet from a public or private crossing, if possible. According to the testimony of O. G. Mills, Southern's Division Superintendent, cars could be placed more closely to a crossing only with the approval of a supervisory officer, and then only in the event that it did not affect safe use of the crossing. According to Mr. Mills, safety precautions such as placement of a flagman at the crossing or a reduction in speed of trains were required where the placement of railway cars more closely to a crossing than one hundred feet resulted in restricted visibility by motorists using the crossing.

K. L. Johnson was superintendent of Southern's Raleigh terminal at the time of the accident and was aware of the requirements and purpose of Rule 103(e). He was also aware of the "prison crossing" and of its use, at least by Department of Correction employees. Despite this knowledge, Johnson had given approval to the placement of railway cars on the storage track approximately thirty feet from the "prison crossing" and had permitted them to remain at that location for at least two days before the accident. On the night before the accident, Southern employees Neely and Patterson placed cars on the passing track approximately thirty feet from the crossing and left them standing there. Both men were aware of the requirements of Rule 103(e); neither made any effort to determine that their placement of the cars on the passing track complied therewith. Mr. Johnson acknowledged at the trial that the location of the cars created a dangerous situation. The cars created an obstruction to the vision of motorists traversing the crossing from the south side, so that a train approaching on the northbound mainline could not be seen by such motorists until it was approximately one hundred and sixty feet from the crossing. Notwithstanding this dangerous obstruction of vision, Mr. Johnson did not require placement of a flagman or any other safety precaution at the crossing to negate

the danger posed by the obstruction or to give persons using the crossing adequate warning of the approach of a train. In our view, these circumstances permit a reasonable inference that Southern's employees manifested "a reckless indifference to injurious consequences probable to result" from their breach of a duty recognized by law and by Southern's own rules as necessary to the safety of others. *See Wagner, supra; Foster, supra.* The acts of Southern's employees are imputable to it under *respondeat superior. Fry, supra.* These assignments of error are overruled.

[6] Southern also contends that the trial court erred by submitting to the jury an issue of punitive damages in connection with Timothy Hutchins' claim for loss of consortium. Southern argues that a spouse's claim for loss of consortium is a derivative claim and that to permit the recovery of punitive damages in such a claim would "penalize the defendant twice for the same act to one individual." The question has not heretofore been squarely addressed in North Carolina. We reject Southern's contentions and hold that damages for loss of consortium may include punitive damages where the injury results from willful and wanton negligence.

In *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. 295, 266 S.E. 2d 818 (1980), the Supreme Court expressly overruled its former decisions to the contrary and restored a spouse's right to sue for loss of consortium resulting from the negligence of a third party. In doing so, the Court recognized that the loss to the uninjured spouse of the services, society, companionship, sexual gratification, and affection of the injured spouse was a separate wrong, though it resulted from the same wrongful conduct giving rise to a claim by the injured spouse. In order to avoid the prospect of double recovery, the Court required that an action by one spouse for loss of consortium be joined with the other spouse's action for personal injury. *Id.*

In *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E. 2d 489, *reh'g denied*, 320 N.C. 799, 361 S.E. 2d 73 (1987), an action for the wrongful death of a viable fetus, the Court held that punitive damages were recoverable in both the wrongful death action and in an action by the parents for personal injuries. In order to avoid double punishment of defendants for a single act of negligence,

the Court required that the claim for the wrongful death of the fetus be joined with the parents' action based on the same negligent act. *Id.*

> In *Nicholson* there were, of course, two alleged victims—the wife and the husband—and therefore two alleged torts. In this case there are *three* alleged victims—the fetus, the mother and the father. Recovery of punitive damages in the wrongful death action would be related to the death suffered by the fetus, while recovery of punitive damages in the parents' personal injury suit would be related to injuries suffered by the mother and father.

Id. at 433, 358 S.E. 2d at 495 (emphasis original).

Applying the reasoning of *Nicholson* and *DiDonato* to the present case, we hold that punitive damages are available to Mr. Hutchins in his action for loss of consortium as well as to Mrs. Hutchins in her action for personal injury. Rather than being punished twice for a single wrong, Southern is being punished for separate wrongs to separate victims—the physical injury suffered by Mrs. Hutchins and the wholly separate injury suffered by Mr. Hutchins for loss of consortium.

[7] Southern's next assignments of error relate to comments made by plaintiff's counsel in his closing argument to the jury. The remarks to which Southern excepts include comments based on counsel's personal experience and a suggestion that Southern's witnesses had been coached. When Southern objected to the remarks, the trial court admonished plaintiff's counsel to confine his argument to those matters in evidence and later instructed the jury to "disregard what [the attorneys] say the evidence is or tends to show and be guided exclusively by your own recollection of the evidence." While we agree with Southern that counsel's remarks were inappropriate and beyond the proper bounds of vigorous argument, we do not believe that the improprieties were so flagrant as to influence the jury's verdict and thus we decline to award a new trial by reason thereof. *See State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

Southern next assigns error to various portions of the trial court's charge to the jury. Southern argues that the trial court erred both in giving certain instructions to the jury, as well as in

refusing to give other instructions requested by it. We have thoroughly reviewed the trial court's charge and find no prejudicial error therein.

Jury instructions must be considered and reviewed in their entirety; the instructions will not be dissected and examined in fragments. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967). Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury. *Id.*; *Caldwell v. Southern Railway Co.*, 218 N.C. 63, 10 S.E. 2d 680 (1940). Bearing these principles in mind, we address Southern's arguments.

[8] Southern first assigns error to the following portion of the charge, given by the court on the issue of Engineer Brooks' negligence:

> Even though there are posted signs which are adequate to give a traveler upon the highway any notice of the presence of a railroad crossing, it is also the duty [sic] the railroad to give reasonable and timely warning of the approach of its train to the crossing by the blowing of the whistle or horn, by ringing the bell, *and* by some other device reasonably calculated to attract the attention of those approaching the crossing upon the highway.

(Emphasis added.) Southern argues that the court should have said "*or* by some other device" rather than "*and* by some other device." Assuming *arguendo* that it was error for the trial court to use the word "*and*," we note that when the court subsequently instructed the jury upon the issues of negligence on the part of Seaboard and Southern, it gave essentially the identical instruction, but used "or" rather than "and." Moreover, when the jury requested that it be reinstructed upon the issue of negligence of Seaboard and Southern, the trial court again used the word "or." We find no reasonable possibility that the instruction complained of by Southern resulted in any prejudice to it, particularly since the instruction which it contends is the correct one was given to the jury with respect to the issue of Southern's negligence.

> An appellate court, by careful examination, may not infrequently find errors in language used or omitted by the

> trial judge in his instructions to the jury upon issues of fact, but in accord with a less technical and more liberal conception of the power to review, the court may also, upon due consideration of all the circumstances surrounding the trial and in light of the matter under investigation, perceive that the errors complained of neither misled the jury nor affected the impartiality of the trial.

Caldwell, supra, at 71-72, 10 S.E. 2d at 694. This assignment of error is overruled.

[9] Southern also assigns error to the following portion of the jury instructions, given on the issue of Seaboard's negligence and incorporated by reference into the court's charge on the issue of Southern's negligence:

> The exercise of due care on the part of the railroad *requires* erection of gates or signal devices or the maintenance of a flagman or some other extraordinary protective means where the crossing is unusually hazardous or dangerous.

(Emphasis added.) Citing *Caldwell, supra*, Southern argues that the court should have instructed the jury using the words "may require" rather than "requires." Southern contends that the instruction given left the jury no alternative but to find Southern negligent due to the absence of gates or signals from the crossing. We disagree.

When the charge is examined in its entirety, it is evident that the law was correctly explained to the jury. In *Caldwell, supra*, the court approved the following instructions:

> Where a railroad crossing is not peculiarly and unusually dangerous, the exercise of due care on the part of the railroad company does not require it to provide gates, signal devices, watchman, or other such safety methods. However, the exercise of due care on the part of the railroad company *may* require the erection of gates or signal device [sic] or the maintenance of a watchman where the crossing is unusually and peculiarly hazardous. It is for the jury to say whether the crossing in question was, under all the circumstances, peculiarly and unusually hazardous *so as to require* the railroad in the exercise of due care to erect gates or signal

> devices or maintain a flagman or such other means of warning and safety.

Id. at 70, 10 S.E. 2d at 688 (emphasis added). We find similar wording in the charge given in this case. Immediately preceding the portion of the instruction to which Southern assigns error, the court charged the jury as follows:

> Ordinarily at a grade crossing where no unusually dangerous or hazardous conditions exist, timely signals by sounding the bell or blowing the whistle are adequate; but where there are circumstances of more than ordinary danger and where the surroundings are such as to render the crossing peculiarly and unusually dangerous to those who have a right to pass over it, these factors must be considered in determining whether under the circumstances the operator of the railroad has exercised due care in providing reasonable protection for those who use the crossing *and whether the degree of care which the operator of the railroad is required to exercise to avoid injury at grade crossings imposes the duty to provide safety devices at the crossing.* A violation of that duty is negligence.

(Emphasis added.) Considered contextually, the trial court's instructions provided an adequate explanation of the railroad's duty.

[10] Southern also contends that the trial court erred by failing to instruct the jury in accordance with its request for an instruction explaining the legal effect of its violation of its own internal safety rules. Southern correctly argues that a violation of its safety rules is only some evidence of negligence. Therefore, it contends, the trial court should have instructed, as it requested, that a violation of internal safety rules was not negligence *per se*. The internal safety rule to which Southern refers is Southern's internal Operating Rule 103(e), prohibiting the parking of railroad cars within one hundred feet of a crossing. The trial court is required to give a party's requested instructions when they are correct and supported by the evidence; however, they need not be given exactly as submitted, but must only be given in substance. *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976); *State v. Mayes*, 86 N.C. App. 569, 359 S.E. 2d 30 (1987). Our review of the instructions reveals that the trial court gave the substance of the re-

quested instruction by instructing the jurors that "[o]bstructions in themselves do not constitute negligence . . . ." This assignment of error is overruled.

[11] Southern has assigned error to the court's refusal to instruct the jury in other particulars requested by it. We have examined these requests and conclude that they consisted of explanations of the law's application to the evidence in this case. Such instructions are no longer required. *See* G.S. 1A-1, Rule 51; 1985 Sess. Laws, c. 537, s. 2. The trial court's instructions to the jury adequately defined the law with respect to every substantive feature of the case. Southern's contentions to the contrary are overruled.

[12] During the jury's deliberations, the jury requested that it be permitted to see one of plaintiff's exhibits—a Seaboard internal memorandum tending to show that Seaboard's division superintendent was aware of frequent public usage of the prison crossing. Over Seaboard's objection, in which Southern later joined, the court permitted the exhibit to be sent to the jury room. Later in its deliberations, the jury requested that the court send thirteen photographic exhibits to the jury room. Without either the consent or objection of any party, the court granted the request and permitted the exhibits to be taken to the jury room. Southern argues that by permitting exhibits to be taken to the jury room without the express consent of all parties, the trial court committed reversible error automatically entitling it to a new trial. We disagree.

It is well established in this State that it is error for the trial court to allow the jury to take exhibits to the jury room during deliberations unless all parties have consented thereto. *Nicholson v. Lumber Co.*, 156 N.C. 59, 72 S.E. 86 (1911); *Doby v. Fowler*, 49 N.C. App. 162, 270 S.E. 2d 532 (1980).

> The jury ought to make up their verdict upon evidence offered to their senses, *i.e.*, what they see and hear in the presence of the court, and should not be allowed to take papers, which have been received as competent evidence, into the jury room, so as to make a comparison of hand-writing, or draw any other inference which their imaginations may suggest, because the opposite party ought to have an opportuni-

> ty to reply to any suggestion of an inference contrary to what was made in open court.

Watson v. Davis, 52 N.C. 178, 181 (1859). Furthermore, the failure to make a timely objection to the taking of the exhibits to the jury room does not waive the error; "specific consent is required" of all parties. *Doby, supra*, at 164, 270 S.E. 2d at 533. Thus, it was error for the judge to allow the jury to take the exhibits to the jury room during its deliberations.

In our view, however, this error does not require a new trial. Notwithstanding decisions which have, without discussing whether similar errors resulted in prejudice, treated them as reversible *per se*; *see, e.g., State v. Stephenson*, 218 N.C. 258, 10 S.E. 2d 819 (1940); *Brown v. Buchanan*, 194 N.C. 675, 140 S.E. 749 (1927); *Nicholson v. Lumber Co., supra*; *Outlaw v. Hurdle*, 46 N.C. 150 (1853); *Doby, supra*; we believe that the party asserting the error must demonstrate that he has been prejudiced thereby. We find support for this position in *Posey v. Patton*, 109 N.C. 455, 14 S.E. 64 (1891), where the Court found no error when the trial court had made the written notation "$493.88, with interest from 1 May 1890," upon the issue sheet submitted to the jury and neglected to erase the notation before submitting the paper to the jury. The jury returned a verdict in the precise amount of the notation. After realizing its mistake, the court brought the matter to the attention of the jury, which responded that it had not been influenced by the notation. Our Supreme Court commented: "If there had been anything tending even to put it in doubt, whether prejudice may not have been done the appellant by the inadvertence, we feel sure the just judge who presided would unhesitatingly and promptly have set the verdict aside." *Id.* at 457, 14 S.E. at 65. In *State v. Haltom*, 19 N.C. App. 646, 199 S.E. 2d 708 (1973), *cert. denied and appeal dismissed*, 284 N.C. 619, 201 S.E. 2d 691 (1974), a panel of this court held that the trial court's error in allowing the jury to take the State's evidence to the jury room was not grounds for a new trial where the defendant failed to show that the error was prejudicial. *See also State v. Bell*, 48 N.C. App. 356, 269 S.E. 2d 201, *appeal dismissed*, 301 N.C. 528, 273 S.E. 2d 455 (1980). And in *Collins v. Ogburn Realty Co.*, 49 N.C. App. 316, 271 S.E. 2d 512 (1980), the court granted a new trial because the trial court erroneously allowed the jury to view exhibits, and because it believed "that such action by the trial court prejudicially af-

fected plaintiffs' right to have the question submitted to the jury considered impartially . . . ." *Id.* at 321, 271 S.E. 2d at 515. Finally, G.S. 1A-1, Rule 61, provides that error is not grounds for a new trial unless it amounts to the denial of a substantial right.

We perceive no way in which justice can be effectively served by requiring a new trial due to error that could not have affected the rights of the complaining party. Southern has not demonstrated that it was prejudiced in any manner by the fact that the Seaboard memorandum or the photographs were taken to the jury room. This assignment of error is overruled.

Plaintiffs' Appeal

Plaintiffs have specifically abandoned all of their assignments of error save two, both of which relate to evidence admitted over their objection and bearing upon Mrs. Hutchins' ability to hear the approaching train and thus relevant to the issue of her contributory negligence. Though the verdict of the jury finding willful and wanton negligence on the part of Southern and our decision upholding that verdict render moot any question of Mrs. Hutchins' contributory negligence as between plaintiffs and Southern, the same is not true as between plaintiffs and Seaboard because Seaboard's negligence was not found willful and wanton by the jury.

[13] The first of plaintiffs' assignments of error concerns the testimony of David Nibbelin, an expert witness in the field of acoustics who had conducted certain tests or experiments at the "prison crossing" in an attempt to determine the audibility of the train horn to Mrs. Hutchins as she approached and traversed the crossing on the date of the accident. Plaintiffs contend that the conditions under which the experiments were conducted were acoustically dissimilar to the conditions existing on the date of the accident so that Mr. Nibbelin's testimony concerning the tests and the results thereof was inadmissible. We disagree.

An experiment must be made under substantially similar circumstances to those existing at the time of the occurrence with which the action is concerned, and the results of the experiment must have a logical tendency to prove or disprove an issue arising out of that occurrence. *Mintz v. Atlantic Coast Line Railroad Co.*, 236 N.C. 109, 72 S.E. 2d 38 (1952). However, substantial similarity

is sufficient, and a lack of complete similarity goes to the weight, not the admissibility, of the testimony. *State v. Brown*, 280 N.C. 588, 187 S.E. 2d 85, *cert. denied*, 409 U.S. 870, 34 L.Ed. 2d 121, 93 S.Ct. 198 (1972); *State v. Phillips*, 228 N.C. 595, 46 S.E. 2d 720 (1948); *Short v. General Motors Corp.*, 70 N.C. App. 454, 320 S.E. 2d 19, *disc. rev. denied*, 312 N.C. 623, 323 S.E. 2d 924 (1984). If differences of condition are such as will not cause confusion and can be explained in such a way that the trier of fact may reasonably evaluate their effect, then the trial court may, in its discretion, properly allow the evidence. *State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975). "Whether substantial similarity does exist is a question which is reviewable by the appellate courts in the same manner as is any other question of law." *Id.* at 98, 214 S.E. 2d at 34.

In his experiment, Mr. Nibbelin utilized an engine and whistle identical to those involved in the accident, the whistle having a pressure approximately two pounds per square inch less than on the day of the accident. Mr. Nibbelin used a car of the same model as that driven by Mrs. Hutchins, had the transmission in the "drive" position with the heater on and the radio tuned according to indications given him by witnesses. The engine was driven by Engineer Brooks, just as it had been on the day of the accident, and Prison Guard Murray was present to give guidance so that the whistle could be blown in a manner as similar as possible to the way it was blown on the day of the accident. Railroad cars were positioned on the storage and passing tracks much as they had been at the time of the accident. Weather conditions were similar. Mr. Nibbelin testified that, due to differences in frequency levels, noises such as might have been made by construction work or traffic on the date of the accident, but not present at the time of the experiment, would have had a negligible effect on Mrs. Hutchins' ability to hear the train whistle. We believe that substantial similarity existed between conditions existing at the time of the accident and those existing at the time of the experiment, and that the dissimilarities complained of by plaintiffs were sufficiently explained as to enable the jury to evaluate the differences and determine the proper weight to be given the evidence. Moreover, Mr. Nibbelin's testimony clearly had probative value on the question of whether Mrs. Hutchins received adequate warning of the train's approach and was therefore relevant to the issues of defendants' negligence and Mrs. Hutchins' con-

tributory negligence. There was no error in the admission of this testimony.

[14] By their other assignment of error, plaintiffs contend that the trial court erred by permitting the investigating police officer to testify as to the position in which he found the volume control knob of Mrs. Hutchins' car radio two days after the accident. Plaintiffs argue that the position of the knob at the time of the officer's inspection of the car is not competent evidence of its position at the time of the accident because it could have been altered in any number of ways, such as the force of the collision, the movements of emergency medical personnel attending to Mrs. Hutchins inside the car after the accident, or tampering.

The test for determining whether evidence of a condition existing at one time is admissible as evidence of a condition existing at another time "depends altogether on the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime." *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 241, 210 S.E. 2d 181, 185 (1974), *quoting* 1 Stanbury's North Carolina Evidence § 90 (Brandis Rev. 1973). "The proper inquiry in each instance is the degree of likelihood that the condition has remained unchanged." *Id.* at 242, 210 S.E. 2d at 185. The admissibility of such evidence is largely a matter within the discretion of the trial court. 1 Brandis on North Carolina Evidence § 90 (2nd Rev. Ed. 1982).

The evidence with respect to the position of the radio volume control knob was relevant to the question of Mrs. Hutchins' ability or inability to hear the horn of the approaching train and, thus, to the issue of her contributory negligence. The police officer testified that at the time of his inspection of the automobile, the radio volume control knob was "one quarter on." The wrecker operator who removed the vehicle from the scene of the accident testified that he had not manipulated the controls nor, to his knowledge, had anyone at his place of business. Mr. Nibbelin testified that the knob had such slight mass that it would not likely have been moved or affected by the collision. Mrs. Hutchins' father testified that it was her habit to play her car radio, but at a low volume. The foregoing evidence demonstrates a reasonable likelihood that the position of the volume control remained un-

changed from the time of the accident until the officer's inspection of the car two days later. The bare possibility that the position of the knob may have been disturbed by the activities of rescue personnel is a circumstance bearing upon the weight, rather than the admissibility, of the evidence. The admission of the evidence was neither error nor an abuse of discretion.

After careful consideration of the assignments of error brought forward by Southern and by plaintiffs, we conclude that all parties received a fair trial free of prejudicial error.

No error.

Judges WELLS and EAGLES concur.

BARNHILL SANITATION SERVICE, INC. v. GASTON COUNTY

No. 8727SC116

(Filed 17 November 1987)

1. **Rules of Civil Procedure § 56— summary judgment—failure to rule on motion to strike portions of affidavits**

While it was error for the trial court to fail to rule on plaintiff's motion to strike portions of affidavits filed by defendant before ruling on defendant's motion for summary judgment, such error was not a clear abuse of discretion which precluded the plaintiff from presenting proper evidence in opposition to defendant's motion for summary judgment.

2. **Counties § 2.1— landfill fees—free use by private citizens—ordinance not arbitrary and discriminatory**

A county landfill fee ordinance was not arbitrary, discriminatory and in excess of the county's authority under N.C.G.S. § 153A-277(a) because it allowed private citizens to use a county landfill without charge but imposed fees on all commercial, industrial and municipal haulers who use a landfill since a county's fees may vary according to classes of service, and the ordinance made a reasonable distinction based on volume of use.

3. **Counties § 2.1— landfill fee ordinance—free use by private citizens—equal protection**

A county landfill fee ordinance did not violate the equal protection clauses of the U. S. and N. C. Constitutions because it allowed private citizens to use a county landfill without charge but imposed fees on all commercial, industrial and municipal haulers since the classification in the ordinance is rationally based on volume of use.

4. **Counties § 2.1; Taxation § 2— landfill use fees—no illegal tax**

Fees imposed by a county for the use of its landfill did not constitute an illegal nonuniform tax and were authorized by N.C.G.S. § 153A-292.

5. **Counties § 2.1; Constitutional Law § 4.1— county landfill fee ordinance—no standing to challenge fees to municipalities**

Plaintiff corporation, which operates a garbage collection business, has no standing either as a taxpayer or as an agent of a municipality to challenge the legality of landfill disposal fees imposed by a county upon municipalities.

APPEAL by plaintiff from *Gaines, Robert E., Judge.* Judgment entered 6 November 1986 in Superior Court, GASTON County. Heard in the Court of Appeals 26 August 1987.

This is a civil action wherein plaintiff seeks a declaratory judgment with respect to the constitutionality of G.S. Sec. 153A-292 and the constitutionality and validity of an ordinance enacted by Gaston County which authorizes charges of fees to commercial, industrial, and municipal haulers to use a landfill operated by defendant.

Defendant Gaston County has operated one or more landfills for the disposal of solid waste for approximately twenty years. The entire operation of the county including landfill operations is financed from total revenues that are not otherwise specifically earmarked. Revenues have not been earmarked specifically to finance landfill operations since fiscal year 1983-84 when the landfill was financed with general revenue sharing funds. Since 1965 municipalities have been charged a per capita fee for the disposal of solid waste of one dollar per person to partially defray the costs of solid waste disposal.

In 1983, the commissioners of Gaston County recognized that the development and refinement of a comprehensive solid waste disposal plan was needed because the available landfill space was rapidly depleting. Gaston County had closed two of its four available landfills since December 1982. In addition, Gaston County has restricted the use of a third landfill to residential customers because of lack of usable space, and was within several months of running out of space at the fourth and last available landfill. Among the factors to be considered in reviewing the solid waste disposal situation were the high costs associated with developing a new landfill, the potential liability associated with landfill operations and the construction of a resource recovery solid waste

burning disposal facility. A tipping or disposal fee was proposed as an alternative to the garbage problem.

On 14 March 1985, the Board of Commissioners of Gaston County approved a resolution effective 1 July 1985 authorizing the collection of landfill fees from all commercial, industrial and municipal haulers for the disposal of solid waste at Gaston County landfills at a cost of three dollars per ton. This landfill fee partially defrays the six dollars and fifty cents per ton estimated cost of disposing such waste at Gaston County's landfills at the time of the enactment of the ordinance and the estimated cost of ten dollars to twelve dollars per ton anticipated for the future. Effective with the initiation of the landfill fee, the one dollar per capita fee for municipalities was abolished. This plan assumed that new landfill sites would be identified and bought so that scales could be in place to collect fees by the ton. Delays in landfill site selection delayed scale installation and fee collections did not begin as scheduled.

In September 1985, the Board approved an alternate plan to collect fees by cubic yard. On 18 November 1985, a fee of one dollar per cubic yard volume (vehicle capacity) for all commercial, industrial and municipal haulers was effected. County residents are permitted to either put their household waste in roadside garbage collection containers ("Green Boxes") maintained by Gaston County or bring those wastes directly to the landfill in their personal vehicles without charge.

Plaintiff-appellant, Barnhill Sanitation Service, Inc. (hereinafter Barnhill), is engaged in the garbage collection business collecting garbage for individuals, businesses and municipalities. Barnhill filed its complaint, initiating the action as a class action on 11 February 1986 and filed an amended complaint on 7 April 1986. Plaintiff, in its amended complaint, alleged that the landfill disposal fee schedule, both on its face and as applied to plaintiff and the class, resulted in the levy of arbitrary, unreasonable and discriminatory rates in violation of G.S. Sec. 153A-277(a), that the landfill fee ordinance created a disposal fee which was illegal and invalid under G.S. Sec. 153A-292, that the disposal fee is a tax and lacks equality and uniformity as required by Article V, Section 2 of the North Carolina Constitution and the due process and equal protection clauses of the United States Constitution, that G.S.

Sec. 153A-292 is unconstitutional under the due process and equal protection clauses of the North Carolina and United States Constitutions because it excepts municipalities from disposal fees, thereby creating classifications favoring municipalities as opposed to citizens outside of municipalities, and that the disposal fee as enacted violates public policy. Defendant Gaston County filed its answer on 14 April 1986 and filed its answer to the amended complaint on 2 May 1986. On 2 October 1986, defendant filed a motion to dismiss pursuant to Rule 12(b)(6), a motion for summary judgment in the alternative and a motion to dismiss the action as not having been brought properly as a class action pursuant to Rule 23. In support of these motions defendant relied on the pleadings on file and the affidavits of Philip L. Hinely (Gaston County Manager), Ronald L. Courtney (Gaston County Finance Director) and Richard H. Wyatt (Director, Gaston County Engineering Department). On 8 October 1986, plaintiff filed a response to defendant's motions. On 14 October 1986, plaintiff filed motions to strike portions of the affidavits of Richard H. Wyatt and Philip L. Hinely. On 6 November 1986, the trial court granted defendant's motion for summary judgment thereby dismissing the action. From the entry of summary judgment plaintiff appeals.

Kelso & Ferguson, by Lloyd T. Kelso, for plaintiff appellant.

Charles L. Moore (County Attorney, Gaston County); and Womble Carlyle Sandridge & Rice, by Anthony H. Brett, for defendant appellee.

JOHNSON, Judge.

Plaintiff appellant brings forth four Assignments of Error. Plaintiff contends that the trial court erred in failing to rule on plaintiff's motion to strike portions of the affidavits of Richard Wyatt and Philip Hinely, granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment.

[1] Plaintiff, in its first and second Assignments of Error, contends that prior to the trial court ruling on motions for summary judgment, it was incumbent upon the trial court to rule on its motions to strike portions of the respective affidavits. More specifically, plaintiff contends that the information contained in de-

fendant's supporting affidavits prejudiced plaintiff's arguments in attacking the landfill disposal fee.

While we agree that it was error for the judge not to rule on motions to strike portions of the affidavits prior to ruling on motions for summary judgment, we find that such error was not a clear abuse of discretion so as to preclude the plaintiff from presenting proper evidence in opposition to defendant's motion for summary judgment.

"[W]here matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985). In *Sullivan v. Johnson*, 3 N.C. App. 581, 165 S.E. 2d 507 (1969), the trial court failed to rule on plaintiff's motions to strike certain portions of defendant's answer on grounds that those portions were conclusions of law or allegations of evidentiary matter, and not allegations of ultimate facts. This court held that the plaintiff, having filed his motion in apt time, was entitled to be heard thereon. (Under G.S. 1-153, now repealed, a motion to strike made in apt time was made as a matter of right.) "The right to make a motion to strike would be an empty one unless it included the right to have the motion ruled upon." *Id.* at 583, 165 S.E. 2d at 508. The reason this Court reversed and remanded that case was that in addition to the court's failure to rule upon plaintiff's motion to strike, the court had no authority to make findings of fact on controverted issues, where the record did not show the hearing of evidence, the waiver of a trial by jury, or an agreement as to the facts. In the case *sub judice*, the record reveals that the court considered all the contentions of the parties and considered all the evidence presented by the parties before ruling on the motions before it. Although it was error for the court not to rule on plaintiff's motions to strike, we find that the record shows that the trial court did not abuse its discretion.

Plaintiff in its third Assignment of Error contends that the trial court erred in granting defendant's motion for summary judgment. 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 court is not authorized to decide an issue of fact but to determine if such an issue exists. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). The party moving for summary judgment has the burden of proving that no genuine issue of material fact exists. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). Once the moving party has submitted materials in support of the motion, however, the burden shifts to the opposing party to produce evidence establishing that the motion should not be granted. *Id.* at 370, 289 S.E. 2d at 366.

[2] First, Barnhill argues that the enactment of the fee was arbitrary, discriminatory, and in excess of statutory ratemaking authority because it allowed private citizens to use the landfill without charge, while it imposed fees on all commercial, industrial, and municipal haulers who used the landfill. We find that this argument is without merit.

"Counties are instrumentalities and agencies of the State government and are subject to its legislative control; they possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them." *High Point Surplus Co. v. Pleasants, Sheriff*, 264 N.C. 650, 654, 142 S.E. 2d 697, 701 (1965). Thus, any power which a county possesses must be exercised in conformity with the laws of the state. G.S. Sec. 153A-11. G.S. Sec. 153A-275 grants counties the specific power to establish and operate a public enterprise, such as a landfill for the disposal of solid waste. "A county may by ordinance or resolution adopt adequate and reasonable rules and regulations to protect and regulate a public enterprise belonging to or operated by it." *Id.* Furthermore, G.S. Sec. 153A-277(a) governs the authority of a county to fix fees:

> A county may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties *for the use of* or the services furnished by *a public enterprise.* Schedules of rents, rates, fees, charges, and penalties may vary for the same class of service in different areas of the county and *may vary according to classes of service*, and different schedules may be adopted for services provided outside of the county. (Emphasis added.)

"Under this broad, unfettered grant of authority, the setting of such [fees] is a matter for the judgment and discretion of [coun-

ty] authorities not to be invalidated by the courts absent some showing of arbitrary or discriminatory action." *Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 212-13, 280 S.E. 2d 490, 492 (1981).

It is clear to this Court that the county acted within its powers as authorized by G.S. Sec. 153A-277(a). It was not a levy of an unreasonable discriminatory rate to charge only commercial, industrial and municipal haulers of garbage for the use of the landfills. "Rates may be fixed in view of dissimilarities in conditions of service, but there must be some reasonable proportion between the variance in the conditions and the variances in the charges. Classification must be based on substantial difference." *Utilities Commission v. Mead Corp.*, 238 N.C. 451, 465, 78 S.E. 2d 290, 300 (1953) (citations omitted). Furthermore, a county, like

> [a] municipality has the right to classify consumers under reasonable classifications based upon such factors as the cost of service, the purpose for which the service or the product is received, the quantity or the amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a ground of distinction.

Wall v. City of Durham, 41 N.C. App. 649, 659, 255 S.E. 2d 739, 745 (1979).

Since the county is allowed to establish a schedule of fees according to classes of service, the class of garbage haulers, whose volume of garbage delivered to the landfill is substantially more than private citizens and, whose commercial use of the landfill is substantially more than private citizens, perfectly justifies a reasonable distinction in the fees charged. Accordingly, Gaston County has a landfill fee schedule based upon the kind of service provided and consistent with G.S. Sec. 153A-277(a).

[3] Second, plaintiff contends that the landfill fee ordinance violates state and federal guarantees of equal protection. Plaintiff's argument is essentially based on the same premise proffered in argument one, i.e., that the disposal fee is arbitrary because it is not applied to all users of the landfill since individuals and users of the Green Boxes can dump garbage free of charge. We find defendant's contention is without merit.

"The equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirements that any legislative classification 'be based on differences that are reasonably related to the purposes of the Act in which it is found.' " *State v. Greenwood*, 280 N.C. 651, 656, 187 S.E. 2d 8, 11-12 (1972), *quoting, Morey v. Doud*, 354 U.S. 457, 465, 77 S.Ct. 1344, 1350, 1 L.Ed. 2d 1485, 1491 (1957).

Courts traditionally have employed a two-tiered scheme of analysis when evaluating equal protection claims. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980). The upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantages of a suspect class. (Citations omitted.) The "strict scrutiny" standard requires that the government demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest. *Id.* at 11, 269 S.E. 2d at 149.

When a governmental classification does not burden the exercise of a fundamental right, or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied. "The 'rational basis' standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity." *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E. 2d 199, 204 (1983).

Plaintiff has not asserted membership in a suspect class such as race, religion or alienage nor argued that the ordinance discriminates on such a basis, and we perceive no basis for doing so. Nor has plaintiff alleged that the ordinance has burdened the exercise of a fundamental personal right. There being no fundamental right or suspect class involved in plaintiff's equal protection challenges, the "rational basis" test is appropriate. The record makes clear that the landfill fee ordinance is an economic regulation aimed at providing a viable solution to the growing depletion of available landfill space for the proper disposal of garbage. The

county's classification of requiring all commercial, industrial and municipal haulers to pay a user fee, because they are the major users of the landfill, rationally furthers the purpose the county has identified as its objective in enacting the ordinance. The private citizens' use of the landfill is not commensurate with the volume of business utilized by the commercial haulers. Plaintiff contends that the county experiences no greater cost per ton in disposing of the residential waste dumped directly at the landfill by residential homeowners than in disposing of similar wastes that are either dumped directly into the landfills by citizens or dumped into Green Boxes. This argument adds no further credence to plaintiff's claim. The right to equal protection does not promise or guarantee economic or financial equality as long as the ordinance was rationally related to a legitimate governmental objective. The feasibility of the city utilizing a cost effective system to ameliorate the landfill availability problem was at issue, and was properly resolved by the landfill fee adopted by the county. The alleged economic disadvantage that plaintiff asserts is a cost it must bear. We conclude that there is a reasonable basis for the classification in the ordinance. Therefore, the classification does not violate the equal protection guarantees of either our state or the federal constitutions.

[4] Next, plaintiff contends that the disposal fee at issue is an illegal tax. We find this contention is without merit.

While not discussed earlier, G.S. Sec. 153A-292 authorizes Gaston County to collect the fees charged for use of the landfill. The county is also authorized under G.S. Sec. 153A-292 to levy taxes to carry out the authority of this governing statute. G.S. Sec. 153A-292 provides that:

> The board of county commissioners of any county is hereby empowered to establish and operate garbage, refuse, and solid waste collection and disposal facilities, or either, in areas outside of incorporated cities and towns where, in its opinion, the need for such facilities exists. The board may by ordinance regulate the use of such garbage, refuse, and solid waste disposal facilities; the nature of the solid wastes disposed of therein; and the method of disposal . . . . The board may contract with any municipality, individual, or privately owned corporation to collect and dispose, or collect or

dispose, of garbage, refuse, and solid waste in any such area provided no county shall be authorized by this Article to levy a disposal fee upon any municipality located in that county if the board of commissioners levy a countywide tax on property which provides in part for financing such disposal facilities. In the disposal of garbage, refuse, and solid waste, the board may use any vacant land owned by the county, or it may acquire suitable sites for such purpose. The board may make appropriations to carry out the activities herein authorized. *The board may impose fees for the use of disposal facilities*, and in the event it shall provide for the collection of garbage, refuse, and solid waste, it may charge fees for such collection service sufficient in its opinion to defray the expense of collection. Counties and municipalities therein are authorized to establish and operate joint collection and disposal facilities, or either of these, upon such terms as the governing bodies may determine. Such agreement shall be in writing and executed by the governing body of the participating units of local government.

The board of commissioners of each county is hereby authorized to levy taxes for the special purpose of carrying out the authority conferred by this section, in addition to the rate of tax allowed by the Constitution for general purposes, and the General Assembly hereby gives its special approval for such tax levies. . . . (Emphasis added.)

A tax within the meaning of the constitutional prohibition against nonuniformity of taxation is a charge levied and collected as a contribution to the maintenance of the general government, and it is imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue. *State ex rel. Dorothea Dix Hospital v. Davis*, 292 N.C. 147, 232 S.E. 2d 698 (1977). However, the landfill fees, like sewer service charges, "are neither taxes nor assessments, but are tolls or rents for benefits received by the use of the [landfill] . . ." *Covington v. City of Rockingham*, 266 N.C. 507, 511-12, 146 S.E. 2d 420, 423 (1966). The record reveals that the Board of Commissioners adopted landfill fees as opposed to increased property tax as the most equitable source of revenue to fund sanitary landfill costs. It is clear to this Court that Gaston County did not levy a tax, as it had the power to do, but acted pursuant to its authority under

G.S. Sec. 153A-292 to set reasonable fees for the use of its available landfills.

[5] Plaintiff next contends that the landfill fee schedule exceeds the county's statutory authority by imposing a disposal fee on municipal haulers. Defendant, in its brief, contends that plaintiff lacks standing to raise the rights of a municipality under G.S. Sec. 153A-292. Plaintiff contends that it has standing to challenge the legality of the landfill disposal fee ordinance on behalf of the municipalities subject to it (as agent of the municipality) and alternatively as a taxpayer.

For the reasons stated below, we find that the plaintiff lacks standing on either theory presented.

We first address plaintiff's allegation that it has taxpayer standing. In deciding a question on taxpayer standing, our Supreme Court in *Nicholson v. State Education Assistance Authority*, states that "[a] taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation. A taxpayer, as such, may challenge, by suit for injunction, the constitutionality of a tax levied, or proposed to be levied, upon him for an illegal or unauthorized purpose." 275 N.C. 439, 447-48, 168 S.E. 2d 401, 406 (1969). Having previously determined that the disposal fee was not a levy of a tax, plaintiff cannot seek to raise the question of the validity of a tax, where there is none.

We now address plaintiff's allegation that it has standing as an agent of the municipality. Our Supreme Court in *State v. Trantham*, 230 N.C. 641, 644, 55 S.E. 2d 198, 200-01 (1949), laid down the following guidelines on the question of standing:

> 'Courts never anticipate a question of constitutional law before the necessity of deciding it arises.' They will not listen to an objection made to the constitutionality of an ordinance by a party whose rights it does not affect and who therefore has no interest in defeating it. (Citations omitted.)

Furthermore, in *Trantham*, the Court said:

> It is not sufficient to show discrimination. It must appear that the alleged discriminatory provisions operate to the hurt of the defendant or adversely affect his rights or put him to a disadvantage. (Citations omitted.)

> When the class which includes the party complaining is in no manner prejudiced, it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of the law. He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against. (Citations omitted.)

Id.

Plaintiff in its brief isolates a proviso of a sentence in G.S. Sec. 153A-292 which indicates that a disposal fee may not be levied upon any municipality in that county if the board of commissioners levy a countywide tax on property which provides in part for financing such disposal facilities. However, the entire sentence reads:

> The board may contract with any *municipality, individual,* or *privately owned corporation* to collect and dispose, or collect or dispose, of garbage, refuse, and solid waste in any such area provided *no county shall be authorized by this Article to levy a disposal fee upon any municipality* located in that county *if the board of commissioners levy a countywide tax on property which provides in part for financing such disposal facilities.* (Emphasis added.)

In order to obtain a proper interpretation of this sentence, the overall purpose of the proviso must be ascertained. In *Propst v. Railroad,* 139 N.C. 397, 398, 51 S.E. 920, 921 (1905), our Supreme Court provided the following on the purpose of a proviso:

> The general office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality or to exclude some possible ground of misinterpretation of it, and usually it is not permitted to enlarge the meaning of the enactment to which it is appended, so as itself to operate as a substantive enactment. It relates generally to what immediately precedes it and is confined by construction to the subject-matter of the section of which it is a part.

This proviso makes an exception for municipalities, but not for individual or privately owned corporations. The primary rule of statutory construction is that the intent of the Legislature con-

trols. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). The intent of the Legislature may be ascertained from the phraseology of the statute as well as the nature and purpose of the act and the consequences which would follow from a construction one way or another. *In re Hardy, supra.* The record reveals that plaintiff is a privately owned corporation. As such, plaintiff cannot now assert the status of a municipality in order to challenge the validity of the ordinance as an agent of the municipality. To interpret the statute as plaintiff alleges would lead to an absurd result. *See, Helms v. Powell*, 32 N.C. App. 266, 231 S.E. 2d 912 (1977).

Occupying the status of a non-municipality, therefore, plaintiff is not in the class it asserts is affected by the statute. Since plaintiff is not in the class affected, it has no standing to challenge the landfill ordinance at issue under G.S. Sec. 153A-292.

The remaining two issues raised by plaintiff in its third Assignment of Error; whether a refund of fees paid pursuant to ordinances may be obtained and whether plaintiff may maintain this action as a class action, we find unnecessary to address in consideration of our previous findings.

Plaintiff's final argument cites as error the court's failure to allow plaintiff's alternative motion for summary judgment. Plaintiff contends that the only genuine issue of material fact is whether Gaston County does in fact use property tax revenues to finance disposal facilities. This argument is without merit. Plaintiff's contention on this issue rests upon its standing as a municipality under G.S. Sec. 153A-292, where the county cannot charge disposal fees to a municipality if it also levies a property tax to finance the landfill. This issue has been settled because plaintiff has no standing to challenge this ordinance under that theory.

A careful examination of the entire record discloses that no genuine issue as to any material fact exists between the parties to this action. The judgment allowing defendant's motion for summary judgment and denying plaintiff's motion for summary judgment is

Affirmed.

Judges ARNOLD and PARKER concur.

JAMES O. BRAWLEY, JR. v. WILDA T. BRAWLEY, CEDAR CREST, INC., AND CONDOMINIUM BUILDERS, INC.

No. 8721SC25

(Filed 17 November 1987)

Contracts § 27.1— sufficiency of evidence of contract—consideration—exhibit missing from contract—no failure of agreement

Appellee presented sufficient evidence of a valid and enforceable contract between the parties for the development of land to entitle it to summary judgment where the essential terms of consideration, development of the property in exchange for monetary compensation, and mutual assent evidenced by the reading and signing of the agreement by all the parties after substantial negotiation were apparent from the face of the agreement and created no triable issue; furthermore, appellant could not successfully advance as a defense that the contract failed because "Exhibit A," setting forth the method of determining costs, had since been lost because appellant assented to the terms of the agreement which stated that Exhibit A was attached thereto.

APPEAL by defendant Wilda T. Brawley from *DeRamus, Judge.* Judgment entered 17 October 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 25 August 1987.

James O. Brawley, Jr. instituted a declaratory judgment action by filing a complaint on 25 September 1984 to determine his respective rights concerning approximately 32 acres of land inherited by plaintiff's wife (now his ex-wife) from her parents on 10 December 1963. Plaintiff also sought a determination as to his rights and responsibilities under, as well as an interpretation of, a written agreement entered into by and between himself and Wilda T. Brawley and Condominium Builders, Inc. (hereinafter referred to as CBI) on 10 March 1981.

On 10 March 1981, the plaintiff together with his wife and CBI reduced the aforementioned agreement to writing. The writing essentially provided that CBI would use its expertise and all available resources to construct and develop condominium units upon the Brawley property. CBI is the holder of an unlimited contractor's license in North Carolina, and is engaged in the business of developing condominiums and other multi-family residential projects.

The agreement specifically provided in pertinent part: (a) that the Brawleys and CBI would form a new corporation to be

known as Cedar Crest, Inc.; that such corporation would be formed for tax purposes to carry out the property development; (b) that the Brawleys would convey the property to Cedar Crest, Inc., in two fifteen-acre sections and in turn Cedar Crest would transfer 25% of its stock to Mr. Brawley and 25% to Mrs. Brawley as partial payment; (c) that as each deed was executed by the Brawleys and delivered to Cedar Crest, Inc., it would execute and deliver to the Brawleys a deed of trust on the property so described in the deed; (d) that as each condominium unit would be sold by Cedar Crest, Inc., CBI would be paid its costs as calculated pursuant to CBI's accounting system in use in 1981, which was allegedly shown and explained to the Brawleys at the time the agreement was reached; (e) that when all of the units in a particular phase would be sold and the legal title to that phase would be transferred by CBI to the Homeowner's Association or other designated entity, the profit would be divided and distributed 50% to the Brawleys and 50% to CBI; and (f) that the agreement would continue and remain in effect for five years from the date of execution as to any portion to be developed for residential purposes and for seven years from the date of execution as to any portion to be developed for non-residential use.

The parties, Mr. Brawley and Mrs. Brawley, both signed the agreement and then delivered it to CBI for further execution by its president, Ralph A. Kiger. All of the parties, including Mrs. Brawley, signed the agreement which stated that Exhibit A, which allegedly contained an illustration of the specific method for determining costs, was attached to it.

Project progression was halted at the outset because the property had to be rezoned to accommodate multi-family dwelling units, but after a considerable amount of effort was expended by both the Brawleys, the rezoning was approved. Subsequent to rezoning approval, the Brawleys along with Ralph Kiger went out to dinner to celebrate and Mrs. Brawley was quoted in the 11 July 1982 edition of the Winston-Salem Journal as saying that she was "happy about it" and pleased that the project could begin now that the rezoning was complete. The edition also states that Mrs. Brawley said she and her husband rejected several plans for the land until they found one that was right.

After execution of the 1981 agreement, Cedar Crest employed the following companies and persons to work on the proj-

ect: (1) Joyce Engineering, surveying; (2) Burrow and Lineback Company, mapping and rezoning; (3) Roy H. Park, landscape architect; and (4) John P. Cone, architect. These employees were paid by Cedar Crest, Inc. For a time, the Brawleys and CBI split the expenses for the employees named above, but defendant CBI alleges that the Brawleys have not paid their share of the bills since the latter part of 1982.

The 1981 agreement was seemingly placed on low priority by all the parties involved, when they entered into another agreement in 1982 hereinafter unsurprisingly known as the "1982 Agreement." The 1982 agreement is not in dispute but explains in part the slow progression of the 1981 agreement; as CBI planned and developed the real estate referred to in the 1982 agreement during the years 1982-84.

Sometime during these years the parties James and Wilda T. Brawley developed marital difficulties and were separated and ultimately divorced on or about 27 February 1984. The ownership of the inherited property which comprises the present action then emerged as a major dispute, as defendant Wilda T. Brawley alleged and still so alleges that plaintiff James Brawley has no interest in the property, equitable nor legal. It is, however, a matter of record that title to the property is held solely in the name of defendant Wilda T. Brawley.

Soon thereafter, on or about 10 April 1984, Ralph A. Kiger received a Notice of Special Meeting of Shareholders of Cedar Crest, Inc., which was called by Wilda T. Brawley; the purpose as he later discovered being to dissolve Cedar Crest. Ralph A. Kiger states by affidavit that "at all times, CBI and Cedar Crest have been ready, willing and able to proceed with the development of the property. CBI has formally demanded that the Brawleys honor the 1981 agreement." After having received the demand letter, James Brawley instituted this declaratory judgment action, on 25 September 1984, for an interpretation by the court concerning the agreement. On 8 March 1985, CBI filed a crossclaim against Mrs. Brawley, and a counterclaim against Mr. Brawley.

On 16 October 1986, the cause came on for hearing. The following motions were before the Court: (1) the motion for summary judgment of Cedar Crest, Inc. and CBI; (2) the motion for summary judgment of defendant Wilda T. Brawley, and motions to

dismiss for failure to state a claim, and, alternative motion for summary judgment. Defendant CBI's motion for summary judgment was granted on the crossclaim and counterclaim and the parties were ordered to specifically perform the written contract entered into by them on 10 March 1981. From this order defendant Wilda T. Brawley appeals. On 21 November 1986, plaintiff, James O. Brawley, Jr. took a voluntary dismissal without prejudice of this action.

Bell, Davis & Pitt, P.A., by Walter W. Pitt, Jr. and Stephen M. Russell, for defendant appellant.

Womble Carlyle Sandridge & Rice, by Michael E. Ray and Thomas L. Nesbit, for defendant appellee.

JOHNSON, Judge.

Defendant's appeal presents three questions for review; whether the trial court erred in granting defendant CBI's (hereinafter known as appellee) motion for summary judgment on its crossclaim and counterclaim for specific performance of the contract; whether the trial court erred in denying defendant Wilda Brawley's (hereinafter known as appellant) motion to dismiss for failure to state a claim and alternative motion for summary judgment; and whether the trial court erred in denying appellant's motion for summary judgment. We find no error and affirm.

I

Summary judgment is a device whereby judgment is rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any 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. *Rose v. Guilford County*, 60 N.C. App. 170, 298 S.E. 2d 200 (1982); G.S. 1A-1, Rule 56(c). When the only issues to be decided are issues of law, summary judgment is proper. *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E. 2d 727 (1978), *aff'd*, 297 N.C. 696, 256 S.E. 2d 688 (1979). It is also well-settled that the party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E. 2d 350 (1985); *Almond Grading Co. v. Shaver*, 74 N.C. App. 576, 329 S.E. 2d 417 (1985).

In reviewing appellant's first Assignment of Error, that the trial court's grant of appellee's motion for summary judgment and order of specific performance were improper, we must determine whether appellee has presented sufficient evidence to establish a valid and enforceable contract between the parties and that no defenses exist which will defeat enforceability. If appellee satisfies these tests, it will have carried its burden of "establishing the absence of any triable issue of fact" thereby entitling it to a grant of its summary judgment motion. *Almond, supra.*

Appellee has consistently contended and has asserted in an affidavit by Ralph Kiger that it is entitled to a grant of summary judgment for the following reasons: (1) On 10 March 1981 the parties executed the 1981 agreement; (2) Mrs. Brawley read over the agreement and assented to its terms by signing; (3) the document in question states that Exhibit A was attached to it; (4) the method for determining costs was to be calculated in accordance with CBI's accounting system in use in 1981, evidenced in Exhibit A, and fully explained to Mr. Brawley who acted as representative for Mrs. Brawley during several meetings with Mr. Kiger; and (5) the 1981 agreement is a binding and complete contract with or without the inclusion of Exhibit A.

II

The law generally does not dictate the contract terms to which parties may agree but does require that in order to constitute a valid and enforceable contract there must be an agreement of the parties upon the essential terms of the contract, definite within themselves or capable of being made definite. *Horton v. Humble Oil & Refining Co.*, 255 N.C. 675, 122 S.E. 2d 716 (1961).

It is well-settled in North Carolina that a contract will not be held unenforceable because of uncertainty if the intent of the parties can be determined from the language used, construed with reference to the circumstances surrounding the making of the contract, and its terms reduced to a reasonable certainty. *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962); *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954). In addition, where the language used in the contract is clear and unambiguous, the intention of the parties is to be gathered from the face of the contract. *Goodyear, supra* at 380, 126 S.E. 2d at 118.

Upon the evidence ascertained by the court, it is evident that a valid and enforceable agreement was reached between the parties on 10 March 1981. The essential terms of consideration, development of the property in exchange for monetary compensation, and mutual assent evidenced by the reading and signing of the agreement by all the parties after substantial negotiation, are apparent from the face of the agreement and create no triable issue. However, appellee is faced with appellant's contention that the 1981 agreement is unenforceable because Exhibit A, which is no longer in existence, contained essential terms for determining costs and "*was never shown* or made part of the offer to Mrs. Brawley."

Appellant's assertion is at best unconvincing and at worst groundless. Appellant signed the 1981 agreement which within its body contained a statement that Exhibit A was attached to the agreement, to wit: "Costs shall be determined in accordance with CBI's accounting system *and* as set forth in Exhibit A *attached hereto* . . ." Where a contract sets the method for determining the price or costs and the costs are determined according to that method, the contract is complete and sufficiently definite in that respect. The exact amount need not be stated in the agreement in order that a contract be sufficiently certain as to price. 17 Am. Jur. 2d, Contracts sec. 82. This agreement cannot fail for lack of the essential price term because a specific method for determining costs, appellee's 1981 accounting system, was in existence and set forth in Exhibit A. In *Howell v. Allen & Co.*, a case inapposite to our facts, the contract failed for lack of the essential price term or any method for determining it, for this Court has held that an agreement which leaves the price for future determination of the parties is not binding. 8 N.C. App. 287, 174 S.E. 2d 55 (1970).

The parties' understanding of the 1981 agreement as it referred to costs is further evidenced by an affidavit submitted by Ralph A. Kiger on 9 October 1986. In it he states that Exhibit A was a computer printout sheet that showed the manner in which CBI had allocated costs on a project similar to that undertaken by the Brawleys. Because Exhibit A no longer exists, Kiger attached to his affidavit a true and accurate copy of another computer printout sheet similar to Exhibit A incorporated by reference as Exhibit L. Finally, Kiger states that the understanding and agreement as to the method for determining costs of the 1981 agree-

ment is identical to that used to calculate costs in connection with the development of the real estate under the aforementioned fully performed 1982 agreement.

The 1981 agreement further provides for the distribution of profits and the sharing of costs in the following manner:

> As each condominium unit is sold by the Company, CBI will be paid its costs as calculated pursuant to the second paragraph of this Article 3, and the Company will also pay the costs incident to the sale of each unit. The balance remaining from the sale of said unit shall be termed "profit" and shall accrue to the benefit of the Company. When all of the units in a particular phase have been sold and the legal title to that particular phase has been transferred by the Company to the Homeowner's Association (or other applicable entity), the profit (if any) for that particular phase shall at that time be divided and distributed 50% to the Brawleys and 50% to CBI. As to each distribution of profit that is made as aforesaid, the parties hereto agree that the Brawleys shall allocate to their share of each such distribution the value of the land in the particular phase for which the distribution of profit is being made. The parties hereto hereby acknowledge and agree that the present value of the Property is $20,000.00 per acre, and that shall continue to be the value of the Property until construction of the aforesaid first phase begins; thereafter, the value of the Property shall appreciate no more and no less than 12% per year until all of the Property has been developed and sold, as aforesaid, or this Agreement terminates as hereinafter provided, whichever occurs first.
>
> . . .

After having assented to the terms of the agreement which states that Exhibit A is attached thereto, by signing her name to the agreement, appellant may not successfully advance as a defense that the contract fails because Exhibit A has since been lost. Therefore, we find that appellee CBI sufficiently met its burden by establishing the existence of a valid and enforceable contract and was correctly granted its motion for summary judgment.

III

In her second Assignment of Error, appellant contends that the trial court erred when it denied her motion to dismiss for failure to state a claim and alternative motion for summary judgment. Again, we do not agree. A complaint should be dismissed for failure to state a claim where it is apparent that plaintiff (cross and counterclaimant under our facts) is entitled to no relief under any statement of facts which could be proven, more specifically, when there is an absence of law to support the claim asserted, a want of facts sufficient to establish a good claim, or some defense which will necessarily defeat the claim. *Orange County v. N.C. Dept. of Transp.*, 46 N.C. App. 350, 265 S.E. 2d 890, *cert. denied*, 301 N.C. 94 (1980). Clearly, appellee's crossclaim does not fit this category of cases. In its crossclaim against appellant, CBI presented a written contractual agreement which listed in particular detail the rights and duties of the parties. Such agreement bore Mrs. Brawley's signature, a copy of which was attached to the complaint. Further, CBI alleged that it has spent substantial amounts of time and money in planning and preparing for the development of the property. Such efforts have been approved by the Brawleys who began performance under the contract but later ceased performance. CBI has requested, orally and in writing, that Mr. and Mrs. Brawley comply with their obligations under the 1981 agreement in order to enable CBI to proceed with its contractual obligations. Because of the Brawleys' refusal, CBI has remained unable to fulfill its obligations under the 1981 agreement.

The defenses alleged by appellant in her answer do not defeat contract enforceability. Those advanced basically include allegations levied against Mr. Brawley, i.e., that he fraudulently procured her signature, that he did not request equitable distribution incident to their divorce and property settlement, that he is unentitled to any rights under the 1981 agreement, and that the agreement was not acknowledged before a certifying officer in violation of N.C.G.S. 52-10(a). These defenses have no bearing upon the enforceability of the 1981 agreement as concerns CBI; further N.C.G.S. 52-10(a) is inappropriately applied to the case *sub judice*, as it governs contracts between husband and wife and was not intended to affect contracts entered between husband, wife and third parties. *Jackson v. Beard*, 162 N.C. 105, 78 S.E. 6 (1913).

The alternative motion for summary judgment was also properly denied. As previously noted when appellee's motion for summary judgment was considered, it is incumbent upon the party asserting the motion to establish the absence of any triable issue of fact and that he is entitled to judgment as a matter of law. *Almond, supra.* Appellant bases this motion upon the contention that the 1981 agreement is unenforceable because "all of the terms of the alleged contract were never revealed to her, to wit Exhibit A which allegedly contained appellee's method for determining its costs."

First, we reiterate the undisputed fact that appellant signed the agreement which states within its body in Article 3 that Exhibit A is attached to the contract. She now contends the term of cost contained within was never revealed to her. This inconsistency has remained unexplained and we must adhere to the rule that where the language of a contract is plain and unambiguous its construction is a matter of law for the court. Never does appellant contend that she understood the provision to have a meaning contrary to that of appellee which would defeat the essential "meeting of the minds" and thus nullify the contract. *Industrial Distributors, Inc. v. Mitchell,* 255 N.C. 489, 122 S.E. 2d 61 (1961). She instead contends that the method for determining costs was never communicated to her, although she signed an agreement which states the opposite. We find this contention untenable and hold that the appellant was not entitled to summary judgment as she did not establish a clear defense to contract enforceability and entitle herself to judgment as a matter of law.

IV

In light of our prior discussion on appellant's alternative motion for summary judgment we find a consideration of her third Assignment of Error that her second summary judgment motion was improperly denied wholly unnecessary. It is for the foregoing reasons that we affirm the ruling of the trial court.

Affirmed.

Judges ARNOLD and PARKER concur.

STATE OF NORTH CAROLINA v. RANDY SCOTT YELTON

STATE OF NORTH CAROLINA v. PHILLIP H. YELTON

No. 8727SC362

(Filed 17 November 1987)

1. **Constitutional Law § 48— joint representation of defendants—pretrial hearing—burden of proof—waiver of appeal**

The trial court did not err procedurally in a prosecution for narcotics offenses where defendants were father and son, both defendants retained the same counsel, the State filed a motion requesting the trial court to determine whether the attorney's representation of both defendants was proper, the State offered no evidence at the hearing, the court denied defendants' motion to dismiss the petition, and the court ordered the attorney to represent only one defendant. The trial court must play the vital role in deciding the outcome of the constitutional and ethical questions arising from this issue, and the State may, but need not, offer evidence in pretrial conflict of interest hearings. The court must conduct a full and searching inquiry to determine whether an actual conflict of interest exists and foremost in the court's inquiry must be the preservation of the accused's constitutional rights; the record in this case clearly demonstrated that defendants voluntarily, knowingly, and intelligently waived their right to appeal on the grounds of ineffective assistance of counsel based upon the counsel's potential conflict of interest.

2. **Constitutional Law § 40— right to counsel—potential conflict of interest—court order requiring attorney to represent one defendant—error**

The trial court erred in the prosecution of a father and son for narcotics related offenses by ordering their retained counsel to represent only one defendant. A potential conflict of interest which is not shown to substantially prejudice defendants' interest is not sufficient to justify interference with defendants' right to retained counsel of choice.

ON writ of certiorari to review order entered by *Owens, Judge*. Order entered 21 November 1986 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 29 September 1987.

The petitioners in this action, Phillip H. Yelton and Randy Scott Yelton, are father and son, respectively. During its 5 May 1986 session, the Cleveland County grand jury returned multiple true bills of indictment against each of them charging narcotics-related offenses. Among the charges were two charges of conspiracy to traffic in cocaine and one charge of conspiracy to sell and deliver cocaine naming the two defendants as co-conspirators.

Phillip Yelton and his son Randy Scott Yelton retained William E. Lamb, Jr. to represent them. Mr. Lamb filed numerous pre-trial motions and requests on behalf of each of the petitioners.

On 17 October 1986 the State filed a motion requesting the trial court to determine whether Mr. Lamb's representation of both petitioners was proper under the circumstances. After a hearing on 21 November 1986, at which both defendants testified, the trial court ordered Mr. Lamb to represent only one defendant and to notify the District Attorney's office which of the defendants he would represent. On 5 December 1986, Mr. Lamb filed writs of supersedeas and certiorari with the Court of Appeals. The writ of supersedeas was allowed on 5 December 1986. On 12 January 1987 the Court of Appeals allowed petitioners' writ of certiorari and stayed further proceedings in the trial court pending disposition of the writ of certiorari.

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

William E. Lamb, Jr. for defendant-petitioners.

EAGLES, Judge.

Petitioners contend the trial court erred in two respects: failing to dismiss the State's motion when the State presented no evidence and issuing an order directing petitioners' retained counsel to represent only one defendant. Though we disagree with appellants' first contention, we agree that the trial court erred by ordering the petitioners' counsel to represent but one defendant. Accordingly, we reverse.

I

[1] Petitioners first assign as error the trial court's denial of their motion to dismiss the State's motion. Petitioners argue that since the State brought the motion before the court, the burden was upon the State to show that petitioners must have separate counsel. No evidence having been offered by the State, petitioners argue that the State has not met its burden. We disagree.

We hold that the trial court must play the vital role in deciding the outcome of the constitutional and ethical questions arising from this issue. Consequently, the State may, but need

not, offer evidence in pre-trial conflict of interest hearings. In effect, the State merely brings the conflict issue to the court's attention. Through the course of the hearing the trial court will determine whether an attorney who jointly represents co-defendants must be disqualified from representing either of them.

The procedural posture of this case is unusual. Rarely before trial is there any inquiry into potential problems associated with multiple representation of defendants by a single attorney. The issue of multiple representation customarily arises in the context of post-trial claims of ineffective assistance of counsel either on appeal or in post-conviction proceedings by one of the defendants. Those cases, though not dispositive here, are helpful in determining the questions before us.

Holloway v. Arkansas, 435 U.S. 475, 55 L.Ed. 2d 426, 98 S.Ct. 1173 (1978), addressed the ineffective assistance of counsel issue. There a court-appointed attorney represented three individual defendants charged with robbery and rape. In two separate pre-trial motions, the defense attorney stated that if he continued to represent all three defendants, there was the possibility of a conflict of interest in each of the cases and moved the court to appoint separate counsel. The trial court conducted a hearing on the first motion, but the defense attorney was not allowed to present evidence to show the alleged conflict of interest. The Supreme Court ruled that the steps taken by the trial court were inadequate and deprived the defendants of the effective assistance of counsel. In *Cuyler v. Sullivan*, 446 U.S. 335, 346, 64 L.Ed. 2d 333, 345, 100 S.Ct. 1708 (1980), the Supreme Court noted that "*Holloway* requires state trial courts to investigate timely objections to multiple representation."

In *State v. Arsenault*, 46 N.C. App. 7, 14, 264 S.E. 2d 592, 596 (1980), our court recognized "the need for the trial judge to inquire prior to trial about possible conflict of interests [sic] arising from joint representation of co-defendants by members of the same law firm or by single joint counsel." *Arsenault*, like *Holloway*, considered the issue of ineffective assistance of counsel upon post-conviction review. Though both *Holloway* and *Arsenault* involved *defendants'* objections to joint representation by their attorney, there is no reason why the *State* may not also raise the question before trial. *Compare*, North Carolina Rules of

Professional Conduct, Rule 5.1 comment (1985) (opposing counsel may raise objection but not as technique for harassment).

Once a motion by the State or the defense, or the court on its own motion, raises a possible conflict of interest in a dual representation situation, the trial court must conduct a hearing. *Cuyler*, 446 U.S. at 346. *See also United States v. Duklewski*, 567 F. 2d 255 (4th Cir. 1977) (defendant must know details of possible conflict of interest before counsel may be disqualified).

When an actual conflict of interest exists between two defendants represented by the same attorney, the attorney must be disqualified from representing one, if not both, defendants. *Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1942); North Carolina Rules of Professional Conduct, Rule 5.1 (1985). Therefore, the court must conduct a full and searching inquiry to determine whether an actual conflict of interest exists. This inquiry may go further than the presentation of facts by the parties and may include *in camera* proceedings or discussions between the trial judge and defendants. Foremost in the court's inquiry must be the preservation of the accused's constitutional rights. The hearing by the trial court must ensure that the defendants are aware of these rights and that any waiver is a knowing, intelligent and voluntary waiver.

First, there must be evidence on the issue of defendants' consent to joint representation. This consent must have been based upon a full disclosure of the advantages and disadvantages of joint representation. North Carolina Rules of Professional Conduct, Rule 5.1(B) (1985). Here, both defendants testified that Mr. Lamb had discussed the potential conflict of interest with each of them. The conflict of interest here would arise, primarily, where one defendant's interests would be served by his giving testimony against the other. Both defendants denied this was a problem because each had decided he would not testify against the other.

Defendants must be made aware that their insistence upon joint representation may constitute a waiver of their right to argue on appeal that they were denied effective assistance of counsel due to a conflict of interest because of joint representation. *United States v. Garcia*, 517 F. 2d 272 (5th Cir. 1975); *see United States v. Atkinson*, 565 F. 2d 1283, *cert. denied*, 436 U.S. 944 (4th Cir. 1977); *State v. Johnson*, 47 N.C. App. 297, 267 S.E. 2d

45, *disc. rev. denied*, 301 N.C. 101, 273 S.E. 2d 305 (1980). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019 (1938), and any waivers must be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 25 L.Ed. 2d 747, 756, 90 S.Ct. 1463 (1970).

In *Garcia*, the United States Court of Appeals discussed the waiver issue. Though that decision is not controlling, it is instructive. There, nine members of the Houston Police Department had been indicted on various federal charges. Each of the defendants retained the attorney of his choice. Two of the defendants hired a single attorney to represent them. The other seven defendants hired two different attorneys to represent all seven of them. The government filed a motion asking the district court to consider conflicts of interest and possible disqualifications of the attorneys. The district court ordered all nine defendants to retain new counsel and disqualified the three attorneys from the case. On appeal, the Fifth Circuit Court reversed and remanded. The Court held that the effective assistance of counsel, like any other constitutional right, could be waived but only so long as the waiver was voluntary, knowing, and intelligent. *Garcia*, 517 F. 2d at 278.

The *Garcia* Court ordered that inquiry procedures "akin to . . . Fed. R. Crim. Proc. 11" be followed by the trial court:

> As in [F.R. Crim. Pro.] 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. [Citations omitted.]

Id.

In the instant case, defense counsel's examination and, particularly, the vigorous cross-examination of both defendants at the hearing below demonstrates substantial compliance with the inquiry called for in *Garcia*. The questioning here apprised both defendants of the potential conflict of interest inherent in having one lawyer represent them both. The State, as well as the defense, inquired into the possibility and probability of one defendant testifying against the other. Given the relationship between these two defendants (father and son) and their unequivocal testimony at the hearing, it appears unlikely that either will testify against the other. Additionally, throughout their testimony each defendant continued to insist that Mr. Lamb represent him. The record before us clearly demonstrates that Phillip H. Yelton and Randy Scott Yelton have voluntarily, knowingly, and intelligently waived their right to appeal, if convicted, on grounds of ineffective assistance of counsel based upon Mr. Lamb's potential conflict of interest.

II

[2] Petitioners next argue that the court's order directing Mr. Lamb to represent only one defendant deprived petitioners of the right to counsel of their choice. We agree and reverse the order of the trial court.

The North Carolina and United States Constitutions guarantee each individual the right to counsel in criminal cases. *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932); *State v. Speller*, 230 N.C. 345, 53 S.E. 2d 294 (1949). The accused's right to counsel includes the right to select and retain an attorney of his choice. *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245 (1969). On the other hand, an indigent defendant does not have the same right to choose his own counsel, but rather must accept an experienced and competent attorney appointed for him by the court. *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976). Here Mr. Lamb is retained by both defendants.

In *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977), the court balanced the defendant's right to the counsel of his choice against the denial of a continuance so that defendant's chosen counsel could try the case. The defendant had retained Mr. Powell to represent him on a felonious sale and delivery of cocaine charge. Mr. Powell received one continuance before the case

came for trial. The week before the case was to be heard, the district attorney refused to agree to another continuance based on Mr. Powell having another case pending in federal court. On the day of trial, Mr. Powell's associate appeared to move for another continuance. The associate knew nothing about McFadden's case; only Mr. Powell knew the case. The trial judge denied the request and required trial to begin, despite the defendant's protestations that he wanted Mr. Powell, his retained counsel, to represent him.

On appeal, the Supreme Court reversed the trial court holding that the trial court impermissibly deprived the defendant of a reasonable time to obtain the counsel of his choice. In reaching its decision the Court quoted with approval:

> The state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources—and that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.

Id., 292 N.C. at 613-614, 234 S.E. 2d at 746 (quoting *People v. Crovedi*, 417 P. 2d 868, 65 Cal. 2d 199, 53 Cal. Rptr. 284 (1966)).

The State does not contend, nor does the record reflect, that the Yeltons hired Mr. Lamb intending to disrupt the orderly processes of justice. Nothing in Mr. Lamb's pre-trial conduct was disruptive or suggests that he was attempting to be disruptive. Having failed to show a disruption of the judicial processes, in order to prevail the State must show a significant prejudice to one of the defendants.

In considering what constitutes "significant prejudice" here, we note that the United States Supreme Court has held that having a single attorney represent two or more co-defendants was not a *per se* violation of the Sixth Amendment right to the effective assistance of counsel. *Holloway*, 435 U.S. at 482. Quoting from Justice Frankfurter's dissent in *Glasser*, the Supreme Court in *Holloway* recognized that in some instances there might be advantages in joint representation: "Joint representation is a means

of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." *Id.* at 482-483 (quoting *Glasser*, 315 U.S. at 92 (Frankfurter, J., dissenting)).

Recently, the Supreme Court reaffirmed this position and, further, stated that prejudice to a defendant could not be presumed from the mere fact of joint representation. *Burger v. Kemp*, 483 U.S. ---, 97 L.Ed. 2d 638, 107 S.Ct. 3114 (1987). The Court stated that prejudice would be presumed only upon a demonstration "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.*, 97 L.Ed. 2d at 650 (quoting *Strickland v. Washington*, 466 U.S. 668, 692, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984) (citation omitted)).

In *United States v. Atkinson*, 565 F. 2d 1283 (4th Cir. 1977), the court indicated that where counsel was retained in joint representation situations, the defendants "more than anyone, including the court, were in a position to know what facts might be developed at trial. Apparently they concluded that such representation was advantageous. . . ." *Id.* at 1284.

In *Cuyler* the United States Supreme Court held that a state prisoner was not entitled to a writ of habeas corpus merely by showing his retained counsel represented *potentially* conflicting interests. There, the Court said the *possibility* of a conflict of interest was insufficient to reverse a criminal conviction. To prevail, the defendant must establish an *actual* conflict of interest. *Cuyler*, 446 U.S. at 350.

Accordingly, we conclude that joint representation, nothing else appearing, is not always prejudicial. In joint representation cases, only where there is an actual conflict of interest which denies the defendants the effective assistance of counsel does a problem arise. A *potential* conflict of interest, as distinguished from an *actual* conflict of interest, is not sufficient to warrant the State's interference with the constitutionally guaranteed right of a criminal defendant to retain and be represented by the counsel of his choice.

In the instant case the State has shown no actual conflict of interest. Indeed, the trial court's conclusion was that there was "a clear potential conflict of interest between the best interest of the

[d]efendants [sic]." The findings of fact and the evidence support this conclusion of law. We conclude that a potential conflict of interest which is not shown to substantially prejudice defendant's interests is not sufficient to justify interference with defendant's right to representation by the retained counsel of his choice. Accordingly, we vacate the trial court's order directing Mr. Lamb represent only one defendant and remand the case to the trial court.

We note that under the North Carolina Rules of Professional Conduct, defense counsel has an ongoing professional and ethical obligation to avoid representing conflicting interests. North Carolina Rules of Professional Conduct, Rule 5.1 (1985). The *Cuyler* court recognized that the attorney is in the "best position professionally and ethically" to determine when and where conflicts may arise. *Cuyler*, 446 U.S. at 347. The Rules of Professional Conduct already allocate to the attorney the obligation of assuring his compliance with the rules.

Vacated and remanded.

Judges MARTIN and ORR concur.

JOHN H. HARDY, PLAINTIFF v. BRANTLEY CONSTRUCTION COMPANY, EMPLOYER; NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANT; JOHN ROGER McKINNEY, THIRD PARTY TORT-FEASOR

ALBERT R. WELLS, EMPLOYEE, PLAINTIFF v. BRANTLEY CONSTRUCTION COMPANY, EMPLOYER; NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANT; JOHN ROGER McKINNEY, THIRD PARTY TORT-FEASOR

Nos. 8710IC26
8710IC27

(Filed 17 November 1987)

1. Master and Servant § 89.4— workers' compensation—attorney's contingent fee—authority of Industrial Commission to review reasonableness

The Industrial Commission erred in drawing the legal conclusion that it lacked statutory authority to review the reasonableness of a contingent fee for the attorney for the plaintiff when the fee is to be subtracted from the subrogation interests of the workers' compensation carrier.

2. Master and Servant § 89.4— workers' compensation—attorney's fee—amounts taken from employee's share and subrogation interest of employer—application of reasonableness rule

Pursuant to N.C.G.S. § 97-90, the attorney fee taken from the employee's share of a judgment may not exceed one-third of the amount recovered, but it is not otherwise subject to the reasonableness requirement of N.C.G.S. § 97-90(c); however, the attorney fee on the subrogation interest of the employer (or its carrier) is subject to the reasonableness requirement of that statute and may not exceed one-third of the amount recovered from the third party. N.C.G.S. § 97-10.2(f)(1)b.

Judge PHILLIPS dissenting.

APPEALS by defendant from Opinions and Awards of the North Carolina Industrial Commission entered 3 October 1986. Heard in the Court of Appeals 13 May 1987.

Connor, Bunn, Rogerson & Woodard by James F. Rogerson; and Allen G. Thomas for plaintiff appellee.

Leboeuf, Lamb, Leiby & MacRae by Jane Flowers Finch and Albert D. Barnes for defendant appellant.

COZORT, Judge.

These two cases have been consolidated for opinion because they arise from the same transactions and involve a common issue of law.

Plaintiffs John H. Hardy and Albert R. Wells were seriously injured on 28 October 1983 when struck by an automobile being driven by John Roger McKinney. At the time of the accident Hardy and Wells were employed by defendant Brantley Construction Company and were on the job at the time of the accident. Defendant Nationwide Insurance Company, the workers' compensation carrier for Brantley, paid workers' compensation benefits of $54,777.78 to Hardy and $17,373.13 to Wells. On 7 November 1983 a claims representative of Nationwide notified the Great American Insurance Company, McKinney's automobile liability insurance carrier, of Nationwide's subrogation lien for the workers' compensation payments made to Hardy and Wells. In a telephone conversation on 7 December 1983 between a claims representative from Nationwide and W. H. Lewis, Jr., a Great American claims representative, Lewis told the Nationwide representative that "it looks like we are going to pay these claims."

On 12 December 1983, Hardy signed a contract for legal services, retaining Allen G. Thomas, a Wilson attorney, to represent him in his claim for damages resulting from the 28 October 1983 accident. The contract provided for Thomas and his law partner to receive one-fourth of the amount recovered on a settlement without filing suit, and one-third of the amount recovered upon a legal action. On 23 January 1984 Wells signed a contract with Thomas identical in all material respects to Hardy's contract with Thomas. On 20 December 1983 Great American settled with Nationwide on Nationwide's subrogation lien with respect to damage to the Brantley vehicle struck by McKinney on 28 October 1983. In the early months of 1984, Lewis learned that Hardy and Wells were represented by Thomas. Lewis wrote to Thomas requesting medical bills and wage information so that the claims could be evaluated. On 27 February 1984 Thomas was notified by letter that Nationwide had turned its subrogation interests over to George R. Ragsdale, a Raleigh attorney. On 6 April 1984 Lewis again wrote to Thomas requesting the medical information and wage data. Lewis never received the information requested from Thomas. Lewis received a letter dated 30 April 1984 from Thomas advising Lewis that Thomas had filed suit with respect to the claims of Hardy and Wells. On 29 June 1984, the attorneys for McKinney, defendant in the action filed by Thomas, filed an answer denying liability.

On or about 18 February 1986, the action filed by Thomas against McKinney was settled, with Great American agreeing to pay $50,000.00, the maximum amount of coverage under McKinney's policy. By letter dated 9 April 1986, Thomas notified the Industrial Commission of the settlement and requested disbursement of the $50,000.00 to be paid by Great American. In that letter Thomas contended he was entitled to one-third of the money going from Great American to Hardy, Wells, and Nationwide, in accordance with his contingent fee contracts with Hardy and Wells. Under Thomas' request, the $50,000.00 would be distributed as follows: (1) $600.00 which had previously been paid to another party who was injured; $5,000.00 for Hardy; $7,300.00 for Wells; and $37,100.00 for Nationwide's subrogation lien. Each of the last three amounts would be reduced by one-third, with Thomas receiving the one-third. The attorney for Nationwide wrote to the Commission on 15 April 1986 requesting a hearing,

contending that Thomas was not entitled to one-third of the amount due Nationwide. In an affidavit filed with the Commission on 2 May 1986, Lewis, the Great American claims representative, stated: "In November of 1983, this case was deemed a case of 100% liability. Had the medical information with respect to Mr. Wells and Mr. Hardy been provided to me earlier, settlement by tendering the full amount of the policy limits would have been precipitated sooner."

In Orders filed 15 May 1986, Commissioner William H. Stephenson held that Thomas was entitled to one-third of all payments as his fee, including one-third of the amount going to Nationwide. Nationwide appealed to the Full Commission. In unanimous Opinions and Awards filed 3 October 1986, the Full Commission adopted as its own and affirmed the 15 May 1986 Orders of Commissioner Stephenson. In finding no reversible error, the Commission stated:

> Based on the information presently before the Industrial Commission it appears that, with Nationwide performing the majority of the work in obtaining the settlement, from an equitable standpoint the fee which Attorney Thomas received was excessive. However, the Industrial Commission does not have jurisdiction in this regard and the proper forum for the defendants' argument is the legislature.

[1] Brantley and Nationwide appealed to this Court. We find the Commission's conclusion of law that it had no jurisdiction to assess the reasonableness of Thomas' fee to be in error.

Legal conclusions made by the Industrial Commission are subject to appellate review. *Pollard v. Krispy Waffle #1*, 63 N.C. App. 354, 356, 304 S.E. 2d 762, 763 (1983). Therefore, the question of the Commission's authority to review the fee claimed by Thomas is properly before this Court.

In his Orders distributing attorney fees to Thomas, Commissioner Stephenson stated:

> G.S. 97-10.2 specifically provides that the attorney for the party making the settlement shall be entitled to an attorney fee for his services. Counsel for plaintiff made the settlement. He is therefore entitled to the fee and it must be paid "in direct proportion to the amount each party receives from the

settlement." As stressfully as Nationwide contends in its argument that it is obligated to pay no fee, the statute is contrary to this position and the motion that no fee be assessed against Nationwide is hereby DENIED.

Commissioner Stephenson made no reference to the "reasonableness" of the fee in his Order. In the Full Commission's Opinions and Awards affirming Commissioner Stephenson, the Commission observed that the fee appeared excessive. Without citing any statutory authority for its conclusion, the Commission then held it lacked jurisdiction "in this regard." We find the Opinions and Awards of the Commission to be a legal conclusion that the Commission lacks statutory authority to review the reasonableness of a contingent fee for the attorney for the plaintiff when the fee is to be subtracted from the subrogation interests of the workers' compensation carrier. This legal conclusion is in error.

[2] The authority of the Industrial Commission and its hearing officers to review fees for attorneys is found in N.C. Gen. Stat. § 97-90. Subsection (c) provides:

> (c) If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed.

The rights and remedies of the employee and employer against third party tort-feasors, including provision for disbursement of amounts recovered, is found in N.C. Gen. Stat. § 97-10.2. Under N.C. Gen. Stat. § 97-10.2(f), the General Assembly directed the order and priority of disbursements of amounts recovered, addressing the subject of attorney's fees as follows:

> b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and *except for the fee on the subrogation interest of the employer* such fee shall not be subject to the provisions of § 90 of this Chapter [G.S. 97-90] but shall not ex-

> ceed one third of the amount obtained or recovered of the third party.

N.C. Gen. Stat. § 97-10.2(f)(1)b (emphasis added). We read this statute to provide as a general rule that "the payment of the fee of the attorney representing the person making settlement or obtaining judgment . . . shall not be subject to the provisions of § 90 of this Chapter [G.S. § 97-90] but shall not exceed one third of the amount obtained or recovered of the third party." Thus, the general rule is that the fee the attorney charges the employee is not subject to the reasonableness requirement of N.C. Gen. Stat. § 97-90(c); the only restriction is that it may not exceed one-third of the amount recovered. The fee attributable to subrogation interests of the employer (or its carrier) is excluded from that provision exempting attorney fees from the reasonableness requirement of N.C. Gen. Stat. § 97-90(c) by the phrase "except for the fee on the subrogation interest of the employer." Thus, while the statute in question is not a model of clarity, we find its purpose plain: the attorney fee taken from the employee's share may not exceed one-third of the amount recovered, but it is not otherwise subject to the reasonableness requirement of N.C. Gen. Stat. § 97-90(c); the attorney fee on the subrogation interest of the employer (or its carrier) is subject to the reasonableness requirement of N.C. Gen. Stat. § 97-90(c) and may not exceed one-third of the amount recovered from the third party.

This result is supported by the legislative history of N.C. Gen. Stat. §§ 97-90 and 97-10.2(f)(1) and case law. N.C. Gen. Stat. § 97-90, in a much shorter form, was a part of the original Workmen's Compensation Act enacted by the General Assembly in 1929. 1929 N.C. Sess. Laws ch. 120, s. 64. Subsection (c) was added in 1959. 1959 N.C. Sess. Laws ch. 1268. In that same session, the General Assembly also enacted what is now N.C. Gen. Stat. § 97-10.2(f)(1)b. 1959 N.C. Sess. Laws ch. 1324. The phrase excepting the fee on the subrogation interest from the exclusion on reasonableness requirement did not appear in the 1959 version. Thus, as enacted in 1959, the statutes provided that no attorney fee in a third-party action was subject to the reasonableness requirement. Only the one-third limitation applied. In a 1978 case, this Court upheld the constitutionality of N.C. Gen. Stat. § 97-10.2(f), denying the employer's and the carrier's claim that the statute unjustifiably impaired their right to be represented by attorneys of

their choice in protecting their subrogation rights against third-party tort-feasors. *Hogan v. Motor Lines*, 38 N.C. App. 288, 294-95, 248 S.E. 2d 61, 64 (1978), *disc. rev. denied*, 296 N.C. 411, 251 S.E. 2d 469 (1979). Five months after the Supreme Court denied review in *Hogan*, the General Assembly amended N.C. Gen. Stat. § 97-10.2(f)(1)b to except the fee on the subrogation interest from the reasonableness exclusion. 1979 N.C. Sess. Laws ch. 865. We read this legislative action as manifesting the intent of the General Assembly that the fee to be taken from the subrogation interest is subject to the reasonableness determination by the Commission directed by N.C. Gen. Stat. § 97-90(c).

The result of the case at bar is:

(1) The decision of the Commission to disburse $5,000.00 to plaintiff Hardy, less one-third to attorney Thomas as his fee, is affirmed.

(2) The decision of the Commission to disburse $7,262.87 to plaintiff Wells, less one-third to attorney Thomas as his fee, is affirmed.

(3) The decision of the Commission to disburse the remaining $37,137.13 to Nationwide, less one-third to attorney Thomas as his fee, is vacated, and the matter is remanded to the Commission to review the fee on the subrogation interest in accordance with N.C. Gen. Stat. § 97-90(c).

Affirmed in part; vacated in part and remanded.

Judge GREENE concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Though I agree that the fee of plaintiffs' counsel is subject to the provisions of G.S. 97-90, as G.S. 97-10.2(f) indirectly requires, I nevertheless am of the opinion that those statutes were correctly applied by the Industrial Commission and that its decision should be affirmed. Nothing in either statute, as I read them, supports the view that under the circumstances of these cases the Commission had either the authority or duty to determine the "reason-

ableness" of the fee involved; though it did have the authority to determine whether the fee *agreement*, a different matter altogether, was unreasonable and the Commission exercised that authority by approving the *agreement*, which is not materially different from myriads of agreements that are routinely approved by the Commission every year. The statutes plainly provide, as the Commission ruled, that when an employee's claim against a third party tort-feasor is settled while being processed by the employee under the provisions of G.S. 97-10(d), and the employee and his lawyer have a fee *agreement* that is *not* unreasonable which is approved by the Industrial Commission, that the fee of the employee's lawyer on the subrogation recovery will be as provided for in the agreement. It is only when there is no fee agreement or when an agreement is found to be unreasonable that the Commission has the authority to determine the reasonableness of the compensation due the claimant's lawyer. In these cases the agreements having been approved as not being unreasonable, the Commission had no authority to evaluate counsel's services as though no agreement existed or to increase or decrease the fee in a *quantum meruit* type of determination, but was obliged to enforce the agreements as written and approved.

The statutory policy is not only clear, it is also sound. It recognizes that a personal injury claim or lawsuit cannot be handled effectively unless someone with a chance of being paid is in charge of it and that ordinarily the employee, whose superior interest encompasses that of the subrogee, should have the first opportunity to pursue the claim with the assistance of counsel under contract as to the fee; and it discourages controversy between the employee and subrogee while the third party claim is being pursued by permitting the compensation of the employee's counsel to be determined by contract, rather than upon evidence presented by the subrogee. Replacing this sensible arrangement for the orderly and expedient handling of employee third party claims with one requiring the Commission to determine "reasonable" compensation in each instance would be folly in my judgment. Such an arrangement would encourage controversy between the subrogee and the employee while the third party claim is still pending; it would permit subordinate insurers to take control of the employee's claim, as Nationwide in effect undertook to do in this instance by instructing plaintiffs' counsel, who was handling

the indivisible claim against the third party, to do nothing with respect to its subordinate interest; and it would require the Commission in each third party claim to receive and evaluate evidence about legal services performed in another forum, and to not only decrease the fee when the services rendered are not commensurate with the amount provided for in the fee contract, but to increase the fee when the contract amount does not constitute "reasonable" compensation. Viewed in perspective, the circumstances of these cases do not justify even considering such a step. The settlement that Nationwide claims to have promoted was not the *final, complete settlement* of the tort-feasor's liability that the statute requires, but merely the collection of the tort-feasor's policy limits. That Great American, notwithstanding its contradictory conduct in denying the liability of its insured and pleading various affirmative defenses, may have been ready to pay its policy limits all along, as Nationwide argues, does not mean that counsel had a duty to forthwith settle the tort-feasor's total liability for those limits. And that plaintiffs' counsel did not send the incomplete medical bills and information to Great American in piecemeal fashion as requested could mean only that he did not want to do a pointless and perhaps even harmful thing, since the extent of his client's injuries could not be known until much later and supplying piecemeal, incomplete medical information about a serious injury often tends to trivialize it.

MARGUERITE B. JOYNER v. J. R. ADAMS

No. 8710SC190

(Filed 17 November 1987)

1. **Contracts § 2— lease agreement—rent escalation clause—no meeting of minds**

In an action for rents allegedly due under a lease, there was evidence to support the trial judge's findings that there had been no meeting of minds on a rent escalation provision.

2. **Appeal and Error § 48; Evidence § 32— rent escalation clause—admission of defendant's testimony on his subjective understanding—no prejudice**

There was no prejudice in an action for rents allegedly due under a lease from the admission of defendant's testimony on his subjective understanding of a rent escalation provision where the trial judge was sitting without a jury and is presumed to have disregarded any incompetent evidence; there is other

evidence in the record to support the trial court's finding regarding defendant's intent; plaintiff did not object to the same evidence earlier in the questioning of defendant; and the trial court also admitted evidence by plaintiff of her own subjective intent.

3. **Contracts § 2— rent escalation clause—no findings on issue of whether the parties knew of the other's understanding of disputed language—remanded**

An action for rents allegedly due under an escalation clause in a lease was remanded for findings on the issue of whether the parties knew or had reason to know of the other's understanding of the disputed language. The trial court erred by awarding judgment for plaintiff based on the rule that ambiguity in contract terms must be construed most strongly against the party which drafted the contract where the record revealed that both parties were experienced in the real estate business and bargained from essentially equal positions of power; the parties engaged in a fairly protracted negotiation process, with the provision in question undergoing particular scrutiny; nothing in the record showed that defendant rather than plaintiff drafted the provision; and it appeared that the language was assented to by both parties who had both the knowledge to understand its import and the bargaining power to alter it.

4. **Frauds, Statute of § 8— rent escalation clause in lease agreement—statute of frauds alleged—motion to dismiss denied**

The trial court did not err by not dismissing an action for rents allegedly due under a lease where defendant contended that plaintiff's failure to introduce the Base Lease and 1975 amendment gave him a defense based on the Statute of Frauds, but the parties stipulated to the existence of both documents, their content was undisputed, and defendant never pled the Statute of Frauds as a defense.

APPEAL by defendant from *Smith, Judge.* Judgment entered 1 December 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 24 September 1987.

This is an action for rents allegedly due under the terms of a lease. Plaintiff, Marguerite B. Joyner, owns real property known as Waters Edge Office Park. To develop the property into an office park, plaintiff and her husband, William T. Joyner, Jr., contracted with Brown Investment Company (Brown) in 1972. Brown agreed, under the "Base Lease," to lease the property from plaintiff at an annual rent, increased each year to correspond with the increase in the Wholesale Price Index, published by the United States Department of Labor. The parties contemplated that Brown would remove all existing buildings, regrade the property, prepare an appropriate land plan, and subdivide the area into individual lots. When each lot was subdivided, the lease called for the execution of individual "Lot Leases" to take the place of the

Base Lease. The rent due under the Lot Leases was based, in part, on the occupancy of buildings planned for each lot.

Due to financial difficulties suffered by Brown, the lease was amended in 1975 to substitute defendant, J. R. Adams, as the lessee/developer. The amendment also suspended the annual rent increases. Instead, defendant agreed to pay a fixed rate until 30 September 1980, at which time he was obligated to have subdivided "all of the undeveloped land . . . whereby all portions are deemed lots and eligible for the execution of a [Lot Lease]." If defendant failed to comply with that provision, the amendment required him to pay, retroactively, the amount of rent which would have been due under the terms of the Base Lease. As of 30 September 1980, defendant had executed separate lot leases and had built buildings on all lots except one. Defendant had, however, subdivided the remaining lot, graded it, installed water and sewer lines on it, and built all planned roads and driveways leading to the lot. A building was not built on the lot and a Lot Lease was not executed until late 1982.

Plaintiff filed this action on 27 September 1983, claiming that defendant failed to comply with the requirements of the lease for developing the property and seeking to recover the difference between the actual, fixed rent paid by defendant and the rent recomputed under the terms of the Base Lease. On 5 July 1985, summary judgment was granted for defendant. In an unpublished opinion, this court reversed, holding that the provision of the 1975 amendment relating to the conditions upon which the retroactive rent escalation would occur was ambiguous. Consequently, the case was remanded for a factual determination of the parties' intent.

On remand, the trial court, sitting without a jury, found that plaintiff intended the escalation clause to require defendant to complete, or at least be ready to begin, construction of all buildings planned for the lot. It also found, however, that defendant intended the clause to require only the subdivision of all lots or, at most, whatever development was necessary to prepare the lot for building construction. The court concluded there was "no meeting of the minds" on the question of what conditions would trigger the rent escalation. The court also concluded that, although the parties had different intentions, the ambiguity should be resolved

against defendant, who was "the party that drafted the 1975 amended lease." Accordingly, the court awarded plaintiff damages in the stipulated amount of $93,695.75. Defendant appeals.

Hunton & Williams, by Julius A. Rousseau, III, for the plaintiff-appellee.

Tharrington, Smith & Hargrove by John R. Edwards and Elizabeth F. Kuniholm, for the defendant-appellant.

EAGLES, Judge.

I

[1] Both parties argue that the trial court erred in concluding that there was no "meeting of the minds" on the rent escalation provision. Each contends that there is no evidentiary basis for finding the other party had a contrary intention. A trial court's findings of fact, however, are conclusive on appeal if supported by competent evidence, *Hill v. Town of Hillsborough*, 48 N.C. App. 553, 269 S.E. 2d 303 (1980), and there is evidence here to support the trial court's findings.

Plaintiff introduced three memoranda written during the negotiation process. One, written to Mr. Joyner by Mr. Mark Lynch, an accountant negotiating on behalf of the Joyners, stated that defendant "would agree" that completion of all buildings within five years would be required to avoid retroactive recomputation of the rent under the Base Lease. The other two memoranda, one written by defendant's negotiator, Mr. Ed Clark, referred to the "completed development" of the property as a possible condition to avoiding rent escalation. Mr. Lynch testified that he and Mr. Joyner interpreted "completed development" to mean the construction of all buildings. In addition, plaintiff testified that she expressed to defendant her wish that the contract contain a more specific provision regarding the construction of buildings on the lots. This evidence is sufficient to support the trial court's finding that plaintiff intended the provision in question to require defendant at least to have begun construction of all buildings on the lots.

Defendant argues that, when read in conjunction with the terms of the Base Lease, his interpretation is the only reasonable interpretation of the rent escalation provision. That argument

was rejected in this court's previous decision in this case. The law of the case is that the language in the amendment is ambiguous and susceptible to more than one reasonable meaning, even when considered with the terms of the Base Lease.

Contrary to plaintiff's contention, there is also evidence that defendant attributed a different meaning to the disputed provision. The evidence indisputably shows that both parties intended the rent escalation clause to require defendant to develop all the property by 30 September 1980. Defendant's evidence showed that, in the local real estate market, a lot is considered "developed" when water and sewer lines are installed and the lot is otherwise ready for the construction of a building. Defendant also established that he was an experienced commercial real estate developer and that Mr. Joyner had personal experience in the real estate business. There is, therefore, competent evidence to support the trial court's finding that defendant intended the provision to require, at most, what he actually accomplished by 30 September 1980.

In arguing that her meaning was the only one intended by the parties, plaintiff specifically cites evidence of her purpose in entering the lease with defendant as well as evidence of the conduct of the parties after the lease was executed. Evidence of the parties' purposes in entering a contract and their conduct after the agreement is some evidence of their intent. *See Century Communications v. Housing Authority of City of Wilson*, 313 N.C. 143, 326 S.E. 2d 261 (1985). However, much of the evidence relied on by plaintiff, as well as other evidence in the record, can support more than one inference. Which among those possible inferences should be deemed credible and worthy of belief is a decision for the trial court. *See Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). The evidence here does not show, as a matter of law, what effect the parties intended the language in the rent escalation provision to have. Therefore, while the evidence and applicable rules of interpretation would have permitted the trial court to find plaintiff's meaning was intended by both parties, they clearly did not compel that finding. It is not the province of this court to reweigh the evidence.

[2] Plaintiff has also cross-assigned as error the admission of defendant's testimony on his subjective understanding of the provi-

sion, citing its inadmissibility under the rule stated in *Howell v. Smith*, 258 N.C. 150, 128 S.E. 2d 144 (1962). *See also, Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968); *Citrini v. Goodwin*, 68 N.C. App. 391, 315 S.E. 2d 354 (1984). Plaintiff does not argue its admission was prejudicial error, only that it cannot serve as competent evidence of defendant's intent. Indeed, a trial judge sitting without a jury is presumed to have disregarded any incompetent evidence unless it affirmatively appears otherwise. *See Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962). There is other evidence in the record to support the trial court's finding regarding defendant's intent. Therefore, any error in the admission of defendant's testimony cannot be held prejudicial. In addition, we note that plaintiff did not object to the same evidence earlier in the questioning of defendant and that the trial court also admitted evidence by plaintiff of her own subjective intent.

II

[3] It is axiomatic that where parties have attributed different meanings to a term within a contract, there is no "meeting of the minds" on that provision and a court will not enforce either party's meaning. *See O'Grady v. Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978); *Elliott v. Duke University*, 66 N.C. App. 590, 311 S.E. 2d 632, *disc. rev. denied*, 311 N.C. 754, 321 S.E. 2d 132 (1984); Restatement (Second) of Contracts, sections 20, 201 (1979) (difference must be "material"); *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960). Consequently, having found divergent meanings between the parties, the trial court did not err in concluding there was no meeting of the minds on the question of what conditions would trigger the retroactive rent escalation.

It is also well-established, although not often enunciated in North Carolina cases, that, where one party knows or has reason to know what the other party means by certain language and the other party does not know or have reason to know of the meaning attached to the disputed language by the first party, the court will enforce the contract in accordance with the innocent party's meaning. *See Insurance Agency v. Leasing Corp.*, 31 N.C. App. 490, 229 S.E. 2d 697 (1976); Restatement (Second) of Contracts, sections 20, 201(2) (1979); 3 Corbin, Contracts, section 537 (1960

and Supp. 1984). In fact, it seems that a determination of whether either or both parties knew or had reason to know of a different meaning attributed by the other is essential in almost every case where the court finds a lack of mutual assent. *Id.* Here, much of the evidence of the negotiations reflects directly on each party's knowledge of what the other party intended the provision to require. Since the trial court failed to make findings of fact on that crucial question, this case must be remanded.

G.S. 1A-1, Rule 52(a) requires the trial court to make specific findings on all facts established by the evidence and essential to support the conclusions of law reached. *Farmers Bank v. Brown Distributors*, 307 N.C. 342, 298 S.E. 2d 357 (1983). When crucial findings of fact are absent from the trial court's judgment, the case must be remanded for further findings. *Rock v. Ballou*, 286 N.C. 99, 209 S.E. 2d 476 (1974). We need not discuss the evidence of the parties' respective knowledge, or reasons to know, of the other's meaning. The question is one of fact, not of law, and it is not generally within the power of an appellate court to determine the weight and credibility of the evidence disclosed in the record. *See Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980).

We note that neither party has specifically assigned as error the sufficiency of the trial court's findings on appeal. However, the purpose of adequate findings is to allow the reviewing court to determine from the record whether the judgment and the conclusions of law underlying it represent a correct application of the law. *Coble v. Coble, supra.* In this case, whether the parties knew or had reason to know of the other's meaning of the disputed language is essential to the proper determination of the contract's enforceability. Accordingly, we remand for findings of fact on that issue.

In remanding, we necessarily find that the trial court erred in awarding judgment for plaintiff based on the rule that ambiguity in contract terms must be construed most strongly against the party which drafted the contract. *See Root v. Insurance Co., supra*; Restatement (Second) of Contracts, section 206 (1979). The rule is essentially one of legal effect, of "construction" rather than "interpretation," since "it can scarcely be said to be designed to ascertain the meanings attached by the parties." Farnsworth, Contracts, section 7.11, page 500 (1982). The rule's

application rests on a public policy theory that the party who *chose* the word is more likely to have provided more carefully for the protection of his own interests, is more likely to have had reason to know of uncertainties, and may have even left the meaning deliberately obscure. *Id.*; Restatement (Second) of Contracts, section 206, comment a (1979); 3 Corbin, *supra*, section 559. Consequently, the rule is usually applied in cases involving an adhesion contract or where one party is in a stronger bargaining position, although it is not necessarily limited to those situations. *Id.* In this case, where the parties were at arm's length and were equally sophisticated, we believe the rule was improvidently invoked.

Before this rule of construction should be applied, the record should affirmatively show that "the form of expression in words was actually chosen by one [party] rather than by the other." 3 Corbin *supra*, section 559 at 266. The only evidence admitted regarding who drafted the 1975 amendment is Mr. Joyner's testimony that no one in his law firm had anything to do with it. Even assuming this is sufficient to support an inference that defendant or his agent wrote the provision, it does not establish that defendant can be charged with having chosen its language.

The record reveals that both parties are experienced in the real estate business and that they bargained from essentially equal positions of power. The record also shows the parties engaged in a fairly protracted negotiation process, with the provision in question undergoing particular scrutiny. Nothing in the record shows that it was defendant, rather than plaintiff, who "drafted" the provision. Instead, it appears that the language was assented to by parties who had both the knowledge to understand its import and the bargaining power to alter it. Therefore, the policy behind the rule is not served in its application here and the trial court erred in using the rule to award judgment for plaintiff.

[4] Defendant's alternate argument that the trial court should have granted his motion to dismiss is without merit. Defendant contends plaintiff's failure to introduce the Base Lease and 1975 amendment into evidence gives him a defense based on the Statute of Frauds. We disagree. The parties stipulated to the existence of both documents, and their content is undisputed. Moreover, defendant never pled the Statute of Frauds as a

defense and, therefore, is barred from raising it here. *See Yeager v. Dobbins*, 252 N.C. 824, 114 S.E. 2d 820 (1960). Defendant's contention that certain testimony and "admissions" of plaintiff required dismissal is also without merit.

If, on remand, the trial court finds that defendant knew or had reason to know what meaning plaintiff attached to the disputed terminology and that plaintiff did not know or have reason to know of the meaning attached to the disputed language by defendant, the trial court should conclude that there is a contract as to the plaintiff's meaning. Otherwise, plaintiff's claim does not prevail.

Affirmed in part, reversed and remanded in part.

Judges WELLS and MARTIN concur.

BILLIE E. HOLDER v. LAYON B. HOLDER

No. 877DC314

(Filed 17 November 1987)

1. **Divorce and Alimony § 24.8— child support—insufficiency of evidence to support increase—no change in parents' ability to pay**

A general finding that a child was older and that inflation had occurred was inadequate to support an order of increased support payments; furthermore, the court's findings did not demonstrate any substantial change in the relative ability of the parents to pay support.

2. **Divorce and Alimony § 30— equitable distribution—no consideration of fault**

There was nothing in the record tending to show that the trial court impermissibly considered fault of either party in the equitable distribution of marital assets.

3. **Divorce and Alimony § 30— equitable distribution—reliance on parties' division of personal property improper**

Where there was no evidence of a written agreement in the record and no affirmative assurance that the parties were in agreement concerning the division of personal property, the trial court's reliance on the parties' oral agreement or existing division of personal property was error, and any marital personal property should have been included in the equitable distribution of the parties' property. N.C.G.S. § 50-20(d).

4. Divorce and Alimony § 27— alimony and child support—attorney fees—award not specific

Though plaintiff was entitled to attorney fees for the legal costs of pursuing her alimony claim, she was not entitled to attorney fees for her child support action because there was no finding that defendant refused to provide adequate child support under the circumstances existing at the institution of the proceeding; however, the award must be vacated where there was no way to determine to what facet or facets of the case the award was attributable, and where the award was not supported by any findings as to the time spent, skill required, nature of services, hourly rate, or customary rate.

APPEAL by defendant from *Sumner, Judge.* Order entered 12 December 1986 in District Court, EDGECOMBE County. Heard in the Court of Appeals 20 October 1987.

Knox and Kornegay, by Howard A. Knox, Jr., for plaintiff-appellee.

Moore, Diedrick, Carlisle and Hester, by J. Edgar Moore, for defendant-appellant.

BECTON, Judge.

I

This is an appeal from a court-ordered child support modification, an equitable distribution of marital property, and an award of attorney fees.

Plaintiff, Billie E. Holder, and defendant, Layon B. Holder, were married on 10 May 1971 and separated on 22 December 1982. A 21 February 1983 order of Edgecombe County District Court awarded the plaintiff wife custody of the parties' minor child, Layon Buie Holder, denied the plaintiff's request for alimony *pendente lite*, and directed the defendant husband to pay child support of $300.00 monthly and plaintiff's attorney's fees of $150.00. The court found facts regarding the respective incomes of the parties but made no findings on their expenses or estates, nor findings concerning the needs of the child. Apparently neither party appealed from that order.

Plaintiff instituted an action for absolute divorce on 17 September 1984 and simultaneously filed motions for an increase in child support, permanent alimony, an equitable distribution of marital property, and attorney fees. Judgment of divorce was en-

tered on 12 December 1986. Following a hearing, a separate order was entered the same day increasing defendant's child support payments to $550.00 per month, dividing the marital real estate, reawarding custody of the child to plaintiff, denying her request for alimony, and directing defendant to pay $750.00 for his wife's attorney fees.

Defendant appeals from the 12 December 1986 order, challenging the sufficiency of the findings of fact supporting the child support modification, equitable distribution, and award of attorney fees, and, further, alleging error in the trial judge's failure to divide personal property and in his consideration of marital fault in the equitable distribution proceeding. For the reasons discussed hereafter, we vacate those portions of the order relating to child support, equitable distribution, and attorney fees, and remand for further proceedings.

II

Child Support Modification

Defendant first contends that the trial court's findings do not support the child support award.

Before ordering an increase in child support, the trial court must find facts, supported by competent evidence, which show that there has been a substantial change of circumstances affecting the welfare of the child. *E.g., Ebron v. Ebron*, 40 N.C. App. 270, 252 S.E. 2d 235 (1979). The court must hear evidence and make findings of specific facts regarding actual past expenditures and present reasonable expenses, in order to determine the "reasonable needs" of the child. *E.g., Norton v. Norton*, 76 N.C. App. 213, 332 S.E. 2d 724 (1985); *Walker v. Tucker*, 69 N.C. App. 607, 317 S.E. 2d 923 (1984); *Newman v. Newman*, 64 N.C. App. 125, 306 S.E. 2d 540, *disc. rev. denied*, 309 N.C. 822, 310 S.E. 2d 351 (1983). Furthermore, to properly determine the parents' relative ability to supply the necessary support, the court must hear evidence and make specific factual findings regarding "the parents' income, estates (e.g., savings; real estate holdings, including fair market value and equity; stocks; and bonds) and present reasonable expenses." *Newman* at 128, 306 S.E. 2d at 542. *See Little v. Little*, 74 N.C. App. 12, 327 S.E. 2d 283 (1985); *Walker; Poston v. Poston*, 40 N.C. App. 210, 252 S.E. 2d 240 (1979).

[1] In the present case, the sole finding of fact regarding a change of circumstances is a general finding that the child is older and that inflation has occurred, which, standing alone, is inadequate to support an order of increased support payments. *See Willis v. Bowers*, 56 N.C. App. 244, 287 S.E. 2d 424 (1982); *Waller v. Waller*, 20 N.C. App. 710, 202 S.E. 2d 791 (1974). Other than an "example" relating to a recent purchase of shoes and clothing costing approximately $150.00, there are no specific findings regarding actual past expenditures or current expenses to support the court's conclusory "finding" that the child's reasonable present expenses are $635.00 per month, or to show that his needs have increased since the prior support order was entered.

Nor do the findings demonstrate any substantial change in the relative ability of the parents to pay support. Although there are findings respecting the incomes, debts, and assets of each parent, some of these are incomplete or involve vague approximations. For example, a finding that defendant has income from rental property fails to state the net amount or to take into account the equitable distribution made of that property in the same order. Moreover, the only findings as to the reasonable expenses of each parent are conclusory unsupported statements that plaintiff has approximate monthly expenses of $875.00 and that the defendant's living expenses are "nominal."

Since the evidence before the trial court is not brought forward in the record, we cannot ascertain whether sufficient evidence was presented from which the trial court could make the additional required findings. Consequently, we vacate that portion of the award modifying child support, and remand so that the trial court may make further findings, hearing additional testimony if necessary, and enter an appropriate order.

III

Equitable Distribution

A

[2] Defendant first contends that because the trial court found facts relating to fault on the part of defendant but failed to award alimony to plaintiff, the court erroneously considered marital fault in the equitable distribution of marital assets, in violation of

the court's ruling in *Smith v. Smith*, 314 N.C. 80, 331 S.E. 2d 682 (1985). This argument is without merit.

Based in part on his findings regarding fault, the trial judge concluded that "technically the Plaintiff should be awarded some permanent alimony," but failed to order alimony due to the "practicality and economics of this case." Furthermore, the court listed in its order the factors it considered in distributing the marital property, and marital fault is not one of them. We find nothing in the record tending to show that the court impermissibly considered fault of either party in the property distribution. This assignment of error is overruled.

B

[3] Defendant next contends that the court erred by failing to include personal property in the equitable distribution of assets. The trial court found as a fact and concluded as a matter of law that "all personal property ha[d] heretofore been mutually divided" and that there was "no reason for the court to address that as an issue." Accordingly, the court divided only the real property of the parties in its order.

Under the equitable distribution statute, the trial court must enforce agreements providing for the distribution of marital property that are "written . . . , duly executed, and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1." N.C. Gen. Stat. Sec. 50-20(d) (1984). However, a simple oral division of marital property is not binding on the parties. *See Peak v. Peak*, 82 N.C. App. 700, 348 S.E. 2d 353 (1986); *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985). *See also McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E. 2d 600 (1985) (contemporaneous inquiry of parties by trial court required before accepting oral stipulations regarding distribution of marital property).

We find no evidence of a written agreement in the record before us, nor any affirmative assurance that the parties were in agreement concerning the division of personal property. Hence, we hold that the trial court's reliance on the parties' oral agreement or existing division of personal property was error and that any marital personal property should have been included in the equitable distribution. That portion of the order relating to the distribution of property is thus vacated. On remand, the trial

court must hear evidence and make findings regarding the existence, nature, and net value of any personal property at the time of separation, and classify that property as separate or marital. Then the court must include the net value of the marital personal property in its equitable distribution of the marital assets.

C

Defendant further questions the adequacy of findings concerning the marital real estate. He first argues that there are no findings regarding the net value of each parcel of real property. Although the trial court inadvertently omitted from the findings of fact any valuation of the real estate, the court did include in the conclusions of law a value for each property. However, there is no indication whether the value assigned is fair market value, or net value as required by the statute. *See* N.C. Gen. Stat. Sec. 50-20(c) (Cum. Supp. 1985). These errors should be corrected on remand.

Defendant's remaining arguments with regard to the equitable distribution proceeding have been carefully considered and found to be without merit.

IV

Attorney Fees

[4] Defendant also contends that the award of attorney fees to plaintiff's attorney is not supported by sufficient findings of fact. We agree.

An award of attorney fees, pursuant to N.C. Gen. Stat. Sec. 50-16.4, in an action for alimony must be supported by findings that establish that the plaintiff (1) is entitled to alimony *pendente lite* under G.S. 50-16.3, *Presson v. Presson*, 13 N.C. App. 81, 185 S.E. 2d 17 (1971), and (2) is unable to defray the expense of prosecuting the suit. *Davis v. Davis*, 62 N.C. App. 573, 302 S.E. 2d 886 (1983). Before a court may award attorney fees under N.C. Gen. Stat. Sec. 50-13.6 in a proceeding for modification of child support, the court must find as facts (1) that the party seeking modification is acting in good faith, (2) that the party has insufficient means to defray the expenses of the suit, and (3) that the party ordered to pay support has refused to pay support which is adequate under the circumstances existing at the time of the institu-

tion of the action. *E.g., Quick v. Quick*, 67 N.C. App. 528, 313 S.E. 2d 233 (1984).

Once the party's entitlement to attorney fees has been shown, the court then decides, in its discretion, on a reasonable fee. *Peak*, 82 N.C. App. at 706, 348 S.E. 2d at 357. However, the order must contain findings as to the basis of the award, including the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested. *See, e.g., id.*; *Coleman v. Coleman*, 74 N.C. App. 494, 328 S.E. 2d 871 (1985).

Moreover, attorney fees are not recoverable in an action for equitable distribution. *Patterson v. Patterson*, 81 N.C. App. 255, 343 S.E. 2d 595 (1986); *see also Conrad v. Conrad*, 82 N.C. App. 758, 348 S.E. 2d 349 (1986); *In re Deed of Cooper*, 81 N.C. App. 27, 344 S.E. 2d 27 (1986). Because this is a combined action for alimony, child support, and equitable distribution, findings should also reflect that the fees awarded are attributable to work only on the alimony and/or child support actions. *See Patterson* at 262, 343 S.E. 2d at 600.

After careful review, we conclude that the findings are sufficient in the present case to establish that plaintiff is entitled to attorney fees for the legal costs of pursuing her claim for alimony. However, because there is no finding that defendant refused to provide adequate child support under the circumstances existing at the institution of the proceeding, an award of attorney fees for the child support action would be error. In the absence of findings or conclusions indicating to what facet or facets of this case the award is attributable, we are unable to ascertain whether the court erred by awarding fees for equitable distribution or child support. In addition, although attorney fees are appropriate in the alimony action, the award is not supported by any findings as to the time spent, skill required, nature of services, hourly rate, or customary rate. Under these circumstances, this court is unable to review the reasonableness of the award.

For the foregoing reasons, we vacate the award of attorney fees, and remand for a new award based on appropriate findings of fact.

V

For the reasons stated, those portions of the order from which defendant appeals relating to child support modification, equitable distribution, and attorney fees are vacated, and this cause is remanded to the District Court for further proceedings consistent with this opinion.

Vacated and remanded.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. ELMORE LEROY PLANTER

No. 8726SC95

(Filed 17 November 1987)

1. **Burglary and Unlawful Breakings § 5— intent to rape—first degree burglary—sufficiency of evidence**

There was sufficient evidence from which a jury could have concluded that defendant entered a motel room with the intent of raping the prosecutrix, and the evidence would thus sustain his first degree burglary conviction, where the evidence tended to show that defendant entered the motel room shortly after the prosecutrix's male companion had left; he remained in the room after he knew for certain that a woman was in it; and he closed and locked the room door before jumping on the prosecutrix who lay in bed.

2. **Rape § 5— attempted second degree rape— sufficiency of evidence**

The evidence was sufficient to establish the intent to rape and an overt act toward the commission of rape necessary for a conviction of attempted second degree rape.

3. **Burglary and Unlawful Breakings § 7— first degree burglary—refusal to instruct on lesser offense proper**

The trial court in a first degree burglary case did not err by denying defendant's timely request for instructions on misdemeanor breaking or entering where testimony by the prosecutrix that defendant, after closing and locking a motel room door, jumped on top of her as she lay in bed and tried to subdue her with threats and force supported the conclusion that defendant attempted to rape the prosecutrix, and neither the State nor defendant submitted any evidence from which to infer another reason for defendant's entry into the room.

State v. Planter

APPEAL by defendant from *Griffin (Kenneth A.), Judge.* Judgments entered 9 October 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 September 1987.

Defendant was indicted for first-degree burglary, N.C.G.S. § 14-51, and second-degree attempted rape, N.C.G.S. § 14-27.3 (a)(1).

At trial the State's evidence tended to show that on 23 November 1985 at 11:00 p.m. the prosecutrix visited her boyfriend, Shaun, at the Tourist Inn, where he was staying. The couple talked with friends and acquaintances at the motel, before going to Shaun's room at 12:00 a.m. At 4:15 a.m. Shaun left the room to see if some relatives, who were staying in the same motel, had returned safely from a party. Shortly after Shaun left the room, the prosecutrix lying alone in bed in the darkened motel room, heard the room door open and someone enter the room. Thinking it was Shaun, she called his name. In response the intruder, after locking the door, answered "No." He then jumped across the two-foot space between the door and bed where the prosecutrix lay. He climbed on top of her in bed, putting his hand over her mouth and threatening to harm her if she was not quiet. A struggle ensued with the two of them falling to the floor. The prosecutrix subsequently pushed him down, ran to the door, unlocked it, and turned on the light. The intruder fled out the door. As he left the room, the prosecutrix recognized the intruder as being an acquaintance she had met earlier in the evening with Shaun.

Defendant was arrested a short time later in the vicinity of the motel in an intoxicated state and was identified by the prosecutrix as the person with whom she had struggled in the room.

Defendant offered no evidence on his own behalf at trial. At the close of the State's evidence and at the close of all the evidence, he made motions for a directed verdict on the charges of first-degree burglary and attempted second-degree rape, which were denied.

The jury found defendant guilty as charged. The trial court sentenced him to an active term of forty years for first-degree burglary and an active term of ten years for second-degree attempted rape.

From the judgments, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General G. Lawrence Reeves, for the State.

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

ORR, Judge.

[1] Defendant first assigns error to the trial court's denial of his motions for a directed verdict on the charge of first-degree burglary. On appeal, he contends the State's evidence failed to establish he entered the motel room with the intent to commit rape, and thus, as a matter of law, was insufficient to sustain his first-degree burglary conviction.

The evidence presented to support a conviction must be substantial, *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979), and "must be sufficient to convince a rational finder of fact of the existence of each essential element [of the crime charged]." *State v. Rushing*, 61 N.C. App. 62, 64, 300 S.E. 2d 445, 447, *aff'd per curiam*, 308 N.C. 804, 303 S.E. 2d 822 (1983). "On review, the State is entitled to all reasonable inferences which may be drawn from the evidence." *Id. See State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

In the present case, defendant was charged pursuant to N.C.G.S. § 14-51 with first-degree burglary by breaking and entering a dwelling at night with the intent to commit rape therein.

To support a guilty verdict on this charge, the State's evidence must sufficiently show that at the time defendant entered the motel room "he intended to have sexual intercourse with the prosecutrix by force and against her will." *State v. Norris*, 65 N.C. App. 336, 338, 309 S.E. 2d 507, 509 (1983). "The intent to commit a felony must exist at the time of entry, and it is no defense that the defendant abandoned the intent after entering." *State v. Rushing*, 61 N.C. App. at 64, 300 S.E. 2d at 448; *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977).

"Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E. 2d

506, 508 (1974), quoted with approval in *State v. Freeman*, 307 N.C. 445, 448, 298 S.E. 2d 376, 378 (1983).

In *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, this Court extensively reviewed prior decisions examining the sufficiency of the State's evidence on the issue of intent to commit rape prior to breaking into a victim's dwelling. We concluded that the evidence must present "some overt manifestation of an intended forcible sexual gratification [by defendant to prevail]." 61 N.C. App. at 66, 300 S.E. 2d at 449. When evaluating the evidence, we considered the Supreme Court's holding in *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376, that an overt manifestation of sexual intent may be derived from the words spoken by the defendant, or from his dress or demeanor.

Applying this standard in *Rushing*, we reversed the defendant's first-degree burglary charge where the State's evidence of defendant's intent to commit rape tended to show: that defendant broke into the victim's home in the early morning hours wearing dark pants, white fabric gloves and no shirt; threatened to shoot the prosecutrix if she screamed; came to the side of her bed and grabbed her arm; told her not to move; and then put his hand over her mouth when she began screaming. This was held to be insufficient to prove intent to commit rape.

After review, we find the present case distinguishable from *Rushing*. The evidence of defendant's intent, presented at trial, tended to show: that defendant met the prosecutrix earlier in the evening and defendant, therefore, knew she was with Shaun at the Tourist Inn; shortly after Shaun left his motel room at 4:15 a.m., the defendant entered the room; after defendant entered, the prosecutrix said "Shaun?"; and defendant quickly closed and locked the motel room door and answered "No" to the prosecutrix's question. He then jumped on top of her as she lay undressed in bed, placing his hand over her mouth and threatening to harm her if she was not quiet. Defendant grappled with the prosecutrix until he realized he could not subdue her, then fled. As defendant left the room, the prosecutrix recognized him and noted that he was wearing blue work pants. When police arrested defendant at approximately 5:00 a.m., he was wearing blue work pants with no zipper.

Based upon this evidence, with all reasonable inferences drawn in the State's favor, we conclude a jury could reasonably find that defendant showed a preconceived intent to rape the prosecutrix (1) by entering the motel room shortly after the prosecutrix's male companion had left; (2) by remaining in the room after he knew for certain that a woman was in it, and (3) by then closing and locking the room door before jumping on the prosecutrix who lay in bed. Therefore, there was sufficient evidence from which a jury could have concluded that defendant entered the room with the intent of raping the prosecutrix. The fact that the prosecutrix was more than a match for defendant, causing him to abandon any such intent and flee the room, would not absolve him from responsibility for his actions.

Consequently, this Court finds the evidence of defendant's intent to commit rape prior to entering the room sufficient to overcome a motion for directed verdict. It is for the jury to decide if in fact the intent to commit rape was present.

[2] In his second assignment of error defendant argues the State's evidence failed to show that he acted with intent to rape the prosecutrix. Therefore, the trial court improperly denied his motions to dismiss the charge of second-degree attempted rape.

"In order to convict defendant of an attempt crime, the State must show: (i) an intent to commit the crime and (ii) an overt act done toward the commission of the crime, beyond mere preparation." *State v. Slade*, 81 N.C. App. 303, 307, 343 S.E. 2d 571, 573 (1986); *State v. Powell*, 277 N.C. 672, 178 S.E. 2d 417 (1971). "[T]o carry its burden, it was necessary for the State to present sufficient evidence to permit the jury to find first, that when defendant assaulted the prosecutrix he intended to engage in forcible, nonconsensual intercourse with her and second, that in the ordinary and likely course of events his assaultive acts would result in the commission of a rape." *State v. Rushing*, 61 N.C. App. at 67, 300 S.E. 2d at 449.

We conclude that the State's evidence, as set forth above, after drawing all reasonable inferences in the State's favor, was sufficient to establish both the intent to rape and an overt act toward the commission of rape necessary for a conviction of attempted second-degree rape. For this reason, we hold the trial

court properly dismissed defendant's motions for a directed verdict on the charge of attempted second-degree rape.

[3] Finally, defendant contends the trial court committed reversible error by denying his timely request to instruct the jury on misdemeanor breaking or entering.

Misdemeanor breaking or entering is a lesser included offense of N.C.G.S. § 14-51, first-degree burglary. *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965); *State v. Patton*, 80 N.C. App. 302, 341 S.E. 2d 744 (1986). "The distinction between the two offenses rests on whether the unlawful breaking or entering was done with the intent to commit the felony named in the indictment." *State v. Patton*, 80 N.C. App. at 305, 341 S.E. 2d at 746. "When any evidence presented at trial would permit the jury to convict defendant of the lesser included offense, the trial court must instruct the jury regarding that lesser included offense." *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E. 2d 514, 518 (1986). Failure to give such an instruction, when it is supported by the evidence, constitutes reversible error. *State v. Whitaker*, 316 N.C. 515, 342 S.E. 2d 514; *State v. Thomas and State v. Christmas and State v. King*, 52 N.C. App. 186, 278 S.E. 2d 535 (1981).

Our Court previously addressed the question now before it in *State v. Thomas and State v. Christmas and State v. King*, 52 N.C. App. 186, 278 S.E. 2d 535 and held that:

> where the only evidence of the defendant's intent to commit a felony in the building or dwelling was the fact that the defendant broke and entered a building or dwelling containing personal property, the appellate courts of this State have consistently and correctly held that the trial judge must submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict. . . . However, where there is *some additional evidence of the defendant's intent* to commit the felony named in the indictment in the building or dwelling, such as . . . evidence that the felony was attempted, . . . and *there is no evidence that the defendant broke and entered for some other reason*, then the trial court does not err by failing to submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict.

52 N.C. App. at 196-97, 278 S.E. 2d at 542-43 (emphasis added). *See State v. Patton*, 80 N.C. App. 302, 341 S.E. 2d 744.

In the present case the prosecutrix testified that defendant, after closing and locking the motel room door, jumped on top of her as she lay in bed and tried to subdue her with threats and force. This testimony supports the conclusion that defendant attempted to rape the prosecutrix and is additional evidence of his intent to commit the felony of rape named in the indictment. In contrast, neither the State nor defendant submitted any evidence from which to infer another reason for defendant's entry into the room. We hold, therefore, that the trial court did not err in failing to submit the lesser included offense of misdemeanor breaking or entering to the jury as a possible verdict for defendant.

In conclusion, this Court finds that defendant received a fair trial free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

MARK RICHARD GARRISON v. WILLIAM E. GARRISON, III, AND W. E. GARRISON GRADING COMPANY

No. 8710SC306

(Filed 17 November 1987)

1. Rules of Civil Procedure § 59— new trial—proper grounds

There was no merit to defendant's contention that the trial court erred in granting a new trial on the improper ground that the jury included a lawyer and an insurance agent, since the evidence, the trial judge's comments, and the trial judge's order itself indicated that the judge awarded a new trial based on his belief that the verdict was against the weight of the evidence and that it was in the interest of justice to do so.

2. Rules of Civil Procedure § 50— new trial motion under Rule 50—prerequisites

There was no merit to defendants' contentions that a trial court may not grant a new trial under N.C.G.S. § 1A-1, Rule 50(b) unless the movant would have been entitled to a judgment n.o.v., or that a proper motion for directed verdict, stating the specific grounds, is a prerequisite for a new trial motion under N.C.G.S. § 1A-1, Rule 50(b), just as it is a prerequisite for judgment n.o.v.

Garrison v. Garrison

APPEAL by defendants from *Herring, Judge.* Order entered 27 October 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 20 October 1987.

David R. Cockman for plaintiff-appellee.

Maupin, Taylor, Ellis, and Adams, P.A., by John T. Williamson, M. Keith Kapp, and James E. Gates for defendant-appellants.

BECTON, Judge.

Plaintiff, Mark Richard Garrison, brought this action for personal injuries sustained as a result of a one-vehicle accident during which he was a passenger in a truck driven by defendant William E. Garrison, III, and owned by defendant, W. E. Garrison Grading Company. On 23 October 1986, following three days of testimony, the jury returned a verdict finding that plaintiff was not injured by the negligence of William Garrison. At a hearing on 27 October 1986, plaintiff moved in open court, pursuant to Rule 50(b) of the Rules of Civil Procedure, for judgment notwithstanding the verdict, or in the alternative, for a new trial. From an order of the trial court setting aside the verdict and awarding a new trial, defendants appeal. We affirm.

I

At trial, plaintiff's evidence about the accident consisted of testimony by two witnesses, Bryan Upchurch, and Trooper M. D. Cash, which tended to show the following:

On 1 February 1975, plaintiff, then age eight, his sixteen year old brother, William Garrison, and a number of others spent the morning doing landscaping and related work at Aversboro Road Baptist Church in Garner. At lunchtime, the Garrison brothers, Bryan Upchurch, and another boy left to get lunch, and were returning to the church when the accident occurred.

The boys were riding south on Buffalo Road in a pick-up truck driven by William Garrison. Plaintiff sat in the middle seat, Upchurch sat by the door, and the other boy rode in the truck bed. Some other boys from their group were ahead of them in a car. Upchurch testified, "They were trying to outrun us and we were trying to catch them." The truck approached a sharp left curve at a point where the pavement was 18 feet wide and the

low shoulders consisted of dirt and gravel. The speed limit was 55 miles per hour, but Upchurch recalled seeing a diamond shaped sign with a lower advisory speed limit. Upchurch testified that, as the truck entered the curve, the right front tire dropped down off the pavement onto the shoulder, and William Garrison jerked the truck back onto the road. The truck traveled across to the left side of the road, struck a driveway culvert, overturned, struck a light pole and a bush, and came to rest on its top. Plaintiff was thrown from the truck and suffered serious injury.

Upchurch opined that the truck was travelling in excess of 55 miles per hour when it entered the curve. According to Trooper Cash, there were 259 feet of tire impressions before the actual impact, and the truck traveled an additional 118 feet, after striking the culvert, to the place where it came to rest.

Plaintiff also offered extensive evidence regarding the nature and extent of his injuries. Defendant presented no evidence.

II

The single question presented for our review is whether the trial court erred by granting plaintiff's motion for a new trial.

A

Plaintiff premised his motion for a new trial upon the grounds that "the verdict is contrary to all of the evidence and the jury disregarded the court's instructions . . . ." In his oral ruling upon the motion in open court following arguments of counsel, Judge D. B. Herring began: "This is one that has bothered me all weekend. As I recall, the uncontroverted evidence . . . ." The judge then proceeded to summarize the evidence of negligence, after which he concluded:

> In the interest of justice, reluctantly I am going to set aside the verdict and order a new trial *because* I cannot logically see how the jury could have found "no" on the issue of negligence.
>
> I had really thought at the outset that negligence might be stipulated. I note, also, that there was a lawyer on the jury in addition to an insurance agent who sells liability insurance. (Emphasis added.)

The subsequent written order stated, in pertinent part, that the court was awarding a new trial "*in its discretion* and in the interest of justice." (Emphasis added.) This fact controls the scope of our review of Judge Herring's action. *See Worthington v. Bynum*, 305 N.C. 478, 481, 290 S.E. 2d 599, 602 (1982).

B

It is a well established rule in this jurisdiction that a trial judge's discretionary decision to deny or grant a new trial upon any ground may be reversed on appeal only when the record affirmatively demonstrates a manifest abuse of discretion. *E.g., Bryant v. Nationwide Mutual Fire Insurance Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985); *Worthington v. Bynum*. Only when the trial court grants or refuses to grant a new trial due to some error of law in the trial is its decision fully reviewable. *See Bryant* at 381-82, 329 S.E. 2d at 344-45, *Worthington* at 483, 290 S.E. 2d at 603. Further, the scope of appellate review of a trial judge's exercise of the power to grant a new trial was not enlarged by the adoption of the Rules of Civil Procedure. *Worthington* at 482, 290 S.E. 2d at 602.

C

[1] Defendant first argues that the trial court made an error of law, fully reviewable on appeal, by granting a new trial on the improper ground that there was a lawyer and an insurance agent on the jury. However, the judge's comment on the composition of the jury does not indicate to us that this reflection formed the basis for his decision. If such were the case, the award of a new trial would constitute clear error, particularly since the parties presumably examined the jurors prior to trial and were satisfied with them. However, based upon our review of the evidence, the judge's comments, and the order itself, we are convinced that the judge awarded a new trial based on his belief that the verdict was against the weight of the evidence and that it was in the interest of justice to do so. These are grounds which have traditionally afforded bases for a trial court's discretionary authority to award a new trial. *See, e.g., Selph v. Selph*, 267 N.C. 635, 148 S.E. 2d 574 (1966); *Walston v. Green*, 246 N.C. 617, 99 S.E. 2d 805 (1957).

D

[2] Defendant's remaining arguments are based on a premise that there are two varieties of motion for a new trial, and that, although the grant of a new trial under Rule 59(d) of the Rules of Civil Procedure may be overturned on appeal only if the trial court has abused its discretion or committed an error of law, a new trial motion under Rule 50(b) is subject to a stricter standard. These contentions are without merit.

Defendants first maintain that a trial court may not grant a new trial under Rule 50(b) unless the movant would have been entitled to a judgment notwithstanding the verdict. However, the federal case law relied upon by defendants imposes that limitation only in cases in which the new trial was not ordered within 10 days of entry of judgment pursuant to Rule 59(d), and in which the party moving for judgment notwithstanding the verdict *did not also move for a new trial. See Goldsmith v. Diamond Shamrock Corp.*, 767 F. 2d 411 (8th Cir. 1985); *Kain v. Winslow Manufacturing, Inc.*, 736 F. 2d 606 (10th Cir. 1984), *cert. denied*, 470 U.S. 1005, 84 L.Ed. 2d 381 (1985); *Jackson v. Wilson Trucking Corp.*, 243 F. 2d 212 (D.C. Cir. 1957). These cases are inapposite to the case *sub judice* in which the new trial was granted on plaintiff's motion. Moreover, the order was entered within ten days of judgment so as to be proper under Rule 59(d), even had a motion therefore not been made.

Rule 59(a) sets forth the grounds upon which a new trial may be ordered, while Rule 50(b) merely establishes a procedure whereby a movant may, *if he chooses*, join the new trial motion with one for judgment notwithstanding the verdict. Because there is no requirement that a new trial motion accompany any other motion, there would be no logic to a rule which imposed the limitation championed by defendants.

Defendants also contend that a proper motion for directed verdict, stating the specific grounds, is a prerequisite for a new trial motion under Rule 50(b), just as it is a prerequisite for judgment notwithstanding the verdict. The rule itself does not impose this requirement nor does logic demand that we do so. The purpose of the rule which makes a specific directed verdict motion a prerequisite for a judgment notwithstanding the verdict is to allow the adverse party to meet any defects in his case with fur-

ther proof and thus avoid the entry of a judgment notwithstanding the verdict at the close of the trial on a ground that could have been met with proof had it been suggested earlier. *See, e.g., Byerly v. Byerly*, 38 N.C. App. 551, 248 S.E. 2d 433 (1978). No similar reason exists when the motion is for a new trial since the grounds for a new trial are not the same as those for a directed verdict, and since a new trial motion need not accompany one for judgment notwithstanding the verdict.

Plaintiff's motion was clearly based (and granted) on grounds available under Rule 59(a). See N.C. Gen. Stat. Sec. 1A-1, Rule 59(a)(5), (7), and (9) (1983). The failure to state a particular rule number as a basis for a motion is not a fatal error so long as the substantive grounds and relief desired are apparent and the opponent of the motion is not prejudiced thereby. *See, e.g., In re Estate of English*, 83 N.C. App. 359, 350 S.E. 2d 379 (1986), *disc. rev. denied*, 319 N.C. 403, 354 S.E. 2d 711 (1987); *McGinnis v. Robinson*, 43 N.C. App. 1, 258 S.E. 2d 84 (1979). Defendants would have us penalize plaintiff for citing Rule 50(b) instead of Rule 59(a) even though the grounds for his motion were clear. We decline to do so.

III

We are unpersuaded by any of defendants' arguments that Judge Herring's decision to order a new trial should be subjected to any standard of review other than the usual one of "abuse of discretion." A review of the record discloses no manifest abuse of discretion, and consequently, the ruling of the trial court will not be disturbed.

Affirmed.

Judges PHILLIPS and GREENE concur.

BERNADINE MOSES DUNCAN AND HOWARD BOYKIN DUNCAN v. AMMONS CONSTRUCTION COMPANY INC. AND JUSTICE M. AMMONS

No. 8710SC216

(Filed 17 November 1987)

1. **Rules of Civil Procedure § 15.1— lateness of motion to amend—amendment properly denied**

The trial court did not abuse its discretion in denying plaintiffs' motion for leave to amend their complaint to allege wanton negligence where plaintiffs waited to file the motion until the very day they wished it heard, and allowing it would have been unfair and prejudicial to defendants. N.C.G.S. § 1A-1, Rules 6(d) and 15(a).

2. **Limitation of Actions § 4.2— negligence in building house—action barred by six-year statute of limitations**

In an action to recover from defendant builder for injuries sustained by one plaintiff when the folding stairs to her attic collapsed while she was climbing them, the trial court properly determined that the claim was filed more than six years after defendants completed improvements to real property, and N.C.G.S. § 1-50(5) barred the action; furthermore, N.C.G.S. § 1-50(5)e was inapplicable to extend the period of limitation where plaintiffs never alleged wanton negligence or made any assertions of intentional wrongdoing.

APPEAL by plaintiffs from *Bailey, Judge*. Order entered 17 October 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 25 September 1987.

Moses & Murphy by Pinkney J. Moses for plaintiff appellants.

Teague, Campbell, Dennis & Gorham by George W. Dennis, III, for defendant appellees.

COZORT, Judge.

Plaintiffs filed this action grounded in negligence to recover damages for personal injuries. Defendants denied negligence and moved for summary judgment on the basis of the statute of repose. On the date the summary judgment motion was to be heard, plaintiffs moved to amend the complaint to allege "wanton" negligence. From an order granting defendants' motion for summary judgment and denying plaintiffs' motion for leave to amend, plaintiffs appeal.

On 10 September 1979, plaintiffs purchased a home, which had been built and completed by defendants prior to that date. On 15 May 1983, plaintiff Bernadine Duncan suffered injuries when the folding attic staircase collapsed as she was climbing it. On 14 May 1986, plaintiffs filed suit alleging that defendants had installed the staircase in a negligent manner. Defendants denied negligence and pled the statute of repose under N.C. Gen. Stat. § 1-50(5) as a bar to plaintiffs' action. N.C. Gen. Stat. § 1-50(5) provides:

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

Defendants then filed a motion for summary judgment, again pleading the statute of repose.

A hearing on defendants' summary judgment motion was scheduled for 16 October 1986. On that day, immediately prior to the hearing, plaintiffs filed a motion for leave to amend their complaint. Plaintiffs' motion requested leave to include a claim for wanton negligence, which would enable plaintiff to rely on N.C. Gen. Stat. § 1-50(5)e, which provides:

> The limitation prescribed by this subdivision [N.C. Gen. Stat. § 1-50(5)] shall not be asserted as a defense by any person who shall have been guilty of fraud, or *willful or wanton negligence* in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence. (Emphasis supplied.)

The trial court considered both motions simultaneously. The trial court then issued an order denying plaintiffs' motion for leave to amend, ruling that the motion was not timely filed and that plaintiffs failed to give notice of the hearing thereof, as re-

quired by N.C. Gen. Stat. § 1A-1, Rule 6(d). In the same order, the trial court granted defendants' motion for summary judgment. From that order, plaintiffs appeal.

[1] Plaintiffs argue that the trial court erred in denying its motion for leave to amend the complaint. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 15 provides in pertinent part:

> (a) *Amendments.*—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 party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

Since defendants had already filed a responsive pleading, plaintiffs could amend their complaint only by the defendants' written consent, which was never given, or by leave of court. Although leave to amend should be freely given, the motion is addressed to the discretion of the trial judge and is not reviewable on appeal in the absence of a showing of an abuse of discretion. *Garage v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979). Refusal to grant the motion without any justifying reason and without a showing of prejudice to defendant is considered an abuse of discretion. *Henry v. Deen*, 61 N.C. App. 189, 300 S.E. 2d 707 (1983), *rev'd on other grounds*, 310 N.C. 75, 310 S.E. 2d 326 (1984).

In the case at bar, the trial judge stated his reason for denying plaintiffs' motion. In his order, the trial judge said, "[p]laintiffs having failed to timely file their Motion for Leave to Amend Complaint and give notice of the hearing thereof under North Carolina Rule of Civil Procedure [6(d)][1] said motion is denied." Rule 6(d) provides in part:

1. The record on appeal states that the trial court referred to Rule 6"(b)." However, after reading the briefs and the entire record, we are convinced that the "(b)" is a typographical error in the record and that the trial court was actually relying on Rule 6"(d)."

> A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court.

Clearly, plaintiffs did not comply with the requirements of Rule 6(d). Rather, they waited to file their motion until the very day that they wished it heard. Because of the untimely manner in which the motion was presented, allowing it would have been unfair and prejudicial to defendants. Therefore, we hold that the trial court did not abuse its discretion in denying plaintiffs' motion.

[2] Plaintiffs next contend that the trial court erred in granting defendants' motion for summary judgment. We disagree.

The purpose of summary judgment is to provide an expeditious method of determining whether a genuine issue of material fact exists, and if not, whether the moving party is entitled to judgment as a matter of law. *Schoolfield v. Collins*, 12 N.C. App. 106, 182 S.E. 2d 648 (1971), *rev'd on other grounds*, 281 N.C. 604, 189 S.E. 2d 208 (1972). If plaintiffs' claim is barred by the statute of limitations, defendant is entitled to judgment as a matter of law and summary judgment is appropriate. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E. 2d 878 (1971).

In this case, the applicable statute of limitations is N.C. Gen. Stat. § 1-50(5), which requires that an action arising out of an alleged defective or unsafe condition of an improvement to real property be brought within six years from the last specific act or omission of defendants giving rise to the cause of action. This statute "is designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 428, 302 S.E. 2d 868, 873 (1983).

Defendants in the present action completed construction on plaintiffs' home prior to 10 September 1979. Plaintiffs had an outside time limit of six years from that date, or until 10 September 1985, to bring an action for negligent construction. Plaintiffs had more than two years from the date of the accident, 15 May 1983, to bring an action. However, plaintiffs did not file their complaint

until 14 May 1986. Since they failed to file their complaint within the six-year limitations period, N.C. Gen. Stat. § 1-50(5) bars their action.

Plaintiffs argue, however, that N.C. Gen. Stat. § 1-50(5)e is applicable here, precluding defendants from relying on the protection of N.C. Gen. Stat. § 1-50(5). The trial court ruled that N.C. Gen. Stat. § 1-50(5)e did not apply, because "wanton negligence" was not alleged in plaintiffs' complaint. Plaintiffs contend that the word "wanton" has no fixed definition, but is a "term of art" used to separate ordinary from extraordinary negligence and that whether or not defendants' behavior was wanton is a question for the jury.

We hold that the allegations in plaintiffs' complaint were insufficient to assert a claim for "wanton negligence." In *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956), our Supreme Court stated:

> Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.

Id. at 28, 92 S.E. 2d at 396-97.

In their complaint, plaintiffs never allege wanton negligence or make any assertions of intentional wrongdoing. Therefore, we hold that N.C. Gen. Stat. § 1-50(5)e is inapplicable in this action.

Since plaintiffs' claim was filed more than six years after defendants completed improvements to real property, N.C. Gen. Stat. § 1-50(5) bars the action. Accordingly, the trial court's decision to grant defendants' motion for summary judgment is affirmed.

Affirmed.

Judges PHILLIPS and GREENE concur.

S & F TRADING COMPANY, A GENERAL PARTNERSHIP v. DOUGLAS B. CARSON INDIVIDUALLY AND D/B/A CARSON AND ASSOCIATES, STEVE J. EMMANUEL AND HEIDI S. EMMANUEL

No. 8726SC232

(Filed 17 November 1987)

Landlord and Tenant § 6; Evidence § 32.7— identity of lessee—parol evidence inadmissible

The trial court did not err in entering summary judgment for plaintiff in its action for breach of a lease agreement, and defendant could not rely on parol evidence to show that there was a genuine issue of fact with regard to the identity of the lessee where the contract was not ambiguous on its face; the contract was not a negotiable instrument and the N.C.G.S. § 25-3-403(b) exception to the parol evidence rule therefore would not apply; and the action was governed by the general rule that defendant could not escape liability on his unqualified signature by the mere assertion that he signed as a representative of a corporation.

APPEAL by defendant from *Saunders, Judge.* Order entered 21 March 1986 regarding liability, and judgment entered 9 October 1986 regarding damages in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 September 1987.

Weinstein and Sturges, P.A. by L. Holmes Eleazer, Jr. and William H. Sturges for plaintiff-appellee.

DeArmon and Burris by James H. Morton for defendant-appellant.

BECTON, Judge.

Plaintiff, S & F Trading Company, brought this action against defendants, Douglas B. Carson, Carson and Associates, and Steve J. and Heidi S. Emmanuel, to recover damages for breach of a lease agreement. The trial judge granted S & F Trading Company's motion for summary judgment against Douglas B. Carson individually and d/b/a Carson and Associates regarding the issue of liability. Defendant Douglas Carson appeals. We affirm.

I

The following facts are not in dispute. On 1 July 1979, defendant Douglas B. Carson entered into a written lease agreement

with co-defendant Steve James Emmanuel, as lessor, to lease the ground floor of a building located in Charlotte, North Carolina. The lease was for a period of three years beginning 1 July 1979 and ending 30 June 1982. On 31 December 1980, Emmanuel sold the leased property to S & F Trading Company (S & F), subject to the lease between him and Carson. In January 1981, Carson was notified of the sale and advised to send future rental payments to S & F. Carson paid rental to S & F in January, February, March, April, May, and June 1981. The January, May, and June rental payments were made on the checking account of Douglas Carson and Associates, Ltd., and were signed by Douglas B. Carson, individually. The February, March, and April rental payments were made on the checking account of Re/Max Properties, Inc. and were signed by S. Roslyn Langley. Rental payments were not received for July 1981 through June 1982. S & F made demand for payment by letter in June 1982. The trial judge concluded that Carson was liable as a matter of law, and a jury awarded S & F $9,600 plus interest in damages for Carson's breach of the lease agreement.

II

Carson's sole contention on appeal is that the trial judge erred in granting S & F's motion for summary judgment. Summary judgment is appropriate when the pleadings, depositions, interrogatories, admissions, and affidavits on file raise no genuine issue of material fact and a party is entitled to judgment as a matter of law. N.C. Gen. Stat. Sec. 1A-1, Rule 56 (1982); *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmovant. In addition, in a contract case, the trial judge must determine whether the proffered evidence will be admitted under the parol evidence rule.

Carson contends on appeal that there is a genuine issue of fact regarding the identity of the lessee. He argues that the contract is ambiguous on its face and, consequently, the parol evidence rule does not apply. The parol evidence rule provides:

> [W]here the parties have deliberately put their engagements in writing *in such terms as import a legal obligation free of uncertainty*, it is presumed the writing was

> intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony or prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent. [Citations omitted.] (Emphasis added.)

Neal v. Marrone, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953).

Carson argues that the lease agreement is ambiguous on its face because the party named in the body of the lease as the lessee is "Carson and Associates," and the contract was signed "by Douglas B. Carson." He argues that the term "by" before the signature indicates that he signed in a representative capacity for "Douglas Carson and Associates, Limited," a corporation. Furthermore, Carson contends, (1) because there is no such entity as "Carson and Associates," and (2) because the original lessor, Steve Emmanuel, in his verified answer, denied contracting with Doug Carson d/b/a Carson and Associates, the identity of the lessee should be determined by a trier of fact. We disagree.

Carson's attempt to avoid the parol evidence rule is circular at best. He relies on parol evidence to create ambiguity. The contract is not ambiguous on its face. There is no corporate designee anywhere on the contract; neither is there any indication that Carson signed in a representative capacity for a corporation. There is no seal or title of any kind beside his name. Further, the word "by" is placed in front of both signatures merely to introduce the signature lines, leaving no language within the contract to support Carson's construction.

Carson also attempts to avoid the parol evidence rule through a novel application of N.C. Gen. Stat. Sec. 25-3-403(b) (1986) which provides:

> An authorized representative who signs his own name to an instrument . . .
>
> (b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the

> person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

The statute appears to permit parol evidence, between the "immediate parties" to a negotiable instrument, to demonstrate that a party who merely signed his name, intended to sign in a representative capacity. Carson argues section 403(b) was applied to a similar factual situation in *N. C. Equipment Co. v. DeBruhl*, 28 N.C. App. 330, 220 S.E. 2d 867, *cert. denied*, 289 N.C. 451, 223 S.E. 2d 160 (1976). In *DeBruhl* the court admitted parol evidence to establish that defendant signed in a representative capacity for a corporation when the signature block read:

> "LaFayette Transportation Service
> x(s) James L. DeBruhl"

Carson's reliance on *DeBruhl* is misguided. First, *DeBruhl* involved a negotiable instrument, which made section 403(b) controlling. Secondly, *DeBruhl* involved a suit between the "immediate parties" to the instrument thereby making applicable section 403(b)'s exception to the parol evidence rule. Although Carson makes several arguments in favor of extending the "immediate parties" parol evidence rule exception to the instant case, he cites no authority for so doing. Carson argues on the one hand that we should apply section 403(b) to "simple contracts," yet in the same breath he insists we ignore the limits of its specifically proscribed "immediate parties" exception. Moreover, Carson has not overcome the initial obstacle—that section 403(b) has not been specifically extended to contracts other than negotiable instruments. In *Keels v. Turner*, 45 N.C. App. 213, 217-18, 262 S.E. 2d 845, 847 (1980) this court referred to section 403 in stating the general rule that "one who places his unqualified signature on an instrument as maker or endorser will not be able to escape liability as such by a mere assertion that he intended to sign only as the representative of a corporation [citations omitted]"; however, *Keels* did not attempt to interpret section 403(b) which contains the exception for immediate parties that Carson would have us both embrace and extend. We decline the invitation to do so. We rely instead on the general rule that Carson cannot escape liability on his unqualified signature by the mere assertion that he signed as a representative of a corporation.

Judgment is affirmed.

Judges JOHNSON and PARKER concur.

AUTOMOTIVE EQUIPMENT DISTRIBUTORS, INC. v. PETROLEUM EQUIPMENT & SERVICE, INC.

No. 8726SC187

(Filed 17 November 1987)

Rules of Civil Procedure § 55.1— entry of default—setting aside proper

Defendant showed good cause to justify setting aside an entry of default and the trial court therefore erred by reinstating the entry of default where defendant employed counsel and diligently conferred with him as soon as defendant was served with plaintiff's complaint; due to a family medical emergency, defendant's counsel did not file a responsive pleading within the time allowed, but plaintiff made no allegation that it was prejudiced by the five-day delay between expiration of the filing period and the date defendant filed its motion and proposed answer; and justice would best be served by permitting defendant to try the case on its merits where there was a legitimate dispute between the parties as to whether they had entered into an enforceable contract and what actual performance was or should have been contemplated by them.

APPEAL by defendant from *Pachnowski, Judge.* Judgment entered 13 May 1986 and amended 10 October 1986 and 5 December 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 23 September 1987.

Plaintiff filed this action for breach of contract against defendant on 18 June 1984. Due to a family medical emergency, original counsel for defendant did not file a responsive pleading within the time allowed. On 21 August 1984, pursuant to plaintiff's motion, the clerk of court made an entry of default and entered default judgment against defendant. Defendant subsequently moved under N.C.G.S. § 1A-1, Rules 55(d) and 60(b) to have the entry of default and the judgment set aside. The clerk allowed this motion and plaintiff appealed to superior court.

On 27 November 1984, the superior court reinstated the entry of default but not the judgment and directed that the issue of damages be calendared for inquiry. Defendant then appealed to

this Court which dismissed the appeal as interlocutory. Following an inquiry into damages by the presiding judge, a judgment for plaintiff in the sum of $16,000 was entered.

Murchison, Guthrie & Davis, by Robert E. Henderson, attorney for plaintiff-appellee.

Joe C. Young, attorney for defendant-appellant.

ORR, Judge.

Defendant assigns as error the trial court's reinstatement of the clerk's entry of default. The statute authorizing the court to reinstate the default is N.C.G.S. § 1-276, which provides as follows:

> **Judge determines entire controversy; may recommit.**
>
> Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so. (1887, c. 276; Rev., s. 614; C.S., s. 637.)

Our courts, in numerous decisions, have interpreted this statute to mean that the clerk is merely an "arm of the superior court." *Hassell v. Wilson*, 301 N.C. 307, 311, 272 S.E. 2d 77, 80 (1980). Thus, when a civil action or special proceeding "before the clerk is brought before the judge *in any manner*, the superior court's jurisdiction is not derivative but it has jurisdiction to hear and determine all matters in controversy as if the case was originally before him." *Redevelopment Comm. v. Grimes*, 277 N.C. 634, 638, 178 S.E. 2d 345, 347 (1971) (emphasis added). Therefore, in the case *sub judice* the superior court judge had full authority to hear plaintiff's appeal from the clerk's order *de novo*. *In re Estate of Longest*, 74 N.C. App. 386, 389, 328 S.E. 2d 804, 807, *appeal dismissed and disc. rev. denied*, 314 N.C. 330, 333 S.E. 2d 488 (1985).

We now address the critical question of whether the trial court properly exercised its discretion when reinstating the clerk's entry of default.

A motion to set aside an entry of default pursuant to N.C.G.S. § 1A-1, Rule 55(d) for "good cause" shown falls within the sound discretion of the trial court, whose decision will not be disturbed on appeal "absent a showing of abuse of that discretion." *Lumber Co. v. Grizzard*, 51 N.C. App. 561, 563, 277 S.E. 2d 95, 96 (1981). We stated in *Peebles v. Moore*, 48 N.C. App. 497, 269 S.E. 2d 694 (1980), *modified and aff'd*, 302 N.C. 351, 275 S.E. 2d 833 (1981) that:

> [w]hat constitutes 'good cause' depends on the circumstances in a particular case, and within the limits of discretion, an inadvertence which is not strictly excusable may constitute good cause, particularly 'where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant.'

48 N.C. App. at 504, 269 S.E. 2d at 698 (citations omitted).

The law generally disfavors default and "any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits." *Id.* at 504-505, 269 S.E. 2d at 698. Our Supreme Court has held that "the better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise." *Peebles v. Moore*, 302 N.C. at 356, 275 S.E. 2d at 836.

In reviewing the trial court's action in light of the above principles, we must consider the following: (1) was defendant diligent in pursuit of this matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action.

We find no evidence in the record that defendant was anything less than diligent in its pursuit of this matter. The uncontradicted evidence shows that defendant's vice president, Mr. Arthur P. Wilson, was served on 18 July 1984 and that shortly thereafter he telephoned defendant's attorney and discussed the general nature of the complaint and defendant's responses thereto. Defendant's attorney at the time agreed to handle the matter

and said he would prepare an answer as required by law. After defendant's attorney reviewed the complaint, he had a second conversation with Mr. Wilson. At that time Mr. Wilson gave additional specific information about his corporation's defenses to plaintiff's allegations.

It is well settled in our state that when a defendant employs counsel and diligently confers with him and generally tries to keep informed of the proceedings, the attorney's negligence will not be imputed to the defendant. *Kirby v. Contracting Co.*, 11 N.C. App. 128, 180 S.E. 2d 407, *cert. denied*, 278 N.C. 701, 181 S.E. 2d 602 (1971). The evidence in this case shows no lack of diligence which can fairly be attributed to defendant.

We note that plaintiff made no allegation that it was prejudiced by the five-day delay between the expiration of the filing period and the date defendant filed its motion and proposed answer, and therefore conclude that plaintiff was not prejudiced by the delay.

Finally, we believe justice would best be served by permitting defendant to try this case on its merits. Whether these parties entered into an enforceable contract and what actual performance was or should have been contemplated by them appears to be legitimately disputed.

Defendant, in our opinion, has shown "good cause" to justify setting aside the entry of default and the trial court therefore erred by reinstating the entry of default. Defendant's further assignments of error need not be addressed at this time pending the outcome of the trial on the merits. We vacate the judgment below and order a new trial.

Vacated and remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

MARY E. HEDGEPETH, GUARDIAN OF CORA HAITH v. HOME SAVINGS AND LOAN ASSOCIATION

No. 8715SC224

(Filed 17 November 1987)

Principal and Agent § 1— power of attorney—incompetent principal—note and deed of trust valid

In an action by the guardian of an incompetent to annul a note and deed of trust, the trial court did not err by upholding the validity of the note and deed of trust where the defendant contracted solely with the attorney-in-fact in reliance on the recorded power of attorney and there was sufficient evidence to support the trial court's finding that all of the requirements of *Chesson v. Insurance Company*, 269 N.C. 98, had been met. A power of attorney executed by a non-adjudicated incompetent should be considered voidable and not *void ab initio*.

APPEAL by plaintiff from *Lee, Judge*. Judgment entered 29 October 1986 in Superior Court, CHATHAM County. Heard in the Court of Appeals 28 September 1987.

Plaintiff brings this action on behalf of her mother and ward, Cora M. Haith. On 11 February 1981, Mrs. Haith executed a durable power of attorney appointing her now deceased son, James H. Haith, attorney-in-fact with power to convey or encumber her real property. On 9 May 1983, pursuant to the power of attorney, James Haith executed a promissory note and deed of trust in favor of defendant in the amount of $19,000. The loan was intended to refinance an existing mortgage and to finance remodeling.

Plaintiff was appointed guardian after her mother was adjudicated incompetent on 9 September 1985.

Plaintiff filed suit to have the note and deed of trust annulled for failure of consideration. She alleged, and the trial court found, that Mrs. Haith was totally incompetent by reason of unsound mind when she signed the power of attorney and when her son executed the note and deed of trust. Plaintiff claims her now deceased brother, James H. Haith, received the loan proceeds but did not apply them to their mother's benefit.

At trial defendant argued it had no knowledge of Mrs. Haith's incompetency nor reason to inquire about her mental state. The testimony showed defendant had extended eight loans

to Mrs. Haith, the first of which was made in 1955 for the purpose of buying the lot upon which Mrs. Haith's residence is located and to finance its construction. All of these loans were secured by a lien on the property. James Haith as attorney-in-fact negotiated four of these loans.

The trial court found defendant had satisfied each of the five requirements which must be proven in order to enforce the written contract of an incompetent, and upheld the validity of the note and deed of trust. From this decision, plaintiff appeals.

Gunn & Messick, by Paul S. Messick, Jr., attorney for plaintiff-appellant.

L.T. Dark, Jr., attorney for defendant-appellee.

ORR, Judge.

It is well established in our state that a contract executed by an incompetent prior to being so adjudicated, is voidable and not *void ab initio*. *Reynolds v. Earley*, 241 N.C. 521, 85 S.E. 2d 904 (1955). The party contracting with an incompetent may nevertheless enforce the agreement if the following requirements can be established: (1) ignorance of the party's mental incapacity; (2) lack of notice of the incapacity such as would indicate to a reasonably prudent person that inquiry should be made of the party's mental condition; (3) payment of a full and fair consideration; (4) that no unfair advantage was taken of the incompetent; and (5) that the incompetent had not restored and could not restore the consideration or make adequate compensation therefor. *Chesson v. Insurance Co.*, 268 N.C. 98, 150 S.E. 2d 40 (1966).

In the case *sub judice* there is a durable power of attorney executed by an incompetent. The issue before us is whether a note and deed of trust can be enforced by a party contracting solely with the attorney-in-fact in reliance on the recorded power of attorney.

To begin with we acknowledge the distinction between a third party seeking to enforce a power of attorney executed between two other parties and a party seeking to enforce a contract made directly with the incompetent as found in *Chesson*. However, we find that the logic behind the decision in *Chesson* and the established rule set forth in *Reynolds* should apply to the

facts of this case. Therefore, the power of attorney in the case *sub judice* should be treated the same as any other contract. 2 S. Williston, *The Law of Contracts* § 250 (3d ed. 1959) and cases cited therein. *See generally* 44 C.J.S. *Insane Persons* § 116 (1945). Likewise, a power of attorney executed by a nonadjudicated incompetent should be considered voidable and not *void ab initio.*

If the third party contracting solely with the attorney-in-fact can satisfy all five of the *Chesson* requirements, the power of attorney will be enforced even though the principal was a nonadjudicated incompetent when the power of attorney was executed.

After carefully examining the record, we are satisfied it contains sufficient evidence to support the trial court's finding that all five *Chesson* requirements were met in this case.

Plaintiff conceded defendant did not know Mrs. Haith was incompetent when she executed the power of attorney in 1981 or when her attorney-in-fact executed the note and deed of trust in 1983. When coupled with the fact that James Haith as attorney-in-fact executed three of his mother's seven previous loans from defendant, all of which were routine transactions, we find sufficient evidence to support the trial court's finding that defendant was not aware of anything which would reasonably indicate it should have inquired into Mrs. Haith's mental condition.

Uncontradicted testimony shows more than one-half of the loan proceeds were used to pay off Mrs. Haith's prior indebtedness to defendant. Moreover, the evidence tends to show Mrs. Haith's home increased in value substantially as a result of renovations made after James Haith received the remaining proceeds of approximately $5,000. We believe both of these factors sufficiently support the findings that defendant paid full and fair consideration to Mrs. Haith in exchange for the note and deed of trust and that defendant did not take unfair advantage of her.

Finally, three factors convince us that sufficient evidence existed for the trial court to conclude that Mrs. Haith could not restore the consideration or make adequate compensation thereof. First, the uncontradicted testimony that Mrs. Haith owed a balance in excess of $18,000 on the note and was in arrears several months at the time of trial. Second, the uncontradicted testimony also showed her total liquid assets were approximately $2,000.

Finally, plaintiff's own statement that her mother "can't afford to pay noway."

The trial court was not required to find that all of the evidence supported his decision. So long as sufficient evidence supported the judgment, it will not be disturbed on appeal. *Aetna Casualty and Surety Co. v. Younts*, 84 N.C. App. 399, 352 S.E. 2d 850, *disc. rev. denied*, 319 N.C. 671, 356 S.E. 2d 774 (1987). We believe the evidence sufficiently supports the trial court's conclusion and therefore affirm.

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. DANA LEMLY COOKE

No. 8721SC285

(Filed 17 November 1987)

Criminal Law § 138.23— aggravating factor for rape—use of deadly weapon—steak knife

The trial court properly found as an aggravating factor for second degree rape that defendant employed a deadly weapon during the commission of the crime based upon a description of the instrument used by defendant as a "steak knife," the manner in which the knife was used to threaten the victim, and the victim's frightened condition.

APPEAL by defendant from *Morgan, Judge.* Judgment entered 15 December 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 September 1987.

Defendant was charged in a proper bill of indictment with first-degree rape. He pleaded guilty to second-degree rape. The testimony offered by the State at the sentencing hearing consisted of a summary of the State's proposed evidence by the assistant district attorney comprised of the statements made by the victim and Kenneth Cox to police. Although the two statements differed somewhat, the narrative tended to show the following:

On or about 2 August 1986, the victim was awakened about 3:30 a.m. by loud noises outside her apartment. She went to her

window where she observed Kenneth Cox and a man, later identified as defendant, outside her door. The victim did not open the door because the men appeared to have been drinking. After a period of time, the men started to leave. As they did, they started pushing the victim's baby stroller up the street. The victim then went outside and told the men to bring back the stroller.

When they returned with the stroller, defendant tried to put his hands on the victim. The men then followed the victim into her apartment. Once in the dwelling, defendant "started acting crazy." He told the victim that he wanted to have sex with her and told her if she refused he would force her.

Defendant hit the victim's male companion, Richard Hatcher, in the face. Defendant then grabbed a knife, described by the victim as a "steak knife," off of the counter, put the knife to Hatcher's throat and threatened to kill him unless the victim agreed to have sex with him. Defendant also placed the knife against the victim's throat and threatened her. He then took her into a bedroom and raped her.

The State offered no other description of the knife and the knife was not introduced into evidence. The State also presented evidence of defendant's criminal record.

Defendant offered evidence tending to show that he was married and had two children. At the time of the incident, defendant was drinking heavily because he was depressed over his inability to work and support his family. He also offered evidence that when he was not under the influence of alcohol he was a law-abiding citizen with a good reputation.

At the sentencing hearing the trial court found factors in aggravation and mitigation. One of the aggravating factors found was that "at the time the defendant employed a deadly weapon in the commission of this crime." After finding that the aggravating factors outweighed the mitigating factors, the trial court imposed a twenty-year prison sentence, a sentence in excess of the presumptive term. From this judgment, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

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

ORR, Judge.

On appeal defendant contends the trial court erred in finding as a factor in aggravation that he employed a deadly weapon during the commission of the crime.

Aggravating factors which are found must be supported by a preponderance of the evidence. *State v. Teague*, 60 N.C. App. 755, 300 S.E. 2d 7 (1983). Defendant does not challenge the admissibility or accuracy of the State's narrative. He neither objected to nor contradicted any portion thereof. His sole contention is that the narrative was insufficient to support the trial court's finding that the knife was a deadly weapon.

A knife may be, but is not always, a deadly weapon. *See State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978). "[T]he evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law . . . ." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E. 2d 719, 726 (1981). N.C.G.S. § 15A-1334(b) sets forth the procedure at the sentencing hearing. There defendant and the prosecutor *may* present witnesses and arguments on facts relevant to the sentencing hearing. However, the "formal rules of evidence do not apply at the hearing." *Id.*

In the case *sub judice*, the prosecutor chose to relate to the court a narrative of the testimony that the victim and Kenneth Cox would have given. Defendant chose to introduce three character witnesses. At no time did defendant challenge or question the prosecutor's description of the knife or its use by defendant to threaten the victim and her companion.

Under N.C.G.S. § 15A-1340.4(a) the trial judge in considering aggravating and mitigating factors, must find that those factors exist "by the preponderance of the evidence . . . ." In this case all the evidence was uncontradicted that defendant used a knife, described by the victim as a "steak knife," to threaten the victim and to facilitate the act of raping her. The trial court, taking into consideration the everyday use of the term "steak knife" and the utilization of the weapon by defendant, had adequate evidence upon which to base its factual determination that a deadly weapon was used in the commission of the crime.

This Court stated in *State v. Parker*, 7 N.C. App. 191, 171 S.E. 2d 665 (1970) that:

> [t]he deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself.

7 N.C. App. at 195, 171 S.E. 2d at 667.

Here the victim was threatened with her life at knife point at 3:30 a.m. in her own apartment by a man acting in what can reasonably be described as a drunken rage. He deliberately placed the knife against her throat to overcome her resistance. As a result, she submitted to his demands. We believe the manner of use, the description of the instrument as a "steak knife," and the victim's frightened condition permitted the trial court to reasonably find by a preponderance of the evidence that defendant employed a deadly weapon in the commission of the crime.

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

COMMUNITY HOUSING ALTERNATIVES, INC. v. BERNARD LATTA

No. 8715DC397

(Filed 17 November 1987)

Landlord and Tenant § 13.1— tenant's breach—acceptance of rent—waiver of breach by landlord

Plaintiff landlord's acceptance of rent with knowledge of defendant tenant's breach of the lease constituted a waiver of plaintiff's right to assert the breach as grounds for forfeiture of the lease.

APPEAL by defendant from *Peele, Judge*. Judgment entered 7 January 1986 in District Court, ORANGE County. Heard in the Court of Appeals 27 October 1987.

Bayliss, Hudson & Merritt, by Ronald W. Merritt, for plaintiff-appellee.

North State Legal Services, Inc., by Carlene McNulty and Candace Carraway, for defendant-appellant.

MARTIN, Judge.

This is an action for summary ejectment. Following an adverse ruling by the magistrate, defendant appealed to the district court, which after trial *de novo* concluded that defendant had violated the terms of his lease and ordered his removal from the leased premises. Defendant appeals, contending, *inter alia*, that plaintiff had, as a matter of law, waived its right to demand a forfeiture of the lease. We agree with defendant's argument and reverse the judgment entered below.

Plaintiff owns the Adelaide Walters Apartments, a federally subsidized apartment complex for low-income elderly and handicapped persons, located in Chapel Hill. Defendant is fifty-five years of age and is handicapped due to partial paralysis as a result of strokes. He has leased an apartment in the Adelaide Walters complex since 5 July 1984.

According to pertinent findings made by the trial court and supported by competent evidence in the record, plaintiff gave defendant written notice on 30 June 1986 that his lease would be terminated on 31 July 1986 for "repeated minor violations of [the lease] which disrupt the livibility [sic] of this project, adversely affect the health or safety of any person or the right of any tenant to the quiet enjoyment of the leased premise [sic]." The violations relied upon by plaintiff consisted of defendant's failure to maintain his apartment in a clean and sanitary condition and repeated instances of activation of the smoke alarm in defendant's apartment.

Defendant did not vacate his apartment on 31 July 1986. Notwithstanding its notice of termination of the lease, plaintiff continued to accept rent from defendant for the months of August and September 1986. It filed this action on 17 September 1986, relying on the violations stated in the 30 June 1986 notice of termination as grounds for defendant's eviction.

It is settled law in North Carolina that a landlord's acceptance of rent with knowledge of his tenant's breach of the lease constitutes a waiver of the landlord's right to assert the breach as grounds for forfeiture of the lease. *Winder v. Martin*, 183 N.C. 410, 111 S.E. 708 (1922).

> It is the generally accepted rule that if the landlord receives rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which occurred prior to the acceptance of the rent.

Id. at 411, 111 S.E. at 709. *See Raleigh City Limits, Inc. v. Sandman*, 49 N.C. App. 107, 270 S.E. 2d 552 (1980); *Mewborn v. Haddock*, 22 N.C. App. 285, 206 S.E. 2d 336, *cert. denied*, 285 N.C. 660, 207 S.E. 2d 755 (1974); *Office Enterprises, Inc. v. Pappas*, 19 N.C. App. 725, 200 S.E. 2d 205 (1973).

In the present case, upon defendant's failure to vacate his apartment on 31 July 1986, plaintiff had two choices: 1) it could commence proceedings to remove defendant from the premises, or 2) it could continue to accept rent from defendant and permit the lease to remain in force. Plaintiff could not do both. *Winder v. Martin, supra; Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 98 S.E. 2d 871 (1957). Plaintiff chose to accept defendant's August and September rent. By doing so, it waived its right to assert defendant's prior violations of the lease provisions as grounds for termination of the lease. The judgment of the trial court ordering that defendant be removed from the premises must be reversed. In view of our holding, we need not address defendant's other assignments of error.

Reversed.

Judges EAGLES and PARKER concur.

JERRY L. BAKER v. HENRY HARPER WHITLEY, JR. AND FARMERS COUNTY MUTUAL FIRE INSURANCE COMPANY, INC.

No. 8711DC268

(Filed 17 November 1987)

Insurance § 143— homeowner's insurance—"collapse" provision—cabinet becoming unhinged from wall

A provision of a homeowner's policy covering loss caused by "collapse of the building or any part of the building" did not apply to loss caused when a kitchen cabinet became partly unhinged from a wall and tilted forward, and glassware fell from the cabinet and broke.

APPEAL by defendant from *McCormick, Judge*. Judgment entered 29 October 1986 in District Court, JOHNSTON County. Heard in the Court of Appeals on 1 October 1987.

W. Richard Moore for plaintiff appellee.

Mast, Tew, Morris, Hudson, and Schulz, P.A., by George B. Mast and Bradley N. Schulz for defendant appellant.

BECTON, Judge.

Plaintiff Jerry L. Baker brought this action against defendants Henry Harper Whitley, Jr., and Farmers County Mutual Fire Insurance Company, Inc. to recover insurance benefits under a home fire insurance policy. A jury returned a verdict for plaintiff in the amount of $1,300.00. Defendant appeals. We reverse.

Plaintiff acquired an insurance policy from defendant in February 1985 which covered specified damages to his residence and/or its contents. In June 1985 a wall of the plaintiff's home was damaged when a built-in kitchen cabinet became partly unhinged from the wall, causing the cabinet to drop several inches, tilt forward, then come to rest on a window sill. The contents of the cabinet, which included china, crystal, glassware and other ceramics, fell onto a table and floor and shattered. Plaintiff filed a claim with defendant seeking payment for the losses under the "collapse" provision of his insurance policy. Although the policy did not define the term collapse, the policy provided insurance "against direct physical loss to covered property caused by the following perils:

* * *

13. Collapse of the building or any part of the building (collapse does not include settling, cracking, shrinking, bulging or expanding). Unless the damage is directly caused by the collapse of the building, this does not cover loss: (a) to outdoor awnings or canopies, including their supports; (b) to outdoor equipment not permanently installed; or (c) to any structures (other than buildings, carports, or mobile homes) such as swimming pools, retained walls, fences, septic tanks, piers, wharves, foundations, patios, and paved areas."

Defendant denied plaintiff's claim, and plaintiff brought this action. A jury entered a verdict for plaintiff. Defendant makes nine assignments of error, the first two of which relate to the trial judge's failure to enter judgment in its favor as a matter of law. Defendant moved for a directed verdict at the close of plaintiff's evidence and renewed its motion at the close of all the evidence. Defendant argues that no reasonable construction of its "collapse provision" would permit coverage of the damage sustained by plaintiff. We must agree.

When interpreting contracts, words will be given their common ordinary meaning unless the agreement requires otherwise. We have not been referred to any North Carolina cases, and we have found none, in which the term collapse has been defined. However, defendant refers to two definitions of the term from other jurisdictions. Under one view, collapse denotes falling, reduction to flattened form or rubble. *See Central Mutual Ins. Co. v. Royal*, 269 Ala. 372, 113 So. 2d 680 (1959); *Higgins v. Conn. Fire Ins. Co.*, 163 Colo. 292, 430 P. 2d 479 (1967); *Northwestern Mut. Ins. Co. v. Bankers Union Life Ins. Co.*, 485 P. 2d 908 (Colo. App. 1971). Under a second view, collapse denotes settling, cracking, or the like which materially impairs basic structure or substantial integrity of a building. *See Rogers v. Maryland Casualty Co.*, 252 Iowa 1096, 109 N.W. 2d 435 (1961); *Allen v. Hartford Fire Ins. Co.*, 187 Kan. 728, 359 P. 2d 829 (1961); *Krug v. Miller's Mut. Ins. Assoc.*, 209 Kan. 111, 495 P. 2d 949 (1972). In addition, defendant referred us to several dictionary definitions of collapse, including the *Webster's New Collegiate Dictionary* (1977) which defines collapse as:

"(1) to break down completely; (2) to fall or come together abruptly and completely; fall into a jumbled or flattened mass . . .; (3) to cave in."

The evidence in the instant case does not satisfy any of these definitions. At most, plaintiff's cabinet became unhinged from the wall. The wall remained intact. Defendant was entitled to judgment as a matter of law.

Because of our disposition of the first two assignments of error, we need not and do not address defendant's remaining assignments of error.

Judgment is reversed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. THOMAS WALL

No. 8719SC220

(Filed 17 November 1987)

1. **Criminal Law § 158.1— diary omitted from record—court unable to determine admissibility**

In a prosecution for incest, the record failed to show the contents of a volume alleged to be the victim's diary, and it was therefore impossible for the court on appeal to determine if the document was relevant or material and therefore admissible.

2. **Criminal Law § 85.1— character witnesses—cross-examination as to rumors about defendant**

In an incest prosecution, the prosecutor did not improperly cross-examine two of defendant's character witnesses as to whether they had heard rumors that defendant had had an affair with an 18-year-old girl and that defendant's wife had made a statement that she had "expected something was going on" between defendant and their daughter, since the witnesses had testified that they knew defendant's reputation, and counsel had a right to test the basis for their claimed knowledge.

3. **Incest § 1— instructions proper summary of evidence**

In an incest prosecution, the trial court's instruction concerning reputation testimony was an accurate summary of the evidence.

4. Criminal Law § 138.24— tender age of victim—finding of aggravating circumstance proper

The trial court in an incest prosecution did not err in finding as a factor in aggravation that the victim was and is of tender years where the evidence indicated that defendant began his abuse when his daughter was 13 years old. N.C.G.S. § 15A-1340.4(a)(1)j.

APPEAL by defendant from *Walker, Judge.* Judgment entered 23 July 1986 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 23 September 1987.

Attorney General Thornburg, by Associate Attorney General Rodney S. Maddox, for the State.

Appellate Defender Hunter, by Assistant Appellate Defender Gayle L. Moses, for defendant appellant.

PHILLIPS, Judge.

Upon sharply conflicting evidence defendant was convicted of incest with his sixteen-year-old daughter. In substance, the daughter testified that defendant had intercourse with her on 2 September 1985, the time alleged in the indictment, and that the abuse began three years earlier, while defendant denied all wrongdoing. In appealing he makes four contentions concerning the trial and one as to sentencing. None of the contentions has merit and we overrule all of them.

[1-3] As to the trial defendant first contends that the court erred in refusing to receive into evidence a small volume alleged to be the daughter's "diary"; but we have no basis for determining that the document contained relevant evidence beneficial to defendant because the record does not show what it contains. *Carter v. Carr*, 312 N.C. 613, 324 S.E. 2d 222 (1985). The record does indicate, though, that defendant was not mentioned in the document, which is proof, so he argues, that the forbidden acts did not occur; but the validity of this argument, along with the relevancy and materiality of the proffered evidence, depends upon the contents of the document, about which the record is silent. Defendant's next two contentions are that the prosecutor's cross-examination of two of his character witnesses was improper in that he was permitted to question them about a purported rumor that he had an affair with a certain eighteen-year-old girl and about defendant's wife purportedly stating that she had "ex-

pected something was going on" between defendant and their daughter. Though the inquiries concerned hearsay statements they were not banned by the general rule against hearsay. G.S. 8C-1, Rule 803(21), N.C. Rules of Evidence. Each witness had testified on direct examination that he knew defendant's general reputation and on cross-examination each denied having heard about the wife's purported statement, but one admitted hearing about the rumored affair with the eighteen-year-old girl. On cross-examination counsel has wide latitude. *Maddox v. Brown*, 233 N.C. 519, 64 S.E. 2d 864 (1951). The witnesses having testified that they knew defendant's reputation, which is what people in the community say about a person, counsel had a right to test the basis for their claimed knowledge. *State v. Nelson*, 200 N.C. 69, 156 S.E. 154 (1930). The other error asserted concerning the trial is that in instructing the jury about the reputation testimony the court stated that one witness testified that "there may have been some talk about the defendant being involved with some other girl." The instruction was not objected to and the error, if any, was waived, Rule 10(b)(2), N.C. Rules of Appellate Procedure, unless it was "plain error" as laid down in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). In our opinion the statement was not such an error; it was an accurate part of the court's summary of the evidence, both favorable and unfavorable to defendant, and it could not have caused defendant any legal prejudice.

[4] Finally, defendant contends that in sentencing him the court erred in finding as a factor in aggravation that the victim "was and is of tender years." G.S. 15A-1340.4. This finding was made in connection with findings that defendant had no criminal record and was of good reputation, and that the aggravating and mitigating factors were of equal weight. Defendant correctly recognizes that he is not entitled to appeal on this issue because he was sentenced to the presumptive term, G.S. 15A-1444(a1), and the judge was not required to find factors in aggravation and mitigation, G.S. 15A-1340.4(b), and he asks that his contention be accepted as a petition for *certiorari*, which we have done. Even so, the contention has no merit because the record shows that the finding in aggravation was properly made. The aggravating factor as to a victim of crime being "very young or very old," G.S. 15A-1340.4(a)(1)j, concerns the vulnerability of the victim to the particular crime involved, *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d

689 (1983), and it is too obvious for debate that a girl thirteen years old, the age of the victim when defendant's abuse began according to the evidence, is more vulnerable than an adult both to the sexual advances of her father and to the baleful effects of such abuse. *State v. Jackson*, 70 N.C. App. 782, 321 S.E. 2d 169 (1984), involved similar facts and we made the same holding.

No error.

Judges COZORT and GREENE concur.

MAXINE TWITTY BERRY v. RAMSEUR DEVON BERRY

No. 8726DC338

(Filed 17 November 1987)

Divorce and Alimony § 24.11— temporary child support order—no immediate appeal

Though a child support order was not expressly designated *pendente lite* by the court, it was nevertheless a temporary order, entered provisionally pending a final determination to be made at a later date, and there was therefore no right to immediate appeal from the order.

APPEAL by plaintiff from *Johnston, Robert P., Judge.* Order entered 18 December 1986 in Mecklenburg County District Court. Heard in the Court of Appeals 21 October 1987.

This case takes its beginning in the dissolution of the marriage of Maxine Twitty Berry and Ramseur Devon Berry, who were married 27 December 1967 and separated 8 August 1980. The marriage yielded one child, Stephanie Colette Berry, born 20 April 1971. On 13 August 1980, plaintiff wife filed a complaint seeking child custody, child support, and attorney's fees. Defendant husband answered and counterclaimed for, *inter alia*, child custody and child support. On 18 October 1982, after trial, the district court granted custody to plaintiff and visitation rights to defendant.

On 17 June 1985, plaintiff mother was divested of custody of the minor child in a proceeding under N.C. Gen. Stat. § 7A-647 of

the Juvenile Code, and the minor child was placed with defendant father. On 29 October 1986, defendant filed a motion seeking partial child support. On 3 November, plaintiff served motions to dismiss defendant's petition on various grounds. On 18 December, the court examined the record, heard arguments by counsel, and awarded the defendant "temporary child support." From this award the plaintiff appeals.

Tucker, Hicks, Moon, Hodge and Cranford, P.A., by Michael F. Schultze, for plaintiff-appellant.

Flanary & Davies, by Kenneth T. Davies, for defendant-appellee.

WELLS, Judge.

Defendant contends that plaintiff's appeal should be dismissed as interlocutory according to this Court's holding in *Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E. 2d 281 (1981). We agree. In *Stephenson* we held that orders awarding child support, alimony, and attorney's fees *pendente lite* are "interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. 7A-27(d)." The trial court's second Conclusion of Law states as follows: "That it is appropriate and in the best interests of the child that an Order for *temporary* child support be entered." [Emphasis added.] In addition, the court's order expressly provides that plaintiff's support payments shall be made twice monthly "*pending* further Orders of the Court." [Emphasis added.] The employment of the word "pending" underlines the non-final character of the order in question.

We recognize that in the present case, unlike *Stephenson*, the child support order was the only order entered and was not expressly designated *pendente lite* by the court. Nevertheless here, as in *Stephenson*, the support order appealed from was a temporary one, entered provisionally pending a final determination to be made at a later date. It is the non-finality of the support order that brings the present case within the reach of *Stephenson*.

It follows that the child support order of 18 December 1986 is not subject to review by appeal and must be, and is,

Dismissed.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. DWIGHT BELL

No. 8714SC186

(Filed 1 December 1987)

1. **Assault and Battery § 14.4— assault with deadly weapon with intent to kill inflicting serious injury—sufficiency of evidence**

Evidence was sufficient to withstand defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury where the victim testified that defendant pulled out a gun and placed it to the victim's head, the gun discharged, and the victim was injured as a result.

2. **Criminal Law § 90.1— State's witness—impeachment by prior inconsistent statement—procedure**

Subsequent to the adoption of N. C. Rule of Evidence 607, the better practice continues to be for the trial court, before allowing impeachment of the State's own witness by a prior inconsistent statement, to make findings and conclusions with respect to whether the witness's testimony is other than what the State had reason to expect or whether a need to impeach otherwise exists. In this case, the trial court did not err in allowing the State to impeach its own witness without a preliminary inquiry by the court where the record indicated that the prosecutor was unaware of the witness's prior inconsistent statement until after she had testified on direct examination, and defendant offered substantially the same evidence through his own witness.

3. **Criminal Law § 117.1— impeachment—sufficiency of instructions**

Though the trial court should have given a more detailed instruction explaining how impeachment works to insure that the jury did not consider any hearsay evidence as substantive evidence of defendant's guilt, failure to do so was not so prejudicial as to rise to the level of "plain error."

4. **Assault and Battery § 16— assault with deadly weapon with intent to kill inflicting serious injury—failure to instruct on lesser offenses—error**

In a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in failing to include an instruction on either simple assault or assault inflicting serious injury where all witnesses agreed that defendant struck the victim with his hands; only the victim himself testified that defendant had a gun; and some evidence suggested that, if a gun was present, it may have been that of the victim himself.

5. Assault and Battery § 13— witness "still afraid" of defendant—improper character evidence

The trial court in an assault prosecution erred in overruling defendant's objection to testimony that a witness was "still afraid" of defendant on the day she testified, since the only apparent relevance of the evidence was to imply that defendant was a violent person, and it was thus inadmissible character evidence.

6. Assault and Battery § 15.3— gun as deadly weapon—instruction proper

The trial court in an assault prosecution did not err in instructing the jury that a gun was a deadly weapon, and it was of no significance whether the gun was used to strike or to shoot the victim.

APPEAL by defendant from *Robert Hobgood, Judge.* Judgment entered 2 October 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 September 1987.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isham B. Hudson, Jr. for the State.

Loflin and Loflin, by Thomas F. Loflin, III for defendant-appellant.

BECTON, Judge.

Defendant, Dwight Bell, was indicted for the offenses of assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into an occupied vehicle. At the conclusion of the State's evidence, the trial court granted defendant's motion to dismiss the second charge. From possible verdicts of assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, or not guilty, the jury returned a verdict of assault with a deadly weapon inflicting serious injury. From a judgment imposing an active five year prison sentence, defendant appeals, assigning error to the trial court's (1) admission of testimony by the State's witness, Sharon Cameron, that she was "still afraid" of defendant, (2) admission of evidence offered by the State to impeach its own witness, Terry Smith, (3) failure to give adequate limiting instructions regarding various hearsay statements offered for impeachment or corroboration, (4) denial of defendant's motion to dismiss the assault charge, (5) failure to instruct the jury on simple assault, and (6) instruction to the jury that a .45 caliber pistol is a deadly weapon as a matter of

law. We find merit in his fifth assignment of error and accordingly award defendant a new trial.

I

State's Evidence

Defendant was arrested pursuant to a warrant that charged him with felonious assault with intent to kill "with a handgun cal. unknown a deadly weapon by striking the victim Dennis Allen in the head with said weapon, gun discharging resulting in an open wound above the right eye requiring six stitches."

At trial the alleged victim, Dennis Allen, testified in part as follows: Allen had known defendant all his life. Allen's girlfriend, Sharon Cameron, and defendant's wife were sisters. On 22 March 1986, at approximately 6:00 or 7:00 p.m., Allen, driving his mother's pick-up truck, visited the home of Sharon Cameron, where she resided with her grandmother, her young daughter, and two of her brothers. Allen's cousin, Terry Smith, arrived a few minutes later. While the two were conversing outside with Rodney Cameron, one of Sharon's brothers, defendant drove up in his red Javelin automobile, accompanied by defendant's cousin, Phil Harris. Allen talked to Harris a few minutes; then, defendant and Harris left.

Allen, Smith, and Rodney Cameron then drove to a nearby store for a six pack of beer, returned directly to the Cameron residence, and while remaining in the truck, began to talk and drink the beer. Allen occupied the driver's seat of the truck, Rodney Cameron sat in the middle, and Smith sat by the door. Allen was still on his first beer when defendant returned, accompanied by Phil Harris, Wayne Cameron (Sharon's oldest brother), and a third person that Allen did not recognize, although he heard the name "Rick" mentioned. Defendant backed into the driveway; Wayne Cameron got out and walked around to the back of the house; then defendant accelerated quickly to a position parallel to Allen's truck. Defendant's car faced the street, and the truck faced the house so that the two drivers' doors were facing and a few feet apart. Allen's window was open, and, because he is blind in his left eye, he turned so as to see defendant with his right eye.

Defendant alighted, approached Allen, and, without provocation, struck him several times, probably with an open hand. Allen started the truck but was prevented from leaving by defendant, who reached into the cab and attempted to pull Allen from the truck, telling him to stand up and fight like a man. Then defendant stepped back, pulled up his shirt, pulled out a .45 automatic pistol, and "ratched" it, causing a bullet to move from the clip into the chamber.

At that point, Smith had already jumped from the truck. Rodney Cameron was leaning over Allen saying, "Dwight, it's not necessary. Don't do it," but he left the truck when he saw the pistol. Defendant stepped back up to the truck and stuck the pistol through the window and up to Allen's head. As Allen turned his head away, the gun discharged, causing the bullet to strike Allen over his right eye and exit through the top of the truck cab. Defendant told Allen if he said anything else about Dwight Bell "that ain't all he was going to do," and left.

Allen bled profusely from the gash over his eye. Rodney Cameron brought him a towel to wipe the blood away. Then Sharon and one of her brothers called "Popeye" took Allen to the hospital where the wound was cleaned and closed with six or seven stitches. Allen suffered from headaches for a couple of weeks, his head was swollen, and the wound left a scar.

At trial, Allen admitted that, on the occasion in question, he had a 380 millimeter revolver in a paper sack in the truck's glove compartment but denied that anyone knew it was there or that he touched it during the incident. He identified a .45 caliber pistol as that used by defendant. Allen further testified that he never asked Smith or Rodney Cameron to leave the truck, that Rodney Cameron saw the entire incident up to the point that defendant put the gun through the window, and that Smith saw only the beginning.

The State also called three other witnesses who were present during the incident to testify. By their in-court testimony, these three witnesses—Terry Smith, Rodney Cameron, and Sharon Cameron—corroborated Allen and one another in some respects but contradicted Allen and each other in other respects. Equally important, the testimony of Terry Smith and Rodney Cameron was inconsistent with one or more prior out-of-court statements

they had made to three other people. The State called these three people—Jennifer Lee Cook, Sherrie Allen, and Nannie Smith—to testify about what they had been told, but their testimony merely highlighted all the prior inconsistencies. Furthermore, a portion of the testimony of Nannie Smith was inconsistent with a prior statement that she had given to Sharon Cameron. Having heard that, the State then recalled Sharon Cameron to testify about Ms. Smith's prior statement.

In addition to the foregoing, the State offered testimony of a firearms expert, and of the arresting officer, who identified the .45 caliber pistol as the one he took from defendant upon arrest. R. D. Buchanan, the investigating officer, testified regarding statements made to him by Allen and Sharon Cameron at the hospital following the incident. Allen told Officer Buchanan that defendant slapped him several times, then struck him across the forehead with a firearm, and the firearm discharged.

Defendant's Evidence

Defendant's first witness, Bernard Allen, the victim's brother, merely corroborated testimony by the State's witness, Jennie Cook, about an out-of-court statement by Terry Smith. Terry Smith then took the stand to deny having ever discussed the incident with Bernard Allen or Jennie Cook.

Defendant's chief witness, Isaac Cameron, testified in pertinent part as follows: Isaac went to the Cameron residence about 6:30 or 7:00 p.m. on the day of the incident. He walked to his mother's house nearby for a few minutes, and when he returned defendant's car was there. Isaac went inside and watched television with his brother Wayne and defendant for approximately 45 minutes. He then walked outside with defendant, saw Dennis Allen in his mother's truck, and noticed Phil Harris and another person in defendant's car.

When they reached the truck, Allen accused defendant of stealing his drugs and threatened him. Defendant walked up to the truck and smacked Allen, and, at Allen's command, Terry Smith and Rodney Cameron got out of the truck. Smith went behind the house and Rodney went inside. The witness continued: "[a]t that time Dennis leaned over the seat toward the passenger door and at that time he came back up. All I know I saw Dwight

there and he was scuffling with each other and the next thing I knowed I heard a gun shot." Then Allen got out of the truck holding his head, and defendant got in his car and left.

Defendant was dressed in shorts with a tee shirt tucked inside them, and a beige belt. He did not have a gun on his person nor did Isaac Cameron see a firearm of any kind that night.

During the episode, Isaac Cameron was standing near the back of the truck about three feet away from defendant and Allen, and had defendant in full view at all times. He never saw defendant pull out a weapon. The porch light was on, but he did not observe who had the gun because he could not see inside the truck.

Defendant also called three other witnesses. Wayne Cameron denied having been with defendant that day or having any personal knowledge of the incident, but corroborated that his brother, Isaac, had been present at the Cameron residence that evening. The testimony of Phil Harris and Ricky Reams, the two occupants of defendant's car, tended to establish that Isaac was standing where he claimed to have been at the time of the incident, and that defendant did not have a gun before or after the event.

Rebuttal

On rebuttal, Sharon Cameron denied that her brother, Isaac, was ever at her house that night.

II

[1] We first consider whether the trial court erred by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant argues that, although the State produced substantial evidence of simple assault and, arguably, of assault inflicting serious injury, the evidence that Dennis Allen suffered a bullet wound was insufficient to support the offense charged or the lesser included offense of assault with a deadly weapon inflicting serious injury. He specifically cites the existence of evidence tending to show that defendant was unarmed and the absence of any medical evidence that the victim's wound was caused by a gunshot.

In ruling upon a motion to dismiss in a criminal action, the trial court is required to consider the evidence in the light most favorable to the State, disregarding discrepancies and contradictions, and drawing all reasonable inferences in the State's favor. *See State v. Simpson*, 303 N.C. 439, 448, 279 S.E. 2d 542, 548 (1981); *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977). The testimony by the victim, Dennis Allen, that defendant pulled out a gun and placed it to Allen's head, that the gun discharged, and that Allen was injured as a result constitutes substantial evidence from which a jury could find that there was an assault with a firearm, and is sufficient to withstand the motion to dismiss. This assignment of error is overruled.

III

We next consider defendant's second and third assignments of error relating to the State's impeachment of its own witnesses and to the adequacy of the limiting instructions on evidence of out-of-court statements. Defendant specifically challenges the admission, over objection, of Jennifer Cook's testimony concerning prior statements of the witness Terry Smith which tended to impeach Smith's testimony that he never saw a gun. Citing *State v. Cope*, 309 N.C. 47, 305 S.E. 2d 676 (1983), defendant contends that the State should not have been allowed to impeach its own witness without laying a proper foundation showing genuine surprise in fact. In addition, defendant argues that, in view of the large number and prejudicial nature of the other out-of-court statements admitted for purposes of impeachment or corroboration, the trial judge erred by failing to instruct the jury in detail that such testimony is not substantive evidence of guilt.

A

[2] Prior to the adoption of the N. C. Rules of Evidence, the State was prohibited from impeaching its own witness by prior inconsistent statements or evidence of the witness's bad character. *State v. Hosey*, 318 N.C. 330, 348 S.E. 2d 805 (1986). *See, e.g., Cope*. An exception to the rule applied whenever the prosecutor was misled as to the expected testimony on a material fact and "surprised" by the testimony given, questions which were to be determined by a *voir dire*. *See State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975).

The anti-impeachment rule and its exceptions (and apparently their technical requirements) were abolished with the adoption of N. C. Rule of Evidence 607, N.C. Gen. Stat. Sec. 8C-1 (1986), which allows a witness to be impeached by any party, including the party calling him. *Hosey* at 339-40, 348 S.E. 2d at 811. However, there exists a real danger that this rule, if not applied cautiously, especially when it is combined with our rule allowing use of prior consistent statements for corroboration, *see, e.g., State v. Ramey*, 318 N.C. 457, 468-69, 349 S.E. 2d 566, 573-74 (1986), would make fair game of almost any out-of-court statement ever made by any witness. The Commentary to Rule 607 thus cautions that "[t]he impeaching proof must be *relevant* within the meaning of Rule 401 and Rule 403 and *must in fact be impeaching.*" (Emphasis added.)

True impeachment is, of course, a demonstration that a witness is not credible, not a method of presenting substantive evidence. In our opinion, the better practice continues to be for the trial court, before allowing impeachment of the State's own witness by a prior inconsistent statement, to make findings and conclusions with respect to whether the witness's testimony is other than what the State had reason to expect or whether a need to impeach otherwise exists. *See Hosey* (encouraging findings before allowing cross-examination by leading questions of witness friendly to party cross-examining him). Otherwise, the rule too easily camouflages a ruse whereby a party may call an unfriendly witness *solely* to justify the subsequent call of a second witness to testify about a prior inconsistent statement. In our view, it is not the intent of Rule 607 to provide a subterfuge for getting otherwise impermissible hearsay before the jury in the guise of impeachment, and we expressly disapprove this tactic.

Nevertheless, because in this case the record indicates that the prosecutor was unaware of Terry Smith's prior inconsistent statement to Jennifer Cook until *after* Smith had testified, and because defendant offered substantially the same evidence through his own witness, Bernard Allen, we conclude the admission of Ms. Cook's testimony without a preliminary inquiry by the trial court was not prejudicial error.

B

In addition to the challenged testimony of Jennifer Cook, we find in the record at least seven other instances of hearsay statements which were offered, at least ostensibly, for corroboration and/or impeachment of various witnesses. Prior to admitting Ms. Cook's testimony, the court instructed the jury to consider the evidence "only to the extent that you find it impeaches the testimony of the witness, Terry Smith." Thereafter, in most of the other instances, the court interjected a similar instruction. The trial judge further instructed, in his final charge to the jury, that these earlier statements were not to be considered "as evidence of the truth of what was said at that earlier time," and that any consistency or conflict of such statements with the testimony of a witness at trial could be considered in deciding whether to believe the trial testimony.

Defendant did not object to any of the out-of-court statements other than those which were part of the testimony of Ms. Cook, and we do not here consider the propriety of their admission. Moreover, defendant failed to object to the jury charge as given or to request any additional instruction, and is thus barred by Rule 10(b)(2) of the Rules of Appellate Procedure from raising this issue on appeal in the absence of "plain error." *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

[3] We agree that, on the facts of this case, a more detailed instruction explaining how impeachment works should have been given to insure that the jury did not consider any of the hearsay as substantive evidence of defendant's guilt. However, in our view, the failure to do so was not so prejudicial as to rise to the level of "plain error." This assignment of error is overruled.

IV

[4] We next address defendant's contention that the trial court erred by failing to submit to the jury the lesser included offense of simple assault. Because defendant failed to object at trial to the instruction given, our review is limited to whether the omission constitutes "plain error."

The plain error rule "allows review of fundamental errors or defects in jury instructions affecting substantial rights, which were not brought to the attention of the trial court." *State v.*

Rathbone, 78 N.C. App. 58, 65, 336 S.E. 2d 702, 706 (1985), *disc. rev. denied*, 316 N.C. 200, 341 S.E. 2d 582 (1986); *see Odom*. In order to obtain relief under this doctrine, defendant must establish that the omission was error, and that, in light of the record as a whole, the error had a probable impact on the verdict. *E.g., State v. Sams*, 317 N.C. 230, 241, 345 S.E. 2d 179, 186 (1986). In the present case, our review of the whole record reveals "plain error" entitling defendant to a new trial.

Simple assault and assault inflicting serious injury are lesser included offenses of assault with a deadly weapon inflicting serious injury. When there is some evidence supporting a lesser included offense, the trial court must instruct the jury regarding the lesser offense. *E.g., State v. Whitaker*, 316 N.C. 515, 520, 342 S.E. 2d 514, 518 (1986). Failure to do so constitutes reversible error which is not cured by a verdict of guilty of the greater offense. *Id.*

In this case, evidence exists from which the jury could have found defendant guilty of simple assault or assault inflicting serious injury. All eyewitnesses, even witnesses for the defense, agreed that defendant struck the victim with his hands. There is, however, conflicting evidence regarding whether, thereafter, defendant used a firearm to further assault the victim. Only the victim himself testified that defendant had a gun. Defendant's eyewitness to the assault, Isaac Cameron, stated that defendant never drew a gun and was, in fact, unarmed. This was corroborated, in part, by numerous other witnesses who stated they never saw a gun on defendant's person, in his vehicle, or anywhere else. In addition, some evidence suggested that if a gun was present, it may have been that of the victim himself. Moreover, the fact that the jury found that serious injury had been inflicted does not affect our analysis since serious injury may be inflicted without the use of a deadly weapon.

Based on the foregoing, the jury could have disbelieved that a weapon was involved at all, or could have believed that any shot fired was not the result of defendant's use of a weapon. There is simply no way to ascertain what verdict the jury might have reached had they been given an alternative which did not include the use of a deadly weapon. Consequently, we hold that failure to include an instruction on either simple assault or assault inflicting serious injury was error.

Further, this is not a case like *Odom* in which the State's evidence of guilt was clear and the defendant's evidence neither credible nor corroborated. Rather, the State's own witnesses contradicted one another on various points regarding the timing of events, the persons present, and what actually happened. In view of the number of witnesses, the multiple prior consistent and inconsistent out-of-court statements admitted, and the generally confusing and contradictory nature of much of the testimony at trial, we hold that the error prejudicially affected substantial rights of the defendant and probably impacted upon the verdict so as to constitute "plain error" and mandate a new trial.

V

Having ordered a new trial, we now address briefly defendant's remaining two contentions since they may arise on retrial.

A

[5] Defendant argues that the trial court erred by overruling his objection to testimony elicited by the prosecutor from Sharon Cameron that she was "still afraid" of defendant on the day she testified. Defendant contends that this testimony was inadmissible character evidence under N.C. Gen. Stat. Sec. 8C-1, Rule 404(a).

We agree that, on these facts, the only apparent relevance of this evidence was to imply that defendant was a violent person and, consequently, it should not have been admitted. However, on this record, this error, standing alone, was not prejudicial.

B

[6] Defendant's remaining assignment alleges "plain error" in the trial court's instruction to the jury that "[a] 45 caliber pistol is a deadly weapon." Defendant argues that a gun is not a deadly weapon unless it is used in a way that is likely to cause serious injury, and that, because there was some evidence that a pistol was used to *strike* the victim, rather than to shoot him, the nature of the instrument as a deadly weapon was a question of fact for the jury. This argument is without merit.

The only evidence that the pistol was used to hit the victim consists of testimony by Officer Buchanan about the victim's out-of-court description of the incident. This hearsay is not competent

substantive evidence of what happened. Moreover, numerous cases of our appellate courts state, without qualification, that a gun or pistol is a deadly weapon *per se*. *E.g.*, *State v. Bullard*, 312 N.C. 129, 160, 322 S.E. 2d 370, 388 (1984); *State v. Ross*, 31 N.C. App. 394, 395-96, 229 S.E. 2d 218, 219 (1976), *disc. rev. denied and appeal dismissed*, 291 N.C. 715, 232 S.E. 2d 206 (1977). Accordingly, we hold that the instruction was proper.

VI

For "plain error" in the failure to submit to the jury the lesser included offense of simple assault or assault inflicting serious injury, we order a

New trial.

Judges JOHNSON and PARKER concur.

RICHARD E. WATSON v. NORTH CAROLINA REAL ESTATE COMMISSION

No. 8610SC1287

(Filed 1 December 1987)

1. **Brokers and Factors § 8— revocation of real estate license—sufficiency of evidence to support findings of fact**

In a proceeding for revocation of petitioner's real estate license findings of fact by respondent Commission were supported by substantial evidence, and those findings were sufficient to support its conclusions of law that petitioner engaged in improper and dishonest dealing with regard to using altered tape recordings at the hearing; he falsely promised to buyers that their contract was terminated and that they would receive earnest money; he engaged in improper, fraudulent, and dishonest dealing by arranging for a city inspection and using it to attempt to coerce the buyers into closing a transaction; and he made a wilful misrepresentation to buyers that nothing was wrong with the house in question. N.C.G.S. § 93A-6(a)(1), (2), (8) and (10).

2. **Brokers and Factors § 8— revocation of real estate license—adequate notice of hearing**

In a proceeding for revocation of petitioner's real estate license, there was no merit to petitioner's contention that he did not receive adequate notice of the hearings before respondent Commission and the order of the Commission was therefore based on "unlawful procedure," since petitioner received two notices which advised him of the date, hour, place, and nature of the hearings,

made particular reference to the sections of the statute involved, and set forth a short and plain statement of the factual allegations. N.C.G.S. § 150A-23(b).

3. Brokers and Factors § 8— revocation of real estate license—allegedly improper actions unrelated to real estate selling

Respondent Commission could properly find that petitioner's knowingly permitting the use of altered tape recordings in his Commission hearing violated N.C.G.S. § 93A-6(a)(8) and (10), since it was not required that the activities giving rise to a suspension or revocation be directly related to real estate brokering or selling.

APPEAL by respondent North Carolina Real Estate Commission from *Farmer, Judge.* Order entered in Superior Court, WAKE County. Heard in the Court of Appeals 7 May 1987.

Satisky and Silverstein, by John M. Silverstein, for petitioner-appellee.

Erdman, Boggs & Harkins, by Harry H. Harkins Jr., for respondent-appellant.

GREENE, Judge.

Defendant Watson (hereinafter, "Watson") was a licensed real estate broker. Norman and Elizabeth Stewart (hereinafter sometimes collectively called "buyers") filed a complaint against Watson with the North Carolina Real Estate Commission (hereinafter, the "Commission"). The Commission filed a notice of hearing under N.C.G.S. Sec 150A-23 (1983) charging Watson with certain violations of N.C.G.S. Sec. 93A-6 (1983). After the first hearing was adjourned, the Commission served Watson with a second notice alleging additional violations. After the hearings were completed, the Commission found Watson had violated various provisions of Section 93A-6 and revoked his real estate license. On appeal, the superior court reversed the Commission's order. The Commission appeals.

As this case commenced before 1 January 1986, the scope of our review is determined by former N.C.G.S. Sec. 150A-51 (now codified as N.C.G.S. Sec. 150B-51 (Cum. Supp. 1985)) which provided:

> The court may . . . reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions,

> or decisions are: (1) in violation of constitutional provisions; or (2) in excess of the statutory authority or jurisdiction of the agency; or (3) made upon unlawful procedures; 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.

Review in this court is further limited to the exceptions and assignments of error set forth to the order of the superior court. N.C.G.S. Sec. 150A-52 (1983); N.C.R. App. P. 10(a); *see O.S. Steel Erectors v. Brooks*, 84 N.C. App. 630, 632, 353 S.E. 2d 869, 872 (1987).

The following issues are presented: I) in view of the entire record under Section 150A-51(5), whether substantial evidence supported (A) the Commission's Findings of Fact and (B) the Commission's Conclusions of Law; II) whether (A) Watson received adequate notice of the Commission's charges under Section 150A-23(b) or (B) whether the Commission's grounds for revocation fatally varied from the charges set forth by the notice; III) whether Watson's use of certain tape recordings before the Commission constituted a violation of Section 93A-6(a)(8) or Section 93A-6(a)(10); and IV) whether the Commission's determination of Watson's violations and revocation of his license were arbitrary and capricious.

I

Under Section 150A-51(5), we apply the "whole record" test in determining whether the Commission's findings and conclusions are supported by substantial evidence:

> The 'whole record' test does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views; however, it does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached. . . . 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . It is more than a scintilla or a permissible inference.

Lackey v. N.C. Dept. of Human Resources, 306 N.C. 231, 238, 293 S.E. 2d 171, 176 (1982) (citation omitted); *see also* 2 C. Koch *Administrative Law and Practice* Sec. 9.4 (1985) (characterizing "substantial evidence" standard as "reasonableness" review). While our review is limited to assignments of error to the superior court's order, this court is not required to accord any particular deference to the superior court's findings and conclusions concerning the Commission's actions. *See* 2 C. Koch *Administrative Law and Practice* Sec. 8.54 at 82. However, the "whole record" standard of review is not intended to encourage "judicial duplication" of administrative decision-making. *Id.*, Sec. 9.4 at 92.

A

[1] Without any discussion whatsoever, the superior court concluded that none of the Commission's twenty findings of fact were supported by substantial evidence. Such a "broadside" conclusion is of little aid to this court and subverts the intent of Section 150A-51 which specifically requires the court to set out its reasons for reversing or modifying the Commission's decision. However, we have reviewed the entire record and find all twenty findings are supported by substantial evidence. Specifically, we find no evidence in the record that would contradict Findings of Fact Nos. 1-8. The record does evidence some dispute concerning the remaining findings.

Finding of Fact No. 9

> (9) Respondent then told the [buyers] that the "deal was dead" and the contract would be terminated. When the Stewarts inquired about the return of their earnest money, Respondent promised them he would return it upon receipt of a letter from their bank certifying that their check had cleared.

Norman Stewart specifically testified that Watson told him the "deal was dead and the contract terminated" and that the earnest money would be returned as soon as the check cleared the bank. Testifying to the contrary, Watson stated he told Stewart that, if the seller failed to make certain requested repairs, Stewart "might be entitled to get out of the contract" and might also be entitled to a refund of the $500 deposit. Despite Watson's somewhat contradictory statement, we find substantial evidence supported this particular finding.

Findings of Fact Nos. 11-16

(11) The Stewarts obtained a letter from their bank. They attempted to call Respondent for two days, but he refused to return their phone calls. When the Stewarts finally reached Respondent on the evening of July 22, 1982, he told them the property had been reinspected, was in good repair, that there was nothing wrong with the house, and that the "deal was on." In subsequent conversations, he further told them that Mr. Gaddy was a liar and a cheat, and threatened them with litigation if they did not go ahead with the purchase.

(12) Respondent contacted the High Point Inspections Department and asked for a letter stating the property was in good condition. He requested the acting Director of Inspections, Julius Lambeth, to certify the property was in good condition without inspecting the property. Mr. Lambeth refused to so certify without an inspection. The city inspections were limited to determining if utilities were currently working, and were not as extensive as Mr. Gaddy's.

(13) The High Point Inspections Department determined that although the plumbing worked, it was not in compliance with the new building code. The city merely certified that the property was fit for human habitation. Although the city reported the heating system currently worked, it did not determine if the heat exchanger was cracked.

(14) The High Point Inspection Department refused to give Respondent a letter stating everything was in good working order. The city did provide a letter stating the plumbing worked "at this time."

(15) Respondent failed to disclose to the sellers, Mr. and Mrs. Lambeth, that their plumbing did not comply with the new building code. Instead, he falsely told them that all the utilities in their house had passed inspection. Based on Respondent's representations and failures to disclose to the Lambeths, they refused to authorize the return of the Stewarts' earnest money.

(16) Respondent's attempts to get the city to certify the property was in good working order was for the purpose of

discrediting Mr. Gaddy's report and to force the Stewarts to close the transaction, after he had already promised them the "deal was dead" and they would receive their earnest money.

Evidence supporting Findings Nos. 11-16 came from various sources. The High Point Director of Inspections testified Watson requested he issue a "certificate of inspection" without inspecting the property. The Inspections Department did determine the plumbing "worked," but also determined it did not comply with the building code. A city building inspector testified he could not determine if the heat exchanger was cracked without taking it apart; he also stated the city could only determine if the device was in good working order as of the time of inspection. The seller testified Watson never told her the plumbing did not meet the current building code requirements. Gaddy, an inspector employed by the buyer, testified the plumbing was inadequate and the heat exchanger might be cracked.

Watson testified he told Norman Stewart that the plumbing did not meet code specifications but was in good working order. He further testified he told Stewart that the furnace had been inspected by the city and was found to be in good working order. Watson denied asking for a city certification without an inspection.

In resolving this conflicting evidence, the credibility of the witnesses was obviously an issue. The Commission apparently chose not to believe Watson and that is within its discretion. *See State ex rel. Util. Comm'n v. Duke Power Co.*, 305 N.C. 1, 21, 287 S.E. 2d 786, 798-99 (1982). We find substantial evidence supported Findings of Fact Nos. 11-16.

Findings of Fact Nos. 17-20

(17) On September 29, 1983, at the first hearing in this proceeding, Respondent, in the physical presence of the Commission, handed his attorney two cassette tapes purporting to be recordings of telephone conversations between Respondent and Mr. Stewart and Mr. Julius Lambeth. The tapes were made without the knowledge or consent of either Mr. Stewart or Mr. Julius Lambeth.

(18) Respondent gave the tapes to his attorney to be used in the cross-examination of Mr. Stewart and Mr. Julius

Lambeth. The tapes were so used, in that Respondent and his attorney personally played them in the presence of the Commission during such cross examination.

(19) The tapes were not accurate depictions of the conversations between Respondent and Mr. Stewart and Mr. Julius Lambeth. Rather, portions of the conversations were deleted, and Respondent inserted information into the recordings that were not part of the original conversations. This finding is based on the testimony of Mr. Stewart and Mr. Julius Lambeth, and the results of an analysis of the tapes conducted by the Federal Bureau of Investigation.

(20) Respondent deliberately caused "doctored" tapes that were not accurate recordings of the conversations to be played before the Commission in an attempt to deceive the Commission.

The evidence supporting these findings comes from several witnesses, including Watson himself. Watson testified he permitted the tapes to be played before the Commission; Watson actually placed the tapes into the recorder and later removed them. The persons whose conversations were allegedly taped testified the recordings were made without their knowledge or consent. The record clearly reveals the tapes were used in the cross-examination of both the buyer and the city inspector. Both the buyer and the city inspector testified the recordings of their respective conversations with Watson did not properly reflect those conversations. They both testified that either portions of the conversations had been deleted or certain additional conversation had been inserted. A tape recording expert with the Federal Bureau of Investigation testified the tape of Watson's conversation with the buyer contained information which was "not part of the conversation as originally recorded and was subsequently inserted." The agent further stated the tape of Watson's conversation with the city inspector contained several lines which were repeated a second time on the same recording; however, the expert stated he could not definitely say that this latter tape recording had been altered.

Watson testified that no extraneous matter had been inserted on two of the tapes and that the tapes were not "doctored." He admitted taping the conversations and argued any

appearance of a "doctored" tape occurred when he dropped the recording device while taping one of the conversations. He further stated the original tapes had been destroyed and the tapes analyzed for the Commission were actually recordings of the original tapes. While Watson denied altering the tapes and offered some explanations for any appearance of altered tapes, the agency obviously did not find the explanations believable, particularly in light of the expert testimony. We therefore find substantial evidence to support these findings.

B

The Commission next assigns as error the trial court's findings that the Commission's Conclusions of Law are not supported by substantial evidence. The Commission entered the following conclusions:

> (1) Respondent is adjudged guilty of violating GS 93A-6 (a)(10) by engaging in improper and dishonest dealing for his conduct with regard to the altered tapes.
>
> (2) Respondent is adjudged guilty of violating GS 93A-6 (a)(8) as being unworthy to act as a real estate broker in a manner that endangers the public interest, for his conduct with regard to the altered tapes.
>
> (3) Respondent is adjudged guilty of violating GS 93A-6 (a)(2) by falsely promising to the Stewarts that their contract was terminated and they would receive their earnest money.
>
> (4) Respondent is adjudged guilty of violating GS 93A-6 (a)(10) by engaging in improper, fraudulent and dishonest dealing for his conduct in arranging for the High Point city inspection, using such inspection to attempt to coerce the Stewarts into closing the transaction, and failing to disclose the true facts to the sellers.
>
> (5) Respondent is adjudged guilty of violating GS 93A-6 (a)(1) by making a willful misrepresentation to the Stewarts that nothing was wrong with the house.

We find these conclusions are supported by those findings we have previously found were supported by substantial evidence. Specifically, Conclusions of Law Nos. 1 and 2 are supported by Findings of Fact Nos. 17 through 20. Conclusion of Law No. 3 is

supported by Findings of Fact Nos. 9 and 10. Conclusion of Law No. 4 is supported by Findings of Fact Nos. 11 through 16. Conclusion of Law No. 5 is supported by Finding of Fact No. 16.

II

[2] The Commission next assigns error to the trial court's finding that the Commission's Conclusions of Law Nos. 1 and 2 were entered upon unlawful procedure. Watson had argued before the superior court that he did not receive adequate notice of the hearing under N.C.G.S. Sec. 150A-23(b) and therefore the order of the Commission was based on "unlawful procedure" under N.C.G.S. Sec. 150A-51(3). N.C.G.S. Sec. 150A-23(b) provides:

> The parties shall be given a reasonable notice of the hearing, which notice shall include: (1) a statement of the date, hour, place and nature of the hearing; (2) a reference to the particular sections of the statutes and rules involved; and (3) a short and plain statement of the factual allegations.

A

Watson was given two separate notices. The first notice informed Watson a hearing was scheduled before the North Carolina Real Estate Licensing Board on seventeen different specific allegations. The notice further stated if the allegations were found to be true, they "may warrant the suspension or revocation of your real estate broker's license, pursuant to G.S. 93A-6(a)(1), (2), (8) and (10)." The second notice additionally informed Watson the Commission intended to present evidence that he had:

> handed [his] attorney certain tapes purporting to be tape recordings . . . which said tapes were intended to be used, and in fact were used as evidence in [his] defense in this case. The Commission will also present evidence which tends to show that said tape recordings were not genuine recordings . . . and that [he] attempted to deceive the Commission by presenting false or doctored evidence.

The notice further informed Watson that, if true, the conduct violated "G.S. 93A-6(a)(8) and (10)."

In *Parrish v. North Carolina Real Estate Licensing Bd.*, 41 N.C. App. 102, 105, 254 S.E. 2d 268, 270 (1979), we held the notice must "charge the offense with sufficient certainty to apprise the

defendant of the specific accusation against him so as to enable him to prepare his defense . . . ." *See also Edwards v. Latham*, 60 N.C. App. 759, 762, 299 S.E. 2d 819, 821 (1983). Under *Parrish* and *Edwards*, the notice in this case fully complied with Section 150A-23(b). The notices advised Watson of the date, hour, place and nature of the hearings and made particular reference to the sections of the statute involved. Furthermore, a short and plain statement of the factual allegations was contained in the notice sufficient to enable him to prepare his defense.

B

The notice served on Watson stated the Commission would present evidence that Watson had used the tapes "as evidence in your defense." Watson argues he did not use the tapes as evidence in his defense, but only attempted to use them to cross-examine witnesses. In attempting to use the tapes to cross-examine witnesses, Watson did use the tapes in defending himself before the Commission. We find any variance between the notice and proof to be insignificant. In a criminal case, the purpose of the rule as to variance between indictment and proof "is to avoid surprise . . . and the discrepancy must not be used to ensnare the defendant or to deprive him of an opportunity to present his defense." *State v. Guffey*, 39 N.C. App. 359, 362, 250 S.E. 2d 96, 98 (1979) (citation omitted). The same rationale is applicable in proceedings pursuant to N.C.G.S. Sec. 150A-23. *Parrish*, 41 N.C. App. at 105, 254 S.E. 2d at 270. We do not find Watson was surprised nor was any discrepancy used to ensnare Watson or deprive him of an opportunity to present his defense.

We therefore reject both of Watson's arguments and conclude the Commission did not proceed under any unlawful procedure under Section 150A-51(3).

III

[3] The Commission next assigns error to the superior court's findings that the Commission's Conclusions of Law Nos. 1 and 2 exceeded the Commission's statutory authority. The Commission concluded Watson's use of the tapes violated N.C.G.S. Sec. 93A-6(a)(8), (10) which prohibits:

> (8) Being unworthy or incompetent to act as a real estate broker or salesman *in a manner as to endanger* the interest of the public; [or]
>
> (10) Any other conduct which constitutes improper, fraudulent or dishonest dealing.

The superior court specifically found the "disciplinary authority of the agency does not extend to conduct by petitioner's counsel in playing tapes during cross-examination of prosecution witnesses. The 'conduct' does not involve petitioner's actions as a broker."

In support of the lower court, Watson argues his conduct regarding the tapes does not authorize the Commission to revoke his license under the holding of *In re Dillingham*, 257 N.C. 684, 127 S.E. 2d 584 (1962). In *Dillingham*, a licensed real estate broker had pleaded guilty to a charge of operating a disorderly house. By virtue of this guilty plea in another proceeding, the Board found the broker was likewise guilty of violating several provisions of Section 93A-6. Specifically focusing on the "unworthy or incompetent" provision, the Supreme Court held the broker's operation of a disorderly house in violation of a criminal statute was not an action "connected in any way with the pursuit of his licensed privilege as a real estate broker" and was not therefore ground for revoking his license. *Dillingham*, 257 N.C. at 695, 127 S.E. 2d at 592.

The version of Section 93A-6 applicable to the present case substantially differs from the version in effect at the time of *Dillingham*. That earlier version provided in pertinent part:

> The Board . . . shall . . . have power to suspend or revoke any license issued under the provisions of this Chapter . . . *where the licensee in performing or attempting to perform any of the acts mentioned herein* is deemed to be guilty of: . . . (8) being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interest of the public. [Emphasis added.]

The version of Section 93A-6(a) in effect at the time of Watson's hearing and now in effect omits the condition emphasized above and simply states in part:

> The Commission shall have power to suspend or revoke at any time a license issued under the provisions of this Chapter, . . . if, . . . the Commission adjudges the licensee to be guilty of: . . . (8) being unworthy or incompetent to act as a real estate broker or salesman in a manner as to endanger the interest of the public; . . . (10) any other conduct which constitutes improper, fraudulent or dishonest dealing.

In *Dillingham*, the Court found the words "any of the acts mentioned herein" must mean "the acts of a real estate broker or real estate salesman *for which a license is required* . . . ." *Dillingham*, 257 N.C. at 694, 127 S.E. 2d at 591 (emphasis added). A license is required in order to sell or offer to sell, buy or offer to buy any real estate. N.C.G.S. Sec. 93A-2. That the current statute omits the words "any of the acts mentioned herein" is significant: unless the specific provision provides otherwise, the amended statute permits the Commission to suspend or revoke a license issued pursuant to N.C.G.S. Sec. 93A-4 for any of the acts enumerated in N.C.G.S. Sec. 93A-6(a)1-12 without regard to whether the acts were connected in any way with the pursuit of the licensed privilege of a real estate broker or salesman.

In determining legislative intent, it is appropriate to assume the legislature is aware of any judicial construction of a statute. *See* 73 Am. Jur. 2d, *Statutes* Sec. 164 at 368 (1974). That the legislature chose to omit the language on which *Dillingham* relied shows the clear intent to omit the requirement that the activities giving rise to a suspension or revocation must be directly related to real estate brokering or selling. We therefore conclude the amendment of Section 93A-6 evidences the legislature's clear intent to remove the requirements placed on the earlier version of the statute by *Dillingham*. Therefore, we hold the Commission could find Watson's knowingly permitting the use of altered tapes in his Commission hearing violated Sections 93A-6(a)(8) and (10). Consequently, the Commission's order was not affected by any error of law.

IV

The Commission finally assigns error to the superior court's conclusion that the Commission's Conclusions of Law Nos. 3 and 4 were "arbitrary and capricious." Conclusion No. 3 adjudged Watson guilty of violating Section 93A-6(a)(2) "by falsely promising to

the Stewarts that their contract was terminated and they would receive their earnest money." Conclusion No. 4 adjudged Watson guilty of violating Section 93A-6(a)(10) in arranging the city inspection, using such inspection to attempt to coerce the buyers into closing the transaction and for failing to disclose the true facts to the sellers. We find no merit in the superior court's reasoning that these conclusions were arbitrary and capricious. First, the Commission found Watson guilty because he falsely *promised* to return the earnest money, not because he failed to return the money. Second, Watson had ample notice he was charged with fraud.

The superior court also found the Commission's action was arbitrary and capricious because the punishment was too harsh. We note the punishment was within the limits allowed by the statute. Sec. 93A-6(a). Furthermore, agency action is considered "arbitrary and capricious" only if it indicates "a lack of fair and careful consideration" and fails "to indicate 'any course of reasoning and the exercise of judgment.'" *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E. 2d 547, 573 (1980). The Commission's revocation does not evidence any lack of fairness or careful consideration.

V

We find the Commission's revocation of Watson's license was supported by substantial, competent and material evidence, was conducted under lawful procedure, was unaffected by error of law and was not arbitrary or capricious. The judgment of the superior court reversing the order revoking Watson's license is therefore

Reversed.

Judges PHILLIPS and COZORT concur.

IN RE: ARCHIBALD CARTER MAGEE, M.D.

No. 8710SC194

(Filed 1 December 1987)

1. **Physicians, Surgeons and Allied Professions § 6.1— automatic suspension of license for mental incompetency—continuance upon different grounds without notice or hearing**

There is no statutory authority which allows the Board of Medical Examiners to continue, either permanently or indefinitely, the deprivation of a license, begun as an automatic suspension for mental incompetency, upon totally different grounds, without notice of those grounds or an opportunity to be heard; therefore, the trial court properly remanded this matter for a new hearing based on proper procedure where the Board of Medical Examiners denied appellant doctor reinstatement of his license upon grounds of which he had no notice and upon which no hearing was conducted.

2. **Physicians, Surgeons and Allied Professions § 6.1— reinstatement of license suspended for mental incompetence—remand of case for establishment of rules and procedures**

The trial court properly directed the Board of Medical Examiners to establish rules and procedures relating to reinstatement of licenses automatically suspended upon an adjudication of mental incompetency.

3. **Judgments § 2.1— portion of order signed out of session and county and without parties' agreement—order void**

Because it was signed out of session, out of the district and the county, and without agreement of the parties, that portion of the trial court's amended order awarding costs and attorney fees is void.

APPEAL by both parties, Archibald Carter Magee, M.D. and the Board of Medical Examiners of the State of North Carolina, from *Brannon, Judge*. Order entered 2 December 1986 in Superior Court, CUMBERLAND County.[1] Heard in the Court of Appeals on 24 September 1987.

1. The original order was entered 26 June 1986 in Wake County and signed out of session in Durham County on 4 November 1986 by and with the consent of the parties. Thereafter, the amended order appealed from was signed out of session in Cumberland County.

Bailey, Dixon, Wooten, McDonald, Fountain, and Walker, by Wright T. Dixon, Jr. for Archibald Carter Magee, M.D., appellant/appellee.

Smith, Anderson, Blount, Dorsett, Mitchell, and Jernigan, by Michael E. Weddington and Susan M. Parker for the Board of Medical Examiners of the State of North Carolina, appellant/appellee.

BECTON, Judge.

This appeal arises from efforts by Archibald Carter Magee, M.D. to have his suspended license to practice medicine reinstated. Magee petitioned for judicial review of a decision of the North Carolina Board of Medical Examiners (the Board) denying reinstatement of his license, and a hearing was held 26 June 1986. Both Magee and the Board appeal from an amended order of the trial court, entered 2 December 1986, which directed that the matter be remanded to the Board for rehearing and instructed the Board to pay costs and attorneys fees. For the reasons discussed hereafter, the order is affirmed insofar as the rehearing is concerned and reversed as to the award of costs and attorneys fees.

I

In January of 1983, Magee pleaded not guilty by reason of insanity to criminal assault charges, and was subsequently adjudicated mentally incompetent, due to drug and alcohol abuse, and involuntarily committed to a psychiatric hospital for treatment. In consequence, the Medical Board notified Magee, on 2 March 1983, that his medical license was automatically suspended pursuant to N.C. Gen. Stat. Sec. 90-14(a)(10) (1981).

Following months of hospitalization, Magee was found mentally competent at a hearing on 1 September 1983 and was released from the hospital. In November 1983, Magee asked the Board to reinstate his medical license, and the Board responded, by letter dated 14 December 1983, requesting Magee to "furnish the Board with a report from a psychiatrist stating that you are mentally competent to practice medicine." Thereafter, in February and June of 1984, statements of two doctors furnished by Magee as to his mental competence were consecutively found by the Board to be insufficient to satisfy its demand.

Magee next offered to the Board a letter report, dated 25 July 1985, from his then current psychiatrist, Dr. Robert A. Fleury, which stated that medical licensure was reasonable for Magee under specific conditions such as life-long regular attendance at Alcoholics Anonymous and regular outpatient psychiatric care for at least a year. Without notice or a hearing, the Board, on 9 August 1985, voted to deny reinstatement of Magee's license.

On 10 September 1985, Magee formally requested a hearing before the Board on the grounds that he had documented his sound mind and mental competence to practice medicine as required by the Board. A hearing was held 2 December 1985 at which the evidence consisted of testimony by Magee and by Dr. Fleury, primarily relating to Magee's mental competence, efforts at rehabilitation, and continued medical education since the suspension. In an order signed 13 January 1986, the Board included findings of fact concerning Magee's history of substance abuse, the length of time since Magee had practiced medicine, and the events of June 1982 out of which the criminal assault charges arose, and, based on these findings, concluded that grounds existed to deny issuance of a license under N.C. Gen. Stat. Sec. 90-14(a)(5), (6) and (11).

The Board's decision was reviewed by Judge Anthony M. Brannon at a hearing in Wake County Superior Court on 26 June 1986. Judge Brannon then announced in open court that he would not rule upon the contentions of the parties nor consider the issue of attorneys fees, and ordered the case remanded to the Board for a hearing *de novo* to be held in accordance with appropriate regulations and procedures to be adopted by the Board. He requested both parties to submit proposed orders embodying his oral ruling to be signed out of session; and, on 4 November 1986 in Durham, North Carolina, without further hearing, he signed an order prepared by Magee's counsel. That order included findings of fact and concluded as a matter of law, in part, that the Board had violated Magee's constitutional right to due process of law, and further, that the amount of Magee's attorneys fees should be "left for determination at a later date."

Thereafter, the Board filed a proposed amended order, contending that the 4 November order, as drawn, went beyond the intent of the Court and contained findings of fact inconsistent

with the concept of a hearing *de novo*. Among other changes, the proposed order deleted all findings of fact relating to the merits of the case and all reference to attorneys fees. On 2 December 1986, in Fayetteville, where he was presiding at a session of Cumberland County Superior Court, Judge Brannon heard argument on the Board's motion to amend the 4 November order, and entered an amended order remanding the matter and awarding to Magee costs and attorneys fees of $13,136.25.

II

In the Record on Appeal, Magee assigned as error (1) the action of the Superior Court in striking the 4 November 1986 order, and (2) the Court's failure to order reinstatement of his license. However, because neither the assignments of error nor their supporting exceptions are set forth or argued in Magee's brief, they are taken as abandoned. *See* Rule 28, North Carolina Rules of Appellate Procedure; *Brown v. Neal*, 283 N.C. 604, 197 S.E. 2d 505 (1973); *Lloyd v. Carnation Co.*, 47 N.C. App. 203, 266 S.E. 2d 722 (1980). Accordingly, we limit our review to the two issues raised by the Board's appeal, namely, (1) whether the trial court erred by remanding the matter to the Board for a hearing *de novo*, and (2) whether the award of attorneys fees was proper.

III

In the trial court's order that the matter be remanded for a hearing *de novo*, the court further directed that

> . . . before conducting such hearing *de novo*, the Board shall adopt appropriate regulations addressing both (i) how a Board licensee whose license has been automatically suspended under N.C. Gen. Stat. Sec. 90-14(a)(10) should proceed to seek reinstatement of his license, and (ii) the procedures for hearing before the Board, the adoption of such regulations to be accomplished by the Board as soon as reasonably possible consistent with applicable statutory requirements . . . .

The Board contends that the trial court was without authority to either order a hearing *de novo* or to direct the Board to adopt regulations and procedures. Specifically, the Board maintains that the reissuance of a medical license after suspension is wholly and adequately governed by the Medical Practice Act (MPA), N.C. Gen. Stat. Secs. 90-1 *et seq.*; that pursuant to N.C.

Gen. Stat. Sec. 90-14(a), the Board's decision to deny reinstatement of Magee's license was solely within its discretionary authority; and that the decision was supported by the evidence before it and was not the product of an abuse of discretion. On the other hand, Magee argues, in part, that the Administrative Procedure Act (APA), Chapter 150A of the General Statutes,[2] requires the Board to have established regulations and procedures for lifting a suspension imposed under G.S. Sec. 90-14(a)(10); that at the time Magee sought reinstatement of his license, the Board lacked such regulations and procedures, and imposed upon Magee arbitrary *ad hoc* requirements for reinstatement; and that the procedure followed by the Board was constitutionally defective.

A

[1] Procedural due process requires that an individual receive adequate notice and a meaningful opportunity to be heard before he is deprived of life, liberty, or property. *See, e.g., Harrell v. Wilson County Schools*, 58 N.C. App. 260, 266, 293 S.E. 2d 687, 691, *disc. review denied and appeal dismissed*, 306 N.C. 740, 295 S.E. 2d 759 (1982), *cert. denied*, 460 U.S. 1012, 75 L.Ed. 2d 481 (1983). This requirement applies to administrative agencies performing adjudicatory functions. *See Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287 (1970); *Harrell.* Further, a professional license is a protected property interest. *See, e.g., Barry v. Barchi*, 443 U.S. 55, 61 L.Ed. 2d 365 (1979); *Beauchamp v. De Abadia*, 779 F. 2d 773 (1st Cir. 1985); *Keney v. Derbyshire*, 718 F. 2d 352 (10th Cir. 1983).

In this case, the Board, in its communications with Magee, led him to believe that reinstatement of his license was dependent upon adequate proof of his mental competence. Yet, the Board's decision to deny reinstatement was based upon three other grounds, including unprofessional conduct and lack of professional competence, of which Magee had no prior notice and no meaningful opportunity to be heard.

In addition, we disagree with the Board's contention that, under the Medical Practice Act, the Board has complete statutory

2. The APA was revised and recodified as Chapter 150B of the General Statutes as of 1 January 1986. Chapter 150A was in force at the time of the 2 December 1985 Board hearing.

discretion to deny or limit permission to resume the practice of medicine once a physician's right to practice has been terminated "by any action or for any period of time." N.C. Gen. Stat. Sec. 90-14(a) lists thirteen grounds upon which the Board may "deny, annul, suspend, or revoke" a license to practice medicine. Among these grounds is "[a]judication of mental incompetency, which shall automatically *suspend* a license unless the Board orders otherwise." Sec. 90-14(a)(10) (emphasis added). Section 90-14(a) further provides:

> For any of the foregoing reasons, the Board may *deny* the issuance of a license to an applicant or *revoke* a license issued to him, may *suspend* such a license *for a period of time*, and may impose conditions upon the continued practice after such period of suspension as the Board may deem advisable, may limit the accused physician's practice of medicine with respect to the extent, nature or location of his practice as the Board deems advisable. *The Board may in its discretion* and upon such terms and conditions and for such period of time as it may prescribe, *restore a license so revoked or rescinded.*

In addition, Section 90-14.2 requires that the Board give a licensee "written notice indicating the general nature of the charges, accusation, or complaint made against him" and a public hearing "concerning such charges or complaint," *before* the Board may "revoke, restrict, or suspend any license granted by it." Similarly, Section 90-14.1 provides for notice of the reasons and a hearing whenever an applicant is denied issuance of a license. Considered together, these sections reflect a clear legislative intent that no applicant or licensee be denied the right to practice medicine for any reason without notice of the grounds and an opportunity to be heard by the Board. The sole exception is an automatic suspension based on an adjudication of mental incompetency pursuant to Section 90-14(a)(10).

Although, as the legislature recognized, the Board may reasonably rely upon an adjudication of mental incompetency by a competent tribunal as conclusive evidence of unfitness to practice medicine so as to support a suspension, it would be unreasonable, in our opinion, for the Board to continue the deprivation of a license in reliance upon such an adjudication which is no longer

in force but has been superseded by a subsequent adjudication of restored mental competency. And, in fact, the Board did not do so. However, although the Board is clearly authorized to deny reinstatement on *other grounds*, we are convinced that it may not do so without providing proper notice of those grounds and a hearing thereon.

We find it significant that, under Section 90-14(a)(10), an adjudication of mental incompetence merely *suspends* a license. The legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. *E.g., Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). Further, in the absence of a contrary indication, it is presumed that no word of a statute is a mere redundant expression but was intended to add something to the meaning of the statute. *LaFayette Transportation Service, Inc. v. Robeson County*, 283 N.C. 494, 196 S.E. 2d 770 (1973).

Among the disciplinary actions available to the Board under Section 90-14(a) are both the options to *revoke* or to *suspend* a license. While *revoke* and *rescind* mean "to make void," "annul," or "repeal," connoting a total, permanent deprivation, *suspend* means "to cause to stop for a period" or "to render temporarily ineffective," connoting a deprivation of limited duration. *See* The American Heritage Dictionary (2d ed. 1985). The distinction is supported by the language of Section 90-14(a) which states that the Board may suspend a license "for a period of time." On the other hand, the last sentence of that Section, upon which the Board relies, grants to the Board discretion to restore, on such terms and for such period of time that it chooses, only licenses which have been "revoked or rescinded." Because a valid revocation or rescission must follow proper notice and a hearing under N.C. Gen. Stat. Sec. 90-14.2, the exercise of reasonable discretion in restoring a revoked license ordinarily will not violate due process. We find nothing in the statutory scheme, however, which would allow the Board to continue, either permanently or indefinitely, the deprivation of a license, begun as an automatic suspension for mental incompetency, upon totally different grounds, without notice of those grounds or an opportunity to be heard.

For these reasons, we conclude that the action of the Board in denying reinstatement of his license upon grounds of which

Magee had no notice and upon which no hearing was conducted violated due process and exceeded the Board's statutory authority. Moreover, the trial judge obviously ordered this matter remanded due to his belief that the Board's actions were procedurally defective and because he declined, quite properly, to substitute his own judgment for the expert judgment of the Board regarding Magee's qualification to practice medicine. Consequently, we hold that the trial court did not err in remanding the matter for a new hearing based on proper procedure.

B

[2] We are also convinced that the trial court's direction to the Board to establish rules and procedures relating to reinstatement of licenses automatically suspended under Section 90-14(a)(10) was proper.

The Administrative Procedure Act applies to the Board of Medical Examiners "except to the extent and in the particulars that any statute makes specific provisions to the contrary," N.C. Gen. Stat. Sec. 150A-1 (1983), and thus supplements the provisions of the Medical Practice Act to the extent that it is broader than that statute. Section 150A-11 requires every administrative agency subject to the APA to "[a]dopt rules of practice setting forth the nature and requirements of all formal and informal procedures available. . . ." As previously discussed, provisions of the MPA supply procedures for the Board to follow whenever it denies issuance of a license, *see* Section 90-14.1, or whenever it revokes, suspends, or restricts a license, *see* Section 90-14.2. However, the MPA provides no specific procedure for reinstatement of a license which has been automatically suspended pursuant to Section 90-14(a)(10). In our opinion, the Board is required by Section 150A-11 of the APA, under these circumstances, to fill this gap in the MPA by establishing regulations and procedures which are consistent with the spirit of the MPA and the APA and afford procedural protection to suspended licensees. The trial court thus acted within its authority in directing the Board to do what it had a statutory obligation to do.

IV

[3] The Board next argues that the award of costs and attorneys fees to Magee was erroneous because (1) it was not authorized by

statute, (2) it was contrary to the express terms of N.C. Gen. Stat. Sec. 6-19.1, the statute upon which the trial court relied, and (3) it was entered out of session, out of the district, and without the consent of the parties. Because we agree that Judge Brannon lacked jurisdiction to enter that portion of the amended order awarding attorneys fees, we deem it unnecessary to reach the Board's statutory arguments.

The general rule concerning judgments and orders is that

> [j]udgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at a term must be made in the county and at the term when and where the question is presented, and . . . *except by agreement of the parties* or by reason of some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested.

State v. Boone, 310 N.C. 284, 287, 311 S.E. 2d 552, 555 (1984) (emphasis added). This rule has been applied consistently in both criminal and civil cases. *Id.*

Judge Brannon's first ruling in this matter was made during the 23 June 1986 session of Wake County Superior Court, in the Tenth Judicial District. The amended order was signed 2 December 1986 in Fayetteville, North Carolina, in the Twelfth Judicial District, and was thus obviously entered out of session and out of the county and the district in which the matter was presented.

Although it appears from the record that the parties agreed that a written order prepared in accordance with the Court's announced ruling could be signed by Judge Brannon after the conclusion of the session and out of the district, it further appears that Judge Brannon's oral ruling did not include an award of attorneys fees and that there was thus no consent to that portion of the amended order. In fact, the initial 4 November 1986 order specifically ordered, "that the decision on the award of attorney fees is hereby deferred until such time as a proper hearing has been held."

Nor does it appear that the hearing on the Board's motion to amend the 4 November 1986 order constituted a "proper hearing" on attorneys fees. Although the court admitted in evidence an "Affidavit of Services Performed," apparently neither the pro-

priety of any award nor the reasonableness of the amount was ever raised or argued before the Court.

We hold that, because it was signed out of session, out of the district and the county, and without agreement of the parties, that portion of the amended order awarding costs and attorneys fees is void.

V

For the reasons stated, the trial court's direction that this matter be remanded to the Board for a hearing *de novo* is affirmed and that portion of the order directing the Board to pay costs and attorneys fees is reversed.

Affirmed in part and reversed in part.

Judges JOHNSON and PARKER concur.

WHITTAKER GENERAL MEDICAL CORPORATION v. CONNIE DANIEL AND DR. T. C. SMITH COMPANY

No. 8710SC230

(Filed 1 December 1987)

1. **Rules of Civil Procedure § 50.1— denial of summary judgment—subsequent directed verdict or judgment n.o.v. not barred**

A denial of a motion for summary judgment, based only upon a forecast of evidence, should not operate to bar the granting of a directed verdict or a judgment notwithstanding the verdict based on the evidence actually presented at trial.

2. **Master and Servant § 11.1— covenant not to compete—promotion plus change in compensation as valuable consideration**

A promotion plus a change in compensation from salary to commission constituted valuable consideration which supported a non-competition agreement between plaintiff employer and defendant employee.

3. **Master and Servant § 11— agreement not to call upon former employer's customers—agreement overly restrictive**

Because there were no trade secrets or confidential information used by defendant employee and because the development of defendant's sales and marketing skills were the result of her own initiative and efforts, plaintiff failed to prove a business interest worthy of the protection provided by its

non-competition agreement which stated that a former employee would not call upon or divert in any way customers served by employer plaintiff, and the agreement was overly restrictive and therefore invalid for overbreadth.

APPEAL by plaintiff from *Herring, D. B., Judge.* Judgment entered 19 September 1986 and signed 6 October 1986 in WAKE County Superior Court. Heard in the Court of Appeals 29 September 1987.

This appeal arises from an action for breach of and interference with contract brought by plaintiff Whittaker General Medical Corporation (Whittaker General) against defendant Connie Daniel (Ms. Daniel), a salesperson formerly employed by plaintiff, and Carolina Surgical Supply Company (Carolina Surgical Co.), a division of Dr. T. C. Smith Company (Smith Co.). Plaintiff sought both injunctive relief and monetary damages. Defendants counterclaimed for damages for lost business and costs of litigation, which counterclaim has since been withdrawn. Defendants later filed a Motion for Summary Judgment on 29 July 1986 and on 13 August 1986 plaintiffs moved for partial summary judgment relating to the defendants' liability. By order dated 20 August 1986, Judge David E. Reid denied both motions without stating specific reasons.

Following a jury trial, a verdict was returned in favor of plaintiff, awarding damages of $93,551.00 for breach of the Non-Competition Agreement against defendant Ms. Daniel and $93,551.00 against defendant Smith Co. for interference with contract. In addition, the jury awarded $12,898.00 in punitive damages against defendant Smith Co. on the interference with contract claim. Defendants, in open court, moved for judgment notwithstanding the verdict or in the alternative for a new trial. The trial court granted the Motion for Judgment Notwithstanding the Verdict. Plaintiff appeals the grant of judgment notwithstanding the verdict.

The evidence at trial tended to show that defendant Ms. Daniel was originally hired as a part-time clerical worker by General Medical Corporation, a predecessor in interest to plaintiff, in 1971. At that time, Ms. Daniel was paid minimum wage and worked on an hourly basis. According to trial testimony, as Ms. Daniel became more familiar with the company's business, she was given additional responsibilities which she handled excep-

tionally well. In March 1976, she was promoted from part-time secretary/part-time salesperson to full-time salesperson. In addition, her compensation was changed from that of the hourly wage to a straight salary of $6,448 per year to $7,272 per year plus a car allowance of $1,865 per year. At the time of her promotion, Ms. Daniel was asked to sign a Non-Competition Agreement which provides, in part:

> 2. Employee agrees that the customers of Employer belong to and are a part of the assets and good will of Employer; that Employee serves and sells, and will continue to serve and sell, such customers in a representative capacity only; and that on the termination, for any cause whatsoever, of his employment with Employer, he will not, for a period of two (2) years thereafter, (a) engage, directly or indirectly, in any business of manufacturing, selling, renting or distributing any goods manufactured, sold, rented or distributed by Employer during the term of his employment, either for himself or for any individual, firm or corporation in the business of manufacturing, selling, renting or distributing any of said items, in any territory (i) assigned to him by Employer at the time of termination of his employment, or (ii) in any territory so assigned within two (2) years prior to such termination, nor (b) call upon, solicit or interfere with or divert in any way any customers served by Employer in such territories. Employee further agrees that he will not, during the term of his employment hereunder, or any time thereafter, furnish to any individual, firm or corporation other than Employer, any list or lists of customers of Employer or any confidential information or trade or business secrets of any kind or nature pertaining to the business or affairs of Employer.

Ms. Daniel continued to expand her territory in the Wake County area, increasing her physicians' accounts from three in March 1976 to 25 or 30 by February 1982. [During the interim between March 1976 and February 1982, General Medical Corporation had been sold to plaintiff Whittaker General. As stipulated in post-trial motions, all contracts and liabilities including the Non-Competition Agreement were properly assigned to plaintiff.]

On 26 February 1982, pursuant to its company policy, Whittaker General required all its sales personnel to be removed from

straight salary and paid solely on a commission basis. No longer were any of the sales personnel, including defendant, to receive car allowances or paid vacations. A new Non-Competition Agreement was not executed during or after the change in compensation. Ms. Daniel's duties remained the same although her territory expanded to include additional counties and her workload likewise increased as did her income.

In early 1985, defendant Smith Co. began discussing the possibility of hiring Ms. Daniel to work sales for Smith Co. During these negotiations, Ms. Daniel informed Smith Co. agents of the Non-Competition Agreement she had signed with plaintiff. Defendant Smith Co. agreed to pay any legal fees Ms. Daniel might incur resulting from litigation over the Non-Competition Agreement.

On 28 June 1985, Ms. Daniel resigned from plaintiff Whittaker General and began to work for defendant Smith Co. on 1 July 1985. On the day of her resignation, Ms. Daniel, by letter, communicated her change of employment to her customers. She advised them that she would call on them the following week on behalf of Carolina Surgical Co. Testimony by Ms. Daniel's supervisor at Whittaker General indicated that Ms. Daniel had been very successful at converting her previous customers from Whittaker General to Carolina Surgical Co. Ms. Daniel continued to work as a sales representative for Smith Co. until trial.

Hunton & Williams, by Julius A. Rousseau, III, for plaintiff-appellant.

Morris, Golding, Phillips & Cloninger, by William C. Morris, Jr., for defendant-appellees.

WELLS, Judge.

The primary thrust of plaintiff's appeal attacks the trial court's grant of judgment notwithstanding the verdict on all questions resolved in favor of plaintiff by the jury. Citing the inadequacy of the grounds asserted by defendants' Motion for Directed Verdict which was subsequently relied upon to provide support for the judgment notwithstanding the verdict, plaintiff contends that the judgment notwithstanding the verdict cannot stand. We disagree.

The standard for review of a grant of judgment notwithstanding the verdict is well established: Where evidence, viewed in the light most favorable to non-movant, is not sufficient as a matter of law to support the verdict in favor of non-movant, judgment notwithstanding the verdict is properly granted. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973); *Harvey v. Norfolk Southern Railway*, 60 N.C. App. 554, 299 S.E. 2d 664 (1983). Additionally, plaintiff correctly points out that judgment notwithstanding the verdict may only be properly granted where movant earlier requested a directed verdict and asserted grounds at that time sufficient to support both a directed verdict and judgment notwithstanding the verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1973); *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 77 N.C. App. 475, 335 S.E. 2d 335 (1985). In the present case, defendant moved orally for directed verdict asserting as bases for the motion that the covenant not to compete or Non-Competition Agreement: (1) failed for lack of consideration; (2) was overbroad; and (3) was superseded by a later employment contract constituting a novation of the contract. While we agree with plaintiff that the grounds relating to failure of consideration and novation of contract would not support the judgment notwithstanding the verdict, the lack of a legitimate business interest and the overbreadth of the covenant's terms cause us to affirm the grant of judgment notwithstanding the verdict.

[1] Plaintiff begins its argument regarding the enforceability of the Non-Competition Agreement by positing that the initial denial of summary judgment by Judge Reid barred any subsequent ruling or determination by a superior court judge relating to the agreement's enforceability. Plaintiff cites *Calloway v. Ford Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972) in support of its contention that denial of summary judgment by one superior court judge constitutes an implicit ruling on the law and facts represented by pleadings, supporting affidavits and documents and as such cannot be overruled subsequently by another superior court judge through judgment notwithstanding the verdict. We disagree. In *Calloway, supra*, our Supreme Court ruled that there is no appeal from one superior court judge to another. We note also that this Court has consistently held that one superior court may not overrule another. *See Jenkins v. Wheeler*, 81 N.C. App. 512, 344 S.E. 2d 371 (1986); *Barbour v. Little*, 37 N.C. App. 686, 247

S.E. 2d 252, *disc. rev. denied*, 295 N.C. 733, 248 S.E. 2d 862 (1978). In *Harris v. Walden*, 314 N.C. 284, 333 S.E. 2d 254 (1985), our Supreme Court ruled that appellate review of a denial of a Motion for Summary Judgment would not be appropriate where there had been a trial on the merits. We find the *Harris* analogy to be more appropriate to the question presented here, and hold that a denial of a Motion for Summary Judgment, based upon only a forecast of evidence, should not operate to bar the granting of a directed verdict or a judgment notwithstanding the verdict based on the evidence actually presented at trial. For decisions of federal courts in agreement with our holding, *see Catts Co. v. Gulf Ins. Co.*, 723 F. 2d 1494 (10th Cir. 1983); *Gross v. Southern Railway Co.*, 446 F. 2d 1057 (5th Cir. 1971); *Robbins v. Milner Enterprising*, 278 F. 2d 492 (5th Cir. 1960). We therefore hold that Judge Herring was not barred by the earlier denial of summary judgment as establishing the law of the case.

Further, plaintiff argues that the Non-Competition Agreement was valid in that it was supported by valuable consideration. To be enforceable, a Non-Competition Agreement, as part of an ongoing employment contract, must be: (1) in writing, (2) made part of an employment contract, (3) based on valuable consideration, (4) reasonable as to time and territory and (5) not against public policy. *AEP v. McClure*, 308 N.C. 393, 302 S.E. 2d 754 (1983); *Wilmar, Inc. v. Liles and Wilmar, Inc. v. Polk*, 13 N.C. App. 71, 185 S.E. 2d 278 (1971). Defendant's assertion of only two of the foregoing elements as grounds for directed verdict necessarily confines our review to an analysis of the questions of the sufficiency of the given consideration and the overbreadth of the agreement; these two issues being dispositive, we need not reach the issue of novation.

[2] Where a Non-Competition Agreement is entered into after the establishment of the underlying employment relationship, as in the present case, such agreement must be in the nature of a new contract and supported by valuable consideration. *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E. 2d 166 (1964); *Associates, Inc. v. Taylor*, 29 N.C. App. 679, 225 S.E. 2d 602 (1976). The evidence in the case at bar tended to show that at the time defendant Ms. Daniel signed the Non-Competition Agreement, plaintiff had just promoted her to a full-time sales position and had increased her

yearly salary from $6,448 to $7,272 with an additional car allowance of $155 per month. This Court has held that a promise, grant of a promotion, or change in compensation from salary to commission constitutes valuable consideration which would support a Non-Competition Agreement. *Associates, Inc., supra; see also Machinery Co. v. Milholen,* 27 N.C. App. 678, 220 S.E. 2d 190 (1975). We hold that Ms. Daniel's promotion and corresponding salary increase provided a valuable consideration sufficient to support the Non-Competition Agreement.

[3] Plaintiff next contends that the Non-Competition Agreement is not overly broad; pointing out that because plaintiff sought to enforce only paragraph 2(b) of the agreement, the remainder of the agreement relating to other restrictions could not be before the Court and therefore could not provide a proper basis for judgment notwithstanding the verdict. Plaintiff argues in the alternative that only paragraph 2(b) should be considered in the overbreadth analysis since any other potentially overly-restrictive clauses should be severed from the agreement. *See Schultz and Assoc. v. Ingram,* 38 N.C. App. 422, 248 S.E. 2d 345 (1978). Accordingly, plaintiff contends the Court should not render the entirety of the contract a nullity on the basis of a few overly restrictive, hence invalid clauses. We believe otherwise. Even if we agree with plaintiff's argument that the only clause subject to the overbreadth analysis should be that at paragraph 2(b) regarding the two-year sales restriction, we would still find it invalid for being overly restrictive.

The overbreadth analysis necessarily embraces not only territorial, time, and business restrictions but as well their reasonableness in relation to the protection of the employer's legitimate business interest. *Robins & Weill, Inc. v. Mason,* 70 N.C. App. 537, 320 S.E. 2d 693 (1984); *Manpower, Inc. v. Hedgecock,* 42 N.C. App. 515, 257 S.E. 2d 109 (1979); *Enterprises, Inc. v. Heim,* 6 N.C. App. 548, 170 S.E. 2d 540, *modified,* 276 N.C. 475, 173 S.E. 2d 291 (1969). A restriction as to territory is reasonable only to the extent it protects the legitimate interests of the employer in maintaining his customers. *Manpower, Inc., supra.* This Court, having recently decided a case very nearly on point, set forth the definition of legitimate business interest: "[A] business interest, not fictitious, which, when weighed against the public's interest in a free economic arena, is worthy of protection in order to encourage

and stimulate business efforts and innovations." *United Laboratories, Inc. v. Kuykendall and Stone Corp.* (No. 8628SC1204, filed 20 October 1987). In *United Laboratories*, this Court held as invalid a Non-Competition Agreement because plaintiff employer lacked a legitimate business interest where plaintiff was engaged in a highly competitive sales industry and defendant salesperson could have located information regarding plaintiff's customers in a public listing. That is, the names and business habits of plaintiff's customers could not be considered confidential or a trade secret. This is true, especially where, as the court points out, defendant salesperson's knowledge about plaintiff's customers had been acquired by defendant through his own efforts. Similarly, Ms. Daniel, in the present case, utilized her own personal sales skills to create her customer accounts. Ms. Daniel was not handed a ready-made clientele list (*compare, Schultz and Assoc., supra*) nor did she learn the names of the physicians solely from plaintiff. Rather, Ms. Daniel recruited the clientele using her own sales abilities and skills. This was essentially knowledge and information acquired through Ms. Daniel's own efforts on plaintiff's behalf but not through plaintiff's efforts. Also, as defendants aptly point out, any person may gain knowledge of hospitals and physicians through a telephone directory.

While it is true that an employer in the business of sales has a strong interest in maintaining and retaining its sales personnel, *see Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 120 S.E. 2d 739 (1961), the public and the individual salespeople also have competing business interests which may outweigh those of the employer. *Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543 (1944); *Beam v. Rutledge*, 217 N.C. 670, 9 S.E. 2d 476 (1940); *United Laboratories, supra.* Where an employee possesses extraordinary sales abilities, cultivated on his own with little or no guidance from the employer, and finds that he could better use those skills under another employer, public policy should prevent his first employer from restraining his personal career success. This is true especially where the employee has not taken or utilized the employer's confidential knowledge or information. Because we can find no confidential information or trade secrets used by Ms. Daniel and because the development of Ms. Daniel's sales and marketing skills were the results of her own initiation and efforts, we hold that plaintiff has failed to prove a business interest worthy of the

protection provided by paragraph 2(b) of the Non-Competition Agreement. Accordingly, we hold that paragraph 2(b) is overly restrictive and therefore invalid for overbreadth.

Finally, plaintiff omits from its appeal any argument relating to its tortious interference with contract claim against Dr. T.C. Smith Co. Because we have held the Non-Competition Agreement unenforceable, plaintiff cannot utilize the agreement in any respect as the basis for its claim. *United Laboratories, supra.* Moreover, when an employment contract, as in this case, is terminable at will and defendant, in competition with plaintiff, recruits one of plaintiff's employees, an action for tortious interference with contract will not lie. *Peoples Security Life Ins. Co. v. Hooks*, 86 N.C. App. 354, 357 S.E. 2d 411 (1987). Accordingly, the grant of judgment notwithstanding the verdict by the trial court below is in all respects

Affirmed.

Judges EAGLES and MARTIN concur.

FEDERAL PAPER BOARD COMPANY, INC. v. ARIZONA H. HARTSFIELD, ET AL.

No. 8713SC333

(Filed 1 December 1987)

1. Reference § 11.1— preservation of right to trial by jury—trial limited to evidence taken before referee

By objecting to the order of reference at the time of its entry, filing timely exceptions to the referee's findings of fact, formulating and tendering issues based upon those exceptions, and demanding a jury trial on the issues, defendants satisfied procedural requirements necessary to preserve their right to a jury trial; however, a jury trial after a compulsory reference is limited to the evidence taken before the referee, and defendants' right to a jury trial depended upon whether that evidence raised material issues of fact and credibility requiring submission to the jury.

2. Adverse Possession § 25.1— sufficiency of evidence

The trial court erred in refusing to submit to the jury issues as to whether defendants had exercised sufficient possession of the disputed property after 1956 to prevent plaintiff from acquiring title by adverse possession under color of title or to establish defendants' own title by adverse possession

under color of title where plaintiff offered evidence that it surveyed the land, marked the corners and sidelines, cut timber, replanted the tract with seedlings, kept the lines marked, inspected the growing timber, and conducted other operations associated with its use of the property as a timber plantation, while defendants offered evidence that they knew the boundaries of the land claimed by them, could describe the boundaries, pointed them out to surveyors employed by them, cut timber on the property and stopped others from doing so, and pulled up seedlings planted by plaintiff.

APPEAL by defendants from *Brewer, Judge*. Judgment entered 18 August 1986 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 20 October 1987.

This is an action to quiet title to a 48.7 acre tract of land in Brunswick County. In its complaint, plaintiff alleged that it acquired fee simple title to the tract in May 1956, by virtue of a deed from Wallace Johnson to Riegel Paper Corporation, plaintiff's predecessor by merger. Plaintiff alleged that since acquiring the property it has held the land under color of title for more than seven years and has been in possession of the property continuously, openly, notoriously, and adversely to all other interests for more than twenty years. Plaintiff further alleged that defendants, who own an adjoining tract, claim an interest in the property adverse to plaintiff's title and that the interest claimed by defendants is invalid. Plaintiff sought a judgment declaring it to be owner of the property, free from any claim of defendants.

By their answer, defendants denied the validity of plaintiff's title and pleaded their own title by adverse possession as a bar to plaintiff's right of recovery. Upon motion of plaintiff pursuant to G.S. 1A-1, Rule 53(a)(2), and over defendants' objection, a referee was appointed. The referee conducted a hearing, received evidence, and made his report, which, after reciting the evidence offered by the parties, contains the following findings of fact:

> 1. That the Plaintiff has introduced a connected chain of title to the lands and premises described in their [sic] complaint filed in this cause and that said chain of title is connected and uninterrupted and is substantiated by the record and Exhibits entered and received in this cause and there is a record of a chain of title from the State of North Carolina to the present owners.

2. The Defendants have failed to comply with the requirements of the laws of North Carolina in establishing a record title and that they have not connected their title with the State of North Carolina or proved title out of the state or out of a common source of title.

3. That the Plaintiff has established, by credible evidence, its possession of the lands and premises involved in this cause for a period of more than seven (7) years under color of title. The testimony of the Plaintiff reflects a systematic management and use of the lands and premises described in their [sic] complaint filed in this cause and a systematic and planned exclusion from said lands and premises of other persons. The possession of the Plaintiff is testified to by the witnesses, High and Alsup [sic] and has been open and under known and visible lines and boundaries and has complied with the requirements of the definition of adverse possession as established by the decisions of the Courts of the State of North Carolina.

4. The Defendants, while offering evidence of occasional, sporadic, interrupted instances of possession and use of said lands and premises, have failed to show that said possession was continuous, that it was under known and visible lines and boundaries or that it was done in such a manner and with such frequency as to constitute adverse possession of said lands and premises.

Upon those findings, the referee concluded that plaintiff is the owner of the property in question by virtue of having record title thereto as well as having acquired title by adverse possession under color of title for more than seven years.

In apt time, defendants filed exceptions to the referee's first, third, and fourth findings of fact, formulated proposed issues to be submitted to a jury, and demanded a jury trial. Upon review of the referee's report and defendant's exceptions thereto, the trial court determined:

(i) There is no genuine issue as to a material fact concerning the record chain of title of the Plaintiff to the lands described in the complaint prior to the year 1956, the court having determined that the Plaintiff has undisputed superior record title to the property;

(ii) There is a jury question as to whether the Defendants and their successors in title obtained title to the property prior to the year 1956, either by adverse possession or by adverse possession under color of title.

(iii) Upon all of the evidence, the Plaintiff has established that it's [sic] continuous possession under known and visible boundaries has obtained title to the property subsequent to the year 1956 by means of adverse possession under color of title, and there is no genuine issue of a material fact as to whether the Defendant [sic] exercised sufficient possession of the property in question under known and visible boundaries, either to defeat the Plaintiff's adverse possession under color of title or to establish the Defendant's [sic] title to the property by adverse possession under color of title; and

(iv) There is no genuine issue as to a material fact to justify a trial by jury and that judgment should be entered in favor of the Plaintiff as prayed in the complaint.

The court entered judgment declaring plaintiff to be the owner of fee simple title to the property free from any claim thereto by defendants. Defendants appeal.

Poisson, Barnhill & Britt, by L. J. Poisson, Jr., and J. L. Seay, Jr., for plaintiff-appellee.

Frink, Foy, Gainey & Yount, P.A., by Henry G. Foy, for defendants-appellants.

MARTIN, Judge.

[1] Defendants' single assignment of error is that the trial court erred by entering judgment disposing of this case without affording them a jury trial. By objecting to the order of reference at the time of its entry, filing timely exceptions to the referee's findings of fact, formulating and tendering issues based upon those exceptions, and demanding a jury trial on the issues, defendants have satisfied procedural requirements necessary to preserve their right to a jury trial. G.S. 1A-1, Rule 53(b)(2). Even though procedurally preserved, however, defendants' right to a jury trial is not absolute. A jury trial after a compulsory reference is limited to the evidence taken before the referee, G.S. 1A-1, Rule 53(b)(2)c; defendants' right to a jury trial depends upon whether

that evidence raises material issues of fact and credibility requiring submission to the jury. *Faucette v. Zimmerman*, 79 N.C. App. 265, 338 S.E. 2d 804 (1986). We conclude that material issues of fact are raised by the evidence in the present case, entitling defendants to a jury trial.

The trial court preliminarily determined, after reviewing the evidence taken by the referee and the referee's report, that there was no material issue of fact with respect to the record title to the property and that plaintiff has superior record title. Defendants did not except to this ruling; we will not consider the argument to the contrary contained in their brief. App. R. 10. In any event, our review of the stipulations and evidence presented to the referee discloses no material factual issues with respect to record title. We agree with the trial court that plaintiff holds record title to the property superior to that of defendants. Submission of the issue of record title to a jury was not required.

[2] Although it determined that the 1956 conveyance from Wallace Johnson gave plaintiff superior record title, the trial court concluded that the evidence before the referee raised a triable issue of fact as to whether defendants had, prior to 1956, acquired title to the property by adverse possession or by adverse possession under color of title. This issue of fact was not, however, deemed by the trial court to be material to the outcome of the case. In paragraph (iii), the trial court determined that, under all the evidence, plaintiff's possession of the property under color of title after the 1956 conveyance was sufficient to oust defendants, defeat any title which they may have previously acquired to the property, and ripen into fee simple title of the plaintiff. Furthermore, the court ruled, the evidence raised no issues of fact as to whether defendants had exercised sufficient possession of the property after 1956 to prevent plaintiff from acquiring title by adverse possession under color of title, or to establish defendants' own title by adverse possession under color of title. It is in these determinations that the court erred.

Title to land may be acquired by adverse possession when there is "actual, open, notorious, exclusive, continuous and hostile occupation and possession of the land of another under claim of right or color of title for the entire period required by the statute." Webster, Real Estate Law in North Carolina, § 286

(Hetrick rev. 1981). As stated in *Locklear v. Savage*, 159 N.C. 236, 237-38, 74 S.E. 347, 348 (1912):

> It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.

At the expiration of the requisite period of possession, the possessor acquires fee simple title to the land; a new title is created and the title of the record owner is extinguished. Webster, *supra*. It is presumed that possession of land is in the person holding legal title thereto, but the presumption is rebuttable. *Memory v. Wells*, 242 N.C. 277, 87 S.E. 2d 497 (1955). The party claiming title by adverse possession has the burden of proof on the issue. *Crisp v. Benfield*, 64 N.C. App. 357, 307 S.E. 2d 179 (1983).

No one disputes that the evidence taken by the referee created an issue of fact as to whether defendants acquired title to the disputed tract by adverse possession prior to 1956. If the jury should decide that issue in favor of defendants, plaintiff's superior record title would be extinguished and plaintiff would have the burden of proving that it had thereafter acquired title by adverse possession under color of title, relying upon the 1956 deed as color of title. *See Christenbury v. King*, 85 N.C. 229 (1881). On the other hand, if the jury should decide the issue of defendants' pre-1956 adverse possession in favor of plaintiff, its record title would be good and defendants would have the burden of proving that they had subsequently, by adverse possession for the requisite period, extinguished plaintiff's title and established title in themselves. Thus, the question for determination is whether the evidence of the respective parties' possession after 1956 is so clear as to permit but one inference, or whether genuine issues of fact are created. Where the evidence of adverse possession is conflicting, the issue is for the jury. *Memory v. Wells, supra*.

In the present case, plaintiff offered evidence tending to show that after purchasing the property in 1956, its predecessor by merger, Riegel Paper Corporation, surveyed the land, marked the corners and sidelines, and cut the timber from it. In 1958, it replanted the tract with seedlings. It has kept the lines marked, has inspected the growing timber, and has conducted other operations associated with its use of the property as a timber plantation.

On the other hand, defendants offered evidence tending to show that they knew the boundaries of the land claimed by them, could describe those boundaries, and had pointed them out to the surveyors employed by them. Two of the defendants, John Oliver Randolph and Franklin Randolph, testified that after Federal had planted on the land, they continued to go upon the land and cut timber. There was testimony tending to show that defendants had stopped persons from cutting timber on the disputed property. On one occasion, defendants stopped a contractor from cutting trees which plaintiff had sold. Moreover, defendant John Oliver Randolph testified that after the tract was replanted, "I pulled some of the trees up and I called my nephew to help me pull some of them us [sic] and then I told him 'Wait a minute [sic] don't pull no more up, let it grow 'cause its *on our land* and we can cut it off.' " (Emphasis added.) Plaintiff did not object to his testimony concerning the ownership of the land, and it must, therefore, be accorded such probative weight as a jury may choose to give it. *See Freeman v. City of Charlotte*, 273 N.C. 113, 159 S.E. 2d 327 (1968); *Hefner v. Stafford*, 64 N.C. App. 707, 308 S.E. 2d 93 (1983). "This evidence was sufficient to warrant the submission of the . . . issue and to support the jury's affirmative answer thereto." *Freeman, supra* at 115, 159 S.E. 2d at 329.

The evidence taken by the referee raises factual issues regarding the respective parties' actual possession of the disputed land subsequent to 1956, which issues are material to a resolution of this case. It is for the jury to decide, under proper instructions, whether the acts shown by the evidence constitute open, notorious and adverse possession. *Memory, supra.* "Whether there has been sufficient adverse possession to ripen title is a mixed question of law and fact, and its solution must necessarily depend upon the situation of the parties, the nature of the claimant's title, the character of the land, and the purpose for which it is

adapted and for which it has been used. All these circumstances must be taken into consideration by the jury, whose peculiar province it is to pass upon the question." *Alexander v. Cedar Works*, 177 N.C. 137, 144, 98 S.E. 312, 315 (1919).

For the foregoing reasons, we reverse the judgment entered for plaintiff and remand this case to the Superior Court of Brunswick County for jury trial upon the issues of adverse possession raised by the evidence.

Reversed and remanded.

Judges EAGLES and PARKER concur.

HANOVER REALTY, INC. v. ROBERT W. FLICKINGER, AND WIFE, ELIZABETH C. FLICKINGER

No. 8713SC384

(Filed 1 December 1987)

Contracts § 6.1— contract by unlicensed contractor—construction supervised by licensed contractor—agreement unavailing

A contract for the construction of a house worth more than $100,000 was properly not enforced by the trial court, since plaintiff was not licensed as a general contractor, and plaintiff's argument that the law did not apply to it because the construction contracted for was supervised by its employee who was a licensed general contractor was unavailing. N.C.G.S. §§ 87-1, 87-10, 87-13.

APPEAL by plaintiff from *Stephens, Judge*. Order entered 23 January 1987 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 27 October 1987.

In July 1985 plaintiff, a North Carolina corporation, contracted in writing to build a house for defendants at the cost of construction not to exceed $107,000, plus 7 percent. While the house was being built defendants paid plaintiff $94,559.50 and upon it being completed in July 1986 they were billed by plaintiff for an additional $40,715.69, which they refused to pay. Plaintiff's suit to collect the claimed balance is based on the written contract and allegations that the contract plans and specifications

were modified at defendants' request to include changes that substantially increased the cost. In their answer, *inter alia*, defendants denied the validity of the extra charges, counterclaimed for allegedly deficient construction, and asserted in defense that plaintiff was not a licensed general contractor as required by Article I, Chapter 87 of the N.C. General Statutes. Following defendants' motion for summary judgment and a hearing in which it was established without contradiction that though plaintiff was not a licensed general contractor, it employed a licensed general contractor to supervise the construction involved, the motion was granted and an order was entered dismissing plaintiff's claim against defendants.

Zimmer and Zimmer, by Melinda Haynie Crouch, for plaintiff appellant.

Fairley, Jess & Isenberg, by William F. Fairley, for defendant appellees.

PHILLIPS, Judge.

In this state one who for a fee or other charge constructs, or contracts to construct, for another a building that costs more than $30,000 to build is required to be licensed as a general contractor, G.S. 87-1, G.S. 87-10, G.S. 87-13, and if not so licensed the contract will not be enforced by our courts. *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983). Since the record shows without contradiction that though not licensed as such by the state plaintiff acted as a general contractor in contracting to build defendants' house at a cost exceeding $30,000, the order refusing to enforce plaintiff's contract and dismissing its claim against defendants was properly entered. Plaintiff's argument that the law as above stated did not apply to it since the construction contracted for was supervised by its employee who was a licensed general contractor is unavailing; for under similar circumstances that same argument was rejected in *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E. 2d 664 (1985).

Affirmed.

Judges BECTON and GREENE concur.

CONNIE CASHWELL HINTON (CASHWELL) v. KEVIN CURTIS HINTON

No. 8712DC316

(Filed 1 December 1987)

Divorce and Alimony § 25.10— child custody—insufficient showing of changed circumstances

The trial court erred in modifying a child custody order by changing primary custody from defendant to plaintiff, since evidence of changes with regard to the parties' jobs, changes in living arrangements, and changes in child care arrangements did not indicate a substantial change in circumstances which would affect the welfare of the child. N.C.G.S. § 50-13.7(a).

APPEAL by defendant from *Hair, Judge.* Order entered 5 February 1987, *nunc pro tunc* 26 November 1986, in District Court, CUMBERLAND County. Heard in the Court of Appeals 20 October 1987.

The parties' child, Joseph, was born 6 November 1982. When they separated in October 1983 they were living in Cumberland County, North Carolina and the child remained there in plaintiff's custody until February 1984 when defendant took the boy to live with him in Murrells Inlet, South Carolina. This action for custody was brought in August 1984 and by order entered on 28 September 1984 defendant was given primary physical custody of the child, plaintiff was given secondary custody, and a detailed visitation schedule was established. In doing so, the court found, among other things, that both parties were fit and proper persons to have custody of the child, and that he had a close and loving relationship with each parent. The other pertinent circumstances then existing, according to the order, were that: Defendant had established his home in Murrells Inlet where he was employed as a foreman with a landscaping firm and during his working hours the child was kept in a day care center; plaintiff lived with her mother, was employed at K&W Cafeteria and might get a job with Purolator. In August 1986 plaintiff moved to modify the child custody order, alleging that there had been a substantial change in circumstances. When the hearing on the motion was eventually completed three months later, the court modified the previous order by awarding primary custody to plaintiff and secondary custody to defendant.

MacRae, Perry, Pechmann, Boose & Williford, by Michael C. Boose, for plaintiff appellee.

Hedahl & Radtke, by Debra J. Radtke, for defendant appellant.

PHILLIPS, Judge.

When the custody of a child has been judicially established custody can be changed by subsequent order only upon it appearing that there has been a substantial change in circumstances *that affects the welfare of the child. Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E. 2d 357 (1968); *Rothman v. Rothman*, 6 N.C. App. 401, 170 S.E. 2d 140 (1969); G.S. 50-13.7(a). Defendant rightly contends that no such change has been established. The modifying order notes only the following changes as having occurred since the initial order giving defendant primary custody was entered: Instead of working for the landscaping concern and leaving the child in day care during working hours, as he did earlier, defendant now works for H&C Fisheries making approximately $210 a week and keeps the child with him at the fishery during the day. Instead of living with her mother and working at K&W as before, plaintiff now lives across the street in a mobile home she bought and works for Purolator making approximately $225 a week, substantially more than she earned before; and she has plans to leave the child with her mother and other relatives while she is at work, and to marry one Mike Mansfield in the near future. Nothing in the record suggests, and the court did not find, that these changes have adversely affected, or will adversely affect, either the welfare of the child or defendant's fitness to continue having primary custody of him. Thus, the change in custody from that previously established is not authorized and the order is vacated.

Vacated.

Judges BECTON and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 NOVEMBER 1987

CITY OF MORGANTON v. BRANCH No. 8725SC159	Burke (85CVD1101)	Affirmed
FOARD v. FOARD No. 8726DC368	Mecklenburg (85CVD10532)	Affirmed in part; vacated in part and remanded
G & S BUSINESS SERVICES v. FAST FARE No. 8710DC393	Wake (86CVD6933)	Appeal Dismissed
GATENSBY v. GATENSBY No. 8710DC582	Wake (86CVD7090)	Affirmed
GENERAL MOTORS v. EDGELL No. 8712DC607	Cumberland (86CVD4940)	Affirmed
HANSLEY v. HANSLEY No. 874DC523	Onslow (85CVD607) (85CVD1096)	Affirmed
IN RE LAIL No. 8729DC602	McDowell (80J23) (80J24) (80J25)	Affirmed
JONES v. GEORGE No. 8721SC335	Forsyth (86CVS3710)	Affirmed
STATE v. BAKER No. 8717SC629	Stokes (85CRS4415) (85CRS4416) (85CRS4417) (85CRS4418) (85CRS4419) (85CRS4420) (85CRS4421) (85CRS4422) (85CRS4423) (85CRS4424) (85CRS4425) (85CRS4426) (85CRS4427)	Appeal dismissed in part; remanded in part
STATE v. CANTY No. 875SC237	New Hanover (84CRS3591) (84CRS3592) (84CRS3593) (84CRS3594)	Vacated and remanded

	(84CRS3595) (84CRS3597) (84CRS3598) (84CRS3599) (84CRS3600) (84CRS3601) (84CRS3602) (84CRS3603) (84CRS3604) (84CRS3605) (84CRS3606) (84CRS3607) (84CRS3608) (84CRS3609) (84CRS3610) (84CRS3611) (84CRS3612) (84CRS3613) (84CRS3614) (84CRS3615) (84CRS3616) (84CRS3617) (84CRS3618) (84CRS3619) (84CRS3620) (84CRS3621) (84CRS3622) (84CRS3623) (84CRS7221) (84CRS7222) (84CRS7223) (84CRS7226)	
STATE v. CHAPMAN No. 8716SC562	Robeson (86CRS20638)	Affirmed
STATE v. JOHNSON No. 8726SC627	Mecklenburg (86CRS62545)	No Error
STATE v. LEWIS No. 8719SC164	Randolph (86CRS456) (86CRS457)	No error in part; vacated and remanded in part
STATE v. SEALEY No. 8716SC197	Robeson (86CRS16712)	No Error
STATE v. SMITH No. 8716SC536	Robeson (86CRS20961)	No Error
SWINSON v. COLONIAL STORES No. 878SC378	Wayne (86CVS453)	Affirmed
VLEARBONE v. PERFORMANCE MOTORS No. 875SC326	New Hanover (85CVS052)	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 DECEMBER 1987

EARLY v. FORBES No. 871SC464	Dare (86CVS152)	Affirmed
GIBNEY v. GILBARCO, INC. No. 8710IC621	Ind. Comm. (504006)	Affirmed
HAYNES v. HAYNES No. 8714DC74	Durham (83CVD914)	Affirmed
HILL v. HILL No. 8710DC390	Wake (86CVD6889)	Affirmed
HOWELL v. HOWELL No. 877DC671	Edgecombe (82CVD966)	Affirmed
IN RE KNIGHT No. 8712DC686	Cumberland (86J118)	Affirmed
INGRAM v. KEY HOMES No. 8710SC527	Wake (87CVS2093)	Dismissed
LOCKLEAR v. ZURICH INS. & LOCKLEAR v. N.C. FARM BUREAU MUTUAL INS. No. 8716SC267	Robeson (83CVS727) (83CVS728)	Affirmed
McNEILL v. FENNELL No. 8720DC736	Moore (86CVD391)	No Error
MOORE v. HERRING No. 8719SC687	Rowan (86CVS603)	Reversed and Remanded
STATE v. BATTLE No. 877SC633	Nash (86CRS3245) (86CRS6428)	No Error
STATE v. BRIMBERRY No. 8718SC596	Guilford (86CRS78405) (86CRS78406)	No Error
STATE v. DUCKETT No. 8726SC663	Mecklenburg (86CRS24154) (86CRS24155) (86CRS24156)	No Error
STATE v. EVANS No. 8726SC507	Mecklenburg (84CRS77146)	Affirmed
STATE v. HAMMOND No. 8726SC564	Mecklenburg (86CRS88498)	No Error

STATE v. LAURIE No. 874SC665	Onslow (86CRS20749)	No Error
STATE v. LONG No. 8717SC670	Rockingham (86CRS11202)	No Error
STATE v. PILGRIM No. 8727SC776	Cleveland (86CRS14420)	Vacated and Remanded
STATE v. SCRUGGS No. 877SC768	Edgecombe (85CRS7707)	Affirmed
STATE v. TEMPLE No. 872SC697	Hyde (87CRS4) (87CRS5)	Affirmed
STATE v. WILLIAMS No. 8716SC723	Robeson (85CRS13990)	Affirmed
WALLACE v. TALTON No. 8711DC721	Johnston (86CVD1580)	Affirmed
WARD v. WARD No. 8719DC257	Randolph (85CVD182)	Affirmed in part; reversed and remanded in part; dismissed in part

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ACCOUNTS

§ 1. Open Accounts

The trial court did not err in failing to submit to the jury a question as to the liability of defendant wife on the account of her husband where the language of the credit application agreement was not ambiguous, although defendant wife contended that when she signed the credit application, she intended only to give plaintiff permission to check her credit. *W. S. Clark & Sons, Inc. v. Ruiz*, 420.

ADMINISTRATIVE LAW

§ 3. Authority of Administrative Boards and Agencies

The authority of the Private Detective Services Board under G.S. 74C-17(c) to assess a civil penalty of up to $2,000 in lieu of revocation or suspension of a license was not an unconstitutional attempt to confer a judicial power on a state agency. *N.C. Private Protective Services Bd. v. Gray, Inc.*, 143.

ADVERSE POSSESSION

§ 25.1. Sufficiency of Evidence in Particular Cases

The trial court erred in refusing to submit to the jury issues as to whether defendants had exercised sufficient possession of the disputed property after 1956 to prevent plaintiff from acquiring title by adverse possession under color of title or to establish defendants' own title by adverse possession under color of title. *Federal Paper Board Co. v. Hartsfield*, 667.

APPEAL AND ERROR

§ 4. Theory of Trial in Lower Court

Plaintiffs gave proper notice of their appeal when they gave oral notice of appeal "in open court" on the same day their action was dismissed for failure to state a claim. *McLaurin v. Winston-Salem Southbound Railway Co.*, 413.

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

Plaintiff's appeal from an order setting aside the clerk's judgment against defendants was premature. *First American Savings & Loan Assoc. v. Satterfield*, 160.

Although a summary judgment for a third party defendant was not final as to all parties and claims, it was appealable because it affected a substantial right. *New Bern Assoc. v. The Celotex Corp.*, 65.

§ 6.3. Appeals Based on Jurisdiction

Defendant's appeal from an order denying its motion to dismiss for lack of personal jurisdiction is interlocutory and is dismissed where defendant's motion was based on its claim that the Virginia judgment against it, which plaintiff sought to enforce by this action, was void in North Carolina because the Virginia court lacked personal jurisdiction over defendant. *Automotive Restyling Concepts, Inc. v. Central Service Lincoln Mercury, Inc.*, 173.

§ 9. Moot Questions

Questions as to whether reports from various chancellors of universities within the U.N.C. system with regard to intercollegiate athletics at their schools were public records were rendered moot by the public disclosure of such reports. *N.C. Press Assoc., Inc. v. Spangler*, 169.

APPEAL AND ERROR — Continued

§ 16.1. Limitations on Powers of Trial Court after Appeal

The district court had no jurisdiction to enter an order modifying child custody while an appeal from a child visitation order was pending. *Hackworth v. Hackworth*, 284.

§ 24. Necessity for Objections

Where plaintiff entered a timely objection to a question eliciting an opinion as to speed, a further motion to strike the answer of the witness was not required in order to assign error to the admission of the opinion testimony. *Coley v. Garris*, 493.

§ 24.1. Form of Assignments of Error

Cross-assignments of error were ineffectual where they did not present an alternative basis to support the trial court's judgment. *Fortune v. First Union Nat. Bank*, 1.

ASSAULT AND BATTERY

§ 3.1. Actions for Civil Assault; Trial

The trial court in a civil assault case did not err in combining issues of whether defendant acted in self-defense and whether plaintiff engaged in an affray with defendant into the single issue of whether defendant assaulted plaintiff. *McNeill v. Durham County ABC Bd.*, 50.

The trial court properly instructed the jury to consider the characteristics of a flashlight and the way it was used in deciding whether it was a deadly weapon, although an instruction that the flashlight was a deadly weapon as a matter of law would have been proper in this case. *Ibid.*

The trial court in a civil assault case properly admitted evidence that criminal charges against plaintiff for assaulting defendant were dismissed. *Ibid.*

§ 13. Competency of Evidence

The trial court in an assault prosecution erred in admitting testimony that a witness was "still afraid" of defendant on the day she testified. *S. v. Bell*, 626.

§ 14.3. Sufficiency of Evidence of Assault with Deadly Weapon with Intent to Kill

The evidence was sufficient for the jury to infer that the victim was struck with a deadly weapon so as to support defendants' conviction of assault with a deadly weapon with intent to kill. *S. v. Phillips*, 246.

§ 14.4. Sufficiency of Evidence of Assault with Deadly Weapon with Intent to Kill where Weapon Is Firearm

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Bell*, 626.

§ 15.3. Instructions on Assault with Deadly Weapon with Intent to Kill; Definitions

The trial court in an assault prosecution did not err in instructing the jury that a gun was a deadly weapon whether the gun was used to strike or to shoot the victim. *S. v. Bell*, 626.

ASSAULT AND BATTERY — Continued

§ 16. Necessity of Submitting Lesser Offenses

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred in failing to include an instruction on either simple assault or assault inflicting serious injury. *S. v. Bell*, 626.

ATTORNEYS AT LAW

§ 7.1. Validity and Construction of Fee Agreements

Summary judgment was improper in an action by an attorney to recover against his client under a contingent fee agreement and to enforce an attorney's charging lien upon funds paid to the clerk by the client's debtor where a genuine issue of fact existed as to whether the attorney was discharged by the client after judgment against the debtor was obtained but before any part thereof was actually collected or whether he had never been discharged. *Clerk of Superior Court of Guilford County v. Guilford Builders Supply Co.*, 386.

§ 7.4. Fees Based on Provisions of Notes or Other Instruments

Where a credit application signed by defendants provided that they would pay reasonable attorney fees incurred as a result of default not to exceed 15% of the balance due but did not specify an exact amount, G.S. 6-21.2 governed, and the trial court properly allowed plaintiff to recover fees amounting to 15% of the outstanding balance owed on the account. *W. S. Clark & Sons, Inc. v. Ruiz*, 420.

§ 7.5. Allowance of Fees as Part of Costs

The trial court erroneously awarded attorney fees as costs of resale against a defaulting bidder at an estate sale because "costs of resale" under G.S. 1-339.30(e) does not expressly include attorney fees. *Parker v. Lippard*, 43.

§ 11. Disbarment Procedure

The State Bar Disciplinary Hearing Committee did not err in receiving into evidence a letter from defendant attorney's client to defendant. *N.C. State Bar v. Speckman*, 116.

Defendant attorney violated the Code of Professional Responsibility by misappropriating his client's funds when the client sent defendant a check for another attorney's fee but defendant cashed the check and failed to forward any part of it to the other attorney. *Ibid.*

Defendant attorney violated the Code of Professional Responsibility by commingling personal funds with clients' funds in his trust account even if defendant placed personal funds in his trust account for the sole purpose of making it possible to clear personal injury settlement drafts and checks so that his clients could be paid on the day of settlement rather than having to wait several days for bank clearance of the funds. *Ibid.*

Defendant attorney's refusal to produce documents in response to a Grievance Committee subpoena violated G.S. 84-28(b)(3) since a subpoena was a "formal inquiry" or "complaint" within the meaning of the statute which defendant was required to answer. *Ibid.*

AUTOMOBILES AND OTHER VEHICLES

§ 5.1. Requirements for Transfer of Title

The trial court did not err by granting summary judgment against defendant on a contract claim in an action to recover damages incurred by plaintiff when it

AUTOMOBILES AND OTHER VEHICLES — Continued

had to reimburse customers for stolen automobiles purchased from defendant Columbus County Auto Auction. *Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Automobile, Inc.*, 467.

§ 44.1. Actions for Negligent Operation of Vehicles; Res Ipsa Loquitur

The trial court erred in instructing the jury on the doctrine of res ipsa loquitur in an action to recover for injuries received by plaintiff when he was struck by a car being driven by defendant auction company's employee when the brakes failed where all the relevant facts were testified to by the witnesses at the trial. *Massengill v. Starling*, 233.

§ 46. Opinion Testimony as to Speed

The trial court erred in permitting an officer to state his opinion of the speed of plaintiff's motorcycle based on physical evidence at the accident scene and statements of persons who had witnessed the accident. *Coley v. Garris*, 493.

§ 50.3. Sufficiency of Evidence of Breach of Duty with Respect to Condition of Vehicle

In an action to recover for injuries received by plaintiff when he was struck by a car being driven by defendant auction company's employee when the brakes failed, plaintiff's evidence was sufficient for the jury to find that defendant was negligent in failing to inspect the car or test its brakes before driving it into the auction garage. *Massengill v. Starling*, 233.

§ 90.11. Failure to Instruct on Sudden Emergency

The trial court properly refused to instruct the jury on the doctrine of sudden emergency in an action to recover for injuries received by plaintiff when he was struck by a car being driven by defendant auction company's employee when the brakes failed. *Massengill v. Starling*, 233.

§ 112.1. Homicide; Evidence of Defendant's Intoxication

There was sufficient evidence of defendant's intoxication for an involuntary manslaughter charge arising from a pedestrian being hit by defendant's van to go to the jury. *S. v. Brown*, 13.

§ 126.3. Breathalyzer Test; Qualification of Expert

The trial court committed reversible error in admitting the results of a breathalyzer test where the evidence showed only that the breathalyzer operator had a "certificate" to operate a Smith & Wesson Model 900 Breathalyzer but there was no evidence that he possessed a permit issued by the Department of Human Resources. *S. v. Franks*, 265.

BROKERS AND FACTORS

§ 8. Licensing and Regulation

The evidence and findings supported determinations by the Real Estate Commission that petitioner engaged in dishonest dealing by using altered tape recordings at the hearing, falsely promising buyers that their contract was terminated and that their earnest money would be returned, arranging for a city inspection and using it to attempt to coerce the buyers into closing a transaction, and making a wilful misrepresentation to buyers that nothing was wrong with the house in question. *Watson v. N.C. Real Estate Comm.*, 637.

CONTRACTS — Continued

§ 12.1. Construction of Clear and Unambiguous Agreements

The trial court did not err in failing to submit to the jury a question as to the liability of defendant wife on the account of her husband where the language of the credit application agreement was not ambiguous, although defendant wife contended that when she signed the credit application, she intended only to give plaintiff permission to check her credit. *W. S. Clark & Sons, Inc. v. Ruiz*, 420.

§ 12.4. Integration of Separate Writings

A Resale Profits Agreement was enforceable where it was signed contemporaneously with an Offer to Purchase real estate and became incorporated into that document to comprise the overall contract. *Zinn v. Walker*, 325.

§ 18.1. Enforceability of Modification

A contract arising from the purchase of real estate was not substituted, but was modified. *Zinn v. Walker*, 325.

§ 19. Novation and Substitution

North Carolina has used the terms substitution and novation interchangeably and they are one and the same under North Carolina law. *Zinn v. Walker*, 325.

The burden of proof for substitution is by clear and convincing evidence. *Ibid.*

§ 26. Competency and Relevancy of Evidence Generally

In an action to recover damages for breach of a lease agreement which gave defendants the right to relocate plaintiff's store within Phase I of a mall project, a letter from the mall developer's architect, a building permit for Phase I, and architectural drawings submitted with the application for a building permit were relevant to show that Phase I consisted only of the first floors of two buildings. *Mosley & Mosley Builders v. Landin Ltd.*, 438.

§ 27.1. Sufficiency of Evidence of Existence of Contract

Appellee presented sufficient evidence of a valid and enforceable contract between the parties for the development of land to entitle it to summary judgment, and appellant could not successfully advance as a defense that the contract failed because an exhibit setting forth the method of determining costs which had been attached to the contract had since been lost. *Brawley v. Brawley*, 545.

§ 28. Instructions Generally

The trial court erred in refusing to give defendants' requested instruction declaring and explaining the law with respect to the jury's determination of the meaning intended by the parties of the term "Phase I" as used in the relocation provision of a lease. *Mosley & Mosley Builders v. Landin Ltd.*, 438.

§ 34. Actions for Interference; Sufficiency of Evidence

Defendant was not guilty of tortious interference with contract when it hired an employee of plaintiff whose employment contract was terminable at will. *United Laboratories v. Kuykendall*, 296.

COUNTIES

§ 2.1. Regulation of Garbage Collection

A county landfill fee ordinance was not discriminatory and in excess of the county's authority under G.S. 153A-277(a) and did not violate equal protection because it allowed private citizens to use a county landfill without charge but im-

CRIMINAL LAW — Continued

§ 66.4. Lineup Identification

A robbery victim's lineup identification of one defendant was not inherently incredible and the lineup procedure was not impermissibly suggestive. *S. v. Phillips*, 246.

§ 73.2. Statements not within Hearsay Rule

Defendant was not prejudiced by the court's admission of hearsay statements under Rule 804(b)(5) without explicitly stating its conclusion that the statements were not admissible under any other exception to the hearsay rule where such a conclusion was implicit in the court's order admitting the statements. *S. v. Moore*, 156.

The trial court made sufficient findings to support its conclusion that hearsay statements possessed the requisite "circumstantial guarantees of trustworthiness" and made a sufficient determination that admission of the statements will best serve the general purposes of the Rules of Evidence. *Ibid.*

§ 73.4. Spontaneous Utterances

The trial court did not err in an arson prosecution by admitting a statement made at the scene to a highway patrolman where the statement fell within the excited utterance exception to the hearsay rule. *S. v. Kerley*, 240.

§ 85.1. Character Evidence; What Questions and Evidence Are Admissible

The prosecutor in an incest case could properly cross-examine defendant's character witnesses as to whether they had heard rumors that defendant had had an affair with an eighteen-year-old girl and that defendant's wife had stated that she had "expected something was going on" between defendant and their daughter. *S. v. Wall*, 621.

§ 86.2. Impeachment of Defendant; Prior Convictions

In a prosecution for involuntary manslaughter in which defendant allegedly struck a pedestrian with his van while intoxicated, the trial court did not err by allowing the State to ask defendant whether he had been convicted in 1977 of driving under the influence where defendant had pled guilty in 1977 without an attorney. *S. v. Brown*, 13.

§ 90.1. Rule that Party Is Bound by Own Witness; Showing Facts to Be other than as Testified by Witness

Subsequent to the adoption of N.C. Rule of Evidence 607, the better practice continues to be for the trial court, before allowing impeachment of the State's own witness by a prior inconsistent statement, to make findings and conclusions with respect to whether the witness's testimony is other than what the State had reason to expect or whether a need to impeach otherwise exists. *S. v. Bell*, 626.

§ 91. Speedy Trial

No time was excluded from the 120-day speedy trial period by open-ended continuance orders. *S. v. Smith*, 474.

The trial court did not abuse its discretion in deciding that medical assistance provider fraud charges should be dismissed with prejudice for failure of the State to comply with the Speedy Trial Act. *Ibid.*

The trial court erred in failing to make detailed findings concerning the factors set forth in G.S. 15A-703(a) in deciding to dismiss charges with prejudice for failure of the State to comply with the Speedy Trial Act, but such error was not prejudicial where the record shows that the trial court did consider such factors. *Ibid.*

CRIMINAL LAW – Continued

§ 92.4. Consolidation of Multiple Charges against Same Defendant Proper

The trial court did not err in a prosecution for possession of stolen property by granting the State's motion for joinder of the charges for trial where there was a clear transactional connection between the offenses as well as a discernible common scheme or plan. *S. v. White*, 311.

§ 98. Presence and Conduct of Witnesses

The brief appearance of a defense witness in jail clothing was not such a serious impropriety as to prevent defendant from receiving a fair trial. *S. v. Knight*, 125.

§ 99.2. Court's Expression of Opinion; Questions During Trial Generally

The defendant in a prosecution for first degree arson did not show that he was prejudiced by questions asked by the trial judge. *S. v. Waters*, 502.

§ 101.4. Conduct or Misconduct Affecting or during Jury Deliberation

Defendants were not entitled to a new trial because the victim's wife was in the jury room before the opening of court one day, the sheriff took coffee cups to the jury in the jury room, the sheriff talked to one juror in the hall outside the courtroom, and three jurors were outside the jury room during some of the deliberations. *S. v. Phillips*, 246.

§ 102.6. Particular Conduct and Comments in Jury Argument

The trial court did not err in finding that defendants were not prejudiced by unsupported statements in the prosecutor's jury argument. *S. v. Phillips*, 246.

§ 106.4. Sufficiency of Evidence; Confession of Defendant

There was substantial evidence tending to establish the trustworthiness of defendant's admission that he was intoxicated and had consumed too much beer in a prosecution arising from the death of a pedestrian. *S. v. Brown*, 13.

§ 106.5. Sufficiency of Evidence; Testimony of Accomplice

An accomplice's testimony was sufficient to establish the identity of defendant as a perpetrator of a second degree burglary. *S. v. Poucher*, 279.

§ 113.7. Charge as to Acting in Concert

The trial court in an assault and armed robbery case did not err in instructing the jury on acting in concert. *S. v. Phillips*, 246.

§ 117.1. Charge on Credibility

The trial court did not commit plain error in failing to give a more detailed instruction explaining how impeachment works to insure that the jury did not consider any hearsay evidence as substantive evidence of defendant's guilt. *S. v. Bell*, 626.

§ 128.2. Particular Grounds for Mistrial

The trial court erred in entering a mistrial in a sexual offense case when the prosecuting witness refused to testify, and defendant's plea of former jeopardy at his second trial should have been granted. *S. v. Chriscoe*, 404.

§ 138. Severity of Sentence

There was no error in a conviction for trafficking in marijuana where the trial court entered a judgment which stated that the court made no written findings of fact because the prison term was imposed pursuant to a plea agreement. *S. v. Leonard*, 448.

CRIMINAL LAW — Continued

§ 138.8. Severity of Sentence; Opportunity for Defendant to Introduce Evidence

Trial courts should exercise extreme caution in conducting in camera "victim input sessions" in sentencing. *S. v. Midyette*, 199.

§ 138.22. Sentence; Aggravating Factor of Use of Weapon Normally Hazardous to Lives of More than One Person

The trial judge erred by finding as an aggravating factor for first degree arson that defendant knowingly created a risk of death to more than one person. *S. v. Waters*, 502.

§ 138.23. Sentence; Aggravating Factor of Use of Deadly Weapon

The trial court properly found as an aggravating factor for second degree rape that defendant employed a deadly weapon based upon a description of the instrument as a "steak knife" and the manner in which the knife was used. *S. v. Cooke*, 613.

§ 138.24. Sentence; Aggravating Factor of Age of Victim

The trial court in an incest prosecution did not err in finding as a factor in aggravation that the victim was and is of tender years where defendant began his abuse when his daughter was 13 years old. *S. v. Wall*, 621.

§ 138.27. Sentence; Aggravating Factor of Position of Trust or Confidence

The trial court erred when sentencing defendant for second degree rape by finding that he had taken advantage of a position of trust or confidence where the evidence merely showed that the victim was acquainted with defendant. *S. v. Midyette*, 199.

§ 138.28. Sentence; Aggravating Factor of Prior Convictions

A sentence of 29 years, 11 months for armed robbery was remanded for resentencing where the court based its finding of prior convictions solely on the prosecutor's remarks. *S. v. Mack*, 24.

§ 138.29. Sentence; Other Aggravating Factors

The trial court did not err in sentencing defendant for armed robbery where the court commented on defendant's pending charges but the record did not affirmatively disclose that the enhanced sentence was based on pending charges. *S. v. Mack*, 24.

The trial court erred in finding as an aggravating factor that "the jury by its verdict found that the defendant committed perjury." *S. v. Warrick*, 505.

The trial judge erred by finding as an aggravating factor for first degree arson that defendant involved a person under the age of sixteen in the commission of the crime where a two-year-old was inside the house when defendant set it ablaze. *S. v. Waters*, 502.

§ 150. Right of Defendant to Appeal

Defendant could not assert on appeal error relating to his sentence for second degree murder where his sentence was less than the presumptive term for such crime. *S. v. Knight*, 125.

§ 158.1. Appeal and Error; No Consideration of Matters Outside Record

The appellate court could not determine whether an incest victim's diary was admissible where the record failed to show the contents of the diary. *S. v. Wall*, 621.

CRIMINAL LAW — Continued

§ 163. Exceptions and Assignments of Error to Charge

Defendants did not properly raise on appeal the issue of an omission from the instructions where they made no objection at trial and do not assert that such omission constituted plain error. *S. v. Morris*, 499.

DAMAGES

§ 3.4. Mental Anguish

Abdominal pain and surgery undergone by the mother of a stillborn child constituted the physical injury required to support a claim for mental anguish from defendant obstetrician's negligence in the death of the stillborn child. *Ledford v. Martin*, 88.

§ 3.5. Loss of Earnings or Profits

If defendants breached a lease by evicting plaintiff's store from a shopping mall, plaintiff is entitled to recover its lost profits for the entire unexpired term of the lease irrespective of whether plaintiff continued to operate its store at another location. *Mosley & Mosley Builders v. Landin Ltd.*, 438.

§ 11.2. Punitive Damages; Circumstances where Inappropriate

Punitive damages were not recoverable against defendant ABC Board for an assault by an ABC officer. *McNeill v. Durham County ABC Bd.*, 50.

§ 13.2. Relevancy of Evidence of Lost Earnings or Profits

In an action to recover for breach of a lease when defendants evicted plaintiff's Nuts N' Such business from a shopping mall and rented plaintiff's former space to a Peanut Shack franchise, the trial court did not err in permitting sales by the Peanut Shack franchise to be used as a basis for determining plaintiff's lost profits. *Mosley & Mosley Builders v. Landin Ltd.*, 438.

DEATH

§ 3. Nature and Grounds of Action for Wrongful Death

An action could properly be maintained for the wrongful death of a stillborn child. *Ledford v. Martin*, 88.

§ 3.2. Who May Maintain Wrongful Death Action

A claim for the wrongful death of a fetus should not be dismissed because it was not brought by the personal representative of the deceased where the failure to bring the action in the name of the estate administrator was due to the unwillingness of the clerk of court to issue letters of administration for the estate of a fetus. *Ledford v. Martin*, 88.

DIVORCE AND ALIMONY

§ 23. Jurisdiction of Child Custody Actions

The district court had no jurisdiction to enter an order modifying child custody while an appeal from a child visitation order was pending. *Hackworth v. Hackworth*, 284.

§ 24.1. Determining Amount of Child Support

The trial court in a child support action erred in refusing to admit the individual income tax returns filed by plaintiff on behalf of the three minor children of the parties. *Sloan v. Sloan*, 392.

DIVORCE AND ALIMONY — Continued

The trial court in a child support action erred in failing to make findings of fact as to the value of the estate of each of the parties. *Ibid.*

The trial court erred in finding that $15,000 was a gift from defendant's parents and should be considered income where defendant gave his parents a non-interest bearing demand note. *Ibid.*

The trial court did not err in determining that defendant's food costs were $100 per month less than he claimed but did err in disallowing defendant's $156 per month car payment as an expense because the car would be paid off within the year while allowing plaintiff a $250 per month allowance for "auto payment/replacement" for a car on which no money was owed. *Ibid.*

The trial court in a child support action did not err in calculating the value of defendant's monetary contributions to the support of the children and properly made adjustments based on income tax consequences. *Ibid.*

§ 24.8. Modification of Child Support Order; Where Changed Circumstances Are Not Shown

Findings that a child was older and that inflation had occurred were inadequate to support an order for increased child support payments. *Holder v. Holder*, 578.

§ 24.9. Child Support; Findings

The trial court did not err in determining that defendant should pay retroactive child support but erred in failing to make a finding that defendant had the present means with which to pay the lump sum retroactive award. *Sloan v. Sloan*, 392.

§ 24.11. Review of Child Support Orders

Though a child support order was not expressly designated *pendente lite* by the court, it was a temporary order which could not be immediately appealed. *Berry v. Berry*, 624.

§ 25.10. Modification of Child Custody; Where Changed Circumstances Are Not Shown

Evidence of changes with regard to the parties' jobs, living arrangements and child care arrangements did not indicate a substantial change in circumstances which would affect the welfare of the child so as to support modification of child custody from defendant to plaintiff. *Hinton v. Hinton*, 676.

§ 27. Attorney's Fees Generally

Though plaintiff was entitled to attorney fees for the legal costs of pursuing her alimony claim, she was not entitled to attorney fees for her child support action because there was no finding that defendant refused to provide adequate child support. *Holder v. Holder*, 578.

§ 30. Equitable Distribution

The trial court did not err by determining that quitclaim deeds executed by plaintiff wife in favor of defendant husband one year before their separation were not gift deeds. *Beroth v. Beroth*, 93.

There was no error in an equitable distribution action from the trial court's receiving evidence and making findings as to plaintiff wife's lack of knowledge about what she was signing when quitclaims were executed. *Ibid.*

DIVORCE AND ALIMONY — Continued

The trial court did not err in an equitable distribution proceeding by not crediting the husband with reducing the marital debt during the years of separation. *Ibid.*

The trial court in an equitable distribution action erred in ruling that no oral evidence would be taken and that only affidavits would be considered. *Murrow v. Murrow*, 174.

The trial court did not err in an equitable distribution action by admitting testimony concerning whether certain property acquired during the marriage was separate property or marital property. *Cornelius v. Cornelius*, 269.

The trial court erred in an equitable distribution proceeding by failing to consider and distribute savings accounts and stocks owned by the parties. *Ibid.*

The trial court did not impermissibly consider fault in an equitable distribution proceeding. *Holder v. Holder*, 578.

The trial court in an equitable distribution proceeding erred in relying on the parties' oral agreement or existing division of personal property, and any marital personal property should have been included in the equitable distribution. *Ibid.*

EMBEZZLEMENT

§ 6. Sufficiency of Evidence

Evidence of fraudulent intent was insufficient to support defendant's conviction of embezzlement by using AFL-CIO Credit Union funds to buy used cars from the State and selling the cars to Credit Union members. *S. v. Britt*, 152.

EMINENT DOMAIN

§ 6.4. *Other* Evidence of Value

Evidence of real property valuations made by a county for ad valorem tax purposes was admissible against the county in an eminent domain proceeding as an admission of a party opponent. *Craven County v. Hall*, 256.

§ 6.6. Evidence of Value; Qualification of Witness

The trial court in a condemnation proceeding erred in refusing to permit defendant landowners' son to testify as to his opinion of the fair market value of defendants' entire property before the condemnation and of the remainder after the condemnation. *Craven County v. Hall*, 256.

EVIDENCE

§ 18. Experimental Evidence

The trial court did not err in an action arising from a railroad crossing accident by admitting testimony from an expert in the field of acoustics who had conducted tests or experiments at the crossing. *Robinson v. Seaboard System Railroad*, 512.

§ 24. Depositions

The deposition of a former trust officer of defendant bank was hearsay, and the trial court erred in permitting plaintiff to read a portion of the deposition into evidence, but such error was not prejudicial in this case. *Fortune v. First Union Nat. Bank*, 1.

EVIDENCE — Continued

§ 26. Physical Objects

The trial court did not err in a railroad crossing accident case by permitting the investigating police officer to testify as to the position in which he found the volume control knob of plaintiff's car radio two days after the accident. *Robinson v. Seaboard System Railroad*, 512.

§ 32. Parol Evidence

There was no prejudice in an action for rents allegedly due under a lease from the admission of defendant's testimony on his subjective understanding of a rent escalation provision. *Joyner v. Adams*, 570.

§ 32.2. Application of Parol Evidence Rule

An Offer to Purchase real estate, a Resale Profits Agreement, and a Design Agreement were to be construed together, a merger clause in the Offer to Purchase notwithstanding. *Zinn v. Walker*, 325.

§ 32.7. Parol Evidence; Ambiguities

Where a written lease gave defendants the right to relocate plaintiff's store within Phase I of a mall project but contained conflicting descriptions of the property included within Phase I, extrinsic evidence was admissible to establish the intent of the parties as to the meaning of "Phase I" as used in the lease. *Mosley & Mosley Builders v. Landin Ltd.*, 438.

The defendant in an action for breach of a lease agreement could not rely on parol evidence to show that there was a genuine issue of fact with regard to the identity of the lessee where the contract was not ambiguous on its face, and defendant could not escape liability on his unqualified signature by the mere assertion that he signed as a representative of a corporation. *S & F Trading Co. v. Carson*, 602.

§ 48. Competency of Experts

The trial court did not err in a case arising from an accident at a railroad crossing by admitting the testimony of an expert witness in the field of system safety. *Robinson v. Seaboard System Railroad*, 512.

The trial court did not err in an action arising from a railroad crossing accident by admitting the testimony of a psychologist as an expert witness in the field of human behavior. *Ibid.*

§ 49. Examination of Experts through Hypothetical Questions

The trial court did not err in an action arising from a railroad crossing accident by admitting the testimony of a Department of Transportation engineer regarding signalization of the crossing. *Robinson v. Seaboard System Railroad*, 512.

§ 50.1. Testimony by Medical Experts as to Nature and Extent of Injury

A neurologist who treated plaintiff was qualified to state his opinion as to the angle and force of a blow to plaintiff's head. *McNeill v. Durham County ABC Bd.*, 50.

EXECUTION

§ 16. Supplementary Proceedings

The trial court properly denied plaintiff's petition for the appointment of a receiver to receive defendant judgment debtor's wages, disburse an amount to

INSURANCE — Continued

§ 85. Automobile Liability Insurance; Use of Other Automobiles and Nonowned Automobiles Clauses

In an action between two insurance companies to determine the order of payment for a settlement arising from a collision involving a County owned fire truck driven by a City employee, the City employee was an additional insured. *Reliance Ins. Co. v. Lexington Ins. Co.*, 428.

§ 142.1. Burglary and Theft Insurance; Mysterious Disappearance

Plaintiff could not recover on an "all risk" insurance policy excluding liability for loss due to "shortage of property disclosed on taking inventory" where plaintiff's evidence revealed that its losses were discovered when the general manager took a regular monthly inventory of available stock. *Blue Stripe, Inc. v. U.S. Fidelity & Guaranty Co.*, 167.

§ 143. Construction of Property Damage Policies

A "collapse" provision of a homeowner's policy did not apply to loss caused when a kitchen cabinet became partly unhinged from a wall and glassware fell from the cabinet and broke. *Baker v. Whitley*, 619.

JUDGMENTS

§ 2.1. Consent to Judgment Rendered out of Term and out of County

A portion of the trial court's amended order awarding costs and attorney fees is void because it was signed out of session, out of the district, and without agreement of the parties. *In re Magee*, 650.

§ 55. Right to Interest

The executor of an estate was entitled to prejudgment interest from a defaulting bidder. *Parker v. Lippard*, 43.

Where defendant defaulted on his bid at a judicial sale, a prior Court of Appeals opinion awarding prejudgment interest to plaintiff executor only on the resale expenses and deficiency after resale unintentionally diminished the executor's right to prejudgment interest on defendant's full $125,000 bid. *Parker v. Lippard*, 487.

LANDLORD AND TENANT

§ 6. Construction of Leases Generally

The defendant in an action for breach of a lease agreement could not rely on parol evidence to show that there was a genuine issue of fact with regard to the identity of the lessee where the contract was not ambiguous on its face, and defendant could not escape liability on his unqualified signature by the mere assertion that he signed as a representative of a corporation. *S & F Trading Co. v. Carson*, 602.

§ 6.1. Premises Demised

In an action to recover damages for breach of a lease agreement which gave defendants the right to relocate plaintiff's store within Phase I of a mall project, a letter from the mall developer's architect, a building permit for Phase I, and architectural drawings submitted with the application for a building permit were relevant to show that Phase I consisted only of the first floors of two buildings. *Mosley & Mosley Builders v. Landin Ltd.*, 438.

LANDLORD AND TENANT — Continued

§ 13. Termination Generally

Plaintiff's evidence was sufficient for the jury in an action for breach of a lease when defendants evicted plaintiff's store from a shopping mall because plaintiff refused to move the store to a basement location. *Mosley & Mosley Builders v. Landin Ltd.*, 438.

§ 13.1. Option to Terminate

Plaintiff landlord's acceptance of rent with knowledge of defendant tenant's breach of the lease constituted a waiver of plaintiff's right to assert the breach as grounds for forfeiture of the lease. *Community Housing Alternatives, Inc. v. Latta*, 616.

LIMITATION OF ACTIONS

§ 2. Applicability to Sovereign

When the State or its political agencies are pursuing a sovereign or governmental purpose rather than a proprietary purpose, statutes of limitation or of repose do not apply unless the statute expressly includes the State. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 106.

A board of education's action to recover the expenses of removing asbestos manufactured by defendant from its schools involved a governmental function and was not barred by the statute of limitations. *Ibid.*

§ 4. Accrual of Right of Action and Time from which Statute Begins to Run in General

Defendant's claim for contribution and indemnification based on a third party defendant's negligence was governed by G.S. 1-50(5) where the original plaintiff's action arose from a defective improvement to real estate and was governed by G.S. 1-50(5). *New Bern Assoc. v. The Celotex Corp.*, 65.

Summary judgment was inappropriately granted for third party defendant in an action arising from a leaking roof where there was a genuine issue of fact as to whether the third party defendant's last act or omission occurred within six years of the date the third party complaint was filed. *Ibid.*

§ 4.2. Accrual of Cause of Action in Negligence Actions

It was not necessary to determine whether a third party plaintiff in an action arising from a leaking roof alleged willful and wanton negligence where the 1963 version of the statute of repose applied. *New Bern Assoc. v. The Celotex Corp.*, 65.

Plaintiff's claim against defendant builder for injuries sustained when the folding stairs to her attic collapsed while she was climbing them was barred by the six-year statute of limitations of G.S. 1-50(5), and G.S. 1-50(5)e was inapplicable to extend the limitation period where the complaint was insufficient to allege wanton negligence or intentional wrongdoing. *Duncan v. Ammons Construction Co.*, 597.

§ 11. Effect of Personal Incapacity

An action against a trustee for breach of fiduciary duty is a claim of the beneficiary, and the statute of limitations is tolled during the beneficiary's minority. *Fortune v. First Union Nat. Bank*, 1.

MALICIOUS PROSECUTION

§ 11.1. Proof of Existence of Probable Cause; Facts Occurring after Institution of Prosecution

In an action for malicious prosecution and intentional infliction of emotional distress arising from a nonsupport warrant, the trial court did not err by allowing a biomedical laboratory employee to testify concerning plaintiff's alleged attempts to bribe the witness. *Lay v. Mangum*, 251.

§ 14. Instructions

The trial court did not err in an action for malicious prosecution arising from a nonsupport warrant by denying plaintiff's request for an instruction on the presumption of legitimacy of a child born in wedlock. *Lay v. Mangum*, 251.

MASTER AND SERVANT

§ 11. Trade Secrets; Solicitation of Former Employer's Customers

Plaintiff failed to prove a business interest protected by its noncompetition agreement where there were no trade secrets or confidential information used by defendant employee and where the development of defendant's sales and marketing skills were the result of her own initiative and efforts, and the agreement was thus invalid for overbreadth. *Whittaker General Medical Corp. v. Daniel*, 659.

§ 11.1. Covenants not to Compete

A promotion plus a change in compensation from salary to commission constituted valuable consideration which supported a noncompetition agreement. *Whittaker General Medical Corp. v. Daniel*, 659.

A covenant not to compete in a sales representative agreement between plaintiff manufacturer of chemical cleaning products and defendant was not enforceable under Illinois or North Carolina law because it does not protect a legitimate business interest of plaintiff employer. *United Laboratories v. Kuykendall*, 296.

§ 49.1. Workers' Compensation; "Employees" within Meaning of Act; Status of Particular Persons

Plaintiff was an employee of defendant rather than an independent contractor when he was injured while teaching defendant's employees how to straighten damaged truck frames with Kansas Jack equipment. *Youngblood v. North State Ford Truck Sales*, 35.

§ 68.1. Workers' Compensation; Silicosis

The Industrial Commission erred in failing to make specific findings as to whether any portion of plaintiff's total incapacity to work was caused by conditions unrelated to employment where the evidence was conflicting as to whether plaintiff was totally disabled from silicosis or whether plaintiff also had a chronic obstructive lung disease due to smoking and asthma which contributed to his total disability. *Pitman v. Feldspar Corp.*, 208.

§ 69. Workers' Compensation; Amount of Recovery Generally

The Industrial Commission erred in a workers' compensation proceeding in which a permanent disability had been found by failing to consider and make findings as to wage earning capacity. *Strickland v. Burlington Industries*, 507.

§ 69.1. Workers' Compensation; Meaning of Disability

Although the Industrial Commission failed to make a specific finding that plaintiff is unable to earn wages at other employment, the Commission's findings when

considered together constituted minimally sufficient findings as to defendant's inability to earn wages at any job so as to support its conclusion that plaintiff is totally disabled. *Pitman v. Feldspar Corp.*, 208.

§ 77.1. Workers' Compensation; Modification of Award; Change of Conditions or Circumstances

Plaintiff established a sufficient change of condition under G.S. 97-47 caused by depression subsequent to an appeal of his original workers' compensation case. *Haponski v. Constructor's Inc.*, 95.

§ 77.2. Workers' Compensation; Modification of Award; Time for Application

A Form 21 agreement for compensation approved by the Commission was an interlocutory rather than a final award and thus did not bar plaintiff's claim for further compensation because the claim was not asserted until more than two years after plaintiff received the last payment for temporary total disability. *Beard v. Blumenthal Jewish Home*, 58.

§ 89.4. Workers' Compensation; Remedies against Third-Person Tortfeasors; Distribution of Recovery of Damages at Common Law

An attorney fee taken from the employee's share of a judgment may not exceed one-third of the amount recovered but is not otherwise subject to the reasonableness requirement of G.S. 97-90(c), but the attorney fee on the subrogation interest of the employer or its carrier is subject to the reasonableness requirement of the statute and may not exceed one-third of the amount recovered from the third party. *Hardy v. Brantley Construction Co. and Wells v. Brantley Construction Co.*, 562.

§ 91. Workers' Compensation; Filing of Claim Generally

There was no prejudice from an erroneous Industrial Commission opinion that plaintiff's claim was not timely filed because there was evidence to support a finding that plaintiff police officer failed to prove that he was injured while making an arrest. *Griffey v. Town of Hot Springs*, 290.

§ 93.3. Workers' Compensation; Proceedings before the Commission; Expert Evidence

An expert's testimony as to the cause of plaintiff's depression was properly elicited in response to a hypothetical question based on plaintiff's statements made to the witness for treatment, on plaintiff's own prior testimony, and on another physician's notes made during treatment of plaintiff. *Haponski v. Constructor's Inc.*, 95.

A medical expert's opinion was not too speculative to be competent evidence of the relationship between plaintiff's pain and depression. *Ibid.*

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

The failure of a licensed practical nurse to record on her time card that she lay down for forty-five minutes while on duty because of a dizzy spell did not constitute "substantial fault" for her dismissal so as to disqualify her from receiving unemployment benefits for an appropriate period under G.S. 96-14(2A). *Baxter v. Bowman Gray School of Medicine*, 409.

MORTGAGES AND DEEDS OF TRUST

§ 21. Limitations on Right to Foreclose

The protection offered by the ten-year statute of limitations of G.S. 1-47(3) is not limited to the original mortgagor or grantor but also extends to subsequent purchasers. *In re Foreclosure of Lake Townsend Aviation*, 481.

Where an action to foreclose a deed of trust was brought more than ten years after the note became due, foreclosure would be barred if the trial court should find that a purchaser of the property was in actual possession for the requisite ten-year period. *Ibid.*

Two collection letters sent to the debtor did not constitute an exercise of the note's acceleration clause so as to begin the running of the statute of limitations prior to the time final payment was due, and a foreclosure action instituted within ten years after the last payment was due was not barred by the statute of limitations. *Ibid.*

MUNICIPAL CORPORATIONS

§ 19.5. Injuries in City Buildings

Plaintiff, a county ambulance attendant, was a mere licensee while on the premises of a city fire station where the ambulances were kept, and the city was not liable for injuries received by plaintiff when he slipped and fell in diesel fuel which had leaked from a fire engine since the city was not guilty of willful and wanton negligence. *Martin v. City of Asheville*, 272.

§ 30.19. Zoning; Changes in Continuation of *Nonconforming* Use

A cemetery corporation's construction of above-ground burial facilities would not amount to an unlawful enlargement of its nonconforming use of property as a cemetery, but construction of an administration, security and sales office building upon cemetery property would constitute an unlawful enlargement. *Stegall v. Zoning Bd. of Adjustment of County of New Hanover*, 359.

A cemetery corporation was not estopped to assert that no special use permit was required for construction of above-ground burial facilities because it had previously operated pursuant to the conditions of a special use permit and had failed to seek judicial review of those conditions. *Ibid.*

NARCOTICS

§ 1.3. Elements and Essentials of Statutory Offenses Relating to Narcotics

Double jeopardy barred defendant's conviction and punishment both for possession of more than one gram of cocaine and for possession of cocaine with intent to sell or deliver. *S. v. Rich*, 380.

§ 3.1. Competency and Relevancy of Evidence

Assuming an officer's testimony that he had observed defendant at the address where heroin was found on occasions prior to her arrest was irrelevant in a prosecution for trafficking in heroin by possession, the erroneous admission of such testimony was not prejudicial to defendant. *S. v. Keys*, 349.

There was no prejudicial error in a prosecution for trafficking in marijuana from the admission of testimony identifying the residence in question as defendant's house, a fact not within the witness's knowledge. *S. v. Leonard*, 448.

NARCOTICS — Continued

§ 4. Sufficiency of Evidence

The evidence was sufficient to support defendant's convictions for manufacturing cocaine and for maintaining a dwelling used for the keeping or selling of controlled substances. *S. v. Rich*, 380.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The State's evidence was sufficient to show that defendant possessed heroin found in a pocketbook in her residence so as to support her conviction of trafficking in heroin by possession. *S. v. Keys*, 349.

Evidence of defendant's constructive possession of cocaine was sufficient to support her convictions for possession of more than one gram of cocaine and possession with intent to sell and deliver. *S. v. Rich*, 380.

The trial court properly denied defendant's motion to dismiss charges of trafficking in marijuana and felonious possession of marijuana where there was ample evidence that the premises in which the marijuana was found were under the control of the defendant. *S. v. Leonard*, 448.

§ 4.6. Instructions as to Possession

The trial court's instructions in substance stated all the relevant and legally correct propositions requested by defendant concerning the amount of heroin which defendant must have possessed to be found guilty of the crime charged. *S. v. Keys*, 349.

NEGLIGENCE

§ 6.1. Application of Doctrine of Res Ipsa Loquitur

The trial court erred in instructing the jury on the doctrine of res ipsa loquitur in an action to recover for injuries received by plaintiff when he was struck by a car being driven by defendant auction company's employee when the brakes failed where all the relevant facts were testified to by the witnesses at the trial. *Massengill v. Starling*, 233.

§ 29. Sufficiency of Evidence of Negligence Generally

In an action to recover for injuries received by plaintiff when he was struck by a car being driven by defendant auction company's employee when the brakes failed, plaintiff's evidence was sufficient for the jury to find that defendant was negligent in failing to inspect the car or test its brakes before driving it into the auction garage. *Massengill v. Starling*, 233.

§ 37. Instructions Generally

The trial court properly refused to instruct the jury on the doctrine of sudden emergency in an action to recover for injuries received by plaintiff when he was struck by a car being driven by defendant auction company's employee when the brakes failed. *Massengill v. Starling*, 233.

§ 59.1. Premises Liability; Particular Cases where Person or Premises Is Licensee

Plaintiff, a county ambulance attendant, was a mere licensee while on the premises of a city fire station where the ambulances were kept, and the city was not liable for injuries received by plaintiff when he slipped and fell in diesel fuel which had leaked from a fire engine since the city was not guilty of willful and wanton negligence. *Martin v. City of Asheville*, 272.

OBSCENITY

§ 1. Statutes Proscribing Dissemination of Obscenity

The statute pertaining to the dissemination of obscenity is not unconstitutionally vague and overbroad. *S. v. Smith*, 217.

The statute prohibiting the dissemination of obscenity does not require proof that defendant knew or believed that the materials in question were obscene but requires proof that defendant knew the nature and content of the materials purveyed. *Ibid.*

The absence of a right to an adversary hearing on the obscenity of seized materials prior to trial does not constitute an unconstitutional prior restraint and denial of due process. *Ibid.*

§ 3. Prosecutions for Disseminating Obscenity

The trial court did not err in failing to give defendant's requested instruction that sexual conduct alone is not sufficient to establish patent offensiveness. *S. v. Smith*, 217.

The trial court in an obscenity case implicitly gave defendant's requested instruction that it must acquit if it could not determine the contemporary community standard that it was to apply. *Ibid.*

Any error in the admission of testimony by the State's expert witness that he understood that solicitation and "other things" went on in adult bookstores was not prejudicial. *Ibid.*

The State's evidence in a prosecution for dissemination of obscenity was sufficient to permit the jury to find that defendant knew the contents of the two movies in question. *Ibid.*

The trial court erred in instructing the jury in an obscenity case that it should apply a community standard rather than the reasonable man standard in deciding the question of a work's value, but such error was harmless since no rational juror could have found value in the materials in question. *Ibid.*

PARENT AND CHILD

§ 1.6. Procedure for Terminating Parental Rights; Sufficiency of Evidence

The evidence in a termination of parental rights hearing was sufficient to show that two incarcerated fathers willfully left their children in foster care for two consecutive years. *In re Harris*, 179.

The trial court could not terminate respondents' parental rights under G.S. 7A-289.32(3) where petitioner did not allege and the trial court did not find that respondents had failed to show substantial progress in correcting the conditions leading to the removal of their children. *Ibid.*

The trial court improperly concluded that respondents failed to show a positive response to the diligent efforts of DSS to encourage each respondent to strengthen his parental relationship. *Ibid.*

The trial court in a termination of parental rights proceeding erred by concluding that neither respondent had established paternity of his child prior to the filing of the petition where the record revealed only evidence of respondents' paternity as of one month before the petition was filed. *Ibid.*

An order adjudging that respondent father had sexually abused his children was res judicata on that issue in a proceeding to terminate parental rights although it failed to state affirmatively that the allegations of abuse had been proven by clear and convincing evidence. *In re Wheeler*, 189.

PARENT AND CHILD — Continued

The erroneous admission of the lay opinion of a guardian ad litem that it was in the best interests of the children for parental rights to be terminated was not prejudicial. *Ibid.*

Testimony by the director of a children's home as to statements made to him by one child during therapy concerning sexual abuse by the child's father was properly admitted as a basis for the director's opinion concerning how the child's psychological and behavioral problems related to prospects for adoption. *Ibid.*

The trial court impliedly found that a social worker was qualified to render an expert opinion on the position of two children as candidates for adoption, and the witness was entitled to rely upon information received from a children's home as a basis for her expert opinion. *Ibid.*

The trial court committed harmless error in permitting a guardian ad litem to testify that respondent father's mother was "torn between loyalty to the boys and loyalty to her son" as a part of the basis for her opinion that it was in the best interests of the children to terminate parental rights. *Ibid.*

PARTNERSHIP

§ 6. Actions against Partners

A partner could maintain an action against his copartners because the partnership agreement upon which the action was based was an express personal contract between the partners. *Crosby v. Bowers*, 338.

The parties in their partnership agreement intended the word "termination" to refer to dissolution, and the plaintiff, pursuant to the terms of the agreement, could enforce the non-competition clause upon dissolution of the partnership. *Ibid.*

The trial court erred in finding that plaintiff's filing of the complaint was an expression of his will to dissolve the partnership in question. *Ibid.*

The trial court erred in giving the jury instructions which implied that any breach of a partnership agreement by defendants, whether or not material, precluded defendants from obtaining a judicial dissolution of the partnership. *Ibid.*

The trial court's instructions which implied that plaintiff must have breached the partnership agreement as a prerequisite to judicial dissolution was erroneous. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 6.1. Proceedings for Revocation of Licenses

Where a license to practice medicine was automatically suspended for mental incompetency, the Board of Medical Examiners may not continue the deprivation of the license upon totally different grounds without notice of those grounds or an opportunity to be heard. *In re Magee*, 650.

The trial court properly directed the Board of Medical Examiners to establish rules and procedures relating to reinstatement of licenses automatically suspended upon an adjudication of mental incompetency. *Ibid.*

§ 17. Malpractice; Sufficiency of Evidence; Departing from Approved Methods or Standards of Care

A complaint was sufficient to state a claim for negligent obstetrical care of a mother and her baby. *Ledford v. Martin*, 88.

SEARCHES AND SEIZURES — Continued

§ 24. Application for Search Warrant; Necessity and Sufficiency of Showing Probable Cause; Information from Informers

An affidavit contained sufficiently current information and sufficiently implicated the premises to be searched to establish probable cause for the issuance of a warrant to search defendant's residence for heroin. *S. v. Keys*, 349.

§ 40. Execution of Search Warrant; Items which May Be Seized

The trial court erred in a prosecution for possession of stolen property by admitting stolen property found in defendant's residence but not listed on the search warrant. *S. v. White*, 311.

STATE

§ 4. Actions against the State; Sovereign Immunity

County ABC Boards can waive their governmental immunity by purchasing liability insurance. *McNeill v. Durham County ABC Bd.*, 50.

Punitive damages were not recoverable against defendant ABC Board for an assault by an ABC officer. *Ibid.*

§ 4.3. Actions against the Department of Transportation

The State has waived immunity from claims falling within the Tort Claims Act without regard to whether the function out of which the claim arises is a governmental or a proprietary function, and the Industrial Commission had personal jurisdiction over the DOT based on alleged negligence in providing an unsuitable detour while a highway was closed. *Zimmer v. N.C. Dept. of Transportation*, 132.

§ 8.4. Negligence of State Employee; School Buses

The Industrial Commission did not err in making findings and conclusions in a school bus accident case that defendant was not negligent in the maintenance, repair, or operation of the school bus. *Hoover v. Charlotte-Mecklenburg Bd. of Education*, 417.

STATUTES

§ 11. Repeal and Revival

The trial court erred by granting defendant's motion to dismiss where the statute under which plaintiff brought his action was repealed without a savings clause, but a new statute with the same remedy was immediately available for the same injury. *Buchanan v. Hunter Douglas, Inc.*, 84.

TAXATION

§ 2. Equality and Uniformity

Fees imposed by a county for the use of its landfill did not constitute an illegal nonuniform tax and were authorized by G.S. 153A-292. *Barnhill Sanitation Service v. Gaston County*, 532.

TRESPASS

§ 2. Trespass to the Person

The trial court did not err by granting defendant's motion for a directed verdict on plaintiff's claim for intentional infliction of emotional distress arising from a nonsupport warrant. *Lay v. Mangum*, 251.

TRIAL

TRUSTS

UNFAIR COMPETITION

WILLS

WITNESSES

WORD AND PHRASE INDEX

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