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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

J & B SLURRY SEAL COMPANY v. MID-SOUTH AVIATION, INC. AND RESORT AIR SERVICE, INC.

No. 8620SC1319

(Filed 15 December 1987)

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

The trial court's summary judgment dismissing plaintiff's claims affected a substantial right such that it was immediately appealable where the possibility of an inconsistent verdict in defendants' counterclaim trial could irreparably prejudice any subsequent trial of plaintiff's negligence and contract claims. N.C.G.S. § 7A-27(d)(1), N.C.G.S. 1-277(a).

2. Rules of Civil Procedure § 17; Insurance § 75.2— subrogation—real party in interest

In an action arising from the disappearance of an aircraft owned by plaintiff and leased by defendant, plaintiff assigned to its insurer a legal interest in the subject matter of all its claims to the extent the insurer's payment compensated its losses, and plaintiff remained a real party in interest under N.C.G.S. 1A-1, Rule 17(a).

3. Assignments § 1— partial assignment of claim—permissible

While suit on an "indivisible" cause of action ordinarily may not be divided without the defendant's consent, legal title to the action may be partially assigned.

4. Insurance § 75.3— subrogation—summary judgment for defendants—improper

In an action arising from the disappearance of an aircraft owned by plaintiff and leased by defendant where plaintiff assigned to its insurer a legal interest in the subject matter of all its claims to the extent of the insurer's payment, the insurer was only a partial assignee and plaintiff consequently retained some legal interest in its claims against defendants as long as the losses

claimed by plaintiff actually exceeded insurer's payments to any extent. Since the record contained correspondence and affidavits asserting varying figures for the value of the aircraft and there were similar factual issues raised regarding uninsured appreciation, lost profits and expenses, plaintiff's real party in interest status could not be determined and the trial court could not enter summary judgment based on N.C.G.S. § 1A-1, Rule 17(a).

5. **Rules of Civil Procedure § 19— partial subrogation of claim to insurance company—necessary joinder of parties**

In an action arising from the disappearance of an aircraft owned by plaintiff and leased by defendant where plaintiff assigned to its insurer a legal interest in the subject matter of its claims to the extent the insurer's payment compensated its losses, the insurer clearly acquired some enforceable legal interest in the subject matter by virtue of the assignment and was a necessary party under N.C.G.S. § 1A-1, Rule 19.

Judge PHILLIPS concurring in the result.

APPEAL by plaintiff from *Wood, Judge.* Order entered 11 August 1986 in Superior Court, RICHMOND County. Heard in the Court of Appeals 12 May 1987.

Gunter & Clayton, P.A., by Woodrow W. Gunter II and Tamela G. Clayton, for plaintiff-appellant.

Van Camp, Gill, Bryan & Webb, P.A., by James R. Van Camp, and Lord, Bissell & Brook, by E. Glenn Parr, Thomas J. Strueber and Kathryn L. Johnson, for defendant-appellees.

GREENE, Judge.

Plaintiff sued defendants for actual and consequential damages arising from the disappearance of plaintiff's aircraft while in defendants' possession pursuant to an alleged charter/lease and service agreement. Plaintiff alleged defendants' negligence and breach of contract caused $1,250,000 in damages, which sum represented the aircraft's alleged fair market value of $850,000 as well as business expenses and lost profits arising from the aircraft's loss. Defendants denied these claims and counterclaimed for allegedly unpaid fees for service and maintenance of the aircraft.

After discovery, defendants moved for summary judgment on all plaintiff's claims. Based upon plaintiff's execution of a subrogation receipt after payment of its insurance claim by Insurance Company of the State of Pennsylvania (hereinafter called "In-

surer"), defendants asserted the aircraft's fair market value was only $600,900, the amount of plaintiff's insurance recovery. More important, defendants asserted the subrogation receipt demonstrated plaintiff had assigned all its claims to Insurer. Defendants also alleged Insurer had waived all subrogation rights against defendants pursuant to an Amendatory Endorsement of Insurer's policy with plaintiff. Defendants therefore moved that all claims be dismissed since: (1) plaintiff could not sue as the "real party in interest" under N.C.G.S. Sec. 1-57 (1983) and N.C.G.S. Sec. 1A-1, Rule 17(a) (1986); and (2) Insurer could not sue in its own name since it had waived its subrogation rights to sue defendants.

The "Proof of Loss/Subrogation Receipt" provided:

> Received from [Insurer] the sum of $600,900 . . . being full settlement of all claims and demands for loss and damage occurring on [the date the aircraft disappeared] to the [aircraft] . . . and in consideration of such payment [plaintiff] hereby assigns and transfers to [Insurer] each and all claims and demands against any other person, or corporation, arising from or connected with such loss and damage (and [Insurer] is hereby subrogated in the place of and to the claims and demands of [plaintiff] against said person or corporation in the premises), to the extent of the amount above named, and [Insurer] is hereby authorized and empowered to sue, compromise or settle in [its] name or otherwise to the extent of the money paid as aforesaid above.

The Amendatory Endorsement provided that Insurer waived "its right of *subrogation* against [defendants] *as respects loss or damage under Physical Damage Coverage* as set forth under this policy; provided, however, that this waiver shall not prejudice the [Insurer's] right of recourse for damages arising from the manufacturer, repair, sale or servicing of the aircraft by [defendants]." (Emphasis added.)

Plaintiff contended that the subrogation receipt was a partial assignment which only assigned those claims arising from losses insured under plaintiff's insurance policy. Since plaintiff claimed losses exceeding the policy's coverage of mere physical damage, plaintiff contended it did not assign to Insurer its claims for business expenses and lost profits. Plaintiff also moved for a continuance in order to join Insurer if the trial court found it was not

the "real party in interest" under Rule 17(a). Without ruling on plaintiff's motion for continuance, the court granted summary judgment for defendants and dismissed plaintiff's action. Plaintiff appeals.

These facts specifically present the following issues: (I) Since the court's summary judgment did not determine defendants' counterclaim, whether the partial summary judgment affects plaintiff's "substantial right" under N.C.G.S. Sec. 1-277(a) (1983) and N.C.G.S. Sec. 7A-27(d)(1) (1986); and (II) where plaintiff assigned its claims to Insurer "to the extent of" its insurance reimbursement, (A) whether plaintiff's assignment was a partial assignment of plaintiff's interest in all its claims; if so, (B) whether the common law rule against "claim-splitting" would invalidate such a partial assignment; and (C) whether factual disputes over the extent of plaintiff's entire loss precluded the trial court's summary determination that plaintiff's assignment divested it of "real party in interest" status under N.C.G.S. Sec. 1A-1, Rule 17(a) (1983) and N.C.G.S. Sec. 1-57 (1983).

I

[1] In general, only final orders and judgments may be appealed. Our Supreme Court distinguished final and interlocutory judgments in *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E. 2d 377, 381 (1950):

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court . . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

As the trial court's summary judgment did not adjudicate defendants' counterclaims, we note the court failed to determine there was no just reason for delay of the appeal under N.C.G.S. Sec. 1A-1, Rule 54(b) (1983). The court's partial summary judgment is therefore interlocutory, *see* N.C.G.S. Sec. 1A-1, Rule 56(c) (1983), and not otherwise appealable "except as expressly provided by these rules or other statutes." Rule 54(b). Section 7A-27(d) authorizes an appeal of right

> from any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which (1) Affects a substantial right, or (2) In effect determines the action and prevents a judgment from which appeal might be taken, or (3) Discontinues the action, or (4) Grants or refuses a new trial.

Compare Sec. 7A-27(d) *with* Sec. 1-277(a) (allowing appeal of *any* order or determination meeting identical four criteria of Section 7A-27(d)); *see Survey of Developments in North Carolina Law, 1978—Civil Procedure*, 57 N.C.L. Rev. 827, 907 n. 101 (1979) (noting both statutes allow interlocutory appeals on grounds other than "substantial right" exception); *but see Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E. 2d 338, 343 (1978) (stating *both* Section 1-277 and Section 7A-27 "in effect provide that no appeal" of "interlocutory" orders allowed unless substantial right affected).

With respect to those interlocutory orders which allegedly do affect a substantial right, our Supreme Court has additionally long required that the interlocutory "ruling or order deprive . . . the appellant of a substantial right *which he would lose if the ruling or order is not reviewed before final judgment.*" *Waters*, 294 N.C. at 207, 240 S.E. 2d at 343 (emphasis added) (quoting *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E. 2d 178, 181 (1974)); *Faircloth v. Beard*, 320 N.C. 505, 358 S.E. 2d 512, 513 (1987) (no appeal unless deprives party of substantial right which would be lost absent immediate review); *Veazey*, 231 N.C. at 362, 57 S.E. 2d at 381 (no interlocutory appeal unless order affects substantial right *and* will work injury if not corrected before final judgment); *accord Welch v. Kinsland*, 93 N.C. 281, 282 (1885).

There has thus evolved a two-part test of the appealability of interlocutory orders under the "substantial right" exception provided in Section 1-277(a) and Section 7A-27(d)(1). First, the right itself must be "substantial." *E.g., Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E. 2d 593, 595 (1982) (court accepts as general proposition that right to avoid one trial is not substantial right but specifically states avoiding possibility of two trials on same "issues" can be substantial right); *but cf. Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 130, 225 S.E. 2d 797, 805 (1976)

(irrespective of issues, plaintiff had substantial right to have all "causes" tried at same time by same judge and jury). Second, the enforcement of the substantial right must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order. *See Waters*, 294 N.C. at 207, 240 S.E. 2d at 343 (substantial right must be "lost"); *Green*, 305 N.C. at 607-08, 290 S.E. 2d at 596 (right must be prejudiced or not fully and adequately preserved by exception to order's entry); *Love v. Moore*, 305 N.C. 575, 579, 291 S.E. 2d 141, 145 (1982) (objection would preserve right to review and delay would not injure plaintiff).

Justice Exum stated in *Waters* that, "Admittedly, the 'substantial right' test . . . is more easily stated than applied." 294 N.C. at 208, 240 S.E. 2d at 343. Our review of the case law suggests the substantial right test is in some respects as difficult to state as it is to apply. For example, some decisions have apparently blurred or otherwise failed to distinguish the two requirements of appealability under the substantial right exception. *E.g., New Bern Assoc. v. The Celotex Corp.*, 87 N.C. App. 65, 359 S.E. 2d 481, 483 (1987) (defining "substantial right" as "one which will be lost").

More important, some decisions have completely omitted the requirement that the right be lost or prejudiced if not immediately appealed. This omission has produced two occasionally incompatible lines of authority governing the appealability of partial summary judgments. *Compare Green*, 305 N.C. at 608, 290 S.E. 2d at 596 (possibility of second trial affects substantial right if presence of same "issue" in second trial creates possibility party will be prejudiced by different juries rendering inconsistent verdicts on same issue) *and Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E. 2d 405, 408-09 (1982) (where summary judgment allowed for fewer than all defendants, order was appealable since possibility of inconsistent verdict in other trials on same issue affected substantial right) *with Oestreicher*, 290 N.C. at 130, 225 S.E. 2d at 805 (where plaintiff's claim for punitive damages dismissed, order held appealable since order "affected" alleged substantial right to try all "causes" in one proceeding: no discussion whether right would be lost or issue prejudiced without immediate appeal).

While the *Oestreicher* Court clearly omitted the requirement that the substantial right be lost or prejudiced, it is true that the

alleged substantial right to have all claims or causes determined in one proceeding could not be protected by simply granting plaintiff a separate trial after appeal. *Cf.* Survey, 57 N.C.L. Rev. at 908 (noting question whether substantial right was adequately protected would not be separate "test" under *Oestreicher*). However, we note the *Green* Court later rejected an appealability argument based solely on the *Oestreicher* right to determine all claims in the same proceeding. *Green*, 305 N.C. at 606, 290 S.E. 2d at 595 (rejecting argument solely based on *Oestreicher* that party had substantial right to have contribution claim determined in same proceeding where primary liability determined).

Thus, after *Green*, simply having all claims determined in one proceeding is not a substantial right. A party has instead the substantial right to avoid two separate trials of the same "issues": conversely, avoiding separate trials of different issues is not a substantial right. *See Porter v. Matthews Enterprises, Inc.*, 63 N.C. App. 140, 143, 303 S.E. 2d 828, 830, *disc. rev. denied*, 309 N.C. 462, 307 S.E. 2d 365 (1983) (stating *Green* held avoiding separate trials on separate issues is not substantial right); *see also Survey of Developments in North Carolina Law—Civil Procedure*, 61 N.C.L. Rev. 957, 1008 (1982) (stating *Green* subordinates judicial efficiency to jury's need for simple issues by allowing severance of different claims arising from same facts).

However, before and even after *Green*, some decisions other than *Oestreicher* either followed its example of a substantial right or otherwise omitted the requirement that the substantial right be lost or irreparably prejudiced. *E.g.*, *Nasco Equip. Co. v. Mason*, 291 N.C. 145, 148, 229 S.E. 2d 278, 281 (1976) (citing *Oestreicher*, court held partial summary judgment denying plaintiff trial of its claims in one proceeding affected a substantial right and was appealable without discussing whether plaintiff would be prejudiced by delaying appeal until after trial of counterclaims); *accord Narron v. Hardee's Food Systems, Inc.*, 75 N.C. App. 579, 581, 331 S.E. 2d 205, 206, *disc. rev. denied*, 314 N.C. 542, 335 S.E. 2d 316 (1985); *compare Bernick*, 306 N.C. at 439, 293 S.E. 2d at 408-09 (right to have "issue" of liability to all plaintiffs tried by same jury) *with Webb v. Triad Appraisal and Adjustment Service, Inc.*, 84 N.C. App. 446, 448, 352 S.E. 2d 859, 861 (1987) (citing *Oestreicher*, holding substantial right to have all "claims" determined in one proceeding); *accord Shelton v. Fairley*, 86 N.C. App. 147,

149, 356 S.E. 2d 917, 918 (1987); *see also Whalehead Properties v. Coastland Corp.*, 299 N.C. 270, 276, 261 S.E. 2d 899, 903 (1980) (citing *Nasco*, court allowed appeal of order denying trial of "issue"; court also allowed appeal of injunctive order since substantial right would be "precluded" if no immediate appeal).

We note the *Nasco* Court also apparently merged two separate grounds for appealing interlocutory orders: the Court characterized a summary judgment as an order which denied plaintiff a jury trial and "*in effect, determine[d] the claim* [and] *thus* affect[ed] a substantial right . . . under General Statutes 1-277 and 7A-27." *Nasco*, 291 N.C. at 148, 229 S.E. 2d at 281 (emphasis added); *cf.* Sec. 7A-27(d)(1), (2) (allowing appeal of interlocutory order which affects substantial right *or* which in effect determines the action and prevents an appeal); *see also Survey of Developments in North Carolina Law, 1979—Civil Procedure*, 58 N.C.L. Rev. 1181, 1265 n. 32 (1980) (provisions of Section 1-277(a) and Section 7A-27(d) both provide independent grounds for appeal and should be analyzed accordingly); *but see Unigard Carolina Insurance Co. v. Dickens*, 41 N.C. App. 184, 254 S.E. 2d 197 (1979) (holding order granting partial new trial was not appealable under Section 1-277(a) since did not deprive defendant of substantial right; statute separately authorizes appeal of an order which "grants or refuses" new trial).

This apparent doctrinal inconsistency concerning the requirements for appealing interlocutory orders may produce irreconcilable results in cases which, like the instant case, include counterclaims. Specifically, where summary judgment is entered against plaintiff in a case where defendant's counterclaims turns on jury issues different from those raised by plaintiff's claim, the *Oestreicher/Nasco* and *Green/Bernick* lines of authority produce opposite results. Under the *Oestreicher/Nasco* line, a partial summary judgment in such a case is appealable since simply denying plaintiff a trial of its claim "affects" the substantial right to have all claims tried in one action. However, irrespective of any effect on this purported substantial right, such a partial summary judgment is not appealable under *Green* and *Bernick* since there is ordinarily no possibility of inconsistent verdicts or other lasting prejudice where trial of defendant's counterclaim before appeal will not determine any issues controlling the potential trial of plaintiff's claims after appeal.

However, the issue of defendants' care of plaintiff's aircraft in the instant case is fundamental to the disposition of both plaintiff's negligence and contract claims and defendants' counterclaim for payment under the alleged charter/lease and service agreement. Therefore, the rationale of either line of authority would allow immediate appeal of the partial summary judgment in this case. Plaintiff's right to have its primary claims and defendants' counterclaim determined in one proceeding is a substantial right under *Oestreicher* and *Nasco* which allows immediate appeal of the court's partial summary judgment under Sections 1-277(a) and 7A-27(d): the presence of identical factual issues in both proceedings may produce inconsistent verdicts and thus an immediate appeal is similarly allowed under *Green* and *Bernick.*

While we value the case-by-case flexibility afforded us by the substantial right test, appellate application of this statutory test need not be so uncertain or inconsistent that premature or fragmentary appeals are needlessly encouraged. *Cf.* Comment, *Interlocutory Appeals in North Carolina: The Substantial Right Doctrine*, 18 Wake Forest L. Rev. 857, 876-78 (1982) (reviewing drawbacks of doctrine). As we question the compatibility of the *Oestreicher/Nasco* analysis with *Veazey, Green* and *Bernick*, we adopt the latter decisions' longer established, and more recently affirmed, rationale and conclude that the possibility of an inconsistent verdict in defendants' counterclaim trial could irreparably prejudice any subsequent trial of plaintiff's negligence and contract claims. We therefore hold that the trial court's summary judgment dismissing plaintiff's claims affected a substantial right such that it is immediately appealable under Section 7A-27(d)(1) and Section 1-277(a).

II

[2] After plaintiff's airplane disappeared, plaintiff executed the disputed form "Subrogation Receipt" in favor of Insurer. Defendants contend the subrogation receipt evidences an absolute assignment to Insurer of all plaintiff's claims such that Insurer is the only real party in interest to this action under Rule 17(a) and Section 1-57. Plaintiff contends the document is ambiguous but, at most, simply reflects a partial assignment to Insurer of the property loss claim compensated by Insurer's $600,900 payment. Plaintiff asserts it retained a legal interest in its negligence and

contract claims for the appreciated value of the aircraft and for expenses and lost profits resulting from its loss. Plaintiff contends it therefore remained a real party in interest under Rule 17(a).

Plaintiff's negligence and contract claims all arise from the disappearance or theft of plaintiff's aircraft. Neither party disputes that tort and contract claims arising from property damage or loss may be assigned *in toto*. *See Rolling Fashion Mart, Inc. v. Mainor*, 80 N.C. App. 213, 341 S.E. 2d 61 (1986) (holding subrogation receipt assigned plaintiff's entire property damage claim to insurer); *American Surety Co. of New York v. Baker*, 172 F. 2d 689, 691-92 (4th Cir. 1949) (under law prior to enactment of Section 1-57, property tort claims were assignable: Section 1-57 does not forbid assignment of rights other than contract but only does not authorize such assignments where not assignable under other law); *see also* 6A J. Appleman, *Insurance Law and Practice*, Sec. 4053 at 137 (1972) (claim for wrongful destruction of personalty by fire is assignable); *compare Southern Ry. Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 9, 318 S.E. 2d 872, 878 (1984) (purported assignment of *personal injury* claim deemed ineffective under common law as against public policy and not allowed under Section 1-57) *with American Surety Co.*, 172 F. 2d at 691-92 *and* 6 Am. Jur. 2d *Assignments* Sec. 39 (1963) (discussing general rule that personal injury claims are assignable if statutes provide for survival of such claims after death).

Insurance policies must be given a reasonable interpretation consonant with their apparent object and plain intent; accordingly, sentence structure and punctuation may be carefully analyzed to confirm the meaning of the document's language. *See Huffman v. Occidental Life Ins. Co. of Raleigh*, 264 N.C. 335, 338, 141 S.E. 2d 496, 498 (1965). The disputed subrogation receipt acknowledges plaintiff's receipt of $600,900 (the maximum insurance recovery minus a $100 deductible payment) as "full settlement" of "all claims . . . for loss and damage occurring [to the aircraft] on the 18th day of August 1979." The receipt then recites that in "consideration of such [settlement] payment[,] all claims arising . . . against any person . . . from . . . such loss" are "subrogated" *and* "assign[ed] . . . *to the extent of the amount above named* [*i.e.*, $600,900]" (emphasis added). The Insurer is accordingly "author-

ized to sue, compromise or settle in [its own] name or otherwise *to the extent of the money paid . . .*" (emphasis added).

A

At the outset, we reject plaintiff's contention that it assigned to Insurer only its interests in the physical damage claim covered by its insurance policy. The subrogation receipt specifically assigns "all claims arising from" the aircraft's loss "to the extent of" $600,900. The partial nature of this assignment, if any, must result from this "extent" to which *all* plaintiff's claims were assigned to Insurer.

The language of the subrogation receipt specifically "assigns" plaintiff's claims to the same "extent" the Insurer is "subrogated" to those claims, *i.e.*, to the extent of Insurer's $600,900 payment. The law of subrogation therefore sheds considerable light on the extent to which the claims have been assigned. Subrogation is an equitable remedy in which one steps into the place of another and takes over the right to claim monetary damages to the extent that the other could have, while an assignment is the formal transfer of property or property rights. *Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 554, 317 S.E. 2d 408, 410 (1984). In effect, the insurer's subrogation is itself an assignment implied by equity to reimburse the insurer "to the extent" the insurer's payments have discharged the tort-feasor's primary liability to the insured. *See Shambley v. Jobe-Blackley Plumbing and Heating Co.*, 264 N.C. 456, 458, 142 S.E. 2d 18, 20 (1965).

Where the insurer's payments compensate the insured's entire loss (including all losses not covered by or compensated under the insurance policy), our courts have long held the insurer is subrogated to the insured's entire cause of action. *E.g., Hardware Dealers Mutual Fire Ins. Co. v. Sheek*, 272 N.C. 484, 486, 158 S.E. 2d 635, 637 (1968); *Powell & Powell, Inc. v. Wake Water Co.*, 171 N.C. 290, 296, 88 S.E. 426, 430 (1916). Conversely, where the insurer's payments have only partially compensated the insured's entire loss, the insurer is only partially subrogated to the insured's claims. *Id.* Since in both instances the insurer is subrogated only "to the extent" of its actual payments, whether an insurer is partially or fully subrogated turns on the factual determination whether the insurer's payments have fully compensated the insured's entire loss. *See Jewell v. Price*, 259 N.C. 345,

349, 130 S.E. 2d 668, 672 (1963) (allegation that insurer paid plaintiff's full losses is allegation of fact for determination by jury).

While the doctrine of subrogation vests an equitable right to reimbursement in the insurer, the insured's assignment of legal title to its claims instead transfers a separable legal interest in the claim's subject matter. *See Payne*, 69 N.C. App. at 554, 317 S.E. 2d at 410 (property rights transferred by assignment are distinguishable from insurer's subrogation rights); *American Surety Co.*, 172 F. 2d at 692 (where claim assignable, assignment of *entire* claim conveyed full legal title such that doctrine of subrogation irrelevant to insurer's suit as assignee).

In the instant case, Insurer could have acquired by assignment a legal interest in the subject matter of plaintiff's claims to an extent *greater* than its $600,900 equitable subrogation interest in plaintiff's recovery; indeed, Insurer could have acquired absolute title to plaintiff's entire $1,250,000 claim irrespective of the extent to which Insurer was subrogated to plaintiff's claims. *See generally* 16 G. Couch, *Couch on Insurance 2d* par. 61:109-113 (1983). However, this subrogation receipt specifically manifests Insurer's contrary choice to acquire a legal interest in plaintiff's claims only "to the extent" it was entitled to subrogation to those claims, *i.e.*, only to the extent its $600,900 insurance payment compensated plaintiff's entire loss.

Thus, we conclude plaintiff assigned to Insurer a legal interest in the subject matter of all plaintiff's claims to the extent the Insurer's $600,900 payment compensated plaintiff's losses arising from the disappearance of its aircraft. If plaintiff's losses exceeded $600,900, then only a partial assignment had occurred. *Cf. Squires v. Sorahan*, 252 N.C. 589, 590, 114 S.E. 2d 277, 278-79 (1960) (where insurance company paid five-sixths of plaintiff's tort judgment, court treated as partial an assignment to insured "to extent of" insurer's payments); *see, e.g., Warren v. Kirwan*, 598 S.W. 2d 598, 600 (Mo. Ct. App. 1980) (characterizing as "partial" assignment an identical proof of loss whereby insured assigned all claims to the extent of the insurer's payments); *see generally* Annot., 13 A.L.R. 3d Sec. 15[b] (1967 and 1987 Supp.) (discussing decisions where assignment or subrogation is for part of insured's entire claim); *cf.* Restatement (Second) of Contracts Sec. 326(1) (1981) (assignment of part of right is operative as to that part "to

the same extent" and in same manner as if part had been separate right).

B

[3] We reject defendants' contention that allowing a partial assignment of the instant plaintiff's claims would contravene the *Rolling Fashion Mart* holding. In that case, the plaintiff-insured's own pleadings revealed the insurer's payments actually exceeded the plaintiff's allowable losses. 80 N.C. App. at 218, 341 S.E. 2d at 64 (plaintiff received $2,600 from insurer for damage to its vehicle but only claimed $2,000 damage to vehicle). Therefore, the court held an assignment "to the extent of" the insurer's payments divested plaintiff of any interest in its allowable property damage claim. In the instant case, the record does not reveal any similarly definitive evidence that Insurer's payments exceeded plaintiff's entire loss. As the insurer's payments in *Rolling Fashion Mart* exceeded the insured's losses by even more than the $100 deductible retained, the court also held that the plaintiff was divested of any legal interest in recovering its deductible payment. *Id.* As to the $100 retained by Insurer, we similarly note the instant plaintiff retains a legal interest in recovering from defendants any portion of that $100 deductible only if plaintiff's entire loss actually exceeds $600,900. *Cf.* Note, *Real Party in Interest—Insurance—Partially Subrogated Insurer's Standing to Sue*, 38 N.C.L. Rev. 99, 100 n. 9 (1959) (assigning entire cause of action divests plaintiff of any right to deductible amount retained by insurer); 16 G. Couch, *Couch on Insurance 2d* par. 61:111-13 (1983) (assignment of insured's entire claim to insurer precludes any objection that insured remains real party in interest).

However, in holding the plaintiff could not recover its deductible payment, the *Rolling Fashion Mart* court also stated:

> Plaintiff argues . . . that it is entitled to recover at least its $100 deductible. We disagree. The property damage claim is a single indivisible claim, *and cannot be partially assigned.* Plaintiff assigned its entire claim for damage to its vehicle; that claim has been resolved by arbitration and award. *To hold otherwise would subject defendant to multiple actions for the same wrong and would sanction the splitting of an indivisible claim for relief.*

80 N.C. App. at 218-19, 341 S.E. 2d at 65 (emphasis added). Our Supreme Court has indeed stated that "[w]here insured property is destroyed or damaged by the tortious act of another, the owner of the property has a single and indivisible cause of action against the tortfeasor for the total amount of the loss." *Burgess v. Trevathan*, 236 N.C. 157, 160, 72 S.E. 2d 231, 233 (1952) (insurer's partial *subrogation* did not divest insured of title to action). In subrogation cases such as *Burgess*, title to the action remains in the insured by virtue of previously discussed subrogation principles, not by virtue of an alleged prohibition against partial assignments. *Cf. Security Fire & Indem. Co. v. Barnhardt*, 267 N.C. 302, 303, 148 S.E. 2d 117, 118 (1966) (following *Burgess* in dismissing claims brought by partially subrogated insurers but noting no allegation claims were assigned to either insurer).

In assignment cases such as the instant case, title to the action is similarly determined by substantive principles of assignment rather than by the procedural rule against "claim-splitting." Our courts have never held the rule against claim-splitting itself controls the substantive determination of a party's legal interest in a cause of action: the rule merely requires that "all damages incurred by the insured as a result of a single injury must be recovered in a single action." *Smith v. Pate*, 246 N.C. 63, 67, 97 S.E. 2d 457, 460 (1957). After finding a partial assignment of a debt under contract law in *Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978), the Court noted the *additional* consideration that, "*both* the assignor of a partial interest in the debt and defendant-debtor *have the right to insist that the entire matter be settled at one time—that the cause of action not be split.*" *Id.* at 157, 240 S.E. 2d at 366 (emphasis added).

While the *Rolling Fashion Mart* result is correct, the court's statement that property damage claims may not be partially assigned results from a misapplication of the rule against "claim-splitting." The rule is for the tort-feasor's benefit and simply ensures that he "cannot be compelled *against his will* to defend two actions for the same injury." *Burgess*, 236 N.C. at 160-61, 72 S.E. 2d at 233; *see also Southern Stock Fire Ins. Co. of Greensboro v. Raleigh, Charlotte and Southern Ry. Co.*, 179 N.C. 290, 292-93, 102 S.E. 504, 505 (1920) (right of action can be divided by agreement or act and rule waived since purpose of rule is to protect defendant from multiple lawsuits and expenses).

Thus, while suit on the "indivisible" cause of action ordinarily may not be divided without the defendant's consent, legal *title* to the action may be partially assigned. Indeed, even under subrogation law, the "claim-splitting" rule does not in every case necessarily bar a *second* suit by a partially subrogated insurer on the same facts giving rise to a prior suit by its insured. *See, e.g., Nationwide Mutual Ins. Co. v. Spivey*, 259 N.C. 732, 131 S.E. 2d 338 (1963) (insured's consent judgment for recovery of losses not compensated by insurer would not bar insurer's subsequent suit against tort-feasor to recover compensation paid).

In the instant case, the "claim-splitting" rule merely gives defendants the choice to settle the entire controversy in one action by joining Insurer. *See Booker*, 294 N.C. at 157, 240 S.E. 2d at 366; *see also* Williston, *Williston on Contracts 3d* Sec. 443 at 311 n. 14 (1960) (approving decision holding assignor may sue for part of claim not assigned but defendant can then assert "claim-splitting" rule to join the partial assignee). Properly applied, the procedural prohibition against "claim-splitting" is therefore irrelevant to our determination under substantive law whether plaintiff's subrogation receipt constituted a valid partial assignment under which plaintiff retained its status as a real party in interest. *See* 3A *Moore's Fed. Practice* par. 17.09[1.-1] at 63 (real party in interest provisions only concern proper party to sue under a valid assignment and leave assignability questions to substantive law); *see also Lumley v. Dancy Const. Co. Inc.*, 79 N.C. App. 114, 121-22, 339 S.E. 2d 9, 14 (1986).

C

If plaintiff has retained any separable legal interest in the subject matter of its claims, then *both* plaintiff and Insurer are real parties in interest under Rule 17(a). *See Booker*, 294 N.C. at 155, 240 S.E. 2d at 365 (1978) (partial assignees and assignor were all deemed real parties in interest based on their respective rights in total debt); *see also Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18-19, 234 S.E. 2d 206, 209, *cert. denied*, 293 N.C. 159, 236 S.E. 2d 704 (1977) (real party in interest must have some interest in subject matter of litigation and have legal right by substantive law to enforce claim). Rule 17(a) then provides defendants the right to a continuance should they desire joinder of Insurer as an additional real party in interest.

[4] While we hold our law allows a partial assignment of interest in claims arising from property loss or damage, we must still determine whether such a partial assignment has occurred under the facts of this case such that plaintiff remains a real party in interest. As long as the losses claimed by plaintiff actually exceed Insurer's payments to any extent, Insurer is only a partial assignee and plaintiff consequently retains some legal interest in its claims against defendants. Plaintiff has claimed losses which greatly exceed Insurer's $600,900 payment. The record contains correspondence and affidavits which assert varying figures for the "cash," "wholesale" and "actual" value of plaintiff's aircraft. Defendants assert the aircraft's "fair market value" equals the insurance payment of $600,900. None of these figures conclusively proves the aircraft's fair market value which is ordinarily the proper measure of stolen or destroyed property's value. *See Southern Watch Supply Co., Inc. v. Regal Chrysler-Plymouth, Inc.*, 82 N.C. App. 21, 345 S.E. 2d 453 (1986). Plaintiff's claims for uninsured appreciation, lost profits and expenses raise similar factual issues.

As to plaintiff's real party in interest status in this action, we must therefore conclude the trial court could not enter summary judgment against plaintiff based on Rule 17(a) since plaintiff's status as a partial assignor and real party in interest cannot be determined until the factual issue of the extent of plaintiff's entire loss is determined. *Cf. Jewell*, 259 N.C. at 349, 130 S.E. 2d at 672 (conflicting allegations of insured's loss raised factual issue whether insured was real party in interest). Of course, where there is no genuine dispute that the insurer's payments exceed the insured's full loss, the trial court may summarily determine an objection to the insured's real-party-in-interest status. *See University Motors, Inc. v. Durham Coca-Cola Bottling Co.*, 266 N.C. 251, 256, 146 S.E. 2d 102, 107 (1965). However, as the instant parties genuinely dispute the full extent of plaintiff's losses, we must reverse the trial court's summary judgment dismissing plaintiff's action for lack of a real party in interest under Rule 17(a) and Section 1-57.

[5] However, we are required to take notice of another potential basis for dismissal after remand. While the real party in interest provisions of Rule 17 are for the parties' benefit and may be waived if no objection is raised, the necessary joinder rules of

N.C.G.S. Sec. 1A-1, Rule 19 place a mandatory duty on the court to protect its own jurisdiction to enter valid and binding judgments. *See Carolina First National Bank v. Douglas Gallery of Homes, Ltd.*, 68 N.C. App. 246, 251, 314 S.E. 2d 801, 804 (1984) (unlike necessary joinder under Rule 19, absence of real party in interest under Rule 17 did not constitute "fatal defect" where opposing party failed to show prejudice in not having real party joined); 3A *Moore's Fed. Pract.* par. 17.09[1.-1] at 65 (although Rule 17 should not be applied to dismiss suits brought by assignors without joinder of their assignees, failure to join assignee where required under Rule 19 may require dismissal); *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E. 2d 313, 316 (1968) (valid judgment cannot be rendered without necessary party). While a party may waive its right to be sued by a real party in interest, Rule 19 requires the court to join as a necessary party any persons "united in interest" and/or any persons without whom a complete determination of the claim cannot be made. *See Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E. 2d 270, 272, *cert. denied*, 297 N.C. 454, 256 S.E. 2d 807 (1979). Since a judgment without such necessary joinder is void, a trial court should, on its own motion, order a continuance to provide a reasonable time for necessary parties to be joined. *Booker*, 294 N.C. at 158, 240 S.E. 2d at 367.

Whether or not Insurer's legal title to plaintiff's claims is partial or complete, Insurer clearly acquired some enforceable legal interest in the subject matter of this action by virtue of the assignment provided by the subrogation receipt. *See American Surety Co.*, 172 F. 2d at 692. Given Insurer's interest in all of plaintiff's claims, a determination of such claims in this action will necessarily prejudice Insurer's interests in them. Insurer is therefore a necessary party under Rule 19. *See Ludwig*, 40 N.C. App. at 190, 252 S.E. 2d at 272 (mandatory joinder of persons whose absence prejudices rights of parties before court or persons not before court); *see also Booker*, 294 N.C. at 157, 240 S.E. 2d at 366 (where suit brought by partial assignees, remaining interests of assignor could not be protected without joinder of assignor). While Insurer's absence does not merit immediate dismissal under *Booker*, the trial court on remand must give plaintiff reasonable time to join Insurer before dismissing plaintiff's claim under Rule 19. *Id.* at 157-58, 240 S.E. 2d at 367.

Finally, we note defendants argue that Insurer has itself waived all its claims against defendants. Such a waiver could of course vitiate Insurer's status as a necessary party. However, since the Amendatory Endorsement in question only evidences a *limited* waiver of Insurer's *subrogation* rights, Insurer's rights as an assignee nevertheless dictate its joinder as a necessary party.

III

Plaintiff's status as partial assignor and a real party in interest turns on the disputed factual extent of plaintiff's entire loss, which includes those losses neither covered by nor compensated under plaintiff's insurance contract with Insurer. Therefore, we reverse the trial court's summary judgment dismissing plaintiff's claims for lack of a real party in interest and remand the case for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judge COZORT concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in the result.

Though I agree that the order is both appealable and erroneous, in my judgment most of what is said in the opinion is unnecessary and some of it is incorrect. In my view the issues discussed are free of difficulty, each can be adequately and correctly treated in a paragraph or two, and neither party nor our jurisprudence would have suffered if nothing had been said about appealability since that issue was not raised by either of the briefs and the order was clearly appealable, in any event. Be that as it may, my opinion is that: (1) The order, though interlocutory, was immediately appealable whether the trial judge so declared or not because plaintiff's right to try its claim for defendants' negligence in caring for its airplane before the same jury that tries defendants' counterclaim for expenses incurred in caring for the plane is a substantial one, G.S. 1-277, for it would be a travesty if the claims were tried before different juries and one found that the parties agreed to one thing and the other found that they agreed to something else; and (2) the order was erroneous and no

further findings are necessary because the materials before the court clearly establish that plaintiff assigned to its insurance company only that part of its indivisible claim that the insurance company paid for, and thus plaintiff is still a necessary party to the action and the insurance company can be joined at the motion of either party.

STATE OF NORTH CAROLINA v. DONALD JOSEPH ROLAND

No. 8726SC321

(Filed 15 December 1987)

1. **Obscenity § 3— value of materials—reasonable man standard—erroneous instructions—harmless error**

The trial court erred in instructing the jury in a prosecution for disseminating obscenity that it should assess the value of the materials based on its "own views" rather than on a reasonable man standard. However, such error was harmless because no rational juror, properly instructed, could have found value in the materials in question even though defendant's expert witnesses testified that the materials "could" have scientific and educational value.

2. **Obscenity § 2— absence of statewide standard—equal protection**

N.C.G.S. § 14-190.1(b) does not violate the equal protection clause of the N. C. Constitution because it does not require the application of a statewide community standard in determining what materials are obscene.

3. **Obscenity § 3— survey of community attitudes—exclusion of specific questions and responses**

The trial court in a prosecution for disseminating obscenity did not err in refusing to permit defendant's expert witness to testify as to the specific questions and responses of a survey conducted to measure the level of community acceptance or tolerance for sexually explicit materials since the questions dealt primarily with public tolerance of obscene materials in general and lacked probative value as to whether the materials in question were patently offensive or appealed to the prurient interest.

4. **Criminal Law § 128.2; Obscenity § 3— testimony that materials "obscene"—refusal to order mistrial**

The trial court did not err in refusing to grant a mistrial in a prosecution for disseminating obscenity when an officer testified that his opinion was that the materials in question were obscene where the court granted a motion to strike and instructed the jury that the officer's opinion was not evidence in the case.

5. Obscenity § 3— jury argument—materials "shameful" and "offensive"—absence of prejudice

Error, if any, in the district attorney's jury argument in an obscenity case that the test was whether the materials were "shameful" and "offensive" was not prejudicial to defendant where the district attorney referred to and gave the legal definitions of patent offensiveness and prurient interest several times in his argument, and the trial court properly instructed the jury on the law of obscenity after the district attorney made his final argument.

6. Criminal Law § 102.6; Obscenity § 3— jury argument—materials as "filth"—reference to defendant's attorney—no gross impropriety

The prosecutor's jury argument that the materials in question were "filth" and his statement that the jury was to apply the test for obscenity, "not some guy from New York," an apparent reference to defendant's New York counsel, were not so grossly improper as to prejudice defendant.

7. Obscenity § 3— dissemination of obscenity—guilty knowledge

The State's evidence in a prosecution for disseminating obscenity was sufficient for the jury to find that defendant had guilty knowledge of the contents of the film and magazines in question where it tended to show that the officer who purchased the materials from defendant in an adult bookstore had seen defendant there on two prior occasions, and that the film box and magazine covers were illustrated with pictures which were indicative of the contents of the film and magazines.

8. Obscenity § 1— dissemination of obscenity—statute constitutional

There was no merit to defendant's contention that the statute prohibiting the dissemination of obscenity, N.C.G.S. § 14-190.1, is unconstitutional on grounds that it (1) fails to set forth a proper scienter requirement; (2) fails to provide for a prompt judicial determination of obscenity; (3) omits the words "in any public place"; (4) is overbroad in its definition of sexual conduct; and (5) fails to include the phrase "taken as a whole" with regard to the examination of a material's literary, artistic, political or scientific value.

Judge GREENE dissenting.

APPEAL by defendant from *Lewis (Robert D.), Judge.* Judgment entered 5 November 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 September 1987.

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

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

COZORT, Judge.

Defendant was convicted on four counts of disseminating obscenity in violation of N.C. Gen. Stat. § 14-190(a)(1). From a judgment sentencing him to a presumptive one-year term and fining him $3,000.00 and the costs of the action, defendant appeals.

On 1 October 1985, Officer W. R. Trull of the Mecklenburg County Police Department entered the East Independence Adult Bookstore. After examining the materials on display, he selected three magazines, all enclosed in clear plastic wrappers, and one film. Officer Trull took these items to the cash register, where defendant, the operator of the bookstore, rang up the sale. Subsequently, on 3 October 1985, defendant was arrested and charged with disseminating obscenity for the sale of these four items.

At trial, defense counsel called two psychiatrists, Dr. Charles B. Nemeroff, and Dr. Wade D. Williams, both of whom had reviewed copies of the magazines and film. Based upon their review of these materials, both doctors testified that in their opinion, the materials could have scientific and educational value, and could be useful in treating sexual dysfunctions, homosexual fears and other sexual problems.

The defense counsel also called Dr. Robert L. Stevenson, a Professor of Journalism at the University of North Carolina at Chapel Hill, who was tendered as an expert in public opinion polls and surveys. Dr. Stevenson testified that he had evaluated and reviewed a survey designed to measure the level of community acceptance or tolerance for sexually explicit materials in Mecklenburg County. He stated that the methods used in conducting the survey were consistent with acceptable polling standards and that the questions presented were adequate to measure the level of acceptability or toleration for sexually explicit materials in Mecklenburg County. Based upon his review of the survey and the subject materials, Dr. Stevenson testified that the average person in Mecklenburg County would find that the materials at issue were not patently offensive. The trial court refused, however, to allow Dr. Stevenson to testify about the actual survey results which formed the foundation of his opinion.

The jury returned a guilty verdict on all four counts of disseminating obscenity. Defendant was then sentenced to a pre-

sumptive one-year term, with an active term of sixty days and the remaining ten months suspended with defendant on special probation. Defendant was also fined $3,000 and the costs of the action. From this judgment, defendant appeals and contends that the trial court erred (1) in its charge to the jury on the test for obscenity; (2) in failing to instruct the jury to apply statewide community standards; (3) in refusing to allow Dr. Stevenson to testify as to specific questions and responses in the survey; (4) in refusing to grant his motion for a mistrial after Officer Trull testified that the materials in question were obscene; (5) in overruling his objections to the prosecutor's jury argument; (6) in denying his motion to dismiss for insufficiency of the evidence on guilty knowledge; and (7) in denying his motion to dismiss based on the unconstitutionality of N.C. Gen. Stat. § 14-190.1. For the following reasons, we find that defendant's contentions have no merit and that he received a fair trial, free of prejudicial error.

[1] Defendant's first contention on appeal is that the trial court erred in its charge to the jury on the test for obscenity.

A three-part test for judging whether material is obscene was set out by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607, *reh'g denied*, 414 U.S. 881, 38 L.Ed. 2d 128, 94 S.Ct. 26 (1973). The court stated that:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the *prurient interest* . . .; (b) whether the work depicts or describes, in a *patently offensive* way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24, 37 L.Ed. 2d at 431, 93 S.Ct. at 2610 (citations omitted) (emphasis added).

"[T]he first and second prongs of the *Miller* test—appeal to prurient interest and patent offensiveness—are issues of fact for the jury to determine applying contemporary community standards." *Pope v. Illinois*, 481 U.S. ---, ---, 95 L.Ed. 2d 439, 445, 107 S.Ct. 1918, 1920 (1987). The third, or "value," prong of the *Miller*

test, however, "is not discussed in terms of contemporary, community standards." *Id.* According to *Pope*, the omission of the community standard from the third prong was a "deliberate choice" by the *Miller* court, because the "value" of a work does not "vary from community to community based on the degree of local acceptance it has won." *Id.* As to value, the court in *Pope* further stated that:

> The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

Id.

In the case *sub judice*, the trial court instructed the jury regarding the third element of the *Miller* test, as follows:

> The third element which the State must prove in order to have you find that this material is obscene is that the State must prove beyond a reasonable doubt that the material, considered as a whole, lacks serious literary, artistic or political or scientific value. This, of course, is not measured by the community standards but is measured by your *own views* of literary, artistic, political and considering the testimony concerning scientific value. (Emphasis added.)

Defendant contends, and we agree, that the trial court erred in instructing the jury to assess the materials' value based on their "own views," rather than on a reasonable man test. However, following the guidance of *Pope*, we hold that this error was harmless.

In *Pope v. Illinois*, the United States Supreme Court stated that erroneous jury instructions would not necessarily require a retrial "if it can be said beyond a reasonable doubt that the jury's verdict . . . was not affected by the erroneous instruction." *Id.* at ---, 95 L.Ed. 2d at 446, 107 S.Ct. at 1922. In that case the Supreme Court decided that "[w]hile it was error to instruct the juries to use a state community standard in considering the value question, if a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines, the convic-

tions should stand." *Id.* at ---, 95 L.Ed. 2d at 447, 107 S.Ct. at 1922.

Having examined the materials in this case, we conclude that no rational juror, properly instructed, could find value in them. Therefore, we hold that the trial court's error was harmless and that defendant's conviction should stand.

Defendant further argues that the trial court's erroneous instruction was particularly harmful since he had offered expert testimony as to the materials' scientific and educational value. He contends that by instructing the jury that the materials were to be judged by their own standards, the trial court directed the jury to disregard this expert testimony. However, Dr. Nemeroff and Dr. Wade testified only that the materials "could" have scientific and educational value, not that they did. In addition, the test is not whether a material has any value, but whether it has "serious" scientific, artistic, literary or political value. *Miller v. California*, 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607. Defendant's experts here did not establish conclusively that the materials had serious scientific or educational value. Therefore, we hold that, despite Dr. Nemeroff's and Dr. Wade's expert testimony as to the material's scientific and educational value, a properly instructed jury would still find no value in them.

[2] Defendant next argues that N.C. Gen. Stat. § 14-190.1(b) is unconstitutional by failing to require the use of a "statewide" community standard in determining what materials are obscene. He further argues that the trial court erred in failing to instruct the jury to apply such a standard. We disagree.

These exact arguments were made by the defendant in *State v. Mayes*, 86 N.C. App. 569, 359 S.E. 2d 30 (1987). In that case, this Court held that "neither G.S. § 14-190.1 nor the judge's instructions in this case contravene the Constitution of the United States by failing to specify what is meant by 'community.'" *Id.* at 574, 359 S.E. 2d at 34. In addition, the Court stated that:

> Our General Assembly chose not to define "community" in precise geographic terms when it enacted G.S. 14-190.1. In the absence of a precise statutory specification of "community," the trial judge properly declined to judicially restrict or expand that term, permitting the jurors to apply the stand-

> ards of the community from which they came in much the same manner as they would determine "the propensities of a 'reasonable' person in other areas of the law."

Id., quoting Hamling v. United States, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887, *reh'g denied*, 419 U.S. 885, 42 L.Ed. 2d 129, 95 S.Ct. 157 (1974).

Defendant further argues that N.C. Gen. Stat. § 14-190.1(b) violates the equal protection clause of the North Carolina Constitution by failing to include a statewide standard. This argument was also addressed in *Mayes*, where this Court stated:

> Ours is a large and diverse State, and it is unrealistic to expect to find that the same standards exist throughout the State or that the residents of one part of the State would have knowledge of the community standards held in another area. Thus we hold that permitting jurors to apply the standards of the community from which they come, rather than requiring the application of a uniform statewide standard of obscenity, does not violate the equal protection clause of the North Carolina Constitution.

Id. at 575, 359 S.E. 2d at 35. Accordingly, we find that defendant's arguments on these issues are without merit.

[3] Next, defendant argues that the trial court erred in refusing to allow Dr. Stevenson to testify as to the specific questions and responses from the survey he evaluated. We disagree.

"[T]he trial court retains 'wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony.' " *Id., quoting Hamling v. United States* at 108, 41 L.Ed. 2d at 615, 94 S.Ct. at 2903. Expert testimony is properly excluded when it lacks sufficient probative value and would serve only to confuse the jury. *See State v. Knox*, 78 N.C. App. 493, 337 S.E. 2d 154 (1985).

In the case at bar the trial court properly disallowed Dr. Stevenson's testimony concerning the questions and responses from the survey. This testimony lacked any probative value as to whether the subject materials were either patently offensive or appealed to the prurient interest. The questions dealt primarily with public tolerance of obscene materials in general, rather than

with acceptance of the materials under scrutiny. Yet, even though the questions were irrelevant, Dr. Stevenson was still allowed to testify as to the content of three of the nine questions, as well as to the specific results of one of them. In addition, Dr. Stevenson was allowed to testify that the answers to the questions showed a 2-1 or 3-1 ratio that the average person in Mecklenburg County would not find this kind of material patently offensive. Finally, even if the exclusion of the remaining questions and answers was error, defendant has failed to show that a different result would have been reached at trial had the error in question not been committed. *State v. Knox*, 78 N.C. App. 493, 337 S.E. 2d 154. Therefore, we hold that the trial court properly excluded Dr. Stevenson's testimony and error, if any, was not prejudicial.

[4] Defendant's fourth argument is that the trial court erred in refusing to grant his motion for a mistrial after Officer Trull testified that "[m]y opinion is that [the subject materials] are obscene." We disagree.

The trial court immediately sustained defense counsel's objection to this statement, granted a motion to strike and instructed the jury that the witness's opinion was not evidence in the case. At that point defense counsel moved for a mistrial and the trial judge stated:

> [Officer Trull's] opinion of what the magazines were or were not is not relevant at this stage of the proceedings. I instruct you that his opinion is not relevant at any point in your deliberations. Are there any of you that can't follow that instruction?

Upon the failure of any juror to respond that he could not follow this instruction, the trial judge reiterated his instruction that Officer Trull's "opinion at this time is not competent and shall not be considered by you at any point in your deliberations."

Defendant contends that the trial court's instructions were insufficient to strike the statement from the jury's mind and that a mistrial should have been granted. However, a motion for mistrial is addressed to the sound discretion of the trial judge and absent a showing of gross abuse of that discretion, the trial court's ruling will not be disturbed on appeal. *State v. Glover*, 77 N.C. App. 418, 335 S.E. 2d 86 (1985). In addition, "our legal system

through trial by jury operates on the assumption that a jury is composed of men and women of sufficient intelligence to comply with the court's instructions and they are presumed to have done so." *Id.* at 421, 335 S.E. 2d at 88. Given the prompt and repeated instructions by the trial court, we hold that it properly exercised its discretion in denying defendant's motion for a mistrial.

[5] Defendant argues that the trial court also erred in not granting his motion for a mistrial based on the prosecutor's improper argument to the jury. We disagree.

In his closing argument the district attorney stated to the jury:

> "Is this material shameful to the average person in this community?" You know this material is shameful to the average person in this community. . . . Would the average adult in this community be offended by that material? Certainly they are going to be offended by the material. . . . They would say number 1, it is shameful, and number 2, it is offensive, and that is the test. . . . Does the average citizen in Mecklenburg County, the average adult citizen, will he or she consider this to be shameful, and will they be offended by it, and does it have serious scientific value, and I submit to you the answer is, "No," and that the answer is that this material is shameful and it is offensive.

Defendant contends that the prosecutor misstated the law of obscenity by referring to the materials as shameful and offensive rather than stating that the material must be patently offensive and appeal to a prurient interest in sex. Defendant argues that the court's failure to sustain objections to these statements and to give curative instructions constituted prejudicial error. However, the district attorney was not arguing that the jury should substitute some test comprised purely of shamefulness and offensiveness for the *Miller* test of obscenity. In fact, the district attorney referred to and defined patent offensiveness and prurient interest, in accordance with *Miller*, several times in his argument. In addition, the trial court properly instructed the jury on the law of obscenity after the district attorney gave his final argument. Therefore, we hold that error, if any, in the district attorney's statement of the law, was not prejudicial.

[6] Defendant also objects to two other portions of the district attorney's argument to the jury. First, defendant argues that the district attorney's reference to the subject materials as "filth" was an improper statement of his personal opinion to the jury. Defendant also objects to the district attorney's statement to the jury that they were to apply the test for obscenity, "not some guy from New York." He contends that this is a hostile reference to defense counsel, Paul Cambria, who is from New York. Defendant contends that these comments were so highly prejudicial as to require a new trial. We disagree.

"The scope of the arguments to the jury is in the sound discretion of the trial judge and his ruling will not be disturbed except upon a finding of prejudicial error." *State v. Spears*, 70 N.C. App. 747, 751, 321 S.E. 2d 13, 15 (1984), *aff'd*, 314 N.C. 319, 333 S.E. 2d 242 (1985). In addition, it is well settled that counsel are allowed wide latitude in arguments to the jury in hotly contested cases. *State v. Wingard*, 317 N.C. 590, 601, 346 S.E. 2d 638, 645 (1986). They are allowed "to argue before the jury law and facts in evidence and all reasonable inferences to be drawn therefrom." *Id.* When the prosecution's argument is viewed as a whole, as it must be, *State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985), we find that the prosecutor's statements were not so grossly improper as to prejudice the defendant. Therefore, we find that the trial court properly denied defendant's objections to these statements.

[7] Defendant next argues that the trial court erred in denying his motion to dismiss for insufficiency of the evidence on the issue of guilty knowledge. We find no merit in this argument.

Under N.C. Gen. Stat. § 14-190.1(a), the prosecutor must prove beyond a reasonable doubt that the person charged "intentionally" disseminated obscenity. This standard requires findings of both "intent" and "guilty knowledge." *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E. 2d 383 (1987). Guilty knowledge requires not only knowledge of the character or nature of the materials, but also knowledge of their *content. Hamling v. United States*, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887 (1974).

Defendant contends that in the present case there is no direct proof that he had any knowledge of the subject materials'

contents, so that his motion to dismiss should have been granted. On a motion to dismiss the evidence must be considered in the light most favorable to the State, and the State must be given the benefit of every reasonable inference to be drawn therefrom. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). "The test of the sufficiency of the evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both." *Id.* at 383, 156 S.E. 2d at 682.

The circumstantial evidence here amply established defendant's knowledge of the subject materials' content. First, Officer Trull testified that he had seen defendant in the bookstore on two occasions prior to the date on which the materials were purchased. Also, the box containing the film and the covers of the magazines were illustrated with pictures. Officer Trull testified that these pictures were indicative of the contents of the film and magazines. Finally, the jury had the opportunity to examine the film and magazines themselves to determine whether the box and covers reflected the materials' contents, as proof that defendant had knowledge of such. Viewing this evidence in the light most favorable to the State, we hold that it was sufficient to permit a reasonable inference that defendant had knowledge of the materials' contents. Therefore, we find that defendant's argument on this issue is without merit.

[8] Finally, defendant argues that the trial court should have allowed his motion to dismiss because N.C. Gen. Stat. § 14-190.1 is unconstitutional. He contends that the statute is unconstitutional in that it: (1) fails to set forth a proper scienter requirement; (2) fails to provide for a prompt judicial determination of obscenity; (3) omits the words "in any public place"; (4) is overbroad in its definition of sexual conduct; and (5) fails to include the phrase "taken as a whole" with regard to the examination of a material's literary, artistic, political or scientific value. Each of these constitutional challenges were previously addressed and found meritless 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. In light of this Court's decision in that case, we hold that there was no error in the trial court's denial of defendant's motion to dismiss based on the unconstitutionality of the statute.

In conclusion, we hold that defendant received a fair trial, free of prejudicial error.

No error.

Judge PHILLIPS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I dissent from the majority's holding that the trial court's erroneous jury instruction constituted harmless error under *Pope v. Illinois*, 481 U.S. ---, 95 L.Ed. 2d 439, 107 S.Ct. 1918 (1987). Under *Pope* an erroneous instruction as to the "value" prong of the obscenity test under *Miller v. California*, 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607 (1973) is harmless error if the "reviewing court concludes that *no rational* juror, if properly instructed, *could* find value" in the allegedly obscene materials. *Pope*, 481 U.S. at ---, 95 L.Ed. 2d at 447 (emphasis added). The "properly instructed" condition refers to, among other things, the juror's being instructed to employ the "reasonable person" standard also enunciated in *Pope*.

Without discussion or example, the majority merely states no rational juror could find value in these materials. I disagree. Neither the "reasonableness" nor the "rationality" of Drs. Nemeroff and Wade has been disputed. Their testimony that these materials "could" have scientific and educational value can only mean that, if these doctors were jurors in this case, *they* "could" find serious educational or scientific value in these materials. Despite the majority's implication, the doctors are certainly not required to "conclusively" establish these materials' serious value in order that one rational juror "could" reach the same value judgment reached by the doctors: such an interpretation turns the *Pope* standard on its head. The "no rational juror" basis for finding harmless error under *Pope* is refuted by demonstrating that even one hypothetical "rational" juror could find value in these materials when using the proper "reasonable person" standard.

I note that, in concurrence, Justice Scalia states it would "carry refinement to the point of meaninglessness to ask whether [a reasonable person] *could*" find value in a particular publication. 481 U.S. at ---, 96 L.Ed. 2d at 448 (Scalia, J., concurring) (emphasis in original). Yet, "could" is the key word adopted in the "no rational juror" standard of harmless error. Given Justice Scalia's criticism, I would further note that only four Justices expressly approved the actual "no rational juror" test applied by the majority of this panel to affirm the instant defendant's conviction.

Nevertheless, given this standard, the instant conviction should be reversed: While a properly instructed juror could find no value despite the doctors' testimony, that juror could just as rationally find the necessary value based on that testimony. In light of the "no rational juror" standard under *Pope* and the testimony of Drs. Nemeroff and Wade, I therefore cannot conclude that *no* rational juror could find in these materials the serious scientific, artistic, literary or political value required under *Miller*.

I fail to see how the majority can simply presume its value judgment accords with that of a "reasonable person" while a contrary judgment based upon the actual experience of two experts does not. Indeed, since the majority reaches its conclusion without discussion or example, its opinion is subject to the charge that the majority has merely imposed its own views rather than apply the "reasonable person" test. This is the very defect under *Pope* that I and the majority recognize in the trial court's instructions to this jury.

I refuse to compound the trial court's error and would remand this case for retrial based upon the trial court's failure to instruct in accord with *Pope*. As I would remand the case for retrial, I do not address the defendant's other assignments of error.

FREDERICK RICHARD MATTHEWS, JR., INDIVIDUALLY AND AS THE EXECUTOR OF THE ESTATE OF FREDERICK RICHARD MATTHEWS, SR. v. LESLIE PRIDE JAMES, WILLIAM A. DAVIS, JR., AS HE IS GUARDIAN FOR THE BENEFIT OF COURTNEY SUZANNE PRIDE JAMES, AND BLUE BELL, INC., A DELAWARE CORPORATION

No. 8718SC271

(Filed 15 December 1987)

1. **Wills § 22— change of beneficiary—mental capacity—evidence sufficient for jury**

In an action alleging mental incapacity and undue influence in changing the beneficiary of a pension and profit sharing plan, plaintiff's evidence showed a history of mental illness and alcohol abuse sufficient to take the question of decedent's mental capacity to the jury.

2. **Wills § 21.4— change of beneficiary—undue influence—evidence sufficient for jury**

In an action alleging undue influence in changing the beneficiary of a pension and profit sharing plan, evidence supporting plaintiff's claim of undue influence was sufficient to go to the jury where decedent was seventy-three years old when he executed the change of beneficiary forms; decedent was a chronic alcoholic and suffered from manic depression; decedent attempted to take his own life less than one month prior to the execution of the forms and did take his own life less than two weeks subsequent to execution of the forms; decedent had been subject to the constant association and supervision of defendant James for approximately two months prior to signing the forms; the person who cared for the decedent prior to the arrival of defendant James testified that decedent was not capable of taking care of himself; both that person and plaintiff's wife testified that at times the decedent could not use the bathroom unassisted and was unable to take care of his own personal hygiene; plaintiff saw the decedent only once during the time he resided with defendant James, and then in the company of defendant James; others were in contact with decedent but he was always accompanied by defendant James; decedent had originally designated his wife and son, the plaintiff, as beneficiary of the profit sharing and pension plan in 1969; decedent changed his designation of beneficiaries in 1984 to defendant James, who was his mother's sister's daughter, and to defendant Davis as guardian for defendant James' daughter; defendant James had been living in California for twenty-six years and had last seen decedent prior to 1984 in 1958, when she was eighteen years old; plaintiff would receive none of the proceeds of decedent's Blue Bell plans under the beneficiary designations executed in 1984; all of the proceeds would be paid to defendant James and her daughter; and the new beneficiary designation was executed shortly after defendant James announced to decedent that she would be leaving decedent permanently instead of returning to care for him after a temporary stay in California.

3. **Wills §§ 21.3, 22.2— change of beneficiary—mental incapacity and undue influence—relevance of evidence**

In an action alleging mental incapacity and undue influence in changing the beneficiary of a pension and profit sharing plan, evidence of plaintiff's relationship with his father, the decedent, prior to his wife's death was relevant in that it tended to show by contrast the decedent's growing irrationality during the last year of his life; evidence of the decedent's hospitalization for alcoholism and manic depression tended to show that the mental instability of the decedent was a recurring problem and allowed the inference that such a problem resurfaced in 1984; the evidence of decedent's competence in 1969 when he signed his original designation of beneficiaries was offered to contrast with decedent's condition in 1984 when he changed the designation and to show the progressive nature of his disorders; testimony as to decedent's drinking habits prior to the execution showed his growing dependence in his loss of physical and mental control; and questions regarding decedent's habits and attitudes toward his yard over the years were offered as a foundation for evidence that in 1984, without any apparent reason, decedent spent lavish amounts of money tending and improving his lawn and yard.

4. **Wills § 23— change of beneficiary—undue influence and mental incapacity—instructions on mental competence and suicide**

In an action alleging mental incapacity and undue influence in changing the beneficiary of pension and profit sharing plans, the court's instructions properly stated the law applicable to the issue of mental incapacity, and defendants' requested instruction that the decedent's suicide could not be considered as evidence on the issue of mental capacity was contrary to the law of the State and was properly rejected by the trial judge.

APPEAL by defendant from *Morgan, Judge*. Judgment entered 2 July 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 1 October 1987.

This is a civil action to rescind change of beneficiary designations executed by Frederick Richard Matthews, Sr. (hereinafter "decedent") on 20 September 1984 for his pension and profit sharing plans administered by his former employer, defendant Blue Bell, Inc. The grounds for rescission asserted in the complaint were breach of contract by defendant Leslie Pride James, lack of mental capacity on the part of decedent, and undue influence exerted by defendant James. After the jury answered the issues related to lack of mental capacity and undue influence in plaintiff's favor, the trial court entered judgment ordering defendant Blue Bell to pay the funds in decedent's accounts to plaintiff pursuant to the decedent's original designation of beneficiary for the plans executed in 1969. Defendant James and defendant

Davis, as guardian for the benefit of Courtney Suzanne Pride James, appeal.

Beskind and Rudolf, P.A., by Heidi G. Chapman and Donald H. Beskind for plaintiff-appellee.

Haines, Short, Campbell and Ferguson by Forrest E. Campbell for defendant-appellants.

PARKER, Judge.

On this appeal, defendants raise three assignments of error: (i) that the trial court erred in denying defendants' motions for directed verdict and for judgment notwithstanding the verdict; (ii) that the trial court erred in admitting evidence of the decedent's mental, emotional, and physical condition at a time remote from the change of beneficiary designations at issue in the case; and (iii) that the trial court erred in refusing to give jury instructions requested by defendants on the presumption of mental competence and the presumption against suicide. We find these assignments to be without merit and hold that there was no reversible error in the court below.

I.

[1] The first question for consideration is whether the trial court erred in denying defendants' motions for directed verdict and for judgment notwithstanding the verdict based on insufficiency of the evidence to go to the jury on the issues of mental capacity and undue influence. In ruling on a motion for directed verdict, the trial judge must consider the evidence in the light most favorable to plaintiff, taking the evidence supporting plaintiff's claims as true, resolving all contradictions, conflicts, and inconsistencies in plaintiff's favor, and giving plaintiff the benefit of every reasonable inference. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E. 2d 333, 337-338 (1985). A motion for judgment notwithstanding the verdict is essentially a renewal of the motion for directed verdict; therefore, if the motion for directed verdict could have been properly granted, the motion for judgment notwithstanding the verdict should be granted. *Id.* at 368-369, 329 S.E. 2d at 337. *See also Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678, 90 A.L.R. 3d 525 (1977).

Our Courts have set out the standard of competency to contract as follows:

> [A] person has mental capacity sufficient to contract if he knows what he is about . . . and . . . the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly.

Sprinkle v. Wellborn, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905) (citations omitted). *See also Ridings v. Ridings*, 55 N.C. App. 630, 633, 286 S.E. 2d 614, 616, *disc. rev. denied*, 305 N.C. 586, 292 S.E. 2d 571 (1982).

At trial, plaintiff presented evidence tending to show the following facts. The decedent was an alcoholic and a diagnosed manic depressive who had been hospitalized on a number of occasions for alcoholism and mental illness. In the year prior to his death, he became more difficult to control, especially after the deaths of his wife and his brother. The decedent's only surviving child, his son, the plaintiff, attempted to care for decedent in plaintiff's home in Chapel Hill, but the decedent insisted on returning to his own home in Greensboro. Ms. Patricia Little, a longtime friend of the family, tried to care for the decedent in his home, but after less than three weeks, she left the decedent. Ms. Little testified that at the time she stayed with and cared for decedent in late June and early July of 1984, the decedent did not have the mental capacity to appreciate or understand the nature or quality of his acts, to understand the nature of his property, to handle his financial affairs, or to care for himself. During this period, decedent made cash gifts of $3,000.00 to his neighbor. When Ms. Little left, plaintiff sought appointment of a guardian for his father through a petition to the court. In late July 1984, defendant James, cousin to decedent, accompanied by her daughter, Courtney Suzanne Pride James, came from California to stay with and care for the decedent. Plaintiff agreed to arrange for defendant James to receive some remuneration either from plaintiff or from the estate of the decedent if she would care for decedent for the rest of his natural life, and plaintiff said he would

consider dropping the guardianship proceedings. The parties also agreed that defendant James would return to California for approximately one month in order to sell her house and make arrangements for her permanent move to North Carolina.

During defendant James's stay in the home of the decedent, the decedent drank excessively on at least two occasions, and tried to commit suicide by drinking vodka on or about 28 August 1984. On 4 September 1984, unbeknownst to plaintiff, the decedent was adjudged to be competent by the Assistant Clerk of Superior Court based on the clerk's observations and on a letter from a psychiatrist. Some time in the middle of September, defendant James announced to the decedent that when she left for California at the beginning of October, she would not be returning. Subsequent to this announcement, on 20 September 1984, the decedent filled out beneficiary designation forms for his Blue Bell plans, changing the beneficiaries from his original designation, made in 1969, of his wife and son to defendants James and Davis, as guardian for the benefit of defendant James's daughter.

Defendant James and her daughter left for California on 1 October 1984. Ms. Hope Fields, who was to temporarily care for the decedent while defendant James was in California, arrived later that same day and learned from the decedent that he had eaten no solid food for ten days, that he had not been taking his medication, and that he had been drinking. On 8 October 1984, Ms. Fields returned to the decedent's home after running some errands and found the decedent slumped in his chair frothing at the mouth with his eyes rolled back. The decedent died that day from what was later determined to be a dosage of cyanide.

In addition to Ms. Little's testimony, plaintiff testified that in August of 1984, when he last saw his father alive, the decedent did not have sufficient mental capacity to handle his personal affairs, to care for himself, to handle his financial affairs, or to understand the nature and effects of his conduct. A psychiatrist testified that when the decedent was hospitalized in May of 1984, he did not have sufficient mental capacity to understand the nature and consequences of his conduct nor could he manage his personal affairs or handle his property. In response to a series of hypothetical questions posed by plaintiff's counsel, the psychiatrist gave his further opinion that the decedent continued to suf-

fer from manic depression, or "bi-polar disorder" through the time of his suicide on 8 October 1984.

Viewed in the light most favorable to plaintiff, plaintiff's evidence showed a history of mental illness and alcohol abuse and was sufficient to take the question of the decedent's mental capacity to contract to the jury. Although defendants presented evidence to the contrary, the jury could have reasonably concluded that on 20 September 1984 defendant lacked the requisite mental capacity to execute the change of beneficiary designation forms.

[2] In order to show undue influence in the execution of a document, a party must show that something operated on the mind of the person who was allegedly influenced that had "a controlling effect sufficient to destroy the person's free agency and to render the instrument not properly an expression of the person's wishes, but rather the expression of the wishes of another or others." *Hardee v. Hardee*, 309 N.C. 753, 756, 309 S.E. 2d 243, 245 (1983). Although there is no mathematical formula by which to ascertain whether there is sufficient evidence of undue influence to take the issue to the jury, several factors have a bearing on the question, including:

1. Old age and physical and mental weakness of the person executing the instrument.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the instrument is different and revokes a prior instrument.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.

Id. at 756-757, 309 S.E. 2d at 245. It must be remembered that " '[u]ndue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence.' " *Id.* at 757,

309 S.E. 2d at 246 (quoting *In re Will of Amelia Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910)).

In the case before us, evidence supporting plaintiff's claim showed that at the time he executed the change of beneficiary forms, the decedent was seventy-three years old, he was a chronic alcoholic, and he suffered from "bi-polar disorder," or manic-depression. Less than one month prior to the execution of the forms, the decedent attempted to take his own life; less than two weeks subsequent to execution of the forms, the decedent did take his own life. Although the decedent was in his own home, he had been subject to the constant association and supervision of defendant James for approximately two months prior to his signing the forms. Ms. Little, who cared for the decedent prior to the arrival of defendant James, testified that the decedent was not capable of taking care of himself. Both plaintiff's wife and Ms. Little testified that at times the decedent could not use the bathroom unassisted and was unable to take care of his own personal hygiene. During the time that defendant James resided with the decedent, plaintiff saw the decedent only once, and then in the company of defendant James. Although others were in contact with the decedent, he was always accompanied by defendant James.

The decedent originally designated his wife and son, the plaintiff, as beneficiaries of the Blue Bell plans in 1969. On 20 September 1984, the decedent changed his designation of beneficiaries to defendant James, who was the decedent's mother's sister's daughter, and to defendant Davis as guardian for defendant James's daughter. Defendant James had been living in California for the past twenty-six years, and the last time she had seen the decedent prior to 1984 was in 1958, when she was eighteen years old. Under the beneficiary designations executed on 20 September 1984, the decedent's son, plaintiff, would receive none of the proceeds of the decedent's Blue Bell plans; all of those proceeds would be paid to the decedent's cousin, defendant James, and her daughter. The new beneficiary designation was executed shortly after defendant James announced to the decedent that instead of returning to care for the decedent after a temporary stay in California, she would be leaving the decedent permanently.

The foregoing evidence is sufficient to permit the jury reasonably to infer that defendant James procured the 20 September 1984 change of beneficiary designations by means of undue influence. Defendants' first assignment of error is overruled.

II.

[3] Defendants' second assignment of error involves twenty-eight excepted-to portions of testimony involving the mental, emotional, and physical condition of the decedent prior to his execution of the change of beneficiary forms on 20 September 1984. Specifically, defendants objected to questions regarding the relationship between the decedent and his son, the plaintiff, in the period prior to the death of the decedent's wife in early 1984; to questions in reference to the decedent's hospitalization for alcoholism and mental illness in 1970 and 1973; to questions regarding the decedent's mental capacity in 1969 when he signed the original designations of beneficiaries for his Blue Bell plans; to questions relating to the decedent's drinking habits over the years; and to questions inquiring as to the decedent's yard work during the time he lived in Greensboro. Defendants object to these areas of inquiry on the basis of relevance, arguing that the events inquired of are too remote to be relevant to the issues in the case, and that any relevance they might have is outweighed by unfair prejudice to defendants. We disagree with this contention.

Our Rules of Evidence define relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." G.S. 8C-1, Rule 401. In general, all relevant evidence is admissible, G.S. 8C-1, Rule 402; however, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." G.S. 8C-1, Rule 403. Whether or not to exclude evidence under this latter rule is a decision within the discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986).

We note at the outset that all evidence favorable to plaintiff will be, by definition, prejudicial to defendants. The test under Rule 403 is whether that prejudice to defendants is unfair. We

find that in each case, the evidence objected to by defendants was relevant and not unfairly prejudicial to defendants.

Although the mental capacity of the decedent to change the beneficiaries of his Blue Bell plans must be determined as of the date of the execution of the forms effecting such change, evidence of the decedent's mental capacity at other times is admissible if it bears on the issue of the decedent's mental capacity at the time he executed the changes. *See In re Daniels*, 67 N.C. App. 533, 535, 313 S.E. 2d 269, 271, *disc. rev. denied*, 311 N.C. 756, 321 S.E. 2d 159 (1984). " 'Evidence of mental condition before and after the critical time is admissible, provided it is not too remote to justify an inference that the same condition existed at the latter time.' " *Id.* at 535, 313 S.E. 2d at 271 (quoting 1 Brandis on North Carolina Evidence § 127 (1982)). Whether or not such evidence is too remote depends on the circumstances of the case interpreted by "the rule of reason and common sense." *In re Will of Hargrove*, 206 N.C. 307, 312, 173 S.E. 577, 579-580 (1934). *See also In re Daniels, supra.* Moreover, undue influence is necessarily proved by a multitude of facts and circumstances surrounding the execution of the document that might suggest the existence of undue influence. *See Hardee v. Hardee, supra.*

Alcoholism and mental illness are conditions that are often progressively debilitating. While evidence of a party's mental or physical condition at a time remote from the execution of a document is generally not admissible, where that party has a progressive degenerative illness, evidence of the party's condition some years prior to and after the date of execution may be admissible to show the onset of the disorder and the gradual deterioration of the party's mind and will. *Compare In re Will of Hargrove, supra* (evidence of mental capacity two to twenty years after execution of will held inadmissible where there was no evidence of progressive mental impairment) *with Moore v. Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966) (evidence of chronic alcoholism before and after surrender of life insurance policy held admissible) *and In re Daniels, supra* (evidence of mental deterioration due to arteriosclerosis up to nine years prior to execution of will held admissible). *See also Ashley v. Delp*, 59 N.C. App. 608, 297 S.E. 2d 905 (1982), *disc. rev. denied*, 308 N.C. 190, 302 S.E. 2d 242 (1983) (evidence of mental capacity eight years prior to and three years

after execution of deed held admissible where mental deficiency is ongoing condition).

Evidence of plaintiff's relationship with his father, the decedent, prior to his wife's death in the winter of 1984 is relevant in that it tends to show by contrast the decedent's growing irrationality during the last year of his life. Evidence of the decedent's hospitalization for alcoholism and manic depression tends to show that the mental instability of the decedent was a recurring problem and allows the inference that such a problem resurfaced in 1984. The evidence of the decedent's competence in 1969 when he signed his original designation of beneficiaries was offered to contrast with the decedent's condition in 1984 when he changed the designation, and again, to show the progressive nature of his disorders. Testimony as to the decedent's drinking habits in the twenty years prior to the execution also shows his growing dependency and his loss of physical and mental control. Finally, questions posed by plaintiff's counsel regarding the decedent's habits and attitudes toward his yard over the years were offered as a foundation for evidence that in the spring and summer of 1984, without any apparent reason, the decedent spent lavish amounts of money tending and improving his lawn and yard. This evidence is admissible in that it tends to show the decedent's growing lack of mental capacity culminating in his signing of the change of beneficiary forms on 20 September 1984.

The foregoing evidence was clearly relevant and admissible to show the decedent's mental incapacity and the exercise of undue influence on him on or about 20 September 1984. Defendants' second assignment of error is overruled.

III.

[4] Defendants' third and final assignment of error is based on the trial court's refusal in instructing the jury to include the language of two statements requested by defendants concerning mental competency and suicide.

Defendants requested the following instruction concerning mental capacity:

> There is a presumption that the Testator, Frederick Matthews, Sr., possessed sufficient mental capacity to execute a valid change of beneficiary in the absence of evidence

to the contrary. Therefore, on this issue, the burden of proof is on the Plaintiffs to overcome the presumption of mental capacity and to prove, by the greater weight of the evidence, that Frederick Matthews, Sr. did not have sufficient mental capacity to make a change of beneficiary on his Blue Bell accounts.

Defendants also requested the following instruction as to the evidence of the decedent's suicide on 8 October 1984:

> The mere fact that there is some evidence that Frederick Matthews, Sr. may have committed suicide is not to be considered as any evidence of his mental capacity on September 20, 1984 when he executed the Beneficiary Changes.

At trial, the court instructed the jury, "The burden of proof . . . is upon the Plaintiff, F. R. Matthews, Jr., to satisfy you by the greater weight of the evidence that Frederick Richard Matthews, Sr., did not have sufficient mental capacity to enter into a change of beneficiary on September 20, 1984." The trial court also instructed the jury as follows:

> A person does not have the mental capacity to change a beneficiary if at the time in question he did not know what he was doing or did not understand the consequences of his act. It makes no difference what caused the lack of capacity if it in fact existed. It is the actual state or condition of the mind itself which controls and not the causes of that condition. However, to have sufficient capacity it was not necessary that he have the capacity to act wisely or discretely [sic] so long as he knew what he was doing and understood the consequences.
>
> . . . .
>
> In this case, members of the jury, there is some evidence tending to show that Frederick Richard Matthews, Sr., attempted to commit suicide on one occasion and died by suicide on another. As regard to this evidence, I instruct you that the lack of mental capacity is not established by the mere fact that Frederick Richard Matthews, Sr., attempted to commit suicide or committed suicide. There is a presumption in law that every person is mentally normal. The evi-

dence of suicide alone is not sufficient to overcome the presumption of mental normalcy, but it is evidence to be considered by you together with all of the other evidence in the case in determining whether Frederick Richard Matthews, Sr., had sufficient mental capacity to change the beneficiary on his Blue Bell plans at the time he signed the beneficiary designation forms on September 20, 1984.

Defendants' tendered statement regarding mental capacity was taken, nearly verbatim, from the North Carolina Civil Patterned Jury Instructions, Section 860.15, on testamentary capacity. The judge's instructions as to plaintiff's burden of showing mental incapacity were taken from the North Carolina Civil Patterned Jury Instructions, Section 505.40, concerning "Rescission of Written Instrument—Mental Incapacity," and accurately state the law as to plaintiff's burden of proof. That a party seeking to avoid a contract has the burden of proof on the question of mental capacity is undisputed, and "Everyone is presumed to be sane until the contrary appears." *Ridings v. Ridings*, 55 N.C. App. at 633, 286 S.E. 2d at 616 (citing 2 Stansbury's N.C. Evidence § 238 (Brandis rev. 1973)). In his instructions the trial judge included the statement, "There is a presumption in law that every person is mentally normal." These instructions properly stated the law applicable to the issue of mental capacity in this case. "The court is not required to charge the jury in the precise language requested so long as the substance of the request is included." *Love v. Pressley*, 34 N.C. App. 503, 513, 239 S.E. 2d 574, 581 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

Defendants' requested instruction that the decedent's suicide may not be considered as any evidence on the issue of mental capacity is contrary to the law of this State and was properly rejected by the trial judge. Evidence of a party's suicide or attempted suicide may be considered as some evidence of his capacity to enter into a contract. Defendants' third and final assignment of error is overruled.

Therefore, for the reasons stated above, we find

No error.

Judges BECTON and JOHNSON concur.

JENNINGS GLASS COMPANY, INC. v. HARRY BRUMMER

HARRY BRUMMER v. JENNINGS GLASS COMPANY, INC.

No. 8728SC300

(Filed 15 December 1987)

1. **Trial § 3.2— deposition of witnesses—illness—denial of continuance**

The trial court did not abuse its discretion in the denial of defendant's motion for a continuance on the ground that plaintiff's deposition of three defense witnesses would delay defendant's trial preparation. Nor did the court abuse its discretion in the denial of defendant's motion for continuance on the ground of serious illness where defendant failed to make a formal motion for continuance on this ground and the trial court noted that defendant had appeared before the court only a week earlier.

2. **Trial § 8— consolidation of claims—defendant absent from motion hearing**

Defendant cannot complain of the trial court's allowance of his motion to consolidate his claim against plaintiff with plaintiff's claim against him when defendant was absent from the motion hearing.

3. **Quasi Contracts and Restitution § 2— extra work not contemplated by contract—quantum meruit recovery**

Plaintiff was entitled to the value of his written contract plus the value of additional services provided to defendant where plaintiff and defendant had agreed, by subsequent oral and written modifications, upon additional work for an increased cost, and plaintiff in fact did additional work not contemplated by the original agreement.

4. **Damages § 11.1— punitive damages for fraud**

Punitive damages were properly awarded in an action to recover for the supply and installation of glasswork where the evidence and findings supported the trial court's conclusion that defendant defrauded plaintiff.

5. **Laborers' and Materialmen's Liens § 8.1— judgment enforcing materialman's lien—effective date and limit of lien**

A judgment enforcing a materialman's lien must be amended to reflect the effective date of the lien and to limit the amount of the lien to the amount stated in the claim of lien.

6. **Unfair Competition § 1— unfair trade practice—failure to pay for services and materials**

Plaintiff was entitled to treble damages and attorney fees for an unfair trade practice where the trial court found that defendant routinely engaged in a pattern of deceitful and misleading practices whereby he secured the services and materials of various businesses and contractors, including plaintiff, without payment of just compensation and without the intent to pay just compensation.

Jennings Glass Co. v. Brummer

APPEALS by defendant Brummer and plaintiff Jennings Glass Company, Inc. from *Gudger, Lamar, Judge*. Judgment entered 22 October 1986 in the BUNCOMBE County Superior Court. Heard in the Court of Appeals 19 October 1987.

For convenience, we shall refer to defendant Brummer as defendant and plaintiff Jennings Glass Company, Inc. as plaintiff. Plaintiff's claim of lien and separate complaint alleging breach of contract against defendant, both filed 14 November 1985, gave rise to the present action. Plaintiff filed an amended complaint on 6 January 1986 seeking, *inter alia*, recovery of amounts owed under the contract, sale of defendant's property pursuant to N.C. Gen. Stat. § 44A *et seq.*, punitive damages, treble damages and attorney's fees under N.C. Gen. Stat. § 75-1.1.

By order dated 19 August 1986 the trial court continued the case until 20 October 1986. The order also required all parties to file by 28 August 1986, a list of all their witnesses to be called at trial.

Defendant, appearing *pro se*, filed a separate action against plaintiff on 3 September 1986 seeking recovery of monies previously paid by defendant. Defendant moved to consolidate his own action with Jennings' which motion was granted 9 October 1986 over plaintiff's objection. Defendant's action was later dismissed by the 22 October 1986 judgment.

Defendant moved to continue the trial on 2 October 1986, asserting as grounds that plaintiff's 10 October 1986 deposition of three of defendant's witnesses would delay defendant's trial preparation and prejudice defendant. The trial court denied the motion on 8 October 1986. On the same day, plaintiff filed supplemental answers previously required by the 19 August 1986 order which listed nine additional witnesses for plaintiff.

When the case came on for trial on 20 October 1986 defendant failed to appear. A woman purporting to be his secretary delivered a letter to the court from a physician in Florida stating that defendant was too ill to attend court. The letter was accompanied by a telegram from defendant's wife containing a similar message. Remarking that defendant had appeared before the trial court within a week of trial, the court refused to continue the case but gave defendant 24 hours in which to appear. The next

day the court received a notarized letter from defendant's Florida physician but defendant did not appear. Defendant made no formal motion to continue nor did he provide any supporting affidavits or other evidence.

The case proceeded to trial on 21 October 1986 without a jury and in defendant's absence. The evidence tended to show that plaintiff, a glass contractor, and defendant, a developer and builder, had, on or around 22 August 1985, contracted for plaintiff to supply and install windows and doors and other glasswork to defendant's residence. The contract also required defendant to make ready all frames, walls, etc. to expedite the installation. The original contract price was $42,648.00. The parties agreed to an additional price of $13.00/sq. ft. for the installation of frames and glass to a swimming pool area. The parties further executed a supplemental agreement providing for the supply of acrylic materials in the amount of $800.00.

Plaintiff's employees timely began work on defendant's residence but discovered that many of the walls, frames and ceilings were "out of plumb" and uneven. The unevenness impaired the installation and delayed plaintiff's work. Defendant refused to correct the frames and walls as required by the contract stating that this was plaintiff's responsibility. Plaintiff's employees eventually straightened the walls and frames and continued work. Subsequently, the parties modified the original contract both in writing and orally to provide for additional work by plaintiff and increased cost to defendant.

On or around 3 October 1986, with approximately 25% of the work under the contract completed, plaintiff requested payment of 25% of the contract price. Defendant refused saying he would have to check with what were apparently his business "people in Miami." Defendant told plaintiff to continue work nonetheless. Two weeks later, with 40% of the work completed, plaintiff again requested payment but defendant refused saying the project was not progressing quickly enough. Defendant also told plaintiff's employee that the original contract would have to be redrafted to satisfy the "people in Miami." Plaintiff agreed to the new contract relying on defendant's promises of future payment and continued to provide labor and materials. Defendant then requested still more work not under contract. Plaintiff's employee refused the

request. Defendant responded saying he would not pay any amounts owed if the work was not done. A few days prior to completion of the work, defendant, for the first time, informed plaintiff that the work was unacceptable. When asked, defendant refused to identify the defective work of which he complained. Plaintiff immediately sent out Mr. Haywood Plott, a construction expert, to inspect the work. Mr. Plott reported that the work met or exceeded the standards for workmanlike construction in the area.

Plaintiff filed a claim of lien on 14 November 1985 which specified the defendant's property by reference to the book and page number in the Buncombe County Registry as well as the beginning and ending dates for the supply of materials.

On or around 15 November 1985 plaintiff made one last request for payment. Defendant refused saying that if suit were brought by plaintiff, defendant and his attorney would delay the litigation process up through an appeal, if any. Defendant again told plaintiff to continue work.

In its judgment the trial court found that pursuant to the contract between the parties, defendant owed plaintiff $70,048.75, less $19,600.00 that defendant had paid by the time of trial. In addition, the trial court found:

> 28. That the Defendant routinely engaged in a pattern of decitful [sic] and misleading practices whereby he secured the services and materials of various businesses and contractors to his benefit, including the Plaintiff, without payment of just compensation by the Defendant and without the intent to pay such just compensation.
>
> 29. That the actions and representations of the Defendant as aforesaid had the capacity to deceive, and were intended to deceive and thereby unfairly obtain credit, which credit was provided by the Plaintiff in the form of beginning and continuing the installation of glass and framing materials even after payment therefore was not forthcoming. That Defendant's consistent avoidance of payment to the Plaintiff was totally unjustified.
>
> 30. That the Defendant's actions in unjustifiably delaying and refusing to make payment to the Plaintiff for an extend-

ed period of time was intended by the Defendant and had the effect of, obtaining the use and benefit of Plaintiff's assets without paying just compensation.

31. That the actions of the Defendant as aforesaid has directly affected the Plaintiff's ability to carry on his business, in that the Defendant's unjustified refusal to pay for the Plaintiff's services and materials has resulted in a cash flow problem in the Plaintiff's business, making it difficult and in some cases impossible for the Plaintiff to accept certain jobs, to make its payroll, and to pay payroll taxes, and to obtain necessary supplies and materials in its business.

Based upon these and other findings of fact, the trial court concluded:

4. That the actions of the Defendant in repeatedly and intentionally making misrepresentations of his intent, and bad faith, as illustrated in the Findings of Fact, which misrepresentations were reasonably relied upon by the Plaintiff to its detriment, constitute fraud and give rise to an award of punitive damages against the Defendant and in favor of the Plaintiff.

Defendant filed notice of appeal on 30 October 1986 and later moved to settle the Record on Appeal. On 13 December 1986 defendant served his proposed Record on Appeal on plaintiff. Plaintiff timely filed an alternative Record on Appeal. Defendant moved for an extension of time to file a new Record on Appeal and for inclusion of certain matters in the Record. Over plaintiff's objections, the trial judge allowed some and excluded other items requested by defendant.

Defendant appeals the judgment awarding plaintiff compensatory and punitive damages. Plaintiff appeals the trial court's ruling that defendant's conduct did not constitute a violation of N.C. Gen. Stat. § 75-1.1 (1985) and the trial court's decision to allow the inclusion of items requested by defendant in the Record on Appeal.

Jackson, Jackson & Burrell, P.A., by Frank B. Jackson and Charles Russell Burrell, for plaintiff-appellee/cross-appellant.

Adams, Hendon, Carson, Crow & Saenger, P.A., by George W. Saenger, for defendant-appellant/cross-appellee.

WELLS, Judge.

Defendant's Appeal

Defendant's first two assignments of error attack the trial court's denial of defendant's motions to continue dated 8 October 1986 and 21 October 1986, respectively. Rulings on motions to continue are addressed to the sound discretion of the trial court. *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976); *State v. Williams*, 51 N.C. App. 613, 277 S.E. 2d 546 (1981). The trial court's ruling is not reviewable absent a manifest abuse of discretion. *Williams, supra.* N.C. Gen. Stat. § 1A-1, Rule 40(b) (1983) requires a showing of good cause on motion for a continuance. *Shankle, supra.* Whether the reasons asserted by movant sufficiently constitute good cause is left to the discretion of the trial court. *Id.* That constituting good cause must necessarily be determined from the facts of each case. *Id.*

[1] In the case at bar, defendant asserts that the 10 October 1986 deposition of his own witnesses would delay his trial preparation thereby causing him prejudice. This assertion is without merit. Defendant should not have been prejudiced by surprise testimony by his own witnesses. On this ruling we defer to the trial court's judgment and overrule the assignment of error.

Defendant contends that his 21 October 1986 motion to continue was improperly denied. Again we disagree. Although defendant claimed serious illness, the trial court noted in response to defendant's absence at the hearing that defendant had only a little more than a week earlier appeared before the court which served to undermine the credibility of his claim. Moreover, defendant's failure to make a formal motion lent support to the trial court's ruling. Again, we defer to the trial court's discretion and overrule this assignment of error.

[2] Defendant next assigns as error the trial court's grant of defendant's motion to consolidate when defendant was absent from the motion hearing. On its face, this states an absurd propo-

sition. Defendant cannot now be heard to complain of the success of his own motion even if granted in his absence. Defendant contends further that he was prejudiced by the consolidation of his case with that of plaintiff's because the 22 October 1986 judgment effectively dismissed his action against plaintiff. This argument is likewise untenable. Whether the trial court should have treated his case as a compulsory counterclaim or a separate action would have no bearing on the dismissal of the defendant's case. This assignment is overruled.

Defendant's fourth assignment of error assails the trial court's admission of nine additional witnesses listed in the 8 October 1986 supplemental answer, asserting a violation of the 19 August 1986 order. However, defendant at no time prior to or during the trial objected to the testimony of these witnesses. Failure to object to the admission of evidence constitutes a waiver of the objection precluding an appeal of the matter. *Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E. 2d 636 (1984); N.C. Gen. Stat. § 8C, Rule 103(d) (1986); 1 Brandis, *North Carolina Evidence*, sec. 27 (2d Rev. Ed. 1982).

Defendant next contends that the evidence adduced at trial supports neither the findings of fact nor conclusions of law rendering the judgment improper. We believe otherwise.

N.C. Gen. Stat. § 1A-1, Rule 52 of the N.C. Rules of Civil Procedure requires a trial judge, sitting without a jury, to make specific findings of fact which support the conclusions of law, which, in turn, support the judgment. *See City of Statesville v. Roth*, 77 N.C. App. 803, 336 S.E. 2d 142 (1985) and cases cited and relied upon therein. On appeal, the trial court's findings are conclusive if they are supported by competent evidence even where there exists some evidence to the contrary. *Id.* Although we have before us a narrative of the trial proceedings in lieu of a transcript (submitted by the consent of both parties), we conclude that the evidence and testimony contained therein overwhelmingly support the trial court's findings in all respects. The only error we note is one of mathematics regarding the amount of the judgment award. The trial court made correct findings regarding the amounts owed plaintiff but failed to carry this through to the judgment. The judgment should be amended to reflect an award of $50,448.75—($70,048.75 less $19,600.00).

[3] By six assignments of error, defendant complains that the award is not based on the contract on which this suit is brought. Claiming that an express contract precludes recovery in *quantum meruit*, reasonable value of services rendered, defendant argues that the plaintiff is limited to a recovery of the contract price only. *Keith v. Day*, 81 N.C. App. 185, 343 S.E. 2d 562 (1986); *Elec-Trol, Inc. v. Contractors, Inc.*, 54 N.C. App. 626, 284 S.E. 2d 119 (1981), *rev. denied*, 305 N.C. 298, 290 S.E. 2d 701 (1982). We disagree. In the present case, plaintiff and defendant had agreed, by subsequent oral and some written modifications, upon additional work for an increased cost. The court found that plaintiff had in fact done the work requested by defendant (work not contemplated in the original contract) which entitled plaintiff to the value of his written contract plus the value of the additional services provided under the modifications. *See Industrial & Textile Piping v. Industrial Rigging*, 69 N.C. App. 511, 317 S.E. 2d 47, *disc. rev. denied*, 312 N.C. 83, 321 S.E. 2d 895 (1984). These assignments are overruled.

[4] Defendant likewise argues that the punitive damages award was not supported by the evidence. In an action for breach of contract where there exists tortious conduct accompanied by aggravating circumstances, punitive damages may be awarded. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). Punitive damages are also available where fraud is found. *Stone v. Martin*, 85 N.C. App. 410, 355 S.E. 2d 255 (1987). Inasmuch as the trial court, based upon numerous findings of fact, concluded that defendant had defrauded plaintiff, all supported by substantial evidence, an award of punitive damages was appropriate.

[5] Defendant correctly points out that the judgment directing the sale of defendant's property pursuant to N.C. Gen. Stat. § 44A-13 (1984) is improper. To enforce a materialman's lien, the judgment must contain a general description of the property and state the effective date of the lien. *Miller v. Lemon Tree Inn*, 32 N.C. App. 524, 233 S.E. 2d 69 (1977). Moreover, the amount recoverable under the lien is limited to the amount claimed in the initial claim, or as here $42,648.00. N.C. Gen. Stat. § 44-13(b). However, because plaintiff pursued this recovery by filing both a claim of lien and this present action, and has at all times maintained its request for a lien in its complaint and appeal, the judgment relating back and incorporating the complaint and claim of

lien includes all the information required under *Miller, supra,* except the effective date of the lien. Plaintiff should not be barred from the benefits of a remedy by the trial court's failure to include in its judgment the beginning and ending dates of the work.

The trial court is instructed on remand to amend the judgment to reflect the effective date of the lien. The judgment must also reflect the limit of $42,648.00, the amount stated in the claim of lien.

Plaintiff's Appeal

[6] Plaintiff cites as error the trial court's refusal to find that the facts supported a claim under N.C. Gen. Stat. § 75-1.1 (1985). We agree with plaintiff and reverse and remand for an amendment to the judgment.

N.C. Gen. Stat. § 75-1.1 declares unlawful the ". . . unfair or deceptive acts or practices in or affecting commerce." The facts which give rise to a Chapter 75 claim necessarily depend on the circumstances of each case and the impact the act(s) or practice(s) has on the marketplace. *Marshall v. Miller,* 302 N.C. 539, 276 S.E. 2d 397 (1981). The statute protects not only individual consumers, but businesses as well. *Concrete Service Corp. v. Investors Group, Inc.,* 79 N.C. App. 678, 340 S.E. 2d 755, *cert. denied,* 317 N.C. 333, 346 S.E. 2d 137 (1986). Proof of fraud necessarily constitutes a violation of G.S. § 75-1.1. Whether the facts found give rise to a Chapter 75 claim is a matter of law to be determined by the trial court, fully reviewable on appeal. *Hardy v. Toler,* 288 N.C. 303, 218 S.E. 2d 342 (1975). Once a Chapter 75 violation is shown, trebling of damages is automatic. *Marshall v. Miller, supra; Hardy v. Toler, supra.*

Our Supreme Court has determined that the concept of unfairness, as contemplated by Chapter 75 ". . . is broader than and includes the concept of 'deception.' [1974] 2 Trade Reg. Rep. (CCH) § 7521. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." (Cites omitted.) *Johnson v. Phoenix Mut. Life Ins. Co.,* 300 N.C. 247, 266 S.E. 2d 610 (1980).

In the present case, the trier of fact specifically found that defendant "routinely engaged in a pattern of deceitful and mis-

leading practices whereby he secured the services and materials of various businesses and contractors to his benefit, including the plaintiff, without payment of just compensation by the defendant and without the intent to pay just compensation." In effect, the trial court found that defendant engaged in a variety of activities which, in this case, leads unerringly to a Chapter 75 claim. We therefore hold that plaintiff is entitled to have its actual damages trebled and to an appropriate award of attorney's fees. As we noted in *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 344 S.E. 2d 297, *rev. denied*, 318 N.C. 283, 347 S.E. 2d 464 (1986), a plaintiff in a case such as this is not entitled to recover both punitive damages and treble damages under G.S. § 75-16. We treat plaintiff's appeal as an election to recover treble damages under a Chapter 75 claim. On remand, the judgment shall be amended to correctly reflect plaintiff's actual damages of $50,448.75. The award of punitive damages shall be stricken, and plaintiff's actual damages shall be trebled. An appropriate award of attorney's fees shall be made.

Because we have decided plaintiff's appeal in its favor, we need not reach plaintiff's arguments regarding the composition of the Record on Appeal.

Affirmed in part, vacated in part, and remanded with instructions.

Judges JOHNSON and COZORT concur.

LOUISE B. HALL, PAUL B. HALL, LUTHER C. HAMMOND, DOROTHY S. HAMMOND AND THE LATTA ROAD NEIGHBORHOOD ASSOCIATION, INC. v. THE CITY OF DURHAM, LOWE'S INVESTMENT CORPORATION, AND B, K, B, INC.

No. 8714SC343

(Filed 15 December 1987)

1. Statutes § 5.1; Municipal Corporations § 30.9— zoning ordinance—evidence of City Council's deliberations—admissible

The trial court did not err in a declaratory judgment action challenging the validity of a zoning ordinance by admitting at the summary judgment

hearing evidence of the City Council's deliberations. Although transcripts of City Council proceedings are not admissible to prove the Council's intent, they may be admissible to prove facts stated therein and the Council's consideration of them; moreover, other evidence in the record supported the court's conclusion that contract zoning occurred.

2. **Municipal Corporations § 30.9— rezoning—contract zoning**

A rezoning constituted unlawful contract zoning where the minutes of the Council meeting showed that discussion centered almost completely around the desirability of the proposed settlement, including collateral promises made by defendant Lowe's, there was no evidence that the tract was unsuitable for development for the uses permitted under the existing R-20 and C-1 zoning or that the tract was more suited for the requested C-4 zoning, and nothing in the record indicated that the Council even considered the suitability of the land for any of the other uses permitted in a C-4 district.

3. **Municipal Corporations § 30.9— contract zoning—provisions authorizing consideration of specific development plan**

Provisions of the Durham City Charter authorizing the City Council to consider a specific development plan in passing upon a zoning request did not obviate the Council's responsibility to determine that the property was suited for all uses permitted in the requested zoning designation. Although the City Council may consider a specific development plan in its deliberations, it is not authorized to base its decision entirely upon that consideration and there is nothing in the law which would allow the Council to limit the actual use made of the property by either the current or future owners.

APPEAL by defendants, Lowe's Investment Corporation, Inc. and B, K, B, Inc. from *Robert H. Hobgood, Judge.* Judgment entered 6 November 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 21 October 1987.

Maxwell, Freeman, and Beason, P.A., by James B. Maxwell and Alice Neece Mosley for plaintiff-appellees.

Loflin & Loflin, by Thomas F. Loflin, III and Dean A. Shangler; and Charles Darsie for defendant-appellants, Lowe's Investment Corporation and B, K, B, Inc. Michaux & Michaux, by Eric Michaux for defendant-appellant, Lowe's Investment Corporation.

BECTON, Judge.

Plaintiffs, Paul and Louise Hall, Luther and Dorothy Hammond, and the Latta Road Neighborhood Association, Inc., filed this action seeking a declaratory judgment concerning the validity of a rezoning amendment adopted by the Durham City Council (the Council), which rezoned approximately 12.9 acres of land near

the intersection of Roxboro and Latta Roads in Durham. The Complaint alleged that the rezoning was invalid because (1) a valid protest petition filed pursuant to N.C. Gen. Stat. Sec. 160A-385 on behalf of residents of the neighborhood near the rezoned property made a three-fourths majority vote by the Council necessary for passage of the amendment, (2) the rezoning was the product of illegal "contract zoning," and (3) the rezoning violated the Durham 2005 Comprehensive Plan for development.

Defendants moved for summary judgment, and a hearing was held 3 November 1986. The trial court, after considering the pleadings, interrogatories, depositions, various exhibits, and arguments of counsel, entered summary judgment for plaintiffs, concluding as a matter of law that the rezoning was invalid because the Council had engaged in prohibited "contract zoning." However, the trial court ruled in favor of defendants on the issue of the protest petition's validity. Plaintiffs conceded at the hearing that they could not prevail on their third claim concerning violation of the City's comprehensive development plan and, for that reason, the judgment did not address that issue.

Defendants, Lowe's Investment Corporation (Lowe's) and B, K, B, Inc. (B,K,B) appeal, contending that the trial court erred (1) by receiving in evidence at the summary judgment hearing the unedited minutes of the Council meeting on the rezoning issue and an affidavit of Karl Hammond concerning statements made at the meeting, and (2) by concluding that the Council had engaged in contract zoning as a matter of law. Plaintiffs cross-assign as error the Court's conclusion that the protest petition was invalid. We affirm the entry of summary judgment for plaintiffs on the issue of contract zoning and, therefore, find it unnecessary to reach the issue presented by plaintiffs' cross-assignment of error.

I

The property in question, owned by defendant B,K,B is an L-shaped piece of land adjacent to Eno Square Shopping Center with frontage along Roxboro Road and extending to within 30 feet of Latta Road. The surrounding area is primarily zoned R-20, single-family residential, and C-1, neighborhood commercial, and consists of residences, neighborhood stores, and service establishments.

On 29 January 1986, defendants Lowe's and B,K,B filed an application with the Durham City Department of Planning and Community Development to rezone the 12.9 acre tract from R-20 and C-1 to C-4(D), heavy commercial with development plan. Lowe's proposed to use the land for operation of a "Home Center" consisting of four buildings, an outdoor lumber storage area, and a parking lot. Lowe's submitted with the application a development plan showing the proposed physical site layout, and including a notation that certain adjoining acreage would be deeded at the time of the development to the Eno River Association, an organization devoted primarily to conservation of the Eno River and its environs. Also included in the Planning Department's file on the rezoning application was a document which described a reverter clause to be placed in the deed from B,K,B to Lowe's, stating that if Lowe's ceased to use the property for a lumberyard and home center, the title would vest in the Eno River Association or, if the Eno River Association no longer existed, in the City of Durham.

The Staff Report of the Planning and Zoning Commission, which was submitted to the City Council, includes a staff recommendation that the rezoning be denied. The "Staff Analysis" section of the Report discusses numerous reasons for the negative recommendation and concludes that the wide range of heavy commercial uses permitted under C-4 zoning are not compatible with the surrounding residential and community-serving commercial areas. The staff's analysis also states:

> Although the development contains a notation that the adjacent R-20 land will be deeded to the Eno River Association, it is important to note that this property dedication is not a part of the development plan. The notation is for information only and should not be considered in analysis of the rezoning request.

Despite the staff's recommendation, the Commission voted 4-2 to recommend that the Council approve the rezoning. The only explanation in the record for the favorable recommendation is contained in the Commission's "Comments" at the end of the Report, which state in part:

> Ken Spaulding, attorney for Lowe's, told the Commission that he has had two meetings with the neighborhood. As a result of those meetings, Lowe's has added a 30-foot land-

> scaped buffer along Latta Road that will remain zoned R-20. Because the land slopes away from Latta Road, the proposed buildings will be hardly visible from the street. To improve traffic, Lowe's will restrict left turns onto Latta Road. In addition, a restriction would be placed on the deed which would require that the rear tract that [sic] would revert to the Eno River Association if Lowe's ceases to operate.

The Durham City Council held a public hearing on 7 April 1986, at which the discussion indicated that a large number of residential neighbors were opposed to the rezoning. The statements of those in favor of the rezoning related to the proposed development, its preferability to some other development, and Lowe's attempts to accommodate community interests. The attorney for Lowe's, in pointing out the company's efforts, stated, in part:

> We [Lowe's] were also concerned about protecting the crooked creek—the dedicating open space to non-profit groups, working with the landowners and also to immediately upon approval of this rezone actually deed over to [sic] the property to Eno River Association (approximately 9 acres). We asked for a C-4(D) plan with unprecedented action by Lowe's Inc. The property used nearest Latta Road—once Lowe's has completed its use on that property, that that [sic] property would in fact go over to the Eno River Association.

Following the public hearing, the Council discussed the matter, and voted 7-6 to rezone the property.

II

[1] Included in the evidence considered by the trial court at the summary judgment hearing were both an expurgated copy, offered by the City, of the minutes of the 7 April 1986 hearing and Council meeting (with comments of Council members deleted), and an unexpurgated copy, submitted by plaintiffs. The court also received, over defendants' objection, an affidavit of Karl Hammond which contains references to some of the comments of Council members which were deleted from the copy of the minutes proffered by the City.

Defendants assign error to the admission of the evidence of the Council's deliberations, citing the rule that a court may not inquire into the motives of a legislative body in determining the

validity of a legislative decision, *see D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 151 S.E. 2d 241 (1966); *Clark's Greenville, Inc. v. West*, 268 N.C. 527, 151 S.E. 2d 5 (1966), and contending that the comments of the Council members are only relevant to show their individual intentions or motives in enacting the rezoning amendment.

However, transcripts of City Council proceedings, although not admissible to prove the intent of the Council, may be admissible "to prove the facts stated therein and the council's consideration of them," *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 227, 258 S.E. 2d 444, 456 (1979), and thus to assist the court in determining whether, based on the evidence before the Council, the rezoning has a reasonable basis or is arbitrary and capricious. In our opinion, the portions of the minutes and the affidavit to which defendants object were properly received by the trial court to show the Council's consideration of the facts before it. Moreover, as discussed hereafter, the other evidence in the record, apart from any consideration of the Council's deliberations, supports the Court's conclusion that contract zoning occurred.

This assignment of error is overruled.

III

[2] Defendants next argue that the undisputed facts before the trial court not only do not establish contract zoning but, in fact, establish that contract zoning did not occur as a matter of law. We disagree.

The basic principles of law concerning rezoning and the prohibition against contract zoning are set forth and explained in *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971), and *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972), in which our Supreme Court held that rezoning in consideration of assurances that a particular tract of land will be developed in accordance with a restricted plan is an invalid exercise of a city's legislative power. *See also Nelson v. City of Burlington*, 80 N.C. App. 285, 341 S.E. 2d 739 (1986); *Willis v. Union County*, 77 N.C. App. 407, 335 S.E. 2d 76 (1985). Because all areas within each zoning classification must be subject to the same restrictions, rezoning is proper only when the surrounding circumstances justify making the property available for *all* uses permissible under the

particular classification. Any action of the City Council which disregards these fundamental concepts of zoning as set forth in the enabling legislation, N.C. Gen. Stat. Sec. 160A-381 *et seq.* (1982 and Cum. Supp. 1985), may be arbitrary and capricious, and thus beyond the Council's legislative authority. *See Allred* at 545, 178 S.E. 2d at 440.

Although the court may not substitute its judgment for that of the City's legislative body concerning the wisdom of imposing restrictions upon the use of property within its jurisdiction, the Court may determine whether the rezoning ordinance was adopted in violation of statutorily required procedures, "or is arbitrary and without reasonable basis in view of the established circumstances." *Blades* at 551, 187 S.E. 2d at 46. From the record before us, we conclude that the challenged rezoning lacks a proper basis and violates the fundamental rules of zoning. First, Lowe's plainly represented to the Planning Commission and the City Council not only that the land would be developed in accordance with its proposed plan, but further, that upon rezoning, the Eno River Association would benefit from both a gift of approximately nine adjacent acres as well as a restriction on the deed of the developed tract. Additional promises made by Lowe's included an agreement with the Eno River Association to stack lumber no higher than ten feet, and a promise to allow the neighborhood to select the color for the building. The minutes of the Council meeting show that discussion centered almost completely around the desirability of the proposed development, including the collateral promises made by Lowe's.

In addition, just as in *Allred* and *Blades*, in which rezoning was held invalid, there is no evidence that the 12.9 acre tract was unsuitable for development for the uses permitted under the existing R-20 and C-1 zoning or that the tract was more suited, under existing circumstances, for C-4 uses. To the contrary, the only evidence on this issue consists of the City staff's analysis which indicates the land was *not* suited to C-4 uses. Equally important, nothing in the record indicates that the Council even *considered* the suitability of this parcel of land for any of the other uses permitted in a C-4 district, such as adult entertainment, correctional institutions, crematoria, heavy equipment sales and storage, or bulk storage of flammable liquids and gases.

[3] Defendants argue that this case is distinguishable from *Allred* and *Blades* due to the existence of provisions of the Durham City Charter, enacted after those decisions, which authorize the City Council to consider a specific development plan in passing upon a rezoning request. Chapter 671, Section 92 of the 1975 North Carolina Session Laws provides, in pertinent part:

> DEVELOPMENT PLANS AND SITE PLANS.
>
> In exercising the zoning power granted to municipalities by G.S. 160A-381, the city council may require that a development plan showing the proposed development of property be submitted with any request for rezoning of such property. *The city council may consider such development plan* in its deliberations *and may require that any site plan subsequently submitted be in conformity with any such approved development plan.*
>
> In addition, the council is authorized to require that a site plan be submitted and approved prior to the issuance of any building permit . . . [t]he council *may* require that site plans be in conformity with previously approved development plans for the same property. (Emphasis added.)

This provision must be harmonized, if possible, with N.C. Gen. Stat. Sec. 160A-382 which states that "all regulations shall be uniform for each class . . . throughout each district," and with Section 160A-383 which requires all zoning regulations to be made "in accordance with a comprehensive plan." One essential of a "comprehensive" zoning ordinance is that all uses permissible within a given classification are available as of right to the owner. *See Allred* at 544, 178 S.E. 2d at 440.

In our opinion, when construed in light of these established principles of zoning, the provisions of the Durham City Charter upon which defendants rely do not obviate the Council's responsibility to determine that the property is suited for all uses permitted in a C-4 district. While the City Council is permitted to *consider* a specific development plan in its deliberations, we are not convinced that it is authorized to base its decision *entirely* upon that consideration. Moreover, although Section 92 appears to allow the Council to insure that the property is actually developed in accordance with the proposed plan by way of a "site plan"

approval, we find nothing in the law which would allow the Council to limit the actual use made of the property by either the current or future owners.

IV

In our view, *Allred* and *Blades* stand not only for the limited principle that rezoning may not be based on assurances that the applicant will make a specific use of the property, but also for the broader principles that property may not be rezoned in reliance upon *any* representations of the applicant and that rezoning must take into account all permitted uses under the new classification. Because, in the present case, the City Council considered a proposed development plan as well as collateral representations concerning adjacent property and deed restrictions controlling future use of the rezoned site, but did not determine the suitability of the land for other C-4 uses, we hold that the challenged rezoning constitutes unlawful contract zoning. Accordingly, the judgment of the trial court is

Affirmed.

Judges PHILLIPS and GREENE concur.

DONALD POWELL AND WIFE, PHYLLIS M. POWELL v. LOIS K. WOLD, AND SEAWELL REALTY & INSURANCE COMPANY

No. 8718SC337

(Filed 15 December 1987)

1. **Fraud § 9— statement of claim for fraud**

Plaintiffs' complaint was sufficient to state a claim against defendant realtors for fraud in failing to disclose to plaintiffs that a major thoroughfare extension was planned to come close to property being purchased by plaintiffs when plaintiffs asked defendants during negotiations for the purchase if there was any factor known to them that would adversely affect the value of the property in the future.

2. **Negligence § 2— statement of claim for negligent misrepresentation**

Plaintiffs' complaint was sufficient to state a claim against defendant realtors for negligent misrepresentation in telling plaintiffs during negotiations for the purchase of a residence that they knew of no factors that would

adversely affect the value of the property when they knew or should have known that a major thoroughfare extension was planned to come close to the property and that this extension would adversely affect the value of the property.

3. Unfair Competition § 1— unfair trade practice—fraud or negligent misrepresentation

Plaintiffs' complaint was sufficient to state a claim for an unfair and deceptive trade practice where it was sufficient to state claims for fraud and negligent misrepresentation by defendant realtors in a commercial setting.

APPEAL by plaintiffs from *Long, Judge*. Judgment entered 5 February 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 October 1987.

Nichols, Caffrey, Hill, Evans & Murrelle by R. Thompson Wright for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by Robert H. Sasser, III, for defendant appellees.

COZORT, Judge.

On 10 October 1986, Donald and Phyllis M. Powell filed a civil complaint naming Seawell Realty and Insurance Company and its agent, Lois K. Wold, as defendants. The basic *allegations* contained in the complaint are: that the plaintiffs and defendants agreed that the defendants, as realtors, would assist the plaintiffs in their effort to find and purchase a house in the Greensboro area; that the plaintiffs located a desirable house; that an offer on the property was made by the plaintiffs and accepted by the sellers; that prior to the purchase the plaintiffs specifically asked the defendants if there was any factor known to them that would adversely affect the value of the property in the future; that the defendant Wold answered that the only adverse affect known to her was that a black family lived nearby; that when the defendant Wold made the above statement, she in fact knew or should have known that a major thoroughfare extension was planned to come close to the property; that defendant Wold knew this street extension would adversely affect the value of the property; and that the value of the property was in fact adversely affected. Plaintiffs alleged that the defendants' acts constituted fraud, negligent misrepresentation, and unfair and deceptive trade practices.

On 17 December 1986, the defendants filed a motion to dismiss alleging that the complaint failed to state a claim upon which relief could be granted under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The trial court granted the defendants' motion to dismiss, on 7 February 1987, and plaintiffs appealed. We reverse.

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a plaintiff's claim. A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that plaintiff is legally entitled to no relief under any construction of the facts asserted. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). With this rule in mind, we shall examine each claim alleged by plaintiffs below, first examining the claim based on fraud.

[1] Actions for fraud in North Carolina are divided into two categories: actual and constructive. A claim of fraud, either actual or constructive, is

> "so multiform as to admit of no rules or definitions. 'It is, indeed, a part of equity doctrine not to define it,' says *Lord Hardwicke*, 'lest the craft of men should find a way of committing fraud which might escape such a rule or definition.' Equity, therefore, will not permit 'annihilation by definition,' but it leaves the way open to punish frauds and to redress wrongs perpetrated by means of them in whatever form they may appear. The presence of fraud, when resorted to by an adroit and crafty person, is at times exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote it. Under such conditions, the inferences legitimately deducible from all the surrounding circumstances furnish, in the absence of direct evidence, and often in the teeth of positive testimony to the contrary, ample ground for concluding that fraud has been resorted to and practiced by one or more of the parties. *Grove v. Spike*, 72 Md., 300.
>
> "*Standard Oil Company v. Hunt*, 187 N.C. 157, 159, 121 S.E. 184, 185 (1924); *Furst v. Merritt*, 190 N.C. 397, 404, 130 S.E. 40 (1925)."

Terry v. Terry, 302 N.C. 77, 82, 273 S.E. 2d 674, 677 (1981). An action in fraud must contain allegations of:

(1) material misrepresentation of a past or existing fact; (2) the representation must be definite and specific; (3) made with knowledge of its falsity or in culpable ignorance of its truth; (4) that the misrepresentation was made with [the] intention that it should be acted upon; (5) that the recipient of the misrepresentation reasonably relied upon it and acted upon it; and (6) that there resulted in damage to the injured party. *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131 (1953); *Harding v. Southern Loan & Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599 (1940).

Rosenthal v. Perkins, 42 N.C. App. 449, 451-52, 257 S.E. 2d 63, 65 (1979). In pleading a claim of fraud, "the circumstances constituting fraud . . . shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b). Further, "in pleading actual fraud the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry*, 302 N.C. at 85, 273 S.E. 2d at 678.

The plaintiffs' pertinent claims for relief are set out in the complaint as follows:

7. During the course of the negotiations with the seller of the property at 1405 Westridge Road, Greensboro, North Carolina, the plaintiff Phyllis M. Powell asked defendant Wold if there were any factors other than the traffic on Westridge Road that would adversely impact the value of the property, to which defendant Wold replied, "Only that there is a black family living down the block." Defendant Wold made no further representation as to any other factors known to her which would adversely impact the value of the property. Such representation by defendant Wold related to facts material to the plaintiffs' decision to purchase the property.

8. At the time defendant Wold made the representation described above, she knew that the project known as the Benjamin Parkway Extension was planned to be constructed in close proximity to the property at 1405 Westridge Road, Greensboro, North Carolina, that such project by the North Carolina Department of Transportation would directly and in-

directly have an impact on the property, and that the pendency and construction of this project would have substantial adverse impact on the value of the property. In the alternative, defendant Wold made said representations with reckless disregard as to their truth or falsity.

9. Defendant Wold made the above representations with the intent that the plaintiffs act upon them. The plaintiffs reasonably relied upon these representations being true in connection with their purchase of the property at 1405 Westridge Road, Greensboro, North Carolina.

10. If the plaintiffs had known the true facts, the plaintiffs would not have purchased said property. As a result of the plaintiffs' reliance upon the false and misleading statements of defendant Wold, the plaintiffs have suffered substantial damages in an amount of at least $125,000.00.

* * * *

12. During the course of negotiations for the purchase of the property at 1405 Westridge Road, Greensboro, North Carolina, defendant Wold failed to disclose to the plaintiffs the fact that the North Carolina Department of Transportation had pending a project for the extension of Benjamin Parkway, which project was planned to be constructed in close proximity of the property which the plaintiffs were interested in purchasing, and which pending project had a substantial impact on the value of the property at 1405 Westridge Road, Greensboro, North Carolina.

13. The plaintiffs had no knowledge of said pending project, and the plaintiffs could not reasonably ascertain the true facts with respect to such pending project. The defendants had a duty to make affirmative disclosure to the plaintiffs the facts pertaining to said pending project in connection with the sale and purchase of property at 1405 Westridge Road, Greensboro, North Carolina.

14. The pendency of the Benjamin Parkway extension project was material to the transaction involving the purchase of the property at 1405 Westridge Road, Greensboro, North Carolina. The defendants intentionally withheld from the plaintiffs facts regarding such project, with the intent

that the plaintiffs act to their detriment in purchasing the property. The plaintiffs reasonably relied upon the defendants to make true and accurate disclosure with regard to facts not reasonably ascertainable by the plaintiffs in the course of the sales transaction.

15. If the plaintiffs had known the true facts, and had the defendant accurately disclosed said facts to the plaintiffs, the plaintiffs would not have proceeded with the purchase of the property at 1405 Westridge Road, Greensboro, North Carolina. As a result of the fraudulent non-disclosure by the defendants, the plaintiffs have been damaged in the sum of at least $125,000.00.

* * * *

17. In the course of performing real estate services for the plaintiffs, defendant Wold undertook the duty to disclose to the plaintiffs relevant factors concerning the property which was under consideration to be purchased by the plaintiffs, and undertook the duty to make true and accurate statements with respect to the property.

18. During the course of the negotiations for the purchase and sale of the property at 1405 Westridge Road, Greensboro, North Carolina, defendant Wold, in response to a question from the plaintiff Phyllis Powell, stated that she was unaware of any factors that might negatively impact on the value of the property. At the time defendant Wold made such representation, she knew or should have known of the existence of the project known as the Benjamin Parkway Extension, and she knew or should have known that said project had a substantial adverse impact upon the value of the property the plaintiffs intended to purchase.

19. The plaintiffs reasonably relied upon the representations of the defendant Wold concerning the value of the property as being true, and the plaintiffs thereafter purchased the property located at 1405 Westridge Road, Greensboro, North Carolina. As a result of the negligent misrepresentations of defendant Wold, the plaintiffs have been damaged in an amount of at least $125,000.00.

First, the plaintiffs alleged that the defendants misrepresented or concealed the existing fact that the Benjamin Parkway Extension was to be constructed in "close proximity" to the property in question. Second, the plaintiffs allege that the misrepresentation or concealment of this material fact was specifically regarding the construction of the extension of a major thoroughfare. Third, the plaintiffs alleged that defendant Wold had, or should have had, prior knowledge that the Parkway Extension was planned. Fourth, the plaintiffs allege that the misrepresentation was made with the intent that it be acted upon. Fifth, the plaintiffs allege that the misrepresentation or concealment was relied upon by them. And sixth, the plaintiffs allege that, because of their reliance, they were damaged in the amount of at least $125,000.00. Although the complaint of the plaintiffs may not constitute a model form for pleading fraud, it does fulfill the statutory and case law prerequisites necessary to avoid a Rule 12(b)(6) dismissal. *See* N.C. Gen. Stat. § 1A-1, Rule 84(7).

[2] We next address plaintiffs' claim for negligent misrepresentation. North Carolina has adopted the Restatement of Torts definition of the requirements for an action based on negligent misrepresentation. *Stanford v. Owens*, 76 N.C. App. 284, 286, 332 S.E. 2d 730, 731-32, *disc. rev. denied*, 314 N.C. 670, 336 S.E. 2d 402 (1985). The Restatement view is:

> "One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon information if
>
> (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
>
> (b) the harm is suffered
>
> (i) by the person or one of the class of persons for whose guidance the information was supplied, and
>
> (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith."

Id. (citations omitted). *See* Restatement (Second) of Torts § 552 (1977).

In substance, the plaintiffs' complaint alleges that the defendants were contacted to, in the course of their business as a realty company, assist the plaintiffs in locating a residence. The complaint continues that, during the negotiations for the property the plaintiffs eventually purchased, the defendant misrepresented, or neglected to communicate, facts critical to the future value of the property. The complaint concludes that, but for this misrepresentation upon which the plaintiffs justifiably relied, the plaintiffs would not be injured in the amount of $125,000.00. We hold that these averments are sufficient to state a claim for negligent misrepresentation, and are thus sufficient to withstand a Rule 12(b)(6) motion to dismiss.

[3] Lastly, as to the plaintiffs' claim for unfair and deceptive trade practices, dismissal was certainly erroneous. Because the claims of the plaintiffs based on fraud and negligent misrepresentation have been held by this Court to be sustainable past a Rule 12(b)(6) motion to dismiss, the claim of unfair and deceptive trade practices cannot be dismissed. "Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive trade practices. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975)." *Webb v. Triad Appraisal*, 84 N.C. App. 446, 449, 352 S.E. 2d 859, 862 (1987). Thus, if the plaintiffs can prove fraud, which we have held they have properly alleged, then in this commercial setting, they will have proved unfair and deceptive trade practices.

In summary, we find the plaintiffs' complaint makes allegations sufficient to withstand the defendants' Rule 12(b)(6) motion on the claims of fraud and negligent misrepresentation. Since a claim of unfair and deceptive trade practices can be established by proving either fraud or negligent misrepresentation in the commercial setting, then that claim too must survive at this point in the litigation. The trial court's order is reversed and the cause is remanded for further proceedings.

Reversed and remanded.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. RICKY VON WILDS

No. 8726SC546

(Filed 15 December 1987)

1. **Obscenity § 2— disseminating obscenity—films introduced—evidence sufficient**

There was sufficient evidence in a prosecution for disseminating obscenity that the material was obscene where each film was admitted into evidence. The State is not required to offer affirmative testimony concerning each of the statutory criteria. N.C.G.S. § 14-190.1(b).

2. **Obscenity § 3— disseminating obscenity—evidence of agreeing to sell—sufficient**

In a prosecution for disseminating obscenity, the evidence was sufficient to support a jury finding that defendant exhibited and agreed to sell the material to an officer where the defendant directed her to a bin where the films were displayed for sale; the films were packaged in boxes upon which were photographs depicting sexual conduct consistent with that depicted in the films themselves; defendant told the officer that the films were on sale; and defendant accepted her money after she selected two of the films. N.C.G.S. § 14-190.1(a)(1), (3) and (4).

3. **Obscenity § 2— disseminating obscenity—definition of community—statute not vague and overbroad**

Contentions in a prosecution for disseminating obscenity that the trial court erred by failing to define the relevant community in that N.C.G.S. § 14-190.1 is vague and overbroad were overruled without discussion.

4. **Obscenity § 3— disseminating obscenity—instructions on intent and guilty knowledge—correct**

The trial court in a prosecution for disseminating obscenity correctly instructed the jury on defendant's intent and guilty knowledge; the State was not required to prove that defendant knew the materials were unlawfully obscene.

5. **Obscenity § 3— disseminating obscenity—activity depicted not alleged in indictment**

The trial court did not err in its instructions in a prosecution for disseminating obscenity by including masturbation in its definition of sexual conduct which could render material obscene, even though masturbation was not alleged in the indictments. Whether the subject matter depicted masturbation is not an element of the crime, only evidence from which a jury could conclude that the material was obscene. N.C.G.S. § 14-190.1(c), N.C.G.S. § 14-190.1 (b)(1).

6. **Obscenity § 3— disseminating obscenity—instructions—no error**

The trial court did not err in a prosecution for disseminating obscenity by refusing to define certain terms such as sale and agreeing to sell as proposed in defendant's requested instructions where the instructions requested were

inappropriate and had the potential to mislead and confuse the jury; moreover, even if the jury erred in failing to give the requested instructions, defendant failed to demonstrate any prejudice as the words sale and agreeing to sell were so generally used and the meaning so commonly understood as to require no further definition.

7. Obscenity § 3— disseminating obscenity—two films purchased in one transaction—two convictions

The trial court did not err in a prosecution for disseminating obscenity arising from the purchase of two films in one transaction by failing to arrest judgment on one of the counts for which defendant was convicted. N.C.G.S. § 14-190.1(a) expressed a clear legislative intent that dissemination of each item will constitute a separate unlawful act; moreover, different evidence was required to prove each offense because the jury was required to make an independent determination as to whether each film was obscene. The Fifth Amendment to the United States Constitution, Art. I, § 19 of the North Carolina Constitution.

APPEAL by defendant from *Owens, Judge.* Judgment entered 4 February 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 November 1987.

Defendant was charged in two separate indictments with disseminating obscenity in violation of G.S. 14-190.1(a). At trial, the State presented evidence tending to show that on 3 March 1986, Officer C. P. House of the Charlotte Police Department's Vice and Narcotics Bureau went to the Joy Adult Bookstore located on East Independence Boulevard in Charlotte. Upon entering the store, Officer House observed several customers looking at magazines and saw two men, one of whom was defendant, standing behind the counter. Officer House selected two magazines and took them to the counter where defendant was standing. She stated that she was interested in purchasing some films. Defendant showed her a bin containing films and explained to her the way in which she could distinguish between eight millimeter films and Super-8 films. Officer House selected two films, handed them to defendant, and asked if both films were Super-8. Defendant handed one back to her, saying that it was not. She returned it to the bin, selected another film, placed it on the counter with the first film and the two magazines, handed defendant seventy dollars in cash, purchased the items and left the store.

Both of the films purchased by Officer House were received into evidence and were shown to the jury. The first film was entitled "These Bases are Loaded" and contained depictions of

several males engaged in oral and anal sexual intercourse. The second film, entitled "Three of a Kind," depicted a male and two females engaged in various acts of vaginal and oral sexual intercourse and in masturbation.

Defendant offered no evidence. The jury returned verdicts finding defendant guilty as charged in each indictment. From judgment entered on the verdicts, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Howard E. Hill, for the State.

Shelley Blum, attorney for defendant appellant.

MARTIN, Judge.

In this appeal, defendant challenges the constitutionality of G.S. 14-190.1 as well as the sufficiency of the evidence to sustain his convictions for violations of that statute. He also contends that the trial court committed several errors with respect to its instructions to the jury. Finally, defendant argues that since both films were sold in a single transaction, he can be convicted on only one offense and that judgment should be arrested as to one of the two indictments. We overrule each assignment of error and find no prejudicial error in defendant's trial.

By his first assignment of error, defendant contends that the State's evidence was insufficient to support his convictions and that the trial court erred by denying his motions to dismiss the charges. In order to convict a defendant of disseminating obscenity, the State must prove that the defendant 1) disseminates, in any manner described by G.S. 14-190.1(a)(1-4); 2) material which is obscene; and 3) that the defendant acted intentionally and with knowledge of the contents of the material. G.S. 14-190.1; *see State v. Mayes*, 86 N.C. App. 569, 359 S.E. 2d 30, *appeal dismissed and disc. rev. allowed*, 321 N.C. 122, 361 S.E. 2d 599 (1987); *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E. 2d 383 (1987).

[1] Defendant first argues that the State failed to offer substantial evidence that either film was obscene. We disagree.

G.S. 14-190.1(b) provides:

(b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

Although the burden is upon the State to prove that the material is obscene, the State is not required to offer affirmative testimony concerning each of the statutory criteria; the materials themselves are sufficient evidence for a determination of the question of obscenity. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 37 L.Ed. 2d 446, 93 S.Ct. 2628, *reh'g denied*, 414 U.S. 881, 38 L.Ed. 2d 128, 94 S.Ct. 27 (1973). In the present case, each film was admitted into evidence and viewed by the jury. Without question, each film depicted "sexual conduct" as defined by G.S. 14-190.1(c); little else, if anything, was depicted. Viewing these exhibits in the light most favorable to the State, as is required upon a defendant's motion to dismiss criminal charges, *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982), we hold that the films themselves furnish substantial evidence from which a jury could reasonably find that they are obscene within the meaning of G.S. 14-190.1(b).

[2] Defendant also argues that the State failed to offer substantial evidence that he disseminated obscenity in the manner alleged in the indictments, that is, by "exhibiting and agreeing to sell" the films. According to Officer House, defendant directed her to a bin where the films were displayed for sale. The films were packaged in boxes upon which were photographs depicting sexual conduct consistent with that depicted in the films themselves. Defendant told Officer House that the films were "on

sale." After she had selected the two films, he accepted her money. In our view, the evidence was sufficient to support a finding that defendant exhibited obscene material to Officer House, G.S. 14-190.1(a)(3) and (4), and agreed to sell such material to her. G.S. 14-190.1(a)(1). Defendant's first assignment of error is overruled.

[3] By his second assignment of error, defendant contends that the trial court erred by failing to define the relevant "community" when it instructed the jurors to apply contemporary community standards in determining whether the films were obscene. By his third assignment of error, defendant contends that G.S. 14-190.1 is vague and overbroad because it does not define the relevant community and in other unspecified particulars. These issues have previously been decided adversely to defendant; we overrule them without discussion. *See State v. Mayes, supra; Cinema I Video v. Thornburg, supra.*

[4] We also overrule defendant's contention that the trial court erred by instructing the jury that the State was required to prove that defendant knew the content, character and nature of the films but was not required to prove that he knew the materials were unlawfully obscene. The instructions were a correct statement of the law with respect to the issue of defendant's intent and guilty knowledge.

> 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 that he had not brushed up on the law.

Hamling v. United States, 418 U.S. 87, 123, 41 L.Ed. 2d 590, 624, 94 S.Ct. 2887, 2910-11, *reh'g denied*, 419 U.S. 885, 42 L.Ed. 2d 129, 95 S.Ct. 157 (1974).

[5] By his next assignment of error, defendant contends that the trial court erred in the instructions to the jury by including masturbation in its definition of sexual conduct which may render material obscene. He contends that since neither indictment alleged that masturbation was depicted in the film, there was a

possibility that he may have been convicted "based on an element not in the indictment." His argument has no merit.

The act of masturbation is included in the statutory definition of sexual conduct, the depiction of which in a patently offensive way can be obscenity. G.S. 14-190.1(b)(1); G.S. 14-190.1(c)(2). Whether the subject material depicts masturbation, however, is not an element of the crime with which defendant was charged; it is only evidence from which the jury can conclude that the material disseminated is, in fact, obscene. The bill of indictment need not contain allegations of an evidentiary matter. G.S. 15A-924(a)(5). This assignment of error is overruled.

[6] Defendant's remaining assignment of error with respect to the jury instructions is that the trial court erred by refusing to define certain terms such as "sale" and "agreeing to sell" as proposed in defendant's requested instructions. A trial court is required to give, in substance, a requested instruction which is supported by the evidence and correct in the law. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). In the context of the evidence in this case, however, the definitions requested by defendant were inappropriate and had the potential to mislead and confuse the jury. Thus, we find no error in the denial of defendant's request. Moreover, even if the court erred in failing to give the requested instructions, defendant has failed to demonstrate any prejudice as the words "sale" and "agreeing to sell" are so generally used and their meaning so commonly understood as to require no further definition. "The defendant bears the additional burden, when challenging a jury instruction, to show that the jury was misled or misinformed by the charge as given, or that a different result would have been reached had the requested instruction been given." *State v. Carson*, 80 N.C. App. 620, 625, 343 S.E. 2d 275, 278 (1986) (citation omitted).

[7] As his final assignment of error, defendant argues that the trial court erred by refusing to arrest judgment on one of the counts for which he was convicted. Defendant argues that, because both films were sold as part of one transaction, he may be convicted and punished for only one offense of disseminating obscenity. We disagree.

The double jeopardy clauses contained in the Fifth Amendment to the United States Constitution and Article 1, Section 19

of the North Carolina Constitution prohibit, *inter alia*, multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986). The prohibition against multiple punishments is a constraint upon the courts, however, rather than the legislature. *Id.* Thus, if it was the clear intent of the legislature in enacting G.S. 14-190.1 to treat the dissemination of each single item of obscene material as a separate offense, that intent is controlling and a defendant may be convicted for multiple violations of the statute even though all were committed as a part of a single transaction. *Id.*

G.S. 14-190.1(a) provides:

> (a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:
>
> (1) Sells, delivers or provides or offers or agrees to sell, deliver or provide *any obscene writing, picture, record* or other *representation* or *embodiment* of the obscene; or
>
> (2) Presents or directs *an obscene play, dance* or *other performance* or participates directly in that portion thereof which makes it obscene; or
>
> (3) Publishes, exhibits or otherwise makes available *anything obscene*; or
>
> (4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: *any obscene still* or *motion picture, film, filmstrip,* or *projection slide,* or *sound recording, sound tape,* or *sound track,* or *any matter* or *material* of whatever form which is a representation, embodiment, performance, or publication of the obscene.

(Emphasis added.) In our view, the statute prohibits the dissemination of any single obscene item and expresses a clear legislative intent that the dissemination of each such item will constitute a separate unlawful act. *See Educational Books, Inc. v. Commonwealth*, 228 Va. 392, 323 S.E. 2d 84 (1984) (holding that Va. Code § 18.2-374 prohibiting sale of "any obscene item" shows legislative intent that sale of each item shall be a separate offense).

Moreover, different evidence was required to prove each offense because the jury was required to make an independent determination as to whether each film was obscene. Each offense requires proof of a fact not required by the other, i.e., the obscenity of the particular film. Thus, even applying the "same evidence test" stated in *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932), there are two separate offenses and defendant's protections against double jeopardy were not violated. *See Gardner, supra; Educational Books, Inc., supra; State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *City of Madison v. Nickel*, 66 Wis. 2d 71, 223 N.W. 2d 865 (1974). We hold, therefore, that defendant was properly tried for and convicted of a separate offense in connection with his dissemination of each film found by the jury to be obscene notwithstanding that both films were disseminated in one transaction.

No error.

Judges EAGLES and PARKER concur.

BRIAN K. WELLMON v. HICKORY CONSTRUCTION CO., INC.

No. 8718SC137

(Filed 15 December 1987)

Negligence § 57.11— explosion caused by welder's torch—failure to warn of flammable material—insufficient evidence of negligence

In an action to recover damages for injuries sustained by plaintiff steel erector when a barrel of concrete sealant below him was ignited by his welding torch and exploded, plaintiff's evidence was insufficient for the jury to find that defendant general contractor was negligent in failing to warn plaintiff of the danger created by placing the barrel of flammable concrete sealant in an area directly under a place where it knew welders would be working where it tended to show that plaintiff was employed by a steel erection subcontractor and thus was an invitee; the barrel of sealant had been in the middle of the building for two to three weeks for the convenience of concrete finishers and was clearly marked as flammable; plaintiff's foreman had seen the barrel in such location for four days; the barrel was out in the open and in plain view for plaintiff to see; and plaintiff failed to check the area for flammables before he began welding.

Wellmon v. Hickory Construction Co.

APPEAL by plaintiff from *Walker, Judge.* Judgment entered 21 October 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 1 September 1987.

Plaintiff seeks to recover damages for personal injuries sustained when a barrel of concrete sealant below him was ignited by fire from his welding and exploded.

Plaintiff's evidence tended to show that, on 29 August 1986, plaintiff, Brian Wellmon was working as a steel erector for J & J Steel Erector's, Inc. (hereinafter J & J) at the construction site of a square one-story building in High Point, North Carolina. J & J was a subcontractor for the prime contractor, defendant, Hickory Construction Company (hereinafter Hickory).

Plaintiff spent the entire morning at the construction site bolting up and tightening bolts. The building under construction was in its early stages. There were no walls or roof. After returning from lunch, plaintiff's foreman, Forest Hildebrand, instructed plaintiff to begin welding in the bridging. This assignment would require him to run the entire length of the building over the floor.

Concrete finishers, who had been pouring and finishing the floor for approximately two to three weeks, were also working at the time of this incident. Hickory supplied the concrete finishers with a fifty-five gallon barrel of sealant to use in finishing the floor. This sealant was made of highly flammable material, and the barrel label clearly contained such a warning. This barrel was placed in the middle of the building for the concrete finishers' convenience.

Plaintiff started at one corner of the building and used a ladder to get up in the bays to begin welding. Plaintiff, who had been welding for one to two hours, was in his third bay, when he came close to the area where men were pouring concrete. Plaintiff informed the concrete men "it was going to get hot" where he was welding for their protection. Plaintiff testified that if you "cut a piece" when welding, a ball of fire can drop and roll around on the floor. Plaintiff was on his third run, and was sitting down on a bar joist welding in the bridging, when apparently fire from his welding ignited the barrel of concrete sealant below him and exploded. Plaintiff sustained first and second degree burns to his arms, right leg and face.

Plaintiff testified that he did not check the floor and area where he was going to weld; that he did not observe or know that the barrel of flammable sealant was below him before he began to weld; that he didn't check to see if any gas cans were underneath him and that he knew concrete finishers were pouring and finishing concrete at the time he went up to weld.

Plaintiff's foreman, Forest Hildebrand, testified as follows: that he has been in the steel erecting business since 1947; that concrete work is normally performed after steel is erected, but a "rush" job at the site required concrete work and steel erection to be performed simultaneously; that welders customarily look around them to see if there is a gas can or flammables nearby before welding; that he did not know the barrel contained flammables until after the explosion; that he had seen the barrel on location for four days prior to the explosion; that during his years in steel business he had never observed a drum in a building while steel erection was going on; that he would not have allowed welding if he had known the barrel contained flammables; and that he did not know if Hickory's superintendent knew if J & J was to begin welding the day of the explosion.

Jimmy Coffey, the concrete finisher subcontractor, testified to the following: that the barrel of sealant had been in the middle of the building for two to three weeks; that it is customary for sealant to be placed in close proximity to concrete finishing operations, and the barrel was placed in the middle of the building for their convenience; that he knew sealant was flammable; and that Hickory's superintendent checked the job site daily.

Mr. Clontz, Hickory Construction's superintendent, testified to the following: that Hickory was in general charge of safety on the job; that the responsibility for safety was mainly the workers'; that he was on the job each day, and when he was not there, someone was in charge; that one of his responsibilities was to make sure combustibles were not inside the building; that the barrel of sealant should not have been where it was, in terms of custom of safety; that he knew where the drum was, where its warning label appeared and that it should be kept away from flames; that he knew they were bolting up steel, but did not know they were welding, but did know, that after bolting, they would weld; that the drum was not "inside" the building because it had

no walls or roof; and that Mr. Hyde, who stands in as a replacement superintendent, was present when the welding began.

Defendant's motion for directed verdict made at close of plaintiff's evidence was denied. Defendant offered no evidence at trial. At the close of all the evidence, defendant renewed its motion for directed verdict, which motion the trial court allowed upon the grounds that, (1) the evidence failed to establish actionable negligence on the part of the defendant and (2) the evidence showed contributory negligence as a matter of law. Plaintiff appeals.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Michael K. Curtis, for plaintiff appellant.

Smith Helms Mulliss & Moore, by J. Donald Cowan, Jr. and Diane S. Peake, for defendant appellee.

JOHNSON, Judge.

The issues on this appeal concern (1) the granting of defendant's motion for directed verdict made on the grounds of insufficient evidence of negligence; (2) the granting of defendant's motion for directed verdict on the grounds of plaintiff's contributory negligence; and (3) the denial of plaintiff's motion to submit the issue of wilful and wanton negligence to the jury. For the following reasons, we conclude it was not error to grant defendant, Hickory Construction's motion for a directed verdict.

The first issue is whether the court erred in granting defendant's motion for directed verdict based on insufficient evidence of negligence.

A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. On such a motion, the nonmoving party's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom. A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Everhart v.*

LeBrun, 52 N.C. App. 139, 277 S.E. 2d 816 (1981). If, when so viewed, the evidence is such that reasonable minds could differ as to whether the plaintiff is entitled to recover, a directed verdict should not be granted and the case should go to the jury. *State Auto. Mutual Insurance Co. v. Smith Dry Cleaners, Inc.*, 285 N.C. 583, 206 S.E. 2d 210 (1974).

Defendant, as general contractor, subcontracted with plaintiff's employer for steel erection. Plaintiff, as employee of a subcontractor working on the building, was an invitee of defendant. *Southern Railway Co. v. A.D.M. Milling Co.*, 58 N.C. App. 667, 294 S.E. 2d 750 (1982); *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 291 S.E. 2d 287 (1982).

The duty defendant owed to the plaintiff is aptly described in *Deaton v. Board of Trustees of Elon College*, 226 N.C. 433, 438, 38 S.E. 2d 561, 564-65 (1946).

> [I]t is generally held that one who is having work done on his premises by an independent contractor is under the obligation to exercise ordinary care to furnish reasonable protection against the consequences of *hidden dangers* known, or which ought to be known, to the proprietor and not to the contractor or his servants. (Citation omitted) (Emphasis added).
>
> The rule applies *only to latent dangers which the contractor or his servants could not reasonably have discovered and of which the owner knew or should have known.* (Citations omitted) (Emphasis added).
>
> The owner is not responsible to an independent contractor for injuries from defects or dangers of which the contractor knew or should have known, 'but if the defect or danger is hidden and known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor, and if he does not do this he is liable for resultant injury.' (Citations omitted).

Deaton, citing, Douglass v. Peck & L. Co., 89 Conn. 622, 629, 95 A. 22, 25 (1915). Furthermore, "defendant [is] under no duty to warn plaintiff, as an invitee, of an obvious condition or of a condition of which the plaintiff [has] equal or superior knowledge." *Wrenn v.*

Hillcrest Convalescent Home, Inc., 270 N.C. 447, 448, 154 S.E. 2d 483, 484 (1967).

Plaintiff contends defendant was negligent in failing to warn him of the danger created by placing the barrel of concrete sealant, which defendant knew to be flammable or explosive, in an area directly under a place where it knew welders would be operating. We disagree.

The evidence revealed that the barrel of sealant had been in the middle of the building for two to three weeks. The building was in its early stages and had no walls or roof. This sealant was made of highly flammable material, the barrel label contained such a warning, and plaintiff's foreman had observed the barrel on location for four days prior to the explosion.

The evidence further revealed that the custom for welders is to check around for flammables prior to commencing any type of welding. Plaintiff testified he did not inspect the area for flammables before beginning his welding, nor did he inspect during his welding. The evidence also reveals that the barrel was properly labeled and was out in the open, in plain view for plaintiff to see. Since the barrel was in plain view and clearly marked, it was obvious, and its obvious existence required plaintiff to inspect the barrel to ascertain its contents.

Plaintiff relies upon *Diamond v. McDonald Service Stores*, as dispositive in the case *sub judice*. 211 N.C. 632, 191 S.E. 358 (1937). We find it distinguishable.

In *Diamond*, the defendant, operator of a gasoline filling station, engaged an independent contractor to cut some metal upon the premises with an acetylene torch. The plaintiff, a welder, and employee of the independent contractor, examined the area around the work to make sure that no flammable material was located within range of fire from the torch, and finding nothing dangerous, began work. Located about four feet from the point at which plaintiff was using the torch was a barrel of alcohol. On the barrel, in large letters, appeared the words "Firestone Super-pyro Anti-Freeze." Despite having examined the area, plaintiff testified he never saw the can of alcohol that exploded; nor did he know the can was in the pit. The flame from the torch soon came into contact with the barrel of alcohol, and in the ensuing explosion and fire, the plaintiff sustained serious burns.

Reversing a nonsuit, the Supreme Court held that it was for the jury to determine (1) whether the defendant should have warned plaintiff of the presence of the nearby barrel of alcohol, and (2) whether the plaintiff was contributorily negligent.

In the case *sub judice*, there is no evidence from which the jury could reasonably infer that the barrel of sealant was a latent or hidden danger. In *Diamond*, there was a question as to the location of the barrel, creating the issue of a hidden danger, whereas in the case *sub judice*, there is no question as to the location of the barrel or its contents. The barrel was clearly marked and sitting out in the open to be seen by those who but merely looked. "[T]he law is unable to protect those who have eyes and will not see." *Hargrove v. Plumbing and Heating Service of Greensboro, Inc.*, 31 N.C. App. 1, 5, 228 S.E. 2d 461, 464, *cert. denied*, 291 N.C. 448, 230 S.E. 2d 765 (1976).

Plaintiff further contends that even if the barrel was obvious, it would still be a jury question as to whether Hickory fulfilled its duty. We disagree. Plaintiff's foreman had seen the barrel for four days, both plaintiff and his foreman knew this project was a rush job and that the concrete finishers were still working. Under these circumstances defendant had no further duty.

Having determined that the directed verdict on the issue of negligence was proper, we find it unnecessary to review plaintiff's remaining assignments of error.

We conclude, therefore, that the decision of the trial court is

Affirmed.

Judges BECTON and PARKER concur.

BLACK HORSE RUN PROPERTY OWNERS ASSOCIATION—RALEIGH, INC., A NON-PROFIT NORTH CAROLINA CORPORATION v. GEORGE ALLEN KALEEL AND WIFE, FAYE SMITH KALEEL

No. 8710SC363

(Filed 15 December 1987)

1. **Evidence § 33.2— statements about restrictive covenants—hearsay**

Statements made by agents of a subdivision developer to purchasers of a subdivision lot that a radio tower was not a "structure" within the meaning of the subdivision restrictive covenants were inadmissible as hearsay. N.C.G.S. § 8C-1, Rule 801(c).

2. **Deeds § 20.4— restrictive covenants—radio towers as "structures"**

Three radio towers and supporting guy wires and concrete pads are "structures" within the meaning of subdivision restrictive covenants so that written approval of the Architectural Control Committee of the subdivision property owners association was required before they could properly be erected on a subdivision lot.

3. **Deeds § 20.8— no waiver of restrictive covenants**

A subdivision property owners association did not waive its right to enforce a restrictive covenant requiring written approval of plans for any structures against three radio towers erected by a subdivision resident when it gave another resident oral permission to erect a single radio tower not visible to passersby from the street without the submission of plans for approval.

APPEAL by defendants from *Smith, Judge*. Judgment entered 30 November 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 22 October 1987.

This is an action to enforce subdivision restrictive covenants. Plaintiff, Black Horse Run Property Owners Association—Raleigh, Inc. (The Association), is a North Carolina non-profit corporation, the members of which are property owners in Black Horse Run Subdivision in Wake County. Defendants, Mr. and Mrs. Kaleel, are the owners of a lot in the subdivision. Plaintiff brought this action to compel the Kaleels to remove three radio towers, each being at least 100 feet tall, from their lot.

The parties stipulated that the Kaleels' lot is subject to certain restrictive covenants recorded in the Wake County Registry and applicable to Black Horse Run Subdivision. The restrictive covenants provide for their enforcement by The Association and contain, *inter alia*, the following restriction:

> 1. All lots in said Residential Areas shall be used for residential purposes exclusively, except that Company hereby reserves the right to use or allow the use of any of the above described lots or parcels as streets for the purpose of providing access to and from other property, whether or not located in said subdivision. No structure or fence or wall shall be erected, placed or altered on any tract until the construction plans and specifications and a plan showing location of said structure or fence have been approved by the Architectural Control Committee of the BLACK HORSE RUN Property Owners' Association (Declaration of Covenants of said Association being filed herewith) as to quality of workmanship and materials, harmony of external design with existing structures, and as to location with respect to topography and finish grade elevation. No structure, except as hereinafter provided shall be erected, altered, placed or permitted to remain on any lot other than one (1) detached single family dwelling not to exceed two and one-half (2½) stories in height, a stable, and such other accessory buildings as allowed by the Architectural Control Committee. No structure, except a stable, (barn) and fence may be constructed prior to the construction of the main building.

The parties also stipulated that the Kaleels did not submit plans or specifications for construction or location of the radio towers in their lot to the Architectural Control Committee prior to erection of the towers because the Kaleels contend that placement of the towers is not prohibited by the restrictive covenants. According to their stipulation, each tower is supported by three guy wires; each guy wire is anchored in a concrete "pad" weighing 5,000 to 6,000 pounds. Of the defendants' approximately one and one-half acre lot, the towers, guy wires and pads cover an area of approximately 150 square feet. The parties stipulated further that the Kaleels, prior to constructing a house upon their lot, submitted house plans and specifications to the Architectural Control Committee and that such plans were approved.

The case was heard without a jury. The trial court made findings of fact and concluded that the radio towers, guy wires and concrete pads are structures within the meaning of the restrictive covenants and are violative of those covenants. The Kaleels were ordered to dismantle and remove the towers. They appeal.

Boxley, Bolton & Garber, by Ronald H. Garber, for plaintiff-appellee.

George R. Barrett and John T. Hall for defendants-appellants.

MARTIN, Judge.

The basic issue raised by this appeal is whether the Kaleels' radio towers are "structures" within the meaning of the restrictive covenants, so that approval by plaintiff's Architectural Control Committee was required prior to their erection. We hold that they are and affirm the trial court's judgment.

Restrictive covenants are not generally favored in the law; any ambiguities in the restrictions are to be resolved in favor of the free and unrestricted use of the land. *Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E. 2d 174 (1981). Nevertheless, such covenants must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction. *Long v. Branham*, 271 N.C. 264, 156 S.E. 2d 235 (1967).

> In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions.

Id. at 268, 156 S.E. 2d at 238 (emphasis original). A restrictive covenant which requires prior approval of building plans is enforceable when it is applicable to all lots in a subdivision as part of a uniform plan of development. *Boiling Spring Lakes v. Coastal Services Corp.*, 27 N.C. App. 191, 218 S.E. 2d 476 (1975).

[1] Both Mr. and Mrs. Kaleel offered testimony tending to show that during the negotiations for the purchase of their lot, and at the time of the closing, representatives of the original developer of the subdivision told them that radio towers such as those erected by appellants were not considered a "structure" within the meaning of the restrictive covenant. After permitting defendants to make an offer of proof, the trial court sustained plaintiff's objection to the testimony. The Kaleels assign error to the court's ruling, contending that the term "structure," as used in the

restrictive covenant, is ambiguous and that statements made by agents of the developer are admissible to show the developer's intention that its use of that term in the restrictive covenant would not apply to a radio tower. We disagree. The developer is not a party to this action; neither of the agents to whom the statements were attributed was called as a witness. The statements were offered by appellants "in evidence to prove the truth of the matter asserted" and are, therefore, inadmissible as hearsay. G.S. 8C-1, Rule 801(c). This assignment of error is overruled.

Notwithstanding its exclusion of the Kaleels' testimony concerning the developer's representations, the trial court found that such representations had been made and that the Kaleels had, at least in part, relied upon those representations when they purchased their lot. The Kaleels assign error to these findings, since the evidence supporting them had been ruled inadmissible. However, the Kaleels have failed to show that they have been prejudiced in any respect by the error as the improper findings were favorable to them and, in any event, were not required to sustain the court's conclusions of law. Where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions. *Wachovia Bank v. Bounous*, 53 N.C. App. 700, 281 S.E. 2d 712 (1981); *Allen v. Allen*, 7 N.C. App. 555, 173 S.E. 2d 10 (1970).

[2] The Kaleels assign error to the trial court's conclusion that the radio towers which they erected, along with the supporting guy wires and concrete pads, are "structures" within the meaning of the restrictive covenants. They contend that the term "structures" is ambiguous and that the court made no findings of fact with respect to the meaning which the parties intended the term to have. We find no ambiguity and agree with the conclusion of the trial court.

Our Supreme Court has held that radio towers are structures within the meaning of statutes levying a tax upon materials "which shall enter into or become a part of any building or any other kind of structure . . . ." *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 69 S.E. 2d 505 (1952). The Court noted that "structure" is defined as "something constructed or built" and stated "[t]hat a radio tower comes within the accepted defini-

tion of the term 'structure' would seem to be beyond question." *Id.* at 207-8, 69 S.E. 2d at 509. Courts of other states have held that radio towers are "structures" within the meaning of restrictive covenants. *See Mitchell v. Gaulding*, 483 S.W. 2d 41 (Tex. 1972) (125-foot radio tower is a "structure" for purposes of restrictive covenant prohibiting all structures other than single-family residences, private garages and other outbuildings necessary for single-family use); *La Vielle v. Seay*, 412 S.W. 2d 587 (Ky. 1966) (64-foot television reception and ham radio transmission tower is a "structure" for the purposes of restrictive covenant governing construction of a building, wall, fence "or other structure"); *Parker v. Hough*, 420 Pa. 7, 215 A. 2d 667 (1966) (50-foot radio tower is a "structure" for purposes of deed restriction prohibiting structures other than single family dwellings, garages and specified accessory structures). This assignment of error is overruled.

[3] Finally, the Kaleels contend that The Association has waived its right to enforce the restrictive covenant and that the trial court erred in its conclusion to the contrary. Their argument is premised upon evidence, and findings by the trial court, that another resident of the subdivision had erected a single radio tower upon his lot after receiving oral permission from the Architectural Control Committee, but without submitting plans for approval. The tower was subsequently dismantled and removed when the owner sold his lot and moved away from the subdivision.

In our view, these findings do not compel a conclusion that The Association has waived its right to enforce the restriction. An acquiescence in a violation of restrictive covenants does not amount to a waiver of the right to enforce the restrictions "unless changed conditions within the covenanted area are 'so radical as practically to destroy the essential objects and purposes' of the scheme of development." *Barber v. Dixon*, 62 N.C. App. 455, 459, 302 S.E. 2d 915, 918, *disc. rev. denied*, 309 N.C. 191, 305 S.E. 2d 732 (1983); *quoting Tull v. Doctors Building, Inc.*, 255 N.C. 23, 39, 120 S.E. 2d 817, 828 (1961). *Accord Williamson v. Pope*, 60 N.C. App. 539, 299 S.E. 2d 661 (1983) (plaintiffs' failure to enforce covenant against motel in residential area did not waive plaintiffs' right to enforce covenant against convenience store); *Mills v. Enterprises, Inc.*, 36 N.C. App. 410, 244 S.E. 2d 469, *disc. rev. denied*, 295 N.C. 551, 248 S.E. 2d 727 (1978) (use of residential lot

for business parking was not significant enough to constitute waiver of right to enforce covenant prohibiting commercial use); *Van Poole v. Messer*, 25 N.C. App. 203, 212 S.E. 2d 548 (1975) (plaintiffs' failure to enforce covenant against a house trailer on another lot 800 feet from defendants' trailer did not render covenant unenforceable); *Cotton Mills v. Vaughan*, 24 N.C. App. 696, 212 S.E. 2d 199 (1975) (plaintiffs' failure to object to the use of four other residences for business purposes does not constitute waiver of protection of restrictive covenant). *See also* Webster, *Real Estate Law in North Carolina* § 389 (Hetrick rev. 1981 and Supp. 1987). In our view, permitting one property owner to erect a single radio tower which, according to the evidence, was not visible to passersby from the street does not amount to such a radical departure from the restrictive covenants as "practically to destroy the essential objects and purposes" of the covenant and does not, therefore, constitute a waiver of plaintiff's right to enforce the restrictive covenants.

The Kaleels' remaining assignments of error neither merit discussion nor afford any grounds for disturbing the judgment of the trial court. The judgment is affirmed.

Affirmed.

Judges EAGLES and PARKER concur.

WILDWOODS OF LAKE JOHNSON ASSOCIATES, A NORTH CAROLINA PARTNERSHIP, AND WILLIAM P. JOYNER, JR., MARGUERITE B. JOYNER, CHARLES B. DOUTHIT, C. OWEN PHILLIPS, LINDA PHILLIPS, AND SUSANNA CLARK, GENERAL PARTNERS v. L. P. COX COMPANY, AND HARTFORD FIRE INSURANCE COMPANY

No. 8710SC152

(Filed 15 December 1987)

Arbitration and Award § 4— arbitration hearing—improper conduct—award vacated

In an arbitration hearing arising from the construction of an apartment complex, the arbitrators conducted the hearing contrary to the provisions of N.C.G.S. § 1-567.6 in their basic refusal to hear evidence which would have interfered with their desire to dispose of the controversy as quickly as possible and at any and all costs, and their award was vacated.

Wildwoods of Lake Johnson Assoc. v. L. P. Cox Co.

APPEAL by defendants from *Herring, D. B., Jr., Judge*. Judgment entered 9 October 1986 in Superior Court, WAKE County, confirming an arbitration award entered on 28 March 1986. Heard in the Court of Appeals 3 September 1987.

On 1 May 1985, plaintiffs instituted this action pursuant to a contract dispute involving the construction of a multi-unit apartment complex in Raleigh, North Carolina. Also on 1 May 1985, in accordance with the mandatory arbitration provisions contained in the agreement, plaintiffs submitted a formal demand for arbitration to the American Arbitration Association. The original proceeding was stayed pending the decision of the Arbitration Association.

A selection process was conducted by the Arbitration Association and as a result, a panel comprising three arbitrators was chosen. The initial panel consisted of Mr. Robert A. Spence, Sr., Mr. Dolph Van Lannen and Mr. Richard L. Rice. Mr. Rice was later replaced by Mr. Aaron C. Vick after disclosing a possible conflict of interest. The arbitration hearings commenced on 4 February 1986 and continued intermittently until 26 February 1986, during which time the plaintiffs presented evidence as per their complaint as follows: that plaintiff Wildwoods of Lake Johnson Associates (hereinafter known as Wildwoods) is a limited partnership organized and existing under the laws of the State of North Carolina; that all other plaintiffs, William T. Joyner, Jr., Marguerite B. Joyner, Charles E. Douthit, C. Owen Phillips, Linda Phillips and Susanna Clark, are general partners of Wildwoods and appear in their representative capacity; that plaintiffs entered into a contract with defendants L. P. Cox Company (hereinafter known as Cox) and Hartford Fire Insurance Company (hereinafter known as Hartford) on 12 September 1983, under which defendant Cox became obligated to build and construct as general contractor, an apartment complex for the plaintiffs; that defendant Hartford issued, as surety, performance and labor and material payment bonds which guarantee proper performance and insure payment of the subcontractors upon failure of defendant Cox to so perform; and that defendant Cox breached the contract in question by employing defective construction and workmanship in constructing the buildings' exteriors with nails which have since rusted, resulting in defacing the exteriors, by failing to per-

form in a timely fashion as per contract specifications, and by completely abandoning the contract in an incomplete state.

The defendants presented evidence as per their answer and counterclaim to the effect that plaintiffs' prior breach of contract and defaults, occasioned by their interference with and disruption of the orderly and timely progress of the construction work, submission of defective and inadequate plans and specifications, and failure to pay contract balances when due, totally justified their breach, i.e., cessation of work on the project prior to completion.

On 28 March 1986, the panel, on behalf of the American Arbitration Association rendered its decision and awarded plaintiffs the sum of Nine Thousand Six Hundred Eight Dollars ($9,608.00). On 7 April 1986 defendant Cox filed a motion to vacate the arbitration award pursuant to G.S. sec. 1-567.13(4), and on 9 April 1986 plaintiffs filed a motion for confirmation of the award. The motions were consolidated for hearing and evidence was presented in the form of affidavits, transcript excerpts, and portions of the court reporter's original audio tape to the effect that the arbitration panel collectively harassed and badgered witnesses and appellant's attorney; refused to hear evidence; and constantly used profanity and sarcastic comments during the proceeding.

In opposition, Wildwoods held the position and presented evidence in support thereof that the misconduct affected both parties equally and that there was no bias toward one side which would justify vacating the award.

In an order entered 9 October 1986, the trial court noted that:

> the conduct of the arbitration proceeding . . . resulted in conduct which [it] would characterize as uncouth and that the arbitrators exhibited a failure to control counsel, an unfortunate tendency for making jokes during the proceeding and issued statements from which inferences may be made toward one party or the other and were constantly pushing the parties to get on with the case as well as using some profanity during the proceedings; . . .

However, the court found that the misconduct was not prejudicial and therefore confirmed the arbitration award in all respects and entered judgment accordingly. From this order defendants appeal.

McMillan, Kimzey, Smith & Roten, by James M. Kimzey, for plaintiff appellees.

Marshall & Safran, by Grayson G. Kelley, for defendants appellants.

JOHNSON, Judge.

Defendants advance one Assignment of Error on appeal, contending that the trial court erred in granting plaintiff appellees' motion for confirmation of the arbitration award and in denying defendant appellants' motion to vacate the award. Appellants base their assignment of error upon an alleged violation of G.S. 1-567.13 by the arbitration panel which presided over the hearing in question. Upon careful consideration of the record, briefs, and transcript, we agree and thus vacate the award and remand.

It has been well established both at common law, and in accordance with the statutory Uniform Arbitration Act that an arbitration award is presumed valid and the party which seeks to vacate it must shoulder the burden of proving the grounds for attacking its validity. *Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E. 2d 815 (1987); *Turner v. Nicholson Properties, Inc.*, 80 N.C. App. 208, 341 S.E. 2d 42 (1986); *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E. 2d 743 (1981). In addition, public policy favors the confirmation of arbitration awards; there is a presumption of validity and "every reasonable intendment will be indulged in favor of the regularity and integrity of the proceeding." *Bryson v. Higdon*, 222 N.C. 17, 20, 21 S.E. 2d 836, 837-38 (1942). Bearing these principles in mind, however, it becomes crucial to note that such an award is not infallible and a careful review, upon motion, serves to protect the integrity of this system for dispute settlement.

Although the issue regarding adequate grounds for vacating an award has infrequently been addressed, the North Carolina Supreme Court has held that where a party sufficiently meets its burden of demonstrating prejudicial misconduct as specified in G.S. 1-567.13, the award must be vacated. *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 230 S.E. 2d 380 (1976).

In attempting to meet this heavy but not insurmountable burden, appellant Cox relies basically upon the statute in question. G.S. sec. 1-567.13 states in pertinent part:

(a) Upon application of a party, the court shall vacate an award where:

. . . (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

. . . (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy *or otherwise so conducted the hearing, contrary to the provisions of G.S. 1-567.6, as to prejudice substantially the rights of a party*; . . . (emphasis added).

In accordance with the Uniform Arbitration Act, arbitrators are also bound by guidelines set forth in G.S. sec. 1-567.6 in order to insure a full and fair hearing. One provision specifically provides that the parties to the action are entitled to be heard and are also entitled to present evidence which is material to the case or controversy.

Appellants contend that the carnival-like atmosphere which the arbitration panel facilitated from the inception of the proceeding substantially prejudiced their right to a full and fair determination. Specifically, appellants' attorney stated in his affidavit that as a result of continuous comments and sarcastic remarks by the panel he "felt compelled to modify [his] presentation, including the deletion of evidence which [he] had intended to present." He also stated that witnesses testifying on behalf of Cox consulted him as to how they could "avoid being criticized by the Arbitration Panel." Specific instances of the panel's negative conduct directed toward Mr. Safran, appellants' attorney, include colloquies as follows:

Arbitrator Spence: That's argumentative.

Mr. Kimzey: I don't have any further redirect.

Mr. Safran: I just want to repeat that I just hope—

Arbitrator Spence: I don't care to hear that either.

. . .

Q. (Mr. Safran): I'm sorry. I didn't hear that.

A. (Bill Dail): I said, we'd probably have to insulate every pipe in the project. I mean that you know, that—

Mr. Spence: (interposing) Say it one more time, because he may not hear well. Is that what you wanted?

. . .

Mr. Van Lannen: No, I think he's done an admirable job in a confusing situation. (Laughter)

Mr. Myles: You should have seen him on the job.

Mr. Kimzey: "Should have seen him on the job"? [sic] Who said that? Mr. Myles? (Laughs)

Mr. Safran: I don't—I don't mind that kind of interplay. It's just, you know, we're sitting here trying to put together a case—

. . .

Mr. Safran: You'll be pleased by—by the sequencing and timing of Mr. Hughes, Mr. Mann, and so forth.

Mr. Spence: I'm not complaining. It's your lawsuit. I sure as hell am not going to try it for you.

In addition, the panel also directed this impatience and unprofessionalism toward witnesses; as a result some of them became intimidated and apparently felt the necessity of apologizing for even testifying. During his direct testimony, appellants' witness Claude (Bubba) Hughes encountered such behavior as follows:

Mr. Spence: I wonder if we could get some testimony on what the hell was done on this job? . . .

Q. (Mr. Safran) Okay, Bubba, let's go right to—

A. (Interposing) All right.

Q. —the point. Let's give them, right now, the as built plan on exactly what happened at Wildwoods.

A. We can do that, and I apologize for bringing you through this; but I do want you to understand what you're fixing to see.

. . .

Mr. Spence: Don't—don't give us a sermon. Let's just talk about this particular project.

A. Sir, I am.

. . .

Mr. Spence: Do you have any documentary evidence that Mr. Li and the contractor and the architect and the owner ever discussed the possibility of delays?

A. Only what would be in the reports.

Mr. Spence: I'll be damned if I can get an answer to save my neck.

A. I'm sorry.

Based upon these specific illustrations we find the arbitrators conducted this hearing contrary to the provisions of G.S. 1-567.6 in their basic refusal to hear evidence which would interfere with their desire to dispose of this controversy as quickly as possible and apparently at any and all costs. G.S. 1-567.6 provides that the parties are entitled to be heard and to present evidence which is material to the determination of the dispute. In order for the parties to be meaningfully afforded such an entitlement, they must be given a reasonable opportunity to present their respective arguments. Upon careful examination of the evidence we find that appellants have sufficiently met their burden of demonstrating misconduct as contemplated in G.S. 1-567.13. It is for these reasons that we vacate the award of the arbitrators and the order confirming it. This case is remanded to the Superior Court of Wake County for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges BECTON and PARKER concur.

WILLIAM N. NEWMAN v. RALEIGH INTERNAL MEDICINE ASSOCIATES, P.A.

No. 8710SC282

(Filed 15 December 1987)

1. **Master and Servant § 8.1— employment contract—post-termination benefits—engaging in "similar" medical practice**

Even though defendant professional corporation offers a broader scope of medical practice areas than plaintiff physician's present medical group offers, plaintiff's present practice is "similar" to defendant's practice within the meaning of a provision of plaintiff's employment contract with defendant precluding post-termination benefits if plaintiff engages in a "similar" practice in Wake County within three years after beginning employment with defendant.

2. **Contracts § 7.1; Master and Servant § 11.1— post-termination compensation agreement not covenant not to compete**

A provision in plaintiff physician's employment contract with defendant professional corporation precluding post-termination benefits if plaintiff engages in a "similar" medical practice in Wake County within three years after his initial employment with defendant was not a covenant not to compete subject to strict public policy limitations.

3. **Master and Servant § 9— post-termination compensation—competency of affidavit**

Where a physician's employment contract provided for post-termination benefits for a period of ninety days after termination if the physician did not engage in a "similar" medical practice in Wake County within three years after beginning employment with defendant professional corporation, the restriction on competitive employment did not expire at the end of ninety days, and an affidavit comparing plaintiff's statistics and procedures during his employment by defendant with those during other employment in the ten months following his departure from defendant was not incompetent in a summary judgment hearing because it did not restrict such comparison to statistics and procedures within the ninety-day period.

APPEAL by plaintiff from *Ellis, Judge*. Order entered 12 February 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 1 October 1987.

Leboeuf, Lamb, Leiby & MacRae by Peter M. Foley and Albert D. Barnes for plaintiff appellant.

Moore & Van Allen by Richard W. Evans and Thomas W. Steed, Jr., for defendant appellee.

COZORT, Judge.

Plaintiff brought this action to recover post-termination benefits pursuant to his employment contract with defendant. Defendant denied liability and moved for summary judgment on the grounds that plaintiff had forfeited these benefits. From the trial court's order granting defendant's motion, plaintiff appeals. We affirm.

Raleigh Internal Medicine Associates, P.A. (RIMA), is a Raleigh professional corporation specializing in internal medicine and various internal subspecialties, such as cardiology, hematology, gastroenterology, pulmonary disease and allergy care. RIMA offers both primary medical care, where service is offered directly to a patient, and referral care, where a patient is referred to one of RIMA's specialists by another physician.

On 11 July 1983, plaintiff, a physician, entered into an employment contract with RIMA and became associated with its cardiovascular division. While employed by RIMA, plaintiff's primary area of practice was invasive cardiology, but he also practiced a significant amount of general cardiology and a small amount of general internal medicine. The majority of plaintiff's services were provided to patients referred from other doctors.

Plaintiff left RIMA's employ on 31 July 1985, and on 1 August 1985, he began working for Wake Heart Associates (WHA), also in Raleigh, where he has worked since that time. Plaintiff's practice at WHA is generally the same as his practice at RIMA, but on a smaller scale. He practices primarily invasive cardiology, just as he had at RIMA, as well as some general cardiology and general internal medicine. Additionally, all of the services offered by WHA were available from RIMA at the time plaintiff left. During plaintiff's first ten months at WHA, almost ten percent of his patients were former patients at RIMA.

On 21 March 1986, plaintiff commenced this action against RIMA to recover post-termination benefits pursuant to paragraph 11(c) of his employment contract. Paragraph 11(c) provides in part:

> If the Employee's employment is terminated by either party for reasons other than cause, death or disability, the [*sic*] the Corporation shall continue to pay Employee's full base salary for the first thirty (30) days following Employee's

> departure, three-fourths (¾) of Employee's base salary for the second thirty (30) day period, and one-half (½) of Employee's base salary for the third thirty (30) day period thereafter. At ninety (90) days, following departure the productivity bonus formula will be computed and final settlement between departing Employee and Corporation will be made.

RIMA denied liability under paragraph 11(c) on the grounds that plaintiff had forfeited his right to post-termination benefits under the terms of paragraph 11(e) of the employment contract. This paragraph provides:

> (e) *Limitation of Practice.* If Employee voluntarily terminates Employee's employment within three (3) years of Employee's initial employment by the Corporation and in Wake County, North Carolina, directly or indirectly engages in, owns, manages, operates, controls, is employed by, connected with, or participates in any practice or business *similar* to the type of practice or business conducted by the Corporation at the time of termination, the Employee shall forfeit any salary continuation beyond his base salary draw up to the date of termination. (Emphasis added.)

RIMA contended that by engaging in employment at WHA "similar" to what he had done at RIMA, plaintiff was not entitled to any of his post-termination benefits.

Following extensive discovery, plaintiff moved for partial summary judgment on the issue of RIMA's liability to him, but not on the issue of damages. RIMA responded by filing a motion for summary judgment as to the entire complaint on the grounds that plaintiff had forfeited his benefits.

After a hearing, the trial court denied plaintiff's motion, granted RIMA's motion, and dismissed plaintiff's claim with prejudice. From this order, plaintiff appeals.

Plaintiff argues that the trial court erred in granting defendant's motion for summary judgment. We disagree.

The test on a motion for summary judgment made under N.C. Gen. Stat. § 1A-1, Rule 56 and supported by matters outside the pleadings is whether, on the basis of the materials presented

to the court, there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Barbour v. Little*, 37 N.C. App. 686, 247 S.E. 2d 252, *disc. rev. denied*, 295 N.C. 733, 248 S.E. 2d 862 (1978). "A party may show that there is no genuine issue as to any material facts by showing that no facts are in dispute." *Best v. Perry*, 41 N.C. App. 107, 110, 254 S.E. 2d 281, 284 (1979).

In the case *sub judice*, plaintiff and RIMA disagree as to the proper interpretation of paragraph 11(e) of the employment contract. Therefore, an issue of fact has been presented. However,

> [e]ven where, . . . an issue of fact arises, a party may show that it is not a genuine issue as to a material fact by showing that the party with the burden of proof in the action will not be able to present substantial evidence which would allow that issue to be resolved in his favor. [Citations omitted.] Therefore, . . . [it] is not a genuine issue as to a material fact if it can be shown that the plaintiff cannot present a forecast of substantial evidence which will be available to her at trial and which would allow that issue to be resolved in her favor.

Id. We hold that plaintiff would not have been able to present evidence at trial which would have allowed a decision in his favor.

[1] Paragraph 11(e) of the employment contract precludes plaintiff's right to post-termination benefits if, within three years of his initial employment with RIMA, he engages in a post-termination practice in Wake County that is "similar" to his practice at RIMA. It is undisputed that plaintiff began his post-termination practice in Wake County within three years of his initial employment at RIMA. Plaintiff contends, however, that the forfeiture of benefits under paragraph 11(e) occurs only if he joins a group practice which offers all, or nearly all, of the services and subspecialties offered by RIMA. Since RIMA is a full service primary care organization offering a broad range of medical care, plaintiff argues that in no way can his practice at WHA, which is primarily a hospital-based, consultative, invasive cardiology practice, be considered similar to RIMA.

We hold that plaintiff's practice at WHA was "similar" to RIMA's practice within the meaning of paragraph 11(e), even

though RIMA offers a broader scope of practice areas than WHA offers. Under plaintiff's purported interpretation of paragraph 11(e), two practices would have to be virtually identical in order to be similar. Clearly, this is not what the contract provision intends. "Similar" is a commonly used word, with an easily ascertainable definition. The American Heritage Dictionary, Second College Edition (1985), defines similar as: "Related in appearance or nature; alike though not identical." We believe the meaning urged by plaintiff is too restrictive and is inconsistent with the commonly understood meaning of "similar."

Plaintiff also argues that the word "similar" creates an ambiguity in paragraph 11(e), which must be strictly construed against RIMA because they were the drafters of the contract. *See Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E. 2d 473 (1974). We have found, however, that the meaning of the word "similar" is clear and unambiguous as it is used in plaintiff's contract. The rule requiring that an ambiguity be construed against the drafter of a contract does not apply.

[2] Plaintiff's argument also implies that paragraph 11(e) is a covenant not to compete subject to strict public policy limitations. We disagree.

> A covenant not to compete is a provision embodied in an employment contract whereby an employee promises not to engage in competitive employment with his employer after termination of employment. Such a covenant is valid and enforceable only if given for a valuable consideration and if the restrictions are reasonable as to terms, time and territory.

Hudson v. Insurance Co., 23 N.C. App. 501, 502, 209 S.E. 2d 416, 417 (1974), *cert. denied*, 286 N.C. 414, 211 S.E. 2d 217 (1975) (citations omitted).

Paragraph 11(e) is not a covenant not to compete; it is merely a "Limitation of Practice" provision. Plaintiff did not promise not to engage in competitive employment. He agreed to forfeit his rights to any post-termination benefits should he decide to engage in a similar practice in Wake County within three years after beginning employment with RIMA. The provision gives RIMA no right to interfere with plaintiff's post-termination practice. It allows RIMA to avoid paying plaintiff additional sums if he

decides to engage in a similar practice. This Court in *Hudson* stated that a "forfeiture, unlike the restraint included in an employment contract, is not a prohibition on the employee's engaging in competitive work . . . . 'A restriction in the contract which does not *preclude* the employee from engaging in competitive activity, but simply provides for the loss of rights or privileges if he does so is not in restraint of trade . . . .'" *Id.* at 503, 209 S.E. 2d at 418 (emphasis added) (citation omitted). Therefore, such limitations, as the one in plaintiff's contract, are not subject to the strict scrutiny with which courts examine such covenants.

[3] Finally, plaintiff argues that one of RIMA's affidavits submitted in support of its motion for summary judgment was not based on competent evidence and should have been disregarded by the trial court. We disagree.

In support of its motion for summary judgment, RIMA submitted the affidavit of Dr. David Allen Hayes, President of RIMA. In that affidavit Hayes stated that he had compared the procedures and statistics of plaintiff while at RIMA with those of plaintiff in the "ten months immediately following [his] departure from RIMA for Wake Heart Associates." The purpose of this comparison was to show the similarity between plaintiff's practice at RIMA and his practice at WHA. Plaintiff contends, however, that this information should be disregarded, because the ten-month time frame in Hayes' comparison is irrelevant to the Limitation of Practice provision. He contends that since there is no time restriction in paragraph 11(e), the ninety-day period of paragraph 11(c), which requires that post-termination benefits be paid for the first ninety days after departure, should apply to it. Under this theory, plaintiff argues that the restriction on competitive employment would expire at the end of ninety days, so that if he waited ninety days before entering another practice, he would have a clear right to the post-termination benefits. Thus, plaintiff argues, the Hayes' affidavit is incompetent because Hayes did not restrict his analysis to those procedures and statistics occurring within the first three-month period.

We hold that the evidence in the affidavit was admissible and was properly considered. Nothing in the employment contract indicates that the restrictions of paragraph 11(e) are to expire nine-

ty days after termination. Nothing in the contract guarantees an employee the absolute right to post-termination benefits if the employee refrains from engaging in a similar practice for only a ninety-day period. An employee who wishes to engage in a similar practice in Wake County may receive post-termination benefits only if he waits for more than three years after his initial employment with RIMA. This restriction is the only relevant time period applicable to paragraph 11(e). Therefore, the affidavit was properly considered as evidence of plaintiff's post-termination activities.

In summary, we hold that the pleadings and affidavits in this case reveal no genuine issue as to a material fact, and the defendant is entitled to summary judgment. The order of the trial court is

Affirmed.

Judges JOHNSON and GREENE concur.

GARY LEE BRINKLEY, EXECUTOR OF THE ESTATE OF ROBERT L. BRINKLEY, AND GARY LEE BRINKLEY, INDIVIDUALLY v. HELEN W. BRINKLEY DAY

No. 8721DC260

(Filed 15 December 1987)

1. Wills § 34.1— devise of life estate in apartment

Provisions of a will devising an apartment building to testator's son and stating that testator's wife "is to live in the apartment presently occupied by her now for her lifetime" gave testator's wife a life estate in the apartment rather than a mere license to occupy, and this life estate was not defeasible upon the wife's failure to live in the apartment.

2. Wills § 39— equitable lien on income from apartments

Provisions of a will devising an apartment building to testator's son and stating that testator's wife "is to live in the apartment presently occupied by her now for her lifetime rent free, tax free, fire insurance and maintenance free" and that "All expenses of whatsoever kind or of whatsoever nature shall be paid from the apartment income of this property" created an equitable lien on the other apartments in the building devised to testator's son to the extent necessary to pay the taxes, fire insurance, and maintenance on the wife's apartment.

Brinkley v. Day

APPEAL by defendant from *Keiger, Judge.* Judgment entered 29 October 1986 in District Court, FORSYTH County. Heard in the Court of Appeals 30 September 1987.

This is an action to have the parties' respective interests in certain real property declared. Plaintiff, Gary L. Brinkley, is the son of Robert L. Brinkley, who died testate on 3 January 1984. Defendant, Helen W. Brinkley Day, was Robert Brinkley's wife. Paragraph nine of Mr. Brinkley's will devised certain real property to plaintiff, leaving defendant an interest in an apartment which had apparently been the marital home. Since the testator's death, defendant has remarried and has, at least for a time, lived in the State of New York.

Plaintiff filed this action on 13 November 1985, seeking a declaration of the parties' interest in the apartment. Based on the verified pleadings, including an attached copy of the will, and the arguments of counsel, the trial court concluded that plaintiff took the apartment in fee simple, subject to defendant's "license to occupy" it. The trial court also concluded that defendant's license would terminate whenever she vacated or ceased to occupy the apartment. The court found that defendant had not vacated the apartment as of the date of the hearing. Defendant appeals.

Laurel O. Boyles and Steven D. Smith, for the plaintiff-appellee.

Gordon W. Jenkins, for the defendant-appellant.

EAGLES, Judge.

[1] Defendant argues that the trial court erred in declaring that her interest in the apartment was limited to a license to occupy. She contends that the provision grants her a life estate. We agree and reverse the judgment of the trial court.

The relevant portion of the will reads as follows:

> The real estate property located at and known as 1015 Caroline Avenue, Winston-Salem, North Carolina, shall become the property of Gary L. Brinkley and any and all income derived from the operation of these apartments shall be the income of Gary L. Brinkley. Helen W. Brinkley, my wife, is to live in the apartment presently occupied by her now for her

> lifetime rent free, tax free, fire insurance and maintance [sic] free. All expenses of whatsoever kind or of whatsoever nature shall be paid from the apartment income of this property so that Helen W. Brinkley bears no expense of any kind including the apartment in which she is to occupy for her lifetime.

The intention of the testator, as gleaned from the four corners of the will, must be the "polar star" that guides courts in interpreting the provisions of a will. *Wing v. Trust Co.*, 301 N.C. 456, 463, 272 S.E. 2d 90, 95 (1980). What the testator intended the language of his will to mean is a question of law. *Lee v. Barksdale*, 83 N.C. App. 368, 350 S.E. 2d 508 (1986), *disc. rev. denied*, 319 N.C. 404, 354 S.E. 2d 714 (1987). Therefore, the sole issue here on appeal is what legally recognized interests in the apartment the testator intended to devise to the parties. We hold that the testator intended to devise a life estate to defendant with plaintiff taking the remainder in fee.

The trial court erred in classifying defendant's interest as a mere license to occupy the apartment. A license is not an estate and creates no substantial interest in land. *Sanders v. Wilkerson*, 285 N.C. 215, 204 S.E. 2d 17 (1974). Rather, a license merely gives the holder the right to do certain specific acts on the property and is generally revocable at will. *Id.* Consequently, if the instrument grants an interest in, or a right to use and occupy, the land, it should not be construed as granting only a license. 53 C.J.S., "Licenses," section 79 (1948); *see also Rizzo v. Mataranglo*, 135 N.Y.S. 2d 92, 16 Misc. 2d 20 (1953), *aff'd*, 186 N.Y.S. 2d 773, 16 Misc. 2d 21 (1954). We believe the testator intended to devise defendant a substantial interest in the apartment, not a license.

Unlike a license, a life estate is an estate in land, vesting the holder with the right to use and possess the property during his lifetime. *See* Restatement of Property, section 117 (1936). Technical words of conveyance are not necessary. *Keener v. Korn*, 46 N.C. App. 214, 264 S.E. 2d 829, *disc. rev. denied*, 301 N.C. 92 (1980). Consequently, language devising property, "to hold and have in her lifetime," *Owen v. Gates*, 241 N.C. 407, 85 S.E. 2d 340 (1955), to "the girls so long as they (or any one of them) desire (or desires) to live in it," *In re Estate of Heffner*, 61 N.C. App. 646, 301 S.E. 2d 720, *disc. rev. denied*, 308 N.C. 677, 304 S.E. 2d 755

(1983), and "to have a home as long as he lives," *Trimble v. Holley*, 49 Tenn. App. 638, 358 S.W. 2d 343 (1962), are sufficient to show an intent to devise a life estate. Similarly here, the testator's language stating that defendant "is to live in the apartment presently occupied by her now for her lifetime" creates a life estate in the apartment.

In addition to the language of the provision itself, other parts of the will reveal an intent that defendant take a life estate. Except for a 1976 Pontiac automobile, a half interest in a savings and checking account, and another half interest in the balance of another account after payment of $15,000 in specific bequests, the interest in the apartment, together with a devise of all the personal property remaining in the apartment, was all that defendant received under the will. Absent a specific manifestation to the contrary, a will should be construed in favor of the surviving spouse and children. *Coffield v. Peele*, 246 N.C. 661, 100 S.E. 2d 45 (1957). Construing defendant's interest as something less than a life estate results in a division of the testator's property heavily favoring the son. Yet, we find nothing in the will or record to otherwise indicate that intent. Instead, limiting defendant's interest under the will to the apartment, while providing all of the personal property and furnishings which go with it, evidences a testamentary intent to provide defendant with all of the assets necessary to insure that she have a place to live for the rest of her life. A life estate is consistent with that intent.

As plaintiff correctly points out, the first sentence of the provision, by itself, undoubtedly gives plaintiff a fee in all the property, including the apartment. Ordinarily, a devise of real property must be construed to be in fee simple unless the other parts of the will plainly show an intent to create a lesser estate. *Welch v. Schmidt*, 62 N.C. App. 85, 302 S.E. 2d 10 (1983); G.S. 31-38. Here, however, the two sentences following the devise clearly disclose an intent to give plaintiff less than a fee in the apartment. Therefore, plaintiff takes it only in remainder, not in fee.

We are cognizant of other authority in North Carolina designating language similar to that which we have here as an "exclusive right to occupy," *Anders v. Anderson*, 246 N.C. 53, 58, 97 S.E. 2d 415, 419 (1957), and a "privilege of 'use,'" *Thompson v. Ward*, 36 N.C. App. 593, 595, 244 S.E. 2d 485, 486, *disc. rev.*

denied, 295 N.C. 556, 248 S.E. 2d 735 (1978). In construing the provisions of a will, however, the court is attempting to discern the intent of the individual testator from the entire will; other cases are often of little value. *Wilson v. Church*, 284 N.C. 284, 200 S.E. 2d 769 (1973). Defendant's interest under the will here should be construed as a life estate.

As the court noted in *Thompson v. Ward*, *supra*, language that a devisee is to have the premises free of rent and the expense of taxes, insurance, and maintenance, belies its classification as a life estate. A life tenant, of course, has no obligation to pay rent. Moreover, a life tenant owes certain duties to the remaindermen regarding payment for taxes and insurance and the prevention of waste. *See Thompson v. Watkins*, 285 N.C. 616, 207 S.E. 2d 740 (1974); Webster, Real Estate Law in North Carolina, section 54.1 (Hetrick rev. ed. 1981). Nevertheless, read as a whole, we believe the provision was intended to qualify plaintiff's interest, not define defendant's interest.

[2] Ordinarily, the sentence that defendant "is to live in the apartment . . . rent free, tax free, fire insurance free, and maintance [sic] free" might be disregarded as indicating only a wish or desire that plaintiff provide for the apartment's maintenance out of income from the other apartments. *See Y.W.C.A. v. Morgan, Attorney General*, 281 N.C. 485, 189 S.E. 2d 169 (1972). Each phrase and word of a will, however, must be given effect if a reasonable construction will allow it. *Joyner v. Duncan*, 299 N.C. 565, 264 S.E. 2d 76 (1980). Here, the following sentence, stating that "[a]ll expenses of whatsoever kind or of whatsoever nature shall be paid from the apartment income of this property . . ." is an unequivocal direction which may not be disregarded as merely precatory. Consequently, we hold that the will creates an equitable lien on the property devised to plaintiff to the extent necessary to pay the taxes, fire insurance, and maintenance on the apartment defendant holds as a life estate.

An equitable lien on real property is an equitable encumbrance, *Falcone v. Juda*, 71 N.C. App. 790, 323 S.E. 2d 60 (1984), which may arise either out of contractual obligations, or whenever the court declares it necessary under the circumstances of the case from considerations of justice. *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965). In *Moore v. Tilley*, 15 N.C. App. 378, 190

S.E. 2d 243, *cert. denied*, 282 N.C. 153, 191 S.E. 2d 758 (1972), this court held that provisions for support in a will should generally be construed as "constituting an equitable lien or charge upon the land itself which will follow the land into the hands of purchasers." *Id.* at 381, 190 S.E. 2d at 246. The court there held that the testatrix's devise of 150 acres to three of her children with the direction that "they are to give support and home" to her four blind children created an equitable lien against the property for the support of the blind children. In this case, the testator's direction that the income from the other apartments be used to pay the expenses in maintaining defendant's apartment must also constitute an equitable lien on those apartments.

[1] The remaining question regarding defendant's life estate in the apartment is whether it is defeasible, terminating upon her ceasing to live there. Like a fee, a life estate may be defeasible if its continued existence is conditional. *See Blackwood v. Blackwood*, 237 N.C. 726, 76 S.E. 2d 122 (1953). The language of Mr. Brinkley's will is insufficient to show an intent to make defendant's interest in the apartment contingent on her continued residence there. *Cf. Blackwood, supra* ("as long as she remains my widow" grants life estate defeasible upon remarriage); *In re Estate of Heffner, supra* (devise of homeplace to testatrix's daughters "so long as they . . . live in it regularly" with direction to sell property and divide proceeds among all her children afterwards created a defeasible life estate). While it is clear that the testator contemplated that his wife would live in the apartment, nothing indicates he intended her interest to depend on it. Rather, as already noted, his testamentary intent regarding defendant was more general: to provide her with the assets to insure her a place to live for the rest of her life.

The judgment of the trial court is reversed. This case is remanded for a declaration that plaintiff took all the real property devised under the will in fee, subject to defendant's life estate in the apartment and a lien for its maintenance in accordance with the terms of the will.

Reversed.

Judges WELLS and MARTIN concur.

G. R. LITTLE AGENCY, INC. v. ROSABELLE W. JENNINGS

No. 871SC273

(Filed 15 December 1987)

1. **Partnership § 1.1— operation of farm and agribusiness with ex-husband—not a partnership**

In an action to collect unpaid insurance premiums, the trial court, sitting without a jury, correctly concluded that defendant was not a partner with her former husband in his farming and agribusiness enterprises where defendant acted only as an assistant to her ex-husband in that she maintained the farm business accounts; at her husband's direction requested insurance policies as the needs of the farm and family required; made no independent managerial decisions respecting the business; never filed a partnership tax return with her husband; and her husband listed himself as an individual in his social security tax return.

2. **Partnership § 1.1— operation of farm business with ex-husband—not a partnership by estoppel**

In an action to collect unpaid insurance premiums, there was no partnership by estoppel based on defendant's communications with plaintiff's insurance agents where defendant contacted and met with plaintiff's agents at her husband's direction and on behalf of the husband's farm business, and plaintiff's agents dealt with defendant as an agent for the farm.

3. **Accounts § 2— acknowledgment of and promise to pay indebtedness—not account stated**

In an action to collect unpaid insurance premiums, defendant's acknowledgment of and promise to pay the indebtedness coupled with her failure to object to receipt of several notices regarding the indebtedness did not constitute an account stated because plaintiff failed to establish defendant's status as a partner in the farm business, the business being the debtor to which the indebtedness attaches.

4. **Trial § 58— trial without jury—weight given to admissions**

In an action to collect unpaid insurance premiums based on defendant's alleged partnership with her former husband, the trial court, sitting without a jury, did not err by giving slight weight to matters admitted by defendant, which plaintiff contended conclusively established a partnership, where there was substantial competent evidence adduced at trial suggesting the nonexistence of a partnership.

5. **Partnership § 1.1— existence of partnership—bankruptcy proceedings—admissible**

In an action to collect unpaid insurance premiums based on plaintiff's contention that defendant was her ex-husband's partner, the trial court did not err by introducing pleadings and other documents concerning the husband's bankruptcy proceeding. There was sufficient evidence outside the bankruptcy proceedings to support the trial court's findings and conclusions, and the

evidence was introduced for the sole purpose of showing that defendant's ex-husband considered the business to be a sole proprietorship, evidence wholly relevant to the establishment of the existence or nonexistence of a partnership.

6. Evidence § 41— issue of partnership—nonexpert opinion witnesses—admissible

In an action to collect unpaid insurance premiums based on plaintiff's contention that defendant was in a partnership with her ex-husband, the trial court did not err by allowing nonexpert witnesses to express their opinions regarding the existence of a partnership. Opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the trier of fact, and the trial court omitted any reference to the witnesses' testimony in his findings of fact and conclusions of law. N.C.G.S. § 8C-1, Rule 704.

APPEAL by plaintiff from *Watts, Thomas S., Judge.* Judgment entered 22 October 1986 in PASQUOTANK County Superior Court. Heard in the Court of Appeals 19 October 1987.

Plaintiff insurance agency instituted this action to collect unpaid insurance premiums on an open account held in the name of defendant's former husband, J. D. Jennings, Jr. The action came on for trial 20 October 1986, without a jury. The trial court's findings of fact show that defendant and her ex-husband, Joseph D. Jennings, Jr., were separated in May 1983 and divorced in 1984. Prior to their separation, defendant's husband operated farming and other agribusiness enterprises. Defendant performed secretarial and bookkeeping duties for the farm or agribusiness. Her duties included the acquisition of various insurance policies from plaintiff at the direction of her husband. The insurance policies were held variously in the couple's joint names or in the name of J. D. Jennings, Jr. only. Defendant did not make any independent managerial decisions regarding the insurance coverage of the farm business but after the couple separated, defendant personally continued some of the previous insurance policies on properties retained by her after the marriage dissolution. Defendant and her husband never filed a partnership tax form. There existed no partnership agreement between them. Defendant's husband listed himself as a "self-employed individual" in his Schedule SE Social Security tax form regarding his Federal tax liability for his farm business. Following the Jennings' divorce, defendant's husband retained all tax attributes arising from income or losses derived from the farm business.

Although not included in the trial court's findings of fact, evidence was introduced at trial of defendant's husband's bankruptcy petition filed in October 1984. Defendant's husband indicated in his bankruptcy petition form that he operated the farm business as an individual—not as "husband and wife as joint individuals" or as a partnership.

Further evidence presented at trial but not included in the trial court's findings of fact tended to show that defendant told plaintiff's employees that the indebtedness here in issue would be paid from the sale of the farm, which sale did not materialize because her then ex-husband refused to cooperate. Defendant also paid $484.00 from her own personal funds on the indebtedness in June 1983. In January 1985, defendant received a statement from plaintiff setting forth the amount owed ($12,985.59) on the account. Several other notices were sent to and received by defendant to which defendant failed to respond. Plaintiff also served requests for admissions on defendant's attorney seeking to establish a partnership to which requests defendant did not respond. These requests were received into evidence at trial.

Upon its findings of fact, the trial court entered the following pertinent conclusions of law:

> 2. That the Defendant was not a partner as provided in N.C.G.S. 59-36 with her former husband, J. D. Jennings, Jr., . . . in his farming or agribusiness operations.
>
> 3. That the Defendant, Rosabelle W. Jennings, . . . is not liable as a partner by estoppel as defined in N.C.G.S. 59-46, for any amount of the debt owed by her former husband . . . that is the subject of this suit.

The trial court entered judgment for defendant and plaintiff appeals from that judgment.

White, Hall, Mullen, Brumsey & Small, by G. Elvin Small, III, for plaintiff-appellant.

Russell E. Twiford, by Edward A. O'Neal, for defendant-appellee.

WELLS, Judge.

As a threshold matter, on appeal the standard of review for a decision rendered in a non-jury trial is whether there existed competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). The trial judge acts as both judge and jury and resolves any conflicts in the evidence. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

[1] Plaintiff takes issue with the trial court's conclusion that defendant was not a partner with her former husband in his farming business as provided by N.C. Gen. Stat. § 59-36 (1982). We agree with the trial court.

A partnership is a combination of two or more persons, their property, labor, or skill in a common business or venture under an agreement to share profits or losses and where each party to the agreement stands as an agent to the other and the business. *Johnson v. Gill*, 235 N.C. 40, 68 S.E. 2d 788 (1952); *Zickgraf Hardwood Co. v. Seay*, 60 N.C. App. 128, 298 S.E. 2d 208 (1982). In the present case, the trial court found that there existed no partnership agreement to share profits as between defendant and her ex-husband. The findings also indicated that defendant acted only as an assistant to her ex-husband in that she maintained the farm business accounts and, at her husband's direction, requested insurance policies as the needs of the farm and family required. While these activities by defendant may have suggested an agency relationship, with defendant acting as an agent for her husband, they did not necessarily indicate a partnership arrangement. *Dubose Steel, Inc. v. Faircloth*, 59 N.C. App. 722, 298 S.E. 2d 60 (1982) (where on similar facts, this Court suggested that although the evidence of the wife's work for the family farm strongly indicated an agency relationship with her husband, it was only such as would allow but not compel a jury to infer a partnership). Further, the trial court's findings indicate that: defendant made no independent managerial decisions respecting the husband's farm business; she and her husband never filed a partnership tax return; and her husband listed himself as an individual in his social security tax return. All such findings weigh heavily against a conclusion that a partnership, as defined by G.S. § 59-36 and

relevant case law, existed between defendant and her former husband. *See Zickgraf Hardwood Co., supra.* Moreover, defendant's use and enjoyment of profits derived from the farm business do not, in this instance, comprise the element of a partnership contemplated by G.S. § 59-36. Defendant utilized these profits merely for living and subsistence purposes to which she, as her husband's wife, was entitled. Without more, such cannot be construed to comprise a partnership, by implied agreement or otherwise. *Supply Co. v. Reynolds*, 249 N.C. 612, 107 S.E. 2d 80 (1959); *Zickgraf Hardwood Co., supra.*

[2] Plaintiff next contends that there was a partnership by estoppel. We disagree. N.C. Gen. Stat. § 59-46 (1982) provides that where a person represents himself as a partner he is liable to another who, in reliance upon the representation, extends credit to the actual or ostensible partnership. *H-K Corp., Inc. v. Chance*, 25 N.C. App. 61, 212 S.E. 2d 34 (1975). Plaintiff claims that defendant's communications with plaintiff's insurance agents regarding the acquisition of insurance policies for the farm business amounted to a representation of her partnership status. This contention is without merit. Defendant contacted and met with plaintiff's agents at her husband's direction and on behalf of the husband's farm business. Plaintiff's agents dealt with defendant as an agent for the Jennings farm and cannot now claim that defendant was anything other than a representative. *See Zickgraf Hardwood, supra.* These arguments are overruled.

[3] Plaintiff also contends that defendant's acknowledgment of and promises to pay the indebtedness coupled with her failure to object to the receipt of several notices regarding the indebtedness constitute an account stated. We disagree. We note at the outset that the trial court chose to ignore this aspect of the evidence in its findings of fact. Nevertheless, it is axiomatic that an account stated arises only where the indebtedness legitimately attaches to the party allegedly failing to object. *Noland Co., Inc. v. Poovey*, 54 N.C. App. 695, 286 S.E. 2d 813 (1981). Because we hold that plaintiff has failed to establish defendant's status as a partner in the husband's farm business, the business being the debtor to which the indebtedness attaches, defendant cannot be held liable for the indebtedness under an account stated theory.

[4] Plaintiff argues, through seven assignments of error that the trial court committed prejudicial error by giving only slight

weight to matters contained within plaintiff's request for admissions, these matters having been deemed admitted by defendant's failure to respond. N.C. Gen. Stat. § 1A-1, Rule 36(b) (1983). Although plaintiff argues that these matters conclusively established a partnership, the trial court stated at trial that the matters contained within the requests did not necessarily make out a *prima facie* case of partnership and elected to assign greater weight to the testimony at trial. The trial court, when sitting as trier of fact, is empowered to assign weight to the evidence presented at trial as it deems appropriate. *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E. 2d 450 (1971). Moreover, even in the presence of evidence to the contrary, if there is competent evidence to support the trial court's findings and conclusions, the same are binding on appeal. *Ayden Tractors v. Gaskins*, 61 N.C. App. 654, 301 S.E. 2d 523 (1983). In light of the substantiality of competent evidence adduced at trial suggesting the nonexistence of a partnership, we are not persuaded by this argument. These assignments of error are overruled.

[5] Plaintiff further contends that the trial court committed prejudicial error by receiving into evidence copies of pleadings and other documents concerning the husband's bankruptcy proceedings and the trial court's failure to sustain plaintiff's objections to the testimony regarding those proceedings. We disagree. At the outset we note that there existed sufficient competent evidence outside that of the bankruptcy proceedings to support the trial court's findings and conclusions. *Ayden Tractors, supra.* This includes the nonexistence of a partnership agreement or partnership tax return; the husband's social security tax form which listed him as a self-employed individual; and the husband's retention of all tax attributes derived from the farm income or losses.

Plaintiff's claim that evidence of the husband's bankruptcy proceedings are irrelevant to the case at bar is likewise without merit. The evidence was introduced for the sole purpose of showing that the defendant's ex-husband himself considered the business to be a sole proprietorship—evidence wholly relevant to the establishment of the existence or nonexistence of a partnership in this case. Plaintiff's application of *H-K Corp., supra* to these facts is inapposite. In *H-K Corp.*, this Court pointed out that an extrajudicial declaration by an alleged partner cannot be used to prove the existence of partnership. To the contrary, defendant

in this case seeks not to prove a partnership but to show that the husband, an alleged partner, did not consider himself such and therefore a partnership did not in fact exist. Accordingly, we find no error in the trial court's admission of the evidence regarding the bankruptcy proceedings.

[6] Plaintiff's last argument that the trial court committed prejudicial error in allowing non-expert witnesses to express their opinions regarding the existence of a partnership is likewise without merit. N.C. Gen. Stat. § 1A-1, Rule 704 (1983) provides that opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Furthermore, in a non-jury trial, if incompetent evidence is admitted and there is no showing that the judge acted on it, the trial court is presumed to have disregarded it and made findings based on other competent evidence. *Gunther v. Blue Cross/Blue Shield*, 58 N.C. App. 341, 393 S.E. 2d 597, *rev. denied*, 306 N.C. 556, 294 S.E. 2d 370 (1982). We hasten to add that the trial court, in the present case, omitted any reference to the witness' testimony from his findings of fact and conclusions of law. Therefore, we can find no prejudicial error in the admission of non-expert witness testimony.

For the reasons stated, we affirm the trial court's judgment in all respects.

Affirmed.

Judges JOHNSON and COZORT concur.

VINSON REALTY CO., INC. v. CLAES CORNELIS HONIG, PAUL HONIG, ALEXANDER HONIG AND ELIZABETH VAN RAPPARD HONIG

No. 8726SC436

(Filed 15 December 1987)

1. Attachment § 2— property owned by resident and nonresidents—attachment order against resident based on nonresident status

The trial court erred by not dissolving an order of attachment issued under N.C.G.S. § 1-440.3(1) as to defendant Claes Cornelis Honig where it was clear that his actual place of residence was in North Carolina, although his domicile might be elsewhere.

2. **Attachment § 3— property jointly owned by nonresident and resident defendants—nonresident property interest subject to attachment**

The property interests of three nonresident defendants were subject to attachment where legal title to the property was held by a resident defendant as an agent; the beneficial interest of the principal is subject to execution, and is therefore subject to attachment. N.C.G.S. § 1-315(a)(4).

3. **Attachment § 3— jointly owned property—nonresident property interest subject to attachment**

Where property was jointly owned by a resident and three nonresident defendants, the property interest of the three nonresidents could be attached. N.C.G.S. § 1-440.3(1).

APPEAL by defendants from *Burroughs, Judge.* Order entered 23 March 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 October 1987.

Plaintiff brought this action seeking to recover a commission allegedly due it for real estate brokerage services rendered in connection with the sale of real estate owned by defendants. Ancillary to this action, plaintiff commenced an attachment proceeding, alleging that grounds for attachment exist under G.S. 1-440.3(1) because the defendants are nonresidents of this State. On 5 December 1986, an order of attachment was entered, pursuant to which the Sheriff of Mecklenburg County attached certain real property in Mecklenburg County. Record title to the attached property is held in the name of "Claes Cornelis Honig, Agent."

On 27 January 1987, defendants moved for dissolution of the order of attachment, alleging that Claes Cornelis Honig is a resident of Mecklenburg County. Defendants filed affidavits and answers to interrogatories disclosing, *inter alia,* that Claes Cornelis Honig is a citizen of The Netherlands, but lives in Charlotte with his wife and three children in a house which he purchased in 1985. He has maintained an office in Charlotte since 1979, pays *ad valorem* taxes in Mecklenburg County, and pays income taxes to the United States and the State of North Carolina. His children are enrolled in school in Mecklenburg County; his wife is a student at The University of North Carolina at Charlotte. Claes Cornelis Honig's five-year E-2 visa was renewed in June 1986. Defendant Paul Honig is a resident of South Africa, defendants Alexander Honig and Elizabeth Van Rappard Honig are residents of The Netherlands. Pursuant to an agency agreement dated 1

August 1980, Claes Cornelis Honig is empowered to act as agent for himself and the other defendants in matters pertaining to the acquisition, management and sale of various properties in North America, including the properties attached in this action, and to hold title to the properties in his individual name as agent. Claes Cornelis Honig owns a 28.87% interest in the property attached; the remaining interest in the property is held by the other three defendants in shares not disclosed by the record.

After hearing the motion to dissolve the attachment, the trial court found facts consistent with those summarized above, concluded that all defendants are nonresidents of North Carolina and that attachment of their property is authorized by G.S. 1-440.3(1). From an order denying their motion to dissolve the attachment, defendants appeal.

Ruff, Bond, Cobb, Wade & McNair, by Robert S. Adden, Jr., and Thomas C. Ruff, for plaintiff-appellee.

Craighill, Rendleman, Ingle & Blythe, P.A., by John R. Ingle, for defendants-appellants.

MARTIN, Judge.

Defendants assign error to the denial of their motion to dissolve the order of attachment. They argue that the trial court's findings of fact do not support its conclusion that Claes Cornelis Honig is a nonresident of this State, and that since legal title to the property is held by him as agent, there are no grounds for attachment pursuant to G.S. 1-440.3(1). We agree that the facts found by the trial court do not support its conclusion that Claes Cornelis Honig is a nonresident. However, we hold that the trial court properly denied the motion to dissolve the order of attachment as to the interests in the subject property belonging to the three nonresident defendants.

G.S. 1-440.3 provides:

> In those actions in which attachment may be had under the provisions of G.S. 1-440.2, an order of attachment may be issued when the defendant is
>
> (1) A nonresident . . . .

Traditionally, residence is taken to signify one's place of actual abode, whether it be temporary or permanent. *Hall v. Wake Co. Board of Elections*, 280 N.C. 600, 187 S.E. 2d 52 (1972), *modified on other grounds by Lloyd v. Babb*, 296 N.C. 416, 251 S.E. 2d 843 (1979); *Sheffield v. Walker*, 231 N.C. 556, 58 S.E. 2d 356 (1950). "Residence" is thus distinguished from "domicile," which indicates one's permanent abode, to which, when absent, one intends to return. *Hall, supra; Sheffield, supra.* Although the two terms have sometimes been used interchangeably, and although the statutory use of "residence" has sometimes been construed to mean "domicile," *see Hall, supra; Martin v. Martin*, 253 N.C. 704, 118 S.E. 2d 29 (1961); *Rector v. Rector*, 4 N.C. App. 240, 166 S.E. 2d 492 (1969), the two terms are quite distinct.

> Precisely speaking, *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another. Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. When absent therefrom, it is the place to which he intends to return (*animus revertendi*); it is the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave (*animus manendi*). Two things must concur to constitute a domicile: First, residence; second, the intent to make the place of residence a home.

Hall, supra at 605-06, 187 S.E. 2d at 55 (emphasis original).

It has been held that the proper determination to be made regarding attachment is residence, not domicile. *Brann v. Hanes*, 194 N.C. 571, 140 S.E. 292 (1927). There, the Supreme Court said that

> one may have his domicile in North Carolina, and his residence elsewhere, and that, therefore, where one voluntarily removes from this to another State, for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, such person is a nonresident of this State for the purpose of attachment, notwithstanding he may visit the state and have the intent to return at some time in the future.

Id. at 574, 140 S.E. at 294. This construction is consistent with one of the purposes of attachment of the property of a nonresident, which is to enable the court to gain jurisdiction over one who otherwise is without the boundaries of this State. *Id.; see also Hutchison v. Bank of North Carolina*, 392 F. Supp. 888 (M.D.N.C. 1975).

[1] Applying the foregoing rules of law to the facts found by the trial court in the present case, it is clear that Claes Cornelis Honig's actual place of residence is in North Carolina, though his domicile may be elsewhere, because he actually resides in this State. Thus, the trial court erred in concluding that he is a nonresident and that his interest in the subject property may be attached pursuant to G.S. 1-440.3(1).

[2] Without question, the other three defendants are nonresidents. The issue is whether their interest in the property may be attached since legal title to the property is held by the resident defendant as "agent." Defendants contend that because Claes Cornelis Honig owns a 28.87% interest in the property and holds title as agent for himself and the other defendants, both the "legal title to and control of the property attached are vested in a resident" of this State and the property may not be attached. We disagree.

Any of a nonresident defendant's property within this State which is subject to levy under execution or is subject to the satisfaction of a judgment for money is also subject to attachment. G.S. 1-440.4.

> [Attachment] is intended to bring property of the defendant within the custody of the court and to apply it to the satisfaction of a judgment rendered in the action. . . . It is in the nature of a preliminary execution against the property, not so much to compel the appearance of the defendant as to afford satisfaction of plaintiff's claim. (Citations omitted). Attachment has been called execution in anticipation. . . . Only that property which may become subject to execution is attachable.

Chinnis v. Cobb, 210 N.C. 104, 109, 185 S.E. 638, 641-42 (1936). "Attachment may be levied on land as under execution, and whatever interest the debtor has subject to execution may be attached, but

the debtor must have some beneficial interest in the land." *Id.* at 109, 185 S.E. at 642.

Although Claes Cornelis Honig holds legal title to the property, he holds it as "agent." The record discloses that he received title as "agent" for himself and the three nonresident defendants. By authorizing Claes Cornelis Honig to hold the property as their agent, the other three defendants, as principals, did not surrender their ownership interests in the property; the agency agreement expressly provides that it is terminable as to any principal upon written notification to the agent. "The appointment of an agent does not divest the owner of his property rights." *Morton v. Thornton*, 259 N.C. 697, 700, 131 S.E. 2d 378, 381 (1963). Rather, an agent who receives or holds title to land for his principal holds the title as trustee for the principal. RESTATEMENT (SECOND) OF AGENCY, § 423, comment a (1957). The beneficial interest of the principal is subject to execution, *see* G.S. 1-315(a)(4), and, therefore, is subject to attachment. If it were otherwise, a nonresident could, by merely causing title to real property acquired by him in this State to be taken in the name of another as his agent, prevent a judgment creditor in this State from satisfying the judgment debt by execution upon the property.

[3] Finally, defendants argue that because one of the joint defendants is a resident of North Carolina, attachment is not available as to any defendant on the grounds of nonresidence. Again we disagree. G.S. 1-440.3(1) authorizes attachment of the property of a nonresident defendant; it does not require that all codefendants be nonresidents in order for the property of those defendants who are nonresidents to be attached. Thus, although Claes Cornelis Honig's interest in the subject property may not be attached because he is a resident of this State, the interests of the three nonresident defendants in the property may be attached "in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action." G.S. 1-440.1(a).

For the reasons stated, we hold that the order of the superior court must be reversed, and the order of attachment dissolved, as those orders apply to the undivided interest of Claes Cornelis Honig in the real property involved in this proceeding. However, the superior court's order denying the motion to dissolve the

order of attachment as to the individual interests of Paul Honig, Alexander Honig, and Elizabeth Van Rappard Honig is affirmed.

Affirmed in part, reversed in part.

Judges EAGLES and PARKER concur.

CORNELIA ELLINWOOD v. EVERETT H. ELLINWOOD, JR.

No. 8714DC322

(Filed 15 December 1987)

Divorce and Alimony § 17— constructive abandonment—may be shown without physical cruelty or willful failure to provide support—insufficient findings

A finding of constructive abandonment as a grounds for alimony may be supported by a level of willful spousal misconduct which rises above the normal and sometimes commonplace problems associated with marriages involving busy professionals notwithstanding the absence of evidence of physical cruelty or willful failure to provide economic support; however, the findings here regarded post separation events and constructive abandonment may not be based on evidence of actions after the parties separated.

APPEAL by defendant from *Titus, Judge.* Order entered 26 February 1987 in District Court, DURHAM County. Heard in the Court of Appeals 20 October 1987.

On 25 May 1984 plaintiff-wife filed a complaint against defendant-husband seeking, *inter alia,* a divorce from bed and board, alimony, and attorney's fees. The parties separated in August 1984; a judgment of divorce was entered on 21 November 1985. On 29 October 1986 the trial court entered an equitable distribution order dividing the parties' marital property and also held a hearing to determine plaintiff's claims for alimony and attorney's fees. An order entered 26 February 1987 granted plaintiff alimony and attorney's fees based upon a theory of constructive abandonment. From that order defendant appeals.

James B. Maxwell for plaintiff-appellee.

Moore & Van Allen, by Edward L. Embree III and Paul M. Green for defendant-appellant.

EAGLES, Judge.

Defendant appeals the order awarding alimony and attorney's fees. Because of our disposition of defendant's first assignment of error, we will address only the issue of constructive abandonment as grounds for alimony.

Defendant argues that constructive abandonment as grounds for the award of alimony may be found only upon serious misconduct by the supporting spouse toward the dependent spouse which forces the dependent spouse to leave the home. On the other hand, plaintiff contends that defendant's long hours spent in advancing his career and neglecting his wife and family, his wilful failure to provide emotional support for his wife individually, and his wilful failure to provide support for her in their mutual obligation of rearing their children, constituted constructive abandonment. While we agree with plaintiff that grounds for constructive abandonment are not limited to wilful failure to provide economic support or physical cruelty and abuse toward a spouse; because of errors discussed *infra*, we must reverse and remand for further consideration.

The evidence here tended to show the following. The Ellinwoods were married on 27 March 1963. At the time of their marriage Mrs. Ellinwood was a registered nurse and Dr. Ellinwood was a medical doctor completing his psychiatric residency. Upon finishing his residency, Dr. Ellinwood and the family moved to Lexington, Kentucky, due to his employment. The oldest of their three children, Everett III, was born while they lived in Lexington. About two years later, Dr. Ellinwood accepted a fellowship and joined the Duke University Medical Center staff in Durham. The family moved to Durham and shortly thereafter the remaining children of the marriage, Susan and Bradley, were born.

After the move to Durham problems began to arise in the marriage. Dr. Ellinwood was seldom at home and did not assist in rearing the children. Three months after Bradley was born Mrs. Ellinwood was hospitalized for a hysterectomy. Though he did visit his wife while she was in the hospital, Dr. Ellinwood did not drive her to or from the hospital. Mrs. Ellinwood drove herself to the hospital and a friend brought her home.

Some time later Mrs. Ellinwood talked to her husband about her need for more of his time. Mrs. Ellinwood told her husband that she was lonely and that she needed his help in rearing their children. She indicated that they needed to make the marriage work or a separation would be necessary. Not wanting a separation, Dr. Ellinwood tried to spend more time at home. Mrs. Ellinwood noted some immediate improvement, but unfortunately, the change did not last long. Thereafter, Dr. Ellinwood did not spend much time at home.

The evidence further tended to show that on several specific occasions Dr. Ellinwood did not help feed the children when Mrs. Ellinwood was sick. Dr. Ellinwood did not attend church with his family except for Christmas Eve services. Meanwhile, Mrs. Ellinwood taught Sunday School and Vacation Bible School. Dr. Ellinwood routinely would leave a checklist of things for Mrs. Ellinwood to accomplish during the day. Mrs. Ellinwood was also expected to act as hostess at numerous dinner parties for his professional associates throughout the year.

During this time period Everett III had psychiatric problems and was hospitalized at John Umstead Hospital. Dr. Ellinwood visited his son about twice a month. Mrs. Ellinwood, on the other hand, insured that their son made his weekly counselling sessions. In uncontradicted testimony, Mrs. Ellinwood further stated that while her son was hospitalized at Umstead, her husband did not visit Everett on either his birthday or Christmas.

Finally, during the fall of 1983, Mrs. Ellinwood asked her husband to leave the home and Dr. Ellinwood refused. When Mrs. Ellinwood attempted to move her husband to a separate bedroom, he kicked in her bedroom door. Shortly thereafter Mrs. Ellinwood filed her complaint for divorce from bed and board and three months later Dr. Ellinwood left the marital home.

In order to receive alimony a dependent spouse must first show one of the ten grounds for alimony listed in G.S. 50-16.2. Abandonment, one of these ten grounds, occurs when "[t]he supporting spouse abandons the dependent spouse." G.S. 50-16.2(4). While the statutes neither explicitly address nor define constructive abandonment, we have long recognized that abandonment can occur under a variety of circumstances and, consequently, each case must be looked at according to its specific facts. *Caddell*

v. Caddell, 236 N.C. 686, 73 S.E. 2d 923 (1953). One set of circumstances encompasses the theory of constructive abandonment.

In *Panhorst v. Panhorst*, 277 N.C. 664, 671, 178 S.E. 2d 387 (1971), the Supreme Court said that "constructive abandonment by the defaulting spouse may consist of either affirmative acts of cruelty or of a wilful failure, as by a wilful failure to provide adequate support." Additionally, the cumulative effect of mistreatment throughout the years of the marriage may be recited in further support of the constructive abandonment argument. *Mode v. Mode*, 8 N.C. App. 209, 174 S.E. 2d 30 (1970).

Here, plaintiff alleges no affirmative acts of physical cruelty nor does she allege a wilful failure to provide adequate monetary support. Plaintiff alleges as a basis for a finding of constructive abandonment that "the defendant has constructively abandoned the plaintiff in that . . . he [does not] participate in any meaningful way in the homelife of the plaintiff as husband and wife or as father of the minor children" and that he "has generally withdrawn his love, affection and concern for his wife, . . . and the children born of the marriage to the extent that the plaintiff has been forced to rear the children almost as a 'single parent' with little imput [sic], no cooperation and no emotional support from the defendant."

If proven, plaintiff's allegations would support a finding of constructive abandonment notwithstanding the absence of evidence of physical cruelty or wilful failure to provide economic support. The permissible bases are more broad and encompass cruelty by other than mere physical cruelty and, as pointed out in *Panhorst, supra*, wilful failure to fulfill spousal or parental responsibilities beyond merely providing adequate economic support. There remains, as a basis for a finding of constructive abandonment, a level of wilful spousal misconduct which rises above the normal and sometimes commonplace problems associated with marriages involving busy professionals. *Cf. Scheinin v. Scheinin*, 200 Md. 282, 89 A. 2d 609 (1952); *Bryant v. Bryant*, 16 Md. App. 186, 294 A. 2d 467 (1972).

While we hold that constructive abandonment may be shown by mental or physical cruelty, or wilful failure of the defaulting spouse to fulfill obligations of the marriage, the trial court's conclusions must be based on findings of fact which are relevant and

are supported by the evidence. Proof of constructive abandonment may not be based on evidence of actions *after* the parties separated. *Fogleman v. Fogleman*, 41 N.C. App. 597, 255 S.E. 2d 269 (1979). Here, the trial court made findings of fact regarding Dr. Ellinwood's failure to attend his daughter's baccalaureate or her graduation exercises from high school. These events occurred in the spring of 1986, well after the parties' separation in August 1984. The court also found as fact that Dr. Ellinwood had only visited his son at college once and had yet to visit his daughter at her school. These are also post-separation events. Since the trial court improperly considered evidence of these post-separation events, we must reverse the alimony order and remand with instructions that the trial court reconsider the plaintiff's allegations based only on evidence which precedes the date of the separation.

Defendant also assigned as error the trial court's denial of defendant's motion for involuntary dismissal at the close of plaintiff's evidence and at the close of all the evidence. Having concluded that constructive abandonment may occur in instances other than physical cruelty or a wilful failure to provide monetary support, we overrule this assignment of error.

Accordingly, the trial court's order is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges PARKER and COZORT concur.

BETTY M. JACKSON v. FAYETTEVILLE AREA SYSTEM OF TRANSPORTATION

No. 8710IC489

(Filed 15 December 1987)

Master and Servant § 94.1— workers' compensation—insufficient findings as to injury—second remand for findings

Where the Industrial Commission made findings supported by the evidence in its original opinion and award which established an accident, and the Court of Appeals remanded the proceeding for the Industrial Commission to

make specific findings of fact regarding the existence and nature of the injury sustained by plaintiff, the Commission exceeded the scope of its instructions on remand by vacating its earlier findings and revising its entire opinion. Moreover, the Commission failed to make specific findings as directed regarding the injury sustained by plaintiff, and the matter is again remanded for the Commission to make findings as to the existence and nature of any injury sustained by plaintiff and to make appropriate conclusions and an order based on its findings.

APPEAL by plaintiff from order of the North Carolina Industrial Commission filed 2 December 1986. Heard in the Court of Appeals 18 November 1987.

Hedahl and Radtke, by Joan E. Hedahl for plaintiff-appellant.

Robert C. Cogswell, Jr. for defendant-appellee.

BECTON, Judge.

I

This is the second appeal of this Workers' Compensation case. Plaintiff, Betty M. Jackson, sought benefits for an injury by accident she allegedly sustained while she was employed by the defendant, Fayetteville Area System of Transportation.

Plaintiff's testimony before the deputy commissioner tended to show the following pertinent facts. Plaintiff's job responsibilities for defendant included removing the money collection boxes from buses, inserting them into a machine, and turning the boxes to a position that allowed the money to fall out and be sorted and counted by the machine. On 13 December 1982, while "running the money" in this manner, plaintiff experienced unusual difficulty with one of the boxes.

In response to questioning by her attorney, plaintiff testified as follows:

Q. Was there anything unusual that night?

A. Yes. The particular box that I was working with—I couldn't get it to get in the slot where it would turn.

Q. What were you doing? How were you trying?

A. I was pressing on it and trying to force it to turn.

Q. What happened next?

A. I kept working with it. I had to stop a few minutes because it was so hard and I was give out and I would say, relaxed just a minute or two and then I went back and tried again and when the box turned loose, pain went across my back and down my right leg.

She further testified, on cross-examination: "I had no problem with any box until this particular one. It just would not open." Plaintiff stated that she could not recall ever having a box that was that tough or that heavy, and that she had not previously had to put as much pressure on one to get it to open.

Following the incident, plaintiff and a co-worker finished that night's work, but plaintiff could "hardly walk." The next day, she sought medical attention for the pain in her leg and back. Eventually, plaintiff had surgery and stopped working completely.

After the hearing on 6 June 1984, the deputy commissioner found facts and concluded that, although plaintiff sustained an injury, the injury was not compensable because it was not the result of an accident. On appeal, the full Commission set aside the deputy commissioner's opinion and award, substituted its own findings of fact, and concluded that plaintiff sustained a compensable injury by accident arising out of and in the course of employment.

Defendant appealed to this Court, and in *Jackson v. Fayetteville Area System of Transportation*, 78 N.C. App. 412, 337 S.E. 2d 110 (1985), the matter was reversed and remanded due to the absence of any findings of fact regarding the existence and nature of the injury sustained by plaintiff. On remand, the Commission reconsidered the entire record, along with briefs and arguments of counsel, and on 2 December 1986, reinstated the original opinion and award of the deputy commissioner in its entirety.

Plaintiff now appeals from the 2 December 1986 decision denying her claim, contending that the Commission (1) exceeded the scope of its authority on remand, and (2) erred by ruling that plaintiff's injury was not compensable under the Workers' Compensation Act. Because the Commission failed to follow the instructions of this Court on remand, and because the Commission's

new findings and conclusions are not supported by the evidence, we once again reverse and remand the matter for further proceedings.

II

It appears from the record that the primary issue between the parties at all stages of this case has been whether plaintiff was injured as the result of an *accident*, as required by N.C. Gen. Stat. Sec. 97-2(6) in order to receive compensation. It is well-settled in this state that an extra or unusual degree of exertion by an employee while performing a job may constitute the unforeseen or unusual event or condition necessary to make any resulting injury an injury "by accident." *See, e.g., Jackson v. North Carolina State Highway Commission*, 272 N.C. 697, 158 S.E. 2d 865 (1968); *Gabriel v. Town of Newton*, 227 N.C. 314, 42 S.E. 2d 96 (1947); *Gladson v. Piedmont Stores*, 57 N.C. App. 579, 292 S.E. 2d 18, *disc. rev. denied*, 306 N.C. 556, 294 S.E. 2d 370 (1982); *Bingham v. Smith's Transfer Corp.*, 55 N.C. App. 538, 286 S.E. 2d 570 (1982); *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E. 2d 360 (1980). In our opinion, the facts of this case are analogous to those in *Porter*, in which the Court upheld the Commission's determination that the plaintiff had suffered an injury by accident when he experienced pain while straining to withdraw a rod from a roll of cloth which was "extra tight" and "unusually hard" to pull out.

In the present case, the Commission found as a fact that "[o]n 13 December 1982, the plaintiff performed this task [emptying the money boxes] without interruption of her normal work routine." We hold that this finding is not supported by the evidence.

In the original opinion and award, filed 14 January 1985, the Commission made different findings, supported by the evidence, which supported a conclusion that if plaintiff was injured, she was injured "by accident" within the meaning of the statute.[1] However, in determining the existence of an injury by accident, "accident" and "injury" are considered separate. *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 429, 124 S.E. 2d 109, 111 (1962). Just as the mere fact of injury does not of itself establish

1. These findings are set forth in our original opinion at 78 N.C. App. 412-13, 337 S.E. 2d at 110.

the fact of accident, *see, e.g., Reams v. Burlington Industries*, 42 N.C. App. 54, 255 S.E. 2d 586 (1979); neither does the fact that an accident occurred establish that an employee was injured.

Although, in its original opinion, the Commission made findings which establish an accident, it failed to specifically find that plaintiff was injured, and it was for that reason that the case was remanded. The Court instructed the Commission, on remand, to make "specific findings of fact regarding the injury, if any, sustained by plaintiff and the nature of that injury," *not* to reconsider the case in its entirety, 78 N.C. App. at 414, 337 S.E. 2d at 112. The Commission was entitled to reverse its conclusion of injury by accident only if it found as a fact that plaintiff was not injured.

The Commission exceeded the scope of its instructions by revising its entire opinion and vacating its earlier findings. Moreover, the Commission failed to make findings, as directed, regarding any injury sustained by plaintiff. Although the new opinion concludes as a matter of law that plaintiff "sustained an injury," there is no finding to support that conclusion.

For these reasons, this matter is again reversed and remanded so that the Commission may carry out this Court's original directions to make specific findings of fact regarding the injury, if any, sustained by plaintiff, and to make the appropriate conclusions and order based on its findings. The Commission is also authorized to consider medical or other additional evidence if necessary to determine whether plaintiff was injured and the nature of her injury.

Reversed and remanded.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. ROBERT HUGH HEWSON

No. 8713SC402

(Filed 15 December 1987)

Arrest and Bail § 6.2— resisting arrest—officers' illegal entry into defendant's home

The trial court erred by denying defendant's motions to dismiss charges of resisting a public officer where a dispatcher for the Sheriff's Department had in her possession an order for the arrest of defendant for contempt for arrearage in child support; the dispatcher radioed a deputy sheriff and informed him of the order for defendant's arrest; four officers drove to defendant's home and a deputy went up to some sliding glass doors on the rear of defendant's home, which were open but covered by sliding screen doors; the deputy knocked and defendant answered; the deputy identified himself, informed defendant that he had an order for his arrest, and asked defendant to go with him to the sheriff's office; defendant asked to see the order and the deputy replied that the order was at the sheriff's office; defendant refused to go with the deputy and an argument ensued; defendant closed and locked the sliding glass doors; and the deputy and three other officers entered defendant's house through an unlocked door, and arrested defendant. The order of arrest was issued for civil contempt and the record discloses no basis for the officers having probable cause to believe that defendant had committed a crime or that an exigent circumstance existed; therefore, under N.C.G.S. § 15A-401(b), without the order of arrest in their possession, the officers had no authority to enter defendant's home and could do so only with his consent. N.C.G.S. § 15A-401.

APPEAL by defendant from *Stephens, Judge.* Judgment entered 12 February 1987 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 29 September 1987.

Defendant was charged with resisting a public officer in violation of G.S. 14-223. At trial in the District Court, defendant was found guilty and sentenced. Defendant appealed for a trial *de novo* in Superior Court. The jury convicted defendant of the charged offense and defendant was sentenced to a term of 30 days, suspended on condition that defendant pay a fine of $100.00 plus costs. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Guy A. Hamlin, for the State.

Davey L. Stanley for defendant-appellant.

PARKER, Judge.

Defendant has two assignments of error. Defendant's first assignment of error is that the trial court erred in denying defendant's motion to dismiss the charge at the close of the State's evidence and again at the close of all the evidence because the State's evidence failed to prove every element of the offense charged. Defendant's second assignment of error relates to the trial court's failure to instruct the jury on G.S. 15A-401(e).

The record shows that the trial court's interpretation of the North Carolina statutes covering arrests formed the basis of both the court's denial of defendant's motions to dismiss and the court's charge to the jury. We find that the trial court erred in denying defendant's motions to dismiss for the reasons set forth in defendant's first assignment of error.

The essential facts of this case are not in dispute. On 16 June 1986 the dispatcher for the Brunswick County Sheriff's Department received a call from a private investigator requesting assistance regarding nonsupport papers. The dispatcher had in her possession an order for the arrest of defendant, Robert Hugh Hewson, issued by the District Court of Moore County. The order stated that defendant was in contempt of court for arrearage in child support. The dispatcher radioed a deputy sheriff, Carl Pearson, and informed him of the investigator's request for assistance and of the order for arrest. Deputy Pearson met with two private investigators and three other officers at a shopping center. The four officers drove to defendant's home in two cars. One car was unmarked and the other was a marked patrol car. Deputy Pearson went up to some sliding glass doors on the rear of defendant's house. The glass doors were open, but the opening was covered by sliding screen doors. Deputy Pearson knocked and defendant answered. The deputy identified himself, informed defendant that he had an order for his arrest, and asked defendant to go with him to the sheriff's office. Defendant asked to see the order. The deputy replied that the order was at the sheriff's office. Defendant refused to go with the deputy; an argument ensued. At this point defendant closed and locked the sliding glass doors. After consulting with the chief deputy on the radio, Deputy Pearson and the other three officers entered defendant's house through a different door, which was unlocked. The officers found defendant

in his kitchen, placed him under arrest, and forcibly handcuffed him. Defendant was taken to Brunswick County jail where he was served with a copy of the order for arrest.

The specific question raised by this appeal is whether defendant's act of closing the glass door and locking himself in his house after he was informed by the deputy sheriff that there was an order for his arrest constituted resisting an officer in the exercise of his duty. Defendant argues that the trial court erred in denying his motions to dismiss the action because the State's evidence failed to show a lawful arrest—a necessary element of resisting arrest. In considering a motion to dismiss in a criminal case, the court must determine if there is substantial evidence of each element of the crime charged. *State v. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980). The court must consider the evidence in the light most favorable to the State when making this determination. *Id.* If an arrest is not lawful, the person being arrested has a right to resist and, in a prosecution for resisting arrest, a motion to dismiss shall be granted. *State v. McGowan*, 243 N.C. 431, 90 S.E. 2d 703 (1956); *State v. Carroll*, 21 N.C. App. 530, 532, 204 S.E. 2d 908, 909-10, *cert. denied*, 285 N.C. 759, 209 S.E. 2d 283 (1974). Thus, if defendant's arrest in this case was not lawful, then the trial court erred in denying defendant's motions to dismiss.

Although defendant was arrested for civil contempt, G.S. 1-409 expressly provides that the rules governing civil arrest are not applicable to contempt. The legality of defendant's arrest must therefore be determined under the criminal arrest statute, G.S. 15A-401.

Before discussing the provisions of this statute, we note the basic rule of statutory construction that a statute dealing with a specific situation controls other sections which are general in their application. *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E. 2d 663, 670 (1969).

General Statute 15A-401(a)(1) provides that an officer with a warrant in his possession may arrest the person named therein at any time and at any place.

General Statute 15A-401(a)(2) provides that an officer who does not have a warrant in his possession, but who knows that a warrant has been issued and unexecuted, may arrest the person

named therein at any time. This provision of the statute does not give the officer without possession of the warrant authority to arrest the person at any place.

General Statute 15A-401(e)(1), pertaining to entry on private premises, provides that the officer may enter private premises or a vehicle to effect an arrest when the officer (i) has in his possession a warrant or order for the arrest of a person or (ii) is authorized to arrest a person without a warrant or order having been issued. By contrast with G.S. 15A-401(a)(2), this section applicable specifically to entry on private premises does not authorize an arrest based on knowledge that a warrant has been issued; the officer must actually have the warrant in his possession. Further, any arrest without a warrant must be authorized by statute, *see Alexander v. Lindsey*, 230 N.C. 663, 668, 55 S.E. 2d 470, 474 (1949), and the only statutory authority to arrest a person without a warrant having been issued is G.S. 15A-401(b), which requires probable cause that a criminal offense has been committed. In this case the order of arrest was issued for civil contempt, and the record discloses no basis for the officers' having probable cause to believe that defendant had committed a crime or that an exigent circumstance existed. Hence, under this statute, without the order of arrest in their possession, the officers had no authority to enter defendant's home, and could do so only with his consent.

The statute does not define "premises." Accepting, without deciding, for purposes of argument the State's position that G.S. 15A-401(a)(2) entitled the officers to approach defendant's house and knock on his door, the fact remains that under the circumstances, the officers had no authority to enter defendant's house to apprehend him.

The law does not require defendant to consent to the officers' entry without a warrant; hence, failure to consent cannot as a matter of law be resisting arrest. The fact that defendant closed the glass door was of no legal significance; a screen door and the missing order of arrest already insulated defendant from the officers. Unless we are prepared to say, which we are not, that there is a legal distinction between refusing to exit one's home to allow officers to make an arrest they could not otherwise make and refusing to consent to an unlawful entry into one's home to permit an arrest, defendant's conduct was not resisting arrest.

The constitutional protection surrounding the sanctity of the home cannot be so easily circumvented. *See Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980); *United States v. Prescott*, 581 F. 2d 1343 (9th Cir. 1978); and *Miller v. United States*, 230 F. 2d 486 (5th Cir. 1956). A lawful arrest is an essential element of the crime charged. *State v. McGowan, supra.* "Officers have no duty to make an illegal entry into a person's home. Hence, one who resists an illegal entry is not resisting an officer in the discharge of the duties of his office." *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E. 2d 897, 905-06 (1970).

Because the officers in this case had no right to enter, defendant cannot be convicted on the basis of resisting such entry. The State's evidence failed to show defendant's resistance to a lawful arrest. The trial court, therefore, erred in denying defendant's motions to dismiss at the close of the State's evidence.

Vacated.

Judges BECTON and JOHNSON concur.

MARION BASCUM MERRITT, FRANCES M. SMITH, HENRY C. MERRITT, ELEANOR M. JORDAN AND HENRY C. SMITH IN HIS CAPACITY AS GUARDIAN FOR WILLIAM P. MERRITT v. EDWARDS RIDGE, A GENERAL PARTNERSHIP, JOHN W. COFFEY, PHILIP E. WALKER AND PAMELA A. MCCULLOUGH, INDIVIDUALLY AND AS PARTNERS

No. 8715SC408

(Filed 15 December 1987)

1. Attorneys at Law § 7.4; Mortgages and Deeds of Trust § 32.1— foreclosure of purchase-money deed of trust—recovery of attorney's fees and foreclosure expenses

The anti-deficiency judgment statute, N.C.G.S. § 45-21.38, does not bar a purchase-money mortgagee from recovering from a defaulting purchase-money mortgagor attorney's fees and the expenses of foreclosure, including the trustee's commission, where such recovery was expressly provided for in the promissory note executed by the parties. Nor does N.C.G.S. § 45-21.31(a) prohibit recovery of the expenses of foreclosure from the defaulting purchase-money mortgagor.

2. Attorneys at Law § 3— foreclosure—trustee acting as attorney for noteholders

Ethics Opinion 166 of the N. C. State Bar did not prohibit the trustee from acting as attorney for the noteholders in enforcing their rights under the note and deed of trust where there was no contest in the foreclosure action.

APPEAL by defendants from *Hobgood, Robert H., Judge.* Order entered 2 March 1987 in ORANGE County Superior Court. Heard in the Court of Appeals 28 October 1987.

The facts in this case are not in dispute. On 26 January 1982, plaintiffs conveyed to defendants an 80.55-acre tract of land in Chatham County and accepted in return two purchase-money promissory notes in the total amount of $200,000.00, secured by a purchase-money deed of trust on the property. Both notes contained the following term:

> Upon default the holder of this note may employ an attorney to enforce the holder's rights and remedies and the maker, principal, surety, guarantor and endorsers of this note hereby agree to pay to the holder the sum of fifteen percent (15%) of the outstanding balance owing on said note for reasonable attorney's fees, plus all other reasonable expenses incurred by the holder in exercising any of the holder's rights and remedies upon default.

The provisions of the promissory notes were expressly incorporated by reference into the deed of trust.

Subsequently, defendants defaulted on the notes, and plaintiffs foreclosed on the property. After foreclosure, plaintiffs sued to recover attorney's fees and expenses, as provided for in the notes. Upon defendants' denial of liability, plaintiffs moved the court for summary judgment. Based on the pleadings and supporting documents, the trial court allowed plaintiffs' motion, and defendants appealed.

Bayliss, Hudson & Merritt, by Ronald W. Merritt, for plaintiff-appellees.

Northen, Blue, Little, Rooks, Thibaut & Anderson, by J. William Blue, Jr., for defendant-appellants.

WELLS, Judge.

[1] The principal question presented is whether North Carolina's Anti-Deficiency Judgment statute, N.C. Gen. Stat. § 45-21.38, bars a purchase-money mortgagee from recovering from a defaulting purchase-money mortgagor attorney's fees and the expenses of foreclosure, including the trustee's commission, where such recovery was expressly provided for in the promissory notes executed by the parties. Plaintiffs contend that this question was squarely addressed and resolved in *Reavis v. Ecological Development, Inc.*, 53 N.C. App. 496, 281 S.E. 2d 78 (1981). In *Reavis*, as in the present case, the purchase-money creditor brought suit, after foreclosure, to recover attorney's fees and expenses, as expressly provided for in a promissory note. The defendants in *Reavis* argued, as do defendants in the present case, that North Carolina's Anti-Deficiency Judgment statute bars the recovery of costs and attorney's fees in such transactions. Our Court disagreed. We held that G.S. § 45-21.38 only prohibits a purchase-money creditor from suing to recover for a decline in the value of the property conveyed:

> A deficiency under G.S. 45-21.38 refers to an indebtedness which represents the balance of the original purchase price for the real estate not recovered through foreclosure. The attorneys' fees and expenses in this case do not represent the unrecovered "balance of purchase money for [the] real estate," G.S. 45-21.38; the fees represent the costs of foreclosing on the property.

Defendants in the present case rely chiefly on *Ross Realty Co. v. First Citizens Bank & Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1980), in which our Supreme Court held that the Anti-Deficiency Judgment statute not only abolishes deficiency judgments *after* foreclosure of a purchase-money mortgage or deed of trust, but also prohibits an action on the note even in the absence of an antecedent foreclosure of the mortgage or deed of trust securing the note. Defendants direct our attention to such broad language in *Ross* as the following:

> While the statute now codified as G.S. 45-21.38 is not artfully drawn, we think the manifest intention of the Legislature was *to limit the creditor to the property conveyed* when the note and mortgage or deed of trust are executed to the

> seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price. [Emphasis added.]

Defendants contend that G.S. 45-21.38, as construed broadly in *Ross*, strips purchase-money creditors of the right to bring action on *any* term or provision of a secured note and limits the noteholder strictly and narrowly to the proceeds of the foreclosure sale, regardless what the terms of the note provide. They contend that to permit the recovery of attorney's fees and expenses threatens circumvention of the statute and defeat of its historical purpose.

We agree with plaintiffs that *Reavis* controls the decision of the present lawsuit. *Reavis* is not inconsistent with *Ross*. *Ross* enforces the statutory prohibition against suing on the note for the unpaid balance of the purchase price. *Reavis* merely permits the recovery of attorney's fees and expenses after default and foreclosure, insofar as attorney's fees and expenses are not part of the balance owing on the note. We note that the language of the term providing for attorney's fees and expenses given effect in *Reavis* is identical to the language of the term promising payment challenged in the present case.

Defendants further contend that in the light of the terms of the deed of trust and the provisions of N.C. Gen. Stat. § 45-21.31(a) the expenses of foreclosure should have been deducted from the proceeds of the sale and are not recoverable from them. The deed of trust provides that the proceeds received from the foreclosure sale be applied first to pay the trustee's commission, next to pay the costs of foreclosure, and finally to pay the amount due on the notes. The provisions of G.S. § 45-21.31(a) require that the proceeds of a foreclosure sale be applied first to the costs and expenses of the sale, including the trustee's commission, next to taxes due and unpaid on the property, next to special assessments as designated by statute, then finally to the obligation secured by the deed of trust.

But defendants fail to recognize that the costs of a foreclosure sale must be debited to the foreclosing noteholder, who receives that much less from the sale. In fact, plaintiffs in the present case *have* paid the costs of the foreclosure sale, and they are here seeking indemnifying recovery of those expenses in ac-

cordance with the terms of the promissory notes which were, as indicated *supra*, incorporated by reference into the deed of trust.

[2] Relying on Ethics Opinion 166 of the N.C. State Bar, defendants further contend that the trustee could not legally act as attorney for the noteholders in enforcing their rights under the notes and deed of trust. We disagree. Opinion 166 merely enjoins an attorney/trustee from representing a noteholder "in a role of advocacy" at a foreclosure proceeding. The record in the present case discloses no contest in the foreclosure action. Defendants did not appear at the foreclosure hearing and have never denied their default nor contested plaintiffs' right to foreclose.

We have carefully examined the rest of defendants' assignments of error and find them to be without merit.

For the reasons elaborated above, plaintiffs were entitled to judgment as a matter of law. It follows that the trial court's allowance of plaintiffs' Motion for Summary Judgment must be, and is,

Affirmed.

Judges JOHNSON and COZORT concur.

VIRGINIA NIPLE, EMPLOYEE v. SEAWELL REALTY & INSURANCE COMPANY, EMPLOYER; PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, INSURER

No. 8710IC495

(Filed 15 December 1987)

Master and Servant § 69.1— partial disability of leg—complete diminution of capacity to earn wages

The Industrial Commission's conclusion that plaintiff realtor was totally and permanently disabled from a fall suffered while showing clients a house despite testimony that she had a 60 percent disability of the leg below the knee was supported by evidence of plaintiff's advanced age, education, experience, degree of chronic pain and resulting limited activity, the medical evidence, and the vocational rehabilitation specialist's assessment of her ability to work. N.C.G.S. § 97-31, N.C.G.S. § 97-29.

Niple v. Seawell Realty & Insurance Co.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 25 November 1986. Heard in the Court of Appeals 18 November 1987.

Gabriel, Berry, Weston & Weeks, by M. Douglas Berry for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Thomas C. Duncan for defendant-appellants.

BECTON, Judge.

I

The sole issue presented by this workers' compensation case is whether the Industrial Commission correctly ruled that plaintiff, Virginia Niple, is totally and permanently disabled within the meaning of N.C. Gen. Stat. Sec. 97-29 (1985).

The uncontroverted evidence before the Commission tended to show the following facts. Plaintiff was born 20 May 1918 and, at the time of the hearing, was 67 years old. She had three years of college education, and her employment history included work as a secretary, a receptionist, general manager and vice president of a consumer research firm, personnel and purchasing manager for a data processing company, and public relations work.

Beginning in August of 1980, plaintiff worked as a real estate agent. She was injured on 23 September 1981, when she fell while showing a house to potential buyers. At the time of the accident, she had been employed by defendant, Seawell Realty and Insurance, for one month.

Following the accident, plaintiff was treated by Dr. D. B. Olin for injury to her right ankle. She continued to work with the aid of crutches, but the foot remained painful and swollen. She was referred, on 11 March 1982, to Dr. Peter Whitfield, an orthopedic surgeon, who treated her with a cast for "chronic right ankle strain," and, on 27 January 1983, Dr. Whitfield surgically reconstructed the ligaments around plaintiff's right ankle. Thereafter, plaintiff worked part time but suffered from progressively more pain until she stopped working in August of 1983. She was admitted to the Duke University pain clinic from 20 February to 17 March 1984, and was also seen by a neurologist, but the persistent pain was not alleviated.

At the time of the hearing, plaintiff experienced chronic pain such that she was unable to remain on her right leg for more than four or five cumulative hours per day, and even sitting for more than ten or fifteen minutes without elevating her foot was painful. Dr. Whitfield stated his opinion that the pain would be permanent and that plaintiff suffered a sixty percent permanent partial disability of the leg below the knee.

James M. Ratcliff, a vocational rehabilitation specialist, testified that, in his opinion, plaintiff could not return to work as a real estate agent, and that he could not think of any other employment she could do based on her age, education, experience, and medical problem.

Based on this and other evidence, the deputy commissioner found facts, concluded as a matter of law that plaintiff had a 60% permanent partial disability of the right foot, and awarded compensation under N.C. Gen. Stat. Sec. 97-31. Citing *Whitley v. Columbia Manufacturing Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986), the Commission revised some of the Deputy Commissioner's findings of fact, and concluded as a matter of law that plaintiff was entitled to benefits for total and permanent disability pursuant to N.C. Gen. Stat. Sec. 97-29.

II

Defendants concede that, under the Supreme Court's decision in *Whitley*, the fact that plaintiff suffered from a "scheduled" injury under Section 97-31—a disability to her foot—does not preclude her recovery of total disability benefits under Section 97-29. However, defendants contend that the only evidence as to the degree of disability is Dr. Whitfield's assignment of 60 percent disability of the leg below the knee and Mr. Ratcliff's conclusion that plaintiff can no longer work as a real estate agent, and that this evidence fails to establish that plaintiff is incapable of earning *any* wages.

It is well-established that "disability," under the statute, refers not to the degree of physical infirmity but to a diminished capacity to earn wages. *See, e.g., Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979); *Fleming v. K-Mart Corp.*, 67 N.C. App. 669, 313 S.E. 2d 890 (1984), *aff'd*, 312 N.C. 538, 324 S.E. 2d 214 (1985). In this case, Dr. Whitfield's estimate of plaintiff's

disability plainly does not refer to the diminution of her capacity to earn wages but rather to the degree of the loss of use of her right foot. *See Little v. Anson County Schools Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978).

Further, Mr. Ratcliff's testimony includes an assessment of plaintiff's ability to work at any gainful employment, not just real estate work. Moreover, plaintiff's own testimony regarding her limited ability to engage in any activity and the effect that physical exertion has upon her is competent evidence as to her ability to work. *See Singleton v. D. T. Vance Mica Co.*, 235 N.C. 315, 69 S.E. 2d 707 (1952). In determining the extent of a particular employee's incapacity for work, the Commission also may consider such factors as the individual's degree of pain, *see Fleming*, and the individual's age, education, and work experience, *see, e.g., Little; Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E. 2d 766 (1982); and its opinion indicates that the Commission did consider such factors in this case.

We hold that the evidence of plaintiff's advanced age, education, experience, and degree of chronic pain and resulting limited activity, coupled with Mr. Ratcliff's assessment of plaintiff's ability to work and all the medical evidence, supports the Commission's conclusion that plaintiff is totally and permanently disabled. Accordingly, the award of total disability benefits is

Affirmed.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. BOBBY MITCHELL ADAMS

No. 872SC632

(Filed 15 December 1987)

1. Automobiles and Other Vehicles § 4— accident in parking lot—refusal to exhibit driver's license

Defendant could properly be convicted of willfully refusing to exhibit his driver's license to a uniformed law officer in violation of N.C.G.S. § 20-29 where the evidence showed that defendant's vehicle struck a car in an off-street parking lot at a dentist's office; uniformed officers came to the parking

lot to investigate the accident; and defendant refused several requests by the officers to display his driver's license to facilitate the investigation.

2. **Assault and Battery § 14.6— investigation of parking lot accident—performance of duties as law officers**

Law officers who were investigating an accident in an off-street parking lot at a dentist's office involving damage under $500 and not resulting in personal injury or death were performing a duty of their office so as to support defendant's conviction of feloniously assaulting the officers in the performance of their duties even though N.C.G.S. § 20-166.1(e) may not have required an investigation in this case.

3. **Assault and Battery § 14.6— assault on law officers—sufficient evidence**

The State's evidence was sufficient to support defendant's conviction of assaulting two law officers with a deadly weapon in violation of N.C.G.S. § 14-34.2 where it tended to show that defendant threatened to kill the officers if either one tried to touch him, removed a pocketknife from his pocket, shook it at the officers, began cleaning his fingernails with the knife, told officers that it would take the whole county sheriff's department to take him down, and finally folded the knife and put it back in his pocket after being asked repeatedly to put it away.

APPEAL by defendant from *Llewellyn, Judge*. Judgments entered 1 April 1987 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 9 December 1987.

Defendant was charged in proper bills of indictment with two counts of feloniously assaulting a law enforcement officer with a deadly weapon in violation of G.S. 14-34.2, refusing to produce and exhibit his driver's license to George Stokes, a uniformed law enforcement officer, in violation of G.S. 20-29 and assaulting a law enforcement officer in violation of G.S. 14-33(b)(4).

The evidence at trial tends to show the following: On 17 November 1986, defendant took his son to a dentist's office and parked his vehicle, a wrecker, in the dentist's parking lot. After his son's appointment, as defendant was leaving the lot, he backed into a gray 1976 Toyota that was parked in the lot. Defendant sent his son into the dentist's office to find the Toyota's owner. Defendant's son found the driver, and the driver's mother reported the accident to the police. Two police officers, Sergeant George Stokes and Adolphus Fonville, came to the scene to investigate the accident. Stokes asked defendant several times to produce his driver's license, and he refused. Stokes informed defendant that he would be arrested if he did not produce and exhibit his driver's license. Defendant told the officers present that

if either one tried to touch him he would try his best to kill them. Defendant removed a pocketknife from his pocket, shook it at the officers, and then began cleaning his fingernails. Defendant told the officers that it was going to take the whole Beaufort County Sheriff's Department and the whole police department to take him down. Sergeant Stokes pulled his service revolver from his holster and held it pointed towards the sky in the ready position when defendant pulled out the knife. Stokes told defendant if he made a move toward the officers or tried to stab either one he would shoot him. Stokes also called for a backup on his hand-held walkie-talkie and Officer J. W. Pollard came to the scene. Defendant finally folded the knife and put it back in his pocket after being asked repeatedly to put it away. As the officers tried to effectuate the arrest defendant reached in his wrecker for an iron pipe and a struggle ensued. During the struggle defendant bit Officer J. W. Pollard's ring finger on his right hand and the middle finger on his left hand.

From judgments imposing five years for assault with a deadly weapon on George Stokes, a law enforcement officer, two years for assault with a deadly weapon on Adolphus Fonville, a law enforcement officer, and not less than twelve months nor more than fifteen months for refusing to produce his driver's license, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for the State.

Frazier T. Woolard for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant argues the trial court committed error in denying his motion to dismiss the misdemeanor charge of willfully refusing to produce and exhibit his driver's license to George Stokes, a uniformed law enforcement officer. Defendant contends that since he struck the Toyota "on Dr. Manning's off-street parking lot, which is a public vehicular area," he did not have to produce his driver's license to the officers. In support of this contention, defendant cites *Keziah v. Bostic*, 452 F. Supp. 912 (W.D.N.C. 1978). In that case a highway patrolman driving along a public highway observed the petitioner driving out of a private driveway. The patrolman followed the petitioner into another private driveway.

Both the petitioner and the patrolman got out of their cars and approached each other. The patrolman asked the petitioner to produce his driver's license, and the petitioner refused, stating that he did not have to show his license on his own property. The patrolman informed the petitioner he was under arrest for failing to display his license, and a scuffle ensued. The court found that "while petitioner would have had a meritorious defense to any prosecution based on failure to display his license, he was not entitled to invoke self-help against what was, at the time, an arguably lawful arrest." *Id.* at 916.

Defendant in the present case has no such meritorious defense. Unlike the patrolman in *Keziah*, who had no reason to stop the petitioner or be suspicious of him, the policemen here were called to investigate an accident. The uniformed officers were legitimately on the parking lot premises to perform a duty of their office. Defendant was requested several times to display his driver's license to facilitate the investigation. When he refused, defendant clearly violated G.S. 20-29 which states:

> Any person operating or in charge of a motor vehicle, when requested by an officer in uniform . . . who shall refuse, on demand of such officer . . . to produce his license and exhibit same to such officer . . . for the purpose of examination . . . shall be guilty of a misdemeanor and upon conviction shall be punished as provided in this Article.

These assignments of error have no merit.

[2] Defendant next contends the trial court erred in denying defendant's motions to dismiss the charges of felonious assault with a deadly weapon on George Stokes and Adolphus Fonville, the two law enforcement officers who were investigating the accident. Defendant argues that Stokes and Fonville were not at the scene performing a duty of their office because G.S. 20-166.1(e) only requires law enforcement departments to investigate collisions resulting in injury to or death of any person or total property damage to an apparent extent of five hundred dollars or more. Although the damage to the Toyota was estimated by Stokes to be under five hundred dollars, the officers present were legitimately at the scene. The police were called to the parking lot to investigate an accident. Stokes testified that it was not unusual to be called to investigate minor traffic accidents and that an acci-

dent report is usually filed. The statute may not have required an investigation in this case, but it certainly did not forbid one. Defendant's argument borders on the frivolous.

[3] Defendant further argues that since Stokes and Fonville testified that defendant was "cleaning his fingernails" when he had the pocketknife out, "it is difficult to imagine how that could constitute an assault." We agree with defendant that cleaning one's fingernails should hardly be considered an assault, but here defendant was doing much more. The officers testified that defendant, after threatening their lives, withdrew the knife and shook it at them while continuing to threaten the policemen. Under the circumstances shown by the State in this case, there is plenary evidence that all the requirements of G.S. 14-34.2 were met. Defendant made an overt act with force and violence to do some immediate physical injury to the uniformed officers who were investigating the accident, and his show of force or menace of violence was sufficient to cause the officers a reasonable apprehension of immediate bodily harm.

Defendant had a fair trial free from prejudicial error.

No error.

Judges EAGLES and GREENE concur.

JANICE KING, PLAINTIFF v. GREGORY ODELL HUMPHREY, DEFENDANT, AND THIRD-PARTY PLAINTIFF v. EMBREY BOYKIN AND NATHAN BANKS, THIRD-PARTY DEFENDANTS

No. 874SC446

(Filed 15 December 1987)

Torts § 4.1— contribution among tort-feasors—settlement by one—not entitled to contribution

The trial court properly granted a directed verdict against an original defendant and third-party plaintiff who entered into a settlement with the original plaintiff but failed to affirmatively show that he had met the requirements of N.C.G.S. § 1B-1(d). Plaintiff did not introduce into evidence the release he claimed he obtained from the original plaintiff, nor did he otherwise show that defendants' liability to the original plaintiff had been extinguished.

King v. Humphrey

APPEAL by defendant and third-party plaintiff from *Watts, Thomas S., Judge.* Judgment entered 11 June 1986 in SAMPSON County Superior Court. Heard in the Court of Appeals 16 November 1987.

On 25 February 1985 original plaintiff Janice King filed suit against defendant and eventual third-party plaintiff, Gregory Odell Humphrey, seeking recovery for injuries resulting from his alleged negligence. On 20 June 1985 defendant Humphrey filed a third-party complaint against the driver and owner of plaintiff's vehicle, seeking contribution. Plaintiff and defendant subsequently settled, whereupon, according to defendant's brief, plaintiff King issued a general release dismissing with prejudice her claim against the defendant. The third-party claim for contribution came on for trial on 9 June 1986. At the conclusion of defendant's and third-party plaintiff's evidence, the trial court granted third-party defendants' Motion for a Directed Verdict under N.C. Gen. Stat. § 1A-1, Rule 50 of the Rules of Civil Procedure. Third-party plaintiff appealed.

Anderson, Broadfoot, Johnson & Pittman, by Steven C. Lawrence, for defendant and third-party plaintiff-appellant.

Russ, Worth & Cheatwood, by Walker Y. Worth, Jr., for third-party defendants-appellees.

WELLS, Judge.

Third-party defendants' (hereinafter defendants) Motion for a Directed Verdict was based on two stated reasons: first, because third-party plaintiff (hereinafter plaintiff) "failed to present any evidence of actionable negligence on the part of the third-party defendants" and, second, because plaintiff "failed to present any evidence of the extinguishment of the claim of the [original] plaintiff, Janice King, against the third-party defendants as required by Chapter 1B of the General Statutes of North Carolina." Plaintiff assigns as error the trial court's ruling on both bases of defendants' motion.

This case arose out of a collision that occurred at about 12:10 a.m. on 16 October 1983 near Autryville in Sampson County as the parties were returning home from a concert in separate vans. Defendant Boykin was driving his vehicle in an eastward direc-

tion on N. C. Highway 24 when he encountered thick smoke of unknown origin which had engulfed the highway. The evidence presented at trial tends to show that defendant drove a short distance into the cloud of smoke and then brought his van to a stop, on the highway, in order to converse with the driver of a vehicle coming from the opposite direction. While Boykin's vehicle was stopped, a van owned and operated by plaintiff Humphrey crashed into the rear of the Boykin van, injuring the original plaintiff, Janice King.

Plaintiff contends that the trial court's directed verdict was improper because (1) there was sufficient evidence to go to the jury on the question of negligence, and (2) because the failure to prove extinguishment of liability under N.C. Gen. Stat. § 1B-1(d) is an improper ground upon which to grant a Rule 50 Motion for Directed Verdict. We disagree.

Our review of the trial transcript persuades us that the trial court granted defendants' motion on the grounds that plaintiff had not complied with the contribution statute. G.S. § 1B-1(d) provides, in pertinent part, as follows: "A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury on wrongful death has not been extinguished . . . ." The record shows that plaintiff entered into a settlement with King, the original plaintiff, but the trial transcript makes it clear that plaintiff did not introduce into evidence the release he claims he obtained from King, nor did he otherwise show that defendants' liability to King had been extinguished. This was a threshold requirement for plaintiff in this case. Plaintiff asks us to hold that in order for defendant to prevail on this issue it was necessary for defendant to plead and prove the absence of a general release —in other words, treat the statutory requirement of extinguishment as an affirmative defense. We cannot agree. Our Supreme Court has consistently held that since contribution among joint tort-feasors is a purely statutory remedy, its enforcement must be in accord with the statute's provisions. *See, e.g., Shaw v. Baxley*, 270 N.C. 740, 155 S.E. 2d 256 (1967) and *Potter v. Frosty Morn Meats, Inc.*, 242 N.C. 67, 86 S.E. 2d 780 (1955) (interpreting and applying the predecessor statute, G.S. § 1-240). We therefore hold that in this case it was plaintiff's burden to affirmatively show that he had met the requirements of G.S. § 1B-1(d). Plaintiff

having failed to do this, the trial court correctly granted defendants' Motion for a Directed Verdict.

No error.

Judges JOHNSON and COZORT concur.

BHAGU PATEL v. MID SOUTHWEST ELECTRIC

MID SOUTHWEST ELECTRIC v. BHAGU PATEL

No. 8728SC572

(Filed 15 December 1987)

Appeal and Error § 14— contract action—appeal more than ten days from denial of motion for j.n.o.v.—untimely

Notice of appeal was not timely given, and the court had no jurisdiction to consider the appeal, where the court directed a verdict as to the existence of a contract and awarded Mid Southwest Electric $5,000.00, the jury on 29 January 1987 returned a verdict for $19,495.29 based on modification to the contract, Patel's motion for j.n.o.v. or for a new trial was denied in open court on 30 January, no oral notice of appeal was given, the order denying Patel's motion was not signed until 9 February, notice of appeal was given on 18 February, and the judgment was signed on 19 February. Entry of judgment was on 29 January, when the jury returned its verdict, defendant's motions tolled the ten-day period for giving notice of appeal until 30 January, and it was necessary to give notice of appeal within ten days of 30 January. N.C.G.S. § 1A-1, Rule 58, N.C.G.S. § 1-279(c).

APPEAL by defendant Bhagu Patel from *Lewis (Robert D.), Judge.* Judgment entered 30 January 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 2 December 1987.

This is a civil action wherein Mid Southwest Electric filed a complaint against Bhagu Patel based upon a contract. Patel then filed a counterclaim against Mid Southwest for damages based upon the same contract.

The court directed a verdict as to the existence of a contract and awarded Mid Southwest $5,000.00. The jury, on 29 January 1987, further awarded Mid Southwest an additional $19,495.29

based on modifications of the contract. Patel moved for judgment notwithstanding the verdict, or in the alternative for a new trial. The motion was denied in open court on 30 January 1987. No oral notice of appeal was given. Patel filed a written notice of appeal on 18 February 1987.

Pope, McMillan, Gourley, Kutteh & Parker, by David P. Parker, for appellee Mid Southwest Electric.

Morris, Golding, Phillips & Cloninger, by Thomas R. Bell, Jr., for appellant Bhagu Patel.

HEDRICK, Chief Judge.

The jury in this case returned its verdict on 29 January 1987. The court denied Patel's motion for judgment notwithstanding the verdict and in the alternative for a new trial on 30 January 1987. Although the judgment was not signed until 19 February 1987 and the order denying Patel's motion was not signed until 9 February 1987, the notice of appeal on 18 February 1987 was not timely and this Court has no jurisdiction.

G.S. 1-279(c) provides for time for taking appeal in a civil proceeding:

> (c) Time When Taken by Written Notice.—If not taken by oral notice as provided in subsection (a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subsection, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under G.S. 1A-1, Rule 50(b), for judgment n.o.v. whether or not with conditional grant or denial of new trial; (ii) a motion under G.S. 1A-1, Rule 52(b), to amend or make additional findings of fact, whether or not an alternation of the judgment would be required if the motion is granted; (iii) a motion under G.S. 1A-1, Rule 59, to alter or amend a judgment; (iv) a motion under G.S. 1A-1, Rule 59, for a new trial. If a timely notice of appeal is filed and served by a party, any other par-

ty may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

Entry of judgment in this case was when the jury returned its verdict. The date of entry does not depend on the date of formal signing or filing, but instead depends upon the date when oral notice of the judgment is given in open court. *In re Moore*, 306 N.C. 394, 293 S.E. 2d 127 (1982); *Byrd v. Byrd*, 51 N.C. App. 707, 277 S.E. 2d 472 (1981).

This is provided in G.S. 1A-1, Rule 58 which provides in part:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.

Entry of judgment, therefore, was on 29 January 1987, when the jury returned its verdict.

Because G.S. 1-279(c) provides for the 10-day period to be tolled when certain motions are made, the entry of judgment in this case does not begin the running of the 10-day period for giving notice of appeal. A motion for judgment notwithstanding the verdict or for a new trial, as was made in this case, tolls the period until the court rules on such motions. Here, the denial of the motion was announced in open court on 30 January 1987, and it was therefore necessary for Patel to give notice of appeal to this Court within 10 days of 30 January 1987, which he did not do, and the record affirmatively discloses that this Court has no jurisdiction to consider Patel's appeal.

Appeal dismissed.

Judges MARTIN and GREENE concur.

PEGGY JEAN EDWARDS ROPER v. MACK ANDERSON EDWARDS AND JUDITH BERTLING EDWARDS

No. 8719SC528

(Filed 15 December 1987)

Trusts § 19— conveyance of real property—constructive trust—evidence not sufficient

Summary judgment was properly granted for defendants in an action to force defendants to convey to plaintiff a tract of land where the land had been conveyed to defendants as a part of the settlement of a civil action; the agreement required that defendants not dispose of the property before the death of the other party to the action; defendants were to convey the property to whomever the other party designated by her will, and if no such designation was made, the property would belong to defendants in fee simple; the other party's will specifically referred to the settlement provisions and directed defendants to convey the property to plaintiff in this action; and defendants refused to convey the property. The language in the settlement agreement was a prohibited restraint upon alienation, and the equitable remedy of constructive trust did not apply because there was no evidence of any fraud or wrongdoing on the part of defendants, and nothing in the record to indicate that defendants had any legal duty to convey the property to plaintiff.

APPEAL by plaintiff from *Walker, Judge.* Judgment entered 18 March 1987 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 30 November 1987.

This is a civil action wherein plaintiff seeks to require defendants to convey to her a 1.12 acre tract of land pursuant to a settlement agreement. The record shows that on 24 February 1984 Myrtle Burroughs Edwards, defendants and Robert Burroughs Edwards entered into a settlement agreement arising from a civil action then pending in the Superior Court of Randolph County. As part of this agreement, Myrtle Burroughs Edwards promised to convey to defendants a tract of land which defendants could not dispose of before her death. Defendants were then to convey the property to whomever Myrtle designated by her will, and if no such designation was made the property would belong to defendants in fee simple.

Myrtle conveyed the property to defendants by a deed which noted the agreement's provisions. When Myrtle died 4 September 1986 her will specifically referred to the settlement provisions and directed defendants to convey the property to plaintiff. De-

fendants refuse to convey the property, contending they are not obligated to do so.

At trial, both plaintiff and defendants moved for summary judgment. The trial judge granted defendants' motion, denied plaintiff's motion and entered judgment for defendants dismissing plaintiff's claim. Plaintiff appealed.

Haworth, Riggs, Kuhn, Haworth and Miller, by John Haworth, for plaintiff, appellant.

Ivey Mason & Wilhoit, by Rodney C. Mason, for defendants, appellees.

HEDRICK, Chief Judge.

Plaintiff's sole question on appeal is "did the trial court commit reversible error by granting defendant's motion for summary judgment and by denying plaintiff's motion for summary judgment?" Both plaintiff and defendants agree summary judgment was appropriate pursuant to G.S. 1A-1, Rule 56(c), because there is no genuine issue as to any material fact. Plaintiff contends, however, the summary judgment should have been in her favor.

In this case, the grantor of real property attempted to retain a testamentary power of appointment. When Myrtle conveyed the tract of land to defendants, she undertook to keep a right to designate by will who would receive the property after her death.

Plaintiff admits in her brief that the language regarding the settlement in the deed from Myrtle to defendants "is a prohibited restraint upon alienation" and that the agreement by defendants "to refrain from conveying the property is void." Any condition attached to the creation of an estate in fee simple which prevents the conveyee from alienating it for a period of time is void as a restraint on alienation. *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E. 2d 580 (1976). A restraint on alienation is also against public policy. *Trust Co. v. Construction Co.*, 3 N.C. App. 157, 164 S.E. 2d 519 (1968); *Clayton v. Burch*, 239 N.C. 386, 80 S.E. 2d 29 (1954). Only the restraint is invalid, however, and the grant normally stands. *Id.*

Here, plaintiff argues defendants should convey the property as required by the settlement agreement because the equitable

remedy of constructive trust applies. A constructive trust is imposed "to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust." *Wilson v. Development Co.*, 276 N.C. 198, 211, 171 S.E. 2d 873, 882 (1970).

Plaintiff contends defendants were unjustly enriched by the conveyance simply because they received the property from Myrtle when she, Myrtle, clearly manifested her intention that plaintiff receive the property in question.

In order to invoke a constructive trust plaintiff must show that unjust enrichment is the result of fraud, a breach of duty, or some other circumstance making it inequitable for defendants to keep the property. Plaintiff cites *Cline v. Cline*, 297 N.C. 336, 343, 255 S.E. 2d 399, 404 (1979), for the proposition that "[w]henever one obtains legal title to property in violation of a duty he owes to another who is equitably entitled to the land or an interest in it, a constructive trust immediately comes into being."

There is nothing in this record to indicate that defendants had any legal duty to convey the property to the plaintiff. There is no evidence in this record of any fraud or wrongdoing upon the part of defendants with respect to the manner in which they acquired the property or their failure to convey it because of the void provision in their deed with respect to the settlement agreement. They have a legal right to refuse to convey the property because of the restraint on alienation, and this exercise of a legal right cannot amount to fraud. *Walker v. Walker*, 231 N.C. 54, 55 S.E. 2d 797 (1949).

The judgment appealed from is

Affirmed.

Judges MARTIN and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 DECEMBER 1987

BRITTAIN v. BRITTAIN No. 878DC586	Lenoir (81CVD1452)	Vacated & Remanded
CAIN v. CAIN No. 8710DC329	Wake (81CVD2158)	Affirmed in part, vacated and remanded in part
IN RE GORDON No. 8729DC713	Henderson (85J16) (85J26) (85J27)	Affirmed
JORDAN v. GUPTON No. 8710SC235	Wake (85CVS3423)	Affirmed
LOWE'S COMPANIES, INC. v. ETERNAL CROWN MINISTRIES No. 8723SC351	Wilkes (86CVS203)	Affirmed
PORTER v. COHN No. 8710IC577	Ind. Comm. (557864)	Reversed
SELLERS v. WHITT No. 8713DC522	Brunswick (85CVD145)	Reversed & Remanded
STATE v. BREWER No. 874SC563	Onslow (86CRS20602) (86CRS20596)	No Error
STATE v. GRIMES No. 8724SC552	Watauga (86CRS4023)	No Error
STATE v. HEWELL No. 8727SC616	Gaston (86CRS11739) (86CRS11748) (86CRS11749)	No Error
STATE v. LETTIERI No. 876SC565	Bertie (86CRS2497)	No Error
STATE v. McDOWELL No. 8726SC757	Mecklenburg (86CRS093588)	Appeal Dismissed
STATE v. PEGUESE No. 8710SC660	Wake (86CRS23713)	Affirmed
STATE v. WHITE No. 8719SC623	Cabarrus (86CR10429) (86CR10430)	New Trial

State ex rel. Utilities Comm. v. Southern Bell

No. 8610UC427: STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION, MCI TELECOMMUNICATIONS CORPORATION AND U.S. SPRINT COMMUNICATIONS COMPANY v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY; THE PUBLIC STAFF; AT&T COMMUNICATIONS, INC.; CENTRAL TELEPHONE COMPANY; ALLTEL CAROLINA, INC.; GENERAL TELEPHONE COMPANY OF THE SOUTHEAST; CAROLINA TELEPHONE COMPANY; TELECOMMUNICATIONS SYSTEMS, INC.; CAROLINA UTILITY CUSTOMERS ASSOCIATION; ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; AND NORTH CAROLINA LONG DISTANCE ASSOCIATION

No. 8610UC610: STATE OF NORTH CAROLINA *EX REL.* UTILITIES COMMISSION, MCI TELECOMMUNICATIONS CORPORATION AND U.S. SPRINT COMMUNICATIONS COMPANY v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE PUBLIC STAFF; CENTRAL TELEPHONE COMPANY; ALLTEL CAROLINA, INC.; GENERAL TELEPHONE COMPANY OF THE SOUTHEAST; CAROLINA TELEPHONE COMPANY; TELECOMMUNICATIONS SYSTEMS, INC.; CAROLINA UTILITY CUSTOMERS ASSOCIATION; ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; AND NORTH CAROLINA LONG DISTANCE ASSOCIATION

Nos. 8610UC427 and 8610UC610

(Filed 22 December 1987)

1. **Telecommunications § 1.2; Constitutional Law § 23.1— telecommunications regulation—operating expenses increased, return on investment decreased—not unconstitutional taking of property**

Where the Utilities Commission entered an order requiring certain long distance carriers to pay compensation for the unauthorized transmission of some long distance calls, the order was not unlawfully confiscatory and thus a violation of the prohibition against the taking of property without due process because there was nothing which compelled U.S. Sprint to operate in North Carolina at a loss, there was no evidence that U.S. Sprint was being required to operate at an unfair return on its investment, and U.S. Sprint was free to dismantle its operation in the state. N.C.G.S. § 62-94(b)(1).

2. **Utilities Commission § 20; Telecommunications § 1.1— payment by long distance carriers for unauthorized transmission of long distance calls—not an unauthorized penalty**

An order of the Utilities Commission did not constitute a penalty and was statutorily authorized where, pursuant to the federally ordered breakup of AT&T, the Utilities Commission directed that certain long distance carriers pay compensation for the unauthorized transmission of some long distance calls. The plan was reasonably calculated to provide protection for the local exchanges who provided needed services to local exchange customers and the compensation plan was a proper term or condition of certification consistent with the public interest. N.C.G.S. § 62-110, N.C.G.S. § 62-94(b)(2), N.C.G.S. § 62-312.

3. Telecommunications § 1.1; Constitutional Law § 20.1— requirement that certain long distance carriers pay compensation for unauthorized transmission of some long distance calls—no violation of equal protection

A Utilities Commission order did not violate the equal protection clauses of the United States and North Carolina Constitutions where, pursuant to the federally ordered breakup of AT&T, the Utilities Commission directed that certain long distance carriers pay compensation for the unauthorized transmission of some long distance calls. The plan was rationally related to the objective of insuring that the legitimate State objective of providing its citizens with a competitive telecommunications environment beneficial to the individual consumer was accomplished in an equitable manner without jeopardizing reasonably affordable local exchange service. N.C.G.S. § 62-110.

4. Telecommunications § 1.1; Constitutional Law § 27.1— State regulation of long distance carriers—not undue burden on interstate commerce

An order of the North Carolina Utilities Commission requiring some long distance carriers to pay compensation for the unauthorized transmission of some long distance calls was not unduly burdensome on interstate commerce where the plan adopted was temporary and reasonable, and similar plans worked effectively in other states and have been upheld in similar suits.

5. Telecommunications § 1.1; Utilities Commission § 5— intrastate long distance telecommunications—regulation by State—valid

A North Carolina Utilities Commission order requiring certain long distance carriers in North Carolina to pay compensation for the unauthorized transmission of long distance calls was a valid regulatory exercise of authority over intrastate telecommunications, which were left to the control of State legislators and their regulatory agencies.

6. Telecommunications § 1.1— payment for unauthorized transmission of long distance calls—not money damages

A Utilities Commission order that long distance carriers pay compensation for the unauthorized transmission of some long distance calls was a proper term or condition of certification consistent with the public interest and not an improper award of money damages.

7. Telecommunications § 1.1; Constitutional Law § 23.4— long distance carriers required to compensate local exchanges—no violation of due process

An order of the North Carolina Utilities Commission that certain long distance companies, including MCI, pay compensation to local exchanges for the unauthorized transmission of long distance calls did not violate MCI's right to due process of law in that MCI was not informed prior to the first hearing of what the ultimate decision would be where exhaustive hearings were conducted at each step, MCI was present and represented by counsel at each stage of the proceedings, the record is replete with evidence that a compensation plan was considered from the outset of the hearings, an order on 22 February found that OCCs such as MCI and resellers should be required to pay compensation to LECs, and the Commission then held further hearings before setting the final rate of compensation.

8. Telecommunications § 1.1; Utilities Commission § 20— compensation for unauthorized transmission of long distance telephone calls—proceedings not arbitrary or capricious

An order of the Utilities Commission requiring compensation for the unauthorized transmission of long distance telephone calls was not arbitrary and capricious where the case involved numerous hearings at which voluminous amounts of evidence were taken; the Commission heard from dozens of witnesses; there was plenary evidence to support the Commission's findings, conclusions, and orders, although not all of the witnesses advocated the decision made by the Commission; and, although the Commission's decision may not be the best solution or the most desirable to all parties, that does not render the proceedings arbitrary and capricious.

9. Utilities Commission § 43; Telecommunications § 1.1— compensation between telecommunications carriers—not rate discrimination

An order of the North Carolina Utilities Commission requiring that certain long distance carriers pay compensation to local area exchanges for the unauthorized transmission of some long distance calls did not constitute unjust and unreasonable rate discrimination. N.C.G.S. § 62-140(a) was enacted to prohibit a utility from unreasonable discrimination among its customers, and was not meant to be applied to the North Carolina Utilities Commission's conduct towards various public utilities.

10. Telecommunications § 1.1— intraLATA access charges authorized under statute—supported by evidence

In a Utilities Commission proceeding to introduce competition to the North Carolina intrastate long distance telecommunications market following the breakup of AT&T, an intraLATA access charge was within the authority of N.C.G.S. § 62-110 in that the Commission intended the tariff to provide funds to set off those expenditures that the local exchange companies were required to make to provide additional facilities to handle additional intraexchange company carrier access, and the order requiring the tariff was supported by evidence in that the record was replete with testimony supporting a factual finding that access charge tariffs were designed to reflect accurately the actual usage of the local exchange company facilities by resellers and other common carriers.

11. Telecommunications § 1.1— regulation of intrastate telecommunication competition—order requiring access charge tariffs—not unconstitutional

An order of the North Carolina Utilities Commission requiring access charge tariffs was distinguishable from *In re Arcadia Dairy Farms*, 43 N.C. App. 459, and was constitutional where the plan here was designed to compensate local exchange companies for revenues lost due to the transmission of unauthorized traffic over the facilities of other common carriers and those lines rented by resellers; the plan was not designed to protect North Carolina companies from competition; and the plan was a temporary device calculated to compensate local exchange companies for loss of revenue to unauthorized intrastate intraLATA telecommunications carriers during the relatively brief period of transition to a competitive marketplace.

IN Case No. 8610UC427, appeal by MCI Telecommunications Corporation and U.S. Sprint Communications Company from Order of North Carolina Utilities Commission entered 30 September 1985. Heard in the Court of Appeals on 8 December 1986.

In Case No. 8610UC610, appeal by MCI Telecommunications Corporation and cross appeal by the North Carolina Long Distance Association from Order of North Carolina Utilities Commission entered 19 December 1985. Heard in the Court of Appeals on 8 December 1986.

Public Staff Executive Director Robert P. Gruber by Chief Counsel Antoinette R. Wike for appellee, North Carolina Utilities Commission.

Sanford, Adams, McCullough & Beard by Charles C. Meeker and Gary S. Maines; Of Counsel Michael M. Ozburn for plaintiff appellant, MCI Telecommunications Corporation.

Rita A. Barmann; Reboul, MacMurray, Hewitt, Maynard & Kristol by Deborah A. Dupont; and Poyner & Spruill by J. Phil Carlton and Nancy Bentson Essex for plaintiff appellant, U.S. Sprint Communications Company.

Hunton & Williams by Edward S. Finley, Jr., and Grady L. Shields; and General Attorney J. Billie Ray, Jr., for appellee, Southern Bell Telephone and Telegraph Company.

Tharrington, Smith & Hargrove by Wade H. Hargrove; and Gene V. Coker for appellee, AT&T Communications of the Southern States, Inc.

Senior Attorney Jack H. Derrick and Vice President-General Counsel & Secretary Dwight W. Allen for appellee, Carolina Telephone and Telegraph Company.

General Counsel for North Carolina Long Distance Association, John Jordan; and Walter E. Daniels and Linda Markus Daniels for North Carolina Long Distance Association.

COZORT, Judge.

These appeals arise from orders of the North Carolina Utilities Commission introducing competition into the North Carolina intrastate long distance telecommunications market following the

federal court ordered breakup of the American Telephone and Telegraph Company. The specific orders appealed from (1) directed certain long distance carriers to pay compensation for the unauthorized transmission of some long distance calls; and (2) directed local companies to file tariffs setting the access charges resellers of long distance services must pay on certain types of calls. We affirm the orders of the Commission.

The two orders appealed from came to this Court as separate cases. We granted a motion to have the cases scheduled for argument on the same day. Because some of the same parties appear in both cases and many of the pertinent issues are related, we have consolidated the cases for the purposes of this opinion.

The orders appealed from were issued by the North Carolina Utilities Commission pursuant to a federal court ordered breakup of the American Telephone and Telegraph Company, hereinafter "AT&T." Because of the complexity of the issues presented, we shall begin with a review of the history of the telecommunications market, the federal court actions, and the business relationships of the parties to this appeal.

I.

HISTORY AND EVOLUTION OF THE NATION'S TELECOMMUNICATIONS MARKET.

During the past century our nation's telecommunications system has increasingly become a more important part of our business, social, and personal existence. AT&T grew with the national system to the point of essentially engulfing it. As AT&T strengthened its hold on national telecommunications, its competition and the federal government sought ways to loosen AT&T's grip.

The first benchmark in legal actions aimed at AT&T was filed by the United States Government on 14 January 1949. *See U.S. v. AT&T*, 552 F. Supp. 131, 135-39 (D.D.C. 1982), *aff'd sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983). This antitrust litigation which sought an end to AT&T's virtual monopoly did not produce that result. 552 F. Supp. at 138-39. Consequently, a separate

antitrust action was filed by the Justice Department in 1974. *Id.* at 139.[1]

Prior to the 1974 antitrust filing, the Federal Communications Commission (F.C.C.) had attempted to provide freer access to the telecommunications market which would have theoretically assisted in opening those mediums to competition. *See Above 890*, 39 F.C.C. 650 (1959). Because of the strength of the Bell System and the failure of previous litigation, little progress in implementing competition was achieved. A review of the service available at that time will help explain the lack of progress.

A. *Pre-divestiture Telecommunications Market*

Local telephone service was provided in North Carolina and in other states by Local Exchange Companies (LECs). These LECs were either one of two types: local independent companies, or Bell Operating Companies (BOCs), which were, in effect, local subsidiaries of AT&T. Appellee Carolina Telephone Company is an example of the former, while appellee Southern Bell is an example of the latter. In North Carolina these companies operated without competition in specific geographically defined territories pursuant to state authorization. They were, simply put, legal monopolies in their respective regions. They provided origination and termination facilities and services in their areas. When a customer in one of these areas made a telephone call to another person who was also a customer in the same area, an "exchange" call, the LEC would be responsible for the connection from start (origination) to finish (termination) and everything in between.[2] *See AT&T*, 552 F. Supp. at 141 n.37 and accompanying text. In other words, from the time the caller dialed a number on his telephone until the intended recipient of the call lifted the receiver, the transmission never left the LEC's network.

1. For a detailed history of AT&T litigation, *see U.S. v. AT&T*, 552 F. Supp. 131, 135-40 (D.D.C. 1982).

2. This type of telephone service is referred to in *AT&T* as being an "exchange" service, which generally is a service provided local customers by LECs. *See id.* at 141. This would include essentially all calls that originate and terminate within the same state authorized geographic monopoly. This type call will, later in this opinion, be illustrated to be practically identical to an *intra*LATA call in the post-divestiture market.

When the local customer sought a connection with a person outside of the geographic area serviced by the LEC, the traffic was described as "interexchange."[3] An "interexchange" call would leave the local area of origination and be picked up by the "interexchange carrier" (IXC) who would route the call to the LEC that serviced the area where the call was to terminate. This IXC service was almost without fail provided by AT&T. The terminating LEC would then handle the traffic until the intended connection was completed when the terminating LEC's local customer lifted the receiver.

The problem with attempting to introduce competition to the "interexchange" market during these pre-divestiture years was that many, if not most, of the nation's LECs were owned and operated by the Bell System. *See AT&T*, 552 F. Supp. at 139 n.19. *See also, GTE Sprint v. AT&T*, 230 Va. 295, 298, 337 S.E. 2d 702, 704 (1985). ("GTE Sprint" is now known as "U.S. Sprint.") Potential IXC competitors of AT&T *could* therefore be effectively hindered or denied in their attempts to gain access to *all* local customers. If, for example, a caller's intended termination point on an interexchange call happened to be within a geographic monopoly serviced by a Bell-operated LEC, an IXC competitor of AT&T had to rely on the good graces of AT&T to be afforded complete and equal access. Without such complete and equal access, the public, as consumers, would be reluctant to do business with an AT&T IXC competitor because the IXC competitors of AT&T were competing with a system that could complete calls anywhere in the country. The AT&T system had unlimited access to *all* local exchanges in the nation. In addition, local independent LECs were hesitant to jeopardize any working relation with AT&T, the dominant "interexchange" carrier, by becoming too cozy with AT&T's IXC competitors, because they too wanted their customers to be able to terminate connections in foreign local service areas that were served by Bell-operated LECs.

3. For all intents and purposes, AT&T handled practically all the "interexchange" traffic prior to divestiture. "Interexchange" traffic is that which originated in one area serviced by a North Carolina authorized monopoly and had or has a termination point, either interstate or intrastate, outside that geographical service area. This type call will, later in this opinion, be illustrated to be practically identical to an *inter*LATA call in the post-divestiture market.

Thus, AT&T handled practically all "interexchange" telephone traffic. Local access had become the critical component for any national telecommunications company.

B. *The Divestiture of 1982*

Access to this crucial link in long distance dialing, the local connection, was the basis of the filing of the 1974 antitrust action. The government's contention in that filing was that AT&T so tightly controlled access to so much of the local exchange network through its BOCs that potential competitors of AT&T were shut out of those local markets. The complaint contended that AT&T in reality enjoyed a monopoly in the "interexchange" telecommunications market. It was not until 1982, eight years after the second antitrust suit was filed, that the relief sought by the government became a reality. *See AT&T*, 552 F. Supp. at 131.

In an interim decision in the case, District Judge Harold H. Greene denied an AT&T motion to dismiss the 1974 filing pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. *U.S. v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981). After this published denial, the parties tendered a proposed settlement to the federal court. That settlement offer, based on an agreement between AT&T and the Justice Department, was ultimately approved and adopted by Judge Greene, in an Order of Judgment denominated a Modification of Final Judgment (MFJ).

As a result of the MFJ, AT&T retained two subsidiaries, Western Electric Company, Inc., and Bell Telephone Laboratories, Inc. *GTE Sprint*, 230 Va. at 298, 337 S.E. 2d at 704; *AT&T*, 552 F. Supp. at 139 n.19. The twenty-two BOCs were divested from AT&T and divided into Local Access and Transport Areas (LATAs).[4] A LATA "generally center[s] upon a city or other identifiable community of interest. Simply put, a LATA marks the

4. For purposes of this appeal, it is uncontested that there are five LATAs in North Carolina which are the respective regional geographical limits beyond which Southern Bell could not, at the time of the Commission's 30 September Order, offer telecommunications services. Further, the service areas of all independent telephone companies in North Carolina are either associated with a Southern Bell LATA or organized into geographical market areas that are equivalent thereto. *See* Common Docket No. P-100, Sub. 65. LATAs in North Carolina are conterminous with the geographical boundaries that previously delineated state authorized local exchange company monopolies.

boundaries beyond which (in the future) a Bell Operating Company may not carry telephone calls." *U.S. v. Western Electric Co.*, 569 F. Supp. 990, 993 nn.4 and 9 and accompanying text. (D.D.C. 1983.)

By forcing AT&T to divest the BOCs that had, prior to the MFJ, performed an LEC function for AT&T, it was hoped that the desired national policy of telecommunications competition could be accomplished in the interstate market.[5] Before the MFJ, these companies had blended into the AT&T scheme and existed therein without readily definable distinctions. In the post-divestiture days, these "former" BOCs were to act independently of AT&T, and to exist severed from AT&T in a manner consistent with the relationship that had existed between AT&T and local independent LECs. *AT&T*, 552 F. Supp. at 170-71.

C. *Post-Divestiture Telecommunications Market*

The MFJ spelled out the function the BOCs were to perform in the services field after divestiture: "(1) to engage in *exchange telecommunications*, that is, to transport traffic between telephones located within a LATA, and (2) to provide *exchange access* within a LATA, that is, to link a subscriber's telephone to the nearest transmission facility of AT&T or one of AT&T's long-haul competitors [*e.g.*, MCI and U.S. Sprint]." *Western Electric Co.*, 569 F. Supp. at 994 (footnotes omitted) (emphasis added). The federal order forced the BOCs

> to relinquish to AT&T their right to carry long distance traffic between LATAs but [they] were granted the right, denied to AT&T, to transport communications which originate and terminate within a single LATA (intraLATA [or exchange] traffic). Only AT&T and its competitors, the other common carriers such as MCI and GTE Sprint, were permitted to provide service between LATA's (interLATA [or interexchange] traffic).

GTE Sprint, 230 Va. at 298, 337 S.E. 2d at 704.

5. "The history of the American economic system teaches that fair competition is more likely to benefit all, especially consumers, than an industry dominated by a single-company monopolist. There is no reason to believe that the experience of the telecommunications industry will be contrary to that rule." *AT&T*, 552 F. Supp. at 170.

1. Post-divestiture companies

Long haul, or IXC, competitioners of AT&T had emerged onto the national telecommunications scene pursuant to F.C.C. authority and have competed actively with AT&T in the interstate market for some time.[6] Interexchange carriers (IXCs) can generally be divided into three categories with distinctive characteristics: AT&T, other common carriers (OCCs), and "resellers," of long distance services.

Because of its historical dominance in the long distance market, AT&T is in an IXC category by itself. AT&T maintains its own facilities and remains the primary carrier of interstate telecommunications traffic.

Like AT&T, OCCs also establish and maintain their own facilities. Unlike AT&T, however, they have traditionally been totally dependent on both types of LECs, the Bell Operated Companies *and* local independents, for origination and termination of their traffic.[7] Appellants U.S. Sprint and MCI are both OCCs competing directly with AT&T.

The third type of long haul competitor is the reseller. Resellers do not maintain their own facilities; rather, they purchase "use time" from facility operating companies and offer it for resale to the consuming public. Their interests are represented in these appeals by the North Carolina Long Distance Association.

In summary, post-divestiture companies party to this appeal fall into two major categories: One group is composed of interexchange carriers (IXCs), including AT&T, OCCs and resellers. These companies provide interexchange connections between

6. These competitors began to enter the national telecommunications field pursuant to F.C.C. authorization, but due to the domination of the market by AT&T were unable to compete effectively until recently. Since divestiture, they control a growing portion of the market share of interexchange communications.

7. Although AT&T also relied to a certain extent on local independents for one end or the other of certain traffic, and both ends of some traffic, local independents, as discussed earlier, also were by necessity forced to depend on AT&T to complete calls made by their local customers to termination points outside the local independent's service area. OCCs were at a disadvantage to offer local independents the same transfer service as AT&T, because the termination point intended by the local independent customer could have been to an LEC that was an AT&T controlled BOC.

local exchange service areas. The second group is composed of the Local Exchange Companies (LECs) that provide local exchange service, some long distance service within their protected areas, and consumer access to IXCs. Divested BOCs now perform the same function as local independent companies do in their operation as LECs. *AT&T*, 552 F. Supp. at 131, 139 n.19, and 171; *Western Electric Co.*, 569 F. Supp. at 994-95.

2. Post-divestiture service

Post-divestiture long distance service is also best understood by viewing it categorically. "[F]ollowing the court ordered reorganization, long distance service is now divided into three categories: interstate service regulated by the Federal Government; intrastate interLATA service, regulated by the states; and intrastate intraLATA service regulated by the states." *GTE Sprint*, 230 Va. at 298, 337 S.E. 2d at 704.

The MFJ entered by Judge Greene was affirmed by the United States Supreme Court on 23 February 1983. On 29 June 1984, the North Carolina General Assembly enacted legislation, effective that date, to amend the powers and duties of the North Carolina Utilities Commission. 1983 N.C. Sess. Laws Ch. 1043 (2d Sess. 1984). In § 1, the General Assembly amended N.C. Gen. Stat. § 62-2 by adding a new paragraph at the end to read:

> Because of technological changes in the equipment and facilities now available and needed to provide telephone and telecommunications services, changes in regulatory policies by the federal government, and changes resulting from the court-ordered divestiture of the American Telephone and Telegraph Company, competitive offerings of certain types of telephone and telecommunications services may be in the public interest. Consequently, authority shall be vested in the North Carolina Utilities Commission to allow competitive offerings of long distance services by public utilities defined in G.S. 62-3(23)a.6. and certified in accordance with the provisions of G.S. 62-110.

In § 2, N.C. Gen. Stat. § 62-110 was amended by adding two new paragraphs at the end to read:

> The Commission shall be authorized to issue a certificate to any person applying to the Commission to offer long dis-

tance services as a public utility as defined in G.S. 62-3(23) a.6., provided that such person is found to be fit, capable, and financially able to render such service, and that such additional service is required to serve the public interest effectively and adequately; provided further, that in such cases the Commission shall consider the impact on the local exchange customers and only permit such additional service if the Commission finds that it will not jeopardize reasonably affordable local exchange service. Notwithstanding any other provision of law, the terms, conditions, rates, and interconnections for long distance services offered on a competitive basis shall be regulated by the Commission in accordance with the public interest. In promulgating rules necessary to implement this provision, the Commission shall consider whether uniform or nonuniform application of such rules is consistent with the public interest. Provided further that the Commission shall consider whether the charges for the provision of interconnections should be uniform.

For purposes of this section, long distance services shall include the transmission of messages or other communications between two or more central offices wherein such central offices are not connected on July 1, 1983, by any extended area service, local measured service, or other local calling arrangement.

On 24 July 1984, the Utilities Commission initiated the proceeding which led to these appeals. On that date, the Commission issued an "ORDER INSTITUTING INVESTIGATION, SCHEDULING HEARINGS AND REQUIRING PUBLIC NOTICE." By that Order, the Commission began to investigate whether intrastate long distance competition in the North Carolina telecommunications market would benefit the North Carolina consumer. The Commission commenced a lengthy process of hearings resulting in, among other things, the orders appealed herein. Before proceeding to an analysis of the orders and the issues presented for appeal, we first state the standard governing appellate review of North Carolina Utilities Commission orders.

II.

STANDARD OF REVIEW

In North Carolina, the standard that governs appellate review of Utilities Commission orders is statutorily articulated:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.
>
> (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

N.C. Gen. Stat. § 62-94(b) and (c). In analyzing this limited right of review, our Supreme Court stated that any findings of fact made by the Commission, if "supported by competent, material and substantial evidence [is] conclusive," even if the reviewing court would have reached a different result on the same evidence. *Utilities Commission v. The Public Staff*, 317 N.C. 26, 34, 343 S.E. 2d 898, 903 (1986).

III.

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After initiating the investigation, the North Carolina Utilities Commission conducted six public hearings in six different North Carolina cities between 15 October and 22 October 1984. On 22 February 1985, the Commission entered an "ORDER AUTHORIZING INTRASTATE LONG-DISTANCE COMPETITION." In that Order, the Commission determined that intrastate telecommunications in North Carolina, to that date, was being provided by certified public utilities, each with a legal monopoly in its service area. The Commission also found that the MFJ had divided North Carolina's long distance telecommunication services into five LATAs. Southern Bell was prohibited by the MFJ from carrying traffic beyond those regional geographical limitations. InterLATA services in North Carolina could at the time of that order, be offered only by AT&T-C[8] or "an independent (non-Bell) within its respective service area." Although the Commission noted that the current system was adequate, it also noted that the policy of interstate telecommunications competition had recently been favored by the F.C.C. and the federal courts. The Commission found as fact that authorization of *intra*state *inter*LATA[9] competition by OCCs and resellers *in* North Carolina would be in the public interest if it would not "jeopardize reasonably affordable local service," and that authorization of *intra*state *intra*LATA service[10] would be in the public interest as soon as certain other issues were resolved.

The Commission also found that probably all of the OCCs and resellers appearing in the proceeding were then carrying intrastate intraLATA traffic over their lines, without the Commis-

8. AT&T-C is a designation utilized within the former BOC's internal operations that identifies the access line upon which interstate AT&T traffic enters these local exchange company's networks. To accommodate OCCs and resellers, other "feature group" access had to be devised. These other feature groups are designated FGA ("Feature Group A") and FGB ("Feature Group B"). FGA and FGB access has been adjudged inferior to FGC (*i.e.* AT&T-C), and the Commission has reduced the amount of access charge that AT&T competitors must pay to compensate for the deficiency; that reduction amount, however, is not questioned in this appeal.

9. *See* n.2, *supra.*

10. *See* n.3, *supra.*

sion's authority to do so. All the witnesses who testified regarding this unauthorized traffic agreed that "because of the lineside (FGA/FGB) connection currently used by OCCs and resellers, it [was] not practical for the local exchange companies [LECs] to block unauthorized intraLATA calls placed over the network of an OCC or reseller or to reroute such calls automatically over the authorized intraLATA network" as done for AT&T by the LECs.

The Commission determined that since there were unauthorized intraLATA calls flowing over the OCC and reseller lines, and that the LECs who were authorized to carry this traffic were, as a result, losing revenue, the OCCs and the resellers should provide appropriate remunerative compensation to the LECs. The Commission adopted an interim compensation plan for the unauthorized intraLATA calls made over the OCCs' networks. The North Carolina Utilities Commission conducted additional hearings in June, and on 30 September 1985 the Commission entered an Order reaffirming most portions of the 22 February 1985 Order. The Commission reduced the rate of compensation to be paid by the OCCs for the unauthorized intraLATA calls. The Commission specifically found that it is in the public interest for the LECs to be compensated for lost revenues associated with unauthorized transmittal of intraLATA long distance calls by OCCs during the transition period pending the authorization of intraLATA competition by OCCs as of January of 1987. The Order of 30 September 1985 was modified slightly by the Commission in an Order entered on 25 November 1985. In the November Order, the Commission directed that resellers shall also be subject to the compensation plan for transmitting unauthorized intraLATA calls. The Commission established the compensation rate by finding the difference between the amount of toll revenue an LEC would have received if the consumer's call had been properly routed over that licensed LEC's intraLATA exchange system, and the amount of access charge revenue received by the LEC for the call. The appeal of U.S. Sprint and MCI is based largely on whether the Commission has the authority to implement this Interim Compensation Plan, hereinafter the Plan. We hold that the appellants have failed to demonstrate that adoption and implementation of the Plan is in violation of N.C. Gen. Stat. § 62-94; therefore, the decision of the Commission is affirmed.

A. *Appeal of U.S. Sprint*

U.S. Sprint contends that the Plan is contrary to several constitutional provisions, in violation of N.C. Gen. Stat. § 62-94(b)(1), and that the Order was entered in excess of the Commission's statutorily granted authority, in violation of N.C. Gen. Stat. § 62-94(b)(2).

[1] U.S. Sprint first argues that the compensation requirement will lower its return on investment by increasing its operating expenses. U.S. Sprint contends that because it is denied the "ability to earn a fair return on its investment," the Plan is unlawfully confiscatory and thus a violation of the prohibition against the taking of property without due process.

In support of this contention, U.S. Sprint relies on a United States Supreme Court case, quoting, in part, from the case and arguing that to require a public utility, a railroad in the case cited, to operate at a loss, "would be to take its property without the just compensation which is a part of due process of law." *Railroad Comm. v. Eastern Texas Ry.*, 264 U.S. 79, 85 (1924). We have examined the cited case, especially the passage from which the quote was taken. The full passage reads:

> [If] at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by *dismantling the road.* To compel it to go on at a loss, or to give up the salvage value, would be to take its property without the just compensation which is a part of due process of law.

Id. (emphasis added). We believe this case is of no benefit to U.S. Sprint.

First, we could find nothing in the record that indicated that U.S. Sprint was being compelled by law to operate in North Carolina at a loss. Nor did we discover any evidence that U.S. Sprint was being *required* to operate at what was an unfair return on its investment. If U.S. Sprint is unsatisfied with the profit margins generated in North Carolina, it is free to "dismantle" its operation in this State. Any statement to the contrary could not be found in the record before us. North Carolina law requires that appellate review of Commission orders be limited to the record as

certified. *Utilities Commission v. Coach Co.*, 261 N.C. 384, 391, 134 S.E. 2d 689, 695 (1964). We have discovered nothing in the record that amounts to an unlawful confiscation or a violation of due process. That argument is therefore without merit.

[2] U.S. Sprint's primary argument is that the Commission lacks the statutory authority to impose the Plan. It calls the compensation a "penalty" and reasons that N.C. Gen. Stat. § 62-312 specifically provides that an action for the recovery of a penalty must be instituted in the North Carolina state court in Wake County, in the name of the State on the relation of the Utilities Commission "against the person incurring such penalty," by either the Attorney General, the District Attorney of Wake County, or the injured party. U.S. Sprint concludes that since the compensation required by the Plan *amounts* to a penalty, the Commission has violated N.C. Gen. Stat. § 62-94(b)(2) by instituting the Plan. We disagree.

We do not agree that the compensation plan imposes a "penalty" on U.S. Sprint or any other appellant. We note initially that nowhere in the Commission's proceedings is the compensation referred to by the North Carolina Utilities Commission as a penalty. We find it is more appropriately considered as a prerequisite to receiving the certificate.

The North Carolina General Assembly granted the Utilities Commission broad authority to regulate public utilities. N.C. Gen. Stat. § 62-2. The language added to N.C. Gen. Stat. § 62-110 by the General Assembly in 1984 gives great discretion to the Commission in the issuance of certificates to offer long distance service. The Commission is to "consider the impact on local exchange customers" and permit additional service only if the Commission finds that it will not "jeopardize reasonably affordable local exchange service." To accomplish these ends, and "[n]otwithstanding any other provision of law, the terms, conditions, rates and interconnections for long distance services offered on a competitive basis shall be regulated by the Commission in accordance with the public interest." *Id.* We find that the plan requiring compensation to the LECs for lost revenues during the transition period is reasonably calculated to provide protection for the local exchanges who provide needed services to local exchange customers and that the compensation plan is a proper "term" or "condition"

of certification which is consistent with the public interest. The plan is therefore statutorily authorized.

[3] U.S. Sprint also argues that the Plan violates its right to equal protection of the law. Citing *State v. Greenwood*, 280 N.C. 651, 656, 187 S.E. 2d 8, 11 (1972), U.S. Sprint contends that "[t]he equal protection clauses of the United States and North Carolina Constitutions impose upon lawmaking bodies the requirement that any legislative classification 'be based on differences that are reasonably related to the purposes of the Act in which it is found.' (Citation omitted.)"

On review of the record below, we do not find that the Commission has violated the equal protection rule. Assuming for the sake of argument that U.S. Sprint is correct in its contention that the plan is a "legislative classification," we find that the plan is rationally related to the objective of insuring that the legitimate state objective of providing its citizens with a competitive telecommunications environment beneficial to the individual consumer is accomplished in an equitable manner, "without jeopardizing reasonably affordable local exchange service." N.C. Gen. Stat. § 62-110. The complexity of this objective will almost certainly cause this transitional period to be characterized by inconvenience and inexactitude. Nonetheless, the contention that the Plan is not rationally related to a legitimate state objective is unfounded. We find no violation of the appellant's right to equal protection of the law.

U.S. Sprint's final argument is that the Plan "burdens interstate commerce and unlawfully conflicts with federal antitrust and communications objectives." We turn first to U.S. Sprint's interstate commerce argument.

[4] We agree with the proposition that a State's exercise of authority which places an undue burden on interstate commerce will, if tested, be declared void even when congressional legislation on the subject is absent. *Hunt v. Washington Apple Advertising Comm.*, 432 U.S. 333, 350, 53 L.Ed. 2d 383, 97 S.Ct. 2434, 2445 (1977). But, it is also true that legislation that merely "may have an impact on interstate commerce" will not always be struck down. *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 523, 3 L.Ed. 2d 1003, 1006, 79 S.Ct. 962, 964 (1959). Considering how little is re-

quired to affect interstate commerce,[11] we are not in a position to state flatly that the plan has no effect on interstate commerce. We can state, however, that any effect is certainly not unduly burdensome. The Plan adopted was temporary and reasonable, and similar plans have worked effectively in other states and have been upheld in similar suits. *See GTE Sprint*, 230 Va. 295, 337 S.E. 2d 702. We find no violation of the interstate commerce clause of the United States Constitution.

[5] We now consider U.S. Sprint's final argument that the plan conflicts with federal antitrust and communications objectives. In support of this argument, U.S. Sprint contends that the plan is in conflict with the provisions of the MFJ. The main thrust of the argument is that because the former BOCs are not providing the OCCs with equal, but rather with inferior, access to local exchanges, the BOCs violate the federal court's directive. *See AT&T*, 552 F. Supp. at 233. An almost identical argument was made by U.S. Sprint (then "GTE Sprint") in the Virginia case. There, the court held:

> There is no merit in the contention of MCI and GTE Sprint that the interim compensation plan violates the provisions of the modification of final judgment (MFJ) and subsequent orders in the AT&T divestiture case. These orders require that the divested operating companies provide equal access to the other carriers and assess all access charges in the form of cost-justified tariffs. MCI and GTE Sprint challenge the plan's formula for payments that are not cost-justified and the plan's exclusion of the payments from the local companies' tariffs. They also assert that the plan violates the equal access requirement by forcing them to pay additional fees for access inferior to that afforded AT&T of Va.
>
> These contentions ignore the fact that the charges imposed by the plan are not access charges. As the Commission noted, access charges cannot compensate for lost revenues. The compensation plan establishes another means of making reimbursement for losses occasioned by unauthorized intra-

11. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294, 13 L.Ed. 2d 90, 85 S.Ct. 377 (1964).

> LATA usage. Nothing in the MFJ or subsequent related orders requires the local companies to assess access charges for service which is not authorized under state law.
>
> Moreover, intrastate telephone service is exclusively under the jurisdiction of state regulatory agencies. *American Tel.*, 552 F. Supp. at 159 n. 117, 169 & n. 161; *Western Elec.*, 569 F. Supp. at 1005; *see United States v. Western Elec. Co., Inc.*, 569 F. Supp. 1057, 1109 (D.D.C. 1983).

GTE Sprint, 230 Va. at 305-06, 337 S.E. 2d at 708-09. Furthermore, even if we assume to be true the allegation that the MFJ has not been adhered to, we are in no position to enforce all provisions of a federal court's directive. *Intra*state telephone service is left to the control of state legislatures and their regulatory agencies. *American Tel.*, 552 F. Supp. at 159 n.117, 169 n.161; *Western Electric*, 569 F. Supp. at 1005; *see also, United States v. Western Electric Company, Inc.*, 569 F. Supp. 1057, 1109 (D.D.C. 1983). The Plan imposed by the North Carolina Utilities Commission to compensate LECs for revenues lost because the appellants were carrying unauthorized *intra*state traffic is a valid regulatory exercise of the authority over intrastate telecommunications. It is this Court's duty to assure that the state agency here in question has acted pursuant to and within its statutory authority. N.C. Gen. Stat. § 62-94. U.S. Sprint has illustrated no defect in the record or in the Orders of the Utilities Commission that would indicate that the implementation of the Plan by the Commission should be deemed by this Court to be unlawful or improper under state law. Any contention that the LECs have failed to comply with the directives of the MFJ should be addressed to the U.S. District Court, which retained jurisdiction to enforce the MFJ. *AT&T*, 552 F. Supp. at 231.

In summary, we find no merit to any of the assignments of error brought forward by appellant U.S. Sprint. We turn next to the assignments of error brought forward by MCI Corporation.

B. *Appeal by MCI Corporation*

The appeal of MCI Corporation (MCI) also focuses primarily on the authority of the North Carolina Utilities Commission to implement the compensation plan.

[6] MCI first argues that the plan is an improper award of money damages which the Commission is not statutorily authorized to make. MCI's position is that the Commission, "[i]n ordering the compensation plan, . . . improperly mixed its judicial and legislative activities in an attempt to validate an improper award of money damages to the LECs by couching it in the form of a Commission rule." MCI concludes that the "payment of monies to the LEC by MCI . . . can be valid only if viewed as (a) a validly established tariff rate or charge, or (b) as a valid award of damages." We disagree with the characterization of the compensation plan as money damages and the conclusion that the plan would be valid only if it constituted a tariff or a "valid" award of damages.

We find MCI's argument that the plan constitutes "money damages" essentially the same as U.S. Sprint's argument that the plan amounted to a "penalty." For the reasons expressed earlier in this opinion, we find the compensation plan to be a proper term or condition of certification consistent with the public interest, and not money damages. This assignment is overruled.

[7] MCI next argues that it was denied due process of law because the Commission "render[ed] its 'compensation' decision without providing MCI with proper notice of its intention to consider such a remedy." MCI states in its brief that it was given no notice of the possibility that it might be required to compensate LECs for unauthorized traffic that flowed over its facilities prior to October 1984, the date the hearings were conducted before the Commission to determine whether competitive intrastate offerings of long distance telephone service should be allowed in North Carolina.

Hearings were conducted in Asheville, Charlotte, and Wilmington on 15 October 1984, and in Rocky Mount, Greensboro, and Raleigh on 22 October 1984, and again in Raleigh on 23 October 1984. It was not until 22 February 1985 that the Commission issued its initial order authorizing intrastate competition and establishing the interim compensation plan. On 20 March 1985, MCI filed a petition for reconsideration of the "differential in access charges for long distance telephone services," and for a "grant [of] a 55% access charge differential on both the originating and terminating ends of intrastate long distance telephone calls." The Commission responded to this petition of MCI, and the

petitions of other parties, with an order of 11 April 1985 which set a hearing date for 24 June 1985 to consider "(c) the compensation plan for incidental intraLATA calls adopted by the Commission in the Order Authorizing Intrastate Long-Distance Competition." Subsequent to the hearing in June, the Commission entered the Order reaffirming the interim compensation plan, which became the order appealed by MCI.

At each stage of these proceedings, MCI was present and represented by counsel. Exhaustive hearings were conducted at each step. The record is replete with evidence that a compensation plan was considered from the outset of these hearings. Public Staff witness Hugh L. Gerringer, Jr., testified at the 22 October 1984 hearing that, "if for some reason blocking of intraLATA (unauthorized) calls proves to be infeasible for a particular carrier, that carrier should be required to provide adequate compensation to the local exchange companies for such calls." The Order of 22 February 1985 found as fact that OCCs and resellers should be required "to compensate LECs for revenue losses resulting from the completion of unauthorized intraLATA calls by OCCs or resellers." The Commission then held further hearings before setting the final rate of compensation.

Considering these proceedings, we cannot agree with MCI's contention that its right to due process was denied because it had improper notice. That MCI was not informed prior to the first hearing of what the ultimate decision would be is hardly an adequate contention to support a claim of a due process violation. We find no merit to this contention.

[8] MCI also argues that the Commission's "purported 'compensation plan' is arbitrary and capricious in form and in substance" because it (MCI) must pay for "unequal access" to local exchanges.[12] MCI insists that Southern Bell's request, granted by the Commission, that it not be required to "provide" equal access

12. That the appellants do not have access to all local exchanges equal in quality to AT&T's is clearly established and unrefuted in the record and briefs of the parties. The Commission's recognition of the difference resulted in a 25% reduction of the access tariff on the originating end of the OCC's authorized traffic, which was determined by the Commission to be a "sufficient differential to recognize the differences between FGA/FGB and FGC (AT&T-C) access." The justification or appropriateness of this percentage differential or its reconsideration by the Commission is not questioned in this appeal.

immediately to OCCs, but instead to "provide" such access on a "phased-in basis," while allowing Southern Bell to receive " 'compensation' for a hypothetical gain that it may have failed to realize because of the inadequacies of its own equipment" is an "illogical and unreasonable claim [that] can only be described as arbitrary and capricious." MCI further argues that the Order lacks adequate support in the record.[13] Our review of the record leads us to the conclusion that the Order is not arbitrary and capricious.

> Agency decisions have been found arbitrary and capricious, *inter alia*, when such decisions are "whimsical" because they indicate a lack of fair and careful consideration; when they fail to indicate "any course of reasoning and the exercise of judgment," . . . or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements. . . . "The ultimate purpose of rulemaking review is to insure 'reasoned decisionmaking' . . . ."

Comr. of Insurance v. Rate Bureau, 300 N.C. 381, 420, 269 S.E. 2d 547, 573 (1980) (citations omitted). *See Burton v. Reidsville*, 243 N.C. 405, 90 S.E. 2d 700 (1955). The record below is in no way consistent with circumstances justifying the arbitrary and capricious labels. This case involved numerous hearings at which voluminous amounts of evidence were taken. The Commission heard from dozens of witnesses. Although not all the witnesses advocated the decision made by the Commission, there is plenary evidence to support the Commission's findings, conclusions, and orders.[14] That the decision of the Commission may not be the best solution, or the most desirable to all parties, does not reduce the proceedings

13. Appellant MCI attempts to establish arbitrariness and capriciousness by offering a comparison of intraLATA revenue generated by Southern Bell in 1983 versus that produced in 1985. Because there is a 15% dollar volume increase in the 1985 figure over 1983, the appellant concludes: "Thus, Southern Bell in fact had no 'lost revenue' due to intraLATA calling on the OCCs [*sic*] facilities." We find this argument frivolous, at best. A 15% increase in dollar volume over a two-year period could be attributed to an increase in customers, traffic volume, or an infinite number of other possibilities.

14. Witnesses from the Public Staff, Southern Bell, Carolina Telephone, and other independent companies, supported adoption of an interim compensation plan. Witness Cherie A. Lucke encouraged adoption of an interim compensation plan

to the level of being deemed arbitrary and capricious. *Id.* at 407, 90 S.E. 2d at 702-03. The contention that the Commission orders are arbitrary and capricious is meritless.

[9] MCI's final argument maintains that the Commission's Plan constitutes rate discrimination which is unjust and unreasonable in violation of N.C. Gen. Stat. § 62-140(a). That statute's pertinent part, as quoted in the brief of MCI, reads:

> No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service.

Id. We believe this statute was enacted to prohibit a utility from unreasonable discrimination among *its customers*. We do not believe it was meant to be applied to the North Carolina Utilities Commission's conduct toward various public utilities, as MCI apparently contends. MCI offered no case in support of its position, and we could fine none. Consequently, we find no merit in MCI's argument.

C. *Argument by North Carolina Long Distance Association*

We now turn our attention to the brief submitted by the North Carolina Long Distance Association (NCLDA). In its brief, NCLDA called itself an "appellee." Yet, NCLDA made arguments for the reversal of the Commission's order, making essentially the same arguments as appellants U.S. Sprint and MCI. NCLDA did not enter notice of appeal and did not place any assignments of error in the record. The argument of NCLDA is subject to dismissal under Rules 18 and 28 of the Rules of Appellate Procedure. Under Rule 2 of the Rules of Appellate Procedure, we have elected not to dismiss NCLDA's brief for Rule violations. Instead, we have considered the arguments made therein, and we find that

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similar to that adopted by the Virginia State Corporation Commission "to ensure that LECs are compensated for any incidental intraLATA traffic that ICs (IXCs) may have." The appellant's witnesses supported a contrary position. Nonetheless, any factual finding by the Commission supported by "competent, material and substantial evidence" must remain undisturbed by this Court on appeal. *The Public Staff*, 317 N.C. at 34, 343 S.E. 2d at 903.

NCLDA has failed to raise any issues, other than those raised by U.S. Sprint and MCI, which merit any discussion. The assignments of error argued by NCLDA are overruled.

D. *Summary*

A decision of the North Carolina Utilities Commission is to be upheld on appeal unless the appellate court finds error based on one of the enumerated grounds of N.C. Gen. Stat. § 62-94(b). *Utilities Comm. v. Telephone Co.*, 35 N.C. App. 588, 591, 242 S.E. 2d 165, 166 (1978), *aff'd*, 298 N.C. 162, 257 S.E. 2d 623 (1979). Appellate reversal of "an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria which circumscribe judicial review." *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 20, 273 S.E. 2d 232, 235 (1981) (footnote omitted). We have carefully considered all of the arguments made by U.S. Sprint, MCI, and NCLDA, and we find no grounds for reversal. The Order of the Utilities Commission in Case No. 8610UC427 is affirmed.

IV.

CASE NO. 8610UC610

The second appeal considered herein arises from a further order of the Utilities Commission in the same proceedings considered above, *i.e.*, the Commission's implementation of long distance competition in the North Carolina telecommunications market. After the Commission entered its Order of 30 September 1985 (as amended by Order of 25 November 1985), which was the subject of the appeal in Case No. 8610UC427, the Commission held another hearing on various issues not resolved by the prior orders. The Commission entered an Order on 19 December 1985 authorizing intrastate intraLATA competition through the resale of intraLATA LEC WATS and MTS. The Order also continued the compensation plan for unauthorized intraLATA calls, ordered that resellers be subject to the compensation plan, and directed that LECs prepare and file access tariffs. MCI and NCLDA filed notice of appeal. The appeal of the Order of 19 December 1985 constitutes Case No. 8610UC610.

A. *Appeal of North Carolina Long Distance Association*

Two specific portions of that order are challenged by NCLDA: first, that ordering resellers to pay intraLATA access charges is unlawful; and second, that the intraLATA Interim Compensation Plan as adopted by the Commission and applied to the resellers is unlawful.

In the findings of fact, the Commission found that it was "in the public interest that the intraLATA compensation plan continue in effect as to intraLATA calls completed by long-distance carriers (other than LECs) over facilities other than resold intrastate WATS and MTS of the LECs." The Commission further found as fact that it was "appropriate and in the public interest for switched access charges (including the carrier common line charge) to apply to intraLATA access minutes and said access charges should be set at the same level as interLATA access charges." The LECs and the Public Staff, pursuant to the Commission's 22 February 1985 requirement, proposed implementation of provisional access charges to apply to the resellers in the same amount as those currently in effect on a provisional basis for interLATA access of the OCCs, because the "resellers' use of the local exchange network for collection of traffic to resell *intra*LATA MTS and WATS [was] identical to their use in the resale of *inter*LATA MTS and WATS." Despite the arguments of MCI and NCLDA to the contrary, the Commission concluded "that since the resellers' use of the network is the same regardless of whether the call is interLATA or intraLATA, the access charges for each should be the same."

In its brief, NCLDA contends that application of intraLATA access charges to resellers is unlawful, and that application of the intraLATA Compensation Plan to resellers is unlawful.

1. Lawfulness of Application of *Intra*LATA Access Charges to Resellers

In order to provide LEC access to all post-divestiture IXCs, the LECs needed to devise and construct special access facilities to accommodate certain IXCs. At the 2 October 1985 hearing, Raymond L. Slazyk, Jr., testified as a witness for AT&T that "[t]he appropriate mechanism to recover the costs of these additional facilities [was] to apply the LEC's approved tariffed charges

for special access services." Slazyk summarized his testimony by stating his company's position as being

> that if a long distance provider uses *additional* LEC facilities in providing the services, those facilities should be paid for by that long distance provider. The appropriate charges for the use of those additional facilities should be access charges. The same access charges that are paid by other long distance providers. (Emphasis added.)

The Commission, consistent with the testimony of Slazyk and other witnesses, ordered that *intra*LATA access charges be applied to resellers. NCLDA challenges the lawfulness of the Commission's orders regarding access charges for resellers on two grounds.

[10] NCLDA first argues that the Commission exceeded its authority in ordering *intra*LATA access charges because the Commission is not empowered to provide any LEC a revenue increase without first satisfying the prerequisites articulated in N.C. Gen. Stat. § 62-133, the statute governing the fixing of rates by the Commission. NCLDA contends that, since the resellers were, by these Commission orders, required to make payments to the LECs, the LECs were in effect being granted a revenue increase without considering relevant evidence and concluding that additional revenues are needed for a utility to earn a fair rate of return on the fair value of its assets, as the Commission is directed to do by N.C. Gen. Stat. § 62-133(b)(4).

Considering the evidence supporting the view that the access charge tariff is calculated to reimburse LECs for their having to provide OCCs and resellers with additional connection facilities to the LECs' local networks, we believe the payments should not be viewed as mere increased revenues for the LECs. A fair reading of the record demonstrates that the Commission intended the access charge tariff to provide funds to set off those expenditures that the LECs were required to make to provide additional facilities to handle additional IXC carrier access. We believe the imposition of the access charge tariff is within the authority the General Assembly granted to the Commission in the 1984 amendments to N.C. Gen. Stat. § 62-110, which we discussed *supra*. We hold that the imposition of the access charge tariff is authorized under that statute.

The second portion of NCLDA's argument on the Commission's authorization of access charges contends that the Order was not supported by the evidence and was arbitrary and capricious, in violation of NCLDA's rights to due process. We disagree. We have reviewed the entire record to determine whether the Order is supported by competent, material, and substantial evidence, as we are directed to do under N.C. Gen. Stat. § 62-94. We find that issuance of the access charge tariff is fully and properly supported by the record, and this Court shall not substitute its judgment for that of the Commission. *State ex rel. Utilities Comm. v. Southern Bell*, 57 N.C. App. 489, 496, 291 S.E. 2d 789, 793 (1982), *modified and aff'd*, 307 N.C. 541, 299 S.E. 2d 763 (1983).

The access charge tariff has necessarily evolved because the federal court mandated today's competitive telecommunications environment. The access charge tariff is essentially a customer charge with which LECs determine the monetary amount due for providing line access to the public, including businesses, individuals, and now, other telecommunications companies. The record is replete with testimony supporting a factual finding that access charge tariffs were designated to "reflect accurately the actual usage of LEC facilities by the resellers and OCCs." Similarly, evidence that OCCs and resellers use LEC networks to the same extent is equally supported. *See* 2 October 1985 Hearing, Vol. 1, pp. 23, 75-76.

We are thus of the opinion that no portion of the Commission's order is "whimsical," lacking "fair and careful consideration," or illustrates "manifest unfairness." *N.C. Rate Bureau*, 300 N.C. at 420, 269 S.E. 2d at 573. We hold that the Commission Orders are therefore not arbitrary and capricious.

2. Lawfulness of the *Intra*LATA Compensation Plan As Applied to Resellers

[11] In challenging the application of the plan to resellers, NCLDA first argues that because the Plan is "an exact parallel to the equalization plan ordered by the N.C. Milk Commission," which was held unconstitutional, the Plan must likewise be struck down. We disagree.

The case upon which the appellants rely is *In Re Arcadia Dairy Farms*, 43 N.C. App. 459, 259 S.E. 2d 368 (1979). That case

invalidated a statute giving the Milk Commission the authority to assess an equalization payment to certain milk distributors. The assessment there was made pursuant to regulations adopted by the Milk Commission, one of which required "a distributor of Class I recombined or reconstituted milk to pay the difference between the prices of Class I and Class II milk on reconstituted milk obtained from non-state based producers or other unapproved sources." *Id.* at 460, 259 S.E. 2d at 369. In striking down the statute, this Court followed *In Re Dairy Farms*, 289 N.C. 456, 223 S.E. 2d 323 (1976), where our Supreme Court, through Justice Lake, stated:

> Quite clearly, there is, at least, serious doubt that G.S. 106-266.8, if construed to authorize the Commission to require the distributor of milk, "reconstituted" from Wisconsin milk powder, to make compensatory payments to North Carolina milk producers, can be reconciled with the Commerce Clause of the Constitution of the United States.
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> * * * *
>
> *Arcadia obtains nothing in return for the payment it is required to make by the order of the Commission.* It is required to make such payment to its competitor distributors from whom it elected to purchase nothing, for the benefit of producers from whom it purchased nothing. Likewise, the Commission, by this order, has not undertaken to supervise or regulate the processing of "reconstituted" milk or its sale. Its order has nothing whatever to do with the selection of the ingredients which go into Arcadia's "reconstituted" milk and nothing whatever to do with Arcadia's method of processing such milk. The order leaves Arcadia free to sell its "reconstituted" milk. There is no contention that such milk is not wholesome, that Arcadia is representing it to its customers as anything other than that which it is, or that Arcadia, in the sale of its "reconstituted" milk is engaged in unlawful price cutting or other unfair trade practices. The sole purpose and effect of the Commission's order is to require Arcadia to pay to its competitors, for the benefit of producers with whom Arcadia has no dealings, an amount equal to the difference between the price those producers receive for the milk delivered to those distributors and the price they would

> have received for such milk had Arcadia purchased from those distributors the milk sold to them by those producers.

Id. at 469-71, 223 S.E. 2d at 331-32 (emphasis added).

We find the factual circumstances and legal conclusions in *In Re Dairy Farms* easily distinguishable from the compensation plan at issue here. The Plan here is designed to compensate LECs for revenues lost due to the transmission of unauthorized traffic over the facilities of OCCs and those lines "rented" by resellers. The plan is not designed to protect North Carolina companies from competition; rather, it is a temporary device calculated to compensate authorized LECs for *loss of revenue* to unauthorized intrastate intraLATA telecommunications carriers during the relatively brief period of transition to a competitive marketplace. The difference between the Plan at issue here, and the Milk Commission's rule requiring payment from out-of-state processors to in-state processors apparently just to even out prices, is readily apparent. We find no merit to NCLDA's argument.

The remaining arguments presented by NCLDA argue points previously considered in other parts of this opinion. We find it unnecessary to restate those contentions and our disposition of them.

B. *Appeal of MCI Corporation*

MCI does not dispute the authority of the Utilities Commission to require payment of access charges to the LECs. In the first sentence of the argument in its brief, MCI concedes that "the Commission clearly has authority to establish rates for services provided by the LECs, such as access services provided pursuant to the North Carolina access tariffs . . . ." MCI's brief focuses instead on the Commission's authority to impose upon resellers an interim compensation plan.

In its brief, MCI brings forward arguments very similar to the arguments it made in Case No. 8610UC427 above; in fact, more than half its brief is a verbatim copy of the brief submitted in the first case. In that portion of the brief that is not a verbatim copy, no new issues meriting discussion are raised. Thus, we find that MCI has failed to present reasons sufficient to reverse the Order of the North Carolina Utilities Commission.

C. *Summary*

We have carefully considered all of the arguments by MCI and NCLDA, and we find no basis for reversal of the Commission's Order in Case No. 8610UC610. The Order is affirmed.

V.

CONCLUSION

Having found no grounds for reversal of the Orders of the North Carolina Utilities Commission presented for review in Cases Nos. 8610UC427 and 8610UC610, we hold the Orders are

Affirmed.

Judges MARTIN and ORR concur.

SHIRLEY C. YORK AND DONALD MATTHEW YORK v. NORTHERN HOSPITAL DISTRICT OF SURRY COUNTY; RICHARD R. GUIDETTI, M.D.; AND PIEDMONT ANESTHESIA ASSOCIATES, P.A.

No. 8717SC460

(Filed 22 December 1987)

1. **Physicians, Surgeons & Allied Professions § 15.1— malpractice—exclusion of certain evidence—no error**

In an action to recover for injuries sustained during the birth of a child, the trial court did not err in sustaining defendants' objections to an overbroad question calling for a neurologist's opinion as to "what went wrong"; sustaining defendants' objections to questions put to an expert witness on redirect examination as to administering glucose to the infant in question when the subject had not been introduced on direct or cross-examination; refusing to permit a nurse to testify as to the standard of care required of a surgeon or anesthesiologist in the absence of a proper foundation therefor; and excluding testimony by an expert witness in nursing concerning the standards of care applicable to hospitals similarly situated to defendant hospital, since evidence establishing those standards had already been received.

2. **Physicians, Surgeons & Allied Professions § 20.2— malpractice—instructions on contentions—request properly denied**

The trial court did not err in denying plaintiffs' requests for instructions consisting of detailed and specific statements of plaintiffs' contentions with respect to each of many ways in which plaintiffs alleged that defendants were

negligent, since the trial court is not required to state the contentions of the parties.

3. **Jury § 9— seating alternate—juror's prior inattention—no abuse of discretion**

The trial court did not abuse its discretion in excusing a juror and substituting an alternate juror whose inattentiveness had been noted by the court earlier in the trial.

4. **Physicians, Surgeons & Allied Professions § 20.2— malpractice—duration of duty to provide care—instruction not required**

In an action to recover for injuries sustained during the birth of a child, the trial court did not err in refusing to instruct with respect to the duty of a health care provider to continue treatment of a patient until treatment is no longer required or until the relationship is terminated by mutual consent, since the evidence neither required nor supported such an instruction.

5. **Physicians, Surgeons & Allied Professions § 15— malpractice—reading from textbook not allowed—no error**

In an action to recover for injuries sustained during the birth of a child, the trial court did not err by refusing to allow a nurse to read statements from a textbook regarding the care of a mother in labor and of a newborn infant, since plaintiffs laid no foundation which would tend to show that the standards described in the textbook were the same as those of hospitals similarly situated to defendant hospital.

6. **Physicians, Surgeons & Allied Professions § 20.2— childbirth—malpractice—instructions as to proximate cause of child's injuries improper**

In an action to recover for injuries sustained during the birth of a child, the trial court erred in its instructions as to whether the child's injuries proximately resulted from negligence of defendant hospital, since the jury could have understood that defendant hospital was liable for injuries to the child only if it found that the hospital was negligent in its treatment of plaintiff mother in a manner specified by the court.

APPEAL by plaintiffs from *Rousseau, Judge.* Judgment entered 5 May 1986 in Superior Court, SURRY County. Heard in the Court of Appeals 30 November 1987.

Plaintiffs, who are husband and wife, filed separate complaints alleging that plaintiff Shirley York and the York's minor child, Matthew Howard York, sustained serious and permanent injuries as a result of negligent medical treatment rendered to them by defendants Northern Hospital District of Surry County (Hospital), Dr. Richard R. Guidetti, and Piedmont Anesthesia Associates, P.A. (Piedmont). Shirley York sought to recover damages for her own personal injuries; Donald York sought damages for loss of consortium. Both parties sought to recover damages for

loss of services of the minor child and for past and prospective expenses for the child's medical care.

The two actions were joined. Evidence at trial tended to show that on 29 June 1981, plaintiff Shirley York was 38 years old and was at term with her second pregnancy. Because her first pregnancy in 1970 had required a classical Caesarean section, she was scheduled for a second Caesarean section at defendant Hospital on 1 July 1981. She was informed by her obstetrician that in the event she should experience any sign of labor before the scheduled procedure, she should contact him and go immediately to the hospital. On 25 June 1981, Mrs. York contacted Dr. Guidetti, an anesthesiologist and president of defendant Piedmont, in preparation for the surgery. She advised Dr. Guidetti that she was a repeat Caesarean patient and that she had been instructed not to labor.

At 9:00 p.m. on 29 June 1981, Mrs. York began to experience labor pains and went to defendant Hospital, arriving at approximately 10:15 p.m. She was taken to the labor room at 10:35 p.m., where she was attended by nurse Joan Vest. Nurse Vest took Mrs. York's history and was informed by Mrs. York that she was a repeat classical Caesarean section case. When nurse Vest went off duty at 11:15 p.m., nurse Shirley Danley began attending Mrs. York. Nurse Danley was likewise informed of Mrs. York's repeat classical Caesarean status.

At about midnight, Mrs. York's attending obstetrician was notified of her admission to the Hospital. He ordered that she be given Seconal, a sedative, but did not come to the Hospital. At approximately 1:30 a.m. on 30 June, nurse Danley notified the doctor that Mrs. York's contractions had become stronger. The doctor arrived at the hospital sometime after 1:30 a.m. He ordered that Mrs. York be given fluids intravenously and that she be administered Stadol, a barbiturate for pain relief which has the effect of causing respiratory depression. By approximately 2:20 a.m., the fetal heart rate, which had been strong at the time of Mrs. York's admission to the Hospital, could not be detected with a fetascope but could be heard with a monitor. Mrs. York was taken to the operating room at 2:35 a.m. There was evidence tending to show that by this time, Mrs. York's uterus had ruptured.

Faye Bryant, a certified registered nurse-anesthetist employed by Piedmont and "on-call" on 30 June 1981, was called at approximately 2:00 a.m. and informed that her services were needed in order to perform a Caesarean section delivery. She arrived at the Hospital at 2:35 a.m. Defendant Guidetti was not called by any hospital personnel and nurse Bryant did not know until her arrival at the hospital that Mrs. York had a ruptured uterus.

At 3:04 a.m., Matthew Howard York was delivered by Caesarean section. At the time of his birth, he was not breathing, had a faint heartbeat, and had a blue color. Because only one physician was present and was involved in caring for Mrs. York, it was necessary for nurse-anesthetist Bryant to attend to the infant. She inserted an endotrachael tube and administered oxygen; after five minutes the infant's color, heart rate, and muscle tone were improved, after 12 minutes he was breathing satisfactorily and the endotrachael tube was removed. Nurse-anesthetist Bryant then resumed assisting the obstetrician in performing an emergency hysterectomy on Mrs. York. No one from defendant Hospital provided further medical care for the infant until approximately 4:42 a.m., when he was transferred to Baptist Hospital in Winston-Salem. He now suffers from mental retardation and cerebral palsy.

The plaintiffs offered additional evidence, through various expert witnesses, tending to show that the rupture of Mrs. York's uterus and her subsequent hysterectomy occurred as a direct and proximate result of defendant Hospital's failure, through its agents, to promptly and properly perform a repeat classical Caesarean section, to attend to Mrs. York's needs following the rupture of her uterus, and to assemble a competent and adequate medical staff for these purposes. Plaintiffs also offered expert medical testimony tending to show that the permanent injuries to Matthew York were a direct result of Hospital's failure, through its agents, to render appropriate care both before and after his birth, as well as the failure of all defendants to render proper medical care after his birth. Plaintiffs' expert medical evidence further tended to show that the care provided by defendants in these respects did not rise to the minimum applicable standards of care. Defendants Guidetti and Piedmont offered evidence tending to generally show that the care rendered both Mrs. York and

Matthew York by nurse-anesthetist Bryant was within the applicable standards of practice and that any injuries which Matthew received resulted from the negligence of others prior to his birth rather than the treatment provided by Bryant. Defendant Hospital offered evidence tending to show that the treatment rendered Mrs. York and the child by its personnel was within the applicable standards of practice and that their injuries resulted from the negligence of others.

The following issues were submitted to and answered by the jury as indicated:

1. Did the plaintiff, Shirley C. York, suffer personal injury and damage as a result of the negligence of the defendant, Hospital?

ANSWER: NO.

2. What amount of damages, if any, is plaintiff, Shirley C. York, entitled to recover from defendant, Hospital, for her personal injuries?

ANSWER:

3. Did the plaintiff, Donald Matthew York, lose the consortium of his wife, Shirley C. York, as a result of personal injury which she sustained?

ANSWER:

4. What amount of damages, if any, is plaintiff, Donald Matthew York, entitled to recover from defendant, Hospital, for the loss of consortium of his wife, Shirley C. York?

ANSWER:

5. Was the minor child, Matthew York, injured and damaged as result of the negligence of the defendant, Hospital?

ANSWER: NO.

6. Was the minor child, Matthew York, injured and damaged as a result of the negligence of the defendant, Richard R. Guidetti, M.D.?

ANSWER: NO.

7. Was the minor child, Matthew York, injured and damaged as a result of the negligence of Faye Bryant?

ANSWER: NO.

8. What amount of damages, if any, are plaintiffs, Shirley C. York and Donald Matthew York, entitled to recover for the additional expenses of supporting Matthew York until he attains age eighteen?

ANSWER:

From a judgment for defendants entered on the verdict, plaintiffs appealed.

Daniel J. Park for plaintiffs-appellants.

Walter J. Etringer for defendant-appellee, Northern Hospital District of Surry County.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James G. Billings and John D. Madden, for defendants-appellees, Richard R. Guidetti, M.D., and Piedmont Anesthesia Associates, P.A.

MARTIN, Judge.

Through twenty-seven questions presented in their brief, plaintiffs attempt to argue forty-three assignments of error. Of the twenty-seven questions, eight relate solely to plaintiffs' claims against defendants Guidetti and Piedmont, ten relate solely to plaintiffs' claims against defendant Hospital and the nine remaining questions relate to assignments of error involving all of the claims. After reviewing plaintiffs' arguments, we find no error with respect to their claims against defendants Guidetti or Piedmont, nor do we find error with respect to their claims against defendant Hospital to recover for damages arising out of the personal injuries sustained by Mrs. York. For reasons that we shall state herein, however, we do find error with respect to plaintiffs' claim against defendant Hospital for damages resulting from injuries sustained by their minor child. Accordingly, we grant plaintiffs a new trial on their claims against Hospital for loss of services and medical expenses incurred as a result of defendant Hospital's alleged negligent injury of their son.

I.

Plaintiffs' Claims Against All Defendants

Plaintiffs argue that the trial court erred by denying their motions for change of venue for the convenience of witnesses and the promotion of the ends of justice, made pursuant to G.S. 1-83, and for removal to Forsyth County made pursuant to G.S. 1-84. The record contains no exception to the trial court's order denying these motions. Accordingly, plaintiffs have failed to preserve the alleged errors for review. App.R. 10.

[1] Plaintiffs assign error to a number of the trial court's evidentiary rulings excluding testimony which they offered at the trial. We have examined each of their arguments and find no prejudicial error.

Plaintiffs argue that the trial court improperly sustained defendants' objections to the following question asked of Dr. Sheff D. Olinger, an expert neurologist, by plaintiffs' counsel:

> Q. (Mr. Park) In your opinion, and based upon reasonable medical certainty, what, from reading the medical reports, hospital charts and other medical records in this case, went wrong? And can you describe for us what, in your opinion, went wrong in the delivery of Matthew Howard York by his mother on June 29 and June 30, 1981?
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> MR. MADDEN: Objection to form.
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> MR. ETRINGER: Objection to form.

As phrased, the question is clearly objectionable as overbroad. Moreover, it does not relate to any relevant standard of care, a violation of which would permit a finding of medical negligence. Thus, we find no abuse of discretion in the court's ruling. *See* G.S. 8C-1, Rule 611(a).

Plaintiffs also argue that the trial court erred by sustaining defendants' objections to questions asked during plaintiffs' redirect examination of Dr. Hal Stuart, one of their expert witnesses, as to whether the administration of glucose to the infant was required by the standards of care applicable to nurse-anesthetist Bryant. Redirect examination is generally limited to the subject matter elicited on direct and cross-examination. *State v. Pearson*,

59 N.C. App. 87, 295 S.E. 2d 499 (1982), *disc. rev. denied*, 307 N.C. 472, 299 S.E. 2d 227 (1983). The subject of intravenous administration of fluids to the infant was not raised during Dr. Stuart's direct or cross-examination. Whether or not to permit it to be raised on redirect examination was a matter within the discretion of the trial judge. *Id.* We find no abuse of that discretion in this instance.

Plaintiffs also assign error to the trial court's refusal to permit nurse Joyce Parker, head surgical nurse at defendant Hospital, to testify as to the standard of care required of a surgeon or anesthesiologist. However, plaintiff did not lay a proper foundation for such testimony by showing that nurse Parker was familiar with the standards applicable to the surgeon or anesthesiologist. *See* G.S. 90-21.12; *Haney v. Alexander*, 71 N.C. App. 731, 323 S.E. 2d 430 (1984), *cert. denied*, 313 N.C. 329, 327 S.E. 2d 889 (1985). Accordingly, we find no abuse of discretion in this ruling.

Plaintiffs also assign error to the exclusion of testimony by Sandra Luffman, an expert witness in nursing, concerning the standards of care applicable to hospitals similarly situated to defendant Hospital, as well as standards applicable to anesthesiologists and nurse-anesthetists, under circumstances similar to those in the present case. As plaintiffs admit in their brief, however, evidence establishing these standards had already been received through the testimony of Dr. Stuart and Dr. Stanley Gall. Accordingly, assuming *arguendo* that the exclusion of nurse Luffman's testimony was error, it could not have been prejudicial. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978); *Leary v. Nantahala Power and Light Co.*, 76 N.C. App. 165, 332 S.E. 2d 703 (1985). This argument is without merit.

Plaintiffs have argued that the trial court erred with respect to certain of its instructions to the jury regarding Mrs. York's claims against Dr. Guidetti and Piedmont for her own personal injuries. Plaintiffs, however, have not directed us to, and we have been unable to find, any objection made to these instructions at trial. They are precluded, therefore, from assigning error to these instructions and we decline to consider their argument with respect thereto. App.R. 10(b)(2).

[2] Plaintiffs also contend that the trial court erred by refusing their requests for instructions "with regard to the defendants'

physicians and nurses possessing the requisite degree of learning, skill and ability necessary to practice their profession and instructing the jury as to the specific acts of negligence on the part of the defendants." The instructions requested by plaintiffs consist of detailed and specific statements of plaintiffs' contentions with respect to each of many ways in which plaintiffs alleged that defendants were negligent. The trial court is not required to state the contentions of the parties, *Daniels v. Jones*, 42 N.C. App. 555, 257 S.E. 2d 120, *disc. rev. denied*, 298 N.C. 567, 261 S.E. 2d 120 (1979); nor is it required that the court state the evidence or explain the application of the law thereto. G.S. 1A-1, Rule 51(a) (1985 Cum. Supp.). We find no error in the trial court's refusal of the requested instructions and overrule this assignment of error.

[3] During the second week of the trial, one of the jurors was involved in an automobile accident and sought medical treatment at defendant Hospital. The trial court excused the juror and, over plaintiffs' objections, substituted the first of two alternate jurors. Plaintiffs assign error, arguing that at an earlier point in the trial, the court had remarked concerning the inattentiveness of the alternate juror. Whether or not a juror should be disqualified from service on grounds of inattentiveness is a matter within the sound discretion of the trial court. *State v. Barbour*, 43 N.C. App. 38, 258 S.E. 2d 72 (1979), *disc. rev. denied*, 299 N.C. 122, 261 S.E. 2d 924 (1980). We find no such abuse of discretion in the present case. This assignment of error is overruled.

II.

Plaintiffs' Claims Against Defendants Guidetti and Piedmont

Several assignments of error argued by plaintiffs relate only to their claims against defendants Guidetti and Piedmont. Plaintiffs argue that the trial court excluded admissible evidence and declined to give instructions to which they were entitled. We have reviewed their arguments and find no error prejudicial to plaintiffs.

Plaintiffs challenge rulings of the trial court sustaining defendants' objections to portions of the deposition testimony of Dr. Olinger. Each of the three questions to which objections were sustained was improperly phrased. Moreover, two of the questions called for Dr. Olinger's interpretation of a contract through which

Piedmont provided anesthesia services to defendant Hospital, an area beyond that in which Dr. Olinger qualified to testify as an expert. We find no abuse of discretion in the court's ruling with respect to the testimony of Dr. Olinger.

By plaintiffs' arguments VI, XIII, and XV, they contend that the trial court committed reversible error by excluding evidence which plaintiffs sought to elicit from defendant Guidetti, and from their experts, Drs. Gall and Stuart. Assuming *arguendo* that exclusion of the testimony was error, no prejudice resulted therefrom. All of the evidence was either received through other witnesses, was actually favorable to defendants, or was irrelevant to the issues before the jury. These assignments of error are overruled.

[4] Plaintiffs also assign error to the trial court's refusal of their request that the jury be instructed with respect to the duty of a health care provider to continue treatment of a patient until treatment is no longer required or until the relationship is terminated by mutual consent. *See* NCPI—Civil 809.30. The evidence neither requires nor supports such an instruction. Although Mrs. York had discussed her impending Caesarean section with Dr. Guidetti, there was no evidence that he was contacted with respect to her emergency delivery on 30 June and, therefore, he could not be found to have unilaterally terminated the physician-patient relationship with respect to the anesthesia services which he was obligated to provide. Moreover, Dr. Guidetti was an officer and employee of defendant Piedmont; there is no evidence to support a finding that Piedmont ever attempted to terminate its obligation to provide anesthesia services to plaintiff. As there was no evidence to support this instruction, the trial court properly refused to give it. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). This assignment of error is overruled.

III.

Plaintiffs' Claims Against Defendant Hospital

Plaintiffs present four questions with respect to the exclusion of testimony concerning plaintiffs' claims against defendant Hospital. Plaintiffs argue that the trial court erred by excluding Dr. Olinger's deposition testimony regarding the standard of care required of defendant Hospital. They also assign error to the exclu-

sion of testimony by Dr. Stuart regarding the standard of care required of defendant Hospital with respect to notification of Mrs. York's attending physician of her condition. Without elaborating upon the subject testimony, we conclude that the trial court's rulings could not, even if error, have been prejudicial because substantially the same evidence was presented through other testimony. *State v. Smith, supra; Leary, supra.* These assignments of error are overruled. Similarly, we overrule plaintiffs' exception to the exclusion of nurse-anesthetist Bryant's opinion as to whether "the hospital waited too long to do this surgery" on Mrs. York, as we see no reasonable possibility that the jury's verdict would have been different had the testimony been admitted. *See Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E. 2d 859, *disc. rev. denied*, 314 N.C. 336, 333 S.E. 2d 496 (1985).

[5] By another assignment of error, plaintiffs argue that the trial court erred by refusing to allow nurse Luffman to read statements from a textbook entitled *Maternity Care of the Nurse and the Family*, Second Edition, regarding the care of a mother in labor and of a newborn infant. Plaintiffs argue that this testimony was admissible under G.S. 8C-1, Rule 803(18). We disagree.

G.S. 8C-1, Rule 803, delineates instances in which evidence will not be excluded simply because such evidence is hearsay. It does not, however, annul the requirement of G.S. 8C-1, Rule 402, that the evidence be relevant. Plaintiffs in this case laid no foundation that would tend to show that the standards described in the textbook were the same as those of hospitals similarly situated to defendant Hospital. The mere fact that the textbook was used in Surry Community College does not establish its relevance. Until the proper foundation was established, the information in the textbook had no relevance to the issues before the jury.

With respect to the jury instructions concerning the alleged negligence of defendant Hospital, plaintiffs contend that the jurors should have been instructed with respect to the Hospital's duty to exercise reasonable care in the selection of the physicians assigned to render treatment to Mrs. York and Matthew. In our view, however, the evidence offered by plaintiffs was not sufficient to support a finding that defendant Hospital assigned any

physician to treat Mrs. York upon the occasion of her emergency admission and surgery; the attending obstetrician was a private physician and a member of the obstetrical group chosen by Mrs. York. Therefore, the instruction was not required. *Link, supra.*

[6] We find merit, however, in plaintiffs' contentions regarding the instructions given the jury with respect to the fifth issue—whether Matthew York's injuries proximately resulted from negligence of defendant Hospital. Because the instructions given the jury were incomplete and potentially misleading, we must order a new trial on that issue.

The trial court's instructions with respect to the fifth issue consisted of the following:

> Now, MEMBERS of the JURY, you heard me describe negligence and proximate cause and the standard of care and wherein the plaintiff alleges that the hospital was negligent in regard to Mrs. York's claim. Those same rules apply with regard to issue number five, that is, was Matthew injured as a result of the negligence of the hospital? So, I am not going to repeat that for you at this time, but you will recall what I said about negligence and proximate cause and *the acts of negligence which the plaintiff contends the hospital committed.* And if the plaintiff has proven to you, that is, Mr. and Mrs. York have proven to you—this is their claim for reimbursement of additional living expenses for the boy until he reaches eighteen. So, if Mr. and Mrs. York have proven to you by the evidence and by its greater weight that the hospital was negligent in any one or more of those respects I've enumerated, then it would be your duty to answer that issue yes. However, if you are not so satisfied or find the evidence evenly balanced or cannot tell where the truth of the matter is, it would be your duty to answer that issue no. (Emphasis supplied.)

The specific acts of negligence referred to by the judge were those given with respect to the first issue—whether Mrs. York was injured as a result of the Hospital's negligence—and were as follows:

> So, MEMBERS of the JURY, I instruct you that if the plaintiff has proven by the greater weight of the evidence that

> the hospital was negligent in that the hospital accepted Mrs. York for delivery of her baby by caesarian section, was negligent by failing to exercise its best judgment in the treatment and care of the plaintiff, or that the hospital, in admitting her for the delivery of the child, was negligent by failing to use reasonable care and diligence in the application of its knowledge and skill to the care of the plaintiff, or that the hospital was negligent by failing to act in accordance with the standards of practice used by hospitals with similar training and experience in Mt. Airy or other similar communities in that the hospital failed, through its agents and employees, to properly notify the obstetrician of the condition of the plaintiff, Mrs. York, after her arrival at the hospital, or the hospital failed to provide minimum standards for the number and type of medical care providers necessary in this case to compose a competent surgical team, and failed to commence their duties within a reasonable period of time after notification, or Nurse Danley breached her duty not to obey instructions of a physician which are obviously negligent, which were deferring the immediate repeat classical caesarian section upon Mrs. York when she was in labor and at term and the administration of a drug Seconal, a sedative, having knowledge that the plaintiff, Mrs. York, was to have a repeat classical Caesarian section. And, I say, MEMBERS of the JURY, that if the plaintiff has proven by the greater weight of the evidence that the defendant hospital was negligent in any one or more of those regards, and if the plaintiff has further proven by the greater weight of the evidence that such negligence, if any, was a proximate cause of her injury, then it would be your duty to answer this first issue yes, that is, in favor of Mrs. York.

In apt time, plaintiffs objected to the instructions as given on the grounds that the instructions did not permit the jury to consider, in determining the issue, evidence that defendant Hospital's postnatal care of the infant did not conform to applicable standards. Plaintiffs' objections were renewed when, upon the jurors' request for reinstruction upon the fifth issue, the court repeated essentially the same instruction.

Although the trial judge is no longer required to apply the law to the evidence, G.S. 1A-1, Rule 51(a) (1985 Cum. Supp.), if the

judge undertakes to do so he must instruct completely and without omission. *See State v. Rainey*, 236 N.C. 738, 74 S.E. 2d 39 (1953) (court not required to instruct on a subordinate feature, but if judge elects to do so, he must charge accurately). In addition to the alleged negligence of defendant Hospital in caring for Mrs. York after her arrival at the hospital and in connection with the delivery of the infant, plaintiff alleged and offered evidence tending to show that the care and treatment of the infant after his birth did not conform to the applicable standards in several respects. The court, however, declined to instruct the jury as to the Hospital's alleged breach of duty in these respects. As a result, the jury could have understood that it could find defendant Hospital liable for injuries to the child only if it found that the Hospital was negligent in its treatment of Mrs. York in a manner specified by the court. In our view, this possibility was sufficiently substantial as to constitute error prejudicial to plaintiffs, entitling them to a new trial upon the issues of defendant Hospital's negligent treatment of Matthew York, and the damages resulting to plaintiffs as a proximate result thereof.

IV.

In view of our decision, we decline to address plaintiffs' remaining assignments of error as they are unlikely to recur at the new trial. Moreover, because of our disposition of this case as to defendants Guidetti and Piedmont, we need not consider the cross-assignments of error raised by them.

V.

In summary, we find no error in the trial of plaintiffs' claims against defendants Richard R. Guidetti, M.D., and Piedmont Anesthesia Associates, P.A. We likewise find no error in the trial of plaintiffs' claims against defendant Northern Hospital District of Surry County for damages resulting from its alleged negligent care and treatment of Shirley C. York. For the reasons stated above, however, we award plaintiffs a new trial upon their claims against defendant Hospital for damages resulting from the Hospital's alleged negligent treatment of Matthew Howard York.

No error in part, new trial in part.

Chief Judge HEDRICK and Judge GREENE concur.

STATE OF NORTH CAROLINA v. MARK H. SCHULTZ

No. 874SC309

(Filed 22 December 1987)

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

The trial court did not err in denying defendant's motions to dismiss the charge of attempted second degree rape, since the victim's testimony that defendant dragged her down a hallway toward a guest bedroom, put his hand down over her shoulder and down the front of her shirt, and grabbed her breasts was sufficient circumstantial evidence from which the jury could infer defendant's intent to engage in vaginal intercourse with the victim by force and against her will.

2. **Rape and Allied Offenses § 4.1— attempted second degree rape—earlier similar incident—evidence admissible**

In a prosecution for attempted second degree rape and second degree kidnapping, the trial court did not err in allowing the State to present evidence concerning an incident two years earlier involving defendant's assault on a female, since the identity of defendant was put in issue by defendant's alibi defense; the earlier incident was not too remote in time to be probative; and the incidents were similar in that both began when a man came to the female victim's residence to inquire about a lost dog, left his name and number in the event the victim saw the dog, asked to use the phone and the bathroom, and toyed with the lock of the victim's front door before seizing hold of her.

Judge BECTON dissenting.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 4 December 1986 in Superior Court, ONSLOW County. Heard in the Court of Appeals 24 September 1987.

Defendant was charged with attempted second degree rape and with second degree kidnapping. At trial, the State's evidence tended to show that at approximately 5:00 p.m. on 9 September 1986 a man identified as defendant rang the doorbell at the residence of Kelly Ann Tease, a high school student age 17, who lived with her parents and was at home alone. When Ms. Tease opened the door, the man asked if she had seen a basset hound. She said no, but agreed to take his name and telephone number in case she did see the dog. The man then asked to use the telephone, and Ms. Tease consented. After using the telephone, the man asked to use the bathroom. When he came out of the bathroom, the man went to the foyer and fumbled with the double doors, asking Ms.

Tease which door led out. As Ms. Tease attempted to open the door, the man grabbed her from behind and asked her for her money. Ms. Tease stated that she had no money and that she did not work. The man then asked her if he could see her underwear drawer. With one hand across her mouth and the other arm around her body, the man dragged Ms. Tease down the hall leading to the guest room. In the hall, he dropped Ms. Tease in a corner, and she began to scream. The man, panicking, again picked up Ms. Tease and attempted to push her into the guest bathroom. Ms. Tease continued to resist him. At this point, the man put one hand over the shoulder and down the shirt of Ms. Tease, and touched her breasts. Ms. Tease then bit the forefinger of the man's other hand which was across her mouth, and the man released her. Ms. Tease promised not to "say anything" because that was what she thought the man wanted to hear. The man left the house. This episode lasted approximately twenty-five to thirty minutes. Ms. Tease was treated later at the hospital for scratches and bruises she received in the struggle.

At the close of the State's evidence, the court denied defendant's motion to dismiss the charge of attempted second degree rape. Defendant presented evidence of an alibi defense as well as evidence tending to show his good character and reputation. Defendant also testified on direct examination that he had previously pled guilty to "being in [a] woman's house with her permission, and possibly stepping back on her breaking her fingernail . . . ."

In rebuttal, the State introduced evidence that defendant had pled guilty to a charge of assault on a female resulting from an incident that occurred in April 1985. The State showed that on 1 April 1985 defendant went to the home of Peggy Dyer and asked her if she had seen a German shepherd. When she said no, he asked to use her phone. He then left a number for her to call if she saw the dog. A few days later, defendant returned to Ms. Dyer's home, asking if a set of keys he had found belonged to her. She answered in the negative. The next morning, defendant again went to Ms. Dyer's home and asked to use her telephone. After using the telephone, defendant asked to use the bathroom. Defendant then left the house. Ms. Dyer had begun to get ready for work when she heard her front door open. She found defendant fumbling with the lock on the door. When asked what he was doing, defendant asked if Ms. Dyer wanted the door locked. Ms.

Dyer told him to "go on" and she would "get the door." At that point, defendant pushed Ms. Dyer against the wall by a closet, held her arms down, and covered her mouth with his hand. She screamed, and defendant ran out the door.

At the close of all the evidence, the court again denied defendant's motion to dismiss the charge of attempted second degree rape. The jury found defendant guilty of one count of attempted second degree rape and one count of second degree kidnapping. The offenses were consolidated for judgment, and, after finding factors in aggravation and mitigation of punishment, the trial judge sentenced defendant to twenty years' imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kaye R. Webb, for the State.

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

PARKER, Judge.

Defendant has raised two issues in this appeal: whether the trial court erred in denying his motions to dismiss the charge of attempted second degree rape and whether the trial court erred in allowing into evidence testimony regarding the incident that occurred in April 1985. We find defendant's arguments as to both issues to be without merit.

[1] Defendant first argues that the evidence presented by the State was insufficient as a matter of law to establish defendant's guilt beyond a reasonable doubt as to the charge of attempted second degree rape. We disagree.

Our Supreme Court has recently recited the duty of the trial court in considering a criminal defendant's motion to dismiss:

> Upon a motion to dismiss in a criminal prosecution, the trial court must view the evidence in the light most favorable to the state, giving the state the benefit of every reasonable inference that might be drawn therefrom. . . . The trial judge must decide if there is substantial evidence of each element of the offense charged. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Citations omitted).

State v. Etheridge, 319 N.C. 34, 47, 352 S.E. 2d 673, 681 (1987).

General Statute 14-27.3(a) provides the following in relevant part:

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person . . . .

General Statute 14-27.6 makes the attempt to commit second degree rape a Class H felony. Under applicable North Carolina case law, to convict a defendant of attempted rape, the State must prove, beyond a reasonable doubt, two essential elements: (i) that defendant had the specific intent to rape the victim and (ii) that defendant committed an act that goes beyond mere preparation, but falls short of the actual commission of the rape. *State v. Boone*, 307 N.C. 198, 210, 297 S.E. 2d 585, 592 (1982); *State v. Hall*, 85 N.C. App. 447, 452, 355 S.E. 2d 250, 253 (1987).

The critical question in this case is whether the State met its burden of showing defendant's intent. The State is not required to show that the defendant made an actual physical attempt to have intercourse, *State v. Hudson*, 280 N.C. 74, 77, 185 S.E. 2d 189, 191 (1971), *cert. denied*, 414 U.S. 1160, 94 S.Ct. 920, 39 L.Ed. 2d 112 (1974), and defendant's actions clearly exceeded "mere preparation." *See State v. Hall*, 85 N.C. App. at 452, 355 S.E. 2d at 253. The element of intent as to the offense of attempted rape is established if the evidence shows that defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding any resistance on her part. *State v. Moser*, 74 N.C. App. 216, 220, 328 S.E. 2d 315, 317 (1985). It is not necessary that defendant retain the intent throughout the incident. *State v. Hudson*, 280 N.C. at 77, 185 S.E. 2d at 191; *State v. Gammons*, 260 N.C. 753, 755, 133 S.E. 2d 649, 651 (1963). Furthermore, "Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred." *State v. Gammons*, 260 N.C. at 756, 133 S.E. 2d at 651.

Our Courts have addressed the issue of the sufficiency of the evidence of intent to commit rape in a variety of factual situa-

tions. *See, e.g., State v. Whitaker*, 316 N.C. 515, 342 S.E. 2d 514 (1986); *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); *State v. Dawkins*, 305 N.C. 289, 287 S.E. 2d 885 (1982); *State v. Hall, supra; State v. Powell*, 74 N.C. App. 584, 328 S.E. 2d 613 (1985); *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *aff'd per curiam*, 308 N.C. 804, 303 S.E. 2d 822 (1983); *State v. Norman*, 14 N.C. App. 394, 188 S.E. 2d 667 (1972). In each of these cases where the evidence of intent was found sufficient, the defendant manifested his sexual motivation by some overt act. *See, e.g., State v. Whitaker, supra* (defendant verbally expressed his intent to commit cunnilingus with the victim); *State v. Hall, supra* (defendant pulled the victim's shirt down and touched her breasts); *State v. Powell, supra* (defendant undressed himself in room where victim was sleeping and began to fondle his genitalia); *State v. Norman, supra* (defendant touched the victim on the breast).

In the case before us, the victim testified that defendant dragged her down a hallway toward a guest bedroom, and that he put his hand down over her shoulder and down the front of her shirt and grabbed her breasts. This evidence is sufficient circumstantial evidence from which the jury could infer defendant's intent to engage in vaginal intercourse with the victim by force and against her will.

Defendant's contention that the case of *State v. Rushing, supra*, is dispositive of the issue of intent is meritless. In *Rushing*, the State's evidence showed that defendant entered the victim's bedroom window at night, awakening the victim. Defendant wore dark pants, no shirt, and white gloves. When the victim asked who he was, defendant stated, " 'Don't holler, don't scream, I got a gun, I'll shoot you.' " When the victim backed away from him, defendant grabbed her arm, and prevented her from turning on a light. When a child sleeping in the room woke up and began to scream, defendant fled. The Court held that the evidence did not permit an inference that defendant intended to commit rape because there was no "overt manifestation of an intended forcible sexual gratification." *State v. Rushing*, 61 N.C. App. at 66, 300 S.E. 2d at 449. The case before us is distinguishable in that there was such an overt manifestation in the defendant's touching of the victim's breasts. *See State v. Hall, supra; State v. Norman, supra.*

Defendant's argument that the evidence shows only his intent to rob the victim is also without merit. The fact that defendant verbally manifested his intent to rob the victim when he first grabbed hold of her does not exclude a reasonable inference by the jury that once defendant learned the victim had no money, he formed the intent to gain some other gratification from the situation. *See State v. Whitaker, supra; State v. Hall, supra.* The evidence showed that after Ms. Tease told defendant she had no money, defendant dragged her down the hall and during the struggle grabbed her breast. Notwithstanding the possibility of other inferences, this evidence is sufficient to raise an inference of intent to commit rape. *See State v. Whitaker, supra; State v. Hall, supra.*

[2] The final issue presented by this appeal is whether the trial court erred in allowing the State to present evidence concerning the incident in April 1985 that led to defendant's conviction on a plea of guilty to assault on a female. We find that the court did not err in allowing this evidence.

General Statute 8C-1, Rule 404(b), provides that evidence of crimes, wrongs or acts other than those specifically at issue in the trial is inadmissible "to prove the character of a person in order to show that he acted in conformity therewith"; however, such evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." The test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial under the balancing test of G.S. 8C-1, Rule 403. *State v. Cotton,* 318 N.C. 663, 665, 351 S.E. 2d 277, 278-79 (1987); *State v. Scott,* 318 N.C. 237, 248, 347 S.E. 2d 414, 420 (1986).

In the case before us, evidence of the incident that occurred in April 1985 was clearly probative of defendant's identity as the man who entered Ms. Tease's home on 9 September 1986. The identity of defendant was put in issue by defendant's alibi defense. *See State v. Thomas,* 310 N.C. 369, 312 S.E. 2d 458 (1984); *State v. Freeman,* 303 N.C. 299, 278 S.E. 2d 207 (1981). Application of the identity exception of Rule 404(b) requires that some unusual facts or particularly similar acts be present in both crimes indicating that the same person committed both crimes.

State v. Riddick, 316 N.C. 127, 133, 340 S.E. 2d 422, 426 (1986); *State v. Moore*, 309 N.C. 102, 106, 305 S.E. 2d 542, 545 (1983). The two incidents in the case before us are strikingly similar in many respects. Both incidents began when a man came to the female victim's residence to inquire about a lost dog. In each case, the man left his name and number in the event the victim saw the dog. The man asked to use the telephone and the bathroom in both incidents. In each situation, the man toyed with the lock of the victim's front door before he seized hold of her.

Defendant, however, contends that the time elapsed between the incidents, approximately twenty-one months, rendered the April 1985 incident too remote in time to be probative. This argument is without merit.

Whether or not to exclude evidence under G.S. 8C-1, Rule 403, because its probative value is substantially outweighed by the danger of unfair prejudice is a matter within the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986). We find no abuse of that discretion here.

Remoteness in time is most important where evidence of another crime is used to show that both crimes arose out of a common scheme or plan: "Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes." *State v. Riddick*, 316 N.C. at 134, 340 S.E. 2d at 427. Generally, remoteness in time goes to the weight of the evidence and not to its admissibility. *State v. Brown*, 280 N.C. 588, 187 S.E. 2d 85, *cert. denied*, 409 U.S. 870, 93 S.Ct. 198, 34 L.Ed. 2d 121 (1972); *State v. Hall*, *supra*. For cases sustaining the admission of other crimes committed at similar or longer intervals from the crime being tried, see *State v. Riddick*, *supra*; *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137 (1980); *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975), *sentence vacated*, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed. 2d 1205 (1976); *State v. Hall*, *supra*.

For the foregoing reasons, we find

No error.

Judge JOHNSON concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing that this case is controlled by *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983); *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963); *State v. Gay*, 224 N.C. 141, 29 S.E. 2d 458 (1944); and *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445 (1983), I dissent. In my view, the evidence presented by the State was insufficient as a matter of law to establish defendant's guilt of attempted second degree rape, and I therefore vote to reverse the attempted second degree rape conviction.

Discussing the offense of attempted rape, this court in *Rushing* said:

> . . . in order to 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.

61 N.C. App. at 67, 300 S.E. 2d at 449.

In the case *sub judice*, the evidence in the light most favorable to the State shows the following. Defendant grabbed the prosecuting witness from behind. Placing his left arm under her left arm, defendant then picked her up and asked her for money. When she said she did not have any money, defendant asked to see her underwear drawer and started pulling her down the foyer and guest room hall in such a manner that her feet were not always on the ground. At that point, the direct examination reveals the following:

> . . . [h]e was just kind of holding me up and I was screaming and he dropped me in the corner before the guest bedroom and I started screaming real loud and he got real panicky and he picked me back up and tried to shut me in the guest bathroom and I was fighting back and he put his hands down over

my right shoulder and down my shirt and at that time I bit his finger.

Q. Okay, hold on a second, when he put his hand, you say his hand, which hand?

A. His right hand.

Q. He put his right hand down your shirt, did he grab part of your body?

A. He grabbed my chest.

Q. Your breasts?

A. Yes sir.

Q. After he did that, where was his left hand?

A. I'm not really sure.

Q. O.K., you indicated you bit his hand, do you know which hand you bit?

A. It must have been his left hand, his left hand was over my mouth and I bit his index finger.

Q. What did he do then?

A. He got up and walked to the foyer and he went to the doors and I came out and I said, "I promise I won't say anything," and he said, "you promise," and ran out of the door.

The foregoing evidence does not show the requisite "overt manifestation of an intended forcible sexual gratification" discussed in *Rushing*, 61 N.C. App. at 66, 300 S.E. 2d at 449. Moreover, in my view, the foregoing evidence is weaker than the evidence in *Freeman*, *Gammons*, *Gay*, or *Rushing*. This court, in *Rushing*, thoroughly reviewed the precedent:

> . . . In *State v. Gay*, 224 N.C. 141, 29 S.E. 2d 458 (1944), our Supreme Court held that where the defendant indecently exposed himself to the victim on a city street, posed an indecent question and chased her briefly when she screamed and ran, but did not touch the victim, there was insufficient evidence of assault with intent to commit rape because there was no showing that the defendant intended to gratify his

passions notwithstanding the resistance of the victim. The Court, noting that the evidence would warrant a verdict of guilty of assault on a female, granted the defendant a new trial.

In *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963), the evidence tended to show that the defendant, who was a minister, told the prosecutrix that the Lord had told him to have sexual relations with her in order to heal her, pushed her down on a bed and laid on top of her, put his hand up her dress removing her underclothes and touched her "body" with his. When the woman threatened to scream, which would have alerted the minister's wife, he ceased in his efforts, threatening her with death should she tell. The Court held that there was insufficient evidence to show that the defendant intended to overcome the victim's resistance and granted the defendant a new trial on the lesser included misdemeanor of assault on a female.

* * *

In *Freeman*, the State's evidence tended to show that the defendant, dressed in a sweat shirt type jacket and blue jeans, upon asking permission to enter and being refused, twice forcibly entered the female victim's home at night telling her that she "shouldn't have enticed" him. *Citing State v. Bell, supra* as an example of where sufficient intent to rape had been shown, the Court held that defendant Freeman's conviction of burglary could not stand, stating that "[t]here was nothing in defendant's dress or demeanor to suggest an intent to commit rape" and that the "words spoken by the defendant . . ., [i]n light of [the victim's] testimony that she was fully clothed and in no way encouraged the defendant, . . . are at best ambiguous and . . . are virtually meaningless."

61 N.C. App. at 64-67, 300 S.E. 2d at 448-49. Based on the foregoing precedent, the *Rushing* court held the following evidence insufficient to show intent to rape:

The prosecutrix was awakened from her sleep on 3 August 1981 in the early morning hours by a noise. Although there was no light in her room, she saw someone climb in her win-

> dow. She could tell that the intruder . . . was wearing dark pants, white fabric gloves, and no shirt. The women asked who it was and he said, "Don't holler, don't scream, I got a gun, I'll shoot you." The prosecutrix backed up to the head of her bed, whereupon the intruder came to the side of the bed and grabbed her arm. Every time she tried to turn on the light, the man told her not to move. The prosecutrix started screaming . . . . The intruder put his hand over her mouth. Her small child woke and started screaming. The man let go of her arm and dove out the window head first.

61 N.C. App. at 62-63, 300 S.E. 2d at 447.

Considering the precedent, I believe the evidence in the case *sub judice* fails to show that when defendant assaulted the prosecuting witness, he intended to engage in forcible nonconsensual intercourse with her and it fails to show that in the ordinary and likely course of events his assaultive acts would result in the commission of a rape.

RALEIGH-DURHAM AIRPORT AUTHORITY v. LUCY A. JONES HOWARD, ADMINISTRATOR C.T.A. OF THE ESTATE OF MICHAEL C. JONES, NORMAN E. WILLIAMS, CHARLES E. DARSIE, JEFFREY P. JONES, AND BOYCE, MITCHELL, BURNS & SMITH, A PARTNERSHIP

No. 8710SC46

(Filed 22 December 1987)

1. Attorneys at Law § 7.3— condemnation action—attorney fees—common fund doctrine

In a condemnation action by the Airport Authority in which attorney Boyce owned an interest in the property as compensation for legal services and in which Boyce defended the condemnation action, the trial court had the authority to award Boyce an attorney fee under the common fund doctrine where the condemnation award was under the trial court's supervision and control; Boyce's efforts clearly resulted in a substantial benefit to all of the defendants; the record strongly supports the trial judge's finding that Boyce did virtually all of the legal work which enriched all parties; the action was brought by the Airport Authority and not by Boyce, so that protection of the integrity of the judicial system from abuse by plaintiffs is not involved here; Boyce's interest in the fund tends to lessen the probability of vexatious and trifling litigation; and the common fund doctrine has been applied by the courts in cases in which the beneficiaries of the fund were adversaries. *Horner*

v. Chamber of Commerce, 236 N.C. 96, resolved the question of whether the common fund doctrine should be extended to taxpayer suits and did not limit its application to suits brought by taxpayers.

2. **Attorneys at Law § 7.3— condemnation action—$100,000 attorney fee—supported by record**

A $100,000 attorney fee for the defense of a condemnation action was supported by the trial judge's findings of fact, the especially relevant portions of which took up to two full single-spaced pages in the Record on Appeal.

3. **Trial § 3.1— condemnation action—denial of motion for continuance—no abuse of discretion**

The trial court did not abuse its discretion by denying a motion for a continuance in a condemnation action where the motion was not supported by affidavit or by a forecast of expected testimony or evidence of any kind.

4. **Trial § 4— condemnation action—denial of default judgment—no error**

The trial court did not err in a condemnation action by denying a default judgment for one defendant against another where defendant Jeffrey Jones filed an answer to the Airport Authority's complaint in which he claimed a one-half interest in the property, denied any interest by Boyce, and later denoted his answer as a crossclaim and applied for a default judgment contending that Boyce had failed to respond. Jones' answer did not require a response because Boyce did not claim an individual interest in the property and the issue of the respective interests of the landowners was already before the court.

5. **Eminent Domain § 7.9— condemnation for airport expansion—jury trial denied—no error**

The trial court did not err by denying a defendant's motion for a jury trial on the issue of ownership of the property where the issue of ownership was not triable by a jury of right under N.C.G.S. § 40A-43 and N.C.G.S. § 40A-55, and defendant did not demand a jury trial in writing within the prescribed time.

6. **Rules of Civil Procedure § 15— condemnation action—motion to amend crossclaim denied—no error**

The trial court did not err in a condemnation action by denying defendant Jones' motion to amend his crossclaim, originally labeled answer, against another defendant where no responsive pleading was required after Jones filed his answer and he was thus not entitled to amend as a matter of course.

7. **Bills of Discovery § 1— motion for discovery after trial begun—denied—no error**

The trial judge in a condemnation action did not err by denying a defendant's motion for discovery made after appellees filed a motion to determine the interests of the landowners where the defendant had notice well in advance that the issue of ownership would be determined in the action. The trial judge is not required to permit discovery five years after the action was commenced, two months after other counsel was hired, and three days into the trial.

8. Trusts § 11— disputed ownership interest in property—burden of proof

In a condemnation action in which previous litigation had resulted in a consent judgment transferring ownership of a 50 percent interest in the property to "Eugene Boyce, Attorney and Trustee," the trial court did not err by placing the burden of proof on the trust beneficiary claiming the entire 50 percent interest in property where there were no business dealings of any kind between the trustee, Boyce, and the beneficiary; the beneficiary was seeking to abrogate Boyce's record title to the property which had been conveyed in a consent judgment; and the beneficiary was attacking the record title.

9. Attorneys at Law § 7.3— condemnation action—attorney's interest in property as result of prior litigation

In a condemnation action in which the attorney for defendants had received a 50 percent interest in the property as "Attorney and Trustee" in a consent judgment resulting from prior litigation, the trial judge did not err by awarding the attorney on behalf of his law firm a 25 percent interest in the property where all of the evidence either supported, or at worst did not refute, the attorney's claim that he was paid a 25 percent interest as compensation for his earlier legal services.

APPEAL by defendants from *Bailey, Judge.* Order regarding attorney fees entered 10 September 1986 and Judgment regarding property ownership entered 11 September 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 25 August 1987.

W. Y. Manson for Lucy Jones Howard, and Samuel Roberti for Jeffrey P. Jones, defendant-appellants.

Womble, Carlyle, Sandridge, and Rice by William E. Moore, Jr., G. Eugene Boyce, and R. Daniel Boyce for G. Eugene Boyce as Trustee for Jeffrey P. Jones, for Norman E. Williams, for Charles E. Darsie, and for Boyce, Mitchell, Burns, and Smith, a partnership, defendant-appellees.

BECTON, Judge.

Plaintiff, Raleigh-Durham Airport Authority, brought this action to condemn and appropriate property to which all of the named defendants claimed an interest. A jury determined that the property was worth $1,185,825. On motions filed by defendant appellees Norman Williams, Charles Darsie, Eugene Boyce and the law firm of Boyce, Mitchell, Burns and Smith, the trial judge determined the interests of the landowners *inter se*, and apportioned Mr. Boyce's attorney fees among all defendants. The

amount of the compensation award is not being contested on appeal; rather appellants Lucy Jones Howard and Jeffrey Jones assign several errors to the trial judge's distribution of the property and apportionment of attorney fees. We hold that the trial judge properly determined the interests of the landowners and properly apportioned the attorney fees.

I

In 1978, Freddy Jones owned property located near the Raleigh-Durham Airport. During that year, Freddy Jones was convicted of the murder of his brother, who was appellant Lucy Jones' husband. Lucy Jones, now Lucy Jones Howard, brought a wrongful death action against Freddy Jones. She was represented by attorneys Darsie and Williams. The law firm of Boyce, Mitchell, Burns and Smith (B M B & S, P.A.) by Attorney G. Eugene Boyce, represented Freddy Jones in the criminal and civil cases. A consent judgment was entered in the wrongful death action, awarding Lucy Jones Howard (Howard) a 50 percent interest in Freddy Jones' property. Her attorneys, Darsie and Williams, received a portion of Howard's award under a contingent fee arrangement. The consent judgment also awarded Boyce the remaining 50 percent interest as "Attorney and Trustee."

In August 1981, the Raleigh-Durham Airport Authority initiated a condemnation action against the property owners. During the next several years Boyce prepared to litigate the condemnation action. However, in February 1986, Freddy Jones unsuccessfully attempted to set aside the consent judgment, and Jeffrey Jones (Freddy Jones' son) claimed ownership of the 50% interest which Boyce held as "Attorney and Trustee." Boyce contended that one-half of the 50 percent was given to him as compensation for legal representation in the criminal and civil actions and that he held the other one-half in trust for Jeffrey Jones. After learning that Jeffrey Jones claimed ownership of the entire 50 percent interest, Boyce advised Lucy Howard and Jeffrey Jones by letter that he could not represent them in the condemnation proceeding because of the potential conflict of interest and advised them to retain separate counsel. Jeffrey Jones and Lucy Howard hired attorneys W. Y. Manson and Samuel Roberti to represent them in the condemnation action.

In August 1986, a jury awarded just compensation for the property. In September 1986, the trial judge determined the landowners' interests as follows:

Lucy Jones Howard	33.34%
Charles Darsie	8.33%
Norman E. Williams	8.33%
Eugene Boyce (as trustee for Jeffrey Jones)	25.00%
Eugene Boyce (for B M B & S, P.A.)	25.00%

Upon determining that Freddy Jones had paid Boyce $45,000 in cash during the interim between the civil and criminal trials, the trial judge further found that Boyce held one-half of that sum in trust for Jeffrey Jones and that he, together with his law partners, owned the other one-half. Finally, the trial judge, acting on a motion by appellees, awarded B M B & S, P.A. a $100,000 attorney fee from the total proceeds of the condemnation award.

II

Appellants made nine assignments of error on appeal. We will address them below.

A

[1] Appellants first contend that the trial judge erred in awarding attorney fees to B M B & S, P.A. out of the total compensation award.

As a general rule, attorney fees are not awarded to the prevailing party without statutory authority. In the instant case, the trial judge based the award on the application of an exception to the general rule—the common fund doctrine. *See, e.g., Trustee v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 62 L.Ed. 2d 676 (1980); *Gibbs v. Blackwelder*, 346 F. 2d 943 (4th Cir. 1965); *Alpine Pharmacy, Inc. v. Chas. Phizer & Co.*, 481 F. 2d 1045 (2d Cir.), *cert. denied, Patlogan v. Dickstein, et al.*, 414 U.S. 1092, 38 L.Ed. 2d 549 (1973); *In re Air Crash Disaster at Florida Everglades*, 549 F. 2d 1006 (5th Cir. 1977). The doctrine allows "a court of equity, or a court in the exercise of equitable jurisdiction, [to] in its discretion, and without

statutory authorization, order an allowance for attorney fees to a litigant who at his own expense, has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him." *Horner v. Chamber of Commerce*, 236 N.C. 96, 98, 72 S.E. 2d 21, 22 (1952).

Appellants argue, however, that the North Carolina Supreme Court, in *Horner*, restricted the common fund doctrine in North Carolina, limiting its application in this state to suits brought by taxpayers to protect, preserve or increase a public fund. We disagree.

In *Horner*, plaintiff brought an action on behalf of the taxpayers of Burlington to have declared illegal payments of money made by the City of Burlington to the Burlington Chamber of Commerce. Plaintiff was successful in his suit, and the Chamber was ordered to refund the funds to the City. Plaintiff then petitioned the court for a reasonable attorneys fee, which the court denied.

On appeal, our Supreme Court reversed the decision of the trial court and remanded the case for an award of a reasonable fee. In its opinion, the Supreme Court stated the issue:

> Can the plaintiff in a taxpayers' action, who has recovered for the benefit of a municipality public moneys unlawfully disbursed and otherwise lost, be awarded from the amount recovered and restored to the municipality a reasonable sum to be used in paying the fees of his attorney, without a statute expressly so providing?

Id. at 97, 72 S.E. 2d at 22. In addressing this issue, the court *recognized* and *approved* the common fund theory. In stating the "well established" rule allowing an attorneys fee to a litigant who "has maintained a successful suit for the preservation, protection, or increase of a common fund," the *Horner* court used the term litigant, not taxpayer, and did not restrict the doctrine to "a successful *taxpayers* suit." Indeed, in specifically recognizing that the common fund doctrine had long been applied in non-taxpayers cases, the *Horner* court said:

> *The rule has been recognized and applied by this Court in various classes of cases,* most common among which are those involving allowances to pay fees for services furnished by attorneys to (1) next friends of infants or others under disability and (2) fiduciaries such as receivers, trustees, and those administering estates of decedents, respecting litigation involving either the creation or protection of the common fund or common property. (Citations omitted.)

Horner at 97-98, 72 S.E. 2d at 22 (emphasis added). This language clearly and unequivocally recognizes and approves the common fund doctrine.

The *Horner* court resolved the narrow question whether the rule should be *extended* to taxpayer suits. Citing cases from several other jurisdictions, the court stated:

> By what appears to be the decided weight of authority in other jurisdictions, *the doctrine of allowance of attorney fees against the property or fund created or protected by attorneys' services extends to and embraces taxpayers' actions like the instant case.*

Id. at 98, 72 S.E. 2d at 22 (emphasis added). After discussing several cases from other jurisdictions, the *Horner* court concluded:

> that where, as in the present case, on refusal of municipal authorities to act, a taxpayer successfully prosecutes an action to recover, and does actually recover and collect, funds of the municipality which had been expended wrongfully or misapplied, the court has implied power in the exercise of a sound discretion to make a reasonable allowance, from the funds actually recovered, to be used as compensation for the plaintiff taxpayer's attorney fees.

In extending the rule to include taxpayer actions, the *Horner* court determined that the *rule should be extended only to those taxpayer actions* "in which taxpayers not only recover judgment for the wrongfully expended public money, but actually collect the moneys, so misapplied," *id.* at 101, 72 S.E. 2d at 24, and *should not be extended to all taxpayer actions.*

In our view, the case *sub judice* is controlled by *Horner.* Appellants' reliance on this court's opinions in *Madden v. Chase,* 84

N.C. App. 289, 352 S.E. 2d 456, *disc. rev. denied*, 320 N.C. 169, 358 S.E. 2d 53 (1987) and *Kiddie Korner v. Board of Education*, 55 N.C. App. 134, 285 S.E. 2d 110 (1981) is misplaced and overlooks the *stare decisis* effect of *Horner*.

In the case *sub judice*, all of the ingredients for application of the common fund doctrine are present. The condemnation award was under the trial court's supervision and control. Boyce's efforts clearly resulted in a substantial benefit to all of the defendants. Although appellants take exception to the court's findings of fact regarding Boyce's role in mounting a defense to the condemnation action, the record strongly supports the trial judge's finding that Boyce "did virtually all of the legal work" which enriched all parties. Moreover, the overriding concern expressed in *Horner*—protecting the integrity of the judicial system from abuse by plaintiffs—is not implicated here. This action was brought by the Airport Authority, not by Boyce. Nor are we persuaded that the likelihood of abuse is increased by the attorney himself having had an interest in the fund. To the contrary, this fact tends to lessen the probability of "vexatious and trifling litigation" which was feared by the *Horner* court. Also, contrary to appellants' position, the doctrine has been applied by other courts in cases in which the beneficiaries of the fund were adversaries. *See, e.g., Wallace v. Fiske*, 80 F. 2d 897 (8th Cir. 1935) (on rehearing); *O'Hara v. Oakland County*, 136 F. 2d 152 (6th Cir. 1943); *Carnston v. Hardin*, 504 F. 2d 566 (2d Cir. 1974). *See generally* M. F. Derfner and Arthur D. Wolk, COURT AWARDED ATTORNEY FEES, Section 2 (1st Ed. 1986).

In light of appellees' cogent, equitable arguments and our Supreme Court's holding in *Horner*, we conclude that the trial court had the authority to award Attorney Boyce an attorney fee under the common fund doctrine.

B

[2] Appellants next assign error to the amount of the attorneys fee award. We summarily reject this assignment of error. Considering Judge Bailey's findings of fact, especially findings 3-8, which themselves take up two full single-spaced pages in the Record on Appeal, we conclude that the trial judge did not abuse his discretion in fixing the fee at $100,000.

C

All of appellants' seven remaining assignments of error relate to the trial judge's division of the property interests as between Jeffrey Jones and B M B & S, P.A.

[3] 1. Appellant Jeffrey Jones contends that the trial judge erred in denying his motion for a continuance. The party seeking a continuance bears the burden of showing sufficient grounds. *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976); *Webb v. James*, 46 N.C. App. 551, 265 S.E. 2d 642 (1980). In the case *sub judice*, Jones' motion was not supported by affidavit nor by a forecast of expected testimony or evidence of any kind. We find no abuse of discretion in the trial court's denial of the motion. This assignment is overruled.

[4] 2. Jeffrey Jones next contends that the trial judge erred in denying his motion for default judgment against Boyce. In April 1986, five years after commencement of the condemnation action, Jeffrey Jones filed an Answer to the Airport Authority's Complaint in which he claimed a one-half interest in the property and denied any interest by Boyce. Jones later, in open court, applied for a "Default Final," denoting his Answer as a cross-claim and contending that Boyce had failed to respond. However, Jones' "Answer" did not require a response. In his Answer Jones denied that Boyce held any interest individually. Boyce has not and does not now claim an individual interest in the property. Thus, the only issue raised by Jones' Answer—the respective interests of the landowners—was one already before the court through Judge Hight's 20 February 1986 ruling which preserved that issue for disposition at a later date. This assignment is overruled.

[5] 3. Jeffrey Jones next contends that the trial judge erred in denying his motion for a jury trial on the issue of ownership of the property. Rule 38(b) of the North Carolina Rules of Civil Procedure provides that any party may demand a trial by jury of any issue "triable by a jury of right," if the party demands so, in writing, not more than 10 days after service of the last pleading regarding that issue. Jones' efforts to satisfy the above criteria are rejected.

In the instant case, the issue of ownership was not "triable by a jury of right." N.C. Gen. Stat. Sec. 40A-43 (1984) which

controls special proceedings in condemnation of land for airports provides:

> *The judge*, upon motion and 10 days' notice by either the condemnor or the owner, shall, either in or out of session, *hear and determine any and all issues raised by the pleadings other than the issue of compensation, including but not limited to*, the condemnors' authority to take, questions of necessary and proper parties, *title to the land*, interest taken, and area taken. (Emphasis added.)

Moreover, N.C. Gen. Stat. Sec. 40A-55 (1984) states:

> If there are *adverse and conflicting claimants* to the deposition made into court by the condemnor *or the additional amount determined as just compensation*, on which the judgment is entered in said action, *the judge* may direct the full amount determined to be paid into said court by the condemnor and *may retain said cause for determination of who is entitled to said moneys*. The *judge may* by further order in the cause *direct to whom the same shall be paid* and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made. (Emphasis added.)

In addition, Jones did not demand a trial by jury in writing within the prescribed time. This assignment is overruled.

[6] 4. Jeffrey Jones next contends that the trial judge erred in denying his motion to amend his "cross-claim" against Boyce. Jones argues that he should have been granted leave to amend under Rule 15 of the North Carolina Rules of Civil Procedure which provides that a party may amend its pleading once as a matter of course at any time before a responsive pleading is served, assuming a response is required. On the facts of this case, no responsive pleading was required after Jones filed his Answer. Thus, he was not entitled to amend as a matter of course. This assignment is overruled.

[7] 5. Jeffrey Jones next contends that the trial judge erred in denying his motion for discovery. He argues that discovery should have been allowed after appellees filed a motion to determine the interests of the landowners. Although the trial judge may grant motions for discovery during a trial, he should do so

only when the interests of justice so demand. Jones had notice well in advance that the issue of ownership would be determined in this action. The trial judge is not required to permit discovery five years after the action was commenced, two months after other counsel was hired, and three days into the trial. This assignment is overruled.

[8] 6. Jeffrey Jones next contends that the trial judge erred in placing the burden of proof on him regarding his claimed 50 percent interest in the property. The consent judgment transferred ownership of 50 percent interest to "Eugene Boyce, Attorney and Trustee." However, the judgment did not resolve how much of the ownership interest Boyce held as attorney and how much he held as trustee. The parties agree that Jeffrey Jones is the beneficiary of the interest held in trust. Jones argues that Boyce had the burden of proving the amount held in the trust. He argues, citing *McNeill v. McNeill*, 223 N.C. 178, 25 S.E. 2d 615 (1943), that a presumption of fraud arises when a trustee benefits from a transaction with a beneficiary and the burden of proof is on the trustee to show by the greater weight of the evidence that the transaction was open, fair and honest. Although Jeffrey Jones accurately states the presumption which applies to business dealings, involving trust property, between a trustee and beneficiary, that presumption does not apply in this case because there were no business dealings of any kind between Boyce and Jeffrey Jones. Rather, in the instant case, Jeffrey Jones sought to abrogate Boyce's record title to the property conveyed to Boyce in the consent judgment by Freddy Jones. (Freddy Jones' 1986 effort to set aside the 1978 consent judgment was unsuccessful.) Although Jeffrey Jones filed a separate lawsuit in 1986 alleging that Boyce mismanaged the trust, Jeffrey's claim in the case *sub judice* is that he, not Boyce owns the entire 50 percent interest in dispute. Jeffrey Jones first raised the issue of the division of the interest Boyce held at the 20 February 1986 hearing. Record title was held by Boyce. Jones was attacking the title, and he had the burden of proving his claim. A judge, not a jury, heard all the evidence and was convinced that Boyce held a 25 percent interest. This assignment of error is overruled.

[9] 7. Jones contends, finally, that the trial judge erred in awarding Boyce, on behalf of B M B & S, P.A. a 25 percent interest in the property. All of the evidence either supports, or at worst

does not refute, Boyce's claim that he was paid a 25 percent interest as compensation for his legal services to Freddy Jones. This assignment is without merit.

Affirmed.

Judges MARTIN and COZORT concur.

JESSE R. SIMPSON, RICHARD D. MOORE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; E. T. BARNES, DIRECTOR OF THE RETIREMENT SYSTEM DIVISIONS AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); AND THE STATE OF NORTH CAROLINA

No. 8710SC400

(Filed 22 December 1987)

1. **Retirement Systems § 2— *relationship* between retirees and system contractual**

The relationship between plaintiffs, who were former firemen who qualified for disability benefits, and defendant Retirement System was one of contract, since (1) the retirement benefits were deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance; and (2) fundamental fairness dictated such an interpretation.

2. **Constitutional Law § 25.1; Retirement Systems § 2— impairment of pension rights—reasonableness not determined—violation of contract clause of U. S. Constitution not determined**

States may impair contracts in the exercise of their police power in order to protect the general interests of the commonwealth; therefore, even if N.C.G.S. § 128-27(d4) did impair plaintiffs' pension rights, it did not necessarily violate the contract clause of the U. S. Constitution, U. S. Const. art. 1, § 10, cl. 1, since the trial court made no determination as to whether the impairment was reasonable and necessary to serve an important public purpose.

APPEAL by plaintiffs from *Farmer, Robert L., Judge.* Order entered 9 October 1986 in WAKE County Superior Court. Heard in the Court of Appeals 28 October 1987.

Simpson v. N.C. Local Gov't Employees' Retirement System

On 1 July 1985 plaintiffs filed a petition and complaint in Wake County Superior Court against defendants seeking, *inter alia*, to have N.C. Gen. Stat. § 128-27(d4) declared unconstitutional, to have their action certified as a class action, and an order requiring defendants to pay plaintiffs all past, present, and future benefits to which they are entitled. The challenged statute fixes the method of calculating disability benefits under the North Carolina Local Governmental Employees' Retirement System on and after 1 July 1982. On 9 July 1986 plaintiffs moved for partial summary judgment, and on 8 September 1986 defendants responded, opposing plaintiffs' motion and moving for summary judgment on their own behalf. The trial court examined the supporting documents, heard oral arguments, found no genuine issue of material fact, and allowed defendants' motion. Plaintiffs appealed.

Daniels & Daniels, P.A., by Marvin Schiller, for plaintiff-appellants.

Attorney General Lacy H. Thornburg, by Norma S. Harrell, Assistant Attorney General, for defendant-appellees.

WELLS, Judge.

The question presented is whether the pension rights of vested members of the North Carolina Local Governmental Employees' Retirement System (Retirement System) may be made subject to adverse legislative modification without violation of U.S. Const. art. 1, § 10, cl. 1, prohibiting states from enacting any law "impairing the Obligation of Contracts." This is a case of first impression in North Carolina.[1]

The facts are not in dispute. Both plaintiffs are former firemen for the City of Greensboro who have qualified for disability benefits under the Retirement System. Mr. Simpson became a vested member[2] of the Retirement System by 6 August 1969 and

1. In the case *Harrill v. Retirement System*, 271 N.C. 357, 156 S.E. 2d 702 (1967) our Supreme Court stated as follows: "We find it unnecessary to determine on this record to what extent, if any, plaintiffs' rights to their retirement allowances became vested so that the General Assembly could not by legislation constitutionally impair such rights."

2. In North Carolina the right of members of the Retirement System to retirement benefits vests after five years of creditable service. *See* G.S. § 128-27(a)(1) and (c).

qualified for disability benefits on 1 March 1983. Mr. Moore became a vested member of the Retirement System by 16 July 1978 and qualified for disability benefits on 1 January 1984. Under N.C. Gen. Stat. § 128-27(d3), which was in force from 1 July 1971 through 30 June 1982, a member of the Retirement System retiring on disability received a benefit calculated as if he had worked to the age of 65 years. Further, members whose creditable service began prior to 1 July 1971, like plaintiffs in the present case, received no less than the allowance provided by prior law, G.S. § 128-27 (d2).

On 9 October 1981, the General Assembly modified, effective 1 July 1982, Chapter 128 by adding G.S. § 128-27(d4), which provides as follows:

> (d4) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982.—Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

Thus, under the amended statute a member of the Retirement System retiring on or after 1 July 1982 receives either an unreduced service retirement allowance or an allowance calculated as if he had worked to the earliest date on which he would have been eligible for an unreduced benefit, basically either 30 years or age 65. This means that a member beginning creditable service at, for example, age 20, can no longer, upon disablement after vesting, receive a benefit calculated as if he had worked 45 years. Instead, he may claim no more service credit years than a person retiring on service retirement after a full career of 30 years. Obviously, members such as plaintiffs herein who began work prior to age 35, and/or members who can claim additional service credits such as military service, stand to receive, upon disablement after vesting, a smaller retirement allowance under the modified statute than under prior law. Mr. Moore presently

receives $564.88 per month as his retirement benefit, whereas he would have received $717.08 under the prior statute. Mr. Simpson now receives $801.91 monthly, whereas under the antecedent statute his allowance would have been $1,182.82. The gravamen of plaintiffs' complaint is that they are entitled to have their disability retirement benefits calculated according to the more favorable formula in effect at the time they became vested members of the Retirement System.

Plaintiffs contend that an adverse change in the benefit structure after vesting constitutes an impairment of contractual rights. In response, defendants contend, first, that North Carolina case law either does not support plaintiffs' position, or controverts it, as in *Griffin v. Bd. of Com'rs. of Law Officers' Retirement Fund*, 84 N.C. App. 443, 352 S.E. 2d 882, *disc. rev. denied*, 319 N.C. 672, 356 S.E. 2d 776 (1987). Defendants claim *Griffin* stands for the proposition that the General Assembly can make changes in the disability retirement structure and apply those changes to members with vested rights who have not yet retired on disability retirement at the time the changes came into force.

Defendants further point out that the General Assembly has expressly retained, per G.S. § 128-38, "the right at any time and from time to time . . . to modify or amend in whole or in part any or all of the provisions of the North Carolina Local Governmental Employees' Retirement System." Finally, defendants contend that even if the relationship between the Retirement System and plaintiffs is one of contract, and even assuming an impairment by virtue of the 1981 amendment, the impairment is nevertheless lawful because it is reasonable and necessary to serve an important public purpose.

We have looked to the case law of other jurisdictions to find guidance in deciding this difficult case and have encountered a kaleidoscope of multifarious and conflicting views. *See, e.g.*, Annot., 52 A.L.R. 2d 437 (1957). In a few states, the issue has been removed from the courts' province by constitutional amendment or by statutory enactment expressly providing that public employee pension plans give rise to contractual rights. Most of those courts which have confronted the question presented by this case, or questions similar to the one presented here, have adopted one of five approaches, which we review briefly below.

First, a few jurisdictions still follow the traditional common law in holding that public employee pensions are gratuities creating no contractual rights until the member satisfies all his retirement requirements. According to this view, such pension benefits are mere expectancies, modifiable or revocable at the whim of the legislature. For examples of such cases *see, e.g., Etherton v. Wyatt*, 155 Ind. App. 440, 293 N.E. 2d 43 (1973) and *Creps v. Bd. of Firemen's Relief & Retirement Fund Trustees*, 456 S.W. 2d 434 (Tex. 1970).

Apparently, a majority of courts have in recent years abandoned the common law gratuity theory in favor of an approach which accords more protection to such pension rights. The Minnesota case *Christensen v. Mpls. Mun. Emp. Retire. Bd.*, 331 N.W. 2d 740 (Minn. 1983) represents the second approach reviewed here. In this case, the Supreme Court of Minnesota declared that "a public employee's interest in a pension is best characterized in terms of promissory estoppel." The court went on to imply in law a contract to enforce the state's promise of pension benefits that had been reasonably relied upon.

Third, a large number of states have construed public pension plans as giving rise to contractual rights—even in the absence of a clear statement of legislative intent to contract. *See Pineman v. Oechslin*, 494 F. Supp. 525 (D. Conn. 1980), for cases cited therein. Some of these states have held that such pension rights vest unconditionally at the moment of employment. *See, e.g., Yeazell v. Copins*, 98 Ariz. 109, 402 P. 2d 541 (1965). Other states follow the so-called California rule according to which such pension rights, though contractual, may be modified by the legislature where necessary and reasonable, provided that any disadvantages to employees are offset by comparable new advantages. *See, e.g., Allen v. Bd. of Admin.*, 34 Cal. 3d 114, 192 Cal. Rptr. 762, 665 P. 2d 534 (1983). Courts have generally been more likely to find vested contractual rights arising out of voluntary plans than out of mandatory ones and, further, have generally shown themselves more solicitous of employees who have already retired than of those who have not. *See* Annot., 52 A.L.R. 2d, *supra*, at 441-43.

Fourth, at least two jurisdictions, however, have stubbornly rejected the contractual approach. In *Spina v. Consol. Police &*

Firemen's Pension Fund Comm'n, 41 N.J. 391, 197 A. 2d 169 (1964), the Supreme Court of New Jersey held, in an opinion authored by Chief Justice Weintraub, that the provisions of a pension plan, like other terms and conditions of public service employment, "rest in legislative policy rather than contractual obligation, and hence may be changed except of course insofar as the State Constitution specifically provides otherwise." The court stated that legislative acts do not give rise to contractual rights abridging the power of succeeding legislatures to make revisions for the good of all unless the statute "expressly calls for the execution of a written contract or confirms a settlement of a dispute." The Supreme Court of Connecticut has recently embraced the *Spina* approach in *Pineman v. Oechslin*, 195 Conn. 405, 488 A. 2d 803 (1985). The Connecticut court conceded a "seductive appeal in the contract-oriented approaches" but refused to find that a statute gives rise to contractual rights absent an unmistakable expression of legislative intent to contract. The court summed up as follows:

> Upon examination of the case law in this area, it becomes clear that the contract approach plays havoc with basic principles of contract law, traditional contract clause analysis and, most importantly, the fundamental legislative prerogative to reserve to itself the implicit power of statutory amendment and modification.

[1] After having carefully considered both relevant North Carolina case law and the relative merits and weaknesses of the four approaches reviewed above, we have decided to hold that the relationship between plaintiffs and the Retirement System is one of contract. Our Supreme Court held in *Bridges v. Charlotte*, 221 N.C. 472, 20 S.E. 2d 825 (1942) that the retirement benefits received by state employees from the retirement fund there challenged were payments of salary for services rendered. Twenty years later, in *Insurance Co. v. Johnson, Comm'r of Revenue*, 257 N.C. 367, 126 S.E. 2d 92 (1962), our Supreme Court stated: "A pension paid a governmental employee . . . is a deferred portion of the compensation earned for services rendered." If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. The agreement to defer the

compensation is the contract. Fundamental fairness also dictates this result. A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.

[2] But to hold that Article 3 of G.S. § 128 gives rise to contractual rights does not dispose of the question presented. As *Maryland State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353 (D. Md. 1984) explains, a state does not automatically run afoul of the Contract Clause of the U.S. Constitution by impairing pension rights. In *Hughes*, which represents the fifth and final approach reviewed here, a class of public schoolteachers and other state employees brought suit alleging that Maryland's 1984 "Pension Reform Act" violated the Contract Clause of the U.S. Constitution. Relying on U.S. Supreme Court Contract Clause jurisprudence, the *Hughes* court held that to the extent, if any, the challenged Act had impaired purported contract rights, the impairment was constitutional because it was reasonable and necessary to serve an important public purpose. We adopt the *Hughes* approach because it accords some protection to plaintiffs' pension rights without substantially derogating from the General Assembly's prerogatives.

To be sure, on its face the Contract Clause of the U.S. Constitution absolutely prohibits states from impairing contractual obligations. However, the Supreme Court has recognized that states may impair contracts in the exercise of their police power in order to protect the general interests of the commonwealth.[3] In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court established a tripartite test for deciding cases involving alleged Contract Clause infringements when a state is a

3. *See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). *See generally* B. Schwartz, A Commentary on the Constitution of the United States, Part II: The Rights of Property 266-306 (1965).

party to the contract.[4] The reviewing court must first ascertain whether a contractual obligation arose under the statute. Second, the court must determine if the state's actions impaired an obligation of the state's contract. Third, the court must determine whether the impairment, if any, was "reasonable and necessary to serve an important public purpose."

We have held, *supra*, that Article 3 of Chapter 128 of the North Carolina General Statutes creates contractual obligations. We also find that rights arising under this statute were impaired inasmuch as plaintiffs stand to suffer significant reductions in their retirement allowances as a result of the legislative amendment under challenge. But we conclude that the question of whether the amendment at issue is violative of the Contract Clause because it is reasonable and necessary to serve an important state interest has not been properly resolved in the court below.

Mr. E. T. Barnes, Deputy Treasurer and Director of the Retirement Systems Division of the North Carolina Department of State Treasurer, has elaborated the State's interest in the challenged amendment in his affidavit contained in the Record, from which we quote the following pertinent part:

> From the Retirement System's standpoint, an unreduced retirement, or one normally based on 30 years or age 65, is a full career. Prior to the amendment to the disability retirement provisions in 1982, between 15 and 20% of our retirements had become disability retirements. A significant number of those were coming in the later years for people who were already eligible to retire on service retirement and, in all probability, would have been contemplating service retirement anyway. The possibility of disability retirement appeared to be a device by which people were able to improve their retirement allowances because of the relatively frequent types of health problems which appear in later years. There seemed to be little justification for allowing a disability to be extended as if the person had worked until

4. Where the contract is between private parties the test is somewhat different. *See* United States Trust at 25. *See generally* Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L.J. 1623 (1980); Note, Rediscovering the Contract Clause, 97 Harv. L. Rev. 1414 (1984).

age 65 while another person, with the same service, would be considered to have retired at a normal career retirement point.

Mr. Barnes' affidavit shows that the changes in the System's disability retirement requirements challenged by plaintiffs were made primarily to correct inequities in the System. We are not persuaded that this explanation demonstrates or reflects that these changes were reasonable *and necessary* to serve an important state interest. We perceive that defendants' burden to show that there are no genuine issues as to any material fact in this action and that defendants are entitled to judgment as a matter of law has not been met. *See* N.C. Gen. Stat. § 1A-1, Rule 56 of the Rules of Civil Procedure. Accordingly, we hold that summary judgment for defendants was improvidently entered and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and COZORT concur.

RAY PRESLEY AND WIFE, EDNA PRESLEY v. W. LYNN GRIGGS AND WIFE, JANET C. GRIGGS

No. 8722SC372

(Filed 22 December 1987)

1. **Easements § 6.1— prescriptive easement—farm road—continuous use for twenty-year period—evidence sufficient**

Plaintiffs in a prescriptive easement case presented sufficient evidence of a continuous use of the farm road for a definite twenty-year period where substantial evidence was adduced establishing that the road had been used for the transportation of crops, timber and other similar materials since at least 1932, it was established that the use had been uninterrupted until some time in 1972 when another neighbor strung a chain across the road, which was left down in the daytime but rehung at night to prevent vandalism, and plaintiffs' predecessors in title still had access and use of the road and were not completely barred from using the road until 1983 or 1984 when defendants intervened. Although the need for use of the road with respect to plaintiffs' seven-acre tract could not have arisen before 1968, when the tract came into existence as a result of a partition proceeding, it was enough that plaintiffs and other neighbors utilized the road as the sole means of access to what had been a larger tract since before or around 1932.

2. Easements § 6.1; Evidence § 25— prescriptive easement action—maps—admitted as substantive evidence—no prejudicial error

There was no prejudicial error in an action for a prescriptive easement where the trial court admitted a survey and a metes and bounds description of the road shown on the survey where the map was technically for substantive purposes but was used for illustrative purposes. Defendants failed to request a limiting instruction or to object specifically to the admission of the survey for substantive purposes; plaintiffs introduced the survey into evidence for substantive purposes subject to authentication and later produced an authenticating witness; a proper foundation was laid for the admission of the survey; the owner of the property depicted in the survey testified as to the truthfulness of the survey's representation; and a 3.39 foot disparity between the survey and the legal description constituted a *de minimus* error and did not destroy the reliability of either exhibit.

3. Easements § 6.1— prescriptive easement—farm road—use as hostile, adverse and under claim of right

Plaintiffs presented sufficient evidence in a prescriptive easement action that the use of a farm road was hostile, adverse, and under a claim of right where it was established that plaintiffs' predecessor in title had several times repaired portions of the road which had become gutted, and there was testimony that no one had ever requested permission to use the road and that "we all thought we owned the road together."

4. Easements § 6.1— prescriptive easement—farm road—other means of access—cross-examination

There was no prejudicial error in an action for a prescriptive easement over a farm road where the court sustained plaintiffs' objections during defendants' cross-examination concerning other means of access based on the repetitiveness of defendants' questions and remarked that the questions "had nothing to do with the lawsuit." Although the remarks were unfortunate and misguided at best, defendants' ability nonetheless to establish the possibility of another means of access offset any real prejudicial harm.

5. Easements § 6.1— prescriptive easement—farm road—other means of access

Plaintiffs in an action for a prescriptive easement over a farm road presented sufficient evidence to allow the jury to infer that the farm road constituted a sole means of access to their tract of land where there was testimony that access to a public road other than by the farm road would require plaintiffs to cut through a large ravine and several adjoining tracts owned by them.

6. Compromise and Settlement § 6— prescriptive easement—offer to purchase land—admission harmless error

There was harmless error in a prescriptive easement action from admission of testimony concerning defendants' offer to purchase plaintiffs' land. Although the jury might have reasonably inferred that defendants had by the offer conceded plaintiffs' claim of right to the farm road and the admission of such testimony would usually constitute reversible error, in light of all of the

testimony and other competent evidence presented in support of plaintiffs' case, there was no prejudicial error.

APPEAL by defendant from *Freeman, William H., Judge.* Judgment entered 11 December 1986 in the DAVIDSON County Superior Court. Heard in the Court of Appeals 26 October 1987.

This prescriptive easement case involves a dispute over the rights to an old "farm road" which runs across the eastern boundary of defendants' two-acre tract to plaintiffs' seven-acre tract located north of defendants' property. Plaintiffs, seeking a declaration of their rights to the road as by prescription and money damages for defendants' destruction and removal of the road, instituted this action shortly after defendants had attempted to move portions of the farm road onto their property in 1984. Plaintiffs later abandoned the money damages claim at trial.

In their complaint, plaintiffs allege that the farm road provides the only means of access to the seven-acre tract from Ralph Miller Road, a public road lying south and adjacent to defendants' tract. Plaintiffs further claim that the road has been continuously used for the transportation of timber and as a means to reach the tract and other property beyond for farming purposes. The action came on for trial before a jury 17 November 1986. Accepting the jury's verdict in favor of plaintiffs, the trial court awarded judgment granting plaintiffs a 20-foot wide easement to be used for "general farm purposes." Defendants moved for judgment notwithstanding the verdict, having previously moved for directed verdict and in the alternative for a new trial. From a denial of those motions, defendants appeal.

Allman, Spry, Humphreys, Leggett & Howington, P.A., by James R. Hubbard and Douglas B. Chappell, for plaintiffs-appellees.

Ned A. Beeker for defendants-appellants.

WELLS, Judge.

Although defendants make 16 assignments of error respecting the trial court's evidentiary rulings and admissions, the primary question for review in this appeal is whether there existed sufficient competent evidence at trial to support the jury's

verdict and the ensuing judgment. In other words, did the trial court properly deny defendants' Motion for a Directed Verdict and their subsequent Motion for a Judgment Notwithstanding the Verdict made pursuant to N.C. Gen. Stat. § 1A-1, Rules 50(a) & (b) (1983). Because a Motion for a Judgment Notwithstanding the Verdict constitutes a renewal of defendants' Motion for a Directed Verdict, the grounds asserted in support of the Motion for a Directed Verdict must be brought forth for review. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974); *Dotson v. Payne*, 71 N.C. App. 691, 323 S.E. 2d 362 (1984). At trial, defendants set forth three grounds in support of their motion: (1) plaintiffs failed to show the location of the alleged easement; (2) the evidence was insufficient to sustain a finding of adverse or hostile use; and (3) the evidence was insufficient to show a continuous and uninterrupted use of the farm road for the statutorily required 20 years. Because we believe plaintiffs introduced sufficient competent evidence at trial to meet their burden of proof on each of the above enumerated points, we affirm the judgment below.

On review of Judgment Notwithstanding the Verdict we must determine whether the evidence and all reasonable inferences drawn therefrom viewed in the light most favorable to the plaintiffs was sufficient for submission of the case to the jury. *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982). "The defendants are entitled to a directed verdict and, thus, a judgment notwithstanding the verdict only if the evidence, when considered in the light most favorable to plaintiffs, fails to show the existence of each and every element required to establish an easement by prescription." *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981). To establish an easement by prescription, plaintiffs must show by a preponderance of the evidence: "(1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period." *Id.* at 666, 273 S.E. 2d at 287-88. Moreover, North Carolina adheres to the presumption of permissive use which plaintiffs must rebut in order to prevail on the element of adversity, hostility and claim of right. *Id.*

[1] Defendants contended in their Motion for Directed Verdict and on appeal that plaintiffs had failed to prove a continuous use of the farm road for any definite 20-year period. With this we must disagree. By way of several witnesses' testimony including that of plaintiff Mrs. Presley who had lived in the area all her life and of Ray Miller who had grown up in the area, substantial evidence was adduced establishing that the road had been used for the transportation of crops, timber and other similar materials since at least 1932. It was further established that the use had been uninterrupted until sometime in 1972 when another neighbor strung a chain across the road, which chain was left down in the daytime but re-hung at night to prevent vandalism. Plaintiffs' predecessors in title still had access and use of the road and were not completely barred from using the road until 1983 or 1984 when defendants intervened.

Defendants argue that the claimed use and need for the road with respect to the seven-acre tract could not have arisen before 1968, the time at which the tract came into existence, as a result of a partition proceeding. They argue that if the need for the easement by the seven-acre tract only arose in 1968, plaintiffs cannot now in 1985 meet the 20-year continuous use requirement to establish a prescriptive easement. With this we also disagree. It is enough that plaintiffs and other neighbors utilized the road as the sole means of access to what had been a large tract of property (50+ acres) since before or around 1932. The evidence clearly showed that since that time the road was the only means utilized to reach the larger tract, a period well in excess of 50 years. We conclude that plaintiffs have satisfactorily shown a continuous use of the road for the requisite 20 years.

[2] Defendants also argue in their Motion for Directed Verdict that plaintiffs had failed to prove the location of the farm road. Implicit in this argument was defendants' contention that the trial court had erred by admitting Exhibits 4 and 11: Exhibit 4, admitted for substantive purposes subject to later authentication, over defendants' objection, is a 1975 survey entitled "Robert Eugene Charles" purporting to represent a 20-foot wide easement running north from the Ralph Miller Road along the eastern boundary of defendants' two-acre tract and continuing beyond in a northwesterly direction to a 1.39 acre tract purportedly shown on Exhibit 4. Exhibit 11 was a metes and bounds description of the

road as shown on the survey, Exhibit 4. The significance of both exhibits is that they provide implicitly or explicitly the primary basis of the sole issue put to the jury:

> Have the plaintiffs, Mr. and Mrs. Ray Presley, acquired an easement over the land of the defendants, Mr. and Mrs. W. Lynn Griggs, by adverse use of the farm road shown on the 1975 survey, Plaintiff's Exhibit 4, for a continuous period of twenty years prior to the filing of this action on August 7, 1985[?]

Defendants contend that admission of these exhibits constituted reversible error because neither exhibit was properly authenticated. Clearly, if these exhibits were not properly verified and therefore incompetent, their admission would give rise to reversible error and the jury verdict would fail.

To be admissible, maps, surveys and the like must be authenticated and verified as accurate and true by a qualified witness. 44 Am. Jur.: *Proof of Facts* 2d, "Foundation," § 3 (1986). In North Carolina, such exhibits are admissible for illustrative, not substantive purposes. *Searcy v. Logan*, 226 N.C. 562, 39 S.E. 2d 593 (1946). Plaintiffs correctly point out that there is no reversible error where maps and surveys are admitted for substantive purposes absent a timely request for limiting instructions made by the objecting party. *Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 293 S.E. 2d 240 (1982). The fact that defendants herein failed to request such a limiting instruction or to object specifically to the admission of Exhibit 4 for substantive purposes, prevents our finding reversible error. Furthermore, plaintiffs initially introduced the survey into evidence for substantive purposes subject to authentication and later produced as an authenticating witness, the surveyor Daniel W. Donathan whose seal appears on the exhibit.

We note here that although the rule that private maps are admissible only for illustrative, not substantive, purposes is well-established, *Livermon v. Bridgett*, 77 N.C. App. 533, 335 S.E. 2d 753 (1985), we also point out that this rule does not altogether apply to maps in general, and their admissibility is governed as well by relevant statutes and case law. 1 Brandis, North Carolina Evidence, § 153, nn. 86-91 (2d Rev. Ed. 1982 & Supp. 1986). We also point out that Exhibit 4 was used primarily to illustrate wit-

nesses' testimony even if introduced for substantive purposes. Finally, we are inclined to agree with the remarks of Professor Brandis regarding the implications of N.C. Gen. Stat. § 8-97 (1986) providing for the admission for substantive purposes of photographs: ". . . [I]t now seems unnecessarily technical to retain a dividing line, particularly since maps, models, diagrams and sketches all readily lend themselves to photographing; and if a photo instead of the object is offered, the statute seems quite literally to apply." 1 Brandis, *supra*, § 34, n. 7, p. 136. We think the admission of Exhibit 4 technically for substantive purposes but used for illustrative purposes, constituted no more than harmless error.

Furthermore, a proper foundation was laid for the admission of Exhibit 4. After establishing Donathan's qualifications as a civil engineer and registered land surveyor, Donathan testified that the survey (Exhibit 4) was conducted by surveyors under his supervision. Although Donathan had not been to the property, he testified that the survey represented, "to the best of his knowledge," an accurate depiction of the easement shown thereon. Donathan's qualifying comments to the effect that the survey represented the easement as it existed in 1975 does not, as defendants contend, undermine either the competency or probative value of the exhibit. As a threshold matter, we do not consider the survey improperly admitted or incompetent. That Donathan is an experienced surveyor of 25 years and supervised the survey here in question provides him with sufficient qualifications to attest to the accuracy of the survey procedures and their ensuing results—and the trial court apparently so found. More to the point, Robert E. Charles, the owner of the property depicted in Exhibit 4 and the person for whom the survey was prepared, testified at trial as to the truthfulness of the survey's representation. Taken together, the testimony of both Donathan and Charles more than amply provide the requisite verification for the admission of Exhibit 4. The rule that maps and other similar exhibits be authenticated by one having personal knowledge of the matters contained therein, 2 Brandis, *supra*, § 195, must be applied in the context of the rule that an exhibit need not have been made by the person referring to it, 1 Brandis, *supra*, § 34. Charles' testimony, based on his own personal knowledge, and that of Donathan, based on his expertise as a surveyor, provided for the

proper authentication and admission of Exhibit 4, which therefore constituted competent evidence.

Finally, defendant contends that Donathan's acknowledgment, during his testimony, of a 3.39 foot disparity between the Exhibit 4 survey and legal description set out in Exhibit 11, revealed an inaccuracy in either or both exhibits which should have prevented their admission into evidence. Again, we disagree. Donathan testified as to the survey's accuracy but pointed out that due to a missing tie on the survey, the easement would be moved in a westerly direction by 3.39 feet at its entrance. As the law requires only a "substantial identity" of location, *Potts, supra; Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371 (1946), to prove a prescriptive easement, we hold that the 3.39 foot disparity constitutes a *de minimus* error and does not, especially in light of Charles' and Donathan's testimony, destroy the reliability of either Exhibit 4 or 11. This evidence coupled with the testimony of other witnesses concerning the history of the farm road and its location along what is now defendants' eastern boundary all serve to identify the location of the easement sufficiently well for submission of this issue to the jury. Therefore, defendants' assertion in their Motion for Directed Verdict attacking the sufficiency of the evidence regarding the farm road's location is rejected.

[3] Defendants bring forward in their 16th assignment of error their second ground asserted in support of their Motion for Directed Verdict, that plaintiffs failed to present sufficient evidence establishing their use of the farm road as hostile, adverse, and under claim of right. We disagree. Our Supreme Court's decision in *Potts v. Burnette, supra*, is dispositive of this point. The court in *Potts* held that the presumption of permissive use may be rebutted where the evidence tends to show that the disputed roadway comprised the sole means of access to plaintiff's land; that the roadway had been used continuously for at least 20 years; that permission was never requested nor granted by either party; and that on at least one occasion, plaintiffs had taken efforts to maintain or repair the roadway. *Potts, supra; Dickinson v. Pake, supra.* In the present case, by testimony of two witnesses, Ray Miller and Garland Jones, it was established that Tom Sink, plaintiffs' predecessor in title had, several times over the years, repaired portions of the road which had become gutted. Furthermore, Mrs. Presley testified that no one had ever re-

quested permission to use the road and that "We all thought we owned the road together." Finally, the 20-year period of continuous use having been established, the question remaining in this analysis is whether plaintiffs proved the road to be their sole means of access.

[4] Defendants, in their 12th and 14th assignments of error cite the trial court's refusal to allow defendants' counsel to continue, on cross-examination of Mrs. Presley, questioning her about the nature of the sole access represented by the farm road. Defendants' counsel, during this cross-examination, elicited from Mrs. Presley testimony to the effect that access to another public road north of plaintiffs' seven-acre tract could be obtained only by cutting through other tracts owned by plaintiffs and would require negotiating a large gulley or ravine the size of a "two-story house." After this line of questioning, the following colloquy took place:

> Q. As you come south from Clara Tom Drive across the two peices [sic] of property you own are you telling us there is a gulley across there that will hold almost a two-story house all the way across your tracts?
>
> MR. HUBBARD: Objection as it's repetition and he is beginning to badger the witness as she testified where she thought it was and a little less. I think the question is repetition.
>
> COURT: What has it to do with this lawsuit?
>
> MR. BEEKER: They have alleged and contend they have no other access to this seven acres.
>
> COURT: It has nothing to with the lawsuit.
>
> OBJECTION SUSTAINED.
>
> MR. BEEKER: We contend otherwise and except.
>
> COURT: Go ahead to something else.

As an evidentiary matter, the trial court did not err in sustaining plaintiffs' objections due to repetitiveness of defendants' questions. Although the trial court's remark that the questions "had nothing to do with the lawsuit," was unfortunate and misguided at best, defendants' ability nonetheless to establish on

cross-examination the possibility of another means of access, offset any real prejudicial harm possibly engendered by the trial court's comments. We therefore can find no prejudicial error here.

[5] The more important point here is whether the existence of another possible means of access destroys plaintiffs' rebuttal of the permissive use presumption. We think it does not.

By her testimony, Mrs. Presley indicated that access to a public road other than by the farm road would require the plaintiffs to cut through a large ravine and several adjoining tracts owned by them which lie to the north of their seven-acre tract. We think such evidence was more than sufficient to have allowed the jury to infer that the farm road constituted a sole means of access to the seven-acre tract.

We conclude that all the competent evidence, viewed in the light most favorable to plaintiffs, presented sufficient evidence to have gone to the jury on the issue of an easement by prescription and to have supported the jury's verdict. The trial court's denial of defendants' Motion for Directed Verdict and Judgment Notwithstanding the Verdict was therefore proper.

[6] Because we have found sufficient competent evidence to support the jury verdict we find defendants' numerous assignments of error respecting evidentiary rulings to be largely without merit. We do note one evidentiary ruling raised by defendants on appeal which causes us some concern. The trial court admitted, over defendants' objections, testimony concerning defendants' offer to purchase the seven-acre tract from plaintiffs in 1983. Believing that the jury might have reasonably inferred that defendants had, by this offer to purchase, conceded plaintiffs' claim of right to the farm road, we think that in the usual case, such would have constituted reversible error. This is especially true in view of the well-established rule which bars admission of settlement offers into evidence. *See Dotson, supra.* However, in light of all the testimony and other competent evidence presented in support of plaintiffs' case, we cannot see how this testimony so prejudices defendants as to require a new trial.

No error.

Judges JOHNSON and COZORT concur.

INSURANCE COMPANY OF NORTH AMERICA v. AETNA LIFE AND CASUALTY COMPANY, BOBBY D. BROWN, DDM, INC., D/B/A DOLLAR RENT-A-CAR, KENNETH LANE GARGANUS, JANICE TRIPP GARGANUS, NATIONWIDE MUTUAL INSURANCE COMPANY, HERBERT D. SLUDER, ADMINISTRATOR OF THE ESTATE OF MICHELLE LYNNE SLUDER, ULYSEE WARE, NORMAN T. WILLIAMS AND DAVID YATES

No. 8721SC468

(Filed 22 December 1987)

1. **Insurance § 87.2— automobile liability insurance—rental vehicle—driver without valid license—no express permission of insured to drive vehicle—no voluntary coverage**

In a declaratory judgment action to determine whether plaintiff provided automobile insurance coverage to a rental car dealer for claims for wrongful death and personal injury and property damage arising out of an automobile accident, the trial court erred in determining that the driver, who had no valid driver's license, had the express permission of the named insured, the rental car dealer, so as to be an "insured" under the terms of the policy, since the rental contract specifically provided that the automobile was to be driven only by licensed drivers and that a breach of such provision would constitute a breach of the rental agreement.

2. **Insurance § 87.2— automobile liability insurance—rental vehicle—unlicensed driver—no knowledge by agency—no implied permission to drive vehicle—no voluntary coverage**

In a declaratory judgment action to determine whether plaintiff provided automobile insurance coverage to a rental car dealer for claims for wrongful death and personal injury and property damage arising out of an automobile accident, the trial court erred in determining that the driver had the implied permission of the rental agency to drive the car based on the agency's failure to object to violations of the rental agreement, since there was no evidence that the agency had actual or constructive knowledge that the person who rented the vehicle was permitting unlicensed drivers to operate the cars which he rented in violation of the rental agreements. Because the driver did not have the express or implied consent of the rental agency to drive the car, there was no voluntary coverage under the policy in question.

3. **Insurance § 87— automobile liability insurance—rental agency—driver in "lawful possession"—coverage pursuant to statute**

A driver was in "lawful possession" of a rental agency's car at the time of an accident, though he had neither express nor implied permission from the

agency to drive the car, since he had permission from the lessor of the car to drive it; therefore, plaintiff, which issued a policy of automobile insurance to the rental agency, was required, pursuant to N.C.G.S. § 20-279.21(b)(2) and N.C.G.S. § 20-281, to provide coverage for the driver's negligent operation of the agency's automobile, but only in the amounts required by those statutes, not the amounts provided in the policy.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 29 December 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 November 1987.

This is a declaratory judgment action instituted by Insurance Company of North America (INA) to determine whether it provided coverage, under a policy of business automobile liability insurance issued to DDM, Inc., d/b/a Dollar Rent-A-Car (Dollar), for claims for wrongful death, personal injuries and property damage arising out of a collision which occurred on 14 October 1984 near Siler City, North Carolina. The accident occurred when an automobile owned by Dollar and driven by defendant Ware collided with automobiles driven by Michelle Lynne Sluder, Kenneth Garganus, and David Yates. Michelle Sluder was fatally injured in the collision; Herbert D. Sluder is the administrator of her estate. Defendants Yates, Kenneth Garganus, Janice Garganus, and Bobby Brown, who was a passenger in the rental automobile, each received personal injuries. The vehicles driven by Sluder, Garganus, and Yates were damaged. Defendants Aetna Life and Casualty Company and Nationwide Mutual Insurance Company provided uninsured motorists coverage for, respectively, the Garganus and Sluder automobiles.

The parties waived a jury trial. Based upon competent evidence of record, the trial court found, *inter alia,* that on 11 October 1984, defendant Norman Williams went to the Dollar rental counter at the Charlotte airport, accompanied by Brown, and rented a 1984 Ford automobile. The rental agreement, which listed Williams and his wife Sandra as "customers," contained, *inter alia,* the following provisions:

> 1. The lessor identified on page two hereof (hereinafter "DOLLAR") hereby rents to CUSTOMER named on page two, the motor vehicle described on page two, subject to all terms and provisions on both sides of this rental agreement. The term "CUSTOMER" shall include the person designated on page two

> of this agreement as "CUSTOMER," any driver of the rental vehicle, as well as the employers, employees, and principals whom they represent. . . .
>
> 2. CUSTOMER acknowledges and understands that DOLLAR is relying upon CUSTOMER'S representation that CUSTOMER will only operate and use said vehicle in a safe and prudent manner; and if CUSTOMER operates, entrusts, or uses said vehicle in any manner prohibited below, then CUSTOMER is responsible and liable to DOLLAR for all damages to said vehicle . . . . The parties hereto agree that any breach of the terms of this paragraph is a material breach of this agreement: CUSTOMER AGREES THAT SAID VEHICLE SHALL NOT BE USED OR OPERATED:
> . . .
>
> (F) By any person other than those persons described above as the CUSTOMER, provided always that any driver must be a qualified, licensed driver, over twenty-one (21) years of age
> . . . .

Williams subsequently loaned the rented automobile to Brown and Ware in order that they could drive from Charlotte to Raleigh to visit Brown's wife and Ware's girlfriend, who were inmates at the Correctional Center for Women. The collision occurred while Brown and Ware were returning to Charlotte. At the time of the collision, Ware was driving the rental automobile. Neither Ware nor Brown had a valid driver's license. Williams, however, had no knowledge of this fact and had made no inquiry with respect thereto. Williams had permitted Brown and other persons to drive cars which Williams had rented from Dollar on previous occasions.

The named insured in the business automobile policy issued by INA was "DDM, Inc., dba Dollar Rent-A-Car." The policy contained the following pertinent provisions:

> LIABILITY INSURANCE
>
> A. WE WILL PAY.
>
> 1. *We* will pay all sums the *insured* legally must pay as damages because of *bodily injury* or *property damage* to which this insurance applies, caused by an *accident* and resulting from the ownership, maintenance or use of a covered *auto*.

. . .

D. WHO IS INSURED.

1. *You* are an *insured* for any covered *auto.*

2. Anyone else is an *insured* while using with *your* permission a covered *auto you* own, hire or borrow . . . . (Emphasis original).

The trial court concluded that Ware was a "customer" within the terms of the rental agreement between Dollar and Williams and, thus, that he was using the automobile with the permission of Dollar, so as to be an "insured" within the provisions of INA's policy. The court entered judgment determining that INA provided coverage for claims arising out of the 14 October 1984 automobile collision up to the limits of its policy. In the alternative, the trial court concluded that Ware was in "lawful possession" of the automobile and that INA's policy provided, at the least, the coverage required by G.S. 20-281 and G.S. 20-279.21. Plaintiff appeals.

Petree Stockton & Robinson, by W. Thompson Comerford, Jr., and Jane C. Jackson, for plaintiff-appellant.

Price and Smith, by Wm. Benjamin Smith, for defendant-appellee Bobby D. Brown.

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

Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall and Kent L. Hamrick, for defendant-appellee David Yates.

Holmes & McLaurin, by R. Edward McLaurin, Jr., for defendant-appellee Herbert D. Sluder, Administrator of the Estate of Michelle Lynne Sluder.

Womble Carlyle Sandridge & Rice, by Reid C. Adams, Jr., for defendant-appellee Aetna Life and Casualty Company.

MARTIN, Judge.

This appeal confronts us with two issues: (1) was Ware driving the rental automobile with either the express or implied permission of the named insured, Dollar, so as to be an "insured"

under the terms of INA's policy; and, (2) if not, was Ware in "lawful possession" of the rental automobile so as to be within the coverage required by G.S. 20-281 and G.S. 20-279.21. We conclude that Ware had neither Dollar's express permission to operate the car nor its implied permission to do so and, therefore, was not an "insured" under the terms of the policy issued by INA to Dollar. Accordingly, we must reverse the trial court's holding that INA provides coverage up to the limits of its policy. However, we conclude that Ware was in "lawful possession" of Dollar's automobile within the meaning of G.S. 20-279.21 so as to bring his operation of the automobile within the mandatory liability insurance coverage required for automobile lessors by G.S. 20-281.

I.

A.

[1] Even though there was no evidence that Ware had ever dealt with Dollar, the trial court concluded that he was a "customer" under the terms of Dollar's rental contract with Williams, which defined "customer," *inter alia*, as "any driver of the rental vehicle." Therefore, the court concluded Ware was driving with Dollar's express permission and was an insured under the terms of INA's policy. INA excepts and assigns error, contending that Ware's operation of the vehicle was expressly prohibited, rather than expressly permitted, by the rental contract. We agree.

When the language of a contract is plain and unambiguous, the construction thereof is a matter of law, *Kent Corporation v. Winston-Salem*, 272 N.C. 395, 158 S.E. 2d 563 (1968), and it is the duty of the court to construe the contract as written. *Parks v. Venters Oil Co., Inc.*, 255 N.C. 498, 121 S.E. 2d 850 (1961). The provisions of the rental agreement in this case are free from ambiguity, and the construction to be given the provisions of this contract is, therefore, a question of law, not of fact. *Kent, supra.* Notwithstanding the broad meaning accorded the word "customer" by the first paragraph of the rental contract, the second paragraph specifically provided that Dollar's automobile was to be driven only by licensed drivers and that a breach of such provision would constitute a material breach of the rental contract. Thus, no express permission for Ware to drive the automobile is granted by the rental agreement.

B.

[2] The trial court also concluded that even if Ware had no express permission, he had the implied permission of Dollar to drive the car. This conclusion was based upon findings that Williams had, on previous occasions, rented vehicles from Dollar and permitted persons other than those named as customers on the rental contract to drive the cars. The court found that an employee of Dollar knew of the practice and had not objected to it, signifying Dollar's consent for others to use the vehicles rented by Williams.

It is true that an owner's permission to use an insured automobile may be express or implied. *Bailey v. General Insurance Company*, 265 N.C. 675, 144 S.E. 2d 898 (1965).

> "Where express permission is relied upon it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, implied permission involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent." (Citations omitted.) However, the relationship between the owner and the user, such as kinship, social ties, and the purpose of the use, all have bearing on the critical question of the owner's implied permission for the actual use.

Id. at 678, 144 S.E. 2d at 900. Implied permission may be found "where the named insured has knowledge of a violation of instructions and fails to make a significant protest." *Nationwide Mutual Ins. Co. v. Land*, 318 N.C. 551, 563, 350 S.E. 2d 500, 506-07 (1986), *quoting* 6C J. Appleman, *Insurance Law and Practice* § 4365 (1979).

In the present case, there was neither evidence nor a finding that Dollar had actual or constructive knowledge that Williams was permitting unlicensed drivers to operate the cars which he rented in violation of the rental agreements. There is no evidence that Dollar's employee had ever seen Ware or that Dollar had any knowledge of Ware's operation of its car until after the collision giving rise to this litigation. Thus, there is no evidentiary support for a finding that Dollar, with knowledge of Williams' violations of the rental contract, failed to protest such violations. Moreover,

any implied permission by Dollar is strongly negated by the specific prohibition in the rental contract against permitting an unlicensed driver to drive the rental automobile. We hold that neither the evidence nor the trial court's findings of fact support its conclusion that Ware was driving the rented automobile with Dollar's permission.

C.

The limits of INA's liability under its policy were greater than the coverage required by G.S. 20-281. To the extent that the coverage exceeded that required by the statute, the coverage was "voluntary." *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 338 S.E. 2d 92 (1986). "[A]n insurance company has the right to enter into whatever insuring agreements it wishes to limit its voluntary coverages as opposed to those statutorily required." *Id.* at 350, 338 S.E. 2d at 98.

INA's policy provided coverage to "[a]nyone . . . while using with [Dollar's] permission a covered auto" owned by Dollar. Thus, in order for INA's voluntary coverage to be extended, under the terms of the policy, for Ware's negligent operation of Dollar's automobile, Ware must have had either Dollar's express or implied permission to drive it. *See Nationwide Mutual Insurance Co. v. Land, supra.* Since Dollar had neither expressly nor impliedly given Ware permission to drive its automobile, INA's policy affords no voluntary coverage for claims arising from his negligent operation of it.

II.

[3] Since INA's policy does not provide voluntary coverage, we must determine whether coverage is mandated by the provisions of G.S. 20-281. That statute and G.S. 20-279.21 "prescribe mandatory terms which become part of every liability policy insuring automobile lessors." *American Tours, supra* at 346, 338 S.E. 2d at 96. G.S. 20-281 requires those engaged in the business of renting automobiles to the public to maintain liability insurance "insuring the owner and rentee . . . and their agents" against liability for damages for personal injury or death in the minimum amount of $25,000.00 per person and $50,000.00 per accident and for property damage in the amount of $10,000.00. G.S. 20-279.21, "which applies more generally to every policy insuring any automobile

owner whether or not that owner leases vehicles," *American Tours, supra* at 347, 338 S.E. 2d at 97, requires that the coverage be extended to "any other persons in lawful possession" of the vehicle. G.S. 20-279.21(b)(2). The trial court in the present case concluded that because Williams had given Ware permission to use the car, Ware was in lawful possession of Dollar's car at the time of the accident so that INA was required to provide coverage in at least the amount mandated by the statutes. We agree.

It is not necessary to show that one has the owner's "permission" to drive an automobile in order to show that he is in "lawful possession" of it within the meaning of G.S. 20-279.21(b)(2). *Stanley v. Nationwide Mut. Ins. Co.*, 71 N.C. App. 266, 321 S.E. 2d 920 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E. 2d 33 (1985). A person may be in lawful possession of an automobile if he is given possession by someone using the automobile with the express permission of the owner, even though the permission granted by the owner did not include the authority to permit others to operate the automobile. *See Belasco v. Nationwide Mutual Ins. Co.*, 73 N.C. App. 413, 326 S.E. 2d 109, *disc. rev. denied*, 313 N.C. 596, 332 S.E. 2d 177 (1985); *Engle v. State Farm Mutual Insurance Co.*, 37 N.C. App. 126, 245 S.E. 2d 532, *disc. rev. denied*, 295 N.C. 645, 248 S.E. 2d 250 (1978).

The trial court found in the present case that Brown and Ware were given possession of Dollar's car by Williams, who, as Dollar's customer, was in lawful possession of the automobile. Although Williams violated his contract by permitting Brown and Ware to drive the car, their possession of it was not unlawful. We conclude, as did the trial court, that Ware was in "lawful possession" of Dollar's car at the time of the accident, though he had neither express nor implied permission from Dollar to drive the car. Therefore, INA is required, pursuant to G.S. 20-279.21(b)(2) and G.S. 20-281, to provide coverage for Ware's negligent operation of Dollar's automobile. Such coverage, however, is limited to the amounts of coverage required by those statutes. *See* G.S. 20-279.21(g); *American Tours, supra.*

III.

The judgment of the trial court declaring that INA provides coverage to the full extent of its policy limits must be reversed and this cause remanded for entry of judgment, consistent with

this opinion, declaring that INA provides coverage for Ware's negligent operation of Dollar's automobile, but only to the extent required by G.S. 20-279.21(b)(2) and 20-281.

Reversed and remanded.

Judges EAGLES and PARKER concur.

JAMES D. CARDWELL AND WIFE, ELVA R. CARDWELL, J. V. BODENHEIMER AND WIFE, PEGGY BODENHEIMER, A. LEOLIN SELLS AND WIFE, NAOMI W. SELLS, ROBERT F. LINVILLE AND WIFE, BARBARA C. LINVILLE, RONALD R. SMITH AND WIFE, M. D. SMITH, ADA S. FRYE AND HUSBAND, LOFTEN FRYE, AND PEARL S. SELLS, WIDOW, ON BEHALF OF THEMSELVES AND OTHER LANDOWNERS SIMILARLY SITUATED IN THE IMMEDIATE SURROUNDING AREA v. FORSYTH COUNTY ZONING BOARD OF ADJUSTMENT; GEORGE D. BINKLEY, JR., ROBERT H. COLLEY, HOWARD L. WILSON, DEWEY D. SHROPSHIRE, AND IRVING NEAL, MEMBERS OF THE FORSYTH COUNTY ZONING BOARD OF ADJUSTMENT; AUBREY SMITH, ZONING OFFICER AND SECRETARY TO THE FORSYTH COUNTY ZONING BOARD OF ADJUSTMENT; FORSYTH COUNTY; SALEM STONE COMPANY, WILLIAM E. AYERS, JR.; AND MARTIN MARIETTA CORPORATION D/B/A MARTIN MARIETTA AGGREGATES, AN OPERATING UNIT OF MARTIN MARIETTA CORPORATION, AND MARTIN MARIETTA AGGREGATES

No. 8721SC578

(Filed 22 December 1987)

1. **Counties § 5.2— special use permit—majority vote—valid**

A majority vote of the Forsyth County Zoning Board of Adjustment granting a special use permit was all that was necessary under the Forsyth County Zoning Ordinance because N.C.G.S. § 153A-345(e), requiring a four-fifths vote, did not clearly show a legislative intent to repeal or supersede the local act already in effect. N.C.G.S. § 153A-3.

2. **Counties § 5.2— special use permit—county's rules of procedure not followed**

A superior court order affirming the granting of a special use permit by the county zoning board of adjustment was remanded where the county board of adjustment's rules required that the record state in detail any facts supporting findings required to be made prior to the issuance of a special use permit, required certain affirmative findings, and required the chairman to summarize the evidence and give the parties an opportunity to make objections or corrections. The reading into the minutes by the secretary of the four standards required by the ordinance, the members' explanation for the record of what they considered important, and a 257-page transcript were not sufficient.

Cardwell v. Forsyth County Zoning Bd. of Adjustment

APPEAL by plaintiffs from *Albright, Judge.* Judgment entered 12 February 1987 and order entered 10 February 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 2 December 1987.

The record discloses the following:

On 21 August 1986, Salem Stone Company applied for a special use permit to operate a quarry on its property in a rural residential and agricultural area of Forsyth County. On 11 September 1986, a hearing was held before the Winston-Salem/Forsyth County Planning Board regarding the site plan. Upon motion by plaintiffs, the Planning Board removed the application from the consent docket, but refused to rule on plaintiffs' motion to continue the hearing or to delay or deny approval of the site plan. The Planning Board approved the site plan subject to several additional conditions.

A hearing was held before the Forsyth County Zoning Board of Adjustment on 7 October 1986. Both the plaintiffs and Salem Stone Company presented evidence at the hearing. At the close of the hearing, the Zoning Board voted on Salem Stone Company's application. Three of the five members voted to approve the special use permit, and two voted to disapprove.

On 5 November 1986, plaintiffs filed a petition for writ of certiorari with the Superior Court of Forsyth County, seeking review of the Zoning Board's decision to grant Salem Stone Company a special use permit. Prior to a hearing on the petition, on 26 November 1986, plaintiffs filed a declaratory judgment action in Superior Court of Forsyth County, asking that the majority vote of the Zoning Board be reversed and a permanent injunction issued to restrain all Forsyth County governmental units from issuing any permits regarding the proposed quarry site. Both of plaintiffs' actions were heard on 26 January 1986. The trial judge dismissed both actions with prejudice and appeal was taken from both orders.

Hutchins, Tyndall, Doughton & Moore, by Thomas W. Moore, Jr., and Thomas G. Taylor, for plaintiffs, appellants.

Office of the Forsyth County Attorney, by P. Eugene Price, Jr., and Jonathan V. Maxwell, for Members of the Forsyth County Board of Adjustment; Aubrey Smith, Zoning Officer and Secretary to the Forsyth County Zoning Board of Adjustment; and Forsyth County, and Petree Stockton & Robinson, by Ralph M. Stockton, Jr., Richard E. Glaze, Jeffrey C. Howard, and Stephen R. Berlin, for Salem Stone Company, William E. Ayers, Jr., and Martin Marietta Corporation, defendants, appellees.

HEDRICK, Chief Judge.

We point out that plaintiffs have raised no questions on appeal regarding their claim for a declaratory judgment, thus the dismissal of the claim for declaratory judgment will be affirmed.

[1] Plaintiffs first argue the superior court committed "reversible error in determining that the three-two vote of the Forsyth County Zoning Board of Adjustment constituted approval" of Salem Stone Company's application for a special use permit. They contend that G.S. 153A-345(e) requires the Zoning Board to allow special use permits only when there has been a four-fifths majority vote of the Board. While G.S. 153A-345(e) does mandate a four-fifths vote in order to decide in favor of a special use permit applicant, the statute is not applicable here.

In 1947, the North Carolina General Assembly enacted Chapter 677 of the 1947 Session Laws. Chapter 677 gives Forsyth County the power to adopt ordinances and resolutions for zoning and other land regulation. Sections 32 through 34 specifically provide for the creation of a County Board of Adjustment and set forth its powers and duties. Section 33 of Chapter 677 of the 1947 Session Laws states:

> Upon appeals the Board of Adjustment shall have the following powers:
>
> (1). To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative official or agency based on or made in the enforcement of the zoning resolution.

(2). To hear and decide, in accordance with the provisions of any such resolution, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which such Board is authorized by any such resolution to pass.

Section 33 further states:

The concurring vote of a majority of the members of the Board shall be necessary to reverse any order, requirement, decision or determination of any such administrative official or agency or *to decide in favor of the appellant* (emphasis added).

Pursuant to Chapter 677 of the 1947 Session Laws, Forsyth County enacted a zoning ordinance. The Forsyth County Zoning Ordinance is consistent with Chapter 677 and Section 23-14(D.)(4.) provides:

Majority Vote. The concurring vote of a majority of the members of the Board of Adjustment shall be necessary to reverse any order, requirement, decision, or determination of any administrative official or agency, to decide in favor of an appellant, or to pass upon any other matter on which it is required to act under this ordinance.

The Forsyth County Zoning Board of Adjustment, pursuant to Chapter 677, Section 32, enacted supplemental rules of procedure. These rules also provide for a majority vote in order to decide in favor of an applicant. Forsyth County Zoning Board of Adjustment, Rules of Procedure, IV.C. These Forsyth County ordinances and rules uniformly provide for a majority vote and are consistent with Chapter 677 of the 1947 Session Laws. Section 33 clearly categorizes applications or requests for "special exceptions" as "appeals." The term "appellant" is used generically to refer to any person who makes a request to the Zoning Board of Adjustment, and the Board is authorized to require a "concurring vote of a majority of the members of the Board" when deciding upon such requests.

G.S. 153A-345 does nothing to change the Forsyth County Zoning Ordinance. G.S. 153A-3 provides:

(a) Except as provided in this section, nothing in this Chapter repeals or amends a local act in effect as of January 1, 1974,

> or any portion of such an act, unless this Chapter or a subsequent enactment of the General Assembly clearly shows a legislative intent to repeal or supersede that local act.
>
> (b) If this Chapter and a local act each provide a procedure that contains every action necessary for the performance or execution of a power, right, duty, function, privilege, or immunity, the two procedures may be used in the alternative, and a county may follow either one.

The Forsyth County Zoning Ordinance was enacted and in effect as of 4 April 1967, well before 1 January 1974, as provided by G.S. 153A-3. G.S. 153A-345(e) changes the majority vote previously mandated to a four-fifths vote but does not clearly show a legislative intent to repeal or supersede the local act already in effect. The majority vote of the Forsyth County Zoning Board of Adjustment on 7 October 1986 granting Salem Stone Company's request for a special use permit was all that was necessary to approve of the application under the Forsyth County Zoning Ordinance.

[2] Plaintiff next contends the superior court committed reversible error in upholding a decision of the Forsyth County Zoning Board of Adjustment that was reached in violation of the Board's own required procedures. A court when reviewing a decision of a zoning board of adjustment on a special use permit application must:

> (1) Review the record for errors in law,
>
> (2) Insure that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insure that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insure that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insure that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co., Inc. v. Board of Commissioners, 299 N.C. 620, 265 S.E. 2d 379 (1980). In *Humble Oil & Refining*

Company v. Board of Aldermen, 284 N.C. 458, 467, 202 S.E. 2d 129, 135 (1974), the Supreme Court stated:

> . . . [I]n passing upon an application for a special permit, a board of aldermen may not violate at will the regulations it has established for its own procedure; it must comply with the provision of the applicable ordinance.

Forsyth County Zoning Board of Adjustment Rule of Procedure V.E.2.(B), adopted by the Board on 19 June 1985, states, "Where a special use permit is granted, the record shall state in detail any facts supporting findings required to be made prior to the issuance of a permit." Rule of Procedure V.D.3.(E) states, "The chairman shall summarize the evidence which has been presented, giving the parties an opportunity to make objections or corrections. . . ."

The record before us discloses that at the beginning of the 7 October 1986 meeting of the Zoning Board the secretary read aloud into the minutes the four standards that Forsyth County Zoning Ordinance Section 23-15(A)(2)(c) requires to be met before the Zoning Board can approve a special use permit.

Section 23-15(A)(2)(c) states, "The Board of Adjustment shall issue a special use permit only when the Board makes an affirmative finding as follows:

> (i) that the use will not materially endanger the public health or safety if located where proposed and developed according to the application and plan as submitted and approved,
>
> (ii) that the use meets all required conditions and specifications,
>
> (iii) that the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity, and
>
> (iv) that the location and character of the use, if developed according to the application and plan submitted and approved, will be in harmony with the area in which it is to be located and in general conformity with the plan of development of Forsyth County and its environs."

The record further discloses that after all the evidence was heard, the Chairman stated that "[t]he Board members will be asked one at a time to give an opinion on how they feel . . . ," whereupon each member attempted to explain his opinion and what evidence he thought was important. Thereafter, a vote was taken and three out of five members voted to grant the special use permit, while two voted to deny it. The Zoning Board did not make the findings of fact as required by their Rule of Procedure V.E.2.(B), and the chairman did not summarize the evidence presented and give the parties an opportunity to object or to make corrections as required by their Rule of Procedure V.D.3.(E). The mere reading into the minutes by the secretary of the four standards required by the Forsyth County Zoning Ordinance in order to grant the special use permit and the Zoning Board members' explanation for the record of what they considered important is not sufficient compliance with the rules of procedure that "the record shall state in detail any facts supporting findings required to be made prior to the issuance of a permit," and "[t]he Chairman shall summarize the evidence which has been presented, giving the parties an opportunity to make objections or corrections. . . ." It is not enough, as respondents argue, for the transcript, consisting of 257 pages, to be "replete with detailed facts which support the decision of the majority of the Board that the four criteria in the ordinance were satisfied."

Under the circumstances of this case it is impossible for there to be meaningful appellate review to determine whether the Zoning Board made the requisite findings to grant the special use permit. Thus the order of the superior court affirming the Zoning Board's decision must be reversed, and the cause remanded to superior court for further remand to the Forsyth County Zoning Board of Adjustment for the Zoning Board to conduct its business with respect to the application of the special use permit in accordance with its own rules of procedure, if it chooses, from the record before it.

Affirmed in part, reversed and remanded in part.

Judges MARTIN and GREENE concur.

Stephens v. McPherson

THOMAS C. STEPHENS v. LOIS R. McPHERSON, ADMX. CTA OF THE ESTATE OF JUANITA HOLFORD; NORMA HOLFORD DeWOLF; RAY H. HOLFORD; HENRIETTA HOLFORD CARLE; ELIZABETH HOLFORD DATSON; OKIE HOLFORD GRAHAM; JOHN R. HOLFORD; ROBERT L. HOLFORD; ROGER E. HOLFORD; CAROLYN HOLFORD KENNEDY; BARBARA HOLFORD NORMAN; JAMES W. HOLFORD, JR.; DEBBIE HOLFORD MILLER; BARRY GLENN HOLFORD; AND TIMOTHY P. HOLFORD, MINOR

No. 8712SC453

(Filed 22 December 1987)

1. Wills § 4.1— holographic will—testamentary intent—sufficiency of evidence

Evidence was sufficient to allow the jury to conclude that a document was intended by deceased to be her will where it tended to show that she attempted to create a tone of solemnity or formality by addressing it "to whom it may concern," by noting the precise time and date, by attesting to her own "sound mind" at the time of its execution, and by introducing her signature with the word "signed"; the instrument began and concluded with the words "[t]his is my request" and was structured like a will; deceased used words and phrases such as "sole closes haires," "drop down from one generation to the next," and "the rest of my belongings to be equally divided," which, as propounders pointed out, were "likely to be associated with wills by a lay person"; and the fact that the instrument included a request concerning her own funeral expenses and language tending to dispose of *all* of her property was some evidence that deceased intended the instrument to take effect at the time of her death.

2. Wills §§ 4, 32— holographic will—"request" and "wish"—words not precatory

There was no merit to a caveator's contention that the words "this is my request" and "I wish" were precatory, not mandatory, intended merely as an expression of wishes of the deceased and were thus inadequate to make an actual disposition of her estate.

3. Wills § 4— holographic will—paper found among valuable papers—sufficiency of evidence

Evidence that a paper purporting to be a will was found after deceased's death in a jewelry box containing jewelry which she regularly wore as well as pictures of her nieces and nephews and evidence that a relative saw deceased personally retrieve the document from the box, show it to her, and redeposit it in the box was sufficient to satisfy the requirement of a holographic will that it be found among the valuable papers and effects of deceased. N.C.G.S. § 31-3.4(3).

4. Wills § 4.1— holographic will—evidence of testamentary intent outside will—admission not prejudicial error

Even if the trial court erred in allowing a witness to testify that, at the time when deceased showed her the document in question, they were having a discussion about wills, such error was not prejudicial in view of the ample evidence of testamentary intent within the document itself.

APPEAL by plaintiff-caveator from *Stephens, Judge.* Judgment entered 7 November 1986 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 November 1987.

Murray, Regan, and Regan, by Cabell J. Regan for plaintiff-appellant.

Harris, Sweeny, and Mitchell, by Ronnie M. Mitchell for defendant-appellees.

BECTON, Judge.

This appeal concerns the validity and construction of a holographic will. Juanita Holford died 29 June 1984, and a paper writing was filed for probate as her last will on 5 July 1984. The document consists of a single piece of paper with handwriting on both sides and reads as follows:

> Date June 14, 1977
>
> To whom it may concern.
>
> This is my request and written by me on the night of June 14, 1977, at 8:55 p.m. I wish for my funeral expenses to amount to about the same I payed on my late husband Charles E. Holford which was approximately $3,800.00, I wish for my farm in Robson County to go to my sole closes haires and to never be sold but drop down from one generation to the next, and I wish the rest of my belongings to be equally divided among Mr. and Mrs. Horace Holford, and their children, except I wish $500.00 held out of Barbara Herman's share because she owes me that amount, I wish that amount to be divided among the rest of the brothers and sisters (over) This is my request and I am in sound mind.
>
> Signed
> Juanita Holford

On 19 February 1985, Thomas C. Stephens, the deceased's nephew and sole intestate heir, instituted this caveat proceeding, alleging, in part, that the document lacked the requisite testamentary intent and words of disposition to constitute a will and was not found among the valuable papers and effects of the deceased. Upon trial of the case, a jury found the paper writing to be the

valid last will and testament of Juanita Holford. From judgment entered on the verdict, the caveator appeals. We find no error.

I

At trial, the paper writing was introduced, and evidence was presented that it was in the handwriting of the deceased and signed by her. The document was found by Fern Holford in a jewelry box located in a bedroom of the deceased's residence, where she had seen Juanita Holford deposit the document during a visit sometime in 1982. The box also contained approximately 8 to 12 photographs of Juanita Holford's nieces and nephews, numerous gas bill receipts, and costume jewelry which Juanita Holford wore regularly during her lifetime. Fern Holford also found, in a chest of drawers in the same room, other papers of the deceased, including the military papers and death certificate of her late husband, her previous divorce decree, bank statements, and a will by which she had inherited land at her grandfather's death. A drawer in the deceased's own bedroom contained car titles, deeds, and two certificates of deposit as well as bank statements, checks, and income tax forms. Other papers were found in a hall closet.

At the time of her death, Juanita Holford owned two houses in Cumberland County, a farm in Robeson County, and various personal property.

II

The caveator first assigns as error the trial court's failure to grant what was, in effect, a motion for a directed verdict made at the close of the propounders' evidence and renewed at the conclusion of all the evidence, contending that there was insufficient evidence of testamentary intent to submit the case to the jury. He specifically argues that the evidence establishes no intent that the document operate as a will because the writing (1) fails to indicate that the deceased's wishes were to be effectuated upon her death, (2) contains only precatory language and thus fails to make a disposition of property, and (3) was not found among the deceased's "valuable papers and effects" as required by law.

An instrument may not be probated as a testamentary disposition unless there is evidence that it was written with testamentary intent, that is, that the maker intended that the paper itself should operate as a will or codicil, to take effect upon his death.

In re Mucci's Will, 287 N.C. 26, 30, 213 S.E. 2d 207, 210 (1975); *In re Johnson's Will*, 181 N.C. 303, 305, 106 S.E. 841, 842 (1921). An intent to make a future testamentary disposition is not sufficient. *Mucci's Will* at 30, 213 S.E. 2d at 210. Further, with regard to holographic instruments, the requisite intent must appear not only from the instrument itself and the circumstances under which it was made, but also from the fact that the instrument was found among the deceased's valuable papers and effects, in a safe place where it was deposited by her, or in the possession of some person with whom the deceased deposited it for safekeeping. *Id.*; N.C. Gen. Stat. Sec. 31-3.4 (1984).

[1] In our view, the instrument in this case, when considered as a whole, allows the jury to conclude that the document was intended by the deceased to be her will. First, Mrs. Holford obviously attempted to create in the instrument a tone of solemnity or formality by addressing it to "whom it may concern," by noting the precise time and date that the document was written, by attesting to her own "sound mind" at the time of its execution, and by introducing her signature with the word "signed." Next, the instrument begins and concludes with the words "[t]his is my request" and is structured like a will, containing a statement of intent regarding the deceased's funeral arrangements, followed by an apparent specific devise of the Robeson County farm, and concluding with what appears to be a general residuary clause. Further, Mrs. Holford used words and phrases such as "sole closes haires [sic]," "drop down from one generation to the next," and "the rest of my belongings to be equally divided," which, as the propounders point out in their brief, "are likely to be associated with wills by a lay person." Finally, the fact that the instrument includes a request concerning her own funeral expenses and language tending to dispose of *all* of her property is some evidence that the deceased intended the instrument to take effect at the time of her death.

[2] We further reject the caveator's contention that the words "this is my request" and "I wish" are precatory, not mandatory, are intended merely as an expression of the wishes or desires of the deceased, and are thus inadequate to make an actual disposition of her estate. The caveator correctly argues that precatory words generally do not operate to make a disposition of property, *in the absence of a contrary intention manifested by the testator.*

See Wiggins, Wills and Administration of Estates in North Carolina, Sec. 135 (2d ed. 1983). However, "greater regard is to be given to the dominant purpose of the testator than the use of any particular words," *Moore v. Langston*, 251 N.C. 439, 443, 111 S.E. 2d 627, 630 (1959), and that purpose must be ascertained from the instrument as a whole. In *Brown v. Brown*, 180 N.C. 433, 104 S.E. 889 (1920), the Supreme Court, in holding that the words "I wish" showed sufficient intent of the testator to create a devise of property to her son, stated: "Where the intention is manifest to convey an estate in property upon a devisee, any word may be construed to have that effect which in common parlance would not appear to do so." *Id.* at 435, 104 S.E. at 890.

As previously discussed, there is evidence in the instrument before us that Juanita Holford intended for it to be her will. In the context of the document as a whole, we conclude, therefore, that the words "wish" and "request" could be reasonably interpreted as imperative language of disposition and not merely precatory. For this reason, we hold that the trial court did not err, as the caveator asserts, by submitting the case to the jury and by construing the document to make a disposition of the deceased's property following the jury's determination that it constituted a valid will.

[3] The caveator next argues that there was insufficient evidence from which the jury could find that the purported will was found among the deceased's valuable papers and effects or other safe place, as required by statute, because important documents of the deceased were located at other places in the house and because the actual pecuniary value of the box containing the will and its other contents was small. We disagree.

In *In re Westfeldt's Will*, 188 N.C. 702, 125 S.E. 531 (1924), the Supreme Court discussed in depth the requirement that a holographic will be located among the deceased's "valuable papers and effects" in order to be valid. There the Court recognized:

> Valuable papers and effects mean more than papers that have a pecuniary or money value. Papers that have a sentimental and personal value are sometimes more precious and valuable to men and women than stocks and bonds . . . .
>
> * * *

> Valuable papers consist of such as are *regarded by a decedent* as worthy of preservation, and therefore, in his estimation, of some value. . . .

Id. at 708-09, 125 S.E. at 534. (Emphasis added.) Moreover, "[w]here a person has two or more depositories of his valuable papers and effects, the *finding* in either will suffice. It is not necessary it should be found in that which contains the most valuable papers and effects." (Citations omitted.) *Westfeldt's Will* at 709, 125 S.E. at 534-35. (Emphasis in original.)

The evidence shows Mrs. Holford's will was found after her death in a jewelry box containing jewelry which she regularly wore and which was thus obviously of value to her, as well as pictures of her nephews and nieces, which may have been of significant sentimental value. Moreover, Fern Holford testified to having seen Juanita Holford personally retrieve the document from the box, show it to her, and redeposit it in the box on an occasion in 1982. In our view, this constitutes evidence from which the jury could believe that the writer regarded the paper as valuable and intended to preserve and perpetuate it as a testamentary disposition of her property. *See Westfeldt's Will; In re Will of Williams*, 215 N.C. 259, 1 S.E. 2d 857 (1939). Accordingly, we hold the evidence as to whether the document was found among the valuable papers and effects of the deceased or in a safe place where it was deposited by her, in satisfaction of N.C. Gen. Stat. Sec. 31-3.4(3) was sufficient to support the jury's determination that it was a valid holographic will.

III

[4] The caveator next contends that the trial court erred by allowing the witness, Fern Holford, to testify that, at the time in 1982 when Juanita Holford showed her the document in question, they were having a discussion about wills. This evidence of a conversation occurring five years after the document's execution, the caveator argues, is not admissible to show testamentary intent, which must appear from the instrument itself, and from the circumstances attendant at the time of execution. *See Spencer v. Spencer*, 163 N.C. 83, 79 S.E. 291 (1913).

Assuming *arguendo* that the evidence was improperly admitted, we conclude that the caveator was not prejudiced thereby in

view of the ample evidence of testamentary intent within the document itself. This assignment of error is overruled.

IV

The caveator's remaining assignment of error is to the trial court's interpretation of the phrase "the rest of my belongings" as a general residuary clause. Having carefully considered the arguments of both the propounders and the caveator, we conclude that this assignment of error is without merit.

For the reasons stated,

We find no error.

Judges PHILLIPS and GREENE concur.

HOME HEALTH AND HOSPICE CARE, INC., AND CHARLES H. HARRELL v. ROBERT S. MEYER, CAROL DILDA, BEVERLY WITHROW, AND HOME HEALTH AND HOSPICE CARE I, LTD.

No. 878SC503

(Filed 22 December 1987)

Judgments § 30— motion in the cause to modify consent judgment—no authority in trial court

The trial court had no authority to interpret or correct a "Memorandum of Judgment Settlement" pursuant to a motion in the cause. Defendants did not place on the motion the number of the rule pursuant to which the motion was made; the motion was surely not made pursuant to N.C.G.S. § 1A-1, Rule 60, the rule under which a party must move to attain relief from a judgment; and a declaratory judgment action may not be commenced by motion in the cause any more than an action to modify or reform a consent judgment.

Judge BECTON concurs in the result only.

APPEAL by defendants from *Strickland, Judge.* Order entered 16 February 1987 in Superior Court, WAYNE County. Heard in the Court of Appeals 7 December 1987.

The record discloses the following:

On 30 June 1986, the parties and their attorneys executed a paper writing designated by them as "Memorandum of Judgment

Settlement." The trial judge, after making numerous gratuitous recitals, signed the "Memorandum of Judgment Settlement." We quote this paper writing, in pertinent part, signed by all the parties including the judge:

> 1. That the defendants will cause to be paid to the plaintiff, Charles Harrell, individually, the sum of FIFTEEN THOUSAND ($15,000.00) DOLLARS, THIRTEEN THOUSAND, FIVE HUNDRED ($13,500.00) DOLLARS of which is to be treated as compensation for work performed, back pay, and vacation, FIFTEEN HUNDRED ($1,500.00) DOLLARS of which shall be paid as reimbursement for expenses incurred by the plaintiff.
>
> 2. In regard to the THIRTEEN THOUSAND, FIVE HUNDRED ($13,500.00) DOLLARS figure heretofore mentioned, the defendants will deduct therefrom Social Security taxes. Plaintiff will be solely responsible for any liability to the United States Government, Internal Revenue Service, and the North Carolina Department of Revenue for any income taxes due.
>
> 3. The defendant, Home Health and Hospice Care I, Ltd., and Home Health and Hospice Care, Inc., agree to purchase from the plaintiff, Charles H. Harrell, FIVE THOUSAND (5,000) shares of stock in Home Health and Hospice Care, Inc. for FIVE THOUSAND ($5,000.00) DOLLARS within ninety (90) days from today's date. The certificates of stock are to be held and not reissued or assigned (illegible initials) until FIVE THOUSAND ($5,000.00) DOLLARS has been paid and satisfied in full.
>
> 4. The defendants will cause to be paid within thirty (30) days any and all vested interest in any retirement accounts—that is any vested interest in said accounts in the name of Charles H. Harrell.
>
> 5. It is agreed by plaintiff that he has no vested interest in a TWENTY-FIVE THOUSAND ($25,000.00) deferred compensation plan which has yet this date to be approved by the Board of Directors by Home Health and Hospice Care, Inc.
>
> 6. That the plaintiff shall cause to be returned, any and all personal property held by him and owned by Home Health and Hospice Care, Inc., or Home Health and Hospice Care I, Ltd., said surrender to be within ten (10) days of today's date.

7. The plaintiff, will within ten (10) days resign as trustee of the heretofore mentioned retirement account, and resign all memberships in the non-profit corporations, Home Health and Hospice Care, Inc., and Home Health and Hospice Care I, Ltd. And, shall resign as officer or director of both corporations.

8. The defendants will hold harmless the plaintiff, Charles H. Harrell and/or wife, Faye Harrell, from any liability as accommodation maker, guarantor, surety, or maker of any outstanding indebtedness owed by Home Health and Hospice Care, Inc., or Home Health and Hospice Care I, Ltd., to a third party.

9. Any documents held by the plaintiff Charles Harrell that belong to Home Health and Hospice Care, Inc., and Home Health and Hospice Care I, Ltd., shall be returned, within ten (10) days to Home Health and Hospice Care, Inc., and Home Health and Hospice Care I, Ltd., and Home Health and Hospice Care, Inc., and Home Health and Hospice Care, I, Ltd., shall return any personal effects, documents, correspondence that Home Health and Hospice Care, Inc., and Home Health and Hospice Care I, Ltd., are holding to the plaintiff, Charles H. Harrell, within ten (10) days of today's date.

10. That both parties agree that they shall take a Voluntary Dismissal without prejudice as to all claims, and further agree that the one (1) year Statute of Limitations in regard to the Voluntary Dismissal will be waived, and placed therein a three (3) year Statute of Limitation on the Voluntary Dismissal.

11. Each party shall bear his, her, or its own costs in the matter.

The Court having been informed of the heretofore set out Settlement, accepts the same as a Judgment of the Court and the same is enforceable as in contempt.

This shall be executed in duplicate originals and a copy retained by the plaintiff's attorney, R. Gene Braswell, and the defendant's attorney, R. Michael Bruce, in lieu of being placed in a court file.

This the 30th day of June, 1986.

s/JAMES D. LLEWELLYN
James D. Llewellyn
Judge of Superior Court

CONSENTED TO:

s/CHARLES H. HARRELL
Charles H. Harrell, Plaintiff

s/ROBERT S. MEYER
Robert S. Meyer, Defendant

s/CAROL D. DILDA
Carol D. Dilda, Defendant

s/BEVERLY G. WITHROW
Beverly G. Withrow, Defendant

s/ROBERT S. MEYER
Home Health and Hospice Care I, Ltd.
By: Robert S. Meyer, Chairman

s/R. S. SHACKLEFORD MD
Home Health and Hospice Care, Inc.
By: R. S. Shackleford, President

s/R. GENE BRASWELL
R. Gene Braswell
Attorney for Plaintiff

s/R. MICHAEL BRUCE
R. Michael Bruce
Attorney for Defendants

On 13 November 1986, defendants, by and through their attorney R. Michael Bruce, filed a paper writing designated "Motion" which was served on plaintiffs and in pertinent part reads as follows:

> Now comes Robert S. Meyer, Carol Dilda, Beverly Withrow, and Home Health and Hospice Care I, Ltd., defendants in the above action and move the court that the court declare and determine whether the Contract, labeled Exhibit A, attached hereto and hereby incorporated in this motion by

a reference, falls within the provisions of paragraph 8 of the Memorandum of Judgment Settlement dated June 30, 1986, such that the defendants Robert S. Meyer, Carol Dilda, Beverly Withrow, and Home Health and Hospice Care I, Ltd., are obligated to the plaintiff Charles H. Harrell with respect to said Contract, and enter an order that the defendants are not obligated under the terms of said Memorandum of Judgment Settlement dated June 30, 1986.

On 16 February 1987, after a hearing, the judge made detailed findings of fact and conclusions of law, and entered an order which is quoted below:

1. That the defendants shall pay all outstanding indebtedness owing and incurred by Charles H. Harrell to North Carolina National Bank of Mt. Olive, N. C. for the purchase of a Data Point Computer and software, said indebtedness being that indebtedness undertaken by Charles H. Harrell on behalf of the defendants on or about March 5, 1985.

That the defendants shall immediately pay any indebtedness that is in arrears for the purchase of the Data Point Computer system and software and shall keep such payments current henceforth.

Following defendants' notice of appeal on 26 February 1987, plaintiff Charles H. Harrell (Home Health and Hospice Care, Inc. is no longer a party) moved on 12 March 1987 to have the court order defendants to show cause why they should not be held in contempt of court for failure to make payments in accordance with the court's order. On 23 March 1987, in open court, another order was entered concluding as a matter of law that "the Order or [sic] this Court previously entered is still in full force and effect," and ordering payment by defendants.

Defendants appealed.

Barnes, Braswell, Haithcock & Warren, P.A., by R. Gene Braswell, for plaintiff, appellee.

R. Michael Bruce for defendants, appellants.

HEDRICK, Chief Judge.

Assuming, as the parties do, that the paper writing signed by the judge and consented to by the parties on 30 June 1986 and

called "Memorandum of Judgment Settlement" is a "consent judgment," we hold the trial court had no authority pursuant to the "motion in the cause" to interpret or construe the "consent judgment," and the order entered 16 February 1987 must be vacated.

Defendants did not place the number of the rule pursuant to which the motion of 13 November 1986 ("motion in the cause") was filed in violation of G.S. 1A-1, Rule 7(b)(1) which requires that the grounds for the motion must be stated. While failure to give the number of the rule is not necessarily fatal, it would be of great benefit to the trial court and this appellate court for counsel to name and number the rule pursuant to which the motion is made. Rule 60 is, of course, the rule pursuant to which a party must move to attain relief from a judgment. Defendants' motion is surely not made pursuant to Rule 60. Although defendants made the motion to obtain a construction of the "consent judgment," they are now satisfied to have the order entered pursuant thereto vacated since the court did not construe the "consent judgment" in the manner they desired. Plaintiffs, on the other hand, at oral argument, contended the order entered pursuant to the motion is something in the nature of an action for a declaratory judgment and that the court had authority to enter its order pursuant to G.S. 1-253. We disagree. A declaratory judgment is a separate and independent action to have the court "declare rights, status, and other legal relations, whether or not further relief is or could be claimed." G.S. 1-253. A declaratory judgment action may not be commenced by a motion in the cause, any more than can an action to modify or reform a consent judgment. *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956). Whether the "Memorandum of Judgment Settlement" is such an instrument as the court might construe and interpret rights of parties pursuant to declaratory judgment proceedings under G.S. 1-253 is not a question we need now consider or decide. Whether the "Memorandum of Judgment Settlement" is a judgment enforceable in any way need not be decided at this time; however, with respect to whether a civil judgment may be enforced by a contempt proceeding see *In re Will of Smith*, 249 N.C. 563, 107 S.E. 2d 89 (1959). Since the trial court, as we have already said, had no authority to construe or interpret pursuant to defendants' motion in the cause, it is neither necessary nor desirable that we consider whether the judge's interpretation was correct. Because

we are vacating the order appealed from, we need not consider any proceedings following the entry of such order.

Further proceedings in this matter, if any, must emanate from the fertile imagination of counsel.

Vacated.

Judge BECTON concurs in the result only.

Judge GREENE concurs.

NORTH CAROLINA BAPTIST HOSPITALS, INC. v. BEVERLY R. MITCHELL

No. 8721DC539

(Filed 22 December 1987)

1. **Assignments § 1— proceeds from personal injury action—assignment invalid**

The assignment of proceeds in a cause of action for personal injury is in violation of public policy and thus invalid.

2. **Judgments § 46— personal injury settlement—division among lawyer, injured party, and medical care providers**

Defendant attorney complied with the requirements of N.C.G.S. § 44-50 when she received $25,000 in settlement proceeds in a personal injury action, deducted her fee of 25%, then divided the balance equally between the injured party and the medical care providers.

APPEAL by plaintiff from *Harrill, Judge.* Judgment entered 19 February 1987 in District Court, FORSYTH County. Heard in the Court of Appeals 1 December 1987.

As a result of injuries sustained in an automobile accident, Henry L. Clark was treated at North Carolina Baptist Hospitals, Inc. Treatment lasted from 28 August 1982 to 22 December 1982. Total charges for services amounted to $27,579.69.

On 20 October 1982, Henry Clark executed an assignment to plaintiff which read:

> In consideration of services rendered and/or services to be rendered by North Carolina Baptist Hospitals, Inc. ("Hospital") to Henry Clark ("Patient"), the undersigned hereby

assign to the Hospital all right, title and interest in and to any compensation or payment in any form that (I, ~~we~~) have received or shall receive as a result of or arising out of the injuries sustained by the Patient resulting in (his, ~~her~~) hospitalization, up to the amount necessary to discharge all indebtedness to the Hospital for medical services rendered to the Patient, whenever and wherever rendered. (I, ~~We~~) agree that this assignment shall not relieve (me, ~~us~~) of any such indebtedness until actually paid. This Assignment is irrevocable and made without prejudice to any rights that (I, ~~we~~) might have to compensation for injuries incurred by the Patient, but (I, ~~we~~) hereby authorize and direct any person or corporation having notice of this Assignment to pay to the Hospital directly the amount of the indebtedness owed to the Hospital in connection with services rendered to the Patient. (I, ~~We~~) further authorize and direct any person or corporation making such payments to the Hospital to accept and rely upon a written statement from the Hospital as to the amount of such indebtedness.

Defendant settled Henry Clark's personal injury claim for $25,000.00, the limit of the insured's policy. Pursuant to G.S. 44-50, defendant distributed the funds as follows: $6,250.00 to defendant for legal fees, $5,812.50 to plaintiff for medical bills, $3,562.50 for other medical bills and $45.00 to David Martin (Investigator). This left $9,330.00 for Mr. Clark.

On 17 June 1983, plaintiff obtained judgment against Mr. Clark for the full amount of charges plus costs and legal interest. The $5,812.50 which defendant had paid into the office of the clerk of court was paid to plaintiff. Execution was issued for the remaining amount and returned unsatisfied.

On 4 September 1985, plaintiff brought action against defendant, alleging breach of defendant's fiduciary duty owed to plaintiff as assignee. The trial court held the following:

FINDINGS OF FACT

1. All parties hereto are properly before the Court and all parties necessary for the determination of this action have been made defendants in this action, and the Court has jurisdiction over the subject matter and over all of the parties in this action.

2. The Court hereby incorporates the stipulations of the parties filed January 16, 1987 and in the pre-trial order with like effect as if herein fully set forth as the findings of fact herein.

3. The defendant, as attorney for Mr. Clark received the $25,000.00 in settlement proceeds, and after deducting her fee of 25%, took the balance and divided it equally disbursing 50% to the medical providers and 50% to Mr. Clark.

BASED UPON THE FOREGOING FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. The defendant complied with the provisions of G.S. 44-49 and 44-50, which statutes are in derogation of the common law. Having complied with this statute, the defendant was not obligated to honor the assignment dated October 20, 1982, signed by Henry S. Clark, except to the extent required by G.S. 44-50.

3. Having complied with G.S. 44-50, the defendant was obligated to honor the assignment only to the extent provided by G.S. 44-50, which has been done.

4. Having concluded that this case is controlled by G.S. 44-49 and 44-50, the Court does not reach the question of the validity of the assignment dated October 20, 1982, or the question of whether the defendant was notified or received a copy of the assignment dated October 20, 1982.

JUDGMENT

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff shall have and recover nothing of the defendant in this action, and that the plaintiff's action shall be and the same is hereby DISMISSED; and that the costs of this action, to be taxed by the clerk, shall be paid by the plaintiff.

From this judgment, plaintiff appeals.

Turner, Enochs, Sparrow, Boone & Falk, by Wendell H. Ott and Thomas E. Cone, for plaintiff appellant.

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

ARNOLD, Judge.

[1] It has long been the rule that a purported assignment of rights arising out of a cause of action for personal injury is invalid as contrary to public policy. *Southern Railway Co. v. O'Boyle Tank Lines*, 70 N.C. App. 1, 318 S.E. 2d 872 (1984). The specific question involved here is whether there is a difference between the assignment of a claim and the assignment of its proceeds. We believe that the more reasoned view is that such proceeds are not assignable before judgment.

The only value of a claim for personal injury is the possible conversion of it into a collectible money judgment. *See, Southern Farm Bureau Casualty Ins. v. Wright Oil Co.*, 248 Ark. 803, 454 S.W. 2d 69 (1970). Any distinction drawn between the assignment of a claim and the assignment of its proceeds is a mere fiction and we will not circumvent public policy by adopting such a fiction. *See Town & Country Bank v. Country Mut. Ins.*, 121 Ill. App. 3d 216, 459 N.E. 2d 639 (1984); *see also, Karp v. Speizer*, 132 Ariz. App. 599, 647 P. 2d 1197 (1982). We hold that the assignment of proceeds in a cause of action for personal injury is in violation of public policy and thus invalid.

[2] Having determined the assignment in the present case to be invalid, we turn to whether the trial court correctly concluded that defendant complied with the provisions of G.S. 44-50. G.S. 44-50 attaches a lien upon any funds paid to any person in compensation for or settlement of personal injuries whether in litigation or otherwise, and it directs that person to retain out of those funds a sufficient amount to pay the bona fide claims for medical supplies and services after receiving and accepting notice of such claims. The statute further states that in no case shall the lien, exclusive of attorney's fees, exceed 50% of the damages recovered. G.S. 44-50.

In the present case, defendant received the $25,000.00 in settlement proceeds, deducted her fee of 25%, then divided the bal-

ance equally between Mr. Clark and the medical providers. Such action was in direct accord with G.S. 44-50. The trial court was correct to deny plaintiff any recovery.

Affirmed.

Judges JOHNSON and ORR concur.

JOSEPHINE R. WARD v. HALLETT S. WARD, JR., AS EXECUTOR AND TRUSTEE OF THE WILL OF ALVIN T. WARD; HALLETT S. WARD, JR., INDIVIDUALLY; HALLETT S. WARD, III, CATHERINE WARD, KNOWN AND UNKNOWN, BORN AND UNBORN HEIRS OF HALLETT S. WARD, III AND CATHERINE WARD, AND WACHOVIA BANK & TRUST COMPANY, N.A., AS TRUSTEE FOR THE "REVEREND JAMES R. LONG MEMORIAL TRUST FUND"

No. 8730SC380

(Filed 22 December 1987)

Trusts § 6.1— distribution of income—powers of trustee

The testator of a residuary trust created under a will clearly intended that the trustee pay all of the trust income to his wife during her lifetime and use his discretion only in invading the trust principal.

APPEAL by guardian ad litem from *Hyatt, Judge.* Judgment entered 23 December 1986 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 26 October 1987.

Coward, Cabler, Sossomon & Hicks by Kent Coward for plaintiff appellee.

Charles W. Hipps for defendant appellant.

COZORT, Judge.

Plaintiff brought this declaratory judgment action seeking the proper construction of her husband's will. From a judgment construing the will in her favor, defendant guardian ad litem appeals. We affirm.

Alvin T. Ward died testate on 30 January 1984. In his will he named his nephew, Hallett S. Ward, Jr., as executor of his estate and as trustee of the residuary trust created under Item IV of the will. Item IV provided in relevant part:

All the rest and residue of my property, including real, personal and mixed property, wheresoever situated and whensoever acquired, I devise and bequeath to Hallett S. Ward, Jr., in trust nevertheless as hereinafter set forth, to-wit:

(a) If my wife, Josephine R. Ward, survives me, then and in that event my said Trustee will hold and manage the said trust for her exclusive use and benefit for and during the term of her natural life. My Trustee is directed to pay such amounts of and from the income generated by said trust, and from the principal of said trust if he deems same to be advisable, to, for, or on account of my said wife in quarterly installments or more frequently if he deems advisable and if practicable. It is my wish and desire that my said wife be maintained and supported generally in accordance with the standard of living which I have provided for her during our marriage years and my Trustee will be generally guided by that standard. However, at the request of my said wife, my said Trustee may in his discretion expend monies in her behalf that may or might actually exceed the standard of living which we have enjoyed during our married lives together. My Trustee will have all the power and authority granted by law and as hereinafter set forth and he may, if in his sole and absolute discretion he deems it to be advisable, invade the principal of said trust for her use and benefit.

(b) At the death of my wife, Josephine R. Ward, or at my death if she should predecease me, said trust will continue to be held and managed by my said Trustee and the income therefrom will be paid in at least annual installments to my nephew, Hallett S. Ward, Jr., (50%), to my greatnephew, Hallett S. Ward, III, (25%), and to my greatniece, Catherine Ward, (25%).

From the time he qualifed as executor and until this action was brought, the executor/trustee paid all of the income generated by the trust to plaintiff in quarterly or more frequent installments. Plaintiff filed this action for declaratory judgment, however, because a question had arisen as to whether she was entitled to all of the income generated by the trust or whether payment of such was in the trustee's discretion. In her complaint for

declaratory judgment plaintiff requested an interpretation requiring the mandatory distribution of all trust income during her lifetime. The defendants in this action include the executor/trustee, the other beneficiaries named in Item IV of the Will and the known and unknown, born and unborn heirs of certain beneficiaries. A guardian ad litem was appointed for said heirs, and he answered plaintiff's complaint by denying its material allegations. The other defendants admitted the material allegations of the complaint and joined in plaintiff's prayer for relief.

The trial court issued a judgment which ordered the executor/trustee to pay all of the income generated by the trust to plaintiff during her lifetime. The judgment also ordered that he may invade the principal if "in his sole and absolute discretion," he deems it advisable. From this judgment, the defendant guardian ad litem for the heirs appeals.

The sole question for determination on this appeal is whether plaintiff is entitled to all of the trust income during her lifetime. We hold that the payment of the entire trust income is mandatory.

"[T]he dominant purpose in construing a will is to ascertain and give effect to the testator's intent." *Bank v. Carpenter*, 280 N.C. 705, 707, 187 S.E. 2d 5, 7 (1972). "The intent of the testator must be gathered from the four corners of the will and the circumstances attending its execution." *Wing v. Trust Co.*, 301 N.C. 456, 463, 272 S.E. 2d 90, 95 (1980).

In the case *sub judice*, the testator clearly intended that the trustee pay all of the trust income to his wife during her lifetime and use his discretion only in invading the trust principal. Item IV of the will directed the trustee to

> pay such amounts of and from the income generated by said trust, and from the principal of said trust if he deems same to be advisable, to, for, or on account of my said wife in quarterly installments or more frequently if he deems advisable and if practicable.

The comma following the words "generated by said trust" indicates that the income and the principal portions of the trust are to be treated separately. The instructions given before the comma clearly order a mandatory distribution of the entire trust in-

come. The rest of the sentence directs the trustee to make payments from the principal "if he deems same to be advisable." Therefore, the trustee's use of discretion concerns only the payment of principal. This interpretation is supported by an examination of the word "same" in the phrase "if he deems same to be advisable." This word refers back and applies only to the payment of principal and has no application to the distribution of income.

Defendant guardian ad litem argues that the phrase "if he deems advisable and if practicable" qualifies the payment of both income and principal. This phrase, however, has no application to the payment of income or principal. Rather, it refers to the trustee's decision whether to pay plaintiff "in quarterly installments or more frequently."

An overall reading of Item IV further supports the construction set forth by the trial court. In Item IV the testator stated that his wife is to be supported at the standard of living which he provided during their marriage. He then provides that the executor may exceed that standard "if in his sole and absolute discretion he deems it to be advisable . . . for her use and benefit." This discretionary language again refers only to the invasion of principal.

Accordingly, the construction of the will established by the trial court is affirmed.

Affirmed.

Judges WELLS and JOHNSON concur.

WYMAN FRANKLIN ROACH, EMPLOYEE/PLAINTIFF v. LUPOLI CONSTRUCTION COMPANY, EMPLOYER, AND AETNA CASUALTY & SURETY CO., CARRIER/DEFENDANT

No. 8710IC234

(Filed 22 December 1987)

Master and Servant § 65.2— workers' compensation—back injury—later onset of pain—injury result of specific traumatic incident

The Industrial Commission erred in denying plaintiff workers' compensation benefits for a back injury where the Commission based its conclusion upon the theory that, unless plaintiff's back pain was contemporaneous with carrying and lifting 2x10 boards on his construction job, he could not recover, since N.C.G.S. § 97-2(6) requires that the injury must be the direct result of a specific traumatic incident of the work assigned, but the onset of pain is, as a general rule, the result of a "specific traumatic incident," rather than the incident itself which determines whether compensation will be allowed pursuant to the Act.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 8 December 1986. Heard in the Court of Appeals 26 August 1987.

Arnold & Magie by Roderic G. Magie for plaintiff appellant.

Russell, King & Haigh by Sandra M. King for defendant appellees.

COZORT, Judge.

In late May and early June of 1984, Wyman Franklin Roach, plaintiff below, was holding down two jobs. For a portion of the day, Roach worked for Lupoli Construction Company, codefendant below, as a general carpenter and helper. At night, he was a dishwasher at the King's Inn in Highlands.

On 6 June 1984, at his construction job, Roach was required to carry boards varying in size, length, and weight. Later that night, while working at the King's Inn, Roach felt pain in his lower back. Roach alleged that he had injured himself while at his construction job and sought compensation from Lupoli Construction Company's workers' compensation carrier, Aetna Casualty & Surety Company, codefendant below. Aetna denied coverage, and the issue of liability was heard by Deputy Commissioner Elizabeth G. McCrodden on 7 May 1985. Roach's claim was denied by the Deputy Commissioner, and her decision was affirmed by the

Full Commission, with a dissent from Commissioner Clay, on 10 September 1985. Roach appealed to this Court, and on 20 May 1986, in an unpublished opinion, we remanded the case to the Commission with instruction that it find whether any of Roach's work with Lupoli on 6 June 1984 constituted "a specific traumatic incident which was causally related to his alleged injury." *Roach v. Lupoli Const. Co.*, 80 N.C. App. 724, 343 S.E. 2d 290 (1986).

On remand the Full Commission deleted its previous findings concerning Roach's injury and issued a second opinion on 8 December 1986. Factual findings of that recent opinion, relevant to this appeal, are as follows: (1) that at the time of the alleged injury, the parties were subject to and bound by the North Carolina Workers' Compensation Act (the Act); (2) that Aetna Casualty and Surety Company was defendant Lupoli's compensation carrier; (3) that the "injury" to Roach occurred on 6 June 1984, and he worked for the defendant Lupoli on that day; (4) that while working for Lupoli that day, the plaintiff carried various sizes and lengths of boards as part of his normal work routine; (5) that while on the construction job that day, he experienced no pain in his back, but that his back "felt very tired"; (6) that while at his second job as a dishwasher at the King's Inn in Highlands, he felt "pain" in his back for the first time; and (7) that plaintiff Roach informed the physician he visited for treatment that he had hurt his back lifting 2x10 boards.

Based on the above factual findings, the Commission made the legal conclusion that the plaintiff Roach "did not sustain a specific traumatic incident of the work assigned" by the defendant Lupoli on 6 June 1984. For reasons stated below, this last conclusion of law is error, and the judgment of the Commission must be vacated and the cause remanded.

In its 8 December Order, the Commission correctly noted that before it could find coverage, it must be determined that Roach's injury was caused by a "specific traumatic incident" that "occurred at a recognizable time." *Bradley v. E. B. Sportswear, Inc.*, 77 N.C. App. 450, 452, 335 S.E. 2d 52, 53 (1985). The Commission then concluded that since the "plaintiff experienced no pain while performing the work assigned with [Lupoli Construction]," recovery must be denied.

It is apparent that the Commission made its conclusion upon a theory that, unless the plaintiff's back pain was contemporaneous with carrying and lifting the 2x10 boards, plaintiff cannot recover. This conclusion is clearly in error, based on a misapprehension of the law. N.C. Gen. Stat. § 97-2(6) states that a back injury is compensable when the injury in the course of employment "is the direct result of a specific traumatic incident of the work assigned." The onset of pain is not a "specific traumatic incident" that will determine whether compensation will be allowed pursuant to the act; pain is, rather, as a general rule, the *result* of a "specific traumatic incident."

The Commission, as trier of fact, must determine whether Roach injured himself not "gradually, but . . . at a cognizable time." *Bradley*, 77 N.C. App. at 452, 335 S.E. 2d at 53. Roach offered evidence that he injured his back when lifting 2x10 boards and that he had not lifted that type of board before the day he got hurt. He testified that he had to lift these heavier boards "higher up" than other boards he had worked with. He stated that his back felt "weak and tired like [he] had overexerted [him]self" at the same time he had lifted the 2x10s. Testimony that his back did not begin actually "hurting" until after the lifting was completed can be construed as evidence that his back was not injured by that lifting, but it certainly does not mandate such a finding. Based on the evidence, the Commission would be justified in determining that Roach injured himself while on the job with Lupoli on 6 June 1984. Just because Roach felt pain for the first time hours after the time he alleges he injured himself, does not mean that the "specific traumatic incident" could not have occurred when he says it did. Logic dictates that injury and pain do not have to occur simultaneously for Roach to establish that he sustained a compensable injury on 6 June, especially when the controlling statute is silent on the issue. *See Long v. Morganton Dyeing & Finishing Co.*, 321 N.C. 82, 361 S.E. 2d 575 (1987). It was error for the Commission to conclude otherwise.

On remand, the Commission must make findings based on the evidence and conclusions of law supported by the findings and consistent with legal precedent. We vacate the Commission's 8 December 1986 Order and remand the case to the Full Commission for their determination of whether Roach's lifting of 2x10

boards while on the job with Lupoli on 6 June 1984 was the "specific traumatic incident" responsible for his injury.

Vacated and remanded.

Judges BECTON and MARTIN concur.

STUART EDWARD JAMES FULTON, INDIVIDUALLY AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON AT RISK ON CONTRACT NO. IRPI 10002 v. EAST CAROLINA TRUCKS, INC. AND JAMES C. GREENE CO.

No. 8710SC412

(Filed 22 December 1987)

1. **Rules of Civil Procedure § 37— dismissal with prejudice—not sanction of last resort**

North Carolina does not adhere to the rule that dismissal with prejudice is a sanction of last resort for failure to comply with discovery.

2. **Rules of Civil Procedure § 37— failure to answer interrogatories—dismissal not abuse of discretion**

The trial court did not abuse its discretion in dismissing plaintiffs' claim for failure to answer interrogatories where plaintiffs had ample opportunity to object to the discovery both before and after defendants filed motions to dismiss and for sanctions; plaintiffs did not answer, object, or respond in any manner to defendants' first interrogatories; defendants then filed motions to dismiss and for sanctions, but plaintiffs did not respond in any manner until the date of the hearing on the motions, at which time plaintiffs informally served certain unverified documents upon defendants' counsel; and the case was scheduled to be heard just five days after plaintiffs' first attempt to serve defendants with answers to the interrogatories.

APPEAL by plaintiffs from *Herring, Judge*. Order entered 5 September 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 28 October 1987.

LeBoeuf, Lamb, Leiby & MacRae, by George R. Ragsdale and R. Bradley Miller for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Nigle B. Barrow, Jr. and Donald H. Tucker, Jr. for East Carolina Trucks, Inc., defendant-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Sanford W. Thompson IV for James C. Greene Co., defendant-appellee.

BECTON, Judge.

On 9 July 1985, plaintiffs Stuart Edward James Fulton and certain underwriters at Lloyd's of London brought this action against defendants East Carolina Trucks, Incorporated and James C. Greene Company alleging unfair trade practices, breach of contract, negligent repair and breach of warranty. The case was scheduled to be heard on 8 September 1986 in Wake County Civil Superior Court. Before the hearing date, defendants filed motions to dismiss and for sanctions under Rule 37(d) of the North Carolina Rules of Civil Procedure for plaintiffs' failure to comply with discovery. The trial court granted the motion to dismiss after a hearing on 3 September 1986. Plaintiffs appeal. We affirm.

[1] Plaintiffs' sole contention on appeal is that the trial court abused its discretion in dismissing their case with prejudice because it was the first sanction for failure to comply with discovery. Plaintiffs argue that North Carolina courts adhere to the rule adopted in the federal courts—that dismissal with prejudice is a sanction of last resort and is "applicable only in extreme circumstances and generally proper where less drastic sanctions are unavailable." *McKelvey v. AT&T Technologies, Inc.*, 789 F. 2d 1518, 1520 (11th Cir. 1986); *accord Cine Forty-Second Street Theatre Corp. v. Allied Artist Pictures Corp.*, 602 F. 2d 1062 (2d Cir. 1979); *Gaspard v. U.S.*, 71 F. 2d 1097 (5th Cir. 1983); *Farmers Plant Food v. Fisher*, 746 F. 2d 452 (8th Cir. 1984).

Although the federal rule is laudable and best serves the judicial preference in favor of deciding cases on the merits, our courts have not adopted the federal rule. Indeed, this court's precedent all but expressly rejects the notion of progressive sanctions. This court has upheld dismissals in several cases when no previous less stringent sanction was ordered. *See, e.g., Hammer v. Allison*, 20 N.C. App. 623, 202 S.E. 2d 307, *cert. denied*, 285 N.C. 233, 204 S.E. 2d 23 (1974); *First Citizens Bank v. Powell*, 58 N.C. App. 229, 292 S.E. 2d 731 (1982); *Hayes v. Browne*, 76 N.C. App. 98, 331 S.E. 2d 763 (1985), *cert. denied*, 315 N.C. 587, 341 S.E. 2d 25 (1986).

Moreover, this court specifically rejected a similar argument in *First Citizens Bank* in which defendants argued that plaintiff was required to move for an order compelling discovery pursuant to Rule 37(a)(2) of the North Carolina Rules of Civil Procedure

before a motion to dismiss was granted. This court stated "[w]e concede that issuance of a court order is the more common procedure employed by courts, but the clear wording of Rule 37(d) contradicts defendants' position that [a motion to compel discovery] is a prerequisite to entry of a default judgment . . . . While the sanctions imposed by the court have been somewhat severe, they are among those expressly authorized by the statute and we cannot hold they constituted an abuse of discretion absent specific evidence of injustice occasioned thereby." *First Citizens* at 230, 292 S.E. 2d at 731-32.

[2] We now examine the evidence in the record to determine whether there was an abuse of discretion. Plaintiffs urge that the trial judge abused his discretion because their failure to answer defendants' interrogatories was caused by the following problems: (1) plaintiff-Lloyd's is located in England; (2) plaintiff held reasonable objections to the production of certain information; (3) plaintiff eventually provided organized, complete information; and (4) defendants were not prejudiced by the delay. We disagree. Plaintiffs had ample opportunity to object to the discovery both before and after defendants filed motions to dismiss and for sanctions. Defendant-East Carolina Trucks' first interrogatories and request for the production of documents were served on plaintiffs' counsel on 17 December 1985. Plaintiffs neither answered, objected nor responded in any other manner to defendants' requests. Defendants then filed a motion to dismiss and a motion for sanctions on 10 July 1986. Again, plaintiffs did not respond in any manner until the date of the hearing on the motions—3 September 1986—at which time plaintiffs informally served certain unverified documents upon defendant's counsel. Furthermore, regarding plaintiffs' argument that defendants were not prejudiced by the delay, this case was scheduled to be heard on 8 September 1986, just five days after plaintiffs' first attempt to serve defendants with answers to the interrogatories and the requested documents. Under these circumstances, we cannot find that the trial court abused its discretion in dismissing plaintiffs' claim.

Affirmed.

Judges PHILLIPS and GREENE concur.

DAVID JACKSON STEWART, JR., EXECUTOR OF THE ESTATE OF DAVID JACKSON STEWART, SR.; DAVID JACKSON STEWART, JR., INDIVIDUALLY; DAVID JACKSON STEWART, JR., TRUSTEE v. SUE VINSON STEWART JOHNSON; CHARLES TURNER STEWART; CAROLINE ELIZABETH STEWART COX; ALLEN WELLONS, GUARDIAN AD LITEM FOR UNBORN CHILDREN OF CHARLES TURNER STEWART

No. 8711SC411

(Filed 22 December 1987)

Wills § 60.1— spendthrift trust—remainder to grandchildren—renunciation by child—no acceleration

Where testator created a spendthrift trust for one of his sons with the remainder to go to the children of that son, or to his other children if there were no grandchildren by that son, the beneficiary could not renounce for his unborn children and grant to his brothers and sisters his interest in the trust free from the spendthrift provisions, since the remaindermen could not be determined until the death of the beneficiary, and the testator clearly intended to postpone the point at which the remainder would take effect in order to protect the assets of the trust for his grandchildren, if any, by the spendthrift son.

APPEAL by plaintiffs from *Barnette, Judge.* Judgment entered 5 February 1987 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 28 October 1987.

Albert A. Corbett, Jr., for plaintiff appellants.

Allen H. Wellons for defendant appellees.

COZORT, Judge.

Plaintiff filed this declaratory judgment action for a determination of who is entitled to the renounced portion of a will. We affirm the judgment entered by the trial court.

David Jackson Stewart, Sr., died on 8 July 1986 and left a will naming plaintiff David Jackson Stewart, Jr., as his executor and trustee. In the will he provided that his four children should receive equal shares of his estate. However, David Jackson Stewart, Jr., Caroline E. Stewart and Sue Vinson Stewart Johnson were to receive their shares free and clear of any trust, while the share of Charles Turner Stewart was to be held in trust for him for his natural life.

The trust provisions of the will stated:

> The funds in said trust shall be paid to or applied for the benefit of Charles Turner Stewart in such manner and at such intervals and in such amounts as the trustee, in his uncontrolled discretion, shall deem needful or desirable for his comfortable support, maintenance, education and for medical, surgical, hospital or other institutional care of Charles Turner Stewart.

Upon the death of Charles Turner Stewart, what was left in his trust fund was to go to his children. If, however, he died without children, then the remainder of the trust would go to his brothers and sisters.

Charles Turner Stewart, pursuant to N.C. Gen. Stat. § 31B, renounced his share of his father's estate. A copy of his renunciation was recorded in the Johnston County Registry and a copy was delivered to the executor. At the time of his renunciation, Charles Turner Stewart had no children and indicated that he never plans to have children.

Plaintiff, the executor and trustee under the will, then filed this declaratory judgment action to determine who is entitled to receive the renounced share. A guardian ad litem was appointed to represent the unborn children of Charles Turner Stewart.

The trial court concluded that David Jackson Stewart, Sr., intended to create a spendthrift trust in order to protect his assets for his grandchildren, if any, by Charles Turner Stewart. The trial court further concluded that N.C. Gen. Stat. § 31B-1(b) "prohibits Charles Turner Stewart [*sic*] renunciation from granting the other beneficiaries a greater interest than he would have had which said interest at the most was a life estate." The trial court then ordered that by his renunciation, Charles Turner Stewart had forfeited his interest in the trust created by his father's will. It further ordered that David Jackson Stewart, Jr., as trustee, continue to administer the trust assets and at Charles Turner Stewart's death, to distribute the principal and accumulated income according to the terms of the trust. From this order, plaintiff appeals.

Plaintiff argues that the trial court erred in concluding that Charles Turner Stewart could not renounce for his unborn children and grant to his brothers and sisters his interest in the trust free from the spendthrift provisions. We disagree.

N.C. Gen. Stat. § 31B-1(b) provides that:

> In no event shall the persons who succeed to the renounced interest receive from the renouncement a greater share than the renouncer would have received.

In the case *sub judice*, Charles Turner Stewart had only a life estate in the trust fund established by his father's will, while his unborn children and brothers and sisters have a contingent interest in the remainder. Although he may renounce his life estate, he may not renounce the interest of his unborn children or accelerate the remainder for the benefit of his brothers and sisters. "A remainder will not be accelerated if it is impossible to identify the remaindermen or if there is an intention on the part of the testator to postpone the taking effect of the remainder." *Keesler v. Bank*, 256 N.C. 12, 18, 122 S.E. 2d 807, 812 (1961). It is presently impossible to identify the remaindermen, as they may only be determined at the death of Charles Turner Stewart. In addition, the testator clearly intended to postpone the point at which the remainder would take effect in order to protect the assets of the trust for his grandchildren, if any, by Charles Turner Stewart.

Therefore, we affirm the decision of the trial court ordering David Jackson Stewart, Jr., as trustee, to continue administering the trust assets for the life of Charles Turner Stewart and at his death to distribute them according to the terms of the trust.

Affirmed.

Judges WELLS and JOHNSON concur.

JOSEPH CHOLETTE AND CAROL CHOLETTE v. TOWN OF KURE BEACH, LEE WRENN, NORRIS TEAGUE, ED JONES, LARRY WILLOUGHBY, TOM CAUSBY AND CLARENCE ROBBINS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES

No. 875SC581

(Filed 22 December 1987)

Constitutional Law § 23.1— requirement that fire wall be built—no violation of constitutional rights

Plaintiffs failed to demonstrate that a building inspector's decision requiring them to build a fire wall in their apartments rose to the level of a due process violation, a denial of equal protection, or a taking of their property.

APPEAL by plaintiffs from *Tillery, Judge*. Judgment entered 9 March 1987 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 8 December 1987.

In April 1983, plaintiffs obtained a building permit for the construction of apartments in Kure Beach, North Carolina. Prior to obtaining the permit, the building inspector for the Town of Kure Beach advised plaintiffs that their project would require the construction of a fire wall. Plaintiffs did not appeal from the building inspector's decision and constructed the fire wall.

In early 1984, P. B. Medlin and Betty Medlin, the owners of a motel located next to plaintiffs' property, obtained a building permit to add a third floor to their motel. The building inspector advised them that a fire wall was not necessary. Plaintiffs objected to that decision.

Before the Medlins could complete their new construction, a new building inspector issued a stop work order on their project.

On 2 July 1984, the Kure Beach Town Council reduced the size of the town's fire district so that neither plaintiffs' property nor the Medlin property was in the fire district. The Medlins were then permitted to complete their project.

On 13 November 1984, plaintiffs filed suit against defendants alleging that defendants violated their civil rights by negligently hiring, retaining and supervising a building inspector who was not qualified to inspect plaintiffs' building and who required plaintiffs to build an unnecessary fire wall while not requiring the Medlins to erect a fire wall.

Defendants moved for summary judgment and their motion was granted. From the judgment of the trial court, plaintiffs appeal.

Bruce H. Robinson, Jr. for plaintiff appellants.

Marshall, Williams, Gorham & Brawley, by A. Dumay Gorham, Jr. and Charles D. Meier; and Andrew A. Canoutas for defendant appellees.

ARNOLD, Judge.

The sole question in this case is whether the actual decision of the building inspector to require plaintiffs to construct a fire wall violated any of plaintiffs' federally protected rights. Even taking the allegations in plaintiffs' complaint as true, we do not believe that plaintiffs have made out a federal claim.

Plaintiffs contend that defendants violated "certain federally protected rights which include [plaintiffs'] right to be secure in their property and not to be deprived of their property without due process of law under the Fourteenth Amendment." Plaintiffs assert that they are entitled to damages under 42 U.S.C. § 1983. We do not agree.

There are two essential elements of a cause of action under 42 U.S.C. § 1983: 1) the conduct complained of was carried out under color of state law, and 2) the conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981). In general, the courts have rejected attempts to create a constitutional question out of a state law violation in the land use area. *See Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F. 2d 1524 (1st Cir. 1983).

In *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 344 S.E. 2d 357, *disc. rev. denied*, 318 N.C. 417, 349 S.E. 2d 600 (1986), plaintiffs argued that their constitutional rights were violated when the town refused to allow them to build duplexes on property restricted to single-family residences. Plaintiffs argued that the refusal amounted to an invalid arbitrary and discriminatory enforcement of the zoning ordinance since 13 of 24 residences in the zoning district were duplexes. This Court found

that the Town of Wrightsville Beach violated its own zoning ordinance and was clearly lax in the enforcement of its zoning laws. *Id.* However, this Court concluded that plaintiffs failed to identify a violation of their constitutional rights under § 1983 and stated:

> For plaintiffs to prove a violation of their constitutional rights entitling them to relief, they must show that the Town's actions were arbitrary and capricious so as to violate their due process rights; or that the enforcement infringes upon their constitutional guarantee of equal protection; or that the alleged arbitrary enforcement amounts to a "taking" of their property without just compensation.

Id. at 375, 344 S.E. 2d at 361.

In the case *sub judice*, the building inspector's decision requiring plaintiffs to build a fire wall does not rise to the level of a due process violation or a denial of equal protection. Additionally, the decision in no way amounts to a taking of plaintiffs' property. Plaintiffs have failed to demonstrate that they have suffered the deprivation of any right protected by the Constitution. Accordingly, summary judgment was appropriately entered.

Affirmed.

Judges JOHNSON and ORR concur.

DEBRA ANNE KARP v. UNIVERSITY OF NORTH CAROLINA

No. 8710IC475

(Filed 22 December 1987)

Attorneys at Law § 7.5— Tort Claims Act—attorney's fees—authority of Industrial Commission to award

The Industrial Commission has the authority to award attorney's fees pursuant to N.C.G.S. § 6-21.1 for actions brought under the N.C. Tort Claims Act; the Industrial Commission is considered a court for the purpose of hearing and passing upon tort claims under N.C.G.S. § 143-291, and N.C.G.S. § 143-291.1 expressly authorizes the Industrial Commission to tax costs against the loser in the same manner as costs are taxed in civil actions.

Karp v. University of North Carolina

APPEAL by defendant from the Opinion and Award of the North Carolina Industrial Commission filed 26 March 1987. Heard in the Court of Appeals 18 November 1987.

This appeal arises out of a personal injury action brought under the North Carolina Tort Claims Act, N.C. Gen. Stat. § 143-291 *et seq.* (1983) and heard before the Industrial Commission 7 May 1986. After finding in plaintiff's favor by Decision and Order dated 6 June 1986, the deputy commissioner entered an Order dated 25 November 1986 directing defendant to pay attorney's fees as provided under N.C. Gen. Stat. § 6-21.1 (1986) and N.C. Gen. Stat. § 143-291.1 (1983). Defendant appealed the award of attorney's fees to the Full Commission which by Order dated 26 March 1987 affirmed, with one dissent, the deputy commissioner's award of attorney's fees. From this decision, defendant appeals.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by G. Nicholas Herman, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Randy Meares, for defendant-appellant.

WELLS, Judge.

The sole question for review is whether the Industrial Commission has jurisdiction to award attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1 for actions brought under the N.C. Tort Claims Act. We hold that it does.

Defendant contends that G.S. § 6-21.1 does not extend to the adjudicatory bodies of administrative agencies such as the Industrial Commission and therefore cannot provide the Commission with the authority to award attorney's fees.

G.S. § 6-21.1 provides in pertinent part:

> In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the Court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, . . . the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant. . . .

Defendant contends that the Industrial Commission is neither a "court" nor does a deputy commissioner constitute a "presiding judge" within the meaning of G.S. § 6-21.1 and therefore cannot be brought under the terms of the statute. We disagree.

Defendant correctly points out that the Tort Claims Act must be strictly construed as it stands in derogation of the common law rule of sovereign immunity, *Etheridge v. Graham, Comr. of Agriculture*, 14 N.C. App. 551, 188 S.E. 2d 551 (1972) and that the Commission is a court of limited jurisdiction having only those powers conferred upon it by statute. *Bryant v. Dougherty*, 267 N.C. 545, 148 S.E. 2d 548 (1966). However, defendant's reliance on *Bowman v. Chair Co.*, 271 N.C. 702, 157 S.E. 2d 378 (1967) to support its argument that a deputy commissioner is not a presiding judge is misplaced. The *Bowman* Court held that "there was no provision in the Workmen's Compensation Act for presiding judges" and analyzed the application of G.S. § 6-21.1 on the basis of the specialized types of cases arising under the Workmen's Compensation Act. The *Bowman* Court did not construe N.C. Gen. Stat. § 143-291 which provides that the Industrial Commission is considered "a court for the purpose of hearing and passing upon tort claims . . ." and N.C. Gen. Stat. § 143-291.1 (1983) which expressly authorizes the Industrial Commission, upon an order awarding damages "to tax the costs against the loser in the same manner as costs are taxed by the superior court in civil actions."

Taken together these statutes make clear that the Industrial Commission has jurisdiction and authority to award attorney's fees in a Tort Claims Act case. The decision of the Full Commission affirming the deputy commissioner's award of attorney's fees to plaintiff is hereby

Affirmed.

Judges JOHNSON and COZORT concur.

CAROL HAYNES McLEAN (FISK) v. RUSSELL L. McLEAN, III

No. 8728DC574

(Filed 29 December 1987)

1. **Divorce and Alimony § 30— equitable distribution—tenancy by the entireties—consideration from separate property—presumption of gift**

The presumption of a marital gift for entireties property purchased by a spouse with separate property is still the law in this state, and such presumption is rebuttable by clear, cogent and convincing evidence.

2. **Divorce and Alimony § 30— equitable distribution—presumption of gift to marital estate—insufficient rebutting evidence**

The trial court did not err in finding that defendant husband failed to rebut the presumption of a gift to the marital estate of funds used to purchase a house and an office building placed in the names of both spouses as tenants by the entireties where defendant showed that he used funds inherited from his father in making such purchases and elicited testimony from plaintiff wife that she did not want to be awarded anything from defendant's inheritance.

3. **Divorce and Alimony § 30— equitable distribution—personal property—no presumption of gift**

Even though the names of both spouses were on a promissory note given in exchange for the husband's separate property, the note remained the husband's separate property where no contrary intention was stated in the conveyance. N.C.G.S. § 50-20(b)(2).

4. **Divorce and Alimony § 30— equitable distribution—stock in husband's name as marital property**

The trial court did not err in classifying corporate stock issued in the name of defendant husband alone as marital property, although defendant testified that the stock was a gift from the corporation's president, where the president testified that he expected defendant to be a local contact for the corporation and to perform managerial services for the corporation.

5. **Divorce and Alimony § 30— equitable distribution—valuation of law practice—expert testimony**

The trial court did not err in the admission of the opinion of plaintiff wife's expert witness regarding the value of defendant husband's law practice where the witness explained the methods used to reach his opinion.

6. **Divorce and Alimony § 30— equitable distribution—valuation of law practice—insufficient**

The trial court's valuation of defendant's law practice at $35,000 was not supported by the evidence where the trial court used a "return on investment" approach but there was no evidence before the court to support the rate of return used by the court or to indicate that such method would yield an accurate valuation.

7. Divorce and Alimony § 30— equitable distribution—credit for mortgage payments after separation

The trial court in an equitable distribution action should have credited defendant with at least the amount by which he decreased the principal amount of the joint debt on the home of the parties by the payments made from his separate property after the date the parties separated.

8. Divorce and Alimony § 30— equitable distribution—personal property—distribution different from memorandum

The trial court did not err in ordering the distribution of personal property in a manner different than that agreed upon in a handwritten memorandum where the agreement was not acknowledged before a certifying officer as defined in N.C.G.S. § 52-10(b) and was thus not binding upon the court.

Judge GREENE concurring in part and dissenting in part.

APPEAL by defendant from *Fowler, Judge.* Judgment entered 13 November 1986 in District Court, BUNCOMBE County. Heard in the Court of Appeals 2 December 1987.

Plaintiff Carol McLean Fisk and defendant Russell McLean were married 23 November 1966. In January 1984, the parties separated. On 3 January 1985, plaintiff filed an action seeking divorce, custody, child support, and equitable distribution of the marital property. Defendant answered and filed a counterclaim for child custody, divorce, and equitable distribution. On 29 March 1985, a judgment of absolute divorce, which also resolved the issues of custody and child support, was entered. The equitable distribution claim was heard on 2 May 1986.

Evidence before the trial court tended to show the following: On 2 October 1978, defendant's father died, and defendant and his sister each inherited at least $100,000.00 in cash and property from their father's estate. Assets received by defendant from his father's estate were used to purchase some of the assets at issue in this case. At the time of the father's death, the parties had assets with a net value of approximately $45,000.00. Among those assets was a house which the parties sold for $39,662.38, applying the proceeds towards the purchase of a lot and construction of a home at 749 Camp Branch Road in Haywood County. In addition to those proceeds, the parties secured a loan of approximately $55,000.00 and used $75,311.17 of defendant's separate funds from his father's estate to build the house. Title to the Camp Branch Road property is held by the parties as tenants by the entirety.

On 12 October 1979, defendant and his sister sold a house inherited from their father to E. P. Buie and wife. The purchasers made a cash downpayment, part to defendant and part to his sister, and executed a note (Buie note) payable one-half to defendant's sister and one-half to defendant and plaintiff. Defendant opened two bank accounts in his name, one for his share of the downpayment and the other for the note payments.

Also in 1979, the parties purchased as tenants by the entirety an office building in Waynesville, North Carolina. Defendant paid $7,000.00 from his inheritance and both parties signed a note payable to the seller for three annual installments of $5,499.40 plus interest and assumed a first mortgage of $40,501.81. Defendant made the three installment payments from the following sources: an account containing defendant's separate funds from his inheritance; proceeds from the sale of stock defendant inherited from his father; and an account containing defendant's separate funds from the Buie note payments. Defendant set up another bank account for rents collected from the lease of the office building. The account was used to pay the building's operating expenses and to make the first mortgage payments.

The parties were also the payees of a $32,000.00 promissory note (Medford note) which was payable in 240 monthly installments of $236.20. Defendant collected 34 monthly payments during the period from the date of separation until the equitable distribution hearing. Defendant also held, in his name, 272 shares of stock of Eagles Nest Mountain Estates, Inc. (Eagles Nest). In addition, defendant was a shareholder in a law firm on the date of separation.

In its order, the court: (a) classified the Camp Branch Road property as marital property having a net value of $177,725.00 and ordered it distributed to the defendant; (b) classified the Buie note as marital property with a net value of $23,000.00 and ordered it distributed to plaintiff; (c) classified the Eagles Nest stock as marital property with a net value of $50,000.00 and ordered it distributed to plaintiff; (d) classified defendant's share of the law practice as marital property with a net value of $35,000.00 and ordered it distributed to defendant; (e) classified the office building as marital property with a net value of $59,082.72 and ordered it distributed to plaintiff; and (f) classified

the Medford note as marital property with a net value of $21,441.72 and ordered it distributed to plaintiff. The court also found that defendant had appropriated the Medford note payments to his own use and ordered him to pay plaintiff $236.20 per month for 36 months beginning 1 November 1986 to reimburse plaintiff for the payments he collected.

From this order, defendant appeals.

Riddle, Kelly & Cagle, P.A., by Robert E. Riddle, for plaintiff-appellee.

Long, Parker, Payne & Warren, P.A., by Robert B. Long, Jr., and William A. Parker, for defendant-appellant.

MARTIN, Judge.

Defendant assigns error to the trial court's classification of the Camp Branch Road property, the office building, the Buie note and the Eagles Nest stock. He also assigns error to the valuation of his law practice and to the order that he repay plaintiff for the payments he collected under the Medford note after separation. Finally, defendant contends the trial court erred by distributing personal property listed in a handwritten memorandum signed by the parties, but not acknowledged before a certifying officer, in April 1984.

Defendant's first contention is that "[t]he court erred in failing to make appropriate findings of fact, conclusions of law, and orders that the defendant's separate inherited funds which were invested in the Camp Branch Road property and in the office building remained the separate property of the defendant." He also argues that "[t]he trial court erred by requiring the defendant to present clear, cogent and convincing evidence to rebut the presumption of gift utilized by the trial court in regard to the Camp Branch Road property [and] office building." We disagree.

It is true that there may be both marital and separate ownership interests in the same property. *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985). Our courts have adopted a source of funds approach to distinguish marital and separate contributions to a single asset. *Id.* Under the source of funds approach, each party retains as

separate property the amount he contributed to purchase the property plus passive appreciation in value. *Id.* Thus, defendant contends the contributions from his inherited funds to the purchase price of the home and office building remain his separate property. However, "where a spouse furnishing consideration from separate property causes property to be conveyed to the other spouse in the form of tenancy by the entireties, a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence." *McLeod v. McLeod*, 74 N.C. App. 144, 154, 327 S.E. 2d 910, 916-17, *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985). By placing title to the properties in both names as tenants by the entirety, defendant is presumed to have made a gift of his separate property to the marital estate.

[1] Defendant argues that the presumption of marital gift for entireties property is no longer valid in this State and that the court erred by requiring him to present clear, cogent, and convincing evidence that he intended to retain a separate interest in the property. Defendant cites *Johnson v. Johnson*, 317 N.C. 437, 346 S.E. 2d 430 (1986), and *Dunlap v. Dunlap*, 85 N.C. App. 324, 354 S.E. 2d 734 (1987) as authority for his position. In *Dunlap*, this Court stated that a footnote in *Johnson* overruled a presumption stated in *McLeod* that all property acquired by the parties during the marriage is marital property. *Id.* at 328, 354 S.E. 2d at 736. The issue before us, however, is not whether all the property acquired during the marriage is presumed to be marital property, but whether the use of separate property to acquire property, title to which is taken as tenants by the entirety, creates a presumption of a gift to the marital estate. As neither *Johnson* nor *Dunlap* disturbed the presumption on this issue stated in *McLeod*, we hold that the trial court properly applied the presumption of a gift to the marital estate in this case.

[2] Defendant next contends that if the trial court was correct in applying the presumption of gift to the marital estate and in requiring him to present clear, cogent, and convincing evidence to rebut the presumption, then the court erred in finding he had not met his burden of proof. Defendant presented evidence showing the source of his separate funds and their application to the Camp Branch Road property and the office building. He also elicited testimony from plaintiff that she did not want to be awarded any-

thing from defendant's inheritance. Whether defendant succeeded in rebutting the presumption of gift to the marital estate by clear, cogent, and convincing evidence is a matter left to the trial court's discretion. Defendant's evidence "may be clear and cogent, but evidently it was not convincing to the trial court." *Draughon v. Draughon*, 82 N.C. App. 738, 739, 347 S.E. 2d 871, 872 (1986), *cert. denied*, 319 N.C. 103, 353 S.E. 2d 107 (1987). There is some competent evidence to support the trial court's findings; therefore, its rulings will not be disturbed on appeal. *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E. 2d 100 (1986). These assignments of error are overruled.

[3] Defendant next contends the trial court erred in classifying the Buie note as marital property. He contends that even though both parties' names were on the note, the note remained his separate property. We agree with defendant that the Buie note is his separate property.

> The presumption of gift created by the holding in *McLeod* was limited in its application to real property acquired by both spouses, as tenants by the entirety, in exchange for the separate property of one of them. We decline to extend that presumption to jointly held personal property which is acquired in exchange for the separate property of one spouse, as to do so would seem to defeat the legislative intent of G.S. 50-20(b)(2).

Manes v. Harrison-Manes, 79 N.C. App. 170, 172, 338 S.E. 2d 815, 816 (1986). Separate property remains separate property when it is exchanged for other separate property unless the conveyance states a contrary intention. G.S. 50-20(b)(2). The record discloses no evidence of such a contrary intent with respect to the Buie note. Even though both names are on the note, that fact alone is not sufficient to show an intent to make a gift to the marital estate. *Manes, supra.* The Buie note, property acquired in exchange for defendant's separate property, remains his separate property. Thus, the court erred in distributing it as part of the equitable distribution order.

[4] Defendant next contends that the court erred by classifying the Eagles Nest stock as marital property. Defendant testified that the stock, issued in his name alone, was a gift from the corporation's president, Mr. Tom Daniels, who filed a gift tax return

with regard to the transfer. Defendant also testified that the stock was not given as payment for services to the corporation but that he continued to bill Eagles Nest for legal services. In his deposition, however, Mr. Daniels testified that while he did transfer the stock to defendant to involve defendant as an owner of the corporation, he expected defendant to be a local contact for the corporation and to perform managerial services. The corporation continued to pay defendant for his legal services, but defendant did not receive a managerial fee for his other services until he became an officer of the corporation. Mr. Daniels did not recall whether he filed a gift tax return with regard to the transfer of the stock. The court also found that both plaintiff and defendant visited the corporation's property "to check on the property and follow the progress of various developments" on the property. The evidence is sufficient to support the trial court's finding that the stock is marital property; therefore, its ruling will not be disturbed on appeal. *Lawing, supra.*

Defendant assigns as error the admission at trial of plaintiff's opinion that the value of defendant's professional association was "at least fifty thousand dollars" on the date of separation. He does not argue this assignment of error. Thus, it is deemed abandoned. App.R. 28.

[5] Defendant also assigns error to the admission of the opinion of plaintiff's witness, Foster Shriner, regarding the value of defendant's law practice. Mr. Shriner, received by the trial court as an expert, testified that the value of the professional association on the date of separation was $61,910.00. Defendant contends that this testimony should have been excluded as the witness did not "follow the prerequisites as set forth in *Poore v. Poore* in making a determination as to the value of this professional association." The requirement for the admissibility of an expert's opinion is that it "will assist the trier of fact to understand the evidence or to determine a fact in issue." G.S. 8C-1, Rule 702. The criteria set out in *Poore v. Poore*, 75 N.C. App. 414, 331 S.E. 2d 266, *disc. rev. denied*, 314 N.C. 543, 335 S.E. 2d 316 (1985), are factors for the court to consider in valuing the professional interest and are not criteria for admissibility of the expert's opinion. Mr. Shriner explained the methods used to reach his opinion of value, and defendant was free to, and did, cross-examine the witness regarding

the factors set out in *Poore*. We find no error in the admission of this evidence.

[6] Defendant also argues the court's valuation of the law practice at $35,000.00 is not supported by the evidence. "The task of the reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value of the . . . interest." *Poore v. Poore, supra* at 419, 331 S.E. 2d at 270. Defendant testified and offered the testimony of several local attorneys that the value of his law practice on the date of separation was around $9,000.00 to $12,000.00. Plaintiff's witness Shriner valued the practice at $61,910.00. He reached this valuation by valuing the practice's assets and using a "multiple of earnings" approach to arrive at his figure. Based on the figure supplied by Shriner, the trial court used a "return on investment" approach to compute a value for the practice. Assuming *arguendo* that the "return on investment" approach is an acceptable method of valuing a professional practice, there was no evidence before the court to support the rate of return used by the court in making its calculations or to indicate that such a method would yield an accurate valuation. Therefore we must vacate the court's findings with respect to the value of defendant's law practice.

Defendant next excepts to the trial court's finding of fact that he converted the money collected from the Medford note to his own use and assigns error to the court's order that he be required to repay plaintiff the amount collected. At trial, defendant testified he used the sums collected from the Medford note to pay bills, house payments, insurance and "anything I need money for I'll put it in the Camp Branch property." His testimony supports the court's finding that defendant used the money for his own purposes; that finding is, therefore, conclusive. *Lawing, supra.* In addition, the court's order that defendant repay plaintiff for the amounts collected is not an abuse of its discretion and, therefore, will not be disturbed. *See White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985).

[7] Defendant also assigns error to the trial court's failure to find that he had made all payments on the Camp Branch Road property from the date of separation and to its failure to credit him with the amount of those payments, which were made from his post-separation, and thus separate, property. *Hunt v. Hunt*, 85

N.C. App. 484, 355 S.E. 2d 519 (1987), requires the court to credit a former spouse "with at least the amount by which he decreased the principal owed" on marital debt by using his separate funds. *Id.* at 491, 355 S.E. 2d at 523. On remand, the court should enter an order crediting defendant with at least the amount by which he decreased the principal amount of the joint debt. *Id.*

[8] By his final assignment of error, defendant contends the trial court erred by ordering the distribution of personal property in a manner different than previously agreed in a handwritten memorandum. We disagree. G.S. 50-20(d) requires that written agreements between spouses distributing property must be "duly executed and acknowledged in accordance with . . . G.S. 52-10 and 52-10.1" in order to be binding on the parties. As the handwritten agreement was not acknowledged before a certifying officer as defined in G.S. 52-10(b), it was not binding upon the court and the court was free to distribute the property. This assignment of error is overruled.

For the reasons stated, the equitable distribution judgment entered in this case is vacated. This case is remanded for a new determination of the value of defendant's law practice, classification of the parties' property consistently with this opinion, and entry of an appropriate order distributing that property.

Vacated and remanded.

Chief Judge HEDRICK concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I concur in the majority's treatment of all but the "Camp Branch Road" property and buildings. I dissent from the majority's holding that defendant's use of his separate property to acquire the Camp Branch property and buildings "by the entirety" is presumed to be a "gift" to the marital estate. N.C.G.S. Sec. 50-20(b)(2) provides in part:

> Property acquired in exchange for separate property shall remain separate property *regardless of whether the title is in*

the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. [Emphasis added.]

There is only one reasonable reading of this provision: However acquired property is titled, the manner of titling does not itself affect the separate status of property acquired in exchange for separate property; *but* an acquisition of property with separate funds nevertheless *may* be considered marital property if such an intent is "expressly stated in the conveyance." To hold that titling property by the entirety *itself* constitutes the necessary express intent renders the statutory provision a *non sequitur.*

The source of the majority's erroneous notion of a "marital gift presumption" is *McLeod v. McLeod,* 74 N.C. App. 144, 327 S.E. 2d 910, *cert. denied,* 314 N.C. 331, 333 S.E. 2d 488 (1985). In construing the above-quoted provision of Section 50-20(b)(2), the *McLeod* court reasoned that the Legislature's addition of the "express contrary intent" exception embodies the common law analysis of *Mims v. Mims,* 305 N.C. 41, 286 S.E. 2d 779 (1982):

> Prior to *Mims* that provision read, 'property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both.' G.S. 50-20(b)(2) (1981). Given that language, the *Mims* court wrote 'it does appear . . . that in the context of a divorce and the 'equitable distribution' of all 'marital property' the Legislature has opted for a rule that where land or personalty is purchased with the 'separate property' of either spouse, it remains the 'separate property' of that spouse regardless of how the title is made.' *Mims,* 305 N.C. at 53, 286 S.E. 2d at 787. In apparent response to this reading of the statute as it was written, the Legislature amended the separate provision to state that property acquired in exchange for separate property shall remain so regardless of title 'and shall not be considered to be marital property *unless a contrary intention is expressly stated in the conveyance.*' [emphasis in original] [citation omitted]. . . . *Thus the legislature appears to have availed itself of the reasoning in Mims whereby when spouses title their real property without regard to the source of the consideration a gift will be presumed.* [Emphasis added.]

McLeod, 74 N.C. App. at 155-56, 286 S.E. 2d at 917-918 (quoting *Mims*, 305 N.C. at 53, 286 S.E. 2d at 787).

The *McLeod* construction of the statute in light of *Mims* is neither required by *Mims* itself nor permitted by the plain language of Section 50-20(b)(2). In order to incorporate the *Mims* result, the Legislature would have to completely delete that portion of the statute which states the manner of titling is irrelevant. The Legislature did not do this nor did it specifically "avail itself" of the *Mims* reasoning: Instead of creating a *presumption* of gift to the marital estate as in *Mims*, the Legislature instead provided a method by which a spouse could make such a gift by expressing the specific intent to confer a gift in the conveyance itself.

As its interpretation contravened the language of Section 50-20(b)(2), the *McLeod* court was also constrained to create an apparent exception to the "source-of-funds" analysis previously adopted by this court in *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260 (1985). *See McLeod*, 74 N.C. App. at 154, 327 S.E. 2d at 916-17 (explicitly adopting marital gift presumption rather than follow *Wade*). Given the *McLeod* court's explicit refusal to follow *Wade*, it is perplexing that the court subsequently stated that "the marital gift presumption follows *naturally* from this court's previous decisions in *Loeb* [citation omitted] *and Wade*. . . . In *Loeb* the Court held that property acquired during the marriage is *presumably* marital . . . ." *Id.* at 157, 327 S.E. 2d at 918 (citation omitted) (emphasis added).

More important, our Supreme Court has expressly overruled the basic presumption of marital property underlying both *Loeb* and *McLeod*. *See Johnson v. Johnson*, 317 N.C. 437, 454 n.4, 346 S.E. 2d 430, 440 n.4 (1986). While the *Johnson* Court did not, strictly speaking, specifically address the notion of a "marital gift" presumption, it expressly overruled the more basic presumption of marital property from which the *McLeod* court stated the "marital gift" presumption "follows naturally." *Cf. McLeod*, 74 N.C. App. at 157, 327 S.E. 2d at 918. Furthermore, the *Johnson* Court's favorable citation of *Wade* in its footnote clearly demonstrates its belief that the *Wade* "source-of-funds" analysis does *not* allow a "marital gift" *presumption*. 317 N.C. at 454 n.4, 346 S.E. 2d at 440 n.4 (in overruling the marital property pre-

sumption of *Loeb* and *McLeod*, the Court cited *Wade* as "contra" *Loeb* and *McLeod*).

I recognize that the provisions of Section 50-20(b)(2) also provide that "property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance." This provision may indeed "create a presumption that *gifts* between spouses are marital property." *McLeod*, 74 N.C. App. at 155, 327 S.E. 2d at 917 (emphasis added). However, the provision provides no support for the *McLeod* notion that simply "titling" property jointly creates a "gift" to the other spouse in the first place. Given the statutory provision that joint title is irrelevant to the classification of property acquired in exchange for separate property, the express "contrary" intent required by the statute is itself the vehicle by which a spouse may evidence the intent to confer a "gift" on the other spouse. The *McLeod* interpretation simply assumes its desired conclusion as a basic premise.

The illogic of *McLeod* is further revealed by the limitation of *McLeod* expressed in *Manes v. Harrison-Manes*, 79 N.C. App. 170, 338 S.E. 2d 815 (1986). The *Manes* court wisely declined to extend the *McLeod* presumption to jointly-held "personal" property "as to do so would seem to defeat the legislative intent of G.S. 50-20 (b)(2)." 79 N.C. App. at 172, 338 S.E. 2d at 816. However, there is no principled distinction which would justify treating real and personal property so differently under Section 50-20(b)(2). *Cf. Mims*, 305 N.C. at 53, 286 S.E. 2d at 787 (noting the statutory provision applies "where land or personalty is purchased with the separate property of either spouse"). It is not the extension of *McLeod*, but *McLeod* itself, which "defeat[s] the legislative intent of G.S. 50-20(b)(2)."

Defendant's counsel vigorously argued this court should overrule *McLeod* as a direct contravention of the specific provisions of Section 50-20(b)(2). In affirming the trial court's disposition of the Camp Branch property and buildings, the majority ignores counsel's arguments and the plain language of Section 50-20(b)(2). I accordingly dissent from the majority's affirmance of the trial court in this respect and would remand so that, under Section 50-20 (b)(2), *plaintiff*, not defendant, would be required to demonstrate the conveyance contains the express intent that the Camp Branch

property was acquired as a gift by defendant to the marital estate.

JOHN L. HALL v. EILEEN V. HALL

No. 8726DC443

(Filed 29 December 1987)

1. Divorce and Alimony § 30— equitable distribution—time of separation

The trial court's findings in an equitable distribution action were sufficient to support the court's conclusion that the parties separated on 26 December 1983 rather than in 1979 when plaintiff's employment was transferred to Boston, Mass., where the findings were to the effect that at all times prior to December 1983, the relationship between plaintiff and defendant was of such character as to give the appearance that they were husband and wife living together and that they held themselves out to be such.

2. Divorce and Alimony § 30— equitable distribution—employee stock options

Stock options granted to an employee by his or her employer which are exercisable upon the date of separation or which may not be cancelled and are thus vested as of the date of separation are marital property. Options which are not exercisable as of the date of separation and which may be lost as a result of events occurring thereafter and are thus not vested constitute separate property of the spouse for whom they may vest at some time in the future.

3. Divorce and Alimony § 30— expert valuation testimony

The trial court in an equitable distribution action did not err in ruling that a professor of economics was qualified to testify as an expert witness in valuing plaintiff's employee savings and investment plan, pension plan, and stock options, and in valuing the "human capital" or earning capacity of the parties.

4. Divorce and Alimony § 30— equitable distribution—valuation of limited partnership—sailboat as marital property—insufficient evidence

The evidence in an equitable distribution action did not support the trial court's valuation of a limited partnership tax shelter purchased by plaintiff husband. Furthermore, the court erred in including a sailboat valued at $17,000 in the marital property to be distributed to plaintiff where all discussions concerning the sailboat took place off the record.

5. Divorce and Alimony § 30— equitable distribution—equal division of marital assets

The facts found by the trial court did not compel an unequal division of the marital assets in defendant wife's favor, and the trial court did not abuse its discretion in concluding that an equal division was equitable.

APPEAL by plaintiff and cross-appeal by defendant from *Bissell, Judge.* Order entered 30 December 1986 in District Court, MECKLENBURG County. Heard in the Court of Appeals 29 October 1987.

Plaintiff and defendant were married in 1960. In May 1985, Mr. Hall brought this action for absolute divorce on the ground of one year's separation, alleging in his complaint that the parties had lived separately since the summer of 1979. In her answer Mrs. Hall alleged that the parties had separated in December 1983. She asserted counterclaims seeking alimony and equitable distribution of the marital property. A judgment of absolute divorce was entered 5 August 1985. Defendant's claim for equitable distribution was heard in August 1986 and on 30 December 1986 the trial court entered an order providing for distribution of the parties' marital property. Both parties appeal.

Mark A. Michael and Tharrington, Smith & Hargrove, by Carlyn G. Poole, for plaintiff-appellant, cross-appellee.

Myers, Hulse & Brown, by R. Kent Brown, for defendant-appellee, cross-appellant.

MARTIN, Judge.

In his appeal plaintiff contends the court erred: (a) in determining the date of the parties' separation; (b) by classifying certain stock options held by the plaintiff as marital property; (c) by the manner in which it directed that such stock options be distributed; (d) by permitting a witness offered by defendant to give expert valuation testimony; and (e) by classifying a sailboat as marital property. By her cross-appeal defendant contends the court erred and abused its discretion by ordering an equal division of the marital assets. For the reasons which follow, we find error in the trial court's classification and distribution of the parties' property and remand this case for additional proceedings in accordance with law.

Plaintiff's Appeal

[1] Plaintiff first contends the court erred in concluding that the parties separated on 26 December 1983, thereby establishing that date as the date upon which the marital property was to be val-

ued. He argues that the court should have found that the parties separated in 1979. We disagree.

The trial court, in a portion of the judgment designated Findings of Facts, concluded that the parties separated on 26 December 1983. Generally, findings of fact are binding and conclusive on appeal if supported by any competent evidence; however, if the court's determination is a mixture of findings of fact and conclusions of law, the determination is itself reviewable by the appellate courts. *Jones v. Andy Griffith Products, Inc.*, 35 N.C. App. 170, 241 S.E. 2d 140, *disc. rev. denied*, 295 N.C. 90, 244 S.E. 2d 258 (1978). In this case the finding regarding the date of separation is a mixed finding and conclusion because it involves the application of a legal principle to a determination of facts. Therefore, we must determine whether facts otherwise found by the trial court are sufficient to support its legal determination that separation occurred on 26 December 1983.

> Separation, as this word is used in the divorce statutes, implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together. For the purpose of obtaining a divorce under . . . G.S. 50-6, separation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase.

Young v. Young, 225 N.C. 340, 344, 34 S.E. 2d 154, 157 (1945). The same test for determining the date of separation is applicable under the equitable distribution statutes, G.S. 50-20 *et seq.* The Court made the following findings of fact relevant to the issue of when separation occurred:

> (a) That in November, 1978, Plaintiff received a job promotion and transfer to Boston, Massachusetts. That Plaintiff moved to Boston, Massachusetts where he shared an apartment furnished by his employer with several co-workers. At the time of the transfer, Plaintiff, Defendant and the minor children, three of which were in public school resided in Charlotte, North Carolina and it was decided that Defendant

and the minor children should remain in Charlotte, North Carolina until the end of that school year. That in early 1979 Plaintiff initiated discussions concerning separation from Defendant and Defendant retained the services of an attorney to write a letter to Plaintiff concerning his financial responsibilities should the parties separate. That in response to said letter Plaintiff called Defendant and advised her to terminate the services of her attorney as they were not going to separate. That thereafter, Defendant did terminate the services of her attorney and did not seek further legal counsel until November or December, 1983. That subsequent to the conversation concerning her termination of the services of her lawyer, the subject of separation was not mentioned until November, 1983, up to which time the family relationship had returned to the same status as had existed prior to Plaintiff's transfer to Boston, Massachusetts.

(b) That in late spring or early summer, 1979, Plaintiff and Defendant began discussing the move of the family to Boston, Massachusetts. That in the summer of 1979, Plaintiff returned to his home in Charlotte to assist his wife and two of the children fly [sic] to the Boston area to look at homes. That while in Boston, on one night Plaintiff and Defendant occupied the same hotel room and the children occupied a second hotel room.

(c) That while in Boston, Massachusetts, Plaintiff and Defendant, along with their children, looked at a number of homes to purchase [sic], however, did not decide on a particular home.

(d) That during the fall of 1979, the family home located in Charlotte was placed on the market for sale but did not sell as the real estate market was severely depressed.

(e) That Thanksgiving and Christmas, 1979, Plaintiff returned to the Charlotte home and resided with his family over the holidays and at no time did he mention wishing to separate from Defendant.

(f) That for the year 1979, Plaintiff and Defendant filed a joint tax return wherein Plaintiff listed his home address to be the same as Defendant's.

(g) That in or about March, 1980, Plaintiff and Defendant again discussed moving to Boston, Massachusetts. At that time, Plaintiff advised Defendant that he felt it was in the best interest of the children that they finish high school in Charlotte and that it would be prohibitively expensive for the family to move to Boston based on the cost of living in that area.

(h) That during the summer of 1980, Plaintiff, Defendant and three of the children went to the North Carolina coast for a family vacation for approximately five days.

(i) That Plaintiff returned to the home in Charlotte, North Carolina several times during the year and at both Thanksgiving and Christmas in 1980. During the year 1980, Plaintiff purchased for the home and use in the home a sofa, loveseat, reclining chair [sic], five seats to go around a den table at a cost of over $2,000.00. During the Christmas season of 1980, Plaintiff painted the exterior of the family home. On each of these occasions Plaintiff stayed in the home occupying the same bedroom (but a separate bedroom from Defendant) as he had occupied before his move to Boston. At no time did Plaintiff mention to Defendant during the year 1980 his desire to separate from her or his contention that he was already separated from her.

(j) During the year 1981, Plaintiff returned to the home in Charlotte on several occasions during the year plus at Thanksgiving and Christmas. On each of these occasions Plaintiff stayed within the home occupying the same bedroom as he had occupied before his move to Boston. At no time did Plaintiff mention to Defendant during the year 1981 his desire to separate from her or his contention that he was already separated from her.

(k) That in the year 1982, Plaintiff returned to the home in Charlotte on several weekends plus for his son's graduation in June, 1982 and at Thanksgiving and Christmas. At Thanksgiving, 1982, Plaintiff was wearing his wedding band which he had not worn in a number of years. On each of these occasions Plaintiff stayed within the home occupying the same bedroom as he had occupied before his move to Boston. During the year 1982, Plaintiff further expended the

sum of $725.00 to paint the inside of the family home located in Charlotte. At no time did Plaintiff mention to Defendant during the year 1982 his desire to separate from her or his contention that he was already separated from her.

(l) During the year 1983, Plaintiff returned to the Charlotte residence on a number of occasions and resided therein including Thanksgiving and Christmas. That Plaintiff has not resided within the family residence since December 26, 1983. On the occasions during 1983 when he stayed within the home he occupied the same bedroom as he had occupied before his move to Boston. That at no time did Plaintiff mention to Defendant up until November, 1983, his desire to separate from her or his contention that he was already separated from her.

(m) That Plaintiff wrote Defendant on a number of occasions between the time he was transferred to Boston and December 26, 1983 and on all occasions addressed the envelope as [sic] "Mrs. J. L. Hall." That Defendant has introduced into evidence eleven such envelopes. That subsequent to December 26, 1983, when Plaintiff wrote Defendant he addressed the envelopes [sic] "E. V. Hall" thus deleting "Mrs." That Defendant has introduced eighteen such envelopes.

(n) That between the time Plaintiff moved to Boston and December 26, 1983, Plaintiff regularly used the charge accounts in both names and billed to the family address. Said items include items purchased for Plaintiff's personal consumption and for family use. These bills were paid by Defendant with monies provided to her by Plaintiff.

(o) That on or about March 12, 1980, Plaintiff purchased a vehicle from Carolina AMC Jeep Renault, Inc. [sic] at which time the purchase order and invoice were prepared showing his home address to be 7435 Pine Lake Lane, Charlotte, North Carolina, that being the family home address. That Plaintiff signed said order and invoice.

(p) That after his move to Boston and before December 26, 1983, Plaintiff wrote Defendant on a number of occasions and on a number of these occasions said he would be traveling "home" at some point in the future, said reference being

to the 7435 Pine Lake Lane, Charlotte, North Carolina address. That Defendant has introduced into evidence letters written by Plaintiff to Defendant during the time-frame in which he referenced the Charlotte address as his "home."

(q) That Plaintiff listed his home address as being located at 7435 Pine Lake Lane, Charlotte, North Carolina, up through the year 1982 on his automobile insurance policy.

(r) That in the year 1983, Defendant received a Christmas card addressed to Mr. and Mrs. J. L. Hall, 7435 Pine Lake Lane, Charlotte, North Carolina from Ben and Betty Chreitzberg. That on said Christmas card a personal note was written to Plaintiff which read as follows: "Thanks for your help in 1983!" signed Ben. That Ben Chreitzberg was Plaintiff's roommate in the Boston area the entire year of 1983. The card makes no mention of the parties being separated [sic], it is addressed to both parties and mailed to the home address in Charlotte, North Carolina. That said Christmas card was introduced into evidence by Defendant.

(s) That in or about March, 1981, Plaintiff rented a car through National Car Rentals in Fayetteville, North Carolina and indicated on the rental slip his home address was 5435 [sic] Pine Lake Lane, Charlotte, North Carolina. Additionally, upon said rental, Plaintiff received a number of S & H Green Stamps which he mailed to Defendant herein.

(t) That Mrs. Mildred Triplett testified she was close friends with Defendant herein and was a down-the-street neighbor. That she and Defendant went on walks together on a regular basis between 1979 and 1983 and at no time up until November, 1983, did Defendant ever mention Plaintiff's desire to separate or that the parties were separated. That in November, 1983, Defendant advised Mrs. Triplett that she had received a letter from Plaintiff indicating his desire to separate. That Mrs. Triplett described Defendant's reaction as being devastated, could not sleep or eat and was extremely surprised by Plaintiff's request.

(u) That Mrs. Nancy Smott testified for Defendant that she was a neighbor of Plaintiff and Defendant's and had known them since 1977. That she had seen or spoken with

Defendant on a daily basis from 1980 up through 1983. That at no time during this time frame did Defendant mention that she considered herself separated or unmarried. That during this time frame, this witness observed Plaintiff and Defendant together at their son's graduation where they sat as a family unit.

(v) That both Nancy Smott and Mrs. Triplett testified in their opinion [sic], based on their observations of the family, discussions with Defendant, observations of the home, observations of Plaintiff and the family when he was at the home, that the relationship existing between Plaintiff and Defendant and the manner in which they held themselves out to the public did not change until after December 26, 1983 when Plaintiff no longer returned home.

(w) That Jeff Hall, son of Plaintiff and Defendant, testified that he helped his mother obtain a lawyer in 1979 as above referenced and further overheard the telephone conversation above-referenced wherein Plaintiff told Defendant to terminate the services of the lawyer. That subsequent to that event, the relationship between Plaintiff and Defendant was as it had been preceding Plaintiff's move to Boston and at no time was there any mention to him by either Plaintiff or Defendant of their being separated. That subsequent to Plaintiff moving to Boston, he regularly returned home and interacted with the family as he always had. He regularly referred to the Charlotte property as his "home." That in November, 1983, Defendant herein called Jeff Hall at N.C. State University where he was in school and advised him of the letter she had received from Plaintiff requesting a separation. At that time Defendant was extremely upset and surprised.

(x) That Michael Hall, son of Plaintiff and Defendant, testified for Defendant herein. That there were no discussions concerning separation in his presence, nor did Plaintiff and Defendant interact after January, 1979, in any different manner than before the year 1979. That the first time he became aware of any intent to separate was in November, 1983.

(y) That Plaintiff testified it was his intent to permanently separate from Defendant in 1978 at the time of his move to

Boston and at no time did he intend to resume the marital relationship with Defendant herein. That Plaintiff only visited the family on the above-described occasions when he was in Charlotte on business trips except for Thanksgiving, Christmas and his son's graduation and the other visits were for the purposes of visiting the children and not maintaining a marital relationship. That Plaintiff and Defendant had not had sexual intercourse since 1978 and slept in separate bedrooms since about the same time.

Each of these findings is supported by some competent evidence in the record; therefore, they are binding on appeal. *See Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E. 2d 100 (1986). The court's findings indicate that at all times prior to December 1983 the relationship between plaintiff and defendant was of such a character as to give the appearance that they were husband and wife living together and that they held themselves out to be such. These findings are sufficient to support the conclusion that separation, as that term is defined by case law, did not occur until 26 December 1983.

Plaintiff also argues the court erred in basing its conclusion in part upon the opinions of Nancy Smott, Mildred Triplett and the couple's two sons with respect to the date of the parties' separation. Even if the court erred in finding facts based upon the opinions of these witnesses, plaintiff has not been prejudiced because the other findings of fact quoted above are sufficient to support the court's conclusion. Therefore, the conclusion will not be disturbed. *See Wachovia Bank v. Bounous*, 53 N.C. App. 700, 281 S.E. 2d 712 (1981).

[2] Defendant next contends that the court erred in its classification of certain options to purchase shares of Colgate-Palmolive stock at set prices which plaintiff had been granted by his employer. We agree. According to the court's findings, on 8 March 1979, plaintiff was granted options to purchase 1,500 shares. These options were exercisable as follows: 500 shares on 8 March 1981, 500 shares on 8 March 1983 and 500 shares on 8 March 1985. As of the date of separation, plaintiff could have exercised his options to purchase 1,000 shares of stock. On 12 March 1981, plaintiff was granted options to purchase 1,200 additional shares. As of the date of separation plaintiff could exercise his options to pur-

chase 400 shares of this stock. The remainder of the option was exercisable in two equal parts in March 1985 and March 1987. On 28 April 1982, plaintiff received options to purchase an additional 1,500 shares of stock. Plaintiff could not exercise any part of these options as of the date of separation; the option became exercisable in three equal parts in April 1984, April 1986, and April 1988. In March 1983, plaintiff received options to purchase 1,200 shares of stock. These options became exercisable in three equal parts in March 1985, March 1987 and March 1989. The stock options which were not yet exercisable were subject to cancellation if the plaintiff was terminated for cause and only those which were vested were exercisable for limited periods of time in the event plaintiff voluntarily left the company for reasons other than retirement, disability or death. In sum, plaintiff had been granted options to purchase 5,400 shares of stock; however, as of the date of separation, he had a vested right to exercise options to purchase only 1,400 shares. As of the date of trial, plaintiff had not exercised options to purchase any of the stock.

The trial judge classified the stock options for all 5,400 shares as marital property but stated that she was unable to determine the value of the options. Plaintiff was ordered to exercise all the options; "one-half of any and all amounts of profit realized by Plaintiff in the exercise of any of the options . . . [including] amounts realized by direct stock purchase at option price and resale, or the exercise of Stock Appreciation Units or Equity Units and . . . exclusive of any tax implications" was placed in a constructive trust for defendant. The court allowed brokerage commissions to be deducted.

Plaintiff contends that none of the options are marital property since none had been exercised as of the date of the parties' separation. Alternatively, he contends that, at most, only the options for 1,400 shares which were exercisable on the date of separation should be classified as marital property. While we reject the first contention, we agree with the latter.

The classification and distribution of employee stock options under our equitable distribution statutes is an issue of first impression in this jurisdiction. Other jurisdictions have treated employee stock options in various ways. *See, e.g., Richardson v. Richardson*, 280 Ark. 498, 659 S.W. 2d 510 (1983) (unexercised

stock options obtained during marriage are marital property); *In re Marriage of Moody*, 119 Ill. App. 3d 1043, 75 Ill. Dec. 581, 457 N.E. 2d 1023 (1983) (stock options which had not been exercised were not marital property); *Callahan v. Callahan*, 142 N.J. Super. 325, 361 A. 2d 561 (1976) (stock options granted by employer were a form of compensation and constituted marital property). We believe that the approach most consistent with North Carolina's equitable distribution statutes is to classify stock options granted an employee by his or her employer which are exercisable upon the date of separation or which may not be cancelled, and which may, therefore, be said to be vested as of the date of separation, as marital property. Options which are not exercisable as of the date of separation and which may be lost as a result of events occurring thereafter, and are, therefore, not vested, should be treated as the separate property of the spouse for whom they may, depending upon circumstances, vest at some time in the future. In our view, this rule more closely recognizes the purpose of stock options granted an employee which are designed so that they vest and become exercisable over a period of time; such options represent both compensation for the employee's past services and incentives for the employee to continue in his employment in the future. Those options which have already vested are clearly rewards for past service rendered during the marriage, and, therefore, are marital property; options not yet vested are in essence, an expectation of a future right contingent upon continued service and should be considered separate property. *See* G.S. 50-20(b)(2); *Johnson v. Johnson*, 74 N.C. App. 593, 328 S.E. 2d 876 (1985) (expectation of nonvested pension or retirement rights considered separate property).

Accordingly, we hold that the trial court erred by classifying all of the stock options as marital property; only options for the purchase of 1,400 shares should have been so classified, with the balance classified as plaintiff's separate property. Moreover, since the value of those options which were exercisable on the date of the parties' separation may be easily ascertained, the trial court must determine their value as provided by G.S. 50-21(b) and provide for their distribution in a manner approved by G.S. 50-20.

[3] Plaintiff next contends that the court erred in permitting defendant's witness, Dr. J. C. Poindexter, to testify as an expert witness in four areas: valuing plaintiff's employee savings and in-

vestment plan, valuing his employee pension plan, valuing the stock options, and valuing the "human capital" or earning capacity of the parties. Plaintiff contends that Dr. Poindexter was not properly qualified as an expert. We disagree.

"The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer." *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 75 N.C. App. 201, 230, 331 S.E. 2d 124, 144, *disc. rev. denied*, 314 N.C. 547, 335 S.E. 2d 319 (1985). Dr. Poindexter testified that he is an Associate Professor of Economics in Business at North Carolina State University in Raleigh. He holds a Bachelor of Science degree in Mechanical Engineering from the University of Virginia and a Ph.D. degree in Economics from the University of North Carolina at Chapel Hill. He teaches a course on the techniques of present value calculations and has authored or co-authored three or four textbooks and six to ten journal articles using the same skills and techniques used to value the assets at trial. Further, Dr. Poindexter explained the techniques which he used to value each asset as he rendered his opinions. This evidence is sufficient to permit a finding that, by reason of his specialized knowledge, Dr. Poindexter was in a position to assist the court, as fact finder, in determining relevant facts, i.e., the value of certain marital assets. Thus, we find no abuse of discretion in the trial court's ruling permitting Dr. Poindexter to testify as an expert witness.

[4] Plaintiff also assigns error to the trial court's valuation of a limited partnership tax shelter which he had purchased from Equity Programs Investment Corporation in 1982. The total cost of the partnership interest was $37,250.00. The court valued the interest at $43,000.00. We find no evidence in the record to support such a valuation; it is, therefore, error and vacated.

Plaintiff also contends the court erred by including a sailboat, valued at $17,000.00, in the marital property to be distributed to him. He argues that there is neither evidence nor a finding of fact to support the classification of the sailboat as marital property or its valuation. Defendant concedes that all discussions concerning the sailboat took place off the record and that the findings of fact in the trial court's order do not support its disposition of this asset. Accordingly, the court's valuation and distribution of the sailboat must also be vacated.

Defendant's Appeal

[5] Defendant assigns error to the trial court's conclusion that "an equal division of the marital assets is equitable." Defendant contends the facts found by the trial court compel an unequal division in her favor. We disagree.

G.S. 50-20(c) lists twelve factors the court must consider in determining whether an equal division is equitable. "[T]he statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* 'unless the court determines that an equal division is not equitable.'" *White v. White*, 312 N.C. 770, 776, 324 S.E. 2d 829, 832 (1985), *quoting* G.S. 50-20(c) (emphasis in original). "When evidence tending to show that an equal division of marital property would not be equitable is admitted, however, the trial court must exercise its discretion in assigning the weight each factor should receive in any given case." *Id.* at 777, 324 S.E. 2d at 833. The trial court's ruling may be overturned by the appellate court only if there is a clear abuse of discretion indicating the ruling "was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 777, 324 S.E. 2d at 833.

The burden is on the party seeking an unequal division of marital assets to prove by a preponderance of the evidence that an equal division is not equitable. *Id.* The trial court examined the factors of G.S. 50-20(c) and concluded that an equal division is equitable. We find no abuse of discretion in that conclusion. However, in view of our decision that this case must be remanded for further proceedings in order that the parties' property may be properly classified and valued, we hasten to add that our holding with respect to the issue raised by defendant's appeal should not be construed as the law of the case and binding on the trial court in making its new determination as to an appropriate disposition of the parties' property. Upon remand, the court must decide *de novo* the manner in which the marital property should be divided, including a determination of whether equal distribution is equitable.

Conclusion

We find no error in the trial court's determination of the date of the parties' separation and affirm its decision with respect

thereto. For errors in the classification, valuation and distribution of the parties' property, however, we must vacate the order of distribution and remand this case in order that the parties' property may be classified consistently with this opinion and valued and distributed according to law.

Affirmed in part, vacated in part, and remanded.

Judges EAGLES and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 22 DECEMBER 1987

AIKENS v. OTTAWAY No. 875DC639	New Hanover (82CVD1892)	Reversed and Remanded
AMIRAN CORP. v. BOONE ART No. 8724SC328	Watauga (85CVS582)	Affirmed
ARMSTRONG v. TOWN OF BEAUFORT No. 873SC734	Carteret (86CVS59)	Affirmed
BANDER v. FISHER No. 8710SC395	Wake (85CVS6788)	Reversed
BENNETT v. GORGE VIEW No. 8724SC772	Watauga (86CVS297)	Affirmed
DEPT. OF TRANSPORTATION v. WILLIAMSON No. 8713SC532	Brunswick (83CVS480) (83CVS484)	Dismissed
DIXON v. DIXON No. 874DC801	Onslow (85CVD984)	Vacated and Remanded
EM INVESTMENT v. DUNN MOTEL No. 8726SC796	Mecklenburg (86CVS8301)	Dismissed
GREAT AMERICAN INS. CO. v. BAILEY No. 8728SC517	Buncombe (83CVS3253)	Affirmed
HENSLEY v. INTEGON GENERAL INS. CORP. No. 8725SC785	Caldwell (86CVS543)	Affirmed
HIGH v. FERGUSON No. 8714SC662	Durham (84CVS1962)	No error in part; vacated in part
HOFFMAN v. COMPUTER TEXTUAL SERVICES, INC. No. 8715SC510	Orange (86CVS869)	Affirmed
HOKE v. NCNB No. 8726SC751	Mecklenburg (85CVS4980)	Affirmed
HUFFMAN v. VESTAL No. 8721DC493	Forsyth (76CVD3272)	Affirmed
IN RE EVANS No. 877DC918	Wilson (87J71)	Reversed

IN RE FORECLOSURE OF BEAN No. 8713SC817	Brunswick (85SP162)	Affirmed
IN RE PATRICK No. 878DC779	Lenoir (85J35) (85J36)	Affirmed
JERRETT v. CECIL KING TRUCKING No. 8720DC749	Moore (82CVD413)	Affirmed
MOSER v. MOSER No. 8719DC808	Randolph (86CVD743)	Reversed and Remanded
PARDUE v. PARDUE No. 8717DC389	Surry (85CVD653)	Affirmed
SCOTT D/B/A SCOTT PLUMBING v. WILLIAMS No. 872DC921	Beaufort (85CVD409)	Affirmed
SMART v. EQUITABLE LIFE INS. SOCIETY OF U.S. No. 8721SC86	Forsyth (85CVS4715)	Vacated and Remanded
STATE v. BLAKE No. 8714SC733	Durham (86CRS34352)	Affirmed
STATE v. BROWN No. 8730SC737	Jackson (86CRS2142) (86CRS2143) (86CRS2144) (86CRS2145)	No Error
STATE v. BYRD No. 873SC766	Pitt (86CRS05306) (86CRS23931) (86CRS23932) (86CRS23933)	Affirmed
STATE v. CHRISTIAN No. 8718SC795	Guilford (86CRS25208) (86CRS25209) (86CRS25210) (86CRS25211) (86CRS25212) (86CRS25213) (85CRS55390) (85CRS76251) (85CRS76542) (85CRS76543) (85CRS76544) (85CRS76546) (85CRS60686)	Affirmed

STATE v. CULBRETH No. 8726SC831	Mecklenburg (87CRS4094) (87CRS4095)	Affirmed
STATE v. DAVIS No. 8713SC712	Bladen (86CRS0851) (86CRS0852)	No Error
STATE v. FOXX No. 8726SC717	Mecklenburg (86CRS44929)	No Error
STATE v. GADISON No. 8721SC554	Forsyth (86CRS38006)	No Error
STATE v. HIGGS No. 879SC724	Person (86CRS3813) (86CRS3814) (86CRS3815) (86CRS3816) (86CRS3817)	No Error
STATE v. JACOBS No. 8716SC377	Robeson (84CRS8920)	Appeal Dismissed
STATE v. JONES No. 8710SC825	Wake (85CRS63378) (86CRS84011)	No Error
STATE v. JONES No. 8726SC759	Mecklenburg (86CRS63098) (86CRS63099) (87CRS1399)	No Error
STATE v. JONES No. 8726SC791	Mecklenburg (86CRS83246)	No Error
STATE v. LITTLEJOHN No. 8727SC827	Cleveland (87CRS1982)	No Error
STATE v. LOWERY No. 8716SC771	Robeson (86CR21442) (86CR21443)	No Error
STATE v. MATTHEWS No. 876SC773	Halifax (86CRS11376)	Appeal Dismissed
STATE v. SOLOMAN No. 8711SC617	Johnston (86CRS2837) (86CRS2838)	No Error
STATE v. THREATT No. 874SC870	Onslow (86CRS19978)	No Error
STATE v. WOODRING No. 8725SC836	Caldwell (86CRS8608)	No Error

STATE v. WOODY No. 8728SC675	Buncombe (86CRS23188)	No Error
SURRATT v. SURRATT No. 8718DC520	Guilford (84CVD372)	Affirmed
TWO WAY RADIO SERVICE v. TWO WAY RADIO OF CAROLINA No. 8720DC334	Stanly (86CVD245)	Affirmed
VORBECK v. BARNETT No. 8730DC711	Cherokee (86CVD108)	New Trial

OLYMPIC PRODUCTS COMPANY, A DIVISION OF CONE MILLS CORPORATION, PLAINTIFF v. ROOF SYSTEMS, INC., CARLISLE CORPORATION, D/B/A CARLISLE TIRE & RUBBER COMPANY, CAROLINA STEEL CORPORATION, AND CRAVEN STEEL, INC., DEFENDANTS, AND CAROLINA STEEL CORPORATION, THIRD-PARTY PLAINTIFF v. CARLOS M. SUAREZ, T/A AND D/B/A CARLOS M. SUAREZ AND ASSOCIATES, THIRD-PARTY DEFENDANT

No. 8618SC1292

(Filed 5 January 1988)

1. **Negligence § 2; Contracts § 15— failure of roof—privity of contract between roofing manufacturer and building owner—not required**

In a negligence action arising from the collapse of a roof, the building owner need not prove privity of contract with the manufacturer of the roof membrane in order to prove that the manufacturer owed it a duty.

2. **Negligence § 2; Evidence § 29.2— collapse of roof—negligence—admissibility of contract with third-party roof manufacturer**

In a negligence action resulting from the collapse of a roof caused by an improperly installed drain opening, a contract between the manufacturer of the roof membrane (Carlisle) and the installer of the membrane (Roof Systems) was admissible because the parties had authenticated the document under N.C.G.S. § 8C-1, Rule 901(a) by stipulating before trial that the document was genuine. The document was material in that the existence of a contract is a relevant factor in a negligence action to the extent that it shows the relationship of the parties and the nature and extent of the duty of care.

3. **Negligence § 29.1— reroofing—clogged drain—collapse of roof—liability of manufacturer**

In a negligence action arising from the collapse of a roof due to a partially blocked drain after reroofing where the roof membrane was manufactured by Carlisle and installed by Roof Systems on Olympic's building, the evidence viewed in the light most favorable to Olympic was sufficient to demonstrate that Carlisle breached its duty to Olympic to inspect the roof and report to Olympic any variations from Carlisle's specifications and, since the drains would not have been restricted if the drain openings had complied with Carlisle's specifications and the roof would not have collapsed but for the drain restrictions, the evidence was also sufficient to show that Carlisle's failure to report the lack of compliance was a proximate cause of Olympic's injury. Even though Olympic knew of the condition of the drain openings prior to the collapse of its building, it did not know that the drain openings did not comply with Carlisle's specifications, the building code, or the standard of roofing contractors in general.

4. **Negligence § 7— collapse of roof—willful or wanton negligence by installer of roof membrane—summary judgment for defendant**

In an action resulting from the collapse of a roof due to blocked roof drains, the trial court did not err by granting summary judgment for defend-

ant Roof Systems on plaintiff's claim for willful and wanton negligence where there was no genuine dispute as to the relevant evidence; no one employed by Roof Systems was aware of the building's noncompliance with the building code; the inspector for the roof membrane manufacturer had approved the roof installation a few days before the collapse; and, even if Roof Systems had the duty to check the building's compliance with the building code, the failure to check the code does not indicate a reckless indifference which rises to the level of willful or wanton negligence.

5. Negligence §§ 13.1, 1.3— collapse of roof—contributory negligence—violation of building code

The building code imposes liability on any person who constructs, supervises construction, or designs a building or alteration thereto and violates the code such that the violation proximately causes injury or damage; in addition, if a building owner knows or has reason to know of a building code violation and fails to take reasonable steps to remedy the violation, he may be found liable if the violation proximately causes injury or damage.

6. Negligence § 35.2— collapse of roof—no contributory negligence by building owner

In an action arising from a collapsed roof due to partially blocked drains, the trial court erred by granting a directed verdict for defendant based on the actions of plaintiff building owner's v.p. in charge of engineering when the evidence, viewed in the light most favorable to plaintiff, was not sufficient to show that the v.p. designed, constructed or supervised the reroofing project. The v.p. delegated the task to others rather than taking an active role himself; there was insufficient evidence that the v.p. knew or should have known of the structural inadequacy of the roof either before or after the new roof was installed; and the evidence tended to show that the v.p. was at least implicitly assured by the roofing consultant that the load bearing capacity of the roof was adequate for the new roof.

7. Negligence § 34.2; Principal and Agent § 1— collapse of roof—negligence of roofing consultant—not attributed to building owner

In an action arising from the collapse of a roof due to blocked drains after reroofing, a directed verdict for defendant based on plaintiff building owner's negligence through a roofing consultant was erroneous where the evidence was sufficient for the jury to have found that the building owner did not have the right to control the details of the roofing consultant's work; the roofing consultant, Suarez, was engaged in the independent business of roofing consultant and was hired for his knowledge and experience in that area; he was paid a flat fee for drafting plans and by the hour for supervising and inspecting roofing work; there were no deductions for taxes or employee benefits; there was no evidence of Suarez's power to enter contracts on behalf of the building owner; and the extent of his supervisory authority over the roofing company was not clear. Reasonable men could differ on the inferences to be drawn from the evidence.

8. Negligence § 35.2— collapsed roof—contributory negligence in hiring of roofing consultant—directed verdict inappropriate

In an action arising from a collapsed roof, a directed verdict against plaintiff building owner on the grounds of contributory negligence in that plaintiff's reliance on a roofing consultant was not reasonable was not proper where the evidence was sufficient to show that plaintiff's reliance on the consultant was reasonable given the investigation plaintiff made into the consultant's background as well as the consultant's work in drafting the reroofing plans, securing the bids, and helping draft the contract between plaintiff and the roofing contractor.

9. Negligence § 35.2— collapse of roof—failure to follow general engineering principles—no contributory negligence

Plaintiff was not contributorily negligent in having its building reroofed in that it did not have a structural engineer investigate the building for structural weaknesses because the evidence was sufficient to show that this duty, assuming there was one, was delegated to a roofing consultant, and this violation could not be imputed to plaintiff unless it could be shown that the consultant was acting as plaintiff's servant or agent.

10. Negligence § 35.2— collapse of roof—knowledge of condition of roof—no contributory negligence

The trial court erred by directing a verdict for defendant in an action resulting from the collapse of a roof based on plaintiff building owner's failure to act to correct any negligence of a roofing contractor in that plaintiff knew or should have known of the condition of the roofing installation where the evidence revealed that, when plaintiff discovered the problem with the roof drains, the roofing consultant was called and asked to contact the roofing contractor to have them send an employee to check on the drain.

11. Negligence § 5.2— collapse of roof—duty to ascertain whether building would support new roof—reroofing not intrinsically dangerous

In an action resulting from the collapse of a roof after a reroofing project, plaintiff building owner was not under a nondelegable duty to check the roof support because reroofing a building is not within the purview of intrinsically dangerous or especially hazardous work.

12. Negligence § 19— collapsed roof—negligence of one agent not imputed to principal in action against other agent

Where a building owner brought an action against a roofing consultant and the roofing contractor after its roof collapsed, the agents were not allowed to implead the negligence of each other to bar the principal's claim against them under the doctrine of imputed contributory negligence.

APPEAL by plaintiff from *Lake, Judge*. Judgment entered 16 September 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 April 1987.

Smith Helms Mulliss & Moore, by Vance Barron, Jr., and Jonathan Berkelhammer, for plaintiff-appellant Olympic Products Company, a division of Cone Mills Corporation.

Henson Henson Bayliss & Coates, by Perry C. Henson and Jack B. Bayliss, Jr., for defendant-appellee Roof Systems, Inc.

Womble Carlyle Sandridge & Rice, by Keith A. Clinard and Timothy G. Barber, for defendant-appellee Carlisle Corporation d/b/a Carlisle Tire and Rubber Company.

GREENE, Judge.

This is a civil action filed by plaintiff, Olympic Products (hereinafter "Olympic"), seeking damages in the amount of $501,124.66 and loss of profits in the amount of $93,670.70. Plaintiff's claims for relief are founded on the alleged negligence of defendant Carlisle Corporation (hereinafter "Carlisle") and the alleged negligence and wanton negligence of defendant Roof Systems, Inc. (hereinafter "Roof Systems"). Defendants filed answers denying any negligence and alleging plaintiff's contributory negligence. In reply, plaintiff denied contributory negligence and alleged defendants had the last clear chance to avoid the damage.

Defendants filed motions for summary judgment and the trial court entered summary judgment in favor of defendant Roof Systems on plaintiff's claim for wanton negligence. At the close of plaintiff's case, the trial court granted Carlisle's motion for directed verdict as to all of plaintiff's claims. The trial court also allowed Roof Systems' motion for directed verdict on the issues of contributory negligence and last clear chance. Plaintiff appeals from the summary judgment and the order for directed verdicts.

Plaintiff's evidence tended to show that Randy Mize, vice president in charge of engineering for Olympic, employed Carlos Suarez, a roofing consultant, for a reroofing project to be done on one of Olympic's plants. Suarez was to submit a reroofing program for the plant, help select a contractor to reroof the building, and supervise and inspect the reroofing work. The evidence also tended to show that Suarez has degrees in architecture and engineering from the University of Havana, Cuba, which are not recognized in the United States. Suarez was not licensed in North Carolina as either an architect or an engineer. Mize knew that

Suarez could not perform any type of activity that required a license, such as engineering or architectural work, but did know that Suarez could act as a roofing consultant. Suarez eventually recommended a rubber membrane roof to be held down by rock ballast.

The contractor selected for the project was defendant Roof Systems. Olympic and Roof Systems entered into a contract in which Roof Systems agreed to install the roof membrane in such a manner that the manufacturer of the membrane, defendant Carlisle, would issue its standard warranty. The parties further agreed that materials used in the project would be in accordance with the manufacturer's recommendations.

Roof Systems completed the reroofing project on 5 May 1982. On 18 May 1982, the roof was inspected by a Carlisle inspector, several employees of Roof Systems, and Suarez. The building had several drains which were to take water from the roof and away from the building. Each roof drain had a drain opening and a drainpipe. The drain opening acted as a funnel to the smaller drainpipe. The specifications prepared by Carlisle indicated that the rubber membrane should be spread over the drain opening, clamped at the opening's edge, and then cut away to the interior edge of the drain opening. Carlisle's inspector had been instructed by Carlisle in training sessions that the membrane over the drain opening should have a hole cut at least as large as the drainpipe leading from the drain opening. However, on the Olympic plant, the evidence tended to show the openings cut in the membrane over each of the drains were over fifty percent smaller than the drainpipes. Carlisle's inspector noted several deficiencies in his report on 18 May 1982 but none of them concerned the drain openings. In early to mid-May and again on 25 May 1982, Mize went onto the roof and observed that the membrane had not been cut out to the width of the drain opening. On each occasion, Mize called Suarez and requested that someone cut back the membrane.

On the afternoon of 26 May 1982, an employee of Roof Systems went onto the plant's roof at Mize's request and checked the drain openings. It was raining at the time and had been raining for several hours. It was later discovered that between the hours of 3:00 p.m. and 7:30 p.m., a total of five inches of rain fell around

the plant. The holes in the membrane over the drain openings were covered with cross-hatch wire mesh with one-half inch openings to prevent debris from flowing down the drainpipe. If the drains were blocked, water would accumulate on the roof against one of the parapet walls. Roof Systems' employee found debris clogging the screens in several of the drains and water collecting on the roof. He removed the debris but did nothing further. At approximately 6:00 p.m. that evening, the portion of the roof nearest the plant's west wall collapsed. The next morning another Roof Systems' representative came to the plant and informed Mize that Roof Systems had sent someone the day before to cut the rubber membrane out to the interior edge of the drain opening.

During plaintiff's case, a great deal of detailed evidence was presented concerning the structure of the building, the installation of the roof, the amount of rainfall before the collapse, and the applicable provisions of the North Carolina Building Code. N.C.G.S. Sec. 143-136 *et seq.* (1983). Briefly, the evidence tended to show several Building Code violations. The holes cut in the rubber membrane at the drain openings indicated the holes did not comply with the Building Code because they were smaller than the Code required. The wire mesh covering the holes in the membrane did not meet Building Code standards either. The steel column at the plant's west wall had been improperly constructed when the plant was built in 1969 and did not meet the strength requirements of the Building Code. The rubber membrane and the wire mesh over the drain openings restricted the roof's drainage. Because of this restricted drainage, water accumulated on the roof to the approximate depth of five inches just before the collapse. Testimony indicated that water would not have accumulated and the roof would not have collapsed if the drain openings had not been partially covered by the rubber membrane and the wire mesh. Testimony also indicated that, if the steel column had complied with the Building Code requirements at the time of the building's construction, the roof would not have collapsed even with an accumulation of five inches of water.

Olympic presented evidence from an expert in the field of civil engineering and structural design who testified the installation of the rubber membrane at the drain openings did not meet the standard of care and workmanship of roofing contractors. The

expert also testified that approval of the drain openings by the roofing inspector from Carlisle did not meet the standard of care for roofing inspectors.

Olympic did not have a contract with Carlisle. The contract between Olympic and Roof Systems required that all details of the roof installation be approved by Carlisle. The contract between Roof Systems and Carlisle required Roof Systems to follow Carlisle's specifications in installing the roof and, at Roof Systems' expense, make changes Carlisle deemed necessary for a proper installation.

This appeal presents numerous issues but we shall primarily address the following: I) Whether there was sufficient evidence to direct a verdict for defendant Carlisle on the issue of whether it, as the manufacturer of the roof membrane, owed a duty to Olympic, the building owner, to properly inspect the roof application; II) whether defendant Roof Systems was entitled to summary judgment on the issue of its wanton negligence for failing to cut back the membrane around the drains; and III) whether there was sufficient evidence to direct a verdict against Olympic on the issue of its contributory negligence: (A) for violating the Building Code; (B) for negligently hiring and relying on Carlos Suarez as a roofing consultant; (C) for violating general engineering principles; (D) for failing to correct the alleged negligence on the part of defendants; and (E) for exercising a nondelegable duty which would render Olympic liable for the negligence of persons it hired to perform the reroofing work.

I

Negligence of Defendant Carlisle

A motion for directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure, N.C.G.S. Sec. 1A-1 (1983), presents the question of whether plaintiff's evidence is sufficient to carry the case to the jury:

> In passing on this motion, the trial judge must consider the evidence in the light most favorable to the non-movant, and conflicts in the evidence together with inferences which may be drawn from it must be resolved in favor of the non-movant. The motion may be granted only if the evidence is insuf-

ficient to justify a verdict for the non-movant as a matter of law.

Arnold v. Sharpe, 296 N.C. 533, 537, 251 S.E. 2d 452, 455 (1979) (citation omitted).

Olympic seeks recovery against Carlisle for failing to exercise reasonable care in inspecting the installation of the membrane. It argues Carlisle owed it a duty to inspect and that there was sufficient evidence, when considered in the light most favorable to it, to show that Carlisle breached that duty.

[1] "Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law." *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E. 2d 893, 897 (1955). The duty may arise by statute or by operation of law. *Id.* "The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm . . . ." *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474, 64 S.E. 2d 551, 553 (1951). A duty of care may arise out of a contractual relationship, "the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract." *Pinnix*, 242 N.C. at 362, 87 S.E. 2d at 898. The contract creates "the state of things which furnishe[s] the occasion for the tort." *Council*, 233 N.C. at 474, 64 S.E. 2d at 552.

In this case, there was no contract between plaintiff and Carlisle. However, there was a contract between Carlisle and Roof Systems. Olympic need not prove privity of contract with Carlisle in order to prove that Carlisle owed it a duty. "It is well settled in North Carolina that privity of contract is not required in order to recover against a person who negligently performs services for another and thus injures a third party." *Ingle v. Allen*, 71 N.C. App. 20, 26, 321 S.E. 2d 588, 594 (1984), *disc. rev. denied*, 313 N.C. 508, 329 S.E. 2d 391 (1985). In *Quail Hollow East Condominium Ass'n v. Donald A. Scholz Co.*, 47 N.C. App. 518, 522, 268 S.E. 2d 12, 15, *disc. rev. denied*, 301 N.C. 527, 273 S.E. 2d 454 (1980), this Court stated:

> [U]nder certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person for injuries resulting from his failure to exercise reasonable care in such undertaking.

This duty to protect third parties from harm arises under circumstances where the party is in a position so that "anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other." *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 666, 255 S.E. 2d 580, 584, *disc. rev. denied*, 298 N.C. 295, 259 S.E. 2d 911 (1979).

[2] Therefore, we must determine if Carlisle rendered services to Roof Systems which it should have recognized were necessary for Olympic's protection. We first must determine what services defendant Carlisle agreed to provide to Roof Systems. In making that determination, it is necessary to examine the terms of the contract between those parties. However, the trial judge refused to allow plaintiff to introduce the written contract between Roof Systems and Carlisle. Carlisle objected to the introduction of the contract on the basis of authentication and materiality. Both contentions are meritless.

Before trial, the parties stipulated that the document was genuine. Under Rule 901(a) of the North Carolina Rules of Evidence, such a stipulation authenticates a document. N.C.G.S. Sec. 8C-1, Rule 901(a) (1986). As to the issue of the document's materiality, the existence of a contract is a relevant factor in a negligence action to the extent that it shows the relationship of the parties and "the nature and extent of the common-law duty on which the tort is based." *Pinnix*, 242 N.C. at 362, 87 S.E. 2d at 898. Thus, the exclusion of the contract was error. However, we hold that the error did not prejudice plaintiff because the essence of the contract was admitted into evidence through direct testimony.

[3] The contract required Roof Systems to "[f]ollow and adhere to all current, future and revised Carlisle Roofing Systems specifications, installation instructions and procedures as submitted from Carlisle to [Roof Systems] from time to time." Furthermore,

Roof Systems was required to allow Carlisle to inspect the premises and "approve installation of the Roofing System and direct [Roof Systems] to make such changes at [Roof Systems'] own expense as Carlisle deems necessary for proper installation."

The inspector for Carlisle testified as follows:

Q. But you were sent [to the plant] on behalf of Carlisle to determine whether there had been a proper installation; were you not?

A. I was sent there to check to see that the roof was installed to our specifications.

Q. Okay. And that's what you mean by "a proper installation?"

A. Meeting our specifications? Yes.

Plaintiff's evidence was sufficient to show that under Carlisle's contract with Roof Systems, Carlisle was to inspect the building and determine whether it met Carlisle's specifications for a proper installation. The evidence is also sufficient to show that Carlisle knew or should have known: (1) that compliance with its specifications was necessary for Olympic's protection; and (2) that the drain openings did not comply with its specifications. Further, the evidence was sufficient to show that Carlisle's inspector approved these drain openings and that the openings met neither the general standard of care of roofing contractors nor complied with the Building Code.

When viewed in the light most favorable to plaintiff, the evidence was thus sufficient to demonstrate that Carlisle breached its duty to Olympic to inspect the roof and report to Olympic any variance from Carlisle's specifications. Since plaintiff's evidence was that the drains would not have been restricted if the drain openings had complied with Carlisle's specifications and that the roof would not have collapsed but for the drain restrictions, the evidence also was sufficient to show that Carlisle's failure to report the lack of compliance was a proximate cause of Olympic's injury.

Defendant Carlisle argues that even if it had a duty, Olympic's knowledge of the defective nature of the drain openings relieved it of the duty. The general rule is that when a person has

knowledge of a dangerous condition, the failure to warn him of that condition is without legal significance. *Petty v. Cranston Print Works Co.*, 243 N.C. 292, 304, 90 S.E. 2d 717, 725 (1956). We find Carlisle's contention to be meritless. Construing the evidence in the light most favorable to plaintiff, the evidence was sufficient to show that even though Olympic knew of the condition of the drain openings prior to the collapse of its building, it did not know the drain openings did not comply with Carlisle's specifications, the Building Code or the standard of roofing contractors in general. Therefore, there was not sufficient evidence to show that Carlisle was relieved of the duty to report that the roof did not comply with its specifications. Accordingly, the court's entry of directed verdict for Carlisle on the issue of its negligence was error.

II

Summary Judgment for Roof Systems

[4] The trial judge allowed defendant Roof Systems' motion for summary judgment and dismissed plaintiff's claim for wanton negligence against Roof Systems. Plaintiff contends that the forecast of evidence presented a genuine issue of material fact as to the reckless disregard of safety exhibited by Roof Systems. The test for summary judgment is, first, whether there is a genuine issue of material fact, and second, whether the moving party is entitled to judgment as a matter of law. *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E. 2d 584 (1980).

As to what constitutes willful and wanton negligence, our Supreme Court stated in *Akzona, Inc. v. Southern Ry. Co.*, 314 N.C. 488, 334 S.E. 2d 759 (1985):

> An act is done wilfully when it is done purposely and deliberately in violation of law, or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. "The true conceptions of wilful negligence involves [sic] 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."

> An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.

Id. at 495, 334 S.E. 2d at 763 (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929)). *See also Wagoner v. North Carolina R.R.*, 238 N.C. 162, 168, 77 S.E. 2d 701, 706 (1953) ("Wanton and willful negligence rests on the assumption that [a person] knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results.").

In this case no genuine dispute exists as to the relevant evidence. Our review of the evidence convinces us that the failure to enlarge the drain holes on 26 May 1982, the day of the collapse, was not a willful or wanton act. No one employed by Roof Systems was aware of the building's noncompliance with the Building Code. In addition, the inspector for defendant Carlisle had approved the roof installation just a few days before the collapse. Even if Roof Systems had the duty to check the building's compliance with the Code, which plaintiffs have not asserted, under these facts, the failure to check Code compliance prior to applying the roof membrane does not indicate a reckless indifference which rises to the level of willful or wanton negligence. *See Starkey v. Cimarron Apartments*, 70 N.C. App. 772, 774-75, 321 S.E. 2d 229, 231 (1984) (landlord's knowledge of lack of fire walls in apartments in violation of law and its failure to remedy the same was not willful and wanton negligence and entitled it to summary judgment on the issue), *disc. rev. denied*, 312 N.C. 798, 325 S.E. 2d 633 (1985). Therefore, the evidence does not support a genuine issue of whether Roof Systems was willfully negligent because it knew that damage would probably result from its failure to enlarge the drain openings. Accordingly, the trial judge's allowance of the summary judgment motion for Roof Systems was not error.

III

Contributory Negligence of Plaintiff

Defendants contend Olympic was contributorily negligent in several respects: (A) for specifying and allowing the installation of a roof membrane in violation of the Building Code; (B) for negligently hiring Suarez and relying on him instead of hiring a licensed structural engineer to determine whether the building

would support the new roof; (C) for allowing installation of the roof membrane in contravention of general engineering principles; (D) in failing to correct the negligence of Roof Systems; and (E) for breaching an alleged nondelegable duty arising from an "intrinsically dangerous" activity which would render it liable for the negligence of persons it hired to perform the work.

Since the trial court granted a directed verdict finding Olympic contributorily negligent, we can affirm that verdict only if the "evidence, taken in the light most favorable to the plaintiff, so clearly establishes contributory negligence that no other reasonable conclusion can be drawn therefrom." *Clary v. Alexander County Bd. of Educ.*, 286 N.C. 525, 532, 212 S.E. 2d 160, 165 (1975).

A

[5] Defendants first contend that Olympic, as owner of the building in question, violated the Building Code in such a manner that it was contributorily negligent *per se*. The North Carolina Building Code requires that when an existing building is altered, "all portions thereof affected by such . . . alteration shall be strengthened, if necessary, so that all loads will be supported safely . . . ." N.C. Bldg. Code Sec. 1201.3 (1978). It is undisputed that addition of the new roof violated Section 1201.3 of the Building Code, since the additional weight on the building was not "supported safely" by the structure. Testimony from plaintiff's experts indicated that a steel column supporting part of the roof had been improperly constructed and did not meet the strength requirements of the Building Code even before the addition of the new roof. The evidence at trial also tended to show that the building was not strengthened to accommodate the weight of the new roof.

Defendants cite two cases to support their allegation that Olympic as owner was negligent *per se* in violating the Building Code. In *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972), an owner of an ice merchandiser, who was in the business of vending ice, installed the ice merchandiser without properly grounding the machine, as required by the Building Code. The owner was subsequently held negligent *per se* when a user of the machine was shocked and injured as a result of the improper grounding. In *Federated Mut. Ins. Co. v. Hardin*, 67 N.C. App. 487, 313 S.E. 2d 801 (1984), this Court held that a building owner's

failure to obtain a building permit before adding a fireplace to his home constituted contributory negligence *per se* if it proximately caused his damage. In that case, both a local ordinance and the State Building Code required the permit before a person could proceed with the alteration of a building. The local ordinance specifically placed responsibility for obtaining the permit on the owner or his agent.

The Code does not precisely define the class of persons who must obey it. *Jenkins*, 13 N.C. App. at 445, 186 S.E. 2d at 203. However, as set out in Section 101.2, the purpose of the Building Code is to

> provide certain minimum standards, provisions and requirements for *safe and stable design, methods of construction* and uses of materials in buildings and/or structures hereafter erected, constructed, enlarged, altered, repaired, moved, converted to other uses or demolished and to regulate the equipment, maintenance, use and occupancy of all buildings and/or structures.

N.C. Bldg. Code Sec. 101.2 (1978) (emphasis added). Section 143-138(b) (1983) of the North Carolina General Statutes states that the Building Code Council may establish rules and regulations that are "reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large." From the above emphasized language in Section 101.2 it is apparent that the Code applies to the design and construction of buildings that are altered. *See also Carolinas-Virginias Ass'n of Bldg. Owners and Managers v. Ingram*, 39 N.C. App. 688, 694-99, 251 S.E. 2d 910, 914-17 (Court held that amendments to Building Code could not be applied retroactively to existing buildings and found that Building Code regulates construction of buildings, not buildings themselves), *disc. rev. denied*, 297 N.C. 299, 254 S.E. 2d 925 (1979).

Section 101.6(e) of the Building Code provides:

> (e) *Maintenance*: All buildings or structures, both existing and new, and all parts thereof, shall be maintained in a safe and sanitary condition. All devices or safeguards which are required by this code in a building when erected, altered, or repaired, shall be maintained in good working order. The

> owner, or his designated agent, shall be responsible for the maintenance of buildings or structures.

While this section places responsibility for the maintenance of buildings on the owner or his designated agent, this section, standing alone, does not render an owner negligent *per se* for Code violations committed by independent contractors to whom it has delegated the performance of specific maintenance tasks.

We hold, therefore, that the Code imposes liability on any person who constructs, supervises construction, or designs a building or alteration thereto, and violates the Code such that the violation proximately causes injury or damage. In addition, if a building owner knows or has reason to know of a Building Code violation and fails to take reasonable steps to remedy the violation, he may be found liable if the violation proximately causes injury or damage. *Cf. Sink v. Andrews*, 81 N.C. App. 594, 344 S.E. 2d 831 (1986) (in wrongful death action, plaintiff's failure to show that former owners of house from whom she purchased house, had knowledge or reason to know of alleged Building Code violations entitled them to summary judgment on negligence issue). We do not address the issue of whether a contractor who constructs in accordance with plans provided to him by an owner is liable for Code violations which proximately cause injury or damage. We therefore inquire as to whether Olympic was negligent *per se* under the above principles through the doctrine of imputed contributory negligence, the defensive counterpart to respondeat superior. *Cf. Blanton v. Moses H. Cone Memorial Hosp., Inc.*, 319 N.C. 372, 374-75, 354 S.E. 2d 455, 457 (1987) (since a corporation can only act through its agents, if it is to be liable for negligence, it must be through the doctrine of respondeat superior).

1

[6] It is undisputed that Mize, Olympic's vice president in charge of engineering, selected machinery, contracted with builders for the construction of buildings, and handled major maintenance problems. The evidence tended to show that Mize hired Suarez for the design, inspection, and general supervision of the reroofing project and that Mize hired Roof Systems to apply the roof membrane. The contract between Roof Systems and Olympic provided that Roof Systems would also furnish supervision for the reroofing project. This evidence indicated that Mize delegated the

tasks of designing, constructing and supervising the application of the new roof to others. The evidence also tended to show that Mize delegated these activities because he did not feel qualified to undertake the project and was overseeing construction of another plant. When viewed in the light most favorable to Olympic, the evidence was not sufficient to show that Mize designed, constructed or supervised the reroofing project. Rather than taking an active role himself, he delegated the task to others. Furthermore, there was not sufficient evidence to show that Mize knew or should have known of the structural inadequacy of the roof either before or after the new roof was applied. In addition, the evidence tended to show that Mize was at least implicitly assured by Suarez that the load-bearing capacity of the roof was adequate for the new roof and that he relied on Suarez's plans and specifications. Therefore, we conclude that the directed verdict was in error regarding Olympic's negligence through Mize.

2

[7] Having found that Olympic was not negligent for violations of the Building Code through the actions of Mize, we turn our discussion to Suarez and the nature of his relationship with Olympic. Olympic admits that Suarez may have been negligent but contends that Suarez was an independent contractor and therefore his negligence cannot be imputed to it. *Hendricks v. Leslie Faye, Inc.*, 273 N.C. 59, 159 S.E. 2d 362 (1968). In order to hold Olympic negligent under the doctrine of imputed contributory negligence, the relationship of master and servant or principal and agent must have existed between Olympic and Suarez at the time of, and in respect to, the negligent act or acts which proximately caused Olympic's damage. *Graham v. North Carolina Butane Gas Co.*, 231 N.C. 680, 683-84, 58 S.E. 2d 757, 760 (1950).

At the outset, we note that the determination of whether a person is an independent contractor or servant is a mixed question of law and fact. *See Beach v. McLean*, 219 N.C. 521, 525, 14 S.E. 2d 515, 518 (1941). Where the evidence is conflicting or susceptible of more than one inference, it is a question of fact for the jury. 57 C.J.S. *Master and Servant* Sec. 617 at 409 (1948); *see also Robinson v. McAlhaney*, 214 N.C. 180, 183, 198 S.E. 647, 650 (1938). The issue is a question of law where there is no conflict in the evidence and only one inference may be drawn from the facts.

57 C.J.S. *Master and Servant* Sec. 617 at 410; *Smock v. Brantley*, 76 N.C. App. 73, 75, 331 S.E. 2d 714, 716 (1985), *disc. rev. denied*, 315 N.C. 590, 341 S.E. 2d 30 (1986).

There are several factors that must be considered in determining whether one is a servant or an independent contractor. *See Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 16, 29 S.E. 2d 137, 140 (1944). The right to control the details of the work is one of the controlling principles in making this determination. *See Vaughn v. North Carolina Dept. of Human Resources*, 296 N.C. 683, 686, 252 S.E. 2d 792, 795 (1979). Additionally, one may be an independent contractor for some purposes and a servant for others. *See Hoffman v. Ryder Truck Lines, Inc.*, 306 N.C. 502, 506-08, 293 S.E. 2d 807, 810-11 (1982). In the case at bar, the evidence tended to show that Suarez was hired in at least two distinct capacities. He was first hired to draft the reroofing plans and to help procure bids for the project. He subsequently was hired to supervise and inspect the work of Roof Systems. From the evidence before us, we believe a jury could find that Olympic did not have the right to control the details of Suarez's work in either capacity.

The evidence also tended to show that Suarez was engaged in the independent business of a roofing consultant and was hired for his knowledge and experience in this area. The evidence also indicated that Suarez was paid a flat fee for drafting the plans but was paid by the hour for supervising and inspecting the reroofing work. No deductions were made from his fees for taxes or employee benefits. Although Suarez was referred to as the owner's "representative" in the contract between Roof Systems and Olympic, this reference is not necessarily dispositive on the issue of whether a master-servant or principal-agent relationship existed. *Cf. Kesler Const. Co. v. Dixon Holding Corp.*, 207 N.C. 1, 5, 175 S.E. 843, 845 (1934) (rights of parties under a contract are not to be determined solely by what they call each other).

Defendants contend that Suarez's activities as a roofing consultant to Olympic should be analyzed in light of our decision in *Greensboro Hous. Auth. v. Kirkpatrick & Assocs.*, 56 N.C. App. 400, 289 S.E. 2d 115 (1982). In *Kirkpatrick*, this Court found that several architects in that case were agents of the owner, stating as a general rule that, " 'as regards the performance of his super-

visory functions with respect to a building under construction, [an architect] ordinarily acts as the agent and representative of the person for whom the work is being done.' " *Id.* at 402-03, 289 S.E. 2d at 117 (quoting 5 Am. Jur. 2d *Architects* Sec. 6 at 668 (1962)); *but cf.* 5 Am. Jur. 2d *Architects* Sec. 6 at 668 (architect acts as independent contractor in preparing plans). Defendants liken Suarez's activities in the present case to that of the architects in the *Kirkpatrick* case and contend that any negligence of Suarez should therefore be imputed to Olympic. However, we find the facts of the *Kirkpatrick* case distinguishable from our own. In *Kirkpatrick*, the owner not only stipulated that the architects were its agents, but the architects also had the power to enter into contracts on behalf of the owner and had considerable control over the construction project. In the case *sub judice*, there is no evidence of Suarez's power to enter contracts on behalf of Olympic nor is it clear as to the extent of his supervisory authority over Roof Systems. We reject the notion that an architect or roofing consultant supervising a construction project is conclusively an agent of the owner such that their negligence can be imputed to the owner in all circumstances. *See Cutlip v. Lucky Stores, Inc.*, 22 Md. App. 673, 677-82, 325 A. 2d 432, 435-37, *cert. denied*, 273 Md. 719 (1974).

There are factors indicating that Suarez was an independent contractor and others indicating he was a servant or agent of Olympic. Suarez may have been negligent in designing, supervising, and/or inspecting the reroofing project, or knew or had reason to know of the Building Code violations. However, in each activity, to hold Olympic liable for Suarez's negligence, Suarez must have been a servant or agent acting within the scope of his employment at the time of the negligent act(s) which proximately caused Olympic's damage.

Here, reasonable men could differ on the inferences to be drawn from the evidence on the question of whether Suarez was a servant or agent of Olympic in the reroofing project and whether his alleged negligence, while acting as a servant or agent, was a proximate cause of Olympic's damage. *See Rouse v. Jones*, 254 N.C. 575, 580, 119 S.E. 2d 628, 632 (1961) (proximate cause is ordinarily a question for the jury). Therefore, the directed verdict based on Olympic's negligence through Suarez was error.

B

[8] Defendants further contend that Olympic was negligent in hiring and relying on Suarez as a roofing consultant instead of hiring a licensed structural engineer to check the building's structural adequacy. An employer may be found liable for failing to use due care in securing a competent contractor if the contractor is negligent and proximately causes injury or damage. *See Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E. 2d 813, 817 (1971), *aff'd*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

Even assuming that Suarez was negligent, plaintiff's evidence indicated that Mize inquired into Suarez's qualifications to some extent. This inquiry revealed Suarez had degrees in architecture and engineering from the University of Havana and that Suarez was attempting to have his degrees recognized in the United States. Mize also consulted a plant engineer from another Cone Mills' location that had previously used Suarez to solve a roofing problem at that plant. In addition, Mize requested and obtained a list of other companies for which Suarez had worked.

This evidence was sufficient to show that Olympic's reliance on Suarez was reasonable given the investigation Mize made into Suarez's background as well as Suarez's work in drafting the reroofing plans, procuring the bids, and helping draft the contract between Olympic and Roof Systems. As well, this evidence was sufficient to show that Olympic exercised due care in hiring Suarez. Therefore, the directed verdict against Olympic was not proper on these grounds.

C

[9] Defendants also contend that Olympic was negligent for failing to follow general engineering principles in having its building reroofed. Plaintiff's expert witnesses testified that it was proper engineering practice to have a structural engineer investigate a building for structural weaknesses before making additions. However, as we have previously found, the evidence was sufficient to show that this duty, assuming there was one, was delegated to Suarez. Unless it can be shown that Suarez was acting as Olympic's servant or agent at the time of his alleged violations of engineering principles which proximately caused the collapse, these violations cannot be imputed to Olympic.

D

[10] The trial court further found Olympic negligent as a matter of law, for failing to act to correct any negligence of Roof Systems when Olympic knew or should have known of the condition of the roof installation before the collapse. However, the evidence revealed that when Mize discovered the problem with the roof drains, he called Suarez to advise him of the situation and asked him to contact Roof Systems to have them send an employee to check on the drains. Suarez contacted Roof Systems but Roof Systems failed to cut the drains back as requested. Based on this evidence, it is clear that Mize acted to try and correct the problem and therefore the trial court's ruling was in error.

E

[11] Defendant Carlisle argues that Olympic was under a nondelegable duty to ascertain whether its building would support the new roof because reroofing a building is intrinsically dangerous. *See Deitz v. Jackson*, 57 N.C. App. 275, 279-81, 291 S.E. 2d 282, 285-86 (1982). If Olympic was under a nondelegable duty to check the roof support, any negligence in failing to adequately determine the support would be imputed to Olympic, if it were a proximate cause of Olympic's damage, whether the negligence was on the part of a servant *or* independent contractor. *See Hendricks v. Leslie Faye, Inc.*, 273 N.C. 59, 159 S.E. 2d 362 (1968). However, our Supreme Court has found that the erection of a building is not "intrinsically dangerous" and does not fall within those activities considered nondelegable in nature. *Peters v. Carolina Cotton & Woolen Mills, Inc.*, 199 N.C. 753, 754, 155 S.E. 867, 868 (1930); *Vogh v. F. C. Geer Co.*, 171 N.C. 672, 676, 88 S.E. 874, 876 (1916); *see also Scales v. Lewellyn*, 172 N.C. 494, 90 S.E. 521 (1916) (raising of house by means of jacks and pulleys is not inherently dangerous). We similarly conclude that the reroofing of a building is not within the purview of "intrinsically dangerous" or "specially hazardous" work. Furthermore, we find no other grounds for a nondelegable duty on Olympic arising from the reroofing project.

IV

[12] Having determined that the trial court committed error in granting defendants' motion for directed verdict, this case must

be remanded for a new trial. Since defendants seek to bar Olympic's recovery through the doctrine of imputed contributory negligence, some discussion of that doctrine is appropriate.

Where a party is injured by a servant the purpose of imputed negligence is to provide a remedy against the master for an injury caused by the servant's negligence. From this rule of vicarious liability on the part of a *defendant* master, the companion rule arose which imputes to the master the servant's negligence when the master is the *plaintiff* seeking to recover for his injuries from a third person, even though the master was not at fault. *See Rollison v. Hicks*, 233 N.C. 99, 104-06, 63 S.E. 2d 190, 194-95 (1951).

However, to apply the doctrine of imputed contributory negligence to allow one agent to impute the negligence of a fellow agent to bar the principal's recovery would subvert the reason for the rule of imputed negligence. Instead of granting a remedy where one should be allowed, it would extinguish one that already exists. It is well established that there can be more than one proximate cause of an injury and where two or more proximate causes combine to cause injury, the author of each may be held liable and an action may be maintained against any one author, or against all as joint tort-feasors. *Rouse v. Jones*, 254 N.C. 575, 581, 119 S.E. 2d 628, 633 (1961). Therefore, we conclude that when a principal is injured by the concurring negligence of two or more agents of the principal and the negligence of the agents concur to proximately cause injury or damage to the principal, the agents may not implead the negligence of each other to bar the principal's claim against them.

Therefore, on retrial, if it is found that Suarez and/or Mize were negligent in their capacities as servants or agents and their negligence was a proximate cause of Olympic's damage, it will be necessary to determine if the defendants were servants or agents of Olympic as well. If either defendant was an agent of Olympic and if either defendant's negligence concurred with the negligence of Suarez and/or Mize acting in their capacity as agents to cause Olympic damage, that defendant cannot impute the negligence of Suarez and/or Mize to bar Olympic's recovery. If either defendant is found to be an independent contractor, that defendant would not be barred from imputing the agent's negligence to Olympic.

Our holding is supported by other courts facing similar issues of imputed contributory negligence and agents. *See South Carolina Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 348 S.E. 2d 617 (1986) (agent cannot impute contributory negligence of another agent to principal to bar principal's recovery when principal sued agent for negligent performance of his duties); *Buhl v. Viera*, 328 Mass. 201, 202, 102 N.E. 2d 774, 775 (1952) (fact that negligence of a servant of plaintiff contributed to a third person's injury was immaterial in master's action for indemnification against a fellow servant); *Patterson v. Brater*, 225 Mich. 297, 301, 196 N.W. 202, 203 (1923) (if defendant was guilty of negligence which was the proximate cause of the loss to master, negligence on part of other employees constitutes no defense to master's action for the negligence of defendant-employee); *Lutz Feed Co. v. Audet & Co.*, 337 N.Y.S. 2d 852, 72 Misc. 2d 28 (1972) (two agents acting for principal in the same matter may be held concurrently negligent and not bar master's action against them); *Oxford Shipping Co. v. New Hampshire Trading Corp.*, 697 F. 2d 1, 6-7 (1st Cir. 1982) (to allow agents to set up each other's breach of duty in effect prevents a principal's recovery where more than one agent defaults in his duty); *see also* cases cited in Annotation, *Imputation of Contributory Negligence of Servant or Agent to Master or Principal, In Action by Master or Principal Against Another Servant or Agent for Negligence in Connection with Duties*, 57 A.L.R. 3d 1226 (1974).

V

The trial court allowed defendants' motions for directed verdict on the issue of last clear chance. Olympic contended that if it were negligent, it would not be barred in its claim against defendants because defendants had the last clear chance to avoid the building's collapse. However, since we have found that the directed verdicts on the issue of Olympic's contributory negligence were improperly granted, we need not address this issue. In addition, plaintiff brought forward other assignments of error which are unnecessary to our disposition of this case.

VI

In conclusion, we find the trial court committed error in granting Carlisle's motion for a directed verdict on the issue of its negligence. The summary judgment motion in favor of Roof Sys-

tems on the issue of its wanton negligence is affirmed. We further find the trial court erred in granting a directed verdict on the issue of Olympic's contributory negligence. We therefore remand the case for a new trial.

Affirmed in part, reversed in part and remanded for a new trial.

Judges PHILLIPS and COZORT concur.

GRACE W. THOMAS v. WILLIAM JOSEPH DIXSON D/B/A HILLBILLY TRADING POST

No. 8722SC367

(Filed 5 January 1988)

1. **Negligence § 57.4— fall down stairway by invitee—sufficient evidence of negligence—no contributory negligence as matter of law**

In an action to recover for personal injuries sustained by plaintiff invitee when she fell down a stairway in defendant's store, plaintiff's evidence was sufficient to present a jury question as to defendant's negligence in failing to maintain his premises in a reasonably safe condition and did not disclose contributory negligence by plaintiff as a matter of law where it tended to show: defendant displayed merchandise near the top of an unguarded stairway in its store; defendant had posted no warning calling the attention of customers to the stairway; merchandise was displayed around three sides of the stairwell, obscuring it from view; the floor and steps were covered with a patchwork carpet made up of remnants of various naps and colors; and while plaintiff was looking at merchandise displayed near the top of the stairs, she took a step and fell down the stairway.

2. **Evidence § 19.1; Negligence § 27— stairway structure and appearance—architect's testimony—examination of stairway two years after fall**

In an action to recover for personal injuries sustained by plaintiff when she fell down a stairway in defendant's store, the trial court did not err in ruling that an architect's testimony concerning the structure and appearance of the stairway was relevant and had considerable probative value, and the fact that the architect did not examine the stairway until two years after plaintiff's fall was immaterial in light of defendant's testimony that the stairway was the same at the time of trial as when plaintiff fell.

3. Evidence § 47; Negligence § 27— stairway compliance with N.C. Building Code —opinion by architect

An architect's opinion testimony as to whether the stairway in defendant's store complied with requirements of the N.C. Building Code was relevant and admissible in an action to recover for injuries sustained by plaintiff when she fell down the stairway.

4. Evidence § 25— photographs and diagram—authentication

In an action to recover for personal injuries sustained by plaintiff when she fell down a stairway in defendant's store, photographs of the stairway taken in 1984 and 1986 and a diagram of the stairway were sufficiently authenticated for admission into evidence although there was conflicting evidence as to whether a piece of the railing shown to be missing in the photographs and diagram were missing at the time of the accident.

5. Trial § 35.1— instructions on burden of proof

There was no appreciable difference between defendant's requested instruction and the instruction given by the court on the jury's duty to find against the party with the burden of proof if it was unable to determine where the truth lies.

6. Damages § 17.4— instruction on mortuary table

The trial court could take judicial notice of the mortuary tables, and where the issue of permanent injury was raised by plaintiff's evidence, the court properly instructed the jury on plaintiff's life expectancy as shown by the mortuary tables even though the tables were not introduced into evidence. N.C.G.S. § 8-46.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 6 November 1986 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 22 October 1987.

This is a negligence action for personal injuries sustained by plaintiff Grace W. Thomas when she fell down a flight of stairs on premises owned by defendant William Joseph Dixson d/b/a Hillbilly Trading Post. At trial defendant's motions for directed verdict were denied. The trial judge bifurcated the liability and damages issues, submitting the issues of negligence and contributory negligence to the jury first. When the jury answered these issues in plaintiff's favor, the court submitted the damage issue. The jury awarded plaintiff $35,000 in damages; the trial judge denied defendant's motions for judgment notwithstanding the verdict and new trial and entered judgment on the verdict. Defendant appealed.

James E. Snyder, Jr., for plaintiff-appellee.

Hedrick, Eatman, Gardner and Kincheloe, by Edward L. Eatman, Jr., and William J. Garrity, for defendant-appellant.

PARKER, Judge.

In this appeal, defendant raises five assignments of error: (i) that the trial court erred in denying defendant's motions for directed verdict, for judgment notwithstanding the verdict, and for a new trial because plaintiff failed to show that her fall was proximately caused by any negligence on the part of defendant; (ii) that the trial court erred in denying defendant's motions for directed verdict, for judgment notwithstanding the verdict, and for a new trial because plaintiff was contributorily negligent as a matter of law; (iii) that the trial court erred in admitting the expert testimony of an architect; (iv) that the trial court erred in allowing into evidence certain photographs and a diagram; and (v) that the trial court erred in instructing the jury as to plaintiff's burden of proof and as to mortuary tables that were not in evidence. We will address these issues seriatim.

Defendant's first and second assignments of error involve the trial court's denial of certain motions made by defendant. In ruling on a motion for directed verdict pursuant to G.S. 1A-1, Rule 50(a), the trial court must consider the evidence in the light most favorable to plaintiff. The evidence supporting plaintiff's claims must be taken as true, and all contradictions, conflicts, and inconsistencies must be resolved in plaintiff's favor, giving plaintiff the benefit of every reasonable inference. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E. 2d 333, 337-338 (1985). A directed verdict is seldom appropriate in a negligence action. A motion for judgment notwithstanding the verdict, pursuant to G.S. 1A-1, Rule 50(b), is essentially a renewal of the motion for directed verdict; if the motion for directed verdict could have been properly granted, the motion for judgment notwithstanding the verdict should be granted. *Id.* at 368-369, 329 S.E. 2d at 337. Under these principles, defendant in the case before us was not entitled to a directed verdict or to judgment notwithstanding the verdict unless plaintiff's evidence, viewed in its most favorable light, failed to establish the elements of actionable negligence or showed contributory negligence as a matter of law.

Plaintiff presented the following evidence in support of her claim. Plaintiff and her son entered defendant's store near Boone, North Carolina, at about midday on 30 June 1984. The plaintiff was shopping for a souvenir. At the time, plaintiff was sixty-five years old, had good vision, and was wearing flat, rubber-soled, oxford-style shoes. Neither plaintiff nor her son had ever been in the store before.

Defendant's store, which might appear to be a one-story structure when viewed from the front, actually had a second floor below street level which could be reached by a flight of stairs in the central portion of the building. Around three sides of the stairs on the street-level floor was a railing three feet, seven inches high. This railing had merchandise hanging from it and displayed in front of it. The open part of the stairway faced the back of the store. The floor of the store, around the top of the stairs and on the steps, was covered with a multicolor, patchwork design made up of remnant pieces of different naps and colors of carpet. There was a rack of merchandise close to the top of the steps, and other items of merchandise hung from the inside of the steps.

Plaintiff had been in the shop between five and ten minutes when she stopped to look at the rack of merchandise near the top of the steps. Plaintiff testified that she "made a step" with her left foot and fell down the flight of stairs. Plaintiff's son testified that he was browsing near the back wall of the store while his mother was standing at a metal rack looking at merchandise; he saw her take a step and then fall down the stairs. Both plaintiff and her son testified that they were unaware that there were any stairs in the store prior to plaintiff's fall.

Negligence is the failure to exercise a duty of care for the safety of another. *Dunning v. Warehouse Co.*, 272 N.C. 723, 158 S.E. 2d 893 (1968). In the case before us, plaintiff entered defendant's store in order to purchase goods. Defendant's duty is therefore governed by plaintiff's status as an invitee. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E. 2d 559, 562 (1981); *Morgan v. Tea Co.*, 266 N.C. 221, 226, 145 S.E. 2d 877, 881 (1966). As such, defendant owed plaintiff "the duty to exercise ordinary care to keep [his] store in a reasonably safe condition and to warn her of hidden dangers or unsafe conditions of which [he]

had knowledge, express or implied." *Norwood v. Sherwin-Williams Co.*, 303 N.C. at 467, 279 S.E. 2d at 562.

Ordinarily, a plaintiff is contributorily negligent if she fails to discover and avoid a defect that is visible and obvious. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980). However, this rule is not applicable where there is "some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition." *Walker v. Randolph County*, 251 N.C. 805, 810, 112 S.E. 2d 551, 554 (1960).

In *Walker v. Randolph County, supra*, our Supreme Court held there was sufficient evidence of negligence for the jury and no contributory negligence as a matter of law where defendant maintained a bulletin board next to and partially extending over an unguarded stairway and where plaintiff, while examining the board for a notice, moved sideways and fell down the steps. Similarly, in *Norwood v. Sherwin-Williams Co., supra*, the Court held there was sufficient evidence of negligence for the jury and no contributory negligence as a matter of law where a display and some merchandise in an aisle of defendant's store were designed to attract and keep customers' attention at eye level and where plaintiff tripped over the corner of a platform protruding into the aisle.

[1] In the case before us, plaintiff's evidence showed that defendant displayed merchandise near the top of an unguarded stairway; that defendant had posted no warning calling his customers' attention to the stairs; that merchandise was displayed around three sides of the stairwell, obscuring it from view; that the floor and steps were covered with a patchwork carpet made up of remnants of various naps and colors; that plaintiff had come into defendant's store to purchase goods; and that while she was looking at merchandise displayed near the top of the stairs, she took a step and fell down the staircase. Viewed in the light most favorable to plaintiff, this evidence requires a jury determination as to whether defendant failed to maintain his premises in a reasonably safe condition and, if he did, whether his failure was the proximate cause of plaintiff's injuries. The evidence also does not show contributory negligence on the part of plaintiff as a matter of law. Therefore, the court below properly denied defendant's

motions for directed verdict and for judgment notwithstanding the verdict.

Appellate review of the trial court's denial of a motion for a new trial pursuant to G.S. 1A-1, Rule 59, is strictly limited to whether the record affirmatively shows a manifest abuse of discretion by the trial judge. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. at 380, 329 S.E. 2d at 343. We find no abuse of that discretion in the case before us.

Defendant's second and third assignments of error involve the admission into evidence of certain testimony and exhibits.

[2] At trial, plaintiff presented the testimony of Fred Williams, a licensed architect, who had personally examined the steps in defendant's store just prior to trial. Plaintiff tendered and the court accepted Mr. Williams as an expert in the field of architecture. Over defendant's objection, Mr. Williams described the structure and appearance of defendant's store building and stairs based on his personal examination. Also over defendant's objection, Mr. Williams testified as to the North Carolina Building Code requirements for stairways and gave his opinion as to whether defendant's stairway complied with those requirements. Defendant contends that this evidence was inadmissible under G.S. 8C-1, Rule 702, because it was of no assistance to the jury and its probative value was outweighed by the danger of undue prejudice. We disagree.

Testimony of an expert in the form of an opinion is properly admitted in evidence if the expert's specialized knowledge will assist the jury in understanding the evidence or in determining a fact at issue in the case. G.S. 8C-1, Rule 702. The expert's testimony, even if relevant, must also have probative value that is not outweighed by the danger of unfair prejudice, confusion, or undue delay. G.S. 8C-1, Rule 403; *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E. 2d 154, 156 (1985). The trial court is afforded a wide latitude of discretion in making a determination regarding the admissibility of expert testimony. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E. 2d 370, 376 (1984).

We first note that Mr. Williams' testimony as to the structure and appearance of the stairway was based on direct personal knowledge. This testimony, therefore, was admissible so long as it

was relevant and its probative value was not outweighed by the danger of unfair prejudice. G.S. 8C-1, Rules 402, 403.

We find that the trial judge did not abuse his discretion in his determination that this testimony was relevant and had considerable probative value. The fact that Mr. Williams did not examine the steps until two years after plaintiff's fall is immaterial in light of defendant's testimony that the steps were exactly the same at the time of trial as when plaintiff fell except that a part of the handrail near the top of the steps had been cut off and the testimony of plaintiff's son that the steps were exactly the same. *See Mintz v. R.R.*, 236 N.C. 109, 112, 72 S.E. 2d 38, 41 (1952) (testimony concerning condition of stairs nearly two years prior to plaintiff's fall held relevant and admissible).

[3] Likewise, Mr. Williams' testimony as to the conformity of the stairway to the North Carolina Building Code was relevant and admissible. The North Carolina Building Code was authorized pursuant to G.S., Chap. 143, Art. 9, in order to regulate the construction of buildings, not the buildings themselves. *Carolinas-Virginias Assoc. v. Ingram, Comr. of Insurance*, 39 N.C. App. 688, 251 S.E. 2d 910, *disc. rev. denied*, 297 N.C. 299, 254 S.E. 2d 925 (1979). However, the purpose of the Code is to establish minimum standards, materials, designs, and construction of buildings for the safety of the occupants, their neighbors, and the public at large. G.S. 143-138(b). Whether or not a building meets these standards, though not determinative of the issue of negligence, has some probative value as to whether or not defendant failed to keep his store in a reasonably safe condition. *See Pasour v. Pierce*, 76 N.C. App. 364, 368-369, 333 S.E. 2d 314, 317-318 (1985), *disc rev. denied*, 315 N.C. 589, 341 S.E. 2d 28 (1986). Moreover, to rebut Mr. Williams' testimony, defendant was able to present testimony and photographic evidence to show that the stairs were in conformity with the Code.

[4] At trial, plaintiff offered into evidence for illustrative purposes photographs of the stairway in defendant's store taken in 1984 and in 1986, as well as a diagram drawn just before trial by Mr. Williams. Defendant contends that these illustrations were inadmissible because plaintiff failed to present sufficient foundation evidence that they accurately depicted the stairs at the time of plaintiff's fall. We disagree with this contention.

To authenticate the exhibits at trial, plaintiff's son testified on voir dire that all of the photographs as well as the diagram were fair and accurate representations of the stairway at the time of plaintiff's fall on 30 June 1984. On cross-examination, counsel for defendants attempted to elicit testimony from the witness that the later photographs and the diagram differed from the earlier photographs because a portion of the handrail on one side near the top of the steps had been cut off. The witness admitted that the most recent photographs showed the railing did not reach the top of the stairs, but denied that the earlier photographs showed a complete railing.

Plaintiff's expert, Mr. Williams, stated that he could not tell from the earlier photographs whether at that time the railing reached the top of the stairs, but asserted that all of the photographs and the diagram accurately represented the stairway when he saw it just prior to trial. Mr. Williams' diagram showed the stairs with the disputed portion of handrail sketched in with a broken line. On cross-examination, defendant testified that the only inaccuracy in the later photographs was the missing piece of handrail; that otherwise all of the photographs accurately represented the stairs at the time of plaintiff's fall.

Exhibits such as diagrams and photographs used to illustrate testimony about the scene of an accident must be identified as accurate before they may be properly introduced into evidence. *Sizemore v. Raxter*, 73 N.C. App. 531, 537, 327 S.E. 2d 258, 262-263, *aff'd per curiam*, 314 N.C. 527, 334 S.E. 2d 391 (1985); *Kepley v. Kirk*, 191 N.C. 690, 693, 132 S.E. 788, 790 (1926). *See also*, 1 Brandis on North Carolina Evidence § 34 (1982). Ordinarily, testimony that the exhibit is a fair and accurate portrayal of the scene at the time of the accident is sufficient to satisfy this requirement. *Sizemore v. Raxter*, 73 N.C. App. at 537, 327 S.E. 2d at 262-263; *Kepley v. Kirk*, 191 N.C. at 693, 132 S.E. at 790.

Authentication does not, however, require strict, mathematical accuracy, and a lack of accuracy will generally go to the weight and not the admissibility of the exhibit. *Kepley v. Kirk*, 191 N.C. at 193, 132 S.E. at 790. *See also Coach Co. v. Motor Lines*, 229 N.C. 650, 50 S.E. 2d 909 (1948). Exhibits illustrating testimony about the scene of an accident do not need to have been made at the exact time at which the accident took place.

See, e.g., Sizemore v. Raxter, supra (photograph of scene taken two years after accident); *Kepley v. Kirk, supra* (map of scene made one year after accident). *See also,* 1 Brandis on North Carolina Evidence § 34 (1982). When there is conflicting evidence as to the similarity of conditions at the time of the accident and conditions at the time the exhibits were made, the admissibility of illustrative exhibits is a matter within the sound discretion of the trial judge. *Pearson v. Luther,* 212 N.C. 412, 425, 193 S.E. 739, 747 (1937). We find no abuse of that discretion here.

Defendant's last assignments of error involve the trial judge's instructions to the jury concerning plaintiff's burden of proof and mortuary tables not in evidence.

[5] Defendant first contends that the court erred by not instructing the jury "that if they are unable to determine where the truth lies, it would be their duty to find against the party with the burden of proof." The court did give the following instruction to the jury:

> If you are so persuaded, then it would be your duty to answer the issue in favor of the party with the burden of proof. If you are not so persuaded, *or if you are unable to say what the truth is, it would be your duty to answer the issue against the party with the burden of proof.*

(Emphasis added.)

We cannot see any appreciable difference between what defendant contends the charge should have been and the instruction actually given by the trial judge. This assignment of error is overruled.

[6] At trial, plaintiff presented evidence that plaintiff suffered permanent damage to her knee as a result of her fall. Regarding plaintiff's alleged permanent disability, the trial judge instructed the jury in relevant part as follows:

> Now, in this case the Plaintiff has offered evidence tending to show that her injury is permanent, that is, that the effects of the injury will continue throughout the Plaintiff's life. If you find by the greater weight of the evidence that the injury is permanent, and that such injury was proximately caused by the Defendant's negligence, then what is fair

compensation to the Plaintiff will depend in part on the Plaintiff's life expectancy, that is, how much longer she may reasonably expect to live. This is to be considered by you in determining what is fair compensation for those elements of damage which you find by the greater weight of the evidence will continue throughout the Plaintiff's life, such as the partial loss of use of her knee.

The Mortuary Tables are in evidence. They show that for one of the Plaintiff's age, her life expectancy is 15.2 years. In determining her life expectancy you will consider, not only this evidence, but also all other evidence as to her health, her constitution and her habits.

Mortuary tables are statutory in North Carolina. G.S. 8-46. Our Courts have held that as such, mortuary tables need not be introduced into evidence, but may receive judicial notice when facts are in evidence requiring or permitting their application. *Chandler v. Chemical Co.*, 270 N.C. 395, 400, 154 S.E. 2d 502, 506 (1967); *Rector v. James*, 41 N.C. App. 267, 272, 254 S.E. 2d 633, 637 (1979). In the case before us, the trial judge properly instructed the jury as to life expectancy on the issue of permanent injury raised by plaintiff's evidence.

Therefore, for the reasons stated above, we find

No error.

Judges EAGLES and MARTIN concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

BILLY JOE BURROW v. WESTINGHOUSE ELECTRIC CORP. AND WESTINGHOUSE TRANSPORT LEASING CORPORATION

No. 8721SC359

(Filed 5 January 1988)

1. **Master and Servant § 10.2— workers' compensation—retaliatory discharge—summary judgment inappropriate**

Summary judgment should not have been granted on plaintiff's claim for wrongful discharge arising from his workers' compensation claim where the evidence revealed factual disputes as to whether plaintiff was discharged and, if so, as to defendant's motive in discharging him. N.C.G.S. § 97-6.1.

2. **Master and Servant § 10.2— workers' compensation—retaliatory discharge—statutory defenses not available**

In a wrongful discharge action arising from plaintiff's workers' compensation claim, the statutory defenses of N.C.G.S. § 97-6.1(c) and (e) did not apply and summary judgment for defendants was inappropriate where all of the evidence showed that plaintiff's failure to meet work standards was due to the injury which was the subject of plaintiff's workers' compensation claim and his desire to seek medical attention for it; similarly, defendants failed to establish that plaintiff's permanent partial disability interfered with his ability to perform work available.

3. **Master and Servant § 10.2— wrongful discharge—failure to perform an unsafe act—summary judgment for defendant proper**

The trial court did not err in an action for wrongful discharge by granting summary judgment for defendants on plaintiff's claim that he had been wrongfully discharged for refusing to drive under unsafe conditions. Plaintiff has no cause of action for discharge for failure to perform an act which he may be able to prove was unsafe; *Sides v. Duke University*, 74 N.C. App. 331, was based on the employer's willful violation of clearly expressed public policy.

4. **Master and Servant § 10.2— wrongful discharge—failure to drive when physical condition impaired—summary judgment for defendants**

There was no authority for and the court did not adopt plaintiff's argument that violation of a federal regulation creates an exception to the employment at will doctrine in North Carolina.

APPEAL by plaintiff from *Morgan, Judge*, and *Collier, Judge*. Orders filed 12 December 1986 and 20 January 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 October 1987.

This is an action for retaliatory discharge, brought pursuant to G.S. 97-6.1. The following facts are uncontradicted. Beginning in 1982, defendants employed plaintiff as a tractor-trailer driver

operating out of their terminal in High Point. In early 1985, plaintiff injured his left leg and hip in a work related accident. In May 1985, plaintiff attempted to return to work with a doctor's release, restricting him to tasks not requiring heavy lifting or climbing. Mr. Richard McNabb, the terminal's operations manager, told plaintiff that company policy required that, when he came back to work, he must come without restrictions. Approximately one month later, plaintiff returned to work with an unrestricted release. Plaintiff has sustained a ten to fifteen percent (10-15%) permanent partial disability in his left leg and reached maximum medical improvement in August 1985. Pursuant to an agreement with defendants, plaintiff received workers' compensation benefits and continued to receive follow-up medical attention.

When plaintiff returned to work in June 1985, he was assigned a route to California. He had asked to be assigned to what he perceived were less difficult routes to allow himself to fully recover. After the California trip, plaintiff complained to Mr. McNabb that he had experienced some pain in his leg and again asked to be assigned to easier routes. Thereafter, plaintiff was assigned two routes to the northeast. On the second of these, plaintiff's leg became swollen and painful. At one of his stops in Pennsylvania, plaintiff called his doctor, who told him to come in for further attention as soon as possible. Although he was scheduled to drive to Buffalo, New York, plaintiff called the High Point terminal and talked with the dispatcher. Plaintiff explained his situation and asked if he could exchange routes with another driver so he could return to North Carolina. Plaintiff was told he could not exchange routes and, that if he left his truck there and came back to North Carolina, the company would consider that he had quit. Plaintiff flew back to North Carolina the next day. When he returned to defendants' terminal, he was asked to turn in his keys and company credit cards.

On 4 February 1986, plaintiff filed this action, claiming, in part, that he was discharged in retaliation for pursuing his workers' compensation remedies. He also alleged, as a separate claim for relief, that he was discharged because he raised concerns over the safety of continuing his route and that his discharge was, therefore, wrongful and against public policy. On 12 November 1986, defendants moved for summary judgment on all claims. By order entered 12 December 1986, Judge Morgan grant-

ed defendant's motion as to the retaliatory discharge claim, allowing plaintiff to amend his complaint and submit additional materials on his second claim for relief. On 20 January 1987, after considering the additional materials submitted by the parties, Judge Collier granted summary judgment for defendants on the wrongful discharge claim.

Rabil & Rabil, by S. Mark Rabil, for the plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Guy F. Driver, Jr., M. Ann Anderson, and C. Daniel Barrett, for the defendant-appellees.

EAGLES, Judge.

I

[1] Plaintiff's first claim for relief is based on G.S. 97-6.1, which reads, in relevant part, as follows:

> (a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.
>
> (b) Any employer who violates any provision of this section shall be liable in a civil action for reasonable damages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

To recover under the statute, the plaintiff must show: (1) discharge or demotion, (2) caused by good faith institution of workers' compensation proceedings, or testimony or anticipated testimony, in those proceedings. *Hull v. Floyd S. Pike Electrical Contractor*, 64 N.C. App. 379, 307 S.E. 2d 404 (1983). Plaintiff argues the trial court erred in granting summary judgment for defendant on his claim of retaliatory discharge. We agree.

Summary judgment should only be granted where the evidence presented to the trial court shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d

375 (1976); G.S. 1A-1, Rule 56(c). The movant's materials must be closely scrutinized while the non-movants must be indulgently regarded. *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 296 S.E. 2d 302 (1982), *disc. rev. denied*, 307 N.C. 468 (1983). Defendants contend they are entitled to summary judgment because there is no genuine issue of material fact as to (1) plaintiff's discharge, (2) its motive in discharging plaintiff, assuming he was discharged, and (3) the existence of certain affirmative defenses found in subsections (c) and (e) of the statute. The evidence presented to the trial court, however, precludes summary judgment on any of those grounds.

The evidence undoubtedly reveals a factual dispute on whether plaintiff was discharged. Defendants showed that it was company and industry practice to consider that drivers who left their trucks on the route had quit their job. Moreover, plaintiff was told that in his conversation with the dispatcher on 14 August 1985. Merely because an employer considers an employee as having quit his job, however, does not necessarily make it so, even if the employer had such a policy or practice and the employee knew about it. The proper inquiry in determining whether he was discharged is whether the employee voluntarily left his position, not whether he chose to do an act for which he knew his employer would fire him. Plaintiff's materials showed that he did not want to lose his job; that he told the dispatcher he was not quitting but merely returning to North Carolina to see his doctor about his recurring pain; and that, when he returned to the terminal, Mr. Doyle Vaughn, defendants' terminal manager, asked plaintiff to turn in his keys and credit cards. This is sufficient to establish a genuine issue of material fact regarding whether defendant was discharged.

Assuming *arguendo* that plaintiff was discharged, there is also a genuine issue of material fact as to defendants' motive in discharging plaintiff. Mr. McNabb's and Mr. Vaughn's depositions indicate that the only reason plaintiff was fired, again assuming he was fired, was that he violated company work rules by leaving his truck in Pennsylvania and returning home without it. In plaintiff's deposition testimony, however, there is enough evidence of a retaliatory motive to make summary judgment on that basis inappropriate.

Plaintiff testified that both Mr. McNabb and Mr. Vaughn told him several times after he returned from the California trip and when he complained about his leg, that he should get another job if his injury prevented him from driving. Plaintiff also testified that he felt like he was assigned the California trip to "get rid of" him and that he was sent on the trips to the northeastern United States to "test [him] out." Plaintiff also testified that, during his medical treatment, he missed several doctor's appointments because "they kept me out—when they knew that I had an appointment." In addition, plaintiff's evidence that the dispatcher refused to assign him the easier routes, that easier routes may have been available for assignment to him, and that his fellow drivers did not see why plaintiff could not have those easier routes, is further evidence that defendants' motive was retaliatory.

Plaintiff's evidence showing defendants had a retaliatory motive is all circumstantial. Moreover, defendants' materials attempt to refute much of it. However, motive, like intent or other states of mind, is rarely susceptible to direct proof and almost always depends on inferences drawn from circumstantial evidence. *See* Brandis, North Carolina Evidence, section 83 (1982). Consequently, summary judgment should rarely be granted in those cases. *See Bank v. Belk*, 41 N.C. App. 328, 255 S.E. 2d 430, *disc. rev. denied*, 298 N.C. 293, 259 S.E. 2d 299 (1979). Furthermore, where matters of the credibility and weight of the evidence exist, summary judgment ordinarily should be denied. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). The weight and credibility of both defendants' and plaintiff's evidence, must be determined by the finder of fact.

[2] Finally, defendants contend the summary judgment may be sustained due to the existence of certain statutory defenses set out in G.S. 97-6.1(c) and (e). We disagree.

Defendants rely on G.S. 97-6.1(c) and (e):

> (c) Any employer shall have as an affirmative defense to this section the following: . . . failure to meet employer work standards not related to the Workers' Compensation Claim. . . .
>
> (e) The failure of an employer to continue to employ, either in employment or at the employee's previous level of

> employment, an employee who receives compensation for permanent total disability, or a permanent partial disability *interfering with his ability to adequately perform work available*, shall in no manner be deemed a violation of this section. [Emphasis added.]

Initially the parties dispute the effect of subsections (c) and (e) on proof of the employer's motive under subsection (a). Plaintiff argues that the employer's motive in discharging or demoting the employee is relevant even if the employer can show it has a defense under subsection (c) or (e). Defendants argue that once the employer shows it has a subsection (c) or (e) defense, inquiry into the employer's motive becomes irrelevant. Under defendants' analysis, once a defense is established, even if a plaintiff could prove that his employer fired him for pursuing his remedies under the Workers' Compensation Act, the employer would nevertheless receive judgment. Both parties cite language from *Johnson v. Builder's Transport, Inc.*, 79 N.C. App. 721, 340 S.E. 2d 515 (1986), in support of their position. We need not, however, address that question since, even assuming that defendants' analysis is correct, summary judgment was improperly granted.

All of the evidence shows that any failure to meet defendants' work standards was due to the injury which was the subject of plaintiff's workers' compensation claim and his desire to seek medical attention for it. Therefore, the failure to meet work standards is related to his workers' compensation claim and not within the purview of subsection (c).

Similarly, under subsection (e), defendants have failed to establish that plaintiff's permanent partial disability interfered with his ability to perform work available. It is undisputed that plaintiff sustained a permanent partial disability in his left leg. Prior to the statute's amendment in 1985, proof of this fact alone would have established a defense. *See Bridgers v. Whiteville Apparel Corp.*, 71 N.C. App. 800, 323 S.E. 2d 50 (1984). The 1985 amendment, however, added a requirement that the disability interfere with the employee's ability to perform available work. *See* 1985 N.C. Sess. Laws, chapter 653, section 1. Subsection (e) now requires a causal link between the disability and the ability to perform available work. Here, the evidence establishes a causal link only between the injury and the failure to perform. Plaintiff

produced sufficient evidence from the two employers he has worked for since leaving defendants' employ to show that his permanent partial disability does not interfere with his ability to adequately perform work substantially identical to work he was employed to do for defendants. In addition, as we have already noted, there is some evidence that at the time in question defendant had easier work available which plaintiff might have been able to perform without the trouble he experienced on his assigned routes to California and the northeast. Defendants failed to present a sufficient forecast of evidence to sustain summary judgment based on either G.S. 97-6.1(c) or (e).

II

[3] Plaintiff also contends the trial court erred in granting summary judgment for defendants on his second claim for relief. His complaint alleged that defendants wrongfully discharged him for refusing to drive under unsafe conditions. Citing *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E. 2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 490 (1985), plaintiff argues his second claim for relief states a legally recognized cause of action on which there are genuine issues of material fact for trial. We disagree.

In *Sides*, this court created an exception to the common law employment "at will" doctrine. *Sides* held that a cause of action existed for "wrongful discharge" of an employee at will who was fired in retaliation for her refusal to give false or incomplete testimony in a medical malpractice case. In *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E. 2d 79 (1985), however, this court declined to establish a general cause of action for wrongful discharge of an employee fired for raising safety concerns related to his employment. Instead, we held without deciding whether such a cause of action existed, that the plaintiff in *Walker* had failed to present a sufficient forecast of evidence to justify denial of the defendant's motion for summary judgment.

Like *Walker*, even assuming plaintiff's complaint here states a cause of action, defendants are nevertheless entitled to summary judgment. An essential element of plaintiff's claim, as alleged, would be that defendants' discharge of plaintiff was motivated by plaintiff's raising safety concerns. While there is sufficient circumstantial evidence to show a genuine issue of

material fact on defendants' motive under G.S. 97-6.1, we find nothing in the record to indicate that defendants' motive was that plaintiff raised "safety concerns" about his employment.

In fact, plaintiff's allegations for wrongful discharge do not rest on his having raised safety concerns, but rather on his failure to do an unsafe act. We hold that plaintiff has no cause of action for discharge from failure to perform an act which he may be able to prove was unsafe. Our decision in *Sides v. Duke University, supra,* was based on the employer's willful violation of clearly expressed public policy. To allow an action for "wrongful discharge" where the employer's discharge of the employee was for a failure to perform an "unsafe" act is entirely different. As we noted in *Walker v. Westinghouse Electric Corp., supra,* "some jobs are by their very nature dangerous." *Id.* at 263, 335 S.E. 2d at 86. Holding that every discharge for failure to perform an allegedly unsafe task is actionable, would create a prolific and unwarranted source of trouble in the workplace. The kind of overriding policy concerns present in *Sides* are simply not present here.

[4] Plaintiff has also raised, for the first time on appeal, the argument that a federal regulation prohibits defendants from firing him for his refusal to drive when his physical condition was so impaired. *See* 49 C.F.R., section 392.3 (1986) and 49 U.S.C.A., section 2305 (Supp. 1987). Plaintiff contends that defendants failed to comply with the regulation and therefore, under *Hogan v. Forsyth County Country Club Co.*, 79 N.C. App. 483, 340 S.E. 2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140-141 (1986), defendants are liable for wrongful discharge. In *Hogan*, the court explained *Sides* as recognizing an exception to the employment at will doctrine in favor of an employee who is discharged in retaliation for (1) his refusal to do an act prohibited by law, or (2) his performing an act required by law. *Hogan* at 498, 340 S.E. 2d at 126. Therefore, even assuming that the issue is properly before us, we find no authority for, and decline to adopt, plaintiff's argument that violation of a federal regulation creates an exception to the employment at will doctrine in North Carolina.

Reversed in part, affirmed in part.

Judges MARTIN and PARKER concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

BARBECUE INN, INC., GUS KOOLES AND WILLIE SCHULDT v. CAROLINA POWER & LIGHT COMPANY

No. 8728SC514

(Filed 5 January 1988)

1. **Evidence § 47.1— cause of fire—expert testimony—no exclusion for insufficient factual basis**

Testimony by an expert electrical engineer and fire investigator that one cause of the fire in question was the failure of defendant power company to form drip loops at a service connection which permitted moisture to enter the interior of a conduit and to cause the insulation on the wiring inside the conduit to deteriorate could not be excluded by the trial court on the ground that there was not a sufficient factual basis for the opinion. The witness stated that he was able to infer the presence of moisture from his examination of the conduit, and the trial court could not exclude the opinion testimony merely because it considered this inference to be unreasonable or because the witness failed to examine the wiring inside the conduit. N.C.G.S. § 8C-1, Rule 703.

2. **Evidence § 47— cause of fire—expert testimony—admission of other possible causes**

An expert witness's opinion testimony as to the cause of a fire was not excludable because the expert admitted on *voir dire* that there were other possible causes of the fire.

3. **Electricity § 7— failure to disconnect electric service—issue submitted**

In an action against a power company to recover damages resulting from a fire, the trial court did not err in submitting an issue as to whether defendant was negligent in failing to disconnect electric service outside plaintiffs' building "when it knew or should have known that a dangerous condition existed" and in refusing to submit a less specific issue requested by plaintiff as to whether plaintiff was damaged by defendant's negligence.

4. **Electricity § 4— instructions—standard of care for supplier of electricity**

The trial court's instruction on the standard of care for a supplier of electricity was sufficient, and the court did not err in failing to give plaintiffs' requested instruction on that standard.

5. **Electricity § 4.1— failure to instruct on safety code**

The trial court did not err in failing to instruct the jury as to the National Electrical Safety Code as it related to the applicable standard of care for a supplier of electricity.

6. **Electricity § 4— power company's superior knowledge of service—failure to instruct**

The trial court did not err in failing to give plaintiffs' requested instruction that defendant power company's knowledge of its service is supposedly superior to that of its customers where the trial court adequately instructed on the standard of care applicable to a supplier of electricity.

Barbecue Inn, Inc. v. CP&L

APPEAL by plaintiffs from *Lewis (Robert D.), Judge.* Judgment entered 19 March 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 19 November 1987.

On 20 September 1985, plaintiffs instituted this action alleging in their complaint that the negligence of defendant Carolina Power & Light Company caused a fire on 30 September 1982 which damaged a building located at 80 North Lexington Avenue, Asheville, North Carolina. At the time of the fire, the building was owned by plaintiff Barbecue Inn, Inc. Plaintiff Gus Kooles is the owner and operator of Barbecue Inn, Inc. Although the business of Barbecue Inn, Inc. was not located at 80 North Lexington Avenue, the second floor of the building at that address was used by plaintiffs as storage for personal property. The first floor of the building was leased to plaintiff Willie Schuldt, who operated an automobile repair business on the premises.

At trial before a jury, plaintiffs' evidence tended to show that the fire was caused by electrical wiring on the second floor of the building. Harley Shuford, the fire and arson investigator for the Asheville Fire Department, testified that wiring inside a metal conduit had come in contact with the conduit, thereby causing electrical arcing which melted the conduit and ignited the second-floor ceiling. Plaintiffs' evidence also showed that defendant had supplied electricity to the building, but that only the first floor had electrical service. There was at one time a meter belonging to defendant located on the second floor. In its answer to plaintiffs' interrogatories, defendant admitted that this meter measured electricity used in an adjacent building. The parties stipulated that said meter was removed on 15 September 1980.

Plaintiffs also offered the testimony of Dr. Sam McKnight, who was tendered without objection as an "expert electrical engineer and expert fire investigator." Dr. McKnight agreed with Mr. Shuford as to the cause of the fire, and testified that the arcing which melted the conduit was caused by a fault in the wiring. Before he testified further, defendant requested a *voir dire* to disclose the facts and data that Dr. McKnight was relying on. During the hearing, Dr. McKnight testified that, in his opinion, there were two causes of the fire. The first cause was that defendant's service connection on the exterior of the building was defective in that defendant had failed to form drip loops and this omission per-

mitted moisture to enter the interior of the conduit which in turn caused the insulation inside the conduit to deteriorate. The second cause was defendant's failure to disconnect electrical service to the second floor of the building at a point outside the building after the meter was removed. After an extensive hearing, the trial court concluded that Dr. McKnight could not testify as to the first cause because there were not sufficient facts to support the opinion. The court allowed testimony as to the second cause.

Defendant did not dispute that the fire was caused by faulty wiring inside the building. Defendant offered evidence tending to show that it was not responsible for the interior wiring, and that it was not negligent in failing to disconnect service at a point outside the building.

At the conclusion of the evidence, the following issue was submitted to the jury:

> Was the fire proximately caused by the negligence of Carolina Power & Light Company in failing to disconnect the upstairs service at the outside weatherhead when it knew or should have known that a dangerous condition existed?

The jury answered this issue in the negative, and judgment was entered in favor of defendant. Plaintiffs appeal.

Long, Parker, Payne and Warren, P.A., by Robert B. Long, Jr., and Steve Warren, for plaintiff-appellants.

Brock and Drye, P.A., by Floyd D. Brock, and Fred D. Poisson, Associate General Counsel, Carolina Power and Light Company, for defendant-appellee.

PARKER, Judge.

Plaintiffs bring forward for argument two assignments of error: (i) the trial court's exclusion of Dr. McKnight's expert testimony as to one cause of the fire, and (ii) the trial court's failure to submit plaintiffs' requested issue to the jury and to give their requested jury instructions. Plaintiffs' third assignment of error, that the court's signing and entry of the judgment was not supported by the evidence, is not presented or argued in their brief. We therefore consider the third assignment of error to be abandoned. Rule 28(b)(5), N.C. Rule App. Proc.

[1] Plaintiffs first contend that the excluded part of Dr. McKnight's testimony should have been admitted. The excluded testimony specifically relates to defendant's failure to properly connect the electrical service so as to prevent moisture from entering the interior wiring. The trial court assumed for purposes of the *voir dire* only that the proper connections, known as "drip loops," had not been made. Whether drip loops were actually installed is an unresolved question of fact.

During the *voir dire*, Dr. McKnight testified that it was his opinion that the most probable cause of the fire was the presence of moisture in the conduit which caused the insulation on the wiring to deteriorate. Dr. McKnight admitted that, although he had examined the piece of conduit where the arcing that caused the fire occurred, he had not examined the wiring inside the conduit to determine the condition of the insulation at the exact location of the arcing. The conduit in question had been removed from the building and was admitted into evidence at trial. Dr. McKnight offered the following explanation of how he reached his opinion:

> . . . I looked at the conduit, I see the holes on the conduit, I can look at the condition of the wiring at the ends of the conduit as we have them right here, and I can tell what the condition of the insulation is at those points. But again, I cannot tell the condition of the insulation from a direct observation all the way through, but I can infer, from my knowledge of physical principles and chemical principles of fires and of electrical insulation, what the cause of the fire was.

The trial court did not accept the above explanation, and excluded the testimony on the ground that there was not a sufficient factual basis for the opinion.

Plaintiffs argue that the excluded testimony should have been admitted pursuant to Rule 703 of the N.C. Rules of Evidence. Rule 703 provides that the facts or data upon which an expert bases an opinion may be those "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . . ." Plaintiffs argue that the trial court in this case erred by making its own determination of what facts and data may reasonably be relied on. In support of their argument, plaintiffs cite several federal cases holding that, under Federal Rule of Evidence 703, the trial court may not use its own

judgment to determine whether the basis of an expert's opinion is reasonable. *See, e.g., Indian Coffee Corp. v. Proctor & Gamble Co.*, 752 F. 2d 891, 894-95 (3d Cir.), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180, 88 L.Ed. 2d 150 (1985). The federal courts have held that the trial judge must make a factual inquiry to determine whether the facts and data in question are of a type reasonably relied on by other experts. *Id.* Before North Carolina adopted Rule 703 of the N.C. Rules of Evidence, which is identical to the federal rule, this Court espoused a similar view: "Once the trial court in its discretion determines that the expert testimony will not mislead the trier of fact, any question as to the sufficiency of the factual basis of the opinion affects the credibility of the testimony but not its competence as evidence." *Powell v. Parker*, 62 N.C. App. 465, 468, 303 S.E. 2d 225, 227, *disc. rev. denied*, 309 N.C. 322, 307 S.E. 2d 166 (1983). This Court has also recognized that whether a sufficient factual basis for an expert opinion exists is often a matter within the witness's area of expertise. *Rutherford v. Air Conditioning Co.*, 38 N.C. App. 630, 639, 248 S.E. 2d 887, 894 (1978), *disc. rev. denied*, 296 N.C. 586, 254 S.E. 2d 34 (1979).

We therefore agree with plaintiff to the extent that the trial court could not properly exclude Dr. McKnight's testimony based on its own determination that the factual basis of the opinion was insufficient. The record is not clear, however, that the trial court excluded the testimony on that basis. The trial court was concerned that Dr. McKnight was basing his ultimate opinion on the assumption that moisture did in fact enter the conduit. The court viewed the presence of such moisture as a question of fact, and ruled that Dr. McKnight could not provide the factual basis of one opinion in the form of another opinion.

The trial court was correct in that the substantive facts needed to support an expert's conclusion cannot be supplied by the opinion itself. *Hubbard v. Oil Co.*, 268 N.C. 489, 494, 151 S.E. 2d 71, 76 (1966). In *Hubbard*, the trial court had allowed an expert to testify that an explosion was caused by vapors which came from spilled gasoline. The Supreme Court held that, while the expert could properly testify that the explosion was caused by gasoline vapors, the testimony as to the source of the vapors should have been stricken because there was no evidence that gasoline had been spilled before the explosion. *Hubbard v. Oil Co.*, 268 N.C. at

494, 151 S.E. 2d at 76. In *Hubbard*, however, the expert's opinion conflicted with the facts in evidence. *Id.* at 495, 151 S.E. 2d at 77. In the present case, Dr. McKnight's opinion is entirely consistent with the established facts. Moreover, Dr. McKnight stated that he was able to infer the presence of moisture from his examination of the conduit. The trial court could not exclude the testimony merely because it considered this inference to be unreasonable. *Indian Coffee Corp. v. Proctor & Gamble Co.*, *supra*, and *Mannino v. International Manufacturing Co.*, 650 F. 2d 846 (6th Cir. 1981).

The other deficiency in the excluded testimony that was indicated by the trial court was the failure of the expert to examine the insulation at the point where arcing had occurred. Evidently, such an examination was not made because the conduit would need to be cut open to do so. The expert's failure to examine the wiring inside the conduit undoubtedly affects the credibility of his testimony. Dr. McKnight testified, however, that he had observed the condition of the wiring at the ends of the conduit and could thereby form an opinion as to the condition of the wiring inside the conduit. Again, the witness stated the factual basis of his opinion, and questions as to the sufficiency of this basis go to the weight of the evidence rather than its admissibility. *Powell v. Parker*, *supra*.

[2] Defendant contends that additional grounds exist for the exclusion of the testimony. First, defendant argues that the testimony was properly excluded because Dr. McKnight admitted on *voir dire* that there were other possible causes of the fire. This argument has no merit. Expert testimony that a particular cause "could have" or "possibly" produced a particular result is admissible. *State v. Ward*, 300 N.C. 150, 153-54, 266 S.E. 2d 581, 583-84 (1980); *Tadlock v. Motors, Inc.*, 34 N.C. App. 557, 562, 239 S.E. 2d 311, 314 (1977). Defendant also argues that the trial court could have excluded the evidence because its probative value is outweighed by the chance of misleading the jury. This argument is also meritless. The trial court did not exclude the evidence on this ground, and defendant does not explain how the jury would have been misled by the excluded testimony. The transcript of the *voir dire* reveals that defendant's counsel was quite capable of exposing the weaknesses of Dr. McKnight's opinion. There was therefore little danger that any undue prejudice or confusion

would have resulted from its admission. *See Powell v. Parker*, 62 N.C. App. at 468, 303 S.E. 2d at 227.

Accordingly, we hold that the trial court erred in excluding Dr. McKnight's opinion that the fire was caused by the presence of moisture in the conduit. We also hold that the error was prejudicial to plaintiffs. The exclusion of the expert's opinion precluded plaintiffs from presenting the issue of whether defendant was negligent in failing to form drip loops at the outside service connection. Although the credibility of Dr. McKnight's testimony in this regard may be questioned, his opinion was sufficient to warrant submission of the issue to the jury. *See Walters v. Tire Sales & Service*, 51 N.C. App. 378, 381-82, 276 S.E. 2d 729, 731, *disc. rev. denied*, 303 N.C. 320, 281 S.E. 2d 660 (1981); *Tadlock v. Motors, Inc.*, 34 N.C. App. at 562, 239 S.E. 2d at 314.

[3] Plaintiffs next assign error to the trial court's failure to submit plaintiffs' requested issue to the jury. Plaintiffs requested the following issue:

> Were the Plaintiffs injured or damaged by the negligence of the Defendant, Carolina Power & Light Company?

Plaintiffs contend that the issue submitted by the trial court was misleading because it asked the jury to determine whether defendant was negligent in failing to disconnect service outside the building "when it knew or should have known that a dangerous condition existed." Plaintiffs argue that the question of defendant's negligence should not have been made dependent on whether a dangerous condition existed.

Plaintiffs are objecting to the form rather than the substance of the issue. The transcript shows that the trial court rejected plaintiffs' requested issue because the court felt that a more specific formulation of the issue was required. The form and phraseology of issues is in the court's discretion, and there is no abuse of discretion if the issues are sufficiently comprehensive to resolve all factual controversies. *Pinner v. Southern Bell*, 60 N.C. App. 257, 263, 298 S.E. 2d 749, 753, *disc. rev. denied*, 308 N.C. 387, 302 S.E. 2d 253 (1983). Plaintiffs did not specifically object to the form of the issue at trial, and thus waived their right to object on appeal. *Winston-Salem Joint Venture v. City of Winston-Salem*, 65 N.C. App. 532, 536-38, 310 S.E. 2d 58, 61-62 (1983). In any event,

the submitted issue was not erroneous because the fact of the fire clearly established that a dangerous condition did exist.

[4] Plaintiffs also assign error to the trial court's failure to give several of plaintiffs' requested jury instructions. Plaintiffs first argue that the court erred in failing to instruct the jury that defendant owed to plaintiffs "the highest degree of care for the safe installation, safe maintenance, and safe inspection of the electrical lines and apparatus as is commensurate with the practical operation of the business of electrical utility company [sic]." This argument is totally without merit. The trial court charged the jury as follows:

> [E]lectricity is an inherently dangerous product. Damage can be great, and care and watchfulness must be commensurate with the danger. Consequently, a company supplying it to a customer's building, in the exercise of due care must use a high or highest degree of foresight, and must exercise the utmost diligence in the construction and the maintenance of its wires consistent with the practical application and operation of its own business.

The court's charge is identical in substance to plaintiffs' requested instruction, and was a proper statement of the standard of care. *See Hale v. Power Co.*, 40 N.C. App. 202, 204, 252 S.E. 2d 265, 267, *disc. rev. denied*, 297 N.C. 452, 256 S.E. 2d 805 (1979).

Plaintiffs next argue that the trial court erred in failing to give a detailed instruction concerning the failure of defendant to disconnect service outside the building when it knew or should have known that the lines leading to the second floor were not in use. The trial court instructed the jury that it should find for plaintiff if it was convinced that defendant was negligent in failing to disconnect the lines and that such negligence proximately caused the fire. The court's charge sufficiently presented the issue, and the court was not required to give a more detailed instruction which did not add any substantive matter or essential legal principles. *Morrison v. Stallworth*, 73 N.C. App. 196, 202, 326 S.E. 2d 387, 392 (1985).

[5] Plaintiff next contends that the court erred in failing to instruct the jury as to the National Electrical Safety Code as it related to the applicable standard of care. While the code is ad-

missible as evidence of the standard of care for electrical utilities, it is not decisive on the issue of negligence, which is controlled by the reasonably prudent person standard. *Phelps v. Duke Power Co.*, 76 N.C. App. 222, 225, 332 S.E. 2d 715, 717, *disc. rev. denied*, 314 N.C. 668, 336 S.E. 2d 401 (1985). Plaintiffs here were permitted to put provisions of the code into evidence. They were not entitled to have it included in the charge to the jury.

[6] Finally, plaintiffs argue that the court erred in failing to give a requested instruction including the phrase "The Defendant's knowledge of its service is supposedly superior to that of its customers." The substance of the entire requested instruction, however, is merely a different wording of the standard of care applicable to a public utility. The requested instruction added nothing of substance, and the court's failure to give it was not prejudicial error. *Morrison v. Stallworth, supra.*

For the above-stated reasons, we find that the trial court committed prejudicial error in excluding portions of the expert testimony offered by plaintiff.

New trial.

Judges EAGLES and MARTIN concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

GEORGE ALLEN RONGOTES AND MELODY THOMAS RONGOTES, PLAINTIFFS v. ELIZABETH H. PRIDEMORE AND FORREST D. HEDDEN, DEFENDANTS

No. 875SC427

(Filed 5 January 1988)

1. Frauds, Statute of § 6.1— sale of real estate—agreement covering disposition of proceeds—statute of frauds not applicable

In an action seeking an accounting for profits upon the sale of real estate, the trial court did not err by admitting into evidence writings that appear to outline projected costs and proceeds and that refer to three lots. The statute of frauds does not apply when, as here, a party seeks to prove an oral agreement with respect to the disposition of proceeds from a sale of land rather than to force or prevent the conveyance of the land itself.

2. **Trial § 32.2— sale of real estate—accounting for profits—issue submitted to jury—correct**

The trial court did not err in an action seeking an accounting for profits upon the sale of real estate by submitting to the jury the issue of whether the plaintiffs and defendants agreed that the expenses incurred in the development of lots 1, 2 and 3, excluding construction costs, would be allocated proportionately to each lot where defendants presented no evidence that the parties agreed to apportionment of construction costs and there was no evidence to support the defendant's contention that the issue erroneously contained the clause excluding construction costs.

3. **Quasi Contracts and Restitution § 1.2— sale of real estate—accounting for profits—unjust enrichment**

The trial court did not err in an action for an accounting for profits upon the sale of real estate by failing to submit to the jury issues pertaining to improvements defendants made to the property based on unjust enrichment because the unjust enrichment theory does not operate to alter the terms of an enforceable contract; moreover, there was no evidence of a contract, express or otherwise, to convey land to defendants and defendants may not recover for improvements made in reliance on a contract to reconvey.

4. **Frauds, Statute of § 6.1— sale of real estate—accounting for profits—instructions on enforceability of agreement—statute of frauds not applied**

The trial judge did not err in an action for an accounting of profits upon the sale of real estate by failing to apply the principles of the statute of frauds in his instructions on the enforceability of the agreement where the court instructed the jury that the action was not about the sale and purchase of land but rather dealings in land and management.

APPEAL by defendants from *Henry A. McKinnon, Judge.* Judgment entered 21 November 1986 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 28 October 1987.

Johnson & Lambeth, by Robert White Johnson for plaintiff-appellees.

Shipman & Lea, by Gary K. Shipman for defendant-appellants.

BECTON, Judge.

Plaintiffs, George Allen and Melody Thomas Rongotes, brought this action against defendants, Elizabeth H. Pridemore and Forrest D. Hedden, seeking an accounting for profits upon the sale of real estate sold by defendants pursuant to a partnership agreement with plaintiffs. A jury determined plaintiffs were entitled to receive $34,000 under the agreement. Defendants appeal. We find no error.

I

Plaintiffs owned a house and three contiguous parcels of land located on the Intra-coastal Waterway in New Hanover County, North Carolina. In late 1980, defendants attempted to sell the property as plaintiffs' agent and executed a contract to sell for $115,000; however, the buyer withdrew. Defendants then proposed a plan for developing the property as three separate lots. Plaintiffs agreed. Plaintiffs and defendants disagree on the sequence and significance of subsequent events, as well as the terms of their agreement.

Plaintiffs alleged in their Complaint that, under the development scheme, they were required to contribute their real estate, which was assigned a certain value, and the defendants were to obtain financing and build houses. Upon sale, plaintiffs' contribution was to be returned to them, the defendants would recover their contribution, and the profits would be divided equally. Plaintiffs conveyed a portion of the property to defendant Pridemore to facilitate development.

Defendants answered, alleging that the agreement was unenforceable under the statute of frauds and asserting, in the alternative, that they had not breached such an agreement because all sums owed were paid in full. In addition, defendants filed a counterclaim alleging that they entered into a joint venture with plaintiffs, the terms of which provided that they would be reimbursed for all expenses associated with the development, and that the expenses would be allocated to each lot proportionately. Further, defendants alleged plaintiffs were to receive a predetermined amount upon the sale of all the lots and the remaining proceeds were to be divided equally. Defendants advanced $16,000 to plaintiffs to facilitate development by allowing plaintiffs to relocate. In consideration for the advance, plaintiffs conveyed lot #2 to defendants. Defendants also began making mortgage payments on the remaining two lots, obtained a construction loan, and proceeded to build a house on lot #2. In the interim, plaintiffs further encumbered lots #1 and #3 through an unrelated debt to North Carolina National Bank. Defendants alleged that plaintiffs' action by encumbering the property constituted fraud and entitled defendants to equitable relief. In a second counterclaim, defendants contended that in reliance on their agreement with

plaintiffs to sell the property, defendants made valuable improvements to the property and were entitled to reimbursement.

II

Defendants make five assignments of error on appeal, the first two of which relate to the trial judge's failure to bar plaintiffs' action because the agreement was unenforceable under the statute of frauds.

[1] Defendants first contend that the trial judge erred by admitting in evidence plaintiffs' exhibits numbered 2 and 2A because they did not comport with the requirements of the statute of frauds. These exhibits consist of two writings that appear to outline projected costs and proceeds for the alleged agreement, and that refer to three "lots." Defendants argue that plaintiffs were seeking to enforce a contract to convey real estate; that the statute of frauds requires that such a contract be in writing; and that the writing contain the specific price, a description of the property, and the signature of the person against whom enforcement is sought. Exhibits 2 and 2A do not meet these requirements.

Defendants state the requirements of the statute of frauds accurately. However, the statute of frauds does not apply when, as here, a party seeks to prove an oral agreement *with respect to the disposition of proceeds from a sale of land, rather than to force or prevent the conveyance of the land itself. Schmidt v. Bryant*, 251 N.C. 838, 112 S.E. 2d 262 (1960); *accord Therrell v. Freeman*, 256 N.C. 552, 124 S.E. 2d 522 (1962). In the instant case, plaintiffs alleged that they entered into an oral agreement with defendants which provided plaintiffs would receive a total of $34,000 upon the sale of lot #2. They did not seek a reconveyance of the property to themselves, nor did they seek to force defendants to buy the property. They had already conveyed the property to defendants. Plaintiffs sought, instead, to enforce an oral agreement regarding the disposition of the proceeds from the resale. Such an agreement may be oral, and its enforcement is not barred by the statute of frauds. This assignment of error is overruled.

Defendants next contend that the trial judge erred in denying their motion for directed verdict at the close of plaintiffs' evi-

dence and at the conclusion of all the evidence, and erred in denying their motion to set aside the jury's verdict because the agreement upon which plaintiffs' action was based was unenforceable under the statute of frauds. Our disposition of defendants' first assignment of error forecloses this argument by defendants. Thus, this assignment of error is overruled.

III

Defendants' three remaining assignments of error relate to the manner in which the trial judge framed the issues for submission to the jury. The following questions were considered by the jury.

1. Did the plaintiffs and defendants agree that the plaintiffs were to receive $34,000 upon closing and sale of the house on lot #2?

   Answer: Yes

2. Was there an agreement between the plaintiffs and defendants to develop lots #1, #2, and #3, collectively?

   Answer: Yes

3. Did the plaintiffs and the defendants agree that the expenses incurred in the development of lots #1, #2 and #3, *excluding construction costs*, would be allocated proportionately to each lot? (Emphasis added.)

   Answer: No

[2] Defendants first contend that the trial judge erred in submitting the third issue to the jury because it erroneously contained the clause "excluding construction costs." According to the defendants, the charge given did not provide the jury with an opportunity to find that the parties agreed to apportion all expenses, including construction costs. We find no error in the trial court's submission of the third issue to the jury.

Defendants presented no evidence that the parties agreed to an apportionment of construction costs, and there is, therefore, no evidence to support the defendants' contention. It is true that Ms. Pridemore, one of the defendants, testified to the anticipated expenses; however, her recitation did not include construction of the house on lot #2. Additionally, she testified that the plaintiffs were

to make a profit on the land only, and that she and her brother (co-defendant) were to make a profit on the house and land. Later in her testimony, she was asked to explain how the expenses which were *not* covered in the construction on lot #2 were to be allocated to lots #1 and #3. She asserted that the non-construction expenses were to be apportioned equally. She was never asked about (nor did she voluntarily testify about) the apportionment of construction costs. This assignment of error is overruled.

[3] Defendants next contend that the trial judge erred in failing to submit to the jury issues pertaining to the improvements they made to the property. In their counterclaim, defendants sought to recover $25,000 for repairs and improvements to lots #1 and #2. They argue that the trial judge was required to submit their equitable claims to the jury.

Defendants argue that plaintiffs were unjustly enriched because defendants enhanced the marketability of two lots and were not compensated. "The rule of unjust enrichment is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another." *Stauffer v. Owens*, 25 N.C. App. 650, 652, 214 S.E. 2d 240, 241 (1975). "Thus, where services are rendered and expenditures are made by one party to or for the benefit of another without an express contract to pay, the law will imply a promise to pay a fair compensation therefor." *Clontz v. Clontz*, 44 N.C. App. 573, 575, 261 S.E. 2d 695, 697 (1980), *citing R.R. v. Highway Commission*, 268 N.C. 92, 150 S.E. 2d 70 (1966). Defendants argue because the contract did not contain a specific provision to compensate them for the improvements, they should be permitted to recover the costs of the improvements under the theory of unjust enrichment. We disagree. The unjust enrichment theory does not operate to alter the terms of an enforceable contract. Throughout the proceedings, defendants contested the particulars of the agreement, not its very existence. Defendants had an adequate remedy at law. They neither alleged in their counterclaim, nor do they argue now, that plaintiffs breached the agreement thereby entitling defendants to compensation for the improvements.

Defendants also argue that they made the improvements in reliance on plaintiffs' promise to convey the land, and that thus, the theory of unjust enrichment should apply. The theory has

been applied to permit compensation for improvements made in reliance on a contract to convey land when the contract was *unenforceable* under the parol evidence rule. *See Pitt v. Moore*, 99 N.C. 85, 5 S.E. 389 (1888); *Clontz*. However, in the instant case, there is no evidence of a contract, express or otherwise, to convey land to defendants. Defendants did not seek to enforce a contract to convey nor did they even contend that plaintiffs promised to convey the remaining lots to them. This assignment of error is overruled.

[4] Defendants next contend that the trial judge's instructions to the jury regarding the enforceability of the agreement were erroneous because he failed to apply the principles of the statute of frauds. The trial judge described the jury's options in determining the existence and terms of the alleged agreement as follows: "[the contract] may be oral, it may be partly oral and partly in writing . . . . [This] action is not about the sale and purchase of land, but rather the dealings in land and the management. [sic] No one is attempting to enforce the delivery of a deed or the sale of land and so it does not require for the contracts and agreements contended in this case that they be in writing. [sic]" For the reasons already discussed in Section II, *infra*, we find those instructions to be an accurate statement of the law applicable to this case. This assignment of error is overruled.

We find no error.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA, EX REL. EMPLOYMENT SECURITY COMMISSION v. GROVER C. FAULK T/A BLUE EAGLE CAB COMPANY

No. 874SC508

(Filed 5 January 1988)

1. Master and Servant § 111— decision on unemployment insurance contributions—overruling of exceptions—reasons not required

The Employment Security Commission had no duty to state its reasons for overruling respondent's exceptions to its decision that unemployment insurance contributions were due. N.C.G.S. § 96-4.

2. Master and Servant § 101— unemployment insurance contributions—taxi drivers as employees

The Employment Security Commission properly determined that drivers for a taxicab company were employees rather than independent contractors and that respondent owner was liable for unemployment insurance contributions for such drivers where the evidence showed that respondent owns, maintains, stores and insures all of the taxicabs; he sets the work shifts within which drivers must operate; licenses and permits to engage in the taxi business are all in respondent's name; the drivers do not lease the cabs from respondent and do not have the authority to hire assistants or to obtain someone else to drive for them; drivers must compute rates charged to customers from a chart given to them by respondent; and none of the drivers have any investment in the taxicabs or the business.

APPEAL by respondent from *Small, Judge.* Judgment entered 13 April 1987 in Superior Court, ONSLOW County. Heard in the Court of Appeals 19 November 1987.

This case involves respondent's liability for unemployment insurance contributions under Chapter 96 of the General Statutes. Respondent owns Blue Eagle Cab Company. As a result of an auditor's investigation, petitioner, Employment Security Commission, instituted proceedings to collect over $5,000 in back taxes, interest, and penalties. The assessment was based on the auditor's determination that the company's drivers were "employees," not independent contractors. After a hearing, the special deputy commissioner issued his opinion which contained the following undisputed findings of fact:

> 3. Mr. Faulk owns six automobiles that are licensed by the City of Jacksonville and the State of North Carolina as taxicabs. He obtains individuals to drive these taxicabs for him. None of the individuals who drive his taxicabs have an investment in the taxicabs or in the business itself.
>
> 4. All licenses and permits are in the name of Grover C. Faulk. Each driver does have a permit to drive in the City of Jacksonville. Any taxi driver who drives in the City of Jacksonville must have a permit issued by the city. The Certificate of Public Convenience and Necessity required by the city to operate the taxicab company is issued to Mr. Faulk only. None of the drivers who drive taxicabs owned by Mr. Faulk have a Certificate of Public Convenience and Necessity issued by the city.

5. All insurance on the taxicab business is provided by and is in the name of Mr. Faulk. He also provides a life and accident policy on three of his drivers.

6. Mr. Faulk is responsible for all of the maintenance on the vehicles.

7. Mr. Faulk maintains an office that is equipped with a telephone and a two-way radio to be used to contact the taxicabs. A disptacher [sic] is not, however, always available for the drivers.

8. Individuals seeking to drive for Mr. Faulk contact him and if they have the necessary permit and license, complete the application, pass the police investigation, and if Mr. Faulk has a taxicab available. . . .

9. When a driver picks up a vehicle at the beginning of the shift, the fuel tank is full. At the end of the shift, the driver returns the vehicle with a full fuel tank. Cost of the fuel is deducted from the gross amount of the fares collected by the driver during his shift. After the cost of the fuel has been deducted, the driver and Mr. Faulk split the remaining income on a fifty/fifty basis. The drivers keep a daily log of their fares and turn in this log when they turn in the fifty percent due to Mr. Faulk.

10. An accepted schedule is for a driver to drive from 6:00 a.m. until 6:00 p.m. or 6:00 p.m. until 6:00 a.m. Drivers may, however, within the time that they are allotted the taxicab, select the times that they will drive.

11. When not being used, the taxicabs are maintained at Mr. Faulk's place of business which is located at his home.

12. Mr. Faulk withholds and reports state income tax on the drivers. He does this on a daily basis when they settle at the close of the shift. This is a result of an audit by the North Carolina Department of Revenue. Mr. Faulk does not withhold Federal income tax or Social Security taxes.

13. Drivers generally drive either in the City of Jacksonville or on the military installations located in the area. Rates are set by the military when the drivers drive on the military installations. Mr. Faulk sets the rates when drivers

drive in the city. This is done on a zone basis. When drivers drive off the military reservation and outside of the City of Jacksonville, the charge is a mileage charge. There are no meters in the cabs.

14. The drivers of Mr. Faulk's cabs may not obtain someone else to drive for them.

15. Drivers may drive outside their assigned shift if the driver on the next shift is not available. Mr. Flagg has a cab assigned to him that no one else drives. Therefore, he may drive on any shift.

* * *

17. The taxicabs are not leased by Mr. Faulk to the drivers.

The special deputy commissioner also found that respondent had the right to control the operation of the taxicabs but chose not to exercise that right. The opinion concluded that the taxicab drivers were employees and ordered respondent to pay the assessment. Respondent submitted exceptions to the opinion which were overruled by the chief deputy commissioner. Respondent then appealed to superior court, which held that the Commission's findings were supported by the evidence and that the Commission had correctly applied the law to those findings.

Chief Counsel T. S. Whitaker and Staff Attorney C. Coleman Billingsley, Jr., for the petitioner-appellee.

Bowen C. Tatum, Jr., for the respondent-appellant.

EAGLES, Judge.

[1] By his first assignment of error, respondent argues that the Commission's order overruling his exceptions is insufficient for its failure to state the reasons therefor. Respondent contends this case should be remanded for a more specific order. We disagree.

The procedure for determining whether unemployment insurance taxes are due is set out in G.S. 96-4. G.S. 96-4(m) provides, in part, that a party may appeal to the Commission from the initial decision by filing exceptions, stating the grounds and objections for each one. The statute does not require the Commission to

state the reasons for its rulings. In fact, since the appealing party must state the grounds for its exceptions, the mere overruling of the exceptions provides the parties with the reason for the ruling. The Commission has no duty to state its reasons for rulings on exceptions to the decision.

[2] Respondent next assigns as error the Commission's determination that the taxicab drivers were "employees." G.S. 96-8(6)(a) provides, in relevant part, that:

> [T]he term 'employee' . . . does not include (i) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules. . . .

The common law rules for determining whether an individual is an "employee" or an "independent contractor" are fully laid out in *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944).

In *Hayes*, our Supreme Court stated that the decisive test in determining whether someone is an independent contractor is "the retention by the employer of the right to control and direct the manner in which the details of the work are to be executed." *Id.* at 15, 29 S.E. 2d at 139. The court enunciated the following factors to consider in determining whether there is a relationship of employer and independent contractor:

> 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. No particular one of these factors is controlling and the presence of all factors is not required to show the employed person is an independent contractor. *Id.*

Initially, we note that respondent excepted to the Commission's "finding of fact" that "Mr. Faulk has the right to control the operation of his taxicabs but does not choose to exercise that right." The Commission's findings of fact are conclusive on appeal if supported by any competent evidence. G.S. 96-4(m); *Yelverton v. Furniture Industries*, 51 N.C. App. 215, 275 S.E. 2d 553 (1981). Whether someone is an "employee" is a mixed question of law and fact. *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965). The question of fact is what the terms, express or implied, of the employment contract are; the question of law is whether those terms show the requisite degree of control. *Id.* The Commission's undisputed findings support its conclusion that respondent retained control over the manner and method which the drivers did their work and, therefore, that the drivers are "employees" of the company. To the extent that the excepted to finding purports to say that respondent retained the requisite degree of control over the drivers to legally classify them as "employees," it is a conclusion of law which is fully reviewable by this court.

Respondent owns, maintains, stores, and insures all of the taxicabs. He sets the work shifts within which the drivers must operate. Licenses and permits to engage in the taxi business are all in respondent's name. The drivers do not lease the cabs from respondent, nor do they have the power to hire assistants or obtain someone else to drive for them. Drivers must compute the rates charged to customers from a chart given to them by respondent. None of the drivers have any investment in the taxicabs or the business.

Some of the Commission's findings tend to show that some of the factors in *Hayes, supra*, indicate the drivers are independent contractors. On balance, however, the Commission's findings clearly show that respondent maintained control over the manner and method of the drivers' work and that the drivers did not retain "that degree of independence necessary to require [their] classification as independent contractor[s] rather than employee[s]." *Id.* at 16, 29 S.E. 2d at 140.

Reco Transportation, Inc. v. Employment Security Comm., 81 N.C. App. 415, 344 S.E. 2d 294, *disc. rev. denied*, 318 N.C. 509, 349 S.E. 2d 865 (1986), cited by respondent, is readily distinguishable. In *Reco*, this court held that the Commission's findings of fact

were insufficient to support its conclusion that certain truck drivers were employees. There, however, the drivers could, and did, secure contracts from other companies to haul freight, selected their own routes, and had the power to hire assistants. Moreover, the employer did not control the destination, date, and time of delivery for the freight; the drivers were not required to notify the employer as to their whereabouts at any time; and the drivers had an investment in some of the equipment on the vehicle.

Conversely, drivers for Blue Eagle Cab Company worked for no other companies. They all drove taxicabs which were similarly painted and which were marked "Blue Eagle Cab Company," handed out business cards with only the company name printed on it, and had no separate telephone or other business listing. Furthermore, drivers could not hire assistants, had no investment in the business, and were required to inform respondent or other drivers whenever they took a fare outside the City of Jacksonville. Further, the testimony of both respondent and his drivers tended to show that they believed that respondent had control over the manner and method which the drivers worked and that any flexibility the drivers had was the result of respondent's failure to exercise control rather than any implied condition of the employment relationship.

While there are numerous decisions on whether a taxicab driver is an employee or an independent contractor, the only North Carolina case we find is *Alford v. Cab Co.*, 30 N.C. App. 657, 228 S.E. 2d 43 (1976). There the court held the drivers to be independent contractors. In *Alford*, drivers rented the taxicabs for a flat, daily fee, kept all the fares and tips and could use the cab for their own purposes during the time it was rented. The employer had no supervisory control over the manner or method the driver chose to operate the cab. We believe *Alford* is clearly distinguishable. Moreover, cases from other jurisdictions support our decision, either by holding under similar facts that the taxicab drivers were employees, *see ESC v. Laramie Cabs, Inc.*, 700 P. 2d 399 (Wyo. 1985); *Yellow Cab Co. v. Industrial Com'n of Illinois*, 124 Ill. App. 3d 644, 464 N.E. 2d 1079 (1984), *aff'd sub nom. Yellow Cab Co. v. Jones*, 108 Ill. 2d 330, 483 N.E. 2d 1278 (1985); *Read v. Warkentin*, 185 Kan. 286, 341 P. 2d 980 (1959); *Redwine v. Wilkes*, 83 Ga. App. 645, 64 S.E. 2d 101 (1951), or by finding that the taxicab drivers were independent contractors based on facts

and circumstances different from this case. *See Romanski v. Prudential Property & Cas. Ins.*, 356 Pa. Super. 243, 514 A. 2d 592 (1986); *Brunson v. Valley Coaches, Inc.*, 173 Ga. App. 667, 327 S.E. 2d 758 (1985); *Rubin v. Weissman*, 59 Md. App. 392, 475 A. 2d 1235 (1984).

The Commission's findings of fact are supported by competent evidence. Those findings support its conclusion that taxicab drivers for Blue Eagle Cab Co. are "employees" within the meaning of G.S. 96-8(6)(a). Accordingly, the judgment of the trial court affirming the decision of the Employment Security Commission is affirmed.

Affirmed.

Judges MARTIN and PARKER concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

MARY LOUISE ELDRIDGE AND HUSBAND, DONALD E. ELDRIDGE v. JEAN MORGAN AND HUSBAND, CHARLES L. MORGAN, JR., MARY CLAUDIA HOOKER, SINGLE, FRANCES BOND, SINGLE, AND FIRST UNION NATIONAL BANK, INCORPORATED

No. 8725SC439

(Filed 5 January 1988)

Trusts § 10— action to terminate trust—determination that four separate trusts had been created—no error

In a declaratory judgment action to terminate a trust and distribute trust assets, the trial court did not err by finding that there were four separate trusts where the will, construed as a whole, provided that income be paid in equal shares; the trustees had discretion to pay out principal only as to the share of each child; trustees were constrained to retain $5,000 for each child during his life; the entire share of a child dying without children or descendants surviving was to be divided among surviving children in equal shares in trust; the use of the plural "trusts" and "respective trust funds" could logically only refer to multiple trusts; and construing the will to establish one trust with concurrent equitable interests would leave uncertainty as to the nature of the equitable estates, the disposition of each child's share if the child died with children or descendants surviving, and the distribution of shares to the ultimate beneficiaries, and would render the last sentence of the next item of the will meaningless.

Eldridge v. Morgan

APPEAL by defendants Jean Morgan, Charles L. Morgan, Jr., Mary Claudia Hooker, and Frances Bond from *Sitton, Judge.* Judgment entered 17 December 1986 in Superior Court, CATAWBA County. Heard in the Court of Appeals 29 October 1987.

Plaintiffs Mary Louise Eldridge and her husband, Donald E. Eldridge, brought this declaratory judgment action seeking termination of certain trusts established by a Codicil to the Will of Claudia Field Allen and seeking distribution of the trust assets. Claudia Field Allen (hereinafter, testatrix) died on 12 August 1938, leaving a Will dated 2 August 1918 and a Codicil to that Will dated 12 January 1929. Both of these documents were admitted to Probate in Catawba County, North Carolina, on 3 October 1938. Items One, Two, and Three of the Codicil bequeathed specific sums of money in trust for the use of various individuals under specified conditions. Items Four and Five of the Codicil, the construction of which is here at issue, provided the following:

> ITEM 4: All the rest, residue and remainder of my property, both real and personal, I devise and bequeath to the Trustees hereinafter mentioned, for the use of my children, share and share alike, to invest and re-invest the same and the income therefrom to be paid to the said children in equal shares during their lives. Said Trustees shall have full power in their discretion to pay to any or all of said children at any time any part of the principal of said Trust fund as to the share or shares of such child or children, which shall be over and above the sum of $5,000.00; it being expressly provided hereby that said Trustees shall retain for the use and benefit of my children during their respective lives the minimum sum of $5,000.00 for each child. Upon the death of any of my children without children or their descendants surviving my said child or children, the interest and property devised and bequeathed by this Item 4 shall go to my surviving children in equal shares in trust, as is provided in this Item.
>
> ITEM 5: Upon the termination of the trusts created by this codicil, unless provision is otherwise herein expressly made, the respective trust funds shall go to the heirs of my said children.

Testatrix was survived by four children, Louise Allen, Frank Field Allen, Mary Allen May, and Katherine Allen Cornwell. Lou-

ise Allen died first, without children or descendants. Frank Field Allen died second, leaving three daughters, Jean Morgan, Mary Claudia Hooker, and Frances Bond, three of the defendants involved in this appeal. (The fourth defendant involved in this appeal is Charles L. Morgan, Jr., the husband of defendant Jean Morgan. Defendant First Union National Bank is not a part of this appeal.) Mary Allen May was the third of testatrix's children to die, and she left no children or descendants. Katherine Allen Cornwell was the last of testatrix's children to die; she was survived by one daughter, Mary Louise Cornwell Eldridge, one of the two plaintiffs in this case.

The court below concluded that Item Four of testatrix's Codicil established four separate trusts for testatrix's four children; that when one of testatrix's children died without children or descendants, his trust fund, interest and principal, was to be divided among the surviving children; that when one of the testatrix's children died with children or their descendants surviving him, his share passed to his heirs pursuant to Item Five of the Codicil; that the trusts established by Item Four have all terminated or are now terminable; and that defendants Jean Morgan, Mary Claudia Hooker, and Frances Bond are entitled to one-third of the total funds and plaintiff Mary Louise Cornwell Eldridge is entitled to two-thirds of the total funds. Defendants Jean Morgan, Charles L. Morgan, Mary Claudia Hooker, and Frances Bond appeal.

Corne, Pitts, Corne and Grant, P.A., by Larry W. Pitts, for plaintiff-appellees.

Rudisill and Brackett, P.A., by J. Steven Brackett, Curtis R. Sharpe, Jr., and H. Kent Crowe, for defendant-appellants.

PARKER, Judge.

The principal issue in this appeal is whether the trial court correctly ascertained the respective proportional interests of each beneficiary in the corpus of testatrix's testamentary trust. To a large extent, resolution of this issue depends on whether the court below correctly concluded that Item Four of the Codicil to testatrix's Will created four separate trusts, and not one trust in which testatrix's children held concurrent beneficial interests. If four separate trusts were created by Item Four of the Codicil, the

share of each child who died with children or their descendants surviving him would be payable, upon termination of the trust, to his heirs pursuant to Item Five of the Codicil. If, however, Item Four created only one trust, determination of the ultimate beneficiaries' shares would depend on the nature of the testatrix's children's interests in the trust *res* as well as the nature of the interests granted the children's heirs under Item Five of the Codicil.

Where the meaning of a will or any part thereof is the subject of controversy, the court has the prerogative of construing the provision in question and declaring its meaning. *Wachovia Bank v. Livengood*, 306 N.C. 550, 552, 294 S.E. 2d 319, 320 (1982); *Trust Co. v. Waddell*, 237 N.C. 342, 346, 75 S.E. 2d 151, 153 (1953). In interpreting a will, the Court must be guided by the intent of the testator. *Wing v. Trust Co.*, 301 N.C. 456, 462-463, 272 S.E. 2d 90, 95 (1980); *Trust Co. v. Bryant*, 258 N.C. 482, 484, 128 S.E. 2d 758, 760 (1963). The intent that controls must be gathered from the instrument in its entirety. *Bank v. Goode*, 298 N.C. 485, 489, 259 S.E. 2d 288, 291 (1979). Every word or phrase in the instrument has its purpose and should be given meaning, if possible, and harmonized with the rest; none should be silenced. *Id.* Where parts of the will are dissonant or create an ambiguity, the discord thus created must be resolved in light of the prevailing purpose of the entire instrument. *Id.*

The question of whether or not multiple trusts were established by Item Four of the Codicil to testatrix's Will cannot be answered "by simply marshalling plural references in the document against singular." *Bank v. Goode*, 298 N.C. at 490, 259 S.E. 2d at 292. However, any ambiguity may be resolved by giving purpose to and harmonizing the words and phrases of the Will as a whole. By the terms of Item Four of the Codicil, the trust income was to be paid to testatrix's children "in equal shares during their lives"; the trustees had discretion to pay out principal to each child only as to the share of each child; the trustees were constrained to retain in the trust fund $5,000.00 for each child during his life; and the entire share, both principal and interest, of a child dying without children or their descendants surviving him was to be divided among the surviving children in equal shares in trust. These provisions strongly suggest that testatrix's intent was to create four separate trusts, one for each of her four children.

Use of the word "trusts" and the phrase "respective trust funds" in Item Five of the Codicil bolsters this conclusion. Defendants Morgan, Hooker and Bond contend that these plurals refer to trusts created by Items One, Two, and Three of the Codicil. However, this contention is strongly undercut by the fact that each trust created by Items One, Two, and Three provides for its own termination and each contains either its own specific distribution scheme or "pours over" into the residuary provision of Item Four. Logically, therefore, the plurals, "trusts" and "respective trust funds," could only refer to the multiple trusts set up by Item Four of the Codicil. The fact that the corpus of the trust set up by Item Four of the Codicil was treated as a single trust fund is immaterial. As Justice (now Chief Justice) Exum has noted:

> Whether the assets of the several shares are in fact physically separated and independently invested is immaterial to the existence of separate trusts. An undivided interest in a larger corpus may constitute the *res* of a separate trust. . . . What is important is that the trustees have the legal capacity to manage the shares as separate trusts where needed.

Bank v. Goode, 298 N.C. at 491, 259 S.E. 2d at 292 n. 4 (citation omitted).

Defendants Morgan, Hooker and Bond, however, contend that Item Four of the Codicil created one trust in which the children of testatrix received concurrent equitable interests. This view is untenable for a number of reasons. First, such an interpretation would leave uncertainty as to the nature of these equitable estates, *i.e.*, whether joint tenancies with rights of survivorship or tenancies in common; as to the disposition of each child's share if that child died with children or their descendants surviving; and as to the distribution of shares to the ultimate beneficiaries, the heirs of testatrix's children, *i.e.*, whether per stirpes or per capita. Moreover, if, as defendants Morgan, Hooker and Bond contend, Item Five of the Codicil evidences testatrix's intent to divide the trust *res* per capita among the heirs of testatrix's children after the last of testatrix's children has died, the last sentence of Item Four, granting the share of any child dying without children or their descendants surviving him to testatrix's surviving children, would be meaningless.

In sum, Item Four of the Codicil to testatrix's Will created four trusts in favor of testatrix's four children. The *res* of each trust, or what the Codicil denotes as the "share" of each child, was an undivided one-fourth interest in the residue of testatrix's property, which share was not to drop below the minimum sum of $5,000.00 during the life of the *c'estui que*. On the death of Louise Allen, the first of testatrix's children to die, the three surviving children each received one-third of Louise Allen's share; each child then had an equitable interest in an undivided one-third of the residue of testatrix's estate. When Frank Field Allen died next, his trust terminated, and his one-third interest was thereupon distributable to his heirs, defendants Jean Morgan, Mary Claudia Hooker, and Frances Bond. On the death of Mary Allen May, the third of testatrix's children to die, Mary Allen May's one-third share went to the remaining surviving child of testatrix, Katherine Allen Cornwell. Upon Katherine Allen Cornwell's death, the last of the four trusts terminated, and plaintiff as the heir of Katherine Allen Cornwell became entitled to the remaining two-thirds undivided interest in the residue of testatrix's estate.

Having determined that the trial judge did not err in finding four separate trusts, we find no merit in defendants' remaining assignments of error relating to the trial judge's failure to find certain facts which would be inconsistent with four separate trusts. The construction placed on the Codicil gave effect to the testator's intent as manifest in the language from the four corners of the document.

Accordingly, for the above-stated reasons, the judgment of the trial court is

Affirmed.

Judges EAGLES and MARTIN concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

LEE A. WHITE, ADMINISTRATOR OF THE ESTATE OF BRADLEY D. WHITE, DECEASED v. D. CHARLES HUNSINGER

No. 873SC357

(Filed 5 January 1988)

1. **Physicians, Surgeons and Allied Professions § 15.2— obstetrician—opinion testimony concerning pediatrician—practice in similar community**

An affidavit of a specialist in obstetrics and gynecology concerning when defendant pediatrician should have referred a patient to a neurosurgeon was not incompetent in a summary judgment hearing in a medical malpractice case because the affiant was not a pediatrician. Nor was the affidavit incompetent on the ground that the affiant was not practicing in a community similar to New Bern when defendant's alleged negligence occurred in 1982 where the affiant averred that he practiced in Lumberton from 1957 to 1979.

2. **Physicians, Surgeons and Allied Professions § 20.1— failure to refer patient to specialist—negligence—insufficient showing of proximate cause**

An affidavit of plaintiff's medical expert stating his opinion that plaintiff's son's chances of survival would have been greater if he had been referred by defendant pediatrician to a neurosurgeon earlier was sufficient to raise a genuine issue of material fact as to defendant's negligence but was insufficient to raise a genuine issue on the question of whether defendant's negligence was a proximate cause of the son's death.

APPEAL by plaintiff from *Phillips (Herbert O., III), Judge.* Order entered 18 August 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 22 October 1987.

Plaintiff Lee A. White, administrator of the estate of his son, Bradley D. White, filed this action for wrongful death resulting from alleged medical malpractice. The complaint, filed 13 February 1985, named eleven defendants, but plaintiff eventually took voluntary dismissals as to all except defendant Dr. D. Charles Hunsinger. From entry of summary judgment for defendant, plaintiff appeals.

Neill A. Jennings, Jr., for plaintiff-appellant.

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

PARKER, Judge.

On this appeal plaintiff contends that the trial court erred in granting defendant's motion for summary judgment. Plaintiff ar-

gues that there are genuine issues of fact as to whether defendant was negligent and whether defendant's negligence was the proximate cause of the death of plaintiff's deceased.

On 23 July 1982, Bradley D. White was taken to the emergency room of Craven County Hospital in New Bern, North Carolina, after he had been struck by an automobile. At the hospital, Bradley was seen and treated by several members of the staff of Craven County Hospital, including defendant Dr. Hunsinger. Bradley was kept at the hospital overnight and was transferred to Pitt County Memorial Hospital for treatment by a neurosurgeon the next morning. Bradley died on 28 July 1982. In his complaint, plaintiff alleged that defendant was negligent in failing to refer Bradley to a neurosurgeon or take other action before Bradley was transferred to Pitt County Memorial Hospital and that this delay in treatment was the proximate cause of Bradley's death.

In a medical malpractice action, the plaintiff must prove that the defendant breached the applicable standard of care and that the defendant's treatment proximately caused the injury. *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E. 2d 287, 291, 16 A.L.R. 4th 989, 992 (1978). Summary judgment is rarely appropriate in negligence cases. *Vassey v. Burch*, 301 N.C. 68, 73, 269 S.E. 2d 137, 140 (1980); *Beaver v. Hancock*, 72 N.C. App. 306, 310, 324 S.E. 2d 294, 298 (1985). On a motion for summary judgment, the moving party has the burden of establishing that no triable issue of fact exists and that he is entitled to judgment as a matter of law. *Vassey v. Burch*, 301 N.C. at 72, 269 S.E. 2d at 140. Once the moving party meets this burden, the burden is then on the opposing party to show that a genuine issue of material fact exists. *Id.* at 73, 269 S.E. 2d at 140. If the opponent fails to forecast such evidence, then the trial court's entry of summary judgment is proper. *See Rorrer v. Cooke*, 313 N.C. 338, 354-55, 329 S.E. 2d 355, 365-66 (1985).

Defendant, a pediatrician, submitted his own affidavit and the affidavits of three other doctors. Of these three affiants, one was a specialist in pediatric neurology and the other two were specialists in pediatrics. All three averred that they were familiar with the standards of practice among physicians with similar training and experience to that of defendant practicing in Craven

County or similar communities; that it was their opinion that defendant acted in accordance with those standards in this case; and that nothing that defendant did or did not do would have prevented Bradley's death.

Plaintiff submitted two affidavits in opposition to defendant's motion. One was the affidavit of Neill A. Jennings, Jr., plaintiff's counsel, who averred that he had been unable to prepare and submit the affidavit of Dr. Robert A. Moore due to time constraints. Counsel also averred that Dr. Moore was expected to testify that Bradley should have been referred to a neurosurgeon earlier than he was; that Bradley's chances of survival would have been increased if he had been transferred earlier; and that the 80% mortality rate for persons with injuries like Bradley's did not take into account positive factors such as Bradley's age and good physical condition.

Affidavits opposing a motion for summary judgment must be made on personal knowledge, must set forth facts that would be admissible in evidence, and must affirmatively show that the affiant is competent to testify as to the matters stated therein. Rule 56(e), N.C. Rule Civ. Proc. Plaintiff admits in his brief that counsel's affidavit is hearsay and cannot be considered as substantive evidence. Plaintiff argues that this affidavit was intended as an explanation of why affidavits were unavailable under Rule 56(f), which authorizes the trial court to order a continuance or take other action to allow affidavits to be obtained. Plaintiff does not, however, assign as error the failure of the court to take such action, nor does he argue in his brief that the trial court erred in this respect. The affidavit of plaintiff's counsel therefore has no bearing on this appeal.

[1] Plaintiff also submitted the affidavit of Dr. Jack E. Mohr, a specialist in obstetrics and gynecology, who averred that he was familiar with the standards of practice among physicians with similar training and experience to that of defendant practicing in communities similar to Craven County; that defendant's delay in referring Bradley to a neurosurgeon or taking other action was a deviation from those standards; and that Bradley's chances of survival would have been increased if he had been transferred to a neurosurgeon earlier. Defendant contends that Dr. Mohr's affidavit is inadequate because it shows that Dr. Mohr is not compe-

tent to testify as to the applicable standard of care. The standard of care in medical malpractice actions is statutorily defined to be "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." G.S. 90-21.12. Defendant argues that Dr. Mohr is not competent to testify to this standard because he is not a pediatrician and because he was not practicing in a community similar to New Bern at the time of defendant's alleged negligence.

This Court has held that the standard of care in malpractice cases must be established by "other practitioners in the particular field of practice or by other expert witnesses equally familiar and competent to testify to that limited field of practice." *Lowery v. Newton*, 52 N.C. App. 234, 239, 278 S.E. 2d 566, 571, *disc. rev. denied*, 304 N.C. 195, 291 S.E. 2d 148 (1981). Defendant contends that Dr. Mohr, a specialist in obstetrics and gynecology, is not equally familiar with and competent to testify to standards of practice in the field of pediatrics. In *Bryant v. Sampson Memorial Hosp.*, 72 N.C. App. 203, 323 S.E. 2d 478 (1984), *disc. rev. denied*, 313 N.C. 506, 329 S.E. 2d 390 (1985), however, this Court held that the trial court erred by excluding the testimony of a pathologist as to the standard of care in the treatment of ulcers: "[A] medical doctor of whatever specialty is better able to form an opinion as to medical treatment than the laymen who ordinarily comprise juries." *Id.* at 204, 323 S.E. 2d at 479. The alleged negligence in the present case is defendant's failure to refer his patient to a neurosurgeon. Arguably, any doctor should be competent to testify as to when such a referral should be made. Plaintiff's evidence in opposition to defendant's motion must be viewed indulgently and given every reasonable inference to be drawn therefrom. *See Vassey v. Burch*, 301 N.C. at 75, 269 S.E. 2d at 142. Dr. Mohr has averred that he is familiar with the standards of practice for physicians with similar training and experience as defendant. We, therefore, hold that Dr. Mohr's affidavit is not rendered incompetent as a matter of law solely because he is not a pediatrician.

Defendant also contends that Dr. Mohr's testimony would be incompetent because he was not practicing in a community similar to New Bern at the time of defendant's alleged negligence. Dr.

Mohr averred that he practiced in Lumberton, North Carolina from 1957 to 1979. Defendant argues that since the alleged negligence occurred in 1982, Dr. Mohr is not competent to testify as to the applicable standard because G.S. 90-21.12 specifies that the standard is determined at the time of the alleged negligent act. This Court has held that G.S. 90-21.12 does not require expert witnesses to have actually practiced in a similar community at the exact time of the alleged act. *Simons v. Georgiade*, 55 N.C. App. 483, 494-95, 286 S.E. 2d 596, 603, *disc. rev. denied*, 305 N.C. 587, 292 S.E. 2d 571 (1982). Based on the foregoing, Dr. Mohr is not incompetent to testify as a matter of law. Since his affidavit clearly averred that defendant breached the applicable standard of care, plaintiff sufficiently forecast evidence to raise a genuine issue as to defendant's negligence.

[2] The remaining consideration is whether plaintiff has forecast evidence sufficient to raise a genuine issue of material fact on the question of proximate cause. Dr. Mohr's affidavit states:

> I am . . . of the opinion that had Bradley been transferred to a neurosurgeon earlier, his chances of survival would have been increased.

As defendant correctly notes, plaintiff could not prevail at trial by merely showing that a different course of action would have improved Bradley's chances of survival. Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery. *Gower v. Davidian*, 212 N.C. 172, 193 S.E. 28 (1937); *Bridges v. Shelby Women's Clinic, P.A.*, 72 N.C. App. 15, 20-22, 323 S.E. 2d 372, 376 (1984), *disc. rev. denied*, 313 N.C. 596, 330 S.E. 2d 605 (1985).

Defendant's motion for summary judgment places the burden on him to show lack of causation. *Hall v. Funderburk*, 23 N.C. App. 214, 208 S.E. 2d 402 (1974). When, as here, defendant has adduced evidence negating an essential element of plaintiff's proof, plaintiff must at a minimum come forward with competent evidence that raises a genuine issue of material fact on that element. *Vassey v. Burch, supra; see also Rorrer v. Cooke*, 313 N.C. at 350, 329 S.E. 2d at 363 (legal malpractice action stating requirements to withstand summary judgment).

On the record before us, plaintiff has failed through affidavit or otherwise to forecast any evidence showing that had Dr. Hunsinger referred Bradley to a neurosurgeon when Bradley was first brought to the hospital, Bradley would not have died. The connection or causation between the negligence and death must be probable, not merely a remote possibility. *Bridges v. Shelby Women's Clinic, P.A., supra.*

At the time defendant's summary judgment motion was filed, this action had been pending for eighteen months. Presumably, if plaintiff had had a medical expert who would testify that defendant's negligence was the proximate cause of Bradley's death, plaintiff would have obtained an affidavit which so stated from the expert. In this regard Dr. Robert Moore's affidavit would not be availing.

For the foregoing reasons, we hold that the trial court did not err in entering summary judgment for defendant.

Affirmed.

Judges EAGLES and MARTIN concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

WILLIAM G. HINKLE, II v. C. A. BOWERS

No. 8722DC348

(Filed 5 January 1988)

1. Contracts §§ 20.2, 21— breach of contract—no substantial performance—no prevention of performance by other party

Evidence that defendant merely asked noteholders to sign a release of a lot from a deed of trust did not show substantial performance by defendant of his contractual obligation to furnish the release. Furthermore, defendant's contention that plaintiff prevented him from obtaining the release was refuted by his own pleadings and evidence showing that he could have obtained the release at any time by paying $2,000 on a debt that he had assumed.

2. Attorneys at Law § 7.5; Contracts § 29— breach of contract—damages—fee paid to attorney

A $150 fee which plaintiff had paid to his attorney to obtain a release of a lot from a deed of trust was properly included in the damage award to plaintiff for defendant's breach of a contract to obtain the release since the $150 did not constitute an unauthorized taxing of attorney fees as part of the court costs but constituted a foreseeable expense incurred by plaintiff because of defendant's breach of contract.

Judge GREENE concurring.

APPEAL by defendant from *Cathey, Judge.* Order entered 12 February 1987 in District Court, DAVIDSON County. Heard in the Court of Appeals 21 October 1987.

Lambeth, McMillan and Weldon, by Wilson O. Weldon, Jr., for plaintiff appellee.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Charles H. McGirt, for defendant appellant.

PHILLIPS, Judge.

This appeal is from an order of summary judgment holding defendant liable to plaintiff in the amount of $2,150 for breaching his written contract dated 22 November 1985 to convey to plaintiff "all of his right, title and interest in and to Lot 36 of Misty Acres, Randolph County, released and free from that deed of trust to Loy Craig Gaddy recorded in Book 1156, Page 131, Randolph County Registry." The contract dissolved a real estate development partnership business the parties had operated theretofore and under its other terms defendant *received* plaintiff's interest in the partnership accounts and property, *assumed* the firm's $79,240.50 note to Loy Craig Gaddy and wife which was secured by a deed of trust on the Misty Acres subdivision, and *paid* plaintiff $18,083.85. Though defendant immediately quitclaimed his interest in the lot to plaintiff, he did not get the lot released from the deed of trust because the noteholders would not release it until $2,000 was paid on the note and defendant refused to pay it. Plaintiff had contracted to sell the lot and on 10 April 1986, five days before the sale was scheduled to be closed, he had his attorney obtain the release by paying $2,000 on the note and he paid his attorney $150 for getting the release.

[1] The foregoing facts were established without contradiction by the pleadings, written contract, correspondence, affidavits, and other documents considered by the court in ruling upon plaintiff's motion for summary judgment. But whether these uncontradicted facts establish as a matter of law that defendant breached his contract to get Lot 36 in Misty Acres released from the Gaddy deed of trust and that plaintiff necessarily expended $2,150 in getting the lot released is not raised by any assignment of error and thus will not be discussed. Rule 10, N.C. Rules of Appellate Procedure. The only questions raised by defendant's sole assignment of error are whether "there is a genuine issue as to material fact as to whether or not there was substantial performance and whether or not the plaintiff by his own conduct prevented performance." Neither question has merit. The written agreement, unclouded by either ambiguity or qualification, required defendant to get Lot 36 released from the deed of trust, and merely asking the noteholders to sign the release, all that he did according to his affidavit, was not a substantial performance of his obligation to furnish the release. And defendant's contention that he was "prevented" from getting the lot released by plaintiff is refuted by his own pleadings, affidavit and brief, all of which recognize that he could have obtained the release anytime he wanted to by paying $2,000 on a debt that he assumed and is obligated to pay. Whether the noteholders were justified in requiring the payment is not clear and is immaterial in any event under the circumstances, since defendant contracted to get the release and has shown no valid reason for not doing so. The only possible indication that defendant was "prevented" from getting the release is a statement in his affidavit that the noteholders told him that the note was in default, and presumptively the payment was demanded, because of some earlier failure on plaintiff's part. But the statement has no legal effect because affidavits on a motion for summary judgment must be based on personal knowledge, Rule 56, N.C. Rules of Civil Procedure, and defendant admitted in the affidavit that he had no personal knowledge of the reported default by plaintiff, and prevention of performance cannot be based upon events that occurred before a contract was entered into. 17 Am. Jur. 2d *Contracts* Sec. 427 (1964).

[2] Defendant also argued in his brief that plaintiff told him before the agreement was signed that the release could be ob-

tained without consideration simply by asking the noteholders, and that $150 of plaintiff's award was an unauthorized taxing of attorney's fees as part of the court costs. These arguments are not supported by the assignment of error above quoted and we reject them. Even so, the arguments have no merit. Since the written contract is clear and unambiguous, defendant's parol evidence as to an intention or understanding contradictory to that manifested by the writing cannot be accepted. *Williams v. McLean*, 220 N.C. 504, 17 S.E. 2d 644 (1941). And all the materials recorded, as well as the order itself, show without contradiction that the $150 was awarded to plaintiff not as a cost of court, but as an expense proximately and foreseeably incurred by plaintiff because of defendant's breach of contract. *See* 25 C.J.S. *Damages* Secs. 45, 50(e) (1966); Hightower, North Carolina Law of Damages, Sec. 17-10 (1981).

Affirmed.

Judges BECTON and GREENE concur.

Judge GREENE concurring.

I disagree with the majority's holding that plaintiff was entitled to $150 in attorney's fees "as an expense proximately and foreseeably incurred by plaintiff because of defendant's breach of contract." Whether denominated "costs," "damages" or "expenses," a trial court may only award legal fees pursuant to express statutory or contractual authority or pursuant to its exercise of certain equitable or supervisory powers. *See generally Parker v. Lippard*, 87 N.C. App. 43, 45, 359 S.E. 2d 492, 494 (1987) (denying attorney's fees as "cost" or "expense" of foreclosure and citing cases barring fees as general "damage"). The parties' written agreement does require defendant to indemnify plaintiff for "all loss, damage, claims, liabilities, or obligations" arising out of certain partnership operations and debts. However, the scope of this indemnifying language is not comprehensive enough to encompass reimbursing plaintiff's attorney's fees. *See Cooper v. H. B. Owsley & Son, Inc.*, 43 N.C. App. 261, 269, 258 S.E. 2d 842, 847 (1979); *U.S. Fidelity and Guar. Co. v. Davis Mechanical Contractors, Inc.*, 15 N.C. App. 127, 129, 189 S.E. 2d 553, 554 (1972); *see generally* Hightower, North Carolina Law of Damages, Sec.

17-10 n.19 (1981). Therefore, absent express authority, the trial court erroneously awarded plaintiff $150 attorney's fees.

However, I agree that defendant's lone assignment of error completely fails to address any aspect of the damages awarded by the trial court. As defendant has therefore waived review of this error under N.C.R. App. P. 10(a), I concur in the majority's disposition of the case.

VIVIAN V. McCRAW v. DR. JOHN C. HAMRICK, JR., M.D.; CLEVELAND ORTHOPAEDIC ASSOCIATES, P.A.; AND CLEVELAND MEMORIAL HOSPITAL, INC.

No. 8727SC469

(Filed 5 January 1988)

Judgments § 4— order compelling discovery and dismissal for failure to comply— conditional—void

An order in a medical malpractice case dismissing plaintiff's case if plaintiff failed to produce certain x-ray film within 30 days was conditional and not self-executing and therefore void. N.C.G.S. § 1A-1, Rule 37(b).

APPEAL by plaintiff from *Owens, Judge*. Order entered 29 October 1986 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 17 November 1987.

On 13 December 1983, plaintiff filed her initial complaint against defendants Hamrick, Cleveland Orthopaedic Associates (hereinafter, COA), and Cleveland Memorial Hospital for alleged professional malpractice in connection with an operation performed on plaintiff's shoulder by defendant Hamrick in December 1980. Defendants filed timely answers, and the parties commenced discovery. On 13 March 1985, plaintiff took a voluntary dismissal of her action without prejudice.

Plaintiff refiled her suit on 4 March 1986. On 5 May 1986, defendants Hamrick and COA filed a motion for the production of certain x-rays of plaintiff's shoulder taken prior to the December 1980 operation. On 21 August 1986, defendants Hamrick and COA filed a motion to compel discovery of the x-rays as well as notice that the motion would come on for hearing.

After a hearing on defendants' motion to compel discovery, the trial court entered the following order:

> Defendant Hamrick's motion to compel production of certain original x-ray film and for dismissal of the case on plaintiff's failure to produce the film was heard before the undersigned Judge in the Superior Court of Cleveland County on Monday, October 27, 1986. Counsel for all parties were present and presented oral argument on the motion.
>
> Based on statements of counsel, it appears that the plaintiff Vivian C. McCraw obtained from the Cleveland Memorial Hospital certain original x-ray film and that the films were then delivered by her to a physician's office in South Carolina and thereafter to a physician's office in Greensboro, North Carolina. The plaintiff left instructions with the Greensboro physician's office to mail the x-ray film back to a Doctor Stratford's office in South Carolina, but it appears that those instructions were not followed; instead, the plaintiff has presented an affidavit indicating that the films were mailed back to Cleveland Memorial Hospital. The hospital denies receiving or having the film in its possession. All counsel agree that the films are important to the trial of this action. Defendant Hamrick and the hospital argue that the preparation of their defense has been compromised by reason of nonaccess to the x-ray films and that the rights of the defendants have been prejudiced in the preparation and trial of this case.
>
> Upon obtaining possession of the x-ray films, the plaintiff was under a duty to safeguard the films against loss or misplacement.
>
> THEREFORE, it is ordered that the plaintiff shall have thirty (30) days from this date, October 27, 1986, within which to produce the aforesaid original x-ray film and deliver the same to the defendants' counsel and upon plaintiff's failure to do so, this case is hereby declared to be dismissed without further order from this Court.

From this order plaintiff appeals.

Lamb Law Offices, P.A., by William E. Lamb, Jr., for plaintiff-appellant.

Dameron and Burgin, by Charles E. Burgin, for defendant-appellees John C. Hamrick, Jr., M.D., and Cleveland Orthopaedic Associates, P.A.

No brief filed for defendant-appellee Cleveland Memorial Hospital.

PARKER, Judge.

The five "questions presented" in plaintiff's brief raise but a single issue on appeal in this case: whether the trial court erred in its 29 October 1986 order dismissing plaintiff's case if plaintiff failed to produce certain x-ray film within thirty days. We find that the order entered by the trial court was conditional and not self-executing and, therefore, void.

In her brief, plaintiff presents five alternative attacks on the trial court's dismissal of her case as "the product of the practical mechanics of": "a silent motion for summary judgment"; "a *Rule 41(b)* motion for involuntary dismissal"; "a *Rule 12(b)(6)* motion for failure to state a claim"; "a *Rule 12(c)* motion for judgment on the pleadings"; and "simply . . . an unfiled *Rule 37(b) sanction* for failure to comply with a condition of purge impossible to perform in a short-circuited procedure." Under each of these five "theories" plaintiff asserts various errors against the dictates of the N.C. Rules of Civil Procedure committed by the court below.

As the record makes clear, defendants Hamrick and COA filed a motion for an order to compel plaintiff to produce certain x-ray film. In response to this motion, the court could properly issue an order compelling plaintiff to produce the film pursuant to Rule 37(a) of the N.C. Rules of Civil Procedure. The court below also had express authority under Rule 37(b)(2)(c) to sanction plaintiff's failure to comply with the court's order to produce the film by dismissing plaintiff's action. After a motion and order compelling discovery, defendants were not required to file a motion requesting such sanctions as plaintiff implies in her brief. G.S. 1A-1, Rule 37(b). A party wishing to avoid court-imposed sanctions for failure to comply with an order compelling discovery bears the burden of showing justification for his noncompliance. *Silver-*

thorne v. Land Co., 42 N.C. App. 134, 136-137, 256 S.E. 2d 397, 399, *disc. rev. denied*, 298 N.C. 300, 259 S.E. 2d 302 (1979). The choice of sanctions imposed under Rule 37 is a matter within the trial court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion. *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E. 2d 793, 795 (1984); *Silverthorne v. Land Co.*, 42 N.C. App. at 137, 256 S.E. 2d at 399.

Although Rule 37 gives the trial court authority to issue orders to compel discovery and to sanction failure to comply with such orders, the court below conditioned the sanction, dismissal of plaintiff's case, upon plaintiff's failure to comply with the order to produce the x-ray film within thirty days. Because this order contains a condition to the dismissal of plaintiff's action, the order is not self-executing and is void as a conditional order. *See Cassidy v. Cheek*, 308 N.C. 670, 303 S.E. 2d 792 (1983); *Hagedorn v. Hagedorn*, 210 N.C. 164, 185 S.E. 768 (1936); *Flinchum v. Doughton*, 200 N.C. 770, 158 S.E. 486 (1931); *Lloyd v. Lumber Co.*, 167 N.C. 97, 83 S.E. 248 (1914).

For the foregoing reasons, the order of the trial court declaring plaintiff's case to be dismissed upon plaintiff's failure to produce certain x-ray film within thirty days is vacated, and the cause is remanded for further proceedings.

Vacated and remanded.

Judges EAGLES and MARTIN concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

In re Foreclosure of Williams

IN THE MATTER OF FORECLOSURE OF THE DEED OF TRUST EXECUTED BY GARY DON WILLIAMS AND WIFE, ESSIE G. WILLIAMS; TO: ALLEN R. TEW, TRUSTEE, FOR THE BENEFIT OF JUNIOR AND APPIE JOHNSON, AS RECORDED IN BOOK 1003, PAGE 687 OF THE JOHNSTON COUNTY REGISTRY

No. 8711SC457

(Filed 5 January 1988)

Mortgages and Deeds of Trust § 25— foreclosure—consent order—waiver of right to appeal

The mortgagors waived their right to appeal to the superior court from an order of the clerk authorizing a foreclosure sale under a purchase money deed of trust when they executed a consent order which provided for the foreclosure proceeding to be held in abeyance for a certain time to give the mortgagors the opportunity to obtain conventional financing and pay off the purchase money note and which authorized the clerk to enter an order of foreclosure on the basis of the evidence already presented if the mortgagors failed to pay off the note within the specified time.

Judge GREENE dissenting.

APPEAL by defendants Gary Don Williams and Essie G. Williams from *Allen, J. B., Jr., Judge.* Judgment entered 25 February 1987, *nunc pro tunc* 23 February 1987, in Superior Court, JOHNSTON County. Heard in the Court of Appeals 17 November 1987.

Mast, Tew, Morris, Hudson, Schulz & Holmes-Farley, by Donald E. Hudson, Jr., for plaintiff appellees.

Gary Don Williams, pro se, for defendant appellants.

PHILLIPS, Judge.

Incident to the purchase of a house and lot Gary Don Williams and wife, Essie G. Williams, executed a note and purchase money deed of trust in favor of Junior and Appie Johnson, and when the Williamses failed to make the payments agreed to this proceeding to foreclose under the deed of trust was duly begun. On 1 October 1986 the hearing required to determine whether foreclosure was authorized by G.S. 45-21.16 was held by the Clerk of Superior Court and after evidence was presented indicating that the proceeding was well founded and the Johnsons had a right to proceed with it, the parties and the court signed a consent order providing for the foreclosure proceeding to be held in

abeyance until 2 January 1987 so the Williamses could try to obtain conventional financing and pay off the note. The order also provided in pertinent part that: If "for any reason" the Williamses did not pay off the note on 2 January 1987 the Johnsons could proceed with the foreclosure based upon the "default by the Williamses in the payment schedule previously agreed upon," and without any further hearing the Clerk could make whatever conclusions of fact and law were necessary based upon the evidence already presented "to support an order for a foreclosure sale upon the subject property." The Williamses did not pay off the note by 2 January 1987, and on 19 January 1987 the Clerk of Superior Court, after making all the findings essential to a valid foreclosure stated in G.S. 45-21.16(d), ordered the trustee to proceed with foreclosure. The Williamses' appeal to the Superior Court was dismissed by a judgment directing the trustee to proceed with the foreclosure as previously ordered by the Clerk.

By their appeal here the Williamses question the validity of the judgment dismissing their appeal from the Clerk because G.S. 45-21.16(d) provides that appeals from foreclosure determinations by the Clerk shall be heard *de novo* by a Superior Court judge. The appellants' contention has no merit and we overrule it. While G.S. 45-21.16(d) does provide as they maintain, that provision does not authorize the redetermination of matters that have been finally adjudicated before the Clerk; and it was finally adjudicated by the consent judgment and the Clerk's order based thereon that the note and deed of trust are valid, they are in default, and the Johnsons have a right to proceed with the foreclosure. A duly agreed to and entered consent order in a judicial proceeding is a final determination of the rights adjudicated therein and generally is a waiver of a consenting party's right to challenge the adjudication by appealing therefrom. *King v. Taylor*, 188 N.C. 450, 124 S.E. 751 (1924). Indeed, by joining in the consent order, the Williamses not only waived their right to appeal from the final adjudication based thereon, they also left the case with no unresolved issue to appeal. Nor does it matter that their appeal to the judge was not from the consent order but the Clerk's follow-up order authorizing foreclosure. For the consent order established that the foreclosure issue would be finally set at rest by the subsequent order; and the parties, in effect, agreed and consented to the subsequent order as well.

Affirmed.

Judge BECTON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's holding that the mortgagors waived their right to appeal to the Superior Court because they entered into the consent order.

The consent order entered on 1 October 1986 authorized the Honorable Will R. Crocker, Clerk of the Superior Court of Johnston County to make findings and conclusions "from the evidence already before the Clerk," without a further hearing. Subsequent to the consent order, the Clerk did enter an order authorizing foreclosure on 19 January 1987. In that order, the Clerk made the necessary findings and conclusions as required in N.C.G.S. Sec. 45-21.16(d) (1984).

The appeal to the Superior Court was from the order of the Clerk authorizing the foreclosure sale, not from the previous consent order authorizing the Clerk to proceed without a further hearing on the issue. Therefore, the mortgagors did not waive their right to appeal to the Superior Court once the Clerk entered the order authorizing the foreclosure sale. Accordingly, the order of the trial court should be reversed and the case remanded for a hearing *de novo* pursuant to N.C.G.S. Sec. 45-21.16(d).

CINDY LOU STRICKLAND, ADMINISTRATRIX OF THE ESTATE OF LARRY CHRISTOPHER LOCKLEAR, DECEASED v. TERESSA DEAL JACOBS AND MARTHA IVEY DEAL

No. 8716SC441

(Filed 5 January 1988)

1. Rules of Civil Procedure § 52.1— new trial granted—motion for supporting findings not timely

In a negligence action arising from an automobile accident in which the trial court granted plaintiff's motion for a new trial following a jury verdict for

defendant, the trial court did not err by failing to make findings of fact of the grounds upon which it granted the new trial where defendant failed to make a timely request for findings. A request for the trial court to amend its order to include specific findings of fact after the order has already been issued is not a timely request for findings and is within the trial court's discretion. N.C.G.S. § 1A-1, Rules 52(a)(2) and 59(e).

2. Rules of Civil Procedure § 59— denial of motion for new trial—no findings of facts—no abuse of discretion

The trial court in an automobile negligence case did not abuse its discretion by granting plaintiff's motion for a new trial without findings of fact where plaintiff's motion stated several grounds upon which the trial court could have granted a new trial and the record indicates the defendant cried during much of the trial and that the trial judge was concerned about the prejudicial effect on the proceedings.

APPEAL by defendants from *Bowen, Judge*. Order entered 20 November 1986 in Superior Court, ROBESON County. Heard in the Court of Appeals 29 October 1987.

This is a negligence action arising out of an automobile accident. On 30 January 1985, defendant, Teressa Jacobs, was driving near an elementary school on a four lane road in Lumberton. A group of children were gathered near the road just past the school grounds. As she neared them, one of the group, Larry Christopher Locklear, a six-year-old boy, was either pushed or chased into the street. Defendant's vehicle struck and killed him.

On 27 August 1985, plaintiff, as administratrix of Larry Christopher Locklear's estate, brought this action against Ms. Jacobs and Martha Deal, the vehicle's owner. The complaint alleged negligence by Ms. Jacobs and sought to recover over $117,000 in damages. Defendants answered, denying negligence. Ms. Deal was later dismissed as a party defendant. At trial, the jury returned a verdict for defendant. Plaintiff moved pursuant to G.S. 1A-1, Rule 59(a), listing several grounds for a new trial. The trial court granted the motion.

Subsequent to the order granting a new trial, defendant moved, pursuant to G.S. 1A-1, Rule 59(e), to amend the order to include specific findings of fact. The trial court denied defendant's motion to amend. Defendant appeals.

Musselwhite, Musselwhite & McIntyre, by W. Edward Musselwhite, Jr., and McLean, Stacy, Henry & McLean by H. E. Stacy, Jr., for the plaintiff-appellee.

Murray, Regan & Regan, by Cabell J. Regan, and Maupin, Taylor, Ellis & Adams, by John C. Millberg, for the defendant-appellant.

EAGLES, Judge.

[1] Defendant first argues that the trial court erred in failing to grant her motion to amend the order for a new trial. She contends that Rule 52(a)(2) of our Rules of Civil Procedure and *Andrews v. Peters*, 318 N.C. 133, 347 S.E. 2d 409 (1986), required the trial court to make findings of fact showing the grounds upon which it granted the new trial. We disagree. In ruling on a motion for a new trial under Rule 59(a), absent a specific request made pursuant to Rule 52(a)(2), a trial court is not required to either state the reasons for its decision or make findings of fact showing those reasons. *Edge v. Metropolitan Life Ins. Co.*, 78 N.C. App. 624, 337 S.E. 2d 672 (1985); cf., G.S. 1A-1, Rule 50(c) and G.S. 1A-1, Rule 59(d). In *Andrews v. Peters, supra*, our Supreme Court held that, when requested, the trial court must make findings of fact and conclusions of law sufficiently specific to allow for meaningful appellate review, even on rulings resting in the trial court's discretion. Here, however, defendant failed to make a timely request for findings.

A Rule 59(e) motion to amend the trial court's judgment or order is, of course, made subsequent to the judgment and is, itself, a matter within the trial court's discretion. *See Hamlin v. Austin*, 49 N.C. App. 196, 270 S.E. 2d 558 (1980). A request for the trial court to amend its order to include specific findings of fact *after* the order has already been issued is not a timely request for findings under Rule 52(a)(2). *See* 76 Am. Jur. 2d, "Trial," section 1255 (1975). Denying defendant's motion to amend the order to include what defendant properly could have requested prior to its issuance was not an abuse of the trial court's discretion.

[2] Defendant next contends the trial court erred in granting a new trial. When the trial court grants or denies a motion for a new trial without making findings of fact, our review is limited to determining whether the record indicates that the ruling amounts

to a manifest abuse of discretion. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). We find no abuse of discretion. Plaintiff's motion stated several grounds upon which the trial court, in the exercise of its discretion, could have granted a new trial. In addition, the record indicates the defendant cried during much of the trial and that the trial judge was concerned about its prejudicial effect on the proceedings.

Affirmed.

Judges MARTIN and PARKER concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

AD/MOR, A LIMITED PARTNERSHIP, D/B/A AD/MOR BILLBOARD COMPANY, AND D. P. BLACK AND WIFE, MARY BLACK v. THE TOWN OF SOUTHERN PINES, THE BOARD OF ADJUSTMENT OF THE TOWN OF SOUTHERN PINES, AND BUDDY BLACKBURN

No. 8720SC465

(Filed 5 January 1988)

Municipal Corporations § 31— violation of zoning ordinance—decision of Board of Adjustment—timeliness of petition for certiorari

Since N.C.G.S. § 160A-388(e) gave petitioners the right to file a petition for a writ of certiorari for review of a decision of a board of adjustment finding that their billboard violated the town's zoning ordinance within 30 days after the later of their receipt of the decision or the filing of the decision in the appropriate office, the trial court's finding that petitioners received notice of the board's decision more than 30 days before the petition was filed was insufficient to support the court's determination that the petition was untimely, and the case must be remanded for findings as to when the decision was filed in the appropriate office and a new determination as to whether the petition was timely filed.

APPEAL by petitioners from *Davis (James C.), Judge.* Order filed 5 January 1987 in Superior Court, MOORE County. Heard in the Court of Appeals 17 November 1987.

The following facts are undisputed. On 9 July 1986, the Board of Adjustment of the Town of Southern Pines affirmed an en-

forcement decision of the town's zoning officer. The zoning officer had found that a billboard owned by petitioner Ad/Mor and located on property owned by petitioners D. P. and Mary Black, violated the town's zoning ordinance. Petitioner Ad/Mor received notice of the board's decision on 10 July 1986. Petitioners Black received notice on 11 July 1986. On 15 August 1986, petitioners filed a petition for writ of certiorari in superior court pursuant to G.S. 160A-388(e). Respondents filed a motion in response to the petition asking, in part, that it be denied because it was untimely filed. After considering the pleadings, an affidavit from the town's planner, and the arguments of counsel, the trial court denied the petition for certiorari. The trial court found that the mailing to petitioners of a copy of the board's decision "constituted compliance with the requirements of" G.S. 160A-388(e) and that the petition, having been filed more than 30 days after that notice, was untimely. Petitioners appeal.

Thigpen & Evans, by John B. Evans, for the petitioner-appellants.

Brown, Robbins, May, Pate, Rich, Scarborough & Burke, by W. Lamont Brown, for the respondent-appellees.

EAGLES, Judge.

The sole issue here is whether the trial court erred in dismissing the petition for writ of certiorari as being untimely filed. G.S. 160A-388(e) provides, in relevant part, that "[e]very decision of the board [of adjustment] shall be subject to review by the superior court by proceedings in the nature of certiorari." The statute, however, requires that petitions for certiorari be filed in superior court "within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party . . . whichever is later." *Id.* While the trial court found that the notice of the board's decision was received over 30 days before the petition for writ of certiorari was filed, it did not address the question of when the decision was filed with the office specified in the ordinance. Consequently, we must remand this case for additional findings.

Where the trial court makes findings of fact, they must be sufficient to support the judgment. *Rock v. Ballou*, 286 N.C. 99,

209 S.E. 2d 476 (1974). When findings on matters material to the dispute are not made, the case must be remanded for those findings. *Id.* G.S. 160A-388(e) clearly gives the petitioners 30 days after the later of delivery of the board's decision to petitioners or the filing of the decision with the office specified in the ordinance, within which to petition for certiorari. When the decision was filed in the appropriate office is a question of fact, the resolution of which is essential to determine whether petitioners are entitled to judicial review. Although petitioners presented some evidence that the decision was not properly filed until, or after, 31 July 1986, the trial court made no findings addressing the issue of when the decision was filed. Therefore, we must remand for findings on that question and any appropriate modification of the order denying the petition for certiorari.

Reversed and remanded.

Judges MARTIN and PARKER concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

OAK MANOR, INC. v. NEIL REALTY CO., BRITTHAVEN, INC., AND ROBERT HILL, SR.

No. 8710SC308

(Filed 5 January 1988)

Venue § 2— amended complaint—change of venue improperly granted

The trial court erroneously removed an action from Wake County to Greene County for improper venue pursuant to a motion by defendants where an amended complaint had been filed as a matter of right before any responsive pleadings were filed by the original defendant, the original complaint gave notice of the transactions or occurrences referred to in the amended complaint, and the amended complaint added a corporation which was a resident of Wake County for venue purposes because it had a place of business in Wake County. N.C.G.S. § 1-79, N.C.G.S. § 1A-1, Rule 15(c).

APPEAL by plaintiff from *Farmer, Judge*. Order entered 9 October 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 20 October 1987.

Smiley, Olson, Gilman & Pangia, by William P. Harper, Jr. and Robert A. Mineo, for plaintiff appellant.

Bode, Call & Green, by Robert V. Bode and S. Todd Hemphill, for defendant appellees.

PHILLIPS, Judge.

This action by plaintiff, a North Carolina corporation whose principal place of business is in Lenoir County, started out as a suit against only Neil Realty Co., a North Carolina corporation whose main office is in Greene County, for not leasing a nursing home facility in Wake County to plaintiff as it contracted to do. On 24 April 1986, before any responsive pleading was filed to the action, plaintiff filed an amended complaint that added as party defendants Britthaven, Inc. and Robert Hill, Sr. and that, in addition to repeating the breach of contract claim earlier asserted, claimed that Britthaven and Hill tortiously instigated Neil Realty's breach of contract. Britthaven, Inc., a North Carolina corporation whose registered office is in Greene County, admittedly maintains a place of business in Wake County. Robert Hill, Sr. resides in Greene County. The case was removed from Wake County to Greene County for improper venue pursuant to the motion of defendants.

The order is erroneous. The residence of a domestic corporation for the purposes of being sued is either where its registered or principal office is located, or where it maintains a place of business. G.S. 1-79. The action being between private persons for money damages only it is governed by G.S. 1-82, our general venue statute, which provides that "[i]n all other cases the action must be tried in the county in which the plaintiffs or the defendants, *or any of them*, reside at its commencement . . . ." (Emphasis supplied.) Under the provisions of Rule 15(c), N.C. Rules of Civil Procedure, when an amended complaint is filed as a matter of right before any responsive pleading is filed by the original defendant and the original complaint gave notice of the transactions or occurrences referred to in the amended complaint, as happened here, the claims asserted in the amended complaint are deemed to have been interposed at the time the claim in the original pleading was interposed. *Burcl v. North Carolina Baptist Hospital, Inc.*, 306 N.C. 214, 293 S.E. 2d 85 (1982). Thus, since Britthaven, Inc. is

a resident of Wake County for venue purposes because it has a place of business there and is deemed to have been a defendant in the action at its commencement by operation of Rule 15(c), though not added until later, the venue there is not improper.

Vacated.

Judges BECTON and GREENE concur.

SEAFARE CORPORATION v. TRENOR CORPORATION, FRED J. BENDER AND WIFE, JUDY H. BENDER

No. 871SC398

(Filed 19 January 1988)

1. **Pleadings § 1— extension of time to file complaint—expired on Sunday—filing on Monday proper**

A complaint was timely filed on 17 September 1984 even though an order extending the time to file the complaint expired on 16 September when 16 September fell on a Sunday.

2. **Rules of Civil Procedure § 12.1— improper service of process—not properly raised—waived**

Although defendants may have been correct in arguing that service of process on one defendant by leaving a copy of the complaint with his wife at his office was defective, their failure to raise the defense in the manner provided by N.C.G.S. § 1A-1, Rule 12(h)(1) waived the defense.

3. **Appeal and Error § 32; Fiduciaries § 2— existence of fiduciary relationship—failure to object to submission of issue**

If a party does not object to the submission of issues at trial, he cannot make the objection on appeal; however, even if defendants had objected at trial, the court nevertheless did not err in submitting an issue as to whether a fiduciary relationship existed between plaintiff and one defendant where plaintiff's evidence tended to show that plaintiff hoped the defendant would sell its property for a good price, thus enabling plaintiff to pay its debts, but defendant contended that plaintiff's evidence showed that plaintiff's property was transferred to defendant in order to deceive plaintiff's creditors.

4. **Fraud § 13— existence of fiduciary relationship—transfer of property to fiduciary—presumption of fraud—instructions proper**

The trial judge properly instructed the jury that once plaintiff had shown the existence of a confidential relationship between itself and one defendant and a transfer of plaintiff's property from the fiduciary to another, fraud was presumed, and plaintiff was not required to present direct evidence of fraud.

5. Appeal and Error § 16— notice of appeal filed—no jurisdiction of trial court to grant new trial

The trial court correctly held that it had no jurisdiction to grant a new trial when notices of appeal were filed the same day, and there was no merit to defendants' argument that the trial court retained jurisdiction because they had filed motions for stay of proceedings one minute before filing their notices of appeal, since the motions to stay proceedings were made for the purpose of staying execution of the judgment pending disposition of the motions for new trial.

6. Trial § 3— no knowledge of settlement by codefendants—failure to obtain counsel—continuance properly denied

The trial court did not err in denying defendants' request for a continuance, though defendants were unaware of previous settlements by and dismissals of the other original codefendants and though they had been relying on their codefendants' attorneys to represent their interests, since defendants were notified of their trial date four and one-half months in advance but made no effort to obtain representation.

7. Trial § 12— absence of defendant from trial—no inquiry required by trial court

The trial court did not err in not inquiring as to the whereabouts of one defendant and in entering judgment against her in her absence.

8. Trial § 7— no pretrial conference or order—defendants not prejudiced

The trial court did not err in calling the matter to trial without a pretrial conference or the filing of a pretrial order where the record showed that the trial court ordered that a pretrial order be tendered to the court; defendants offered no explanation as to why no pretrial order was submitted; and a pretrial conference was within the trial judge's discretion. N.C.G.S. § 1A-1, Rule 16.

9. Evidence § 33; Fraud § 11— conspiracy to defraud plaintiff of property—out-of-court declarations not hearsay

Where plaintiff contended that defendants conspired to defraud it and that they engaged in unfair and deceptive trade practices, out-of-court declarations offered to prove that plaintiff's restaurant property was deeded to one defendant in trust for plaintiff and that defendant who purchased it had knowledge of that fact would not be hearsay.

10. Attorneys at Law § 4; Evidence § 13— paralegal's testimony not inadmissible

The trial court did not err in allowing a paralegal employed by plaintiff's counsel to be called as a witness, since Rule 5.2 of the N.C. Rules of Professional Conduct applies only to lawyers, not their employees; and, even if the rule did apply to paralegals, it would not apply in this case because the witness primarily testified for the purpose of authenticating documents and explaining certain basic aspects of real estate transactions which a lawyer would have been allowed to do pursuant to the cited rule.

11. Trial § 11.1— jury argument—reading from treatise—no error

Where plaintiff alleged that its property was deeded to one defendant in trust and that all defendants conspired to defraud it of its property, the trial court did not err in allowing plaintiff's counsel, during closing argument, to read a passage from a treatise on trusts which stated a general principle of trust law which has been applied by the North Carolina courts.

12. Damages § 10— consideration for dismissals against codefendants—failure to disclose amount—no request for information by defendants

Defendants could not complain that the trial court erred in not requiring plaintiff to disclose all the consideration received in exchange for voluntary dismissals as to other codefendants, since defendants did not present any evidence of consideration or make any motion to require disclosure of consideration received by plaintiff.

13. Damages § 10— plaintiff's damages reduced by amount of settlements with codefendants—no application of Uniform Contribution among Tort-Feasors Act

Where plaintiff alleged that defendants conspired to defraud it of its property and that they engaged in unfair and deceptive trade practices, defendants' right to have plaintiff's damages reduced by the amount of any settlements with codefendants was not conditioned on the application of the Uniform Contribution among Tort-Feasors Act; rather, defendants' credit was based on the principle that plaintiff could have only one recovery for its injury, and the trial court properly credited defendants with the right amount.

14. Damages § 10; Unfair Competition § 1— plaintiff's damages reduced by amount of settlements with codefendants—reduction before trebling damages—error

The trial court erred in reducing plaintiff's damages by the amount of settlements with original codefendants *before* trebling the jury's award of damages rather than after, since two purposes of the statutory provision for treble damages are to facilitate bringing actions where money damages are limited and to increase the incentive for reaching a settlement, and these purposes would be thwarted by deducting settlements before trebling damages. N.C.G.S. § 75-16.

APPEAL by defendants from *Small, Judge.* Judgment entered 6 November 1986 in Superior Court, DARE County. Heard in the Court of Appeals 27 October 1987.

In this action plaintiff alleged that defendants Fred J. and Judy H. Bender and Trenor Corporation had conspired with defendant William Stafford to defraud plaintiff; that defendants had engaged in unfair and deceptive trade practices in violation of G.S. 75-1.1; and that plaintiff was entitled to treble damages pursuant to G.S. 75-16. Eleven parties were originally named as defendants; but during the course of the litigation, plaintiff took voluntary dismissals as to all defendants except defendants Bender and Trenor.

Plaintiff Seafare Corporation owned and operated the Seafare Restaurant, a large seafood restaurant located in Nags Head, North Carolina. Michael Hayman was president and principal owner of Seafare Corporation, and personally managed the restaurant. At trial plaintiff's evidence tended to show the following:

In 1982 plaintiff's restaurant business began to experience financial difficulties, and plaintiff sought to refinance its debt structure. Through a mortgage broker named William Stafford, Hayman obtained two loans totalling $300,000 from Central Fidelity Bank in Virginia Beach, Virginia. The loans were secured by deeds of trust on the restaurant property. Business continued to decline, and plaintiff closed the restaurant in January 1983. In addition to the corporate debts, Hayman was having trouble with his personal finances as well.

At about this time Stafford informed Hayman that the bank was going to foreclose on the restaurant. Hayman had received a letter from the bank requesting that he keep his accounts current, but no foreclosure proceedings had been instituted. Hayman nevertheless accepted Stafford's information without checking with the bank. Hayman and Stafford developed a plan whereby the restaurant property would be transferred to Stafford, who would then either sell or manage the property for the benefit of plaintiff. The purpose of the plan was to prevent foreclosure because Stafford was well-known at the bank, and also to prevent the filing of additional liens against the property.

In February 1983 a meeting was held at the office of Mark Spence, an attorney in Nags Head who knew both Hayman and Stafford. At this meeting, Hayman executed a deed conveying the restaurant property and another tract of land to Stafford and his wife, Vanessa Stafford. The second tract of land was owned by My Lady Rachel, Inc., another corporation controlled by Michael Hayman. Hayman and Mark Spence both testified that defendant Fred J. Bender was present at the meeting and that the purpose of the conveyance was discussed during the meeting.

In March 1983 the Staffords executed a contract to sell the restaurant property to defendant Trenor Corporation for a purchase price of $650,000. Trenor Corporation was controlled by defendant Fred J. Bender and his wife, defendant Judy H. Ben-

der, who were respectively president and secretary of the corporation. The Staffords executed a deed conveying the property to Trenor on 3 March 1983. The purchase price was financed by two notes secured by deeds of trust. One note was payable to the Staffords in the amount of $150,000, and the other was payable to Central Fidelity Bank in the amount of $500,000. Trenor Corporation executed a third note payable to the Staffords in the amount of $200,000. This third note stated that it was given as part of the purchase price of real property in Dare County, was unsecured, and bore no interest. Hayman testified that the sale took place without his knowledge and that he never received any proceeds from the sale. The Seafare Restaurant was destroyed by fire on 23 August 1984.

Plaintiff commenced this action on 27 August 1984 by obtaining an order extending time to file complaint. The complaint was filed on 17 September 1984.

Defendants Bender and Trenor were originally represented in this action by Wilton F. Walker. The parties to this appeal have stipulated that Mr. Walker died on 4 February 1985. Defendants apparently failed to obtain new counsel, and were unrepresented in this action after Mr. Walker's death through trial. On the day of the trial, defendant Judy Bender did not appear. Defendant Fred Bender appeared and requested a continuance for the purpose of obtaining counsel. Judge Small denied the request, and defendant Fred Bender proceeded *pro se*. Defendants did not present any evidence at trial. The jury returned a verdict awarding plaintiff $400,000 in damages. The court's judgment credited defendant with $137,000, that amount having been paid to plaintiff by two of the original defendants in return for dismissals. The reduced amount of $263,000 was then trebled pursuant to G.S. 75-16, resulting in a final judgment against defendants in the amount of $789,000. Defendants Bender appeal and plaintiff cross-appeals.

Trimpi, Thompson and Nash, by C. Everett Thompson, II, and John G. Trimpi, for plaintiff-appellee.

Cherry, Cherry, Flythe and Overton, by Larry S. Overton, and Taylor and McLean, by Mitchell S. McLean, for defendant-appellants.

PARKER, Judge.

Defendants appeal on numerous grounds set out in twenty assignments of error. Plaintiff makes two cross-assignments of error. Plaintiff first assigns error to the trial court's crediting of the judgment with the amount received by plaintiff in exchange for dismissals. Plaintiff also contends that the court erred in crediting this amount before rather than after the damage award was trebled. We first consider defendants' appeal.

DEFENDANTS' APPEAL

[1] Defendants first assign error to the trial court's failure to dismiss plaintiff's complaint because it was not timely filed. Plaintiff obtained an order extending the time to file its complaint until 16 September 1984, but the complaint was not filed until 17 September 1984. 16 September 1984 fell on a Sunday, however, and we may take judicial notice of that fact. *State v. Brunson*, 285 N.C. 295, 302, 204 S.E. 2d 661, 665 (1974). Plaintiff therefore had an extra day in which to file its complaint, and the complaint was timely filed. Rule 6(a), N.C. Rules Civ. Proc.

[2] Defendants next assign error to the failure of the trial court to dismiss plaintiff's complaint for insufficiency of service of process. Defendant Fred J. Bender was served by leaving a copy of the complaint with his wife at his office. Defendants may be correct in arguing that this service is defective because a copy of the complaint was not left at defendant Fred Bender's dwelling house or usual place of abode as required by Rule 4(j)(1) of the N.C. Rules of Civil Procedure. Defendants failed, however, to raise this defense in the manner provided by Rule 12 of the N.C. Rules of Civil Procedure and thus waived the defense. Rule 12(h)(1), N.C. Rules Civ. Proc.

[3] Defendants' third assignment of error states that the trial court erred in submitting issues to the jury which were not supported by sufficient relevant and competent evidence. Defendants have excepted to all eight issues that were submitted, but made no objection to any of them at trial. If a party does not object to the submission of issues at trial, he cannot make the objection on appeal. *Baker v. Construction Corp.*, 255 N.C. 302, 307, 121 S.E. 2d 731, 735 (1961); *Hendrix v. Casualty Co.*, 44 N.C. App. 464, 467, 261 S.E. 2d 270, 272-73 (1980). Even if we were to consider this

issue on appeal, we find no merit in defendants' argument that the court should not have submitted an issue as to whether a fiduciary relationship existed between plaintiff and Stafford. Plaintiff presented sufficient evidence to support the submission of this issue to the jury. Defendants contend that plaintiff's evidence shows that the property was transferred to Stafford in order to deceive plaintiff's creditors. The evidence clearly shows, however, that plaintiff hoped that Stafford would sell the property for a good price, thus enabling plaintiff to pay its debts.

[4] Defendants also assign error to the trial court's instructions to the jury concerning the presumption of fraud when a fiduciary sells property held in trust for another. Specifically, defendant objects to the trial court's supplemental instructions on this issue after the jury foreman indicated that the jury could find no evidence of fraud on the part of Stafford. Again, defendants may not raise this issue on appeal because they failed to object to the instructions at trial. Rule 10(b)(2), N.C. Rules App. Proc. In any event, the trial judge properly instructed the jury that once plaintiff had shown the existence of a confidential relationship and a transfer of the property, fraud was presumed and plaintiff was not required to present direct evidence of fraud. *Sanders v. Spaulding and Perkins, Ltd.*, 82 N.C. App. 680, 681, 347 S.E. 2d 866, 867 (1986).

Defendants' next two assignments of error are that the trial court erred in failing to set aside the verdict and in denying defendants' motions for a new trial. Defendants argue that the trial court should have directed a verdict in their favor, yet they made no motions for a directed verdict or for judgment notwithstanding the verdict at trial. The exceptions listed under this assignment of error are exceptions to the judgment. An exception to the judgment does not question the sufficiency of the evidence. *Norman v. Royal Crown Bottling Co.*, 64 N.C. App. 200, 201, 306 S.E. 2d 828, 829 (1983). It raises only two questions of law: (i) whether the facts found support the conclusions of law and the judgment, and (ii) whether error appears on the face of the record. *Id.* In this case the jury's findings of fact clearly support the judgment and no error appears on the face of the record.

[5] Defendants contend that the trial court erred in denying their motions for new trial. The trial court found that it did not

have jurisdiction to hear the motions because defendants had filed notices of appeal at the same time they filed their motions for new trial. The trial court correctly held that it had no jurisdiction to grant a new trial when notices of appeal were filed the same day. *Homes, Inc. v. Peartree*, 24 N.C. App. 579, 211 S.E. 2d 457, *cert. denied*, 286 N.C. 722, 213 S.E. 2d 722 (1975). Defendants argue that the trial court retained jurisdiction because defendants had filed motions for stay of proceedings one minute before filing their notices of appeal. This argument has no merit because, even if one minute would make a difference, the motions to stay proceedings were made for the purpose of staying execution of the judgment pending disposition of the motions for new trial. The motions to stay proceedings had no effect on the trial court's jurisdiction once notice of appeal was filed and the motions for new trial were denied. Defendants also argue that the trial court should have retained jurisdiction under the reasoning of the Supreme Court in *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). Defendants' reliance on that case is misplaced because the court in *Sink* did not consider a motion for a new trial but a motion for relief from judgment under Rule 60(b) of the N.C. Rules of Civil Procedure. The Supreme Court's reasoning in *Sink* was based in part on the fact that the time for making a motion under Rule 60(b) continues to run while the case is pending on appeal. *Sink*, 288 N.C. at 199, 217 S.E. 2d at 542-43. The same reasoning would not apply to a motion for new trial because such a motion must be made within 10 days after entry of judgment, which is the same time by which notice of appeal must be filed. Rule 59(b), N.C. Rules Civ. Proc. Moreover, Rule 3(c) of the N.C. Rules of Appellate Procedure tolls the time for giving notice of appeal when a timely motion for new trial has been made.

[6] Defendants next contend that the trial court erred in failing to grant defendants a continuance. Defendants' principal argument in this respect is that they were unfairly surprised by the previous settlements by and dismissals of the other original codefendants. Defendants apparently had no knowledge of these settlements and had been relying on their codefendants' counsels to represent their interests. Defendants had not been represented in this action since their original counsel died on 4 February 1985. A copy of the order setting trial on 3 November 1986 was mailed to defendants on 17 June 1986.

Rulings on motions to continue rest in the sound discretion of the trial judge and will not be reversed absent abuse of discretion. *Southern of Rocky Mount v. Woodward Specialty Sales*, 52 N.C. App. 549, 553, 279 S.E. 2d 32, 35 (1981). Although we find it somewhat disturbing that defendants were apparently unaware of the settlement negotiations of their codefendants, the trial court can only consider facts in the record when ruling on a motion to continue. *See Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E. 2d 380, 386 (1976). The record here shows that defendants failed to obtain counsel even when they were notified that the case was going to trial. Defendants were obviously mistaken in assuming that their codefendants would protect their interests. Given defendants' gross neglect in obtaining representation, the trial court did not abuse its discretion in denying defendants' request for a continuance.

[7] Defendants also contend that the trial court erred in not inquiring as to the whereabouts of defendant Judy Bender and in entering judgment against her in her absence. This Court has held that a judgment may be entered against a defendant in a civil case whose failure to appear is inexcusable. *Chris v. Hill*, 45 N.C. App. 287, 262 S.E. 2d 716, *disc. rev. denied and appeal dismissed*, 300 N.C. 371, 267 S.E. 2d 674 (1980). The Court in *Chris* specifically held that the trial court is not required to inquire as to the whereabouts of an absent defendant. *Id.* In this case, Judy Bender has not offered any excuse for her absence, and the trial court cannot be faulted for lack of concern with her whereabouts when her husband appeared at trial.

Defendants next assign error to the trial court's denial of their motion under Rule 12(b)(6) of the N.C. Rules of Civil Procedure without giving defendants an opportunity to be heard on the motion. The record shows that defendants did not object when the trial court summarily denied the motion. Defendants' discussion of this assignment of error in their brief merely restates their argument that plaintiff's complaint was not timely filed. We have already determined that this argument has no merit.

[8] Defendants also assign error to the trial court's calling the matter to trial without a pre-trial conference or the filing of a pre-trial order. The record shows that the trial court ordered that a

pre-trial order be tendered to the court on 13 October 1986. Plaintiff contends that plaintiff's counsel attempted to pre-try the case with defendants, but defendants did not cooperate. Defendants offer no explanation as to why no pre-trial order was submitted. A pre-trial conference is within the trial judge's discretion. Rule 16, N.C. Rules Civ. Proc. The assignment of error is therefore overruled.

Defendants next assign error to the admission of much of plaintiff's evidence. Defendants failed, however, to object to the admission of any evidence. To be the basis of an assignment of error on appeal, an exception to the admission of evidence must have been properly preserved by objection or motion to strike at trial. Rule 10(b)(1), N.C. Rules App. Proc.; *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). An unrepresented party is not relieved of the duty to object to evidence in order to preserve the issue for appeal. *State v. Jones*, 280 N.C. 322, 339-40, 185 S.E. 2d 858, 869 (1972). Nevertheless, we have considered defendants' arguments set forth in their brief and conclude there was no prejudicial error.

[9] Defendants contend that plaintiff used inadmissible hearsay testimony to prove the dealings between Michael Hayman and William Stafford. Defendants in their brief have listed over one hundred exceptions without any discussion in the text of the argument as to whether the evidence is hearsay, and if so, whether an exception to the hearsay rule applies. While almost all the evidence of these dealings was in hearsay form, the testimony in question was introduced primarily to prove that the restaurant property was deeded to Stafford in trust for plaintiff and that defendant Fred Bender had knowledge of that fact. Out-of-court declarations offered for these purposes would not be hearsay. *Furniture Co. v. Cole*, 207 N.C. 840, 844-45, 178 S.E. 579, 582 (1935) (testimony of witness as to declarations of purchaser competent to prove parol trust); *State v. Foster*, 293 N.C. 674, 682-83, 239 S.E. 2d 449, 455-56 (1977) (statements offered to prove knowledge are not hearsay). The nature of the conveyance to Stafford and defendants' knowledge thereof were the essential elements of defendants' liability. Any improperly admitted hearsay testimony therefore would not have deprived defendants of a fair trial.

[10] The other principal evidentiary argument made by defendants is that the trial court erred in allowing a paralegal employed by plaintiff's counsel to be called as a witness. Defendants contend that plaintiff's attorneys violated Rule 5.2 of the North Carolina Rules of Professional Conduct by calling their employee as a witness. This argument has no merit because Rule 5.2 only applies to lawyers, not their employees. Even if the rule did apply to paralegals, it would not apply in this case because the witness in question primarily testified for the purpose of authenticating documents and explaining certain basic aspects of real estate transactions. Rule 5.2(A)(2) provides that a lawyer may testify "[i]f the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony." The testimony in question fits this description, and we find no error in its admission.

Defendants next assign error to portions of plaintiff's counsel's closing argument. Again, defendants failed to object at trial. Even in the absence of an objection, however, the courts have a duty to correct errors in closing arguments, but only when the impropriety is gross. *Watson v. White*, 309 N.C. 498, 507, 308 S.E. 2d 268, 274 (1983). Defendants contend that there were two such improprieties in plaintiff's closing argument.

[11] Defendants first object to the following portion of the argument:

> Let me read to you what a noted authority on trust [sic] and trustees has said. "All persons aiding and assisting trustees of any character with a knowledge of their misconduct in misapplying assets are directly accountable to the persons injured. The wrong of participation in a breach of trust is divided into two (2) elements, an act or omission, which further completes the breach of trust by the trustee, and knowledge at the time that the transaction amounted to a breach of trust or the legal equivalent of such knowledge."

Defendants argue that this quote was improper because there is no indication that it is an accurate statement of North Carolina law. The quote is actually from G. Bogert, The Law of Trusts and Trustees § 901 at 257-59 (rev. 2d ed. 1982). The quote states a general principle of trust law which has been applied by the North Carolina courts. *See Abbitt v. Gregory*, 201 N.C. 577, 597-

99, 160 S.E. 896, 906-07 (1931). Arguments of counsel are largely in the control and discretion of the trial judge who must give counsel wide latitude in arguing the law. *State v. Taylor*, 289 N.C. 223, 226, 221 S.E. 2d 359, 362 (1976). The trial court did not err in allowing the above quote in closing argument.

Defendants' second objection is that, immediately after the above quote, plaintiff's counsel stated: "and that makes them both *liers*, [sic] and that makes them responsible . . . ." (Emphasis added.) Plaintiff contends that the word "liers" is a misquote and should read "liable." We agree that "liable" makes much more sense in this context, but we must assume that the record is correct. Although referring to defendants as liars is clearly improper, this single reference is not so prejudicial as to warrant a new trial.

[12] Defendants' final assignment of error is that the trial court erred in not requiring plaintiff to disclose all the consideration received in exchange for voluntary dismissals as to other codefendants. The record reveals that defendants were credited with $137,000, said amount having been received by plaintiff from codefendants Central Fidelity Bank and Andrew S. Rogerson. This amount was apparently brought to the trial court's attention by plaintiff; the record shows that defendants did not present any evidence on this matter, nor did they make any motion to require disclosure of consideration received by plaintiff. Defendants argue that there must have been consideration received from more than two codefendants, and they have offered a copy of a deed from codefendants Stafford to plaintiff's attorneys in support of their claim. This deed was not, however, offered as evidence at trial, and defendants' argument is mere conjecture. This Court cannot rule on a matter that was not properly presented at trial. *Hall v. Hall*, 35 N.C. App. 664, 242 S.E. 2d 170, *disc. rev. denied*, 295 N.C. 260, 245 S.E. 2d 777 (1978).

PLAINTIFF'S APPEAL

[13] Plaintiff first contends that the trial court erred in crediting defendants with the amount plaintiff received from codefendants in return for dismissals. Plaintiff's argument in its brief is based on the Uniform Contribution among Tort-Feasors Act. G.S., Chap. 1B, Art. 1. General Statute 1B-1(g) states: "This article shall not

apply to breaches of trust or of other fiduciary obligation." Plaintiff contends that defendants are not entitled to a credit because, pursuant to G.S. 1B-1(g), they have no right of contribution. As plaintiff's counsel acknowledged on oral argument, this argument has no merit. Defendants' credit in this case is not based on the statutory right of contribution, but on the principle that plaintiff can have only one recovery for its injury. This principle was well established at common law. *See Holland v. Utilities Co.*, 208 N.C. 289, 291, 180 S.E. 592, 593 (1935). Thus, defendants' right to have plaintiff's damages reduced by the amount of any settlements with codefendants is not conditioned on the application of G.S. Chap. 1B. The trial court correctly credited defendants with said amount.

[14] Plaintiff's second assignment of error is that the trial judge erred by crediting the amount received by plaintiff before rather than after trebling the damages pursuant to G.S. 75-16. Plaintiff argues that the credit should have been applied after the verdict of $400,000 was trebled. Plaintiff points out that G.S. 75-16 provides that "judgment shall be rendered . . . for *treble the amount fixed by the verdict.*" (Emphasis added.) Plaintiff further argues that the practice of crediting the damage award before it is trebled would thwart the remedial and punitive purposes of G.S. 75-16 because no recovery would be had if a plaintiff settled its claim for the full amount of damages.

Although the statute provides that the verdict is to be trebled, the title of G.S. 75-16 is "Civil action by person injured; *treble damages.*" (Emphasis added.) In the present case, the verdict amount was $400,000, but defendants argue that, because plaintiff received $137,000 from codefendants, the actual amount of plaintiff's *damages* is only $263,000.

The courts of this State have not previously ruled on this particular issue. Other jurisdictions have, however, considered whether a credit for amounts received from a codefendant should be applied before or after trebling a damage award. The Texas Court of Civil Appeals, when faced with this issue in the context of a treble damage award pursuant to a statute similar to G.S. 75-16, held that such a credit should be applied after the damages are trebled. *Providence Hospital v. Truly*, 611 S.W. 2d 127, 136 (Tex. Civ. App. 1980) (treble damages pursuant to Tex. Bus. &

Com. Code Ann. § 17.50(b)(1) (Vernon 1987)). The court based its holding on the punitive and remedial purposes of the statute and also on the ground that deducting the amount before trebling the award would discourage settlements. *Id.* The federal courts have used similar reasoning to reach the same result with regard to treble damage awards under the Clayton Act, 15 U.S.C.A. § 15. *See, e.g., Flintkote Company v. Lysfjord*, 246 F. 2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835, 78 S. Ct. 54, 2 L.Ed. 2d 46 (1957).

General Statute 75-16 is both remedial and punitive in nature. *Marshall v. Miller*, 302 N.C. 539, 546, 276 S.E. 2d 397, 402 (1981). Two purposes of the statutory provision for treble damages are to facilitate bringing actions where money damages are limited and to increase the incentive for reaching a settlement. *Id.* at 549, 276 S.E. 2d at 403-04. The reasoning of *Providence Hospital, supra,* and *Flintkote, supra,* is therefore applicable to a treble damage award pursuant to G.S. 75-16. Accordingly, we hold that the trial court in the present case erred by deducting the $137,000 before rather than after trebling the jury's award of damages. Plaintiff is therefore entitled to judgment in the amount of $1,063,000.

For the reasons stated above, we find no error in the trial but error in the judgment.

No error in the trial; error in the judgment; remanded for correction of judgment.

Judges EAGLES and MARTIN concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

UNITED STATES LEASING CORPORATION v. EVERETT, CREECH, HANCOCK AND HERZIG, A PARTNERSHIP; EVERETT & HANCOCK, A PARTNERSHIP; KATHERINE R. EVERETT; WILLIAM A. CREECH; AND WILLIAM G. HANCOCK

Nos. 8726DC347
8726DC365

(Filed 19 January 1988)

1. **Landlord and Tenant § 5; Assignments § 1; Appeal and Error § 42.2— lease of business equipment—assignment—material omitted from record—presumption as to trial court's findings**

In an action to recover for breach of contract for the lease of office equipment, there was no merit to defendants' contention that there was no competent evidence to support the trial court's finding of an assignment of the lease from the original lessor to plaintiff and that plaintiff therefore had no standing or capacity to sue, since the vice-president for operations of plaintiff testified to the assignment; six minutes of his testimony were missing but no effort was made to summarize or reconstruct his testimony; and the court's findings were therefore presumed to be supported by competent evidence.

2. **Landlord and Tenant § 5; Evidence § 29.2— lease of business equipment—assignment—testimony from business records proper**

There was no merit to defendants' contention that plaintiff's employee's testimony concerning assignment of a lease to plaintiff was inadmissible because it was not based on personal knowledge of the witness and was hearsay based upon alleged "business records" of plaintiff for which no proper foundation was laid, since the witness, though he admitted that his knowledge of the matter was limited to the contents of plaintiff's file with which he had familiarized himself, could properly testify about the records and their significance so long as the records themselves were admissible under the business records exception to the hearsay rule, and the witness was familiar with the system by which the records were made and maintained; furthermore, because six minutes of the witness's testimony were missing, it must be presumed that the witness was qualified to lay a foundation for plaintiff's business records and that, in fact, a proper foundation was laid.

3. **Landlord and Tenant § 5; Evidence § 31.1— lease of business equipment—assignment—testimony not violation of best evidence rule**

There was no merit to defendants' contention that plaintiff's employee's testimony concerning assignment of a lease to plaintiff was inadmissible because it violated the best evidence rule, since nothing in the record indicated that the assignment was in writing; the law did not require that the assignment be written in order for plaintiff to enforce the lease agreement against defendants; and the best evidence rule requires exclusion of secondary evidence offered to prove the contents of a document whenever the original document is available, but plaintiff here sought to prove, not the contents of a document of assignment, but simply that an assignment had occurred.

4. Landlord and Tenant § 5; Evidence § 29.2— lease of business equipment—assignment—notice of acceptance and assignment—part of business records—authentication

In an action for breach of contract of a lease of office equipment where defendants contested assignment of the lease to plaintiff, defendants could not successfully challenge the admission of a "Notice of Acceptance and Assignment," which was purportedly a copy of a notice to defendants of lessor's assignment of the lease to plaintiff, on the ground that it was an unauthenticated, unexecuted copy of a document calling for a signature, since a proper foundation was laid for the admission of plaintiff's business records concerning the lease, and the document to which defendants objected was at least authenticated as a component of those records; plaintiff's employee testified that thousands of leases were obtained by plaintiff from original lessor, that notices like the one in question were sent to lessees as a standard business practice upon receipt by plaintiff of each lease package, that the challenged document was received with the lease package from the original lessor at the time of this particular assignment, and that plaintiff began receiving payments from defendants; and this testimony, coupled with the very existence of the document in plaintiff's file, was some evidence that the document was what it purported to be.

5. Landlord and Tenant § 5; Assignments § 1— lease of business equipment—assignment—sufficiency of evidence

Evidence was sufficient to support the trial court's finding that a lease allegedly breached by defendants was assigned to plaintiff where the evidence consisted of testimony by an employee of plaintiff that the assignment was made, a notice of assignment which was mailed to defendants, plaintiff's physical possession of the lease agreement between original lessor and defendants, testimony that plaintiff maintained a file concerning the lease in question and the file contained a notice like those customarily sent to lessees upon assignment to plaintiff of other leases, and testimony that plaintiff began receiving payments from defendants.

6. Damages § 9— breach of lease of business equipment—mitigation of damages

In an action for breach of contract for the lease of office equipment, the trial court did not err by finding that plaintiff attempted to mitigate its damages where the trial court found that plaintiff attempted to mitigate damages by authorizing the original lessor to retrieve the leased equipment but that defendants refused to release the equipment, and this finding was supported by testimony of plaintiff's employees based upon documentation in plaintiff's file and by plaintiff's answers to interrogatories of one defendant which defendants offered into evidence without any request for a limitation upon their use.

7. Limitation of Actions § 4.6— breach of contract—installment payments—accrual of cause of action as each installment became due

In an action to recover for breach of contract for the lease of office equipment which was instituted against certain defendants by the filing of an amended complaint on 15 August 1985, the trial court erred in determining that claims against those defendants were barred by the statute of limitations,

since the general rule in the case of an obligation payable by installments, as in this case, is that the statute of limitations runs against each installment individually from the time it becomes due; therefore, plaintiff's claims against these defendants were barred only as to those payments which were due prior to 16 August 1982.

APPEALS by plaintiff and by defendants, William G. Hancock and Everett, Creech, Hancock & Herzig from *T. Patrick Matus, II, Judge.* Judgment entered 7 November 1986 in District Court, MECKLENBURG County. Consolidated and heard in the Court of Appeals 21 October 1987.

Waggoner, Hamrick, Hasty, Monteith, Kratt, Cobb & McDonnell by Robert D. McDonnell for plaintiff-appellant/appellee.

Parker, Poe, Thompson, Bernstein, Gage & Preston by I. Faison Hicks and Regina J. Wheeler for defendant-appellants/appellees.

BECTON, Judge.

I

These consolidated appeals arise from a breach of contract action brought by plaintiff, United States Leasing Corporation (U.S. Leasing) to recover the balance due under a lease of office equipment. The original complaint was filed 13 September 1983 against the law partnership of Everett, Creech, Hancock & Herzig (ECHH) and was served upon William G. Hancock. The complaint alleged, in part, that plaintiff and ECHH had entered a lease agreement in October 1980 and that ECHH had defaulted in making payments under the agreement. ECHH answered, denying the allegations.

On 15 August 1985, with the consent of the trial court, U.S. Leasing filed an amended complaint naming as additional defendants Katherine R. Everett, William Creech, and William G. Hancock, individually, and the law partnership, Everett & Hancock (EH). The amended complaint, which was served on each of the defendants, alleged, in part, that William G. Hancock, on behalf of ECHH, had executed the lease agreement with Lanier Business Products, Inc. (Lanier); that the lease was assigned to U.S. Leasing; and that the partnership EH, a successor firm to ECHH, was obligated to make payments under the lease because it had taken

possession of and used the leased equipment. Each defendant answered the amended complaint, denying any debt to U.S. Leasing and asserting various affirmative defenses, including the statute of limitations, plaintiff's failure to mitigate damages, and plaintiff's lack of capacity and standing to sue.

The matter was tried without a jury on 27 May 1986. In its judgment, filed 7 November 1986, the trial court made findings of fact and conclusions of law and ordered that plaintiff recover from defendants ECHH and Hancock, jointly and severally, the balance due under the lease, $28,893.36, with interest from 15 August 1985, as well as costs and attorney fees. The court further ordered that the action against EH, Creech, and Everett be dismissed, concluding that it was barred by the three-year statute of limitations applicable to contract actions.

Defendants ECHH and Hancock appeal from the judgment against them, assigning as error the admission of certain evidence, the denial of their motion for a "directed verdict," and the court's finding that plaintiff attempted to mitigate its damages. Plaintiff appeals from that portion of the judgment dismissing its action against the remaining defendants, EH, Creech, and Everett. For the reasons discussed hereafter, we affirm the judgment against ECHH and Hancock, and reverse the dismissal of the action against EH, Creech, and Everett.

II

The evidence submitted by plaintiff consisted of testimony by W. A. Hunter, Vice President of Operations for U.S. Leasing, and documentary evidence including (1) the lease agreement and a "certificate of acceptance" signed by defendant Hancock, (2) an unsigned document entitled "Notice of Acceptance and Assignment" purporting to be a copy of a notice to ECHH of Lanier's assignment of the lease to U.S. Leasing, (3) a statement of ECHH's account with U.S. Leasing dated March 1984, and (4) cancelled checks from ECHH showing payments made under the lease agreement. Defendants offered in evidence the plaintiff's answers to defendant Everett's interrogatories.

The evidence tended to show that defendant Hancock, on 26 September 1980, executed, on behalf of ECHH, an agreement for the lease of office equipment from Lanier. At that time, the in-

dividual defendants Hancock, Creech, and Everett were partners in ECHH, which was organized for the practice of law in 1980.

The lease provided for sixty monthly payments of $552.19. ECHH made fifteen payments before it ceased making payments in January or February of 1982. Thereafter, U.S. Leasing and Hancock attempted to negotiate a settlement but failed to reach an agreement. The law partnership EH was formed in March 1982 and, as of 24 January 1986, continued to possess and use the leased equipment.

III

We first address the issues raised by the appeal of defendants ECHH and Hancock.

A

Defendants first argue that the trial court erred by admitting in evidence (1) the testimony of W. A. Hunter that Lanier assigned the lease to U.S. Leasing, and (2) plaintiff's Exhibit 2 ("Notice of Acceptance and Assignment") and Mr. Hunter's testimony about the document insofar as this evidence was offered to prove the assignment. Consequently, they maintain that there was no competent evidence of an assignment; that U.S. Leasing thus failed to establish its "capacity" and "standing" to sue; and that the action should have been dismissed at the close of the evidence.

[1] The trial court found that "on or about 5 November 1980, Lanier Business Products, Inc. assigned the Lease Agreement to the plaintiff, thus making the plaintiff the owner and holder of the Lease Agreement. . . ." This finding is binding on appeal if it is supported by any competent evidence in the record. *See, e.g., Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971); *Worlitzer Distributing Corp. v. Schofield*, 44 N.C. App. 520, 261 S.E. 2d 688 (1980).

The transcript reflects that approximately six minutes of Mr. Hunter's testimony is missing due to the fact that a portion of the tape from which it was transcribed was inaudible. No effort has been made in the record to reconstruct or summarize the missing testimony. When the evidence or some relevant portion thereof is not in the record, the trial court's findings are presumed to be

supported by competent evidence. *See, e.g., Fellows v. Fellows*, 27 N.C. App. 407, 219 S.E. 2d 285 (1975); *Town of Mount Olive v. Price*, 20 N.C. App. 302, 201 S.E. 2d 362 (1973). For this reason and the reasons that follow, we conclude that the court's finding of an assignment must be upheld.

[2] Defendants argue that Mr. Hunter's testimony concerning the assignment was inadmissible because it was not based on personal knowledge of the witness, was hearsay based upon alleged "business records" of plaintiff for which no proper foundation was laid, and violated the best evidence rule. Although the witness admitted that his knowledge of the matter was limited to the contents of plaintiff's file with which he had familiarized himself, he could properly testify about the records and their significance so long as the records themselves were admissible under the business records exception to the hearsay rule, *see In re Smith*, 56 N.C. App. 142, 287 S.E. 2d 440, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982), and Mr. Hunter was familiar with the system by which the records were made and maintained. *See State v. Miller*, 80 N.C. App. 425, 342 S.E. 2d 553, *appeal dismissed and disc. review denied*, 317 N.C. 711, 347 S.E. 2d 448 (1986). Because the record of the evidence is incomplete, we must presume that Mr. Hunter was qualified to lay a foundation for plaintiff's business records and that, in fact, a proper foundation was laid.

[3] Defendants' "best evidence" argument is likewise without merit. The best evidence of the assignment, defendants maintain, is the assignment itself and, thus, the testimony of Mr. Hunter should have been excluded in the absence of a satisfactory explanation for plaintiff's failure to offer the assignment itself in evidence. However, we find nothing in the record which indicates that the assignment was in writing, nor does the law require that the assignment be written in order for plaintiff to enforce the lease agreement against defendants. Moreover, the so-called "best evidence" rule merely requires the exclusion of secondary evidence offered to prove the *contents* of a document whenever the original document itself is available. *See* N.C. Rules of Evidence, N.C. Gen. Stat. Section 8C, Rules 1002-1004 (1986). In this case, plaintiff was not seeking to prove the contents of a document but to establish that an assignment had occurred. Defendant's assignment of error to the admission of Mr. Hunter's testimony is overruled.

[4] Defendants also challenge the admission of the "Notice of Acceptance and Assignment" on the grounds that it is an unauthenticated, unexecuted copy of a document calling for a signature, and they contest as well the admission of Mr. Hunter's testimony about the document. For the reasons previously stated, we uphold the admission of Mr. Hunter's testimony.

The requirement of authentication represents a special aspect of the rule that evidence must be relevant, *see* McCormick on Evidence, Secs. 219, 227 (3rd ed. 1984), and "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 1002. Assuming as we must, due to the incompleteness of the record, that a proper foundation was laid for the admission of plaintiff's business records concerning the lease, the document to which defendants object was at least authenticated as a component of those records.

Mr. Hunter testified that thousands of leases were obtained by U.S. Leasing from Lanier by way of assignment during 1980, that notices like the one in question were sent to lessees as a standard business practice upon receipt by U.S. Leasing of each lease package, that the challenged document was received with the lease package from Lanier at the time of this particular assignment, and that U.S. Leasing began receiving payments from ECHH. In our opinion, this testimony, coupled with the very existence of the document in plaintiff's file, is some evidence that the document is what it purports to be. Under these circumstances, we conclude that the absence of a signature or additional authentication of the notice, merely goes to the weight of the evidence, not its admissibility, and that the document was properly admitted.

[5] We have determined that Mr. Hunter's testimony and plaintiff's Exhibit 2 were properly received in evidence. In addition to this evidence, we are convinced that the following constitutes some evidence to support the trial court's finding that the lease was assigned to plaintiff: (1) U.S. Leasing's physical possession of the lease agreement between Lanier and ECHH, (2) the fact that U.S. Leasing maintained a file concerning that lease and that the file contained a notice like those customarily sent to lessees upon assignment to plaintiff of other leases, and (3) the fact that U.S. Leasing began receiving payments from defendants. Accordingly,

we hold that the trial court properly refused to dismiss the action at the close of the evidence.

B

[6] Defendants next contend that no competent evidence shows plaintiff attempted to mitigate its damages, and that any recovery by plaintiff should thus be reduced to the extent plaintiff could reasonably have minimized its losses. The trial court found as a fact that U.S. Leasing attempted to mitigate damages by authorizing Lanier to retrieve the leased equipment but that EH refused to release the equipment. This finding is supported by testimony of Mr. Hunter based upon documentation in plaintiff's file, and by plaintiff's answers to interrogatories of defendant Everett.

For the reasons previously discussed, the testimony of Mr. Hunter, based upon his familiarity with plaintiff's business records, was competent evidence. Furthermore, the answers to interrogatories, to which defendants object as "self-serving" and therefore, inadmissible and incompetent to prove an attempt to mitigate damages, were offered in evidence by *defendants* without any request for a limitation upon their use. Defendants will not now be heard to object to evidence which they submitted themselves. The trial court did not err by finding that plaintiff attempted to mitigate its damages.

C

For the foregoing reasons, the judgment against defendants ECHH and William G. Hancock is affirmed.

IV

[7] We next address the issue raised by plaintiff's appeal—whether the action was properly dismissed as to the defendants Everett, Creech, and EH as barred by the statute of limitations.

A breach of contract action is governed by a three-year statute of limitations. *See* N.C. Gen. Stat. Sec. 1-52(1) (1983). The period of limitations begins to run whenever the plaintiff's right to maintain an action accrues. *E.g., Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970).

The defendant-appellees correctly argue in their brief that the statute was not tolled as to them by the filing of the original

complaint because they were not served with process, and that the amended pleading, filed 15 August 1985, adding them as additional parties, could not "relate back" to the filing of the original complaint if the period of limitation had run. *See Stevens v. Nimock*, 82 N.C. App. 350, 346 S.E. 2d 180, *cert. denied*, 318 N.C. 511, 349 S.E. 2d 873 (1986), *reconsideration denied*, 318 N.C. 702, 351 S.E. 2d 760 (1987). Therefore, if plaintiff's cause of action accrued outside the three-year period, *i.e.*, prior to 16 August 1982, the statute would bar plaintiff's claim against these defendants. The issue for our resolution is thus: When did plaintiff's cause of action accrue and the period of limitations begin to run?

A cause of action for breach of contract accrues at the time of the breach which gives rise to the right of action. *See, e.g., Rawls v. Lampert*, 58 N.C. App. 399, 293 S.E. 2d 620 (1982). The general rule in the case of an obligation payable by installments is that the statute of limitations runs against each installment individually from the time it becomes due, unless the creditor exercises a contractual option to accelerate the debt, in which case the statute begins to run from the date the acceleration clause is invoked. 51 Am. Jur. 2d, *Limitation of Actions* Section 142 (1970); *see Shoenterprise Corp. v. Willingham*, 258 N.C. 36, 127 S.E. 2d 767 (1962); *Town of Farmville v. Paylor*, 208 N.C. 106, 179 S.E. 459 (1935). The defendants' obligation under the lease in this case was payable by monthly installments. Consequently, we hold that plaintiff's action against EH, Creech, and Everett was barred by the statute of limitations only as to those payments which were due prior to 16 August 1982. The cause of action for each of the remaining payments accrued within the period of limitations and was not barred.

In so holding, we reject plaintiff's contention that the statute was not tolled until plaintiff attempted to repossess the equipment on or about 19 August 1982, in exercise of one of its optional remedies under the provisions of the lease agreement. We likewise reject the defendant-appellees' argument that the first failure to make payment in February 1982 automatically matured all remaining obligations under the contract and started the statute of limitations running against the entire debt. Defendant-appellees base their argument upon a lease provision giving plaintiff the optional remedy of suing, upon any breach by defendants, for all "amounts due and to become due." However, we find nothing

in this provision or elsewhere in the agreement which operates to automatically accelerate all future obligations under the contract. To the contrary, another option available to plaintiff by express terms of the agreement was to seek recovery of each payment as it became due.

The flaw in both sides' positions is that they each interpret contract provisions concerning *remedies* for breach as bearing upon the accrual of plaintiff's cause of action. However, as previously stated, the cause of action accrues when the *breach* occurs, and the contract in question clearly defines breach or default as failure to make the required payments.

Having concluded that the statute of limitations barred only a portion of plaintiff's claim against EH, Creech, and Everett, we next summarily reject plaintiff's contention that the statute was somehow tolled by defendant Hancock's participation in settlement negotiations and by EH's refusal to release the equipment. Applying the principles of equitable estoppel, we find no evidence in the record before us which shows that plaintiff's delay in amending its complaint was induced by any conduct or representation of any of the defendants.

V

In summary, we hold that the trial court's entry of judgment against defendants ECHH and Hancock was proper. The court erred, however, in dismissing plaintiff's claims against defendants EH, Creech, and Everett as to those payments which became due under the lease after 15 August 1982, and this matter is accordingly remanded for entry of judgment against those defendants consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. CARLES C. MESSICK

No. 8730SC588

(Filed 19 January 1988)

1. **Constitutional Law § 45— defendant's right to represent self—understanding of charges and punishment**

The trial court did not err in allowing defendant to represent himself, and the record showed a knowing and intelligent waiver of the right to counsel where defendant signed a written waiver of his right to counsel; he attempted to appoint as counsel a person not licensed to practice law in this or any other state; the judge at a pretrial hearing informed defendant of his right, whereupon defendant stated that he waived counsel, wished to act in his own defense, and understood the nature of the charges against him and the possible sentences; the judge agreed to let defendant's non-lawyer friend sit beside him and assist him as he represented himself, but the friend could not address the court or speak on defendant's behalf; defendant moved for a continuance which was granted; when the case came on for trial, the judge refused to allow the friend to sit with defendant and advise him on the case; the judge informed defendant again of his right to a court-appointed lawyer, which defendant declined; defendant indicated again that he comprehended the nature of the charges and the range of possible punishments; and the judge was not required to make a *de novo* determination of whether defendant wished to have the assistance of counsel.

2. **Criminal Law § 169.3— evidence excluded—similar evidence subsequently admitted—defendant not prejudiced**

In a prosecution of defendant for discharging a firearm into an occupied vehicle and assault with a deadly weapon where defendant contended that he shot at his victims because he thought they were going to bomb his church, defendant was not prejudiced by the trial court's exclusion of evidence concerning prior acts of violence against the church, since defendant testified on cross-examination that the church had put in an alarm system because of another attempted bombing incident, and he testified that the church had been firebombed in the past.

3. **Assault and Battery § 14.2— two people in car—two counts of assault with deadly weapon—defendant's knowledge as to number of people in car irrelevant**

Where defendant was charged with discharging a firearm into an occupied vehicle and with two counts of assault with a deadly weapon, there was no merit to defendant's contention that the trial court erred in failing to dismiss one of the two assault charges because defendant was unaware that there were two people in the car upon which he fired with a semi-automatic rifle.

4. Assault and Battery § 5.3; Weapons and Firearms § 1— discharging firearm into occupied vehicle—assault with deadly weapon—conviction for both not double jeopardy

Defendant was not placed in double jeopardy by convictions for discharging a firearm into an occupied vehicle and assault with a deadly weapon where both offenses arose from the same incident, since each offense included an element not common to the other.

APPEAL by defendant from *Allen (C. Walter), Judge.* Judgments entered 17 December 1986 in Superior Court, MACON County. Heard in the Court of Appeals 8 December 1987.

Defendant was charged in a proper bill of indictment with discharging a firearm into an occupied vehicle in violation of G.S. 14-34.1. He was also charged by warrant with two counts of assault with a deadly weapon in violation of G.S. 14-33(b)(1).

The State's evidence tended to show the following facts. On 14 June 1986 at approximately 2:30 a.m., William Trusty and his wife Patricia Trusty drove on Klassen Road to see a friend, Raleigh Lentz, about borrowing money. Lentz had loaned William Trusty money in the past. The Trustys drove up to the Lentz house but turned around when they noticed a different name on the lamppost, indicating that the Lentzes no longer lived there. They drove back down Klassen Road and stopped near a light in front of the Church of the Creator in order to mix a drink. Patricia Trusty was driving and William Trusty was drinking. As William Trusty was mixing a drink, shots started hitting the car. Patricia Trusty immediately drove off, and the Trustys returned to their home across the state line in Dillard, Georgia. They called the Rayburn County, Georgia Sheriff's Department to report the shooting. The Trustys' car had been hit in the headlights, the radiator, the front of the motor, the windows, the tires and the passenger side of the car. On cross-examination, William Trusty stated that he was not familiar with defendant's church at the time of the shooting but knew that it was a white supremacy church.

Deputy Charles Doster of the Macon County Sheriff's Department testified that he went to the Church of the Creator in the early morning hours of 14 June in response to a report that shots had been fired. Another officer had previously arrived on the scene but had left to track the Trusty car. When the deputy ar-

rived at the church, defendant came out of the church wearing full camouflage clothing and holding an AR-15 semiautomatic rifle over his head. Defendant told the deputy that he had observed a car proceed to the end of Klassen Road, turn around and drive back to the church where it stopped under the light. Defendant told the deputy that he fired at the car "strictly to attempt to disable the vehicle." Defendant had fired 29 rounds of ammunition at the car.

Defendant, appearing *pro se*, presented evidence tending to show the following:

Deputy Keith Doster of the Macon County Sheriff's Department testified that he had received a call about a possible bombing of the church and was the first officer on the scene. Defendant told Keith Doster that when he was sleeping on the balcony, he heard voices threatening to blow up the church. Defendant then grabbed his rifle and went down to the edge of the road to see who was speaking. He found no one. Then a car turned into Klassen Road, turned around and stopped in front of the church. Defendant told the deputy that he fired the shots in order to stop the car.

Defendant testified that he was sleeping nude on the balcony and heard voices threatening to blow up the church. He stated that those voices said, "If that bald-headed dude comes out, we'll take care of him too." Defendant attempted to call the sheriff's department but was unable to contact them. He then called Ben Klassen's residence and informed Mrs. Klassen that prowlers were threatening to bomb the church and to kill him. He told Mrs. Klassen to call the sheriff's department. Defendant dressed, grabbed his rifle, left the church and proceeded to the road. A car turned into Klassen Road and defendant lay in a ditch. The car turned around at what had once been the Lentz house and stopped in front of the church. Defendant noticed a flash of light in the car which was "like somebody lighting a match or a cigarette lighter." Defendant testified that the church had been bombed in the past and that he was "practically positive that somebody was lighting a gasoline bomb or a stick of dynamite or something." At that time, Ben Klassen drove to the church and as his car approached the stopped car, the stopped car drove off at a high rate of speed. Defendant testified that he stepped out, fired

a warning shot or two and then fired at the vehicle in order to stop it. Defendant heard a woman scream as the car drove off. Defendant stated that he later found out that he knew Patricia Trusty because he frequented the video rental store where she worked.

The jury found defendant guilty of discharging a firearm into an occupied vehicle and of two counts of assault with a deadly weapon. He was sentenced to consecutive prison terms totaling seven years. From the judgment of the trial court, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Wilson Hayman, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Geoffrey C. Mangum, for defendant appellant.

ARNOLD, Judge.

[1] In his first assignment of error, defendant contends that the trial court erred in allowing him to represent himself at trial because the record fails to show a knowing and intelligent waiver of the right to counsel.

> A criminal defendant has a constitutional right to the assistance of competent counsel in his defense. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Implicit in defendant's constitutional right to counsel is the right to refuse the assistance of counsel and conduct his own defense. *Faretta v. California*, 422 U.S. 806 (1975). In its decisions both prior to and after *Faretta*, this court has held that counsel may not be forced on an unwilling defendant. *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980); *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1975).

State v. Gerald, 304 N.C. 511, 516, 284 S.E. 2d 312, 316 (1981). G.S. 15A-1242 states:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

On 8 July 1986, defendant signed a written waiver of his right to counsel which was certified by Judge Robert Leatherwood. On 16 July 1986, defendant filed a *pro se* motion in which he refused because of his religious beliefs "to employ or accept any licensed or other privileged person beholden to his adversary or recognizing the State of North Carolina as his/her Sovereign, to become involved in any manner or degree with making my own defense to these alleged criminal charges by the State." Defendant simultaneously filed a notice of appointment of counsel by which he purported to appoint Mr. Don R. Johnson, not licensed to practice law in North Carolina or any other state, as counsel.

On 27 October 1986, a pretrial hearing was held before Judge Lamar Gudger. Judge Gudger informed defendant of his right to counsel, and defendant stated that he waived counsel and wished to act in his own defense. Defendant also indicated that he understood the nature of the charges against him and the possible maximum sentences. Judge Gudger again informed defendant of his right to counsel, and defendant stated that he did not desire to have a licensed attorney or a court-appointed attorney represent him. When defendant stated that he desired Mr. Johnson, the "legal counsel" for his church, to act in his defense, the court informed defendant that although he could have Johnson sit beside him and assist him as he represented himself *pro se*, Johnson would not be permitted to address the court or speak on defendant's behalf. Judge Gudger again advised defendant of the charges against him and the maximum penalties for the offenses and defendant stated that he understood them. Judge Gudger also told defendant that another judge might try defendant's case and could order something different with respect to Johnson's assistance.

Defendant requested a continuance and on 15 December 1986, defendant's case came on for trial before Judge Allen. The following exchanges occurred:

MR. MESSICK: Another motion that was sort of semi-granted was a motion for non-bar counsel. He was permitting me to have assistance of counsel, my own counsel, a non-bar attorney—a non-bar counsel. But I wanted to point out that he has forbidded (sic) him to address the jury or Court.

THE COURT: I am going to forbid him also from being seated next to you.

MR. MESSICK: I'm going to take exception to that, Your Honor.

THE COURT: Yes, sir. He can sit behind you but he cannot sit at counsel table.

MR. MESSICK: Well, without the assistance of Mr. Johnson, Your Honor, I am really not qualified to—

THE COURT: I'm not saying that you can't have his assistance. I'm saying that he cannot sit with you at counsel table. He can be seated immediately behind you.

MR. MESSICK: Will I be allowed to confer with him?

THE COURT: We will have to take that up as it comes up. That is a violation of the law, Mr. Messick for anyone to advise on matters of law in this State who is not an attorney and I cannot allow that, knowingly allow it—

MR. MESSICK: Judge Gudger didn't have any problem with it—

THE COURT: Well, I cannot allow—I cannot not (sic) knowingly allow a violation of the law to take place in the courtroom, no, sir. You can have anyone seated behind you care to. Now whether he advises you or not, is your business, but I am not allowing a non-attorney to sit at counsel table with you.

* * * *

THE COURT: I understand that. The State has offered a lawyer to you, Mr. Messick and I understand that you didn't desire one.

MR. MESSICK: That's true, Your Honor.

* * * *

THE COURT: [Y]ou do not wish to have a Court appointed counsel at this time?

MR. MESSICK: Yes, Your Honor that is right.

THE COURT: You are going to represent yourself?

MR. MESSICK: I am going to defend myself.

Defendant argues that he never voluntarily and knowingly waived his right to counsel once Judge Allen informed him that he could not have the assistance of Mr. Johnson at counsel table. He asserts that Judge Allen was obligated to make a *de novo* determination of whether defendant wished to have the assistance of counsel. We do not agree.

Judge Allen's limitations on Mr. Johnson's "assistance" did not necessitate a *de novo* inquiry into defendant's waiver of counsel. The trial court advised defendant of his right to the assistance of counsel and defendant clearly indicated that he comprehended the nature of the charges and the range of possible punishments. The record is replete with defendant's assertions that he wished to defend himself and that he understood the consequences of his decision. The trial court correctly followed G.S. 15A-1242, and defendant voluntarily and knowingly waived his right to counsel.

[2] Defendant next contends that "the trial court erred in sustaining the State's objections to defendant's questions to show prior acts of violence against the church, because such testimony was relevant to whether defendant had probable cause to suspect the Trustys of having attempted to bomb the church so that he was authorized to detain them." This contention is without merit.

On cross-examination, defendant testified that the church put in an alarm system because of another attempted bombing incident. He also testified that the church had been fire bombed in the past.

It is well settled that no prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence. *State v. Hageman*, 307 N.C. 1, 296 S.E. 2d 433 (1982). Even assuming *arguendo* that the evidence was improperly excluded, any possible prejudice was cured by the admission of defendant's testimony.

[3] Defendant also contends that "the trial court erred in failing to dismiss one of the two assault charges, because the evidence was insufficient in that the State failed to prove defendant was aware two people were in the car." We do not agree.

There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules. *State v. Roberts*, 270 N.C. 655, 155 S.E. 2d 303 (1967).

> In this State a criminal assault may be accomplished either by an overt act on the part of the accused evidencing an intentional offer or attempt by force and violence to do injury to the person of another or by the "show of violence" on the part of the accused sufficient to cause a reasonable apprehension of immediate bodily harm on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed.

State v. O'Briant, 43 N.C. App. 341, 344, 258 S.E. 2d 839, 841-42 (1979). A criminal assault may be proven under the "show of violence" rule by evidence of the apprehension of harm on the part of the person or persons assailed. *Id.* Intent is not a prescribed element of assault with a deadly weapon. *State v. Curie*, 19 N.C. App. 17, 198 S.E. 2d 28 (1973).

In the present case, defendant's "show of violence" placed William and Patricia Trusty in fear of immediate harm. Defendant's ignorance regarding the number of occupants in the car was immaterial since his actions were sufficient to constitute an assault with a deadly weapon on both occupants. The trial court properly refused to dismiss one of the assault charges.

[4] Defendant finally contends that "the trial court erred in denying defendant's motion to dismiss assault charges and the charge of discharging a firearm into occupied property as multiplicitous, because double conviction and punishment for these of-

fenses violates double jeopardy." This contention is without merit.

The Double Jeopardy Clause of the North Carolina and United States Constitutions protect against multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986).

> [T]he general rule in North Carolina for determining whether certain crimes are separate and distinct offenses is based on *Blockburger v. U.S.*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The rule states that in order to show separate and distinct offenses, there must be proof of an additional fact required for each conviction. It is not enough to show that one crime requires proof of a fact that the other does not. Each offense must include an element not common to the other (citations omitted).

State v. Strohauer, 84 N.C. App. 68, 72-73, 351 S.E. 2d 823, 827 (1987).

Discharging a firearm into an occupied vehicle and assault with a deadly weapon are separate and distinct offenses. In *State v. Shook*, 293 N.C. 315, 237 S.E. 2d 843 (1977), defendant was convicted of discharging a firearm into an occupied building and assault with a deadly weapon inflicting serious injury. Our Supreme Court held that defendant was not exposed to double jeopardy and stated:

> To prove [discharging a firearm into an occupied building], the state must show that defendant fired into an occupied building, an element which need not be shown to support the second charge. Likewise to prove [assault with a deadly weapon inflicting serious injury], it must show the infliction of serious injury, which is not an element of the first charge.

Id. at 320, 237 S.E. 2d at 847.

In *State v. Bland*, 34 N.C. App. 384, 238 S.E. 2d 199 (1977), *disc. rev. denied*, 294 N.C. 183, 241 S.E. 2d 518 (1978), this Court held that assault with a deadly weapon was not a lesser included offense of discharging a firearm into an occupied building because the latter does not involve an assault on a person.

In the case *sub judice*, each offense for which defendant was convicted included an element not common to the other. Discharging a firearm into an occupied vehicle is not essential to support an assault with a deadly weapon. An assault on a person is not an essential element of discharging a firearm into an occupied vehicle. Defendant was not placed in double jeopardy by the convictions for both offenses. He received a fair trial in which we find

No error.

Judges JOHNSON and ORR concur.

WILLIAM EARL SUTTON ROBERTSON AND WIFE, KATHRYN L. ROBERTSON v. FINIS C. BOYD AND WIFE, BETTY J. BOYD; GO-FORTH SERVICES, INC.; AND BOOTH REALTY, INC.

No. 8729SC444

(Filed 19 January 1988)

1. Rules of Civil Procedure § 12.1— motions to dismiss granted—subsequent dismissals pursuant to different section of rule redundant

Since all defendants made timely motions to dismiss plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) which were granted by the trial court, the court's subsequent order granting defendants' motions for judgment on the pleadings pursuant to N.C.G.S. § 1A-1, Rule 12(c) was redundant.

2. Vendor and Purchaser § 6— sale of house—termite damage—notice to purchasers

The trial court did not err in dismissing plaintiffs' actions in fraud against all defendants where plaintiffs alleged that they purchased a house from defendant owners and subsequently discovered extensive termite damage; the complaint did not allege any positive affirmations on the part of defendants that the house was free from termite damage; plaintiffs alleged that they saw some termite damage themselves; they saw that the floor was sagging but relied on defendant realtor's guess that "the problem was likely an old broken floor joist"; and the termite report of defendant exterminator upon which plaintiffs allegedly relied noted visible damage, stated that certain parts of the house were not inspected because they were inaccessible, expressly stated that the damage would not be corrected by the exterminator, and recommended that the damage be evaluated by a qualified building expert.

3. **Unfair Competition § 1— claims for unfair and deceptive trade practices—private parties selling residence—claims properly dismissed**

The trial court did not err in dismissing plaintiffs' claims for unfair and deceptive trade practices against defendants who were private parties engaged in the sale of a residence, since they were not involved in trade or commerce and could not be held liable under N.C.G.S. § 75-1.1.

4. **Unfair Competition § 1— purchase of house with termite damage—unfair or deceptive trade practices claim—action not barred by dismissal of fraud claim or by contributory negligence**

Failure of plaintiffs to state a claim for fraud did not mandate dismissal of their claim for unfair or deceptive trade practices, nor was their claim barred by their contributory negligence in failing to inspect for termite damage in a house which they bought from defendants.

5. **Unfair Competition § 1— unfair or deceptive trade practice—sale of house with termite damage—allegations sufficient**

The trial court erred in dismissing plaintiffs' claim for unfair or deceptive trade practices in the sale of a house with undisclosed termite damages where plaintiffs alleged that defendant realtor and defendant exterminator knew about the termite damage and actively engaged in efforts to prevent plaintiffs from learning of the damage.

6. **Professions and Occupations § 1— claim against exterminator—no negligent preparation of termite report**

The trial court did not err in dismissing plaintiffs' claim against defendant exterminator for negligent preparation of a termite report where the report itself specifically recommended further inspection by a qualified building expert.

7. ***Contracts* § 23; Vendor and Purchaser § 6— sale of house free of termite damage—waiver of breach of contract**

The trial court properly dismissed plaintiffs' claim for breach of contract where plaintiffs alleged that defendants agreed to sell them a house free from termites and to repair any termite damage, but they discovered after closing that the house needed substantial repairs because of termite damage, since plaintiffs chose to close the transaction and accept the deed with knowledge that there was termite damage, and the intention of the parties was that the repair and cost of termite damage would not survive closing in the absence of a written agreement to the contrary.

APPEAL by plaintiffs from *Kirby, Judge.* Orders entered 20 January 1987 and 19 February 1987 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 29 October 1987.

Plaintiffs William Earl Sutton Robertson and wife Kathryn L. Robertson instituted this action seeking damages arising out of their purchase of a house from defendants Finis C. Boyd and wife Betty J. Boyd. The house was first shown to plaintiffs by M. Eu-

gene Booth, president of defendant Booth Realty, Inc. Defendants Boyd had listed the house for sale with Booth Realty. Pursuant to the contract of sale, defendants Boyd furnished plaintiffs with a termite report on the house. The report was prepared by defendant Go-Forth Services, Inc. After closing, plaintiffs discovered termite damage underneath the house. Plaintiffs filed a complaint alleging damages in excess of $10,000 as a result of the misrepresentations and concealment on the part of all three defendants. Plaintiffs further alleged that defendants' conduct constituted unfair and deceptive acts within the meaning of G.S. 75-1.1, entitling plaintiffs to treble damages and attorneys' fees pursuant to G.S. 75-16 and G.S. 75-16.1.

All three defendants filed answers and motions to dismiss pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure. All defendants then filed motions for judgment on the pleadings pursuant to Rule 12(c) of the N.C. Rules of Civil Procedure. Plaintiffs then filed an amendment to their complaint, alleging that defendant Go-Forth Services, Inc. was negligent in its preparation of the termite report. Defendant Go-Forth filed an additional motion to dismiss and answer to the amended complaint. All defendants then filed supplements to their original motions for judgment on the pleadings.

On 20 January 1987, Judge Kirby signed an order dismissing plaintiffs' complaint pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure. Plaintiffs filed notice of appeal the same day. On 19 February 1987, Judge Kirby signed an order granting defendants' motions for judgment on the pleadings. Plaintiffs appeal from both orders.

Arledge-Callahan Law Firm, by J. Christopher Callahan, for plaintiff-appellants.

Hamrick, Bowen, Nanney and Dalton, by Walter H. Dalton, for defendant-appellee Booth Realty, Inc.

Tomblin and Perry, by Vance M. Perry, for defendant-appellees Finis C. Boyd and Betty J. Boyd.

Roberts Stevens and Cogburn, P.A., by Frank P. Graham, Glenn S. Gentry, and Robert W. Wolf, for defendant-appellee Go-Forth Services, Inc.

PARKER, Judge.

Plaintiffs first assign error to the trial court's dismissal of plaintiffs' complaint for failure to state a claim upon which relief can be granted. Plaintiffs' second assignment of error is that the trial court erred in granting defendants' motions for judgment on the pleadings. Plaintiffs contend that the trial court had no authority to rule on the motions for judgment on the pleadings after plaintiffs had filed a notice of appeal from the court's prior order dismissing the complaint. Plaintiffs also argue that judgment on the pleadings was not appropriate in this case even if the trial court had the authority to enter its second order.

[1] We first consider whether the trial court had authority to rule on defendants' motions for judgment on the pleadings. The record shows that the order granting said motions was entered after plaintiffs had filed notice of appeal from the prior order dismissing their complaint. After notice of appeal was filed, the trial court had no jurisdiction to enter additional orders. *Lowder v. Mills, Inc.*, 301 N.C. 561, 580-81, 273 S.E. 2d 247, 258-59 (1981). Defendants argue that Judge Kirby actually granted both motions in open court on 12 January 1987, and that the validity of the second order is not affected by his delay in signing it. For the reasons stated below, we do not find it necessary to address defendants' argument.

Both a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim upon which relief can be granted should be granted when a complaint fails to allege facts sufficient to state a cause of action or pleads facts which deny the right to any relief. *Compare Jones v. Warren*, 274 N.C. 166, 169, 161 S.E. 2d 467, 470 (1968) (judgment on pleadings) *with Sutton v. Duke*, 277 N.C. 94, 102-03, 176 S.E. 2d 161, 165-66 (1970) (failure to state a claim upon which relief can be granted). The principal difference between the two motions is that a motion under Rule 12(c) of the N.C. Rules of Civil Procedure is properly made after the pleadings are closed while a motion under Rule 12(b)(6) must be made prior to or contemporaneously with the filing of the responsive pleading.

Defendants in this case apparently utilized Rule 12(c) because they wanted the trial court to consider the termite report and the contract of sale in determining the sufficiency of plaintiffs' com-

plaint. These documents were not submitted by plaintiff, but copies of both documents were attached to the answer and motion to dismiss of defendants Boyd and copies of the termite report were attached to the motions to dismiss of defendants Booth Realty and Go-Forth. Because these documents were the subjects of some of plaintiffs' claims and plaintiffs specifically referred to the documents in their complaint, they could properly be considered by the trial court in ruling on a motion under Rule 12(b)(6). *Coley v. Bank*, 41 N.C. App. 121, 126, 254 S.E. 2d 217, 220 (1979). Since all defendants made timely motions pursuant to Rule 12(b)(6) which were granted by the trial court, the court's subsequent order pursuant to Rule 12(c) was redundant and need not be considered on appeal. Thus, the sole issue in this appeal is whether the trial court erred in granting defendants' motions under Rule 12(b)(6) of the N.C. Rules of Civil Procedure.

A complaint may be dismissed pursuant to Rule 12(b)(6) if there is no law to support the claim made, an absence of facts sufficient to make a good claim, or the disclosure of facts which will necessarily defeat the claim. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E. 2d 240, 241 (1981). In considering a motion to dismiss, a court must assume that the allegations of the complaint are true. *Id.* Plaintiffs' complaint in the present case alleges several causes of action against three defendants. If any claim is sufficient as to any defendant, then dismissal was improper.

[2] The main thrust of plaintiffs' complaint is an action in fraud against all defendants. The complaint alleges that all defendants knew that there was extensive termite damage underneath the house and that defendants deliberately misrepresented the extent of such damage to plaintiffs. Specifically, plaintiffs allege that they asked Mr. Booth about a sagging floor and he replied that it was probably a broken floor joist; that they asked Mr. Booth if there was anything they should know about the house and he answered "no"; and that defendant Go-Forth Services, Inc. knew of the damage but failed to include it in its report. The complaint further alleges that plaintiffs relied on defendants' misrepresentations when they agreed to purchase the house.

The complaint clearly does not allege any positive affirmations on the part of defendants that the house was free from termite damage. In some circumstances, concealment or nondisclo-

sure may support an action in fraud. *Rosenthal v. Perkins*, 42 N.C. App. 449, 452, 257 S.E. 2d 63, 66 (1979). In an action with respect to realty, however, the purchaser can recover only if he has been fraudulently induced to forego inquiries which he otherwise would have made. *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E. 2d 565, 568, *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983). An action in fraud will not lie where the purchaser has full opportunity to make inquiries but neglects to do so through no artifice or inducement of the seller. *Id.*

In the present case, the complaint alleges that all defendants "collectively and/or individually engaged in an effort to keep the Plaintiffs from discovering [the termite damage]." This bare allegation does not suffice. In an action in fraud, the complaint must allege all material facts and circumstances constituting the fraud with particularity. *Rosenthal v. Perkins*, 42 N.C. App. at 452, 257 S.E. 2d at 65. In addition, plaintiffs' complaint alleges facts which show that they had notice of possible termite damage and failed to investigate.

First, plaintiffs allege that they observed termite damage in wood siding around the cement front porch. They were therefore aware that termites had once infested the house. Next, they saw that the floor was sagging, but relied on Mr. Booth's statement that "the problem was likely an old broken floor joist which could very cheaply and easily be repaired." This alleged statement is clearly a guess or opinion, and plaintiffs were not entitled to rely on it. *See Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E. 2d 494, 500 (1974).

The clearest bar to plaintiffs' recovery for fraud is the termite report, on which plaintiffs allege they relied. The report notes the visible damage that plaintiffs observed, but states that the back half of the house, the insides of the walls, under the carpets, and the attic were all areas that were not inspected because they were inaccessible. The report expressly stated that the damage would not be corrected by Go-Forth, and recommended that the damage be evaluated by a qualified building expert. The report also contained the following statement: "This is not a structural damage report."

The report shows that, rather than inducing plaintiffs to forego further investigation, defendant Go-Forth actually recommended additional inspection of the premises. Even when the seller of property makes affirmative misrepresentations, the failure of the purchaser to make diligent inquiries when he has notice of a problem precludes a recovery for fraud. *Calloway v. Wyatt,* 246 N.C. 129, 134-35, 97 S.E. 2d 881, 886 (1957); *Libby Hill Seafood Restaurants, Inc. v. Owens,* 62 N.C. App. at 699-700, 303 S.E. 2d at 569. The trial court therefore did not err in dismissing plaintiffs' actions in fraud against all defendants.

[3, 4] We next consider the sufficiency of plaintiffs' claims that defendants' conduct constituted unfair and deceptive trade practices in violation of G.S. 75-1.1. Defendants Boyd, being private parties engaged in the sale of a residence, were not involved in trade or commerce and cannot be held liable under the statute. *Rosenthal v. Perkins,* 42 N.C. App. at 454, 257 S.E. 2d at 67. However, defendants Booth Realty and Go-Forth were engaged in trade or commerce within the meaning of G.S. 75-1.1. Further, the failure of plaintiffs to state a claim for fraud does not mandate dismissal of their claim for unfair or deceptive trade practices. *Rosenthal v. Perkins,* 42 N.C. App. at 454-55, 257 S.E. 2d at 67.

Defendants rely on *Libby Hill, supra,* to argue that plaintiffs' claim under G.S. 75-1.1 is barred by their failure to make further investigations of the damage to the house. In *Libby Hill,* this Court held that similar conduct supported a directed verdict for the defendant-seller as to a similar claim. *Libby Hill Seafood Restaurants, Inc.,* 62 N.C. App. at 700, 303 S.E. 2d at 569. That holding, however, was based in part on the fact that the plaintiff in *Libby Hill* was a sophisticated corporation engaged in an expensive business venture. *Id.* Moreover, the Supreme Court has disapproved the language used in *Libby Hill* and has held that the defense of contributory negligence is not applicable to actions under G.S. 75-1.1. *Winston Realty Co. v. G.H.G., Inc.,* 314 N.C. 90, 93-96, 331 S.E. 2d 677, 679-81 (1985). Thus, plaintiffs' claim under G.S. 75-1.1 is not barred as a matter of law by their failure to inspect for termite damage.

[5] Here plaintiffs allege that defendants knew about the termite damage and actively engaged in efforts to prevent plaintiffs from learning of the damage. On its face, therefore, the complaint

alleges conduct which, if proved, may be either unfair or deceptive within the purview of G.S. 75-1.1. *See Johnson v. Insurance Co.*, 300 N.C. 247, 263-66, 266 S.E. 2d 610, 621-22 (1980). Accordingly, this cause of action as to the corporate defendants was not subject to dismissal pursuant to Rule 12(b)(6).

[6] Plaintiffs also asserted a claim against Go-Forth based on negligent preparation of the termite report. For reasons already stated, plaintiffs' failure to make further inspections when such inspections were actually recommended by defendant constituted contributory negligence as a matter of law. *Libby Hill Seafood Restaurants, Inc. v. Owens, supra.* Plaintiffs' reliance on *Plow v. Bug Man Exterminators*, 57 N.C. App. 159, 290 S.E. 2d 787, 32 A.L.R. 4th 678, *disc. rev. denied*, 306 N.C. 558, 294 S.E. 2d 224 (1982) and *Johnson v. Wall*, 38 N.C. App. 406, 248 S.E. 2d 571 (1978) is misplaced. In *Plow*, termites were found in the house after defendant had given plaintiff a certificate reporting no evidence of termites. *Plow*, 57 N.C. App. at 160, 290 S.E. 2d at 788, 32 A.L.R. 4th at 678. In *Johnson*, defendant's report stated that there was no structural weakness. *Johnson*, 57 N.C. App. at 408, 248 S.E. 2d at 573. In neither of these cases did the defendants recommend additional inspection. The negligence claim was properly dismissed.

[7] The final claim to be considered is plaintiffs' claim against defendants Boyd for breach of contract. Although plaintiffs did not set out a separate contract claim, the complaint contains the following paragraphs:

> 11. . . . [T]hese Plaintiffs on November 16, 1984, entered into a Contract entitled "Offer to Purchase and Contract" with Defendants Finis C. Foyd [sic] and wife, Betty J. Boyd, to purchase the house and lot at 212 Callahan Street in Rutherfordton, North Carolina for the sum of $27,000.00.
>
> 12. Pursuant to the terms of said Contract, the Defendants Finis C. Boyd and wife, Betty J. Boyd were required to furnish Purchasers at their expense a statement showing the absence of termites and structural damage, and if there be any termite damage, to repair same prior to the closing.
>
> . . . .

> 24. That pursuant to the terms of the Sales Contract, Defendants Finis C. Boyd and wife, Betty J. Boyd owe Plaintiffs amounts necessary to repair the existing termite damage, and are further liable to these Plaintiffs for the acts of and/or omissions of their agent, Defendant Booth Realty, Inc., and in particular the misrepresentations and failure to disclose of agents Go-Forth Services, Inc. and Booth Realty, Inc.

A claim based on contract need only allege the making of the contract, the obligation assumed, and the breach. *Beachboard v. Railway Co.*, 16 N.C. App. 671, 681, 193 S.E. 2d 577, 584 (1972), *cert. denied*, 283 N.C. 106, 194 S.E. 2d 633 (1973). The above quoted portions of the complaint are clearly sufficient to state a claim for breach of contract.

Plaintiffs' claim is based on the following provision of the contract:

> 9. TERMITES, ETC.: Unless otherwise stated herein, Seller shall provide at Seller's expense a statement showing the absence of termites, wood-destroying insects and organisms and structural damage therefrom . . . . All extermination required and repair of damage therefrom shall be paid for by Seller and completed prior to closing unless otherwise agreed in writing by the parties.

Defendants Boyd argue that plaintiffs' contract claim is defective because they chose to close the transaction and accept the deed with knowledge that there was termite damage. We agree. The contract states specifically that repair of damage from termites shall be paid for by seller and completed before closing unless otherwise agreed in writing by the parties. Plaintiffs have alleged no other writing evidencing an agreement to the contrary. Where the terms of a contract are plain and unambiguous, the intention of the parties will be discerned from the language employed. *Corbin v. Langdon*, 23 N.C. App. 21, 25, 208 S.E. 2d 251, 254 (1974). The survival clause in the contract does not assist plaintiffs' claim because the obvious intention of the parties was that the repair and cost of termite damage would not survive closing in the absence of a written agreement to the contrary. Dismissal of the claim for breach of contract was properly entered.

We conclude that plaintiffs' complaint sufficiently states claims upon which relief can be granted as to defendants Booth

Realty, Inc. and Go-Forth Services, Inc. under G.S. 75-1.1. The trial court therefore erred in granting defendants' motions under Rule 12(b)(6) of the N.C. Rules of Civil Procedure with respect to said claims. Plaintiffs' remaining claims for fraud, negligence and breach of contract were properly dismissed.

Affirmed in part; reversed in part; and remanded.

Judges EAGLES and MARTIN concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

CURTIS L. TAYLOR v. NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 8710IC54

(Filed 19 January 1988)

1. **State § 8.3; Convicts and Prisoners § 3— one prisoner inspired by another— sufficiency of evidence to support findings of fact**

Evidence was sufficient to support the Industrial Commission's findings of fact that correctional officers placed plaintiff and another prisoner in the same cell over plaintiff's protest; plaintiff had been fighting with associates of his cell mate; the associates and other prisoners made more than usual noise and encouraged the cell mate to assault plaintiff; the cell mate did in fact threaten, beat, and sexually assault plaintiff; and no correctional officer investigated the noise or made any regular rounds that night.

2. **State § 8.3; Convicts and Prisoners § 3— one prisoner injured by another— negligence of defendant in providing proper care**

Defendant had a duty of reasonable care to protect plaintiff from reasonably foreseeable harm, and the Industrial Commission properly applied this standard in finding that defendant was negligent in failing to exercise proper care in this case where the Commission found that defendant was put on notice that plaintiff inmate was in danger; defendant failed to heed that warning; defendant did not respond to excessive noise from inmates; and defendant's employee failed to make his normal rounds.

APPEAL by defendant from Order of North Carolina Industrial Commission entered 8 September 1986. Heard in the Court of Appeals 4 June 1987.

Milford K. Kirby and Reginald L. Frazier for plaintiff appellee.

Monroe, Wyne, Atkins & Lennon by George W. Lennon for defendant appellant.

COZORT, Judge.

Plaintiff, Curtis L. Taylor, was an inmate confined to the North Carolina Department of Correction, beginning his term of incarceration on or about 20 January 1981. He was assigned to the Harnett Youth Center, where, on or about 17 February 1981, he was involved in a fight with two other inmates, Howard Cheers and Albert Williams. All three inmates were placed in segregation cells. Inmate Darrell Hamilton was later placed in the same cell with plaintiff. Plaintiff was assaulted by Hamilton. Hamilton later pled guilty to a criminal charge of crime against nature in which plaintiff was alleged to be the victim. Plaintiff filed an action against the North Carolina Department of Correction under the State Tort Claims Act, alleging that correctional officers were negligent in placing Hamilton and plaintiff in the same cell after Taylor had warned officers there would be trouble if Hamilton were placed in his cell. Plaintiff's allegations included a claim that plaintiff was sexually assaulted by Hamilton forcibly performing anal intercourse on him. A deputy commissioner of the Industrial Commission found and concluded that the sexual assault and battery suffered by the plaintiff was proximately caused by the negligence of a Department of Correction officer. Plaintiff was awarded recovery in the amount of $7,500. On appeal to the Full Commission, the pertinent findings and conclusions regarding negligence were affirmed unanimously; however, the award was increased to $15,000. The Department of Correction appealed to this Court, contending primarily that the Commission erred by finding and concluding that the criminal assault was proximately caused by the negligence of the officer. We affirm.

In its first two assignments of error, the defendant, North Carolina Department of Correction, contends that the Industrial Commission erred in finding negligence by Officer Charles Neal and that the Industrial Commission erred in finding that any negligence by defendant was a proximate cause of the intentional

criminal assault on the plaintiff by Darrell Hamilton. We find no merit to these contentions.

[1] The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there is evidence which would support findings to the contrary. Appellate review is limited to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusion and decision. *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 684, 159 S.E. 2d 28, 31 (1968). We shall first consider whether the Commission's pertinent findings were supported by competent evidence.

The crucial findings of fact made by the Commission below are:

> 9. On February 17, 1981 during the second shift, Darrell Hamilton, a known associate of the two inmates with whom plaintiff had been fighting, was placed in the same segregation cell with the plaintiff. Plaintiff asked the officer who escorted Hamilton to the cell, not to put Hamilton in his cell, but his plea was to no avail. It is unclear which officer physically put Hamilton in plaintiff's cell, but it is clear that Officer Neal did not make the cell assignment.
>
> * * * *
>
> 13. For about one hour after Hamilton was put in plaintiff's cell, he was being agitated by the others with whom plaintiff had been fighting to harass the plaintiff. The inmates, whom plaintiff had been fighting, passed urine to Hamilton in cups and he made plaintiff drink it. Plaintiff was afraid. Hamilton beat, choked and threatened plaintiff. He made plaintiff wash his clothes in the commode and lick his anus. Hamilton raped plaintiff by forcibly performing anal intercourse on him.
>
> 14. Plaintiff was too afraid to holler for help; however, Officer Neal should or could have heard the noise from the agitation by the prisoners that lasted for at least an hour if he had been exercising the proper supervision and observation of the prisoners.

* * * *

20. Officer Neal would normally make rounds through the cell blocks every 15 to 20 minutes except when interrupted by showers and feeding. From 2:00 p.m. to 4:00 p.m. Neal escorts inmates, one at a time, to shower and back to the cell. After that, he serves their meal trays. After that, any inmates who did not shower get to shower. Thereafter, Neal should have made his regular rounds at 15 to 25 minute intervals.

21. On February 17, 1981, except to handle the showers and the feeding, Officer Neal did not make his regular rounds in the segregation [cell] until approximately 9:00 p.m. when plaintiff asked to talk to him and ultimately report this incident.

22. Officer Neal neglected his duty to make periodic checks to safeguard the inmates from dangerous conditions, e.g. sexual assaults. Officer Neal did not exercise reasonable care to maintain security and prevent assaults and conflicts between these problem inmates.

23. Because these were problem inmates, it was foreseeable that they would be in conflict with each other and a hazard to each other. It was also foreseeable that sexual assaults were a hazard at the Youth Center and that was known to Officer Neal.

24. Officer Neal should have reasonably foreseen that inmates might be assaulted by each other if he failed to make the usual periodic checks for security and safety maintenance.

25. Officer Neal had knowledge of the need and legal duty to insure the adequate protection of the prisoners from violence and assaults and was negligent, when by the simple exercise of proper care, the acts of violence complained of herein should or might have been forseen [*sic*] and prevented.

26. The negligence of Officer Neal was a proximate cause of the sexual assault and battery suffered by the plaintiff.

The Commission then made its crucial conclusion of law:

2. On or about February 17, 1981, defendant's-employee, Officer Charles Neal, negligently failed to exercise due care in his supervision of the plaintiff to protect him from violence and assault and battery that by the exercise of proper care should have been reasonably foreseen and prevented. Plaintiff has suffered . . . emotional disturbance as a proximate result of the negligence of defendant's-employee. (Citation omitted.)

Our review of the record and transcript from the hearing below leads us to the conclusion that there is competent evidence to support the dispositive findings made by the Commission. Plaintiff testified that he got in a fight with Cheers and Williams on 17 February 1981 and was sent to segregation. Darrell Hamilton, an associate of Cheers and Williams, came to his cell. Plaintiff asked the officer who brought Hamilton back there not to put Hamilton "in the cell with me because there would be trouble, which he was an associate of Albert and Howard Cheers, but my request was denied. When I asked him not to put them in there with me he told me to shut up and put Darrell Hamilton in the cell with me anyway." Plaintiff further testified that Williams and Cheers were in the cell next to plaintiff and Hamilton. Hamilton started beating and threatening plaintiff. Plaintiff testified that he was "hollering for the man, but the man didn't come back there at the time so he made me have sex with him, and I didn't want to have no sex with him, and the officer wouldn't come back there and I kept hollering." Plaintiff testified that he could not remember which officer put Hamilton in the cell with him.

Tommy Wilson Dunn, an inmate who was also confined at the Harnett Youth Center in February of 1981, testified that he was in the cell beside plaintiff Taylor on 17 February 1981. He testified that when Hamilton was brought to Taylor's cell, he heard Taylor "say that for him not to put that man in his cell, if they did there was going to be trouble." Dunn further testified that the noise level on the cell block was above average because the other inmates were "boosting" or "agitating" Hamilton. The noise level continued for an hour or an hour and a half. Dunn further testified that no correctional officer made any regular rounds that night.

This evidence is clearly sufficient to support the findings of fact made by the Commission, even though the defendant offered evidence to the contrary and through skillful cross-examination cast doubt upon the credibility of plaintiff's witnesses. Those issues are to be resolved by the Commission as the finder of fact. They are not to be determined by this Court as the reviewing court. Thus, we find there was sufficient, competent evidence to support the Commission's findings of fact.

[2] The next issue to be determined is whether the Commission's conclusion of law relating to negligence and foreseeability of harm was correct. In *Dunn v. Swanson*, 217 N.C. 279, 7 S.E. 2d 563 (1940), the Supreme Court held that the plaintiff in that case had stated a cause of action by alleging that a sheriff was negligent for placing plaintiff's weak, sick and helpless husband in a cell with a violently insane man who during the night killed him by beating him with a table leg which had been left in the cell by the sheriff and jailer. In *Williams v. Adams*, 288 N.C. 501, 219 S.E. 2d 198 (1975), the court held that a complaint against a sheriff should not have been dismissed when it claimed that the death of a prisoner was caused by the negligence of the sheriff's officers in not providing the proper medical attention. In that case, Justice Moore, speaking for the court, observed:

> [T]he author of a note in 19 N.C. L. Rev. 101 (1940-41) states that *Dunn v. Swanson, supra*, is in accord with the general rule that "a prison official is liable when he knows of, or in the exercise of reasonable care should anticipate, danger to the prisoner, and with such knowledge or anticipation fails to take the proper precautions to safeguard his prisoners."

Id. at 504, 219 S.E. 2d at 200. *See also Helmly v. Bebber*, 77 N.C. App. 275, 335 S.E. 2d 182 (1985). From a review of these cases we conclude that defendant had a duty of reasonable care to protect the plaintiff from reasonably foreseeable harm. We further conclude that the Commission correctly applied this legal standard in finding that the defendant was negligent in failing to exercise proper care in this case. The Commission found as fact that defendant was put on notice that the plaintiff was in danger; the defendant failed to heed that warning; the defendant did not respond to excessive noise from inmates; and the defendant's employee failed to make his normal rounds. Thus, while we

recognize that the Department of Correction is not an insurer of the safety of every inmate and will not be found liable for negligence every time one inmate assaults another, the evidence below supported the Commission's findings and conclusions of negligence in this particular case.

Defendant has contended further that even if the findings of the Commission were supported by competent evidence, such negligence was not the proximate cause of the plaintiff's injury because the criminal assault by inmate Hamilton was an intervening, intentional act which relieved the defendant of liability. We find no merit whatsoever to this contention, and we reject it without further discussion.

Finally, the defendant contends that the Commission erred by receiving in evidence the entire transcript of a deposition of Officer Neal, who was available to testify at the hearing. We have reviewed the entire deposition of Officer Neal which was admitted. We conclude that, even if its admission was technically error, the deposition did not prejudice the defendant. All of the crucial findings of fact made by the Commission were supported by other competent evidence. As we stated in *Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E. 2d 859, *disc. rev. denied*, 314 N.C. 336, 333 S.E. 2d 496 (1985), not every error in the admission of evidence is grounds for a new trial or setting aside a verdict. The burden is on the appellant to show the court how he was prejudiced and that a different result would have likely ensued had the error not occurred. *Id.* at 409, 328 S.E. 2d at 864. The defendant herein has failed to carry this burden.

For the foregoing reasons, the Opinion and Award of the Industrial Commission is

Affirmed.

Judges BECTON and MARTIN concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

KAY HUTCHINSON CARROLL v. WILLIAM MITCHELL CARROLL

No. 8718DC502

(Filed 19 January 1988)

Divorce and Alimony § 30— equitable distribution of marital property—no jurisdiction over out-of-state defendant

Plaintiff's claim for equitable distribution of marital property must be dismissed for lack of jurisdiction over defendant where the parties married in the State of Washington, lived there for the duration of the marriage, and accumulated real and personal property there; moreover, that there existed in North Carolina some personal property in which defendant might have an interest because of the equitable distribution statutes was not alone sufficient to establish jurisdiction over defendant or his property, since there was no evidence that defendant himself brought the property into this state or consented to its being brought here.

Judge PHILLIPS concurring in the result.

APPEAL by defendant from *Lowe, Judge.* Order entered 31 December 1986, in District Court, GUILFORD County. Heard in the Court of Appeals 18 November 1987.

Hatfield & Hatfield, by Kathryn K. Hatfield for plaintiff-appellee.

Greeson, Allen and Floyd, by Constance Floyd Jacobs for defendant-appellant.

GREENE, Judge.

This is a civil action brought by the plaintiff-wife seeking a divorce, child custody, child support, and equitable distribution of the marital properties. Defendant-husband, a resident of the State of Washington, moved to dismiss the complaint pursuant to N.C.G.S. Sec. 1A-1, Rule 12(b)(1) and (2) asserting the district court had neither subject matter nor personal jurisdiction.

The trial court denied defendant's motion to dismiss and concluded it had jurisdiction to determine the issues of custody, divorce, and equitable distribution. The court further concluded it did not have jurisdiction over the issue of child support because it did not have personal jurisdiction over defendant.

The parties were married in Florida in 1975 and resided in various locations during the marriage. The court found the plain-

tiff has been a resident of North Carolina since April 1985 when she moved here from the State of Washington with the couple's daughter. The defendant resides in Tacoma, Washington, and has not lived in North Carolina at any time during the parties' marriage. The court also found:

> 7. That property of the parties including real estate and household furnishings are in Tacoma, Washington.
>
> 8. That property of the parties including plaintiff's car and personal property are in North Carolina.

Defendant gave notice of appeal and assigns error only to the court's failure to dismiss plaintiff's claim for equitable distribution.

The sole issue in this appeal is whether the trial court has jurisdiction over the defendant such that it can enter an order for equitable distribution.

I

Resolution of this question normally involves a two-part inquiry. "First, do the statutes of North Carolina permit the courts to entertain this action against defendant. If so, does the exercise of this power by the North Carolina courts violate due process of law." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E. 2d 629, 630 (1977). However, we find it unnecessary to address the first issue. Assuming *arguendo* that the North Carolina "long-arm" statutes at N.C.G.S. Secs. 1-75(4) and 1-75(8) (1983) give North Carolina courts jurisdiction over the defendant, application of those statutes here would violate the due process clause of the Fourteenth Amendment.

The due process clause of the Fourteenth Amendment limits the power of a court to exercise jurisdiction over a nonresident defendant. *Miller v. Kite*, 313 N.C. 474, 477, 329 S.E. 2d 663, 665 (1985). This due process analysis applies with equal force to actions *in personam*, *in rem*, and *quasi in rem*. *See Shaffer v. Heitner*, 433 U.S. 186, 212, 53 L.Ed. 2d 683, 703 (1977); *see also Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 325-26, 244 S.E. 2d 164, 166-67 (1978). However, *Shaffer* did not alter the longstanding rule set out in *Williams v. North Carolina*, 317 U.S. 287, 298-99, 87

L.Ed. 279, 286 (1942), that a state can alter the "marriage status of [a] spouse domiciled there, even though the other spouse is absent," as long as service on the absent spouse comports with due process. *See Shaffer*, 433 U.S. at 208 n.30, 53 L.Ed. 2d at 700 n.30; *cf. Chamberlin v. Chamberlin*, 70 N.C. App. 474, 477, 319 S.E. 2d 670, 672, *disc. rev. denied*, 312 N.C. 621, 323 S.E. 2d 921 (1984) (holding that North Carolina's compelling interest in determining status of residents is consistent with due process fairness under *Shaffer* so that court had jurisdiction over divorce action where only one spouse was resident of State). This Court has also recognized that personal jurisdiction over a nonresident parent is not required in a child custody action filed under the Uniform Child Custody and Jurisdiction Act. *Hart v. Hart*, 74 N.C. App. 1, 7, 327 S.E. 2d 631, 635 (1985).

In an equitable distribution action, the court is exercising jurisdiction over the interests of persons in property and not over a "status" of the parties. Exercise of this jurisdiction must meet the minimum contacts standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945) (defendant and forum State must have minimum contacts such that exercise of jurisdiction does not offend " 'traditional notions of fair play and substantial justice.' "). *Shaffer*, 433 U.S. at 212, 53 L.Ed. 2d at 703. Minimum contacts must have a basis in "some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75, 85 L.Ed. 2d 528, 542 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298 (1958)).

Here, plaintiff and defendant were married in 1975 and lived together in the State of Washington where they accumulated real and personal property. They separated in 1985 and plaintiff moved to North Carolina. Plaintiff has resided in this State since 6 April 1985 and defendant continues to reside in the State of Washington. Defendant has not lived in North Carolina during any part of the marriage; however, the trial court found that certain property of the parties was located in North Carolina.

Our review of these undisputed facts indicates no action by defendant purposefully directed towards this State. Once the ex-

ercise of jurisdiction over a defendant is challenged, the burden of proof is on the plaintiff to establish jurisdiction. *Gro-Mar Public Relations, Inc. v. Billy Jack Enterprises, Inc.*, 36 N.C. App. 673, 677, 245 S.E. 2d 782, 784 (1978). Plaintiff has not met her burden.

The fact that there exists some personal property in North Carolina in which the defendant may have an interest because of the equitable distribution statutes is not alone sufficient to establish jurisdiction over the defendant or his property. If there was evidence the defendant brought the property into North Carolina or consented to the placement of property in North Carolina, this would be some evidence of contacts with the forum State, the defendant and the litigation. *See Holt v. Holt*, 41 N.C. App. 344, 255 S.E. 2d 407 (1979) (nonresident defendant's purchase of real property in North Carolina twenty-five days after being ordered to make payments to plaintiff wife and divorce decree settling interests of parties in real and personal property located in North Carolina established sufficient minimum contacts); *In re Marriage of Breen*, 560 S.W. 2d 358, 362-64 (Mo. App. 1977). This however, would not itself necessarily be decisive concerning the issue of jurisdiction. The United States Supreme Court has recently emphasized that in each case, under the test in *International Shoe*, the exercise of jurisdiction must be reasonable and fair. *See Ashai Metal Indus. v. Superior Ct. of California*, 94 L.Ed. 2d 92, 106-07 (1987).

Here, the facts do not indicate who brought the property into North Carolina or whether defendant even consented to the property being in North Carolina. *See* Restatement (Second) Conflicts of Law Sec. 60 comment d (1969) ("A state will not usually exercise judicial jurisdiction to affect interest in a chattel brought into its territory without the consent of the owner unless and until the owner has had a reasonable opportunity to remove the chattel, or has otherwise waived the exemption . . ."); *see also Burger King*, 471 U.S. at 475, 85 L.Ed. 2d at 542 (" 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of . . . the 'unilateral activity of another party or a third person . . .' "). From the facts presented, we hold that the trial court lacked jurisdiction over the defendant and his property and therefore could not properly determine the equitable distribution claim.

Our decision that the plaintiff's claim for equitable distribution must be dismissed does not appear to deny plaintiff a remedy for the division of the marital property. The State of Washington, where the parties lived as man and wife and where they accumulated their property, authorizes its courts to enter a disposition of the marital property as is "just and equitable." Wash. Rev. Code Sec. 26.09.080 (1986). This order can be entered by the Washington courts "following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse . . . ." *Id.* Therefore, it appears that the plaintiff could proceed with her divorce in this State and seek distribution of the marital property in the State of Washington.

Our holding is supported by United States Supreme Court decisions requiring *in personam* jurisdiction over the defendant before a court can order payment of child support or alimony. *See Kulko v. Superior Ct. of California*, 436 U.S. 84, 100-01, 56 L.Ed. 2d 132, 146 (1978) (a nonresident father "who derives no personal or commercial benefit from his child's presence in [a foreign state] and who lacks any other relevant contact" with the foreign state cannot be required to defend a child support suit); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 1 L.Ed. 2d 1456 (1957) (Nevada court decree could not terminate wife's claim for support where court lacked *in personam* jurisdiction over wife); *Estin v. Estin*, 334 U.S. 541, 92 L.Ed. 1561 (1947) (same).

Plaintiff further contends N.C.G.S. Sec. 50-21(a) (1987) provides a basis for jurisdiction over the defendant. N.C.G.S. Sec. 50-21(a) provides in pertinent part:

> Real or personal property located outside of North Carolina is subject to equitable distribution in accordance with the provisions of G.S. 50-20, and the court may include in its order appropriate provisions to insure compliance with the order of equitable distribution.

This statute simply authorizes jurisdiction over the property of the defendant located outside North Carolina once due process concerns are satisfied. Since neither party has raised the issue, we do not address what limits may otherwise be imposed on this State's jurisdictional competence over real estate located outside of North Carolina. *See generally* 1 A. Oldfather *et al.*, Valuation

and Distribution of Marital Property Sec. 10.01[2][c] at 10-10 to 10-16 (1987).

II

The order of the trial court is reversed and plaintiff's claim against defendant for equitable distribution is dismissed for lack of jurisdiction over the person and property of defendant.

Reversed.

Judge BECTON concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring in the result.

In my opinion the due process question discussed in the opinion does not arise because North Carolina has no statute that purports to give our courts personal jurisdiction over the property or person of a nonresident defendant whose only contact with the state has been that his wife after they separated moved here with their child and her personal property.

CECIL C. ARNETTE v. JAMES E. MORGAN, SR., VIRGINIA MORGAN, AND GENERAL GROWTH LIMITED PARTNERSHIP

No. 8729SC529

(Filed 19 January 1988)

Reformation of Instruments § 9— reformation of deed to correct description—effect on intervening judgment lien

A deed from the individual defendants to plaintiff could be reformed to affect the intervening judgment lien held by defendant partnership since the deed contained an improper legal description which mistakenly did not convey all the property the parties intended; defendants, as grantors, held as constructive trustees for plaintiff that portion of the land the parties intended to be conveyed; and defendant partnership failed to allege or prove that it in good faith advanced new consideration or incurred some new liability on the faith of the apparent ownership of defendants. Furthermore, the reformation of the deed should relate back to the time of the original conveyance rather than to the date of the filing of *lis pendens* on the property by defendant's predecessor.

Arnette v. Morgan

APPEAL by defendant General Growth Limited Partnership and cross-appeal by plaintiff from *Gudger, Judge.* Judgment entered 25 February 1987 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 30 November 1987.

Blue and Fellerath, by James F. Blue, III, and Frederick S. Barbour, for plaintiff.

Ramsey, Cilley and Perkins, by Robert S. Cilley, for defendant General Growth Limited Partnership.

GREENE, Judge.

This is a civil action for the reformation of a deed from defendants James Morgan, Sr., and his wife, Virginia Morgan, to plaintiff Cecil C. Arnette. Plaintiff contends this 1976 deed contains an improper legal description which mistakenly did not convey all of the property the parties intended. Consequently, defendant Morgan retained title to some of the property. In January 1984, General Growth Properties filed a notice of *lis pendens* on the property retained by Morgan and later obtained a North Carolina judgment against him based on a Florida judgment unrelated to the property in question. At some point, General Growth Properties assigned its interest in the judgment to defendant General Growth Limited Partnership (hereinafter, "General Growth"). In November 1985, plaintiff filed this action to reform the deed from James and Virginia Morgan to himself. The case was tried before a jury and the jury found the deed from the Morgans to plaintiff contained an incorrect description due to the mutual mistake of both parties.

The trial court entered an order reforming the deed to include the description of all the property the parties intended to convey, including the property on which defendant General Growth had a lien by virtue of its judgment. The court then decreed that the reformation relate back to the time of the filing of the *lis pendens*. Defendant General Growth gave timely notice of appeal to this Court contending that the reformation should not affect its judgment lien. It does not assign error to the jury's finding that a mutual mistake existed between Arnette and the Morgans as to the description in the deed. Plaintiff cross-assigns as error the trial judge's ruling that the reformation relate back to the time of the filing of the *lis pendens*.

The sole issue presented is whether the deed between Arnette and the Morgans can be reformed to affect the intervening judgment lien held by General Growth.

I

Under our real property registration statutes, registration determines the priority of rights deriving from deeds, mortgages, deeds of trust, and judgments. N.C.G.S. Secs. 47-18 and 47-20 (1984). The recording statutes are designed to protect prospective purchasers and encumbrancers of land. P. Hetrick, *Webster's Real Estate in North Carolina*, Sec. 373 at 404 (1981).

Here, defendant General Growth owns a docketed judgment which is a recorded lien on the real property of the debtor James E. Morgan under N.C.G.S. Sec. 1-234 (1983). The plaintiff, by seeking to reform the earlier deed to him from the Morgans, is claiming an equitable interest in the property on which defendant General Growth has the judgment lien.

Under our recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. *Eaton v. Doub*, 190 N.C. 14, 19, 128 S.E. 494, 497 (1925). However, "parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview" of our registration statutes. *Spence v. Foster Pottery Co.*, 185 N.C. 218, 220-21, 117 S.E. 32, 33 (1923). *See also Crossett v. McQueen*, 205 N.C. 48, 51, 169 S.E. 829, 831 (1933) (declaration of a trust is not a conveyance, contract or lease requiring registration).

In *Lowery v. Wilson*, 214 N.C. 800, 200 S.E. 861 (1939), our Supreme Court held that both judgment creditors and purchasers for value could rely on the record and under the recording statutes be entitled to priority over an equity interest in the property not reflected in the record. Specifically, the Court in *Lowery*, applying the recording statutes, found a mortgage could not be reformed so as to affect the holder of a recorded judgment which accrued subsequent to the date of the mortgage but before the requested reformation of the mortgage. However, the *Lowery* Court

recognized again that parol trusts are outside the registration statutes. *Id.* at 804-05, 200 S.E. at 864.

In *Crossett v. McQueen*, 205 N.C. 48, 169 S.E. 829 (1933), our Supreme Court allowed reformation against several judgment creditors even though the recorded deed to the plaintiff-debtor showed he was the sole owner of the property. The Court allowed reformation when it found the debtor was holding the property as trustee for himself and three other persons even though the agreement was not reflected in the record.

Subsequent opinions indicate the Supreme Court has not rejected the basic holding of *Crossett*. In *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 273 S.E. 2d 268 (1981), the Court allowed reformation of a deed so as to provide an unrecorded equity interest priority over a subsequent purchaser with a recorded deed. However, the Court further held that if the purchaser had no notice of the equity prior to the purchase and if he paid valuable consideration, the purchaser would be given priority over the unrecorded equity interest. *Id.* at 653-54, 273 S.E. 2d at 272.

One authority has noted:

> Where a conveyance of land is made for consideration, and by mistake the conveyance is ineffective to transfer the land or the whole of the land for which the consideration was paid, the grantee is entitled to reformation of the deed. In such a case the grantor holds the land, which was intended to be conveyed, upon a constructive trust for the grantee.

V. A. Scott, *The Law of Trusts*, Sec. 466 at 3432 (3d ed. 1967); *see also* Annot., 12 A.L.R. 2d 961, 963 (1950); *cf. Bell v. McJones*, 151 N.C. 85, 65 S.E. 646 (1909) (Court held that party conveying property which deed failed to adequately describe holds that portion omitted from the description in trust for the purchaser when evidence showed sellers' fraud and that purchasers intended to purchase the entire parcel); *cf. also Spence*, 185 N.C. at 220-22, 117 S.E. at 33-34.

In the case at bar, the jury found the parties intended the deed to pass the entire property. Through a mutual mistake of the parties, the deed failed to do so. Defendant has not assigned error to the jury's finding. We conclude that Morgan, as grantor, held as a constructive trustee for Arnette that portion of the land

the parties intended to be conveyed. Therefore, this case falls outside *Lowery* and the registration act and is controlled by the general principles of reformation in North Carolina. *See Spence*, 185 N.C. at 232, 117 S.E. at 33.

The general rule is that reformation will not be granted if prejudice would result to the rights of a bona fide purchaser for value without notice or someone occupying a similar status. 66 Am. Jur. 2d *Reformation of Instruments* Secs. 11, 65 (1973); *see also Hice*, 301 N.C. at 653, 273 S.E. 2d at 272; *M & J Finance Corp. v. Hodges*, 230 N.C. 580, 582, 55 S.E. 2d 201, 203 (1949) (the grantee or lien creditor of the apparent owner is protected against claims of the equitable owner of property only if grantee or lien creditor is purchaser for value without notice and "to constitute him a purchaser for value he must have advanced some new consideration or incurred some new liability on the faith of the apparent ownership"); and *Spence*, 185 N.C. at 232, 117 S.E. at 33. Where the issue is raised of whether the party resisting reformation is entitled to the protection given a bona fide purchaser for value without notice, the burden is on the resisting party to prove good faith payment of new consideration. The party seeking reformation must then prove the resisting party's knowledge of the equity. 76 C.J.S. *Reformation of Instruments* Sec. 82 at 450-51 (1952); *Johnston v. Terry*, 128 W.Va. 94, 107, 36 S.E. 2d 489, 495 (1945); *see also Hice*, 301 N.C. at 653, 273 S.E. 2d at 272 (where defendant is not party to original deed, plaintiff seeking reformation is required to prove knowledge of mistake can be imputed to defendant).

A review of the record indicates that not only has defendant failed to prove it in good faith advanced new consideration or incurred some new liability on the faith of the apparent ownership of Morgan, but that it has also failed to include any allegation of the same in its answer. Rule 8(c) of the North Carolina Rules of Civil Procedure, N.C.G.S. Sec. 1A-1 (1983) provides: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." Because defendant failed to plead or offer evidence on the defense of consideration advanced in good faith, defendant waived its right to assert this defense. *See Smith v. Hudson*, 48 N.C. App. 347, 352, 269 S.E. 2d 172, 176 (1980) (defendants failing to plead failure of consideration and statute of frauds was waiver of its

right to assert those defenses). Although General Growth is an assignee of the judgment, this bare fact standing alone does not entitle a party to the protection given a bona fide purchaser for value. Therefore, we do not address the issue of whether an assignee of a judgment steps into the shoes of its assignor and takes subject to the rights of the assignor, or whether the assignee may attain the status of a bona fide purchaser in its own right and thereby be unaffected by a subsequent reformation. *But see* 66 Am. Jur. 2d *Reformation of Instruments* Sec. 69 at 595 (1973). We find it unnecessary to address the other assignments of error raised by defendant General Growth.

II

Therefore, reformation is proper as to the judgment lien held by defendant General Growth. However, we agree with plaintiff that the trial judge erred in relating the reformation back to the date of the filing of the *lis pendens*. The reformation should date back to the time of the original conveyance. *Sheets v. Stradford*, 200 N.C. 36, 38, 156 S.E. 144, 146 (1930). This case is remanded to the trial court for entry of judgment in accordance with this opinion.

Affirmed in part and remanded with instructions.

Chief Judge HEDRICK and Judge MARTIN concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

STATE OF NORTH CAROLINA v. VASANTA D. FIELDER

No. 8726SC307

(Filed 19 January 1988)

Criminal Law § 34.5— undercover sale—officer's statement that defendant was present at prior sale—no improper character evidence

In a prosecution of defendant for possession and sale of marijuana and cocaine where the officer who purchased the drugs from defendant testified that she had seen defendant in the same house on an earlier occasion when the officer had purchased drugs from a black male, there was no merit to

defendant's contention that this testimony was inadmissible character evidence, since defendant's mere presence at an earlier drug sale was not a prior wrong, evidence of which was excluded pursuant to N.C.R. Evid. 404(b), and the testimony was admissible to establish a positive identification of defendant.

APPEAL by defendant from *Griffin, Kenneth A., Judge.* Order entered 17 November 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 September 1987.

In 86CRS37521 defendant was tried upon indictment charging her with (1) possession with intent to sell and deliver a controlled substance, cocaine, and (2) the sale and delivery of cocaine. In 86CRS37524 defendant was tried upon indictment charging her with (1) possession with intent to sell and deliver marijuana, and (2) the sale and delivery of marijuana.

The State's evidence tended to show that on 7 May 1986 undercover Charlotte Police Officer Debbie Givens went to the address known as 613 Key Street Apartment No. 8, accompanied by SBI Agent D. H. Bowman and Officer Gwendolyn Fleming, for the purpose of purchasing controlled substances in her undercover capacity. She also testified that the defendant was to be the anticipated seller.

Fielder was targeted as the anticipated seller due to prior events which occurred on 24 April 1986. On that date, Officer Givens and Agent Bowman went to the same address to attempt to purchase controlled substances from a black male known as "Slim." During this stop, Officer Givens saw defendant Fielder there for two or three minutes. Upon her return to the police station on the same evening, and within an hour of having seen her in person, she identified Ms. Fielder in a photograph. She used these identifications at trial to identify defendant.

When Officer Givens arrived at the apartment on 7 May 1986, she went to the door and asked Ms. Fielder if she had "anything," meaning controlled substances. Ms. Fielder then instructed her to return in thirty minutes because an electrician was on the premises and that she did not have "anything" at that moment. When Givens returned an hour later, the electrician had left and she again approached the door after waiting for a black male to leave, who had been talking to the defendant while standing in the doorway.

Givens again approached the defendant and asked, "What is it going to be like?" Defendant answered that she only had some nickels, which Givens understood to mean five dollar bags of marijuana. Givens then asked for a thirty-five dollar bag of cocaine which defendant did not have because her inventory was limited to twenty-five dollar bags of cocaine. Givens then ordered three nickels, or five dollar bags of marijuana, and one twenty-five dollar bag of cocaine, and handed defendant forty dollars. Defendant went upstairs and returned sixty to ninety seconds later with the controlled substances, and handed Givens a plastic bag containing white powder and three manila envelopes.

When she returned to the Law Enforcement Center, Officer Givens packaged the items and submitted them for analysis. Forensic chemist Jennifer Mills testified at trial that the vegetable matter submitted by Givens in the manila envelope was marijuana, and the white powder was analyzed and determined to be cocaine.

On 19 November 1986, the jury returned verdicts of guilty as to all four charges. Defendant was sentenced to four years imprisonment on a judgment consolidating the two cocaine charges, and a five year suspended sentence was imposed on the consolidated marijuana charges, to run consecutively to the four year sentence on the cocaine charges. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Charles Waldrup, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Marc D. Towler, for defendant appellant.

JOHNSON, Judge.

Defendant's appeal presents one issue for this court's determination, to wit: whether the trial court properly allowed evidence that defendant had been observed upon the scene of an illegal drug transaction, other than the one for which she was charged, as an "identity" exception to the N.C.R. Evid. 404(b).

Defendant objects to the introduction of evidence at trial to the effect that on 24 April 1986 when officers went to the defendant's admitted residence, 613 Key Street Apartment 8, to purchase controlled substances from a black male known as "Slim,"

Officer Givens saw the defendant inside the apartment. Defendant contends that this evidence strongly implies that an illegal drug transaction took place in which defendant was involved, and was introduced contrary to the prohibition delineated in N.C.R. Evid. 404(b), against inadmissible character evidence.

N.C.R. Evid. 404(b) states:

> 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.

We note at the outset that we are not convinced that the challenged testimony has been properly categorized by the defendant as a "crime, wrong, or act" as contemplated by this evidentiary rule. Our review of the question presented on appeal reveals that defendant challenges the introduction of testimony by Officer Givens that while she was attempting to make an undercover purchase of controlled substances from another individual, she merely saw the defendant inside the apartment where the transaction was to occur. We also note that defendant concedes in her brief that the contested testimony "may have been relevant to support Givens' identification of defendant as the perpetrator of the offense committed." The crux of her argument is that the evidence admitted exceeded that which was necessary and "prejudiced defendant by raising an inference that she had committed a similar crime in the past." We do not agree.

Although the defendant does not so explicitly state, her argument is based primarily upon N.C.R. Evid. 403 rather than N.C.R. Evid. 404(b). N.C.R. Evid. 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, . . ." We hold that the trial court acted well within its discretion when it allowed the testimony. N.C.R. Evid. 403 is identical to its federal counterpart which has been interpreted to the extent that the decision to exclude evidence under this rule rests solely in the discretion of the trial court. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986), *citing United States v. MacDonald*, 688 F. 2d 224 (4th Cir. 1982).

In the case *sub judice*, we agree with the trial court's decision that the probative value of the contested testimony, which was necessary to establish defendant's positive identification, was not substantially outweighed by the danger of unfair prejudice, i.e. that the jury could possibly infer that defendant could have been involved in a similar crime. Any inferences which may have resulted therefrom were merely unfortunate.

In order to entertain defendant's appeal as presented, we must first embrace the notion that mere presence for which no charge was levied or accusation made must be construed as a "crime, wrong, or an act" as contemplated in N.C.R. Evid. 404(b). Since there was no allegation that a crime was committed, nor any allegation that an affirmative act was performed by the defendant, we must classify the defendant's presence at the scene of the proposed drug transaction on 24 April 1986 as a wrong, in order to properly consider defendant's appeal.

The State contends that evidence of this "wrong" was not introduced to show conformity, but was used to establish the defendant's positive identification as the person who sold controlled substances to Officer Givens on 7 May 1986. We find this contention tenable in light of the fact that the 7 May 1986 transaction was complete in a period of about five minutes during which time Officer Givens only had about three minutes to observe the defendant. It is therefore believable that further evidence could have been required to support a positive identification of defendant as the seller of the controlled substances.

Defendant relies upon both *State v. Thomas*, 310 N.C. 369, 312 S.E. 2d 458 (1984); and *State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542 (1983), in order to support her contention that "in order for evidence to be admissible under the identity exception the circumstances of the two crimes must be such as to tend to show that the crime charged and the other offense were committed by the same person." In fact, this contention lends greater credence to our view that the challenged testimony is not the sort contemplated in N.C.R. Evid. 404(b). Defendant is quite correct in stating that there exists no "logical connection of similarity between the two crimes necessary for use of the other crime to prove identity." Again, we emphasize that we do not have two crimes which may be compared as in *Thomas* and *Moore*. What

we have is one incident in which defendant was performing affirmative acts, and one opportunity for observing defendant's physical person. We are not faced with the task of considering the facts of the crime charged and another crime in order to glean enough similarities between the two to establish a common actor. We are merely faced with the crime charged and defendant's presence at the same location on another occasion when Officer Givens had an opportunity to observe defendant. Officer Givens merely had two opportunities to observe the defendant, and needed both to establish a positive identification.

We therefore find defendant's contention that her case was prejudiced by the introduction of the challenged testimony meritless, and affirm the decision rendered by the trial court.

No error.

Judges BECTON and PARKER concur.

RUTH S. SCHAEFER v. JOHN JOSEPH WICKSTEAD, III, AND AUTO WAREHOUSE, INC.

No. 8718SC584

(Filed 19 January 1988)

1. **Automobiles § 86— pedestrian struck by vehicle—last clear chance—insufficiency of evidence**

In an action to recover for personal injuries sustained by plaintiff pedestrian when she was struck by a vehicle operated by defendant, the trial court did not err in refusing to instruct on last clear chance where plaintiff produced no solid evidence that defendant was aware of or by the exercise of reasonable care should have been aware of plaintiff's presence in his lane of travel.

2. **Automobiles § 72— pedestrian struck by vehicle—instruction on sudden emergency proper**

In an action to recover for personal injuries sustained by plaintiff pedestrian when she was struck by defendant's vehicle as she attempted to cross his lane of travel, the trial court did not err in instructing the jury on the doctrine of sudden emergency.

APPEAL by plaintiff, Ruth S. Schaefer, from *Johnson (E. Lynn), Judge.* Judgment entered 13 February 1987 in Superior

Court, GUILFORD County. Heard in the Court of Appeals 3 December 1987.

On 15 October 1982, plaintiff and a friend were attempting to cross West Market Street where it is intersected by Chapman Street. Plaintiff and her companion had just attended a church bazaar and plaintiff was carrying a cake in her right hand and her purse on her left arm and an african violet in her left hand.

Defendant Wickstead was operating an automobile owned by Auto Warehouse, Inc. and was driving in the inside westbound traffic lane of West Market Street. At the intersection where the accident occurred, West Market Street has two lanes for traffic traveling in an easterly direction. Traveling in a westerly direction at the intersection there are two through lanes and a left turn lane. A median divides the east and west lanes of West Market Street. On the date of the accident, the intersection had electronic traffic control devices controlling vehicular traffic. The intersection also had pedestrian signals which were not activated by traffic but by "push buttons" located at the intersection. There were no streetlights at the intersection and the accident occurred at 7:45 p.m., approximately one hour after sunset.

Plaintiff testified that after hearing someone say "We have pushed the button," she waited until the pedestrian signal changed to "Walk" and crossed the two eastbound lanes of West Market Street and arrived at the median. When plaintiff walked out onto the westbound traffic lanes, she looked to her right and saw headlights. That was the last thing she remembered until she woke up and found herself lying in the road after the accident.

Defendant Wickstead was driving in the inside westbound traffic lane and was being followed in the same traffic lane by another employee of Auto Warehouse, Inc. There was also a vehicle in the outside westbound lane approximately one to two car lengths behind Wickstead's automobile. The speed limit was 35 miles per hour and defendant Wickstead was traveling at a speed somewhere between 25 to 30 miles per hour.

Defendant testified that as he approached the intersection he saw something white reflect in his headlights between seventy-five to one hundred feet away. He veered his car to the left because there was a car overtaking him in the outside lane and

there was no room to maneuver in that direction. The driver of the car directly behind Wickstead stated that he was not aware that there was a problem at the intersection until he saw Wickstead's brake lights come on and his car veer to the left. The driver of the car in the outside lane testified that when she first saw the two women, Wickstead immediately applied his brakes. A passenger in that same car stated that when he saw the women, the car in which he was traveling was between 60 and 100 feet away. According to Wickstead and the parties in the automobile in the outside traffic lane, the traffic lights were green in their favor.

Plaintiff instituted this civil action against defendants on 9 August 1985 alleging negligence and seeking to recover damages in the amount of $1,500,000. The case was tried in Guilford County Superior Court on 9 February 1987. The trial court refused to grant plaintiff's request to submit to the jury the issue of the last clear chance doctrine. Over plaintiff's objection, the trial court instructed the jury on the doctrine of sudden emergency. The jury returned a verdict stating that plaintiff was not injured by the negligence of defendant, John Joseph Wickstead, III. From the judgment of the trial court, plaintiff appeals.

George C. Collie, John F. Ray and Charles M. Welling for plaintiff appellant.

William L. Stocks and Douglas E. Wright for defendant appellees.

ARNOLD, Judge.

[1] Plaintiff contends that the trial court erred in "failing to submit an issue and charge the jury under the doctrine of last clear chance." We disagree.

In order to be entitled to an instruction on the doctrine of last clear chance, the plaintiff must prove four elements: that (1) the pedestrian, by his own negligence, placed himself in a position of helpless peril, (2) the defendant was aware of, or by the exercise of reasonable care should have discovered, plaintiff's perilous position and his incapacity to escape, (3) the defendant had the time and means to avoid injury to the plaintiff by the exercise of reasonable care after he discovered or should have discovered the

situation, and (4) the defendant negligently failed to use the time and means available to avoid injuring the pedestrian. *Watson v. White*, 309 N.C. 498, 308 S.E. 2d 268 (1983). In the case *sub judice*, however, plaintiff does not present evidence of all four elements.

The first requirement is satisfied by the evidence that plaintiff negligently placed herself in a position of peril by which she could not escape by the exercise of reasonable care. Plaintiff, however, presented no solid evidence that defendant Wickstead was aware of, or by the exercise of reasonable care should have been aware of, plaintiff's perilous condition at a time early enough to avoid the accident.

In regard to this issue, plaintiff argues that defendant failed to keep a proper lookout and should have seen plaintiff when he was at least 200 feet away from her. Plaintiff bases this conclusion on the following factors: (1) G.S. 20-131(a) requires that a motor vehicle operated in the night have high beams sufficient to discern a person 200 feet ahead, (2) the average walking rate of a pedestrian is four feet per second, (3) plaintiff had been in the westbound lanes of Market Street approximately 5.5 seconds, (4) a car traveling at a speed of 25 to 30 miles per hour travels 36.6 to 43.9 feet per second, and (5) defendant Wickstead had between 5.5 and 4.55 seconds in which to avoid hitting plaintiff.

Despite the fact that plaintiff claims the average walking rate of a hypothetical pedestrian to be 4 feet per second, she produced no evidence concerning the rate at which plaintiff was walking on this occasion. We note here that plaintiff was sixty-four years of age, and that she was carrying a cake on a paper plate in her right hand and an african violet and her purse in the other. Also, there was no evidence that plaintiff had been in the westbound lane for 5.5 seconds. Plaintiff's conclusion that defendant failed to keep a proper lookout is based to a great degree on mere speculation. The trial court did not err in refusing to submit to the jury the issue of the last clear chance doctrine.

[2] Plaintiff further argues that the trial court erred in instructing the jury on the doctrine of sudden emergency. We disagree.

The doctrine of sudden emergency applies when one is confronted with an emergency situation which compels him to act instantly to avoid a collision or injury, and he will not be held liable

if he acts as a reasonable man might have done, even though his action may later prove not to have been the wisest choice. *Gupton v. McCombs*, 74 N.C. App. 547, 328 S.E. 2d 886 (1985); *Foy v. Bremson*, 286 N.C. 108, 209 S.E. 2d 439 (1974). The present case clearly warranted such an instruction to the jury. Plaintiff's contention is without merit.

Defendants cross-assign as error the fact that the trial court denied defendants' motion to dismiss this action at the end of the evidence. Having resolved the preceding contentions in defendants' favor, we need not address this issue.

No error.

Judges JOHNSON and ORR concur.

BERNICE F. GARNER (OETTENGER) v. DIXON B. GARNER

No. 874DC81

(Filed 19 January 1988)

Husband and Wife § 11.2; Divorce and Alimony § 20.2— separation agreement incorporated in consent judgment—payments denominated "alimony"—payment not required after remarriage

A monthly $400 payment from defendant to plaintiff provided for in the parties' separation agreement which was incorporated in a consent judgment was twice denominated "alimony," and the trial court erred in finding the payments to be part of the property settlement and in ordering defendant to make payments subsequent to plaintiff's remarriage.

APPEAL by defendant from *Martin (James N.), Judge.* Order entered 25 September 1986 in District Court, ONSLOW County. Heard in the Court of Appeals on 9 June 1987.

Gaylor, Edwards & Vatcher by Walter W. Vatcher for plaintiff appellee.

Collins and Howard by Jill R. Howard for defendant appellant.

COZORT, Judge.

Plaintiff initiated this action upon defendant's failure to pay her $400 per month pursuant to a consent judgment. From the trial court's order requiring him to continue the monthly payments, defendant appeals. We vacate.

Plaintiff and defendant were married on 22 December 1977. They separated on 26 March 1983, and on 2 June 1983 plaintiff filed a complaint for divorce from bed and board. The parties' attorneys began extensive settlement negotiations. The parties agreed on a "Deed of Separation and Property Settlement" which included the following paragraph:

> 18. Party of the first part [defendant] hereby agrees to pay to the party of the second part [plaintiff] for her sole use and benefit the sum of Four Hundred ($400.00) Dollars per month, beginning August 1, 1983, and continuing thereafter in a like amount each month for a period of ninety-six (96) months.

On 26 August 1983, the parties signed and filed a consent judgment based upon and attached to the Separation Agreement. In the judgment's conclusions of law the trial court stated:

> 4. That the plaintiff is a dependent spouse and the defendant is a supporting spouse and that the plaintiff is entitled to *alimony* from the defendant pursuant to the provisions of their Separation Agreement as hereto attached in the sum of $400.00 per month for 96 months. (Emphasis added.)

The trial court then ordered that the defendant "pay to the plaintiff *as alimony* the sum of $400.00 per month, . . . for a period of 96 months." (Emphasis added.)

On 1 August 1985, defendant stopped making his $400 monthly payment because plaintiff had remarried on 6 July 1985. He argued that the payments were alimony and that his obligation to pay ceased upon plaintiff's remarriage.

On 3 February 1986, plaintiff filed a motion for defendant to show cause why he should not be held in contempt for failure to pay the $400 monthly payment from August 1985. At the show cause hearing, the trial court allowed plaintiff to offer parol evidence of the parties' prior negotiations to show that the use of

the word "alimony" in the consent judgment was a mistake. The trial court also allowed plaintiff's former attorney to testify as to discussions she had with defendant's former attorney, since deceased, to substantiate plaintiff's claim that the payments were mistakenly referred to as alimony in the court's judgment. Based upon this evidence, the trial court found and concluded that the $400 monthly payments were part of the parties' property settlement and not alimony, so that defendant's obligation to pay did not terminate upon plaintiff's remarriage. The trial court then ordered that defendant pay $4,000 in arrearages and make future monthly payments in accordance with the consent judgment. From this order, defendant appeals.

Defendant argues that the consent judgment constituted the complete agreement of the parties, that the trial court erred in considering parol evidence to interpret its meaning and that the $400 monthly payment constituted alimony. We agree.

> [A] consent judgment is a contract between parties entered upon the record with the approval and sanction of the court. [Citation omitted.] A consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties; it must be interpreted in light of the controversy and the purposes intended to be accomplished by it. . . . Where the language of the contract is plain and unambiguous, the construction of the agreement is a matter of law; the court may not ignore or delete any of its provisions, *nor insert words into it*, but must construe the contract as written, in light of undisputed evidence as to custom, usage and meaning of its terms.

Minor v. Minor, 70 N.C. App. 76, 79, 318 S.E. 2d 865, 867, *disc. rev. denied*, 312 N.C. 495, 322 S.E. 2d 558 (1984) (citations omitted) (emphasis supplied).

In the case *sub judice*, the trial court made numerous findings of fact concerning whether the parties considered the $400 monthly payments as alimony or as part of their property settlement. However, the trial court never made a finding that the consent judgment itself was ambiguous. If the judgment is not ambiguous, then the trial court erred in making findings as to what the parties intended in the signed judgment. Instead, the in-

tent of the parties should have been drawn from the document alone.

After a careful examination of the consent judgment incorporating the Deed of Separation and Property Settlement, we find that its terms are plain and unambiguous. The trial court erred in admitting and relying on parol evidence to construe the terms of the judgment. The judgment resolved all of the issues associated with the dissolution of the marriage. The Deed of Separation and Property Settlement provided for custody, child support, education of the children, and division of the property. In the paragraphs dividing the property, the household furnishings, motor vehicles, and stock were divided between the parties. The document provided for occupancy of the marital home and for its eventual sale with the proceeds divided equally between the parties. At the end of the paragraphs dividing the property, a separate paragraph provided for the $400 per month payments at issue herein, without specifying whether it was intended as alimony or part of the property settlement. In the consent judgment incorporating the Deed of Separation and Property Settlement, the $400 per month payment was twice denominated "alimony." There was no reference whatsoever to the distribution of the stock, vehicles, etc. We find this language clear and unambiguous; the $400 payment is alimony. The defendant's obligation to make the payments terminated upon plaintiff's remarriage in accordance with the mandate of N.C. Gen. Stat. § 50-16.9(b), which provides:

> If a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate.

The trial court erred in finding the payments to be part of the property settlement, in ordering defendant to pay arrearages, and in ordering defendant to make payments in the future. The order is vacated and the cause is remanded for entry of an order denying plaintiff's motion of 3 February 1986.

Vacated and remanded.

Judges BECTON and MARTIN concur.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

TROY W. HORNE, D/B/A TROY'S MOBILE HOMES v. NOBILITY HOMES, INCORPORATED AND BELLEFONTE UNDERWRITERS INSURANCE COMPANY

No. 8725SC648

(Filed 19 January 1988)

Appeal and Error § 6.2— order setting aside default—appeal premature

There was no merit to plaintiff's contention that dismissal of his appeal from an order setting aside a default judgment would result in irreparable harm because defendant's remaining assets would be beyond the jurisdiction of North Carolina courts, thus hindering recovery on a final judgment, since plaintiff failed to show that the attachment provisions of N.C.G.S. § 1-440.1 *et seq.* afforded him no relief as to defendant's assets; therefore, plaintiff's appeal was premature and must be dismissed.

APPEAL by plaintiff from *Sherrill, Judge.* Order entered 18 March 1987 in Superior Court, BURKE County. Heard in the Court of Appeals 4 January 1988.

Plaintiff mobile home dealer brought this action to recover damages resulting from the alleged faulty construction of a mobile home manufactured by defendant Nobility Homes, Incorporated (Nobility), a Florida corporation. Plaintiff's complaint alleged that defendant Bellefonte Underwriters Insurance Company (Bellefonte) was Nobility's surety in accordance with G.S. 143-143.12.

Bellefonte was served with process on 23 June 1986 through its registered agent and on 19 June 1986 through the North Carolina Department of Insurance. Plaintiff's attempted service of process on Nobility through a Florida attorney, Irvin Weiner, was refused. Nobility was served on 10 July 1986 through the general manager of its Reidsville, North Carolina manufacturing plant.

Neither defendant answered and the clerk of Superior Court of Burke County entered default on 22 August 1986. Default judgment was entered against both defendants by Judge Marlene Hyatt on 15 September 1986. On 15 January 1987, defendants moved for relief from the judgment. On 18 March 1987, Judge Sherrill entered an order setting aside the default judgment. Plaintiff appeals.

Stephen T. Daniel & Associates, P.A., by Stephen T. Daniel, for plaintiff-appellant.

Patton, Starnes, Thompson, Aycock & Teele, P.A., by Robert L. Thompson, for defendants-appellees.

SMITH, Judge.

The order from which plaintiff appeals is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E. 2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E. 2d 429 (1950). *Accord McKinney v. Royal Globe Insur. Co.*, 64 N.C. App. 370, 307 S.E. 2d 390 (1983). An order setting aside a default judgment is interlocutory as "it does not finally dispose of the case and requires further action by the trial court." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E. 2d 431, 434 (1980).

No appeal lies from an interlocutory order unless it affects a substantial right and will result in injury if not reviewed before final judgment. G.S. 1-277(a); G.S. 7A-27(d); *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). *Accord Fraser v. Di Santi*, 75 N.C. App. 654, 331 S.E. 2d 217, *disc. rev. denied*, 315 N.C. 183, 337 S.E. 2d 856 (1985). If the appellant's rights "would be fully and adequately protected by an exception to the order that could then be assigned as error on appeal after final judgment," there is no right to an immediate appeal. *Bailey v. Gooding, supra*, at 210, 270 S.E. 2d at 434.

Plaintiff contends our refusal to hear this appeal will deny a substantial right. By affidavit, plaintiff's counsel submits that Nobility's Reidsville plant has been closed and is now for sale. Plaintiff argues that a dismissal of this appeal will result in irreparable harm to plaintiff in that Nobility's remaining assets will be beyond the jurisdiction of North Carolina courts thus hindering recovery on a final judgment. We disagree. Plaintiff has not shown that the attachment provisions of G.S. 1-440.1 *et seq.* afford no relief as to Nobility's assets. Accordingly, plaintiff has not shown that it will be deprived of a substantial right.

In this case, plaintiff's objection to the order setting aside the default judgment is protected by its exception to the order. Avoidance of a trial is not a substantial right entitling plaintiff to an immediate appeal. *Waters v. Personnel, Inc., supra; Bailey v. Gooding, supra.* No right will be lost by delaying the appeal until after a final judgment is entered. As the appeal is premature, it must be dismissed. *Bailey v. Gooding, supra.*

Appeal dismissed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. CHARLIE LEE

No. 876SC432

(Filed 19 January 1988)

Larceny § 7.5— larceny from the person charged—taking from unattended grocery cart—conviction improper

Defendant's conviction of larceny from the person pursuant to N.C.G.S. § 14-72(b)(1) cannot stand because the record shows that the larceny involved was not from the person of the complainant, as charged in the bill of indictment, but was from an unattended grocery cart; however, the evidence and the verdict will support a conviction of the lesser included offense of misdemeanor larceny.

ON *writ of certiorari* to review judgment entered by *Stevens, Judge.* Judgment entered 10 July 1986 in Superior Court, HALIFAX County. Heard in the Court of Appeals 17 November 1987.

Attorney General Thornburg, by Assistant Attorney General Doris J. Holton, for the State.

Thomas I. Benton for defendant appellant.

PHILLIPS, Judge.

Defendant's conviction of larceny from the person, G.S. 14-72 (b)(1), cannot stand because the record shows that the larceny involved was not from the person of the complainant as charged in the bill of indictment, but was from an unattended grocery cart. In pertinent part the evidence presented, all by the State, shows

only that: Lois Strickland, while shopping at the Farm Fresh Store in Roanoke Rapids, had her shoulder handbag in the grocery cart she was pushing along when Anthony Taylor, defendant's accomplice in the thievery, asked her to help him find some unsalted sweet peas; pursuant to the request Ms. Strickland took "four or five" steps away from the cart and looked up and down the shelves and talked with Taylor for "a couple of minutes probably," and during that time defendant got the shoulder bag, which along with its contents had a value of $276 according to the indictment, and left the store with it. Upon returning to the cart and noticing that the bag was missing, Ms. Strickland reported the theft to store personnel and defendant was identified and apprehended a few minutes later.

In arguing that the evidence shows a larceny from the person the State relies upon three decisions in which similar convictions were upheld: *State v. Massey*, 273 N.C. 721, 161 S.E. 2d 103 (1968), where the wallet was not on the person of the victim when it was stolen but was on the ground, knocked there as a consequence of defendant's battery that immediately preceded the larceny; *Banks v. State*, 74 Ga. App. 449, 40 S.E. 2d 103 (1946), where money was stolen from under the pillow upon which the head of the sleeping victim rested; and *State v. Tramble*, 144 Ariz. 48, 695 P. 2d 737 (1985), where defendant reached through the window of a car and snatched a purse lying on the seat next to the victim. For reasons that appear to be self-evident to us, none of these cases is analogous to this case and none is authority for upholding defendant's conviction of larceny from the person.

The deficiency in the State's evidence was not raised directly by a motion for a directed verdict, as it should have been, and is only before us because defendant objected to and assigned as error the trial judge's charge to the jury as to the meaning of the term "from the person" and argued that he was entitled to a new trial. But since the deficiency in the State's evidence is so clear and cannot be remedied in a second trial, fundamental fairness and the orderly administration of justice require that we treat defendant's objection to the instruction as a motion for a directed verdict on the charge stated. In vacating the larceny from the person conviction, however, we note that the evidence and verdict support a conviction of the lesser included offense of misdemeanor larceny, *State v. Cornell*, 51 N.C. App. 108, 275 S.E. 2d

857 (1981), and remand the matter to the trial court so defendant can be sentenced for that offense in compliance with G.S. 14-3(a). Under the circumstances, defendant's other argument for a new trial need not be ruled upon.

Vacated and remanded.

Judges BECTON and GREENE concur.

STEVE WEBB, T/A SNOOPY'S v. THE CITY OF RALEIGH

No. 8710SC635

(Filed 19 January 1988)

Municipal Corporations § 30.13— outdoor banner containing political message—no regulation by city sign ordinance

Plaintiff's banner which he displayed on the exterior wall of his place of business without first obtaining a permit was neither regulated nor prohibited by the Raleigh Sign Control Ordinance, since the banner contained a political message rather than commercial advertising.

APPEAL by plaintiff from *Henry W. Hight, Judge.* Judgment entered 28 April 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 4 December 1987.

DeBank, McDaniel, Heidgerd, Holbrook & Anderson, by L. Bruce McDaniel for plaintiff-appellant.

Associate City Attorney Elizabeth C. Murphy for defendant-appellee.

BECTON, Judge.

Plaintiff Steve Webb t/a Snoopy's, Solomon Brown t/a Brown Alignment Service, and Byrd's Mobile Unit, Inc. t/a the Dairy Freeze brought an action against the City of Raleigh on 13 July 1979 challenging the constitutionality of the Raleigh Sign Control Ordinance. Plaintiffs' action was consolidated with a similar, earlier, action by Goodman Toyota, Inc. After a trial, judgment was entered in Wake County Superior Court on 20 November 1981 upholding the Raleigh Sign Control Ordinance. The trial

judge also ordered plaintiffs to "cease and abate from continued or further violation of [the] ordinance."

In April 1987, Steve Webb was ordered to show cause why he should not be held in contempt for violating the 20 November 1981 judgment because he displayed a banner on the exterior wall of "Snoopy's" (his place of business) without first obtaining a permit. The banner contained a political message. The trial judge entered an order holding Webb in contempt of court. Webb appeals. We vacate the contempt order.

Steve Webb makes three arguments on appeal; however, both Webb and the City of Raleigh agreed in oral argument that the propriety of the contempt order is contingent on the meaning of finding of fact number 14 of the 20 November 1981 judgment which provides:

> 14. That the Raleigh Sign Control Ordinance does not regulate the color, exterior architectural feature, or style of signs, *nor does it prohibit signs carrying noncommercial* advertising and messages. (emphasis added)

Steve Webb's banner contained a political, and thus, "noncommercial," message. He therefore contends that the Raleigh Sign Control Ordinance, at least insofar as it was interpreted in the 20 November 1981 judgment, did not apply to his banner. We agree.

Finding of fact number 14, standing alone, suggests that Webb's banner, containing a political message, is neither regulated nor prohibited by the Raleigh Sign Control Ordinance. One cannot be held in contempt of a court order unless his act violates the order. *See Rose's Stores, Inc. v. Tarrytown Center, Inc.*, 270 N.C. 206, 212, 154 S.E. 2d 313, 317 (1967). Webb did not violate the 20 November 1981 order.

Judgment is vacated.

Judges EAGLES and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 JANUARY 1988

BUCKNER v. GREENE No. 8725SC786	Caldwell (86CVS304)	Dismissed
DOWLING v. BATTAGLIA No. 8730SC462	Jackson (84CVS67)	No Error
FERRELL v. FERRELL No. 8714DC435	Durham (82CVD2150)	Affirmed in part; reversed & remanded in part
HOLDER v. HOLDER No. 877DC728	Edgecombe (83CVD10) (84CVD720)	Vacated and Remanded
HOLMES v. WILLIAMS No. 8716SC396	Robeson (85CVS693)	Affirmed
IN RE JOYCE No. 8717SC650	Rockingham (86CVS1159)	Affirmed
McCOY v. PURSER No. 8720DC521	Union (86CVD534)	Affirmed
SPRUILL v. SPRUILL No. 871DC693	Pasquotank (85CVD12)	Appeal Dismissed
STATE v. ANTHONY No. 8725SC742	Catawba (86CRS16899)	No Error
STATE v. COX No. 878SC741	Wayne (81CRS8925) (81CRS8926)	No Error
STATE v. NORCUTT No. 8717SC483	Stokes (86CRS1928) (86CRS1929) (86CRS1930) (86CRS1931)	No Error
STATE v. PAIGE No. 8728SC740	Buncombe (86CR27116)	No Error
STATE v. RICE No. 8726SC761	Mecklenburg (83CRS50328)	Affirmed
STATE EX REL. LONG v. BEACON INS. CO. No. 8710SC491	Wake (85CVS444)	Affirmed

WEST v. GAITHINGS No. 8727SC561	Gaston (85CVS1244)	Affirmed
WILLIAMS v. MOORE No. 874SC392	Duplin (85CVS131)	Affirmed in part, vacated in part
WILSON v. WILSON No. 8718DC706	Guilford (85CVD1199) (86CVD6462)	Dismissed
WOOD v. WOOD No. 8726DC519	Mecklenburg (80CVD6596)	Remanded

FILED 19 JANUARY 1988

CHAMBERS v. CHAMBERS No. 8713DC569	Columbus (86CVD1129)	Affirmed
MILES v. MILES No. 8610DC1334	Wake (86CVD225)	Affirmed
STATE v. LIVINGSTON No. 8726SC656	Mecklenburg (86CRS83762)	No Error
STATE v. TART No. 8712SC664	Cumberland (86CRS6671) (86CRS7011)	No Error

ELIZABETH BLOW; PETER G. BOUGADES; MOLLIE L. BROWN; STEPHEN J. CHENEY; MARGARET CHENEY; THELMA A. CHURCHILL; HERMAN O. CLARK; PAUL COWGILL; ROBERT A. COX; JESSE B. DAVIS; R. EARL DAVIS, CUSTODIAN FOR CHRISTY M. DAVIS AND MARK DAVIS, MINORS; GEORGE W. DUFFIELD; CAROLYN DUFFIELD; PAUL FAIRBETTER; ALMA FARAH; ALBERT FARAH; ALINE W. FLEMING; MOLLY GLANDER; KENNETH GLANDER; ROBERT HASSELL; MARK L. HITCHCOCK; DIANE HORNE; E. LEE HORNE, JR.; GAYLE B. HORTON; WILLIAM JACKSON, CUSTODIAN FOR DANIEL E. JACKSON AND SCOTT JACKSON, MINORS; GLEN V. JOHNSON; JERRY J. JOHNSON; BARNEY JOYNER; PHYLLIS JOYNER; W. M. KIRVEN; JAMES W. KNIGHT; TERRY R. KNIGHT; JAMES W. KNIGHT, CUSTODIAN FOR MARIE LYNN KNIGHT AND KELLY RENEE KNIGHT, MINORS; RUSSELL LAVIOLETTE; DANIEL C. MARKS; HANS G. MICHEL; NELL J. MINSHEW, CUSTODIAN FOR MARY ELIZABETH MINSHEW AND TERESA LEMAN MINSHEW, MINORS; JOHN H. MITCHELL; MARJORIE MOORE; CARLOS W. MURRAY, JR.; ELLIS NASSIF; ELIZABETH NASSIF; WILLIAM J. O'DONNELL; THOMPSON G. PACE, III; JANE F. RABIL; LEROY REGISTER; ELIZABETH P. TAYLOR; JOHN O. TOBLER; CHERYL UPHAM; MARJORY K. UPHAM; AND JAMES B. UPHAM v. JEFFREY JOHN SHAUGHNESSY; WHEAT, FIRST SECURITIES, INC.; W. LARRY OWNLEY; LEE FOLGER, III; MERRILL, LYNCH, PIERCE, FENNER & SMITH INCORPORATED; RONALD GROVE; BACHE HALSEY STUART SHIELDS INCORPORATED; ROBERT WALTERMAN; AND MAUREEN BERRY

No. 8710SC153

(Filed 2 February 1988)

1. **Appeal and Error § 50; Torts § 4— aiding and abetting breach of fiduciary obligations—definition of substantial assistance—no error**

In a civil action for aiding and abetting breach of fiduciary obligations arising from securities fraud, the trial court's supplemental instruction on the definition of substantial assistance embodied all the principles necessary to convey an appropriate definition of substantial assistance and therefore the supplemental instruction, taken as a whole, did not mislead or misinform the jury; moreover, plaintiffs' request for special jury instruction gave practically the same legal definition of the issues in the case and any misconception of the issue by the jury was conceivably cured by an exchange between the foreman and the judge.

2. **Rules of Civil Procedure § 59— breach of fiduciary obligation—motion for new trial on issue of damages—denied**

The trial court did not abuse its discretion in an action for breach of fiduciary obligation arising from securities fraud by denying plaintiffs' motion for a new trial on the issue of damages where there was no stipulation of damages and the jury weighed the evidence before it and arrived at a figure. N.C.G.S. § 1A-1, Rule 59.

Blow v. Shaughnessy

APPEAL by plaintiffs from *Hobgood, Hamilton H., Judge.* Judgment entered 27 November 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 22 September 1987.

This is the second appeal of this case to this Court. In the first appeal, this Court held that the trial court did not err in denying defendants' motion to stay proceedings in trial court pending arbitration of the matters raised in plaintiffs' complaint. *See, Blow, et al. v. Shaughnessy, et al.*, 68 N.C. App. 1, 313 S.E. 2d 868, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 127 (1984).

This appeal is by plaintiff appellants from a jury verdict in favor of Wheat, First Securities, Inc., Larry Ownley and Lee Folger (the Wheat defendant appellees) and against defendant Jeffrey John Shaughnessy.[1] The essential facts of this case are as follows: Beginning in 1979, plaintiffs purchased a number of "units" in Capital City Investments (hereinafter CCI). CCI was organized in 1979 by defendant Shaughnessy who sold the "units" to plaintiffs. He was a registered investment advisor and had extensive experience as a stock broker before starting CCI. All of the plaintiffs signed a limited partnership agreement in which plaintiffs were all limited partners in CCI and Shaughnessy was to be the sole general partner. Pursuant to the limited partnership agreement, Shaughnessy had exclusive responsibility and authority to invest fund assets. Units were sold initially for $100 each and thereafter the purchase price of each unit was to be determined by dividing market value of CCI holdings by the number of units then outstanding. Shaughnessy's duty was to invest the assets of CCI in the stock market. Initially, Shaughnessy opened brokerage accounts for CCI at Merrill Lynch and at Bache in August 1979. In November of 1979, defendant Shaughnessy lost 80% of the funds' equity in highly speculative commodity trading that was contrary to the trading strategy represented by defendant Shaughnessy to the CCI investors. Shaughnessy personally informed the investors of the losses and assured them that he would not resort to high risk trading strategies in the future.

1. Bache Halsey Stuart Shields, Inc., Robert Walterman and Maureen Berry (the Bache defendants), and Merrill, Lynch, Pierce, Fenner & Smith, Inc. and Ronald Grove (the Merrill Lynch defendants) were also named as defendants when the case was filed. Plaintiffs settled their claims against the Bache and Merrill Lynch defendants prior to trial.

Defendant Shaughnessy then initiated a telephone recording service and issued quarterly reports to allow the investors to keep up with their investments.

Beginning in December and continuing until March 1982, new investors bought units in CCI. Shaughnessy did not inform the new investors of the losses that CCI had suffered in the fall of 1979, and also did not tell them that the original unit value in CCI had been $100 per unit. Shaughnessy led investors to believe that the original unit value had been $25 per unit.

The weekly telephone reports of unit value and the quarterly reports by Shaughnessy indicated to investors that there was a rise in the unit value from January 1980 through September 1981. However, the actual value of the units was fluctuating and Shaughnessy began to falsify the reports of the unit value sometime in 1980. For example, on 23 May 1980, Shaughnessy reported a unit value of $44.22, when the actual unit value was $29.75. On 8 August 1980, Shaughnessy reported a unit value of $50.24 when the actual unit value was $33.22. On 14 November 1980, Shaughnessy reported a unit value of $53.74, when the actual unit value was $33.98.

In March 1981, defendant Shaughnessy opened an account for CCI at Wheat First Securities Incorporated (hereinafter Wheat). Defendants Ownley and Folger along with Tom Dorsey had met earlier with defendant Shaughnessy to discuss opening an account at Wheat. Shaughnessy opened the account at Wheat primarily to have access to technical information about options trading that was not available from Bache or Merrill Lynch. Shaughnessy hoped that this additional technical data might allow him to recover some of the substantial losses he had sustained in his CCI account at Bache and Merrill Lynch in the first quarter of 1981.

During the late summer of 1981, Shaughnessy invested in Boeing Corporation in options at all three brokerage firms. The Boeing investment was a highly speculative investment attempt "to hit a home run" to recoup some of the CCI losses. This investment resulted in a "home run" in which Shaughnessy made approximately $300,000 for CCI on that one stock. Defendant Shaughnessy testified that at this point he had not informed any of his CCI brokers of his false reporting of unit values.

In early October 1981, defendant Ownley contacted defendant Shaughnessy by telephone regarding Bridge Data activity in the stock of Dean Witter. Defendant Shaughnessy declined to make a Dean Witter trade based upon Bridge Data recommendations by defendant Ownley. Several days later the Dean Witter stock was bought out by Sears with the price of the stock rising approximately 100% in less than a week.

On 13 October 1981, defendant Ownley then contacted defendant Shaughnessy with information and recommendations based upon Bridge Data to buy Pennzoil. Shaughnessy eventually invested in Pennzoil under the belief that Pennzoil might be a take-over candidate. He hoped to make substantial profits in a very short time as he did in the Boeing scenario several months before. However, Pennzoil was not the subject of a buyout as hoped for by Shaughnessy, and Shaughnessy sold the Pennzoil holdings at Wheat the next day for a total loss of $18,142.86.

On 16 October 1981, defendant closed out his Pennzoil position at Merrill Lynch and Bache for a total combined loss to the CCI account on all Pennzoil trades of $101,378.06.

Shaughnessy decided not to report the Pennzoil losses to his CCI investors. He reported a unit value for the week ending 16 October 1981 as $73.46 when the actual unit value was $26.64.

Shaughnessy testified that he told Larry Ownley on 16 October 1981, that he (Shaughnessy) did not intend to report the losses to investors and that he intended to report a false unit value. Defendant Ownley testified that defendant Shaughnessy did not inform him of his decision to conceal the Pennzoil losses from CCI investors, that Shaughnessy did not inform him of the total loss of over $100,000 on the Pennzoil trade and further that he had no knowledge of any wrongdoing related to the CCI fund until 8 April 1982. Subsequent to the Pennzoil losses, defendant Shaughnessy engaged in a series of trades resulting in a loss of over $440,000 by CCI funds, such losses occurring in a six month period between 16 October 1981 and 8 April 1982. Of this amount, $166,590.22 was lost on the CCI account at Wheat. As of 9 April 1982, the actual value of the CCI account was $28,595.01.

Shaughnessy also testified that he first informed defendant Folger of his falsification of unit values in February 1982.

Shaughnessy testified that he told Folger at a dinner meeting in mid-February that he (Shaughnessy) was in trouble with certain investments and that he had been falsifying reports of unit value in CCI.

Defendant Folger testified that defendant Shaughnessy never told him anything to indicate Shaughnessy was giving false information to investors. He denied knowing about the falsifications of value any time prior to 9 April 1982.

On 8 April 1982, Shaughnessy received a telephone call from the Securities Exchange Commission (hereinafter SEC) regarding a routine audit. Defendant Ownley visited Shaughnessy's home and learned for the first time the CCI funds money was lost and that defendant Shaughnessy had been falsifying reports of unit values to investors. Defendant Shaughnessy also called defendant Folger and met with defendant Folger the next morning concerning the activities of Shaughnessy. Shaughnessy consulted an attorney and began calling investors to inform them that the funds of CCI had been lost. Shaughnessy was deposed by the SEC on 19 April 1982.

In his testimony before the SEC, Shaughnessy intentionally focused attention on the Pennzoil losses and trading activity. Subsequent thereto, he told the SEC that all his reports to investors had been accurate prior to 19 October 1981. The SEC obtained a permanent injunction on 29 April 1982. The remaining funds of CCI were placed with a conservator.

On 25 November 1985, the case was submitted to the jury on the issues of fraud (Shaughnessy and Wheat defendants); conspiracy to defraud (Shaughnessy and Wheat defendants); breach of fiduciary duties (Shaughnessy) and aiding and abetting breach of fiduciary duties (Wheat defendants).

On 27 November 1985, the jury returned a verdict, finding that Shaughnessy had defrauded and breached his fiduciary duty to plaintiffs and awarded plaintiffs $124,942 in damages against Shaughnessy and finding no liability as to any Wheat defendants.

Plaintiffs moved for a new trial against defendant Shaughnessy on the issue of damages and a new trial against the Wheat defendants on the issue of aiding and abetting breach of fiduciary

duty. Plaintiffs' motions were denied and judgment was entered on 27 November 1985. Plaintiffs appeal.

Harrell & Wright, by Bernard A. Harrell and I. Clark Wright, Jr., for plaintiff appellants.

Hunton & Williams, by David Dreifus and James E. Farnham, for defendant appellees Wheat First Securities, Inc., W. Larry Ownley and Lee Folger, III.

No brief filed by defendant Jeffrey John Shaughnessy.

JOHNSON, Judge.

[1] Plaintiffs contend that the trial court erred in giving a supplemental jury instruction on the definition of "substantial assistance." We find plaintiffs' contention is without merit.

Plaintiffs object to the following language given by the Court:

> Substantial assistance is defined as a large amount or quantity of assistance as distinguished from nominal or routine assistance. Assistance may be said to be substantial when it was a significant factor *in bringing about* the violation complained of, that is, the false reporting of unit values. In the present case, in order for you to find that Ownley or Folger knowingly rendered substantial assistance to Shaughnessy in his reporting of false unit values to investors, you *must* find that plaintiffs have proven by the greater weight of the evidence that Ownley *and* Folger's conduct was a significant factor *in causing* Shaughnessy *to report false unit values* to investors. (Emphasis added based on plaintiffs' brief.)

First, we recognize that a cause of action for aiding and abetting in breach of fiduciary obligations has heretofore never been addressed by this Court. However, a cause of action on this theory has been recognized by federal courts in securities fraud cases based on violations of section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. sec. 78) and Rule 10b-5 (17 C.F.R. sec. 240 -10b-5). *See, Metge v. Baehler,* 762 F.2d 621 (8th Cir. 1985); *Gilbert v. Bagley,* 492 F. Supp. 714 (M.D.N.C. 1980); *Mendelsohn v. Capital Underwriters, Inc.,* 490 F. Supp. 1069 (N.D. Cal. 1979); *Landy v. Federal Deposit Insurance Corporation,* 486

F. 2d 139 (3d Cir. 1973), *cert. denied*, 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed. 2d 312 (1974); *See also*, Comment, The Recognition of Aiding and Abetting in the Federal Securities Laws, 23 Hous. L. Rev. 821 (1986).

Although there have been interpretive variations from circuit to circuit, federal courts have recognized three prerequisites necessary to establish aiding and abetting liability. These requirements include:

(1) the existence of a securities law violation by the primary party;

(2) knowledge of the violation on the part of the aider and abettor; and

(3) substantial assistance by the aider and abettor in the achievement of the primary violation. *See, Metge, supra; Gilbert, supra.* The first two elements of the test are not in dispute. It is the court's supplemental instruction in regard to the third element of this theory that plaintiffs contend is erroneous.

In analyzing this question, it is helpful to examine common law concepts of civil liability for aiding and abetting and the guidance of federal court decisions in reference to an appropriate definition of the term "substantial assistance."

Under subsection (b), section 876, Restatement of Torts 2d, a person is liable for harm resulting to a third person if he:

> knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, . . .

The official comment to clause (b) defines "substantial assistance" as follows:

> If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.

A number of federal courts have adopted this Restatement position for guidance of principles of a cause of action under the theory of aiding and abetting breach of fiduciary duty. Further-

more, our Supreme Court, in *Boykins v. Bennett*, 253 N.C. 725, 118 S.E. 2d 12 (1961), approved the Restatement of Torts 2d sec. 876 position involving the negligence of joint tortfeasors.

Federal courts have construed the "substantial assistance" requirement of aiding and abetting as a causation requirement. They have recognized that the standard of substantial assistance requires a showing of "substantial causal connection between the culpable conduct of the alleged aider and abettor and the harm to the plaintiff, [citation omitted] or a showing that the encouragement or assistance is a substantial factor in causing the resulting tort." (Citation omitted.) *Metge*, 762 F.2d at 624. A body of case law has even developed holding that a party may be liable as an aider and abettor for silence and inaction. *See, Woodward v. Metro Bank of Dallas*, 522 F.2d 84 (5th Cir. 1975).

> "[M]ost [courts] seem to agree that, if the aider and abettor owes the plaintiff an independent duty to act or to disclose, inaction can be a proper basis for liability under the substantial assistance test. . . . [However], in *Monsen v. Consolidated Dressed Beef Co., Inc.*, 579 F.2d 793 (3d Cir. 1978), *cert. denied*, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed. 2d 323 (1979), the Third Circuit evaluated the substantial assistance requirement in a case of inaction and concluded that inaction 'may provide a predicate for liability where the plaintiff demonstrates that the aider-abettor *consciously* intended to assist in the perpetration of the wrongful act.'" *Metge*, 762 F.2d at 625.

Bearing these principles in mind, to determine whether the supplemental instruction on substantial assistance was erroneous, the standard of review requires that:

> The charge of the trial court will be read contextually, and an excerpt from the charge will not be held prejudicial even though it is erroneous when considered out of context, if the charge when considered as a whole presents the law of the case to the jury in such manner as to leave no reasonable cause to believe that the jury was misled or misinformed.

Strong's N.C. Index 3d, Appeal and Error, sec. 50, *citing Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967); *In re Will of Jones*,

267 N.C. 48, 147 S.E. 2d 607 (1966); *Steward v. Gallimore*, 265 N.C. 696, 144 S.E. 2d 862 (1965).

Plaintiffs object to an excerpt of the supplemental instruction, which taken as a whole covers five transcript pages. The remaining portions of the supplemental charge on substantial assistance quotes almost verbatim the Restatement of Torts 2d section on the definition of substantial assistance and quotes the theory on silence and inaction recognized in securities fraud cases involving substantial assistance. Plaintiffs argue that if the jury determined that defendants Ownley and Folger acquired actual knowledge that defendant Shaughnessy was defrauding plaintiffs, then the continued execution of trades and market information to defendant Shaughnessy by the Wheat defendants would constitute actions rising to the level of substantial assistance necessary to find liability on the Wheat defendants. Plaintiffs contend that the supplemental instruction prevented the jury from considering this theory. We perceive no error in that portion of the charge quoted to which plaintiffs excepted when considered as a whole.

Plaintiffs' tenth request for special jury instructions which the trial court read as part of the supplemental instruction on substantial assistance gives practically the same legal definition of the issues in the case. A party may not complain of an asserted error in the charge when the [alleged] erroneous instruction is embodied in his own prayer for instructions. *King v. Higgins*, 272 N.C. 267, 158 S.E. 2d 67 (1967). The definition given by the trial court was in accord with the definition of substantial assistance approved in securities fraud cases in federal court.

Furthermore, after the supplemental charge was read to the jury, the foreman asked for clarification on the substantial assistance charge. The following colloquy took place:

> THE COURT: Members of the Jury, the Court has explained those two terms ["fiduciary" and "substantial assistance"] to you with some detailed explanation as best it can under the circumstances. You may retire and resume your deliberations.
>
> THE FOREPERSON: Before we go in, I know when we go in there there is still going to be the same problem. Can I ask you a direct question which is—

THE COURT: I may not answer it, but you may certainly ask it.

THE FOREPERSON: Okay. On that question, [dealing with substantial assistance] can it be found that one or all of the defendants broke their fiduciary duty without knowing about the fraud.

THE COURT: You'd have to know about the fraud. Does that answer your question?

THE FOREPERSON: Yes.

THE COURT: You have to knowingly do it. All right. Any further questions?

THE FOREPERSON: Uh-uh.

THE COURT: All right. Resume your deliberating.

Thus, any misconception of the issue by the jury was conceivably cured by the exchange between the foreman and the judge. The inclusion in the instruction of the definition of substantial assistance that was practically identical to the Restatement of Torts 2d sec. 876, the embodiment of the theory on silence and inaction, coupled with the colloquy between the judge and the foreman, appears to us to be sufficient to overcome any conceivable error in the alleged erroneous excerpt plaintiffs complain of on the definition of substantial assistance. The supplemental instruction embodied all the principles necessary to convey an appropriate definition of substantial assistance. Therefore, the supplemental instruction given by the court, taken as a whole, did not mislead or misinform the jury in its understanding of the issues before it. Accordingly, the supplemental instruction was not erroneous and plaintiffs are not entitled to a new trial.

[2] Next, plaintiffs assign as error the trial court's denial of plaintiffs' motion for a new trial, pursuant to G.S. 1A-1, Rule 59, on the issue of damages. Plaintiffs contend that the jury award of $124,942.00 for damages against defendant Shaughnessy was grossly inadequate since the evidence tended to show that the loss suffered by the individual plaintiffs was shown to be not less than $442,952.18. We find this contention is without merit.

A motion for a new trial on the grounds of inadequate damages is addressed to the sound discretion of the trial judge. *Gwaltney v. Keaton*, 29 N.C. App. 91, 223 S.E. 2d 506 (1976). The

court's decision on a motion for a new trial under G.S. 1A-1, Rule 59, is not reviewable on appeal, absent manifest abuse of discretion. *Mumford v. Hutton & Bourbonnais Co.*, 47 N.C. App. 440, 267 S.E. 2d 511 (1980).

Our Supreme Court, in *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E. 2d 599, 605 (1982), explained an appellate court's role in reviewing the discretionary power of a trial court to grant a new trial when it held:

> an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.

Furthermore, where there is no stipulation of damages, the testimony of witnesses becomes evidence for the sole province of the jury to consider. *Smith v. Beasley*, 298 N.C. 798, 259 S.E. 2d 907 (1979). Thus, "[i]n weighing the credibility of the testimony, the jury has the right to believe any part or none of it." *Id.* at 801, 259 S.E. 2d at 909.

In the case *sub judice*, there was no stipulation of damages made by either party. The jury weighed the evidence before it on the issue of damages, and arrived at a figure, in its view, to be appropriate. Consequently, in the trial judge's discretion, such an award of damages by the jury did not require granting plaintiffs' motion for a new trial. Therefore, upon thorough review of the record, we hold that the trial judge's denial of plaintiffs' motion for a new trial on the issue of damages did not amount to a substantial miscarriage of justice and was therefore not a manifest abuse of discretion.

For all the foregoing reasons, we find

No error.

Judges BECTON and PARKER concur.

DONALD PHILLIP KLASSETTE BY HIS GUARDIAN, JOHN PHILLIP KLASSETTE v. MECKLENBURG COUNTY AREA MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE AUTHORITY

No. 8726SC583

(Filed 2 February 1988)

1. **Negligence § 29.2— detoxification center—refusal to admit unconscious plaintiff—decision on reference to another facility—due care**

Where a supervisor of a county detoxification center refused to admit the unconscious plaintiff to the center as a client after he was informed that plaintiff had suffered a drug overdose but decided that plaintiff was intoxicated with alcohol, the supervisor was required by N.C.G.S. § 122C-211 and the center's written policies and procedures to use due care in deciding whether or not to refer plaintiff to another facility for treatment.

2. **Negligence § 29.2— assumption of duty of care by actions**

Although a supervisor of a county detoxification center refused to admit the unconscious plaintiff to the center as a client after he was informed that plaintiff had suffered a drug overdose but decided that plaintiff was intoxicated with alcohol, the supervisor assumed a duty of care toward plaintiff by his conduct when he locked the unconscious plaintiff in plaintiff's car at the center's main entrance and regularly monitored plaintiff's condition throughout the night.

3. **Negligence § 35.2— action against detoxification center—voluntary intoxication not contributory negligence**

Plaintiff's voluntary intoxication from drugs did not constitute contributory negligence which barred plaintiff's recovery against a county detoxification center for negligence in failing to refer plaintiff to another facility for medical treatment.

4. **Evidence § 47.1— expert testimony—basis for opinion**

A neurologist's opinion testimony as to the time at which plaintiff suffered irreversible brain damage was not speculation and was properly admitted where it was based on assumed facts in previous hypothetical questions and the neurologist's expertise and actual treatment of plaintiff.

5. **Evidence § 40.1; Negligence § 27— internal investigation of incident—opinion on medical emergency—knowledge of policies and procedures—admission of testimony**

In an action against a county detoxification center for negligence in failing to refer plaintiff, who was unconscious from a drug overdose, to another facility for medical treatment, the trial court properly excluded questioning of the center's acting director concerning the center's internal investigation of the incident in question and properly barred plaintiff's counsel from asking the director for his personal opinion whether an unconscious person presented a medical emergency. However, the trial court erred in refusing to permit the director to testify as to his personal knowledge of the center's interpretation

and implementation of its own written policies and procedures concerning whether a state of unconsciousness was a medical emergency. N.C.G.S. § 8C-1, Rules 407, 702 and 704.

Chief Judge HEDRICK concurs in the result.

Judge MARTIN concurs with the majority that plaintiff is entitled to a new trial for the reasons contained in part I of this opinion.

APPEAL by plaintiff from *Gray, Judge.* Judgment entered 13 February 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 December 1987.

John A. Mraz, P.A., for plaintiff-appellant.

Palmer, Miller, Campbell & Martin, by Douglas M. Martin, for defendant-appellee.

GREENE, Judge.

This appeal arises from plaintiff's negligence suit against defendant for its operation of the Seventh Street Detoxification Center, a treatment center for drug and alcohol abuse in Charlotte, North Carolina (hereinafter, the "Center"). The trial court entered directed verdict against plaintiff at the close of plaintiff's evidence. Viewing the evidence in the light most favorable to plaintiff reveals that plaintiff's friend drove plaintiff to the Center around midnight one evening. Plaintiff had injected himself with a drug which rendered him unconscious. Plaintiff's friend related plaintiff's condition to a Center employee who apparently offered no help. The friend then called the Center from a public telephone and described plaintiff's condition to the shift supervisor. Although the friend informed the supervisor that plaintiff was in a car at the Center's main entrance, the supervisor refused to admit plaintiff into the Center since the friend would not take responsibility for admitting plaintiff and plaintiff could not admit himself. After the friend went home, the shift supervisor found plaintiff lying in the back seat of plaintiff's automobile at the main entrance of the Center. The supervisor concluded plaintiff was alcoholically intoxicated, locked the doors of the automobile and took the car keys with him. The supervisor monitored plaintiff's condition at intervals of approximately 45 minutes to an hour until 5:00 a.m. the next morning. At that time, the supervisor discovered plaintiff's breathing and skin color had deteriorated and called an ambulance.

Plaintiff was diagnosed as having severe permanent brain damage caused by oxygen deprivation. Doctors testified on plaintiff's behalf that plaintiff would have had no brain damage at the time he was brought to the Center. Both doctors testified the drugs in plaintiff's blood system were insufficient alone or together to cause the resulting brain damage. However, the trial court barred certain testimony on the specific time at which plaintiff suffered irreversible brain damage. The court also barred testimony by the Center's acting director on the application and interpretation of the Center's written policies and procedures. At the close of plaintiff's evidence, the trial court entered directed verdict for defendant.

At the outset, we note the parties expressly stipulated that certain portions of the transcript would be omitted from the record on appeal. However, a remaining portion of the transcript reveals some dispute whether defendant had waived its governmental immunity by purchasing liability insurance under N.C.G.S. Sec. 153A-435 (1987). Although the trial court apparently denied defendant's motion pertaining to that plea in bar, defendant has not appealed that ruling. As we therefore assume defendant waived any governmental immunity as provided under Section 153A-435, we need not determine whether defendant's failure to appeal the denial of its motion would itself constitute a valid waiver of its governmental immunity. *Cf. Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E. 2d 427, 429 (1970) (municipality has no authority to waive its governmental immunity absent express statutory authority).

Defendant has similarly not argued any possible limited immunity from civil liability under N.C.G.S. Sec. 122C-210.1 (1986) (no "facility" or staff held civilly liable for examination of "client" where they abide by "accepted professional judgment, practices and standards"); *compare* Sec. 122C-3(14) ("facility" includes any "person" providing services under the statute) *with* Sec. 122C-3(28) ("person" includes area authority). As plaintiff was apparently not a "client" of the Center and as neither party has discussed possible limited immunity under Section 122C-210.1, we express no opinion whether its statutory standard of "accepted professional judgment" applies to the treatment of non-clients such as plaintiff.

This appeal therefore presents only the following issues: I) where defendant's employee refused to admit an unconscious plaintiff to a county detoxification facility, whether defendant's employee either (A) owed or (B) assumed a duty of care in further attending plaintiff's condition without referring plaintiff for medical treatment; II) whether the trial court properly barred plaintiff's doctor from testifying as to the specific time at which plaintiff's condition required medical attention in order to prevent serious brain injury; and III) whether the trial court properly excluded all questions concerning the interpretation and application of defendant's written policies and procedures governing admission to the Center.

I

Our standard for reviewing the trial court's directed verdict in this case was set forth in *Mazza v. Huffaker*, 61 N.C. App. 170, 174, 300 S.E. 2d 833, 836, *disc. rev. denied*, 309 N.C. 192, 305 S.E. 2d 734 (1983):

> In passing upon a defendant's motion for directed verdict, the plaintiff's 'evidence must be taken as true, . . . and [the motion] may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiffs.' *Dickenson v. Pake*, 284 N.C. 576, 583, 201 S.E. 2d 897, 902 (1974). In a negligence case, '[i]f the evidence in the light most favorable to the plaintiff, giving him the benefit of all permissible inferences from it, tends to support all essential elements of actionable negligence, then it is sufficient to survive the motion . . . [for a directed verdict].' *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 645, 272 S.E. 2d 357, 360 (1980) (citation omitted). In addition to the rule giving the plaintiff the benefit of the doubt on a motion for nonsuit, 'judicial caution is particularly called for in actions alleging negligence as a basis for recovery.' *Smithers v. Collins*, 52 N.C. App. 255, 260, 278 S.E. 2d 286, 289 (1981) (citations omitted).

The Center was established pursuant to the general provisions of N.C.G.S. Sec. 122C *et seq.* (1986). These provisions are designed to provide, among other things, "services to . . . reduce the disabling effect of . . . substance abuse through a . . . system designed to meet the needs of *clients* . . . ." Sec. 122C-2

(emphasis added). Defendant argues this statutory policy imposes on it a duty of care only to "clients," who are defined as individuals "admitted to and receiving services from" a regulated facility. Sec. 122C-3(6). Defendant correctly points out that there exists in this state no general duty to aid individuals in distress. *See, e.g., Parrish v. Atlantic Coastline R.R.*, 221 N.C. 292, 300, 20 S.E. 2d 299, 304 (1942). Since the Center supervisor refused to admit plaintiff as a "client," defendant therefore claims it owed plaintiff no duty of care whatsoever. Plaintiff's alleged failure to establish a legal duty to plaintiff could constitute grounds for a directed verdict in his negligence case. *See Kilpatrick v. University Mall Shopping Center*, 68 N.C. App. 629, 632, 315 S.E. 2d 786, 788, *disc. rev. denied*, 311 N.C. 758, 321 S.E. 2d 136 (1984). However, the record discloses two bases for defendant's duty of reasonable care to plaintiff.

A

[1] The detailed statutory scheme for treating substance abusers itself necessarily implies some duty of care toward those prospective clients who are actually denied admission to regulated facilities. For example, Section 122C-211, which governs voluntary admission of substance abusers, clearly provides for some obligation to those individuals denied admission to the facility:

> An individual may not be accepted as a client if the facility determines that the individual does not need or cannot benefit from the care, treatment, habilitation, or rehabilitation available and that the individual is not in need of further evaluation by the facility. *The facility shall give to an individual who is denied admission a referral to another facility or facilities that may be able to provide the treatment needed by the client.*

Sec. 122C-211 (emphasis added); *cf.* Sec. 122C-202 (Article applies to all facilities). Section 122C-211 imposes on a facility the duty to refer an individual to another facility for treatment: therefore, the facility must necessarily use due care in exercising its judgment *not* to refer an individual for further treatment. *Cf.* Sec. 122C-301(b) (no officer liable if uses "reasonable measures" set forth to assist publicly intoxicated individuals). Given the Center's specific public purpose and the circumstances under which plaintiff was deposited on Center premises with the supervisor's

knowledge, we also note the assertion in the Restatement of Torts that "a possessor of land who holds it open to the public is under a . . . duty to members of the public who enter in response to his invitation." Restatement of Torts (Second) Sec. 314A(3) (1965).

Viewing this evidence favorably to plaintiff discloses that plaintiff's friend apparently brought plaintiff to the Center in response to the Center's publicly stated mandate to help substance abusers. The friend twice informed Center employees, including the shift supervisor, that plaintiff had suffered a drug overdose. However, the shift supervisor decided plaintiff was simply intoxicated with alcohol. Since the Center's treatment mandate includes all "substance abuse" (including alcohol abuse) under Section 122C-3(36), plaintiff was in either event a "prospective client" of the Center under these circumstances. Section 122C-211 embodies the legislature's recognition that denying a prospective client admission to a specific facility does not terminate a duty to refer that individual for further help if necessary. Therefore, we hold the shift supervisor was required to use due care in deciding whether or not to refer plaintiff for further aid.

We recognize the unusual manner by which plaintiff's friend brought plaintiff to the Center and notified the shift supervisor of plaintiff's intoxication. However, the shift supervisor testified he examined plaintiff but did not admit him "because he did not meet the criteria of the Center at that time." While plaintiff's unconscious condition may not have met the Center's criteria for voluntary admission, Section 122C-211 does not limit the scope of the facility's referral duty based on the specific criteria used to deny the individual admission.

Furthermore, defendant's own written policies and procedures specifically dealt with the preliminary evaluation and admission of prospective clients. Several written procedures evidence defendant's voluntary assumption of a standard of care toward prospective clients prior to their actual admission or after admission is denied. For example, one written policy apparently implemented the referral directive of Section 122C-211 as it provided in part that, at the preliminary admission evaluation, the "supervisor on duty shall determine the need for medical services

. . . and provide transportation to the services." Another written procedure provided that "individuals brought to the Center . . . by referral agents shall be admitted . . . *unless* in the judgment of Center staff the individual is not appropriate for detoxification services (including significant medical or physical problems) *and would benefit more from other services.*" (Emphases added.) These written procedures specifically charged the shift supervisor with using his own discretion in their implementation. Furthermore, the stated admission policy of the Center was that it "[would] attempt to treat at some level, or to refer to other appropriate treatment, *anyone* who has developed the disease of alcoholism or who is experiencing problems with alcohol."

We recognize voluntary written policies and procedures do not themselves establish a *per se* standard of due care appropriate to these circumstances; however, they represent some evidence of a reasonably prudent standard of care. *See generally Wilson v. Lowe's Asheboro Hardware, Inc.*, 259 N.C. 660, 666, 131 S.E. 2d 501, 505 (1963) (voluntary adoption of safety code is "some evidence" that a reasonably prudent person would adhere to requirements of code); *Slade v. New Hanover County Bd. of Educ.*, 10 N.C. App. 287, 295-96, 178 S.E. 2d 316, 322, *cert. denied*, 278 N.C. 104, 179 S.E. 2d 453 (1971) (voluntary adoption of rules as guide for protection of public is admissible as some evidence of reasonably prudent conduct).

The legislature's statutory scheme for treating substance abuse under Section 122C requires defendant to refer individuals denied admission to a facility for further help if necessary. Defendant's written procedures are some evidence of the reasonable steps necessary to fulfill that requirement. In light of these requirements, defendant owed plaintiff a duty of care in deciding whether or not to refer plaintiff for medical treatment.

B

[2] Irrespective of any duty of care arising by virtue of the above statutes and procedures, we also conclude defendant's shift supervisor assumed a duty of care toward plaintiff by his affirmative conduct. In locking plaintiff in plaintiff's car and regularly monitoring plaintiff's vital signs, the supervisor clearly took charge of the helpless plaintiff. As we stated in *Davidson and*

Jones, Inc. v. County of New Hanover, 41 N.C. App. 661, 666, 255 S.E. 2d 580, 584 (1979):

> The law imposes upon every person who enters upon an act or course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence. *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551 (1951); *Stroud v. Transportation Co.*, 215 N.C. 726, 3 S.E. 2d 297 (1939). The duty to protect others from harm arises whenever one person is by circumstances placed in such a position towards another that anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, that he will cause danger of injury to the person or property of the other. [Citations omitted.]

At the very least, the supervisor's affirmative conduct precluded any other rescuer from rendering the aid allegedly necessary to prevent plaintiff's brain injuries. *Cf.* Restatement of Torts (Second) Sec. 314A(4) (1965) (one who voluntarily takes custody of another under circumstances depriving other of other opportunity for rescue assumes duty of care).

Of course, whether defendant's shift supervisor did or did not use reasonable care in attending to plaintiff is a question for the jury. We simply hold defendant has not demonstrated that it owed no duty whatsoever to plaintiff as a matter of law. Accordingly, we reverse the trial court's directed verdict and remand for a new trial.

[3] In passing, we reject defendant's contributory negligence argument. Defendant argues that plaintiff's apparently voluntary intoxication is contributory negligence which bars plaintiff's recovery. We have already noted that, when officers deal with publicly intoxicated individuals, the legislature has immunized them from civil and criminal liability only if the officers use reasonable measures under Section 122C-301(b): such limited immunity would be unnecessary if an individual's intoxication always constituted contributory negligence. To deny a substance abuser any standard of care when he seeks treatment of his substance abuse would vitiate the legislature's detailed regulatory scheme for aiding substance abusers. Under these cir-

cumstances, defendant's contributory negligence argument is meritless.

II

Although we remand for a new trial, plaintiff has also assigned error to certain other evidentiary rulings. Defendant may be expected to raise again on remand those objections sustained by the trial court. We therefore address these evidentiary issues in the interest of judicial economy.

[4] In eliciting an expert neurologist's opinion concerning the time at which plaintiff suffered irreversible brain damage, plaintiff's counsel directed the doctor to make certain hypothetical assumptions based upon hospital records and the doctor's treatment of plaintiff. The detailed factual assumptions covered plaintiff's specific physical condition and responses during the time plaintiff was unconscious between 12:30 a.m. and 5:00 a.m. Based upon these assumptions, the doctor concluded that plaintiff had not suffered brain damage at 12:30 a.m. The trial court also allowed the doctor's subsequent opinion that plaintiff's brain damage resulted from "his not getting medical attention when he needed it." The doctor then generally testified that such treatment was needed when it was recognized that plaintiff was unconscious and could not be aroused to full alertness and wakefulness.

Plaintiff's counsel then asked the doctor again to assume the above-mentioned facts and asked, "[A]t what point are you saying that [the plaintiff] needed to get the medical attention?" The trial court sustained defendant's objection to both this question and a series of subsequent questions attempting to clarify the doctor's general response. Defendant argues exclusion of this testimony is proper as there was nothing in the record from which the time of plaintiff's deterioration could be determined with precision. Defendant asserts any opinion would therefore be sheer speculation.

We disagree. The factual basis of the doctor's opinion was assumed in part in counsel's previous hypothetical questions. Given these assumed facts and the doctor's expertise and actual treatment of plaintiff, the doctor was not being required to speculate baselessly when asked to narrow the actual time at which plaintiff's brain function had irreversibly deteriorated. *See generally Cherry v. Harrell*, 84 N.C. App. 598, 601-06, 353 S.E. 2d 433, 435-

38, *disc. rev. denied*, 320 N.C. 167, 358 S.E. 2d 49 (1987) (discussing degree of expert certainty required for admissible testimony); *see also Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 100-03, 360 S.E. 2d 109, 111-113 (1987). Under N.C.G.S. Sec. 1A-1, Rule 702 (1983), the neurologist was clearly in a superior position to help the jury determine at what point defendant's alleged negligence occurred. Under N.C.G.S. Sec. 1A-1, Rule 705, defendant is afforded ample opportunity to examine the factual basis of the doctor's opinion.

III

[5] We agree with defendant that the trial court properly excluded certain questioning of the Center's acting director concerning the Center's internal investigation of the incident resulting in this lawsuit. *See* N.C.G.S. Sec. 1A-1, Rule 407 (1983). The trial court also properly barred plaintiff's counsel from asking the Center director for his personal opinion whether an unconscious person presented a medical emergency: the director was never qualified as a medical expert and his testimony on this issue would not be admissible under Rule 702.

However, the trial court also precluded plaintiff's counsel from even asking whether, in light of its written policies and procedures, it was Center policy "that a state of unconsciousness was a medical emergency." Defendant objected that the written documents in evidence "spoke for themselves." The transcript reveals the trial court echoed this notion:

> THE COURT: . . . The policy speaks for itself and it can come in.
>
> MR. MRAZ: Well, okay. Well, I think he's entitled to say what the policy requires.
>
> THE COURT: Well, I don't.

We conclude the trial court should have allowed the Center director to testify as to his personal knowledge of the Center's interpretation and implementation of its own written policies and procedures. The director was presumably competent to answer such questions. Furthermore, since the written policies do not themselves establish defendant's standard of care under these circumstances, such questions do not call for any ultimate legal conclusions which would otherwise invade the province of the jury.

Cf. N.C.G.S. Sec. 1A-1, Rule 704, Advisory Committee Note (1983) (Rules 701, 702 and 403 afford assurance against admitting opinions which merely tell the jury what result to reach and exclude opinions "phrased in terms of inadequately explored legal criteria"). Thus, while plaintiff may not inquire on remand as to those remedial measures taken by the Center after the incident, we fail to see why plaintiff may not inquire as to how the Center actually implemented its written policies and procedures: such evidence would be extremely helpful in determining what duty of care the Center voluntarily assumed which in turn is relevant to the standard of reasonable care at issue.

While we note the trial court also excluded plaintiff's "day-in-the-life" video tape, we express no opinion whether the court's action was an abuse of discretion. *See generally Campbell v. Pitt County Memorial Hosp.*, 84 N.C. App. 314, 319-21, 352 S.E. 2d 902, 905-06, *aff'd*, 321 N.C. 260, 362 S.E. 2d 273 (1987) (in part requiring trial court to "examine carefully into [the tape's] authenticity, relevancy and competency . . .").

For the above and foregoing reasons, the trial court's entry of directed verdict for defendant is reversed and plaintiff's claims against defendant are remanded for a new trial in accordance with this opinion.

Reversed and remanded.

Chief Judge HEDRICK concurs in the result.

Judge MARTIN concurs with the majority that plaintiff is entitled to a new trial for the reasons contained in Part I of this opinion.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

LYNDA DOVE AVRIETT v. ROBERT JAMES AVRIETT, JR.

No. 8712DC291

(Filed 2 February 1988)

Husband and Wife § 4.1— separation agreement—confidential relationship of husband and wife—insufficient evidence of fraud by husband

Plaintiff wife was not entitled to set aside a separation and property settlement agreement on the ground of fraud by defendant husband in allegedly violating their confidential relationship by misrepresenting or concealing from her advice he received from his lawyer concerning alimony and his military pension because (1) the parties had become adversaries and the confidential relationship between husband and wife had terminated before the agreement was executed; (2) fraud cannot be based on plaintiff's ignorance of the law; and (3) although plaintiff knew that defendant had consulted an attorney about their negotiations, plaintiff expressly contracted not to use her failure to obtain her own counsel as a basis for setting aside the agreement.

Judge GREENE dissenting.

APPEAL by plaintiff from *Pate, Judge.* Orders entered 4 August 1986 and 13 November 1986 in District Court, CUMBERLAND County. Heard in the Court of Appeals 1 October 1987.

Harris, Sweeny & Mitchell, by Ronnie M. Mitchell, and Blackwell, Swaringen & Russ, by John V. Blackwell, Jr., for plaintiff appellant.

Reid, Lewis & Deese, by Renny W. Deese, for defendant appellee.

PHILLIPS, Judge.

On 8 May 1986 plaintiff sued to set aside a separation and property settlement agreement entered into with defendant the preceding October. After answering the complaint defendant moved for summary judgment and following a hearing at which affidavits and other materials were considered the court granted the motion by an order that contained detailed findings of fact. The facts pertinent to plaintiff's appeal follow:

Defendant is a career military officer with vested retirement benefits, as plaintiff knew. The eleven page separation and property settlement agreement prepared by his attorney was admittedly executed by plaintiff after she "okayed the proposed draft,

with some modifications." *Inter alia*, the agreement provided for the custody and support of their one child; for defendant to pay plaintiff alimony of $250 a month until she died or remarried; for defendant to arrange for her and the child to use Army hospital, medical, post exchange, and other facilities and services until her death or remarriage; for the temporary possession and eventual sale of their only real property and a division of the proceeds; for an itemized division of their automobiles, bank accounts, clothing, furniture, household utensils, and other personal property; and for his military retirement pension to remain his sole and separate property. The agreement stated that a full disclosure had been made of their assets; that each had been advised of the right to seek separate counsel and waived "any issues or defenses based upon not having separate counsel"; and that the settlement was in full satisfaction of each's right to equitable distribution. The only ground asserted in the complaint for setting the agreement aside was defendant's fraud in allegedly violating their confidential relationship by misrepresenting or concealing from her the advice that he received from his lawyer concerning alimony and his military pension. The specific facts allegedly constituting fraud are stated in plaintiff's complaint as follows: Prior to 1 October 1985 she and defendant discussed their difficulties and began to negotiate the settlement terms ultimately put in the agreement; during the negotiations defendant obtained legal advice but she did not; after defendant consulted counsel they continued their negotiations and discussed the terms agreed to with defendant's attorney; and at the time the agreement was signed she—

> did not know and understand the difference between the ramifications of alimony and property settlement as it pertains to the military pension and the Defendant did know or should have known and understood from his legal counseling the significance and importance of the difference; the Defendant did not inform Plaintiff of this significant difference or that Plaintiff should obtain independent legal advice, but secured the signature of Plaintiff on the Separation Agreement by misrepresentation and/or concealment of material facts as to the rights of the Plaintiff to Defendant's military pension.

Defendant answered or defended these allegations by admitting that he obtained legal advice in regard to their negotiations and did not impart that advice to her; by denying that he did not advise her to obtain counsel of her own; and by asserting that she negotiated the agreement and had waived any possible right she might have had to rescind it by retaining its benefits after obtaining legal advice.

Plaintiff rightly contends that the court's detailed findings of fact were irregular and unnecessary. In determining whether summary judgment is appropriate the judge's function is not to decide the truth of issues raised by the pleadings and other materials of record, but to determine whether any genuine issue of material fact exists that requires adjudication. *Wachovia Bank & Trust Co. v. Peace Broadcasting Corp.*, 32 N.C. App. 655, 233 S.E. 2d 687, *disc. rev. denied*, 292 N.C. 734, 235 S.E. 2d 788 (1977). Nevertheless, plaintiff was not prejudiced by the court's findings, even assuming *arguendo* that some of them were erroneous, because the materials before the court establish without contradiction that plaintiff's fraud action is fatally deficient in two respects. First, though plaintiff's fraud claim is explicitly based on the confidential relationship that usually exists between husband and wife, plaintiff's verified complaint and affidavit, which states that before the agreement was made they had been negotiating settlement terms and defendant to her knowledge had employed a lawyer to advise him with respect thereto, establishes that they had become adversaries and that the confidential relationship that formerly existed between them was terminated before the agreement was executed. *Murphy v. Murphy*, 34 N.C. App. 677, 239 S.E. 2d 597 (1977), *modified on other grounds*, 295 N.C. 390, 245 S.E. 2d 693 (1978). Second, plaintiff's fraud claim is also based on defendant's failure to reveal to her the *advice* that he received from his lawyer as to the significant "difference between the ramifications of alimony and property settlement as it pertains to the military pension," and fraud cannot be based upon ignorance of the law. *Biesecker v. Biesecker*, 62 N.C. App. 282, 302 S.E. 2d 826 (1983).

Plaintiff's action is unenforceable and was properly dismissed for a third reason: Though the action to set aside the settlement agreement is based on plaintiff's failure to receive legal advice in regard to it, the record shows without contradiction that after

learning that defendant had consulted a lawyer about their negotiations and after being explicitly informed or reminded that she could consult counsel of her own if she so desired, she chose to execute the agreement without so doing and thereby expressly contracted not to use that failure to invalidate the agreement. Being *sui juris* plaintiff was free to so contract and nothing in the record suggests that she is not bound thereby.

Affirmed.

Judge COZORT concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The majority asserts the wife's claim to set aside the separation agreement is deficient in two respects: 1) The plaintiff's evidence indicates there was no confidential relationship between the parties; and 2) the plaintiff failed to present sufficient evidence to establish fraud. I disagree on both counts.

I

In North Carolina, separation agreements are contracts and are subject to the same general rules governing creation, construction and rescission as are other contracts. *See Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E. 2d 331, 333 (1985) (separation agreements treated like any other contract and agreement may be set aside if unconscionable or procured by duress, coercion, or fraud); *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E. 2d 738, 740 (1984) (same rules which govern interpretation of contracts generally apply to separation agreements).

However, where a confidential relationship exists between spouses, transactions between husband and wife must not only be free of fraud, undue influence, unconscionability and duress but must also be fair and reasonable. As our Supreme Court stated in *Eubanks v. Eubanks*, 273 N.C. 189, 196, 159 S.E. 2d 562, 567 (1968), transactions must be fair, reasonable and just and "entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties." *See also* Restatement of Contracts (Sec-

ond) Sec. 173 (1981) (where fiduciary makes contract with beneficiary, contract must be on fair terms). As the Court specifically noted, the relationship between husband and wife is "the most confidential of all relationships." *Eubanks*, 273 N.C. at 196, 159 S.E. 2d at 567.

Therefore, any implication in *Knight* that a separation agreement is not held to a fiduciary standard contravenes *Eubanks* and therefore should have no precedential effect. *Cf. Knight*, 76 N.C. App. at 398, 333 S.E. 2d at 333 (courts not required to make independent determination as to whether separation agreement is fair). *Knight* is purportedly premised on the legislature's repeal of N.C.G.S. Sec. 52-6. Prior to 1978, that statute required all separation agreements to be acknowledged before a certifying officer who was required to determine if the contract was unreasonable or injurious to the wife after a separate privy exam. The findings of the certifying officer were conclusive and could be impeached only for fraud; however, the 1978 repeal of the privy exam statute did not eliminate the court's duty to determine the fairness of the separation agreement. First, the statute's repeal merely ended the certifying officer's conclusive fact-finding exam: the repeal did not necessarily terminate the trial court's own fairness review. Furthermore, if the statute's repeal sprang from an evolving legal recognition of spousal equality, then removing the wife's *special* protection under the statute is nevertheless perfectly consistent with the recognition that *both* husband and wife are equally entitled to the court's review. *Cf.* Sharpe, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. Rev. 819, 834 (1981) (with elimination of certifying officer's conclusive finding of fairness, courts should refuse to "become parties to overreaching or unfair separation agreements").

Therefore, the repeal of Section 52-6 did not affect the confidential relationship between spouses. In fact, the confidential relationship between spouses terminates only "when the parties separate and become adversaries negotiating over the terms of their separation." *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E. 2d 117, 119 (1986). The separation of the parties alone is not sufficient to create an adversary relationship. *See Link v. Link*, 278 N.C. 181, 193, 179 S.E. 2d 697, 704 (1971). Furthermore, the employment of a lawyer by one of the spouses is not itself sufficient to terminate the confidential relationship. I question the

Harton court's interpretation of *Joyner v. Joyner*, 264 N.C. 27, 140 S.E. 2d 714 (1965) for the proposition that the retention of counsel by one spouse itself terminates the fiduciary relationship. *Cf. Harton*, 81 N.C. App. at 297, 344 S.E. 2d at 119. However, assuming retention of counsel by one spouse is a factor in terminating the confidential relationship, the *Joyner* Court stated that the confidential relationship is terminated only if a spouse employs an attorney and *negotiates through that attorney* with the other spouse as an adversary. *Joyner*, 264 N.C. at 32, 140 S.E. 2d at 719. The presence of independent counsel, while arguably a factor in determining the existence of a confidential relationship, should not itself require a finding that the fiduciary duty has ended. *See Levine v. Levine*, 56 N.Y. 2d 42, 436 N.E. 2d 476 (1982); *see also* Sharpe, 59 N.C.L. Rev. at 835.

The question whether the confidential relationship has terminated is a question of fact. *See Blum v. Blum*, 477 A. 2d 289, 294 (1984); Clark, *The Law of Domestic Relations in the United States* 2d Sec. 19.2 at 415 n.11 (noting several states hold confidential relationship between spouses is fact question). Here, as the defendant husband moved for summary judgment, we must review the evidence in the light most favorable to the non-movant wife. In reviewing the record in the light most favorable to her, I note the parties negotiated the terms of the separation agreement prior to the date of separation. While the husband had employed an attorney, and the wife had not, the husband's attorney took no part in the negotiations between the husband and wife. As the spouse here alleging deception had not employed counsel to negotiate on her behalf, and as neither spouse negotiated this agreement through an attorney, I conclude under *Joyner* that there exists a genuine issue of material fact as to whether a confidential relationship existed between the parties at the time of the negotiations. The trial court's entry of summary judgment on this ground was therefore error.

II

In general, an essential element of actionable fraud is a material misrepresentation of a past or existing fact, as distinguished from matters of opinion. *See Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E. 2d 494, 500-01 (1974). The wife here contends that, prior to the execution of the separation agreement,

her husband told her "the payment of alimony was the same thing as receiving a portion of his pension." Based on her husband's statement, she agreed to sign the agreement, thereby arguably waiving any rights she had to her husband's military pension. The husband denies making such a statement but argues that the statement in any event merely reflected his opinion and was not a statement of fact.

Even if the husband's statement was an expression of opinion, it would nonetheless support an action for fraud if a confidential relationship existed between the parties at the time of the statement. 37 Am. Jur. 2d, *Fraud and Deceit* Sec. 77 at 119 (relief may be granted where there is misrepresentation of law "where there is a relation of trust and confidence between the parties"). In any event, whether the alleged statement of the husband is an expression of opinion or fact is normally a question for the jury. *See Ragsdale*, 286 N.C. at 139, 209 S.E. 2d at 500-01. Furthermore, declarations made in the form of an opinion may in some cases be considered statements of fact and therefore may be regarded as material misrepresentations. *E.g., J. I. Case Machine Co. v. Feezor*, 152 N.C. 516, 520, 67 S.E. 1004, 1006 (1910) (declarations clothed in the form of opinions may be considered upon the question of whether fraud has been perpetrated).

Therefore, I conclude there is a genuine issue of material fact as to whether the statement alleged to have been made by the husband is a statement of fact or a mere expression of opinion. Accordingly, the trial court erred in using this as a ground for its summary judgment.

III

The husband further contends the wife is estopped to set aside the separation agreement because, after being made aware of the possible fraud, she continued to receive alimony payments under the agreement. It is true that the right to rescind a contract for fraud should be exercised "immediately upon its discovery and any act in recognition of the validity of the contract after the discovery of the fraud is evidence of ratification." *Hutchins v. Davis*, 230 N.C. 67, 72-73, 52 S.E. 2d 210, 213-14 (1949); *see also Hawkins v. Carter*, 196 N.C. 538, 541, 146 S.E. 231, 232 (1929). Again, the question whether the wife waived any right to rescind the contract because of fraud is generally determined by the trier

of fact in light of all the circumstances. *See* 37 Am. Jur. 2d, *Fraud and Deceit* Sec. 387 at 524.

Accordingly, I conclude the entry of summary judgment by the trial court was error. I would reverse the summary judgment and remand the case to the trial court for trial on the issues raised.

HARRY W. HAGWOOD AND EXIE ELIZABETH HAGWOOD v. TONI JEAN ODOM AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 8710SC283

(Filed 2 February 1988)

1. **Negligence § 13.1; Automobiles and Other Vehicles § 45— automobile accident—failure to wear seat belt—not admissible**

The trial court did not err in a negligence action arising from an automobile accident which occurred on 7 October 1982 by not allowing evidence on whether plaintiff was wearing his seat belt. N.C.G.S. § 20-135.2A(d), which prohibits introduction of failure to wear a seat belt in all actions except those based on violation of that statute, was not effective until 1 October 1985; but *Miller v. Miller*, 273 N.C. 228 (1968), held that a motorist does not have a duty to use seat belts without knowledge of a prior specific hazard not generally associated with highway travel.

2. **Damages § 9— automobile accident—mitigation of damages—wearing seat belt not required**

The trial judge in an automobile accident case committed no error in failing to instruct the jury that plaintiff's failure to fasten his seat belt could be used to reduce or minimize his damages. The duty to minimize damages arises only after the negligent act of a defendant and the failure of a plaintiff to fasten his seat belt necessarily occurs before defendant's allegedly negligent act.

3. **Judgments § 55— automobile accident—prejudgment interest—no evidence of lack of liability insurance**

The trial judge did not err in an automobile accident case by awarding prejudgment interest against defendant Odom where the record reveals no evidence presented to the trial court indicating that Odom did not have liability insurance. N.C.G.S. § 24-5.

4. **Rules of Civil Procedure § 60.2— automobile accident—prejudgment interest—Rule 60 motion denied**

The trial court did not err in an automobile accident case by denying defendant's Rule 60(b) motion requesting the court to modify its judgment assess-

ing prejudgment interest where defendants offered no reason why evidence concerning liability insurance was not introduced before the judgment was entered, and the appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under N.C.G.S. § 1A-1, Rule 59(a)(8) (1983).

APPEAL by defendants from *McLellan, Judge.* Judgment entered 16 December 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 1 October 1987.

Weeks, Tantum, Hamrick & Jordan, by J. Michael Weeks, for plaintiff-appellees.

Emanuel and Emanuel, by Robert L. Emanuel and Stephen A. Dunn, for defendant-appellants.

GREENE, Judge.

Plaintiff Harry W. Hagwood (hereinafter, "Hagwood" or "plaintiff") and his wife alleged defendant Odom, an employee of defendant Southern Bell Telephone and Telegraph Company (hereinafter, "Southern Bell"), negligently operated a truck which proximately caused plaintiffs' injuries. Defendants answered that Hagwood's failure to utilize a seat belt was contributory negligence. Prior to trial, the court entered an order *in limine* prohibiting defendants' counsel and witnesses from informing the jury that the plaintiff "was or was not wearing a seat belt at the time of the accident." At trial, defendants admitted their negligence and defended on the grounds of plaintiff's contributory negligence and the lack of proximate cause; however, the only issue submitted to the jury was the amount of damages to which Hagwood was entitled. Defendants requested the trial judge instruct the jury as follows:

> "If the jury shall find by the greater weight of the evidence:
>
> a) that on October 7, 1982, there existed reliable scientific evidence that the use of seat belt and shoulder harnesses by drivers of motor vehicles significantly reduced the risk of those drivers suffering severe bodily injuries from accidents in which they might become involved; and

b) that there was substantial public recognition and awareness of those conclusions in general and on the part of plaintiff in particular;

Then the jury shall go on to consider and determine whether the plaintiff Harry Hagwood's failure to wear a seat belt and shoulder harness on October 7, 1982, significantly contributed to the nature or extent of the injuries he suffered; and

Should the jury so find, it should then reduce any damages it would otherwise find Harry Hagwood suffered by such amount or proportions as the jury may find is attributable to his failure to utilize his available seat belt and shoulder harness."

The trial judge refused to instruct the jury as requested. The jury returned a verdict against defendants, jointly and severally, in the amount of $94,300. The trial court accordingly entered judgment and allowed prejudgment interest against Odom. After entry of the order, defendants moved under N.C.G.S. Sec. 1A-1, Rule 60(b) (1983) to set aside the judgment assessing prejudgment interest. This motion was denied.

Defendants assign as error the court's failure to allow evidence on plaintiff's use of his seat belt, its failure to charge the jury as requested and its assessing prejudgment interest against defendant Odom. Defendants also appeal the denial of their Rule 60(b) motion.

The issues presented in this appeal are: I) whether plaintiff's failure to wear his seat belt at the time of the collision was contributory negligence; II) whether the jury should have been instructed that plaintiff's failure to wear his seat belt should be considered in mitigation of plaintiff's damages; and III) whether the trial court erred in allowing plaintiff prejudgment interest against Odom.

I

[1] Effective 1 October 1985, seat belt use in North Carolina became mandatory. N.C.G.S. Sec. 20-135.2A (Cum. Supp. 1987). Under the seat belt statute, evidence of failure to wear a seat belt is

not admissible in any civil or criminal case except in an action based on a violation of the statute. Section 20-135.2A(d). However, as Hagwood sustained his injuries on 7 October 1982, Sec. 20-135.2A does not affect this action.

Instead, the law enunciated in *Miller v. Miller*, 273 N.C. 228, 160 S.E. 2d 65 (1968) is dispositive since the *Miller* Court specifically addressed the issues of both contributory negligence and the duty to minimize damages where plaintiff failed to wear a seat belt. The *Miller* Court held a motorist does not have a duty to use seat belts "routinely whenever he travels upon the highway." *Id.* at 238, 160 S.E. 2d at 73. Therefore, the motorist is not contributorily negligent for failure to use his seat belt unless the motorist "with prior knowledge of a specific hazard—one not generally associated with highway travel . . . had failed or refused to fasten his seat belt." *Id.* at 234, 160 S.E. 2d at 70 (passenger can be contributorily negligent for failure to fasten seat belt where falls out of car door after being advised of defective door lock). In passing, we note the present seat belt statute precludes the introduction of any evidence regarding seat belt use, regardless of any knowledge of a specific hazard. Sec. 20-135.2A(d).

Under the controlling law of *Miller*, there is no evidence that plaintiff was aware of any specific hazard and therefore Hagwood had no duty to fasten his seat belt. Under these facts, it would therefore have been error for the trial judge to allow evidence on the question whether plaintiff did or did not wear his seat belt. Likewise, it would have been error for the trial judge to instruct the jury regarding the use or lack of use of the seat belt.

II

[2] In *Miller*, the Court also held that the failure to fasten one's seat belt "cannot be held to be a breach of the duty to minimize damages." *Miller*, 273 N.C. at 239, 160 S.E. 2d at 74. The Court reasoned that the duty to minimize damages arises only after the negligent act of defendant. A plaintiff's failure to fasten his seat belt necessarily occurs before defendant's allegedly negligent act and therefore is not consistent with any burden on plaintiff to minimize damages. *Id.* Accordingly, the trial judge here committed no error in failing to instruct the jury that plaintiff's failure to fasten his seat belt could be used to reduce or minimize his damages. Although it is not controlling, we again note that Sec-

tion 20-135.2A(d) likewise now precludes any instruction to the jury which would allow mitigation of damages for failure to wear a seat belt.

III

[3] After the jury returned its verdict against defendants Odom and Southern Bell, the trial judge entered his judgment which provided in part that Odom would be assessed with prejudgment interest on the $94,300 judgment from 11 May 1984 through entry of the judgment. Defendant Odom now contends the trial judge erred in allowing prejudgment interest against her. On 11 May 1984, the date this complaint was filed, Section 24-5 provided in pertinent part:

> [T]he portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contracts shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and the decree of the court shall be rendered accordingly. *The preceding sentence shall apply only to claims covered by liability insurance.*

N.C.G.S. Sec. 24-5 (Cum. Supp. 1983) (emphasis added).

Odom first contends the trial court erred in assessing prejudgment interest against her. We disagree. In construing Section 24-5, this Court has held this version of the statute created a rebuttable presumption that the defendant had liability insurance and that the burden of showing the absence of liability insurance is on the defendant. *Harris v. Scotland Neck Rescue Squad*, 75 N.C. App. 444, 452, 331 S.E. 2d 695, 701 (1985). The record here reveals no evidence presented to the trial court indicating Odom did not have liability insurance. Southern Bell did present an affidavit indicating they were self-insurers and did not have liability insurance. The stipulation between the parties that Odom was an employee of Southern Bell and acting within the course and scope of her employment at the time of the collision does not imply that Odom likewise had no liability insurance. Accordingly, Odom failed her burden of proof.

[4] Second, Odom contends there was error in the denial of her Rule 60(b) motion requesting the court modify its judgment assessing prejudgment interest. Prior to filing their Rule 60(b) mo-

tion on 15 December 1986, defendants had, on 26 November 1986, filed notice of appeal from the entry of the judgment. Plaintiffs argue in their brief that the trial court had no jurisdiction to rule on the Rule 60(b) motion. The record does not indicate that plaintiffs raised the jurisdictional question at the trial level; however, the jurisdictional issue may be raised at any time by the parties or by the court. *See Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E. 2d 806, 808 (1964) (if court finds at any stage of the proceedings it is without jurisdiction, must take notice of defect and stay, quash or dismiss suit).

As a general rule, an appeal divests the trial court of jurisdiction. *See Sink v. Easter*, 288 N.C. 183, 198-200, 217 S.E. 2d 532, 542 (1975). However, we have held the trial court retains limited jurisdiction to hear a Rule 60(b) motion and to indicate its probable disposition after the notice of appeal has been entered. *Talbert v. Mauney*, 80 N.C. App. 477, 478, 343 S.E. 2d 5, 7 (1986); *see Sink*, 288 N.C. at 199-200, 217 S.E. 2d at 542-43; *Bell v. Martin*, 43 N.C. App. 134, 140-42, 258 S.E. 2d 403, 408-09, *rev'd on other grounds*, 299 N.C. 715, 264 S.E. 2d 101 (1980) (better practice is to file motion with the trial court). Where the trial court indicates, as it did here, that the motion should be denied, this Court will review that action along with any other assignments of error raised by the appellant. *See Bell*, 42 N.C. App. at 142, 258 S.E. 2d at 409.

In challenging the trial court's ruling on the Rule 60(b) motion, Odom asserts two grounds for setting the judgment aside: (1) a mistake of fact in that the judgment was "predicated upon the erroneous assumption that [Odom] had liability insurance . . . whereas in fact she does not"; and (2) errors of law in the assessment of prejudgment interest. We note that, while the evidence presented to the court at the Rule 60(b) hearing did indicate Odom had liability insurance at the time of the collision, this evidence had not been presented to the trial court prior to its entering the original order assessing prejudgment interest. As defendants have alleged no other possible basis for their motion, we consider the motion under Subsections (1) and (6) of Rule 60(b). Subsection (1) allows a judgment to be set aside for "mistake, inadvertence, surprise, or excusable neglect." Subsection (6) allows the judgment to be set aside for "any other reason justifying relief from the operation of the judgment."

As no evidence was originally offered on the question of Odom's liability insurance coverage, defendants apparently contend this was a mistake under Rule 60(b)(1) which would require setting aside the order assessing prejudgment interest. However, defendants have offered no reason why the liability insurance evidence was not introduced before the judgment was entered. Defendants do not claim that this information became known to them only after the judgment had been entered. Defendants should have been aware of this deficiency in their case before judgment was entered and therefore relief under Rule 60(b)(1) is not justified. *See* 11 Wright and Miller, *Federal Practice and Procedure* Sec. 2858 at 173 (1973) (defeated litigant "cannot set aside a judgment because he failed to present on a motion for summary judgment all the facts known to him that might have been useful to the court"); *Mas Marques v. Digital Equip. Corp.*, 637 F. 2d 24, 29-30 (1st Cir. 1980) (affidavit not offered prior to entry of judgment cannot be basis for Rule 60(b)(1) motion if no valid explanation given for failure to offer the affidavit prior to entry of judgment).

Defendants next contend the judgment should be set aside as the court committed an error of law in assessing prejudgment interest against Odom. Rule 60(b) provides no specific relief for "errors of law" and our courts have long held that even the broad general language of Rule 60(b)(6) does not include relief for "errors of law." *E.g., Waters v. Qualified Personnel, Inc.*, 32 N.C. App. 548, 551, 233 S.E. 2d 76, 78, *rev'd on other grounds*, 294 N.C. 200, 240 S.E. 2d 238 (1978) (erroneous judgments cannot be attacked under Rule 60(b)(6)). The appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8) (1983).

Accordingly, the order of the trial court denying defendants' Rule 60(b) motion stands and the judgment of the trial court evidences

No error.

Judges PHILLIPS and COZORT concur.

LEWIS M. PASCHALL v. NORTH CAROLINA DEPARTMENT OF CORRECTION, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES AND NORTH CAROLINA DEPARTMENT OF JUSTICE

No. 8610IC1321

(Filed 2 February 1988)

Insane Persons § 11; Negligence § 30.1— release of patient from State mental hospital—assault by patient—absence of negligence by Department of Human Resources

There was no evidence that defendant Department of Human Resources violated any duty owed to plaintiff in releasing a woman from a State mental hospital so as to be liable for injuries received by plaintiff when he was assaulted by the woman where the assailant had been committed by the district court to the State mental hospital for a period not to exceed sixty days for a determination of her capacity to stand trial on criminal charges; a physician employed by defendant performed the evaluation, found that the assailant had the capacity to proceed, and made his report as he was required to do under N.C.G.S. § 15A-1002; and the assailant was returned to the court as soon as all of the requirements of the court-ordered evaluation were met. The fact that defendant could have confined the assailant for a maximum of sixty days, which was ten days past the date of the assault, did not render defendant negligent in releasing the assailant and returning her to the court at an earlier date.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 26 August 1986. Heard in the Court of Appeals 12 May 1987.

Stainback & Satterwhite by Paul J. Stainback for plaintiff appellant.

Monroe, Wyne, Atkins & Lennon by George W. Lennon for defendant appellee.

COZORT, Judge.

On 19 August 1981, the District Court of Warren County committed Clementine Russell, who was charged with breaking or entering and unauthorized use of an automobile, to Dorothea Dix Hospital for a period not to exceed 60 days for observation and examination to determine Russell's capacity to proceed to defend the charges against her. The examination was made, and Russell was discharged on 22 September 1981, with Dr. Billy W. Royal, an employee of the North Carolina Department of Human Resources,

preparing the written evaluation. Dr. Royal stated in his report that Russell was competent to proceed to trial. He also stated, however, that Russell had a "significant, chronic illness resulting in behaviors that present many problems for the patient and for others." Dr. Royal also noted that Russell's "behavior in the community presents a continued danger to the patient and to others as noted in the recent past. Behavior in this hospital has been unpredictable and has presented instances of danger to others."

On 10 October 1981, Lewis M. Paschall, plaintiff herein, was attacked and assaulted by Russell, resulting in serious injuries to Paschall's face. The cuts to Paschall's face resulted in significant medical expenses and severe disfigurement. On 4 October 1984, plaintiff Paschall filed a claim for damages under the State Tort Claims Act, alleging that the State was liable to him because the injuries he received from the attack by Russell were due to the negligence of State officials in releasing Russell from Dorothea Dix Hospital.

Plaintiff initially filed his claim against the North Carolina Department of Correction, the North Carolina Department of Human Resources, and the North Carolina Department of Justice. In an order filed 4 April 1986, the action was dismissed as to all parties except the North Carolina Department of Human Resources and as to all allegations except as to Dr. Billy W. Royal. In a second order filed 4 April 1986, Industrial Commission Chairman David V. Brooks made findings of facts and conclusions of law to the effect that there "has been no showing of negligence upon the part of an employee of defendant [Department of Human Resources] which proximately caused injury to plaintiff." Plaintiff's claim was denied. Plaintiff appealed to the Full Commission. In an order filed 28 August 1986, the Full Commission affirmed and adopted as its own the Opinion and Award of Chairman Brooks. Plaintiff appealed to this Court.

The dispositive issue raised by this appeal is whether the Industrial Commission erred by finding and concluding that plaintiff's claim should be denied because there was no showing of negligence upon the part of an employee of defendant, Department of Human Resources, which proximately caused injury to plaintiff. Finding no error below, we affirm the Industrial Commission's order denying the plaintiff's claim.

Under N.C. Gen. Stat. § 143-293, appeals to the North Carolina Court of Appeals from the Industrial Commission "shall be for errors of law only under the same terms and conditions as governed appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." Thus, appellate review of Industrial Commission decisions is limited to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusion and decision. *Bailey v. North Carolina Department of Mental Health*, 272 N.C. 680, 683-84, 159 S.E. 2d 28, 30-31 (1968).

With this standard in mind, we shall examine the primary argument brought forward by plaintiff. Plaintiff contends that the Commission erred in "Findings of Fact Nos. 7, 8, and 9 of the Opinion and Award, and in the Opinion of the Full Commission, in that the defendant did have notice that Clementine Russell was a danger to herself and others, that the defendant had the authority to prevent her release at the time complained of, and that the assault was foreseeable." We find no merit to this argument.

The Commission's pertinent findings of fact were:

> 3. Prior to 10 October 1981, the said Clementine Russell had been hospitalized at Dorothea Dix Hospital and examined for the purpose of determining her competency to stand trial on other charges. Her examination was as set forth in Dr. Royal's discharge summary, which was received in evidence by stipulation.
>
> 4. The examination of Clementine Russell by Dr. Royal prior to 10 October 1981 was performed pursuant to a lawful order of the General Courts of Justice.
>
> 5. Following the examination of Clementine Russell by Dr. Royal, and prior to her assault on the plaintiff, Clementine Russell was released by a lawful order of the General Courts [*sic*] of Justice.
>
> 6. At the time of her release, pursuant to a court order, the said Clementine Russell was receiving appropriate medication for her mental condition and was not dangerous to the plaintiff or others.

7. No employee of the defendant had notice of any danger to the plaintiff from Clementine Russell at the time of her release prior to 10 October 1981.

8. No employee of defendant had the power of authority to prevent the release of Clementine Russell at any time complained of.

9. The assault on the plaintiff by Clementine Russell was not reasonably foreseeable by an employee of defendant on or prior to 10 October 1981. Foreseeability is an essential element of proximate cause. *Williams v. Boulerice*, 268 N.C. 62, 149 S.E. 2d 590 (1966).

The Commission made only one conclusion of law:

There has been no showing of negligence upon the part of an employee of defendant which proximately caused injury to plaintiff. Plaintiff's claim must therefore be denied.

Plaintiff challenged only Findings of Fact Nos. 7, 8, and 9. The plaintiff did not challenge Findings of Fact Nos. 4, 5, and 6. The plaintiff also failed to challenge the conclusion of law made by the Commission. These unchallenged findings of fact and conclusion of law support the decision of the Industrial Commission to deny plaintiff's claim.

Our review of the record below and the transcript demonstrates that plaintiff simply failed to prove any negligence by the defendant, Department of Human Resources. The plaintiff never presented evidence of any duty of care violated by defendant's employee, Dr. Royal.

Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. (Citations omitted.) The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to endanger the person or property of others. (Citation omitted.) This rule of the common law arises out of the concept that every person is under the

> general duty to so act, or to use that which he controls, as not to injure another. Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part.

Pinnix v. Toomey, 242 N.C. 358, 362, 87 S.E. 2d 893, 897-98 (1955).

There is no evidence that Dr. Royal violated any duty owed to plaintiff or to the public. Russell was committed to Dorothea Dix Hospital under N.C. Gen. Stat. § 15A-1002, which provides that a defendant may be committed to a State mental facility for observation and treatment necessary to determine the defendant's capacity to proceed. The defendant may not be committed to the State mental health facility for more than 60 days. N.C. Gen. Stat. § 15A-1002(b)(2). Dr. Royal testified that Clementine Russell was committed to the Forensic Unit at Dorothea Dix by the District Court of Warren County on 19 August 1981. She was confined there until 22 September 1981 for the purpose of an evaluation regarding her competency to proceed to trial. Dr. Royal further testified that the Forensic Unit is not a treatment facility where patients are retained for treatment. If the patient is in need of continued long-term treatment, "we recommend that to the court, that they initiate the proper procedure for admission to the regional hospital for which that patient belongs or if we think they need some kind of treatment, outpatient or whatever, we recommend that to the Court." Dr. Royal prepared the discharge summary for Russell and sent copies of it to the presiding judge, the district attorney, the defense attorney, the Mental Health Center in the county from which she came, the Department of Social Services in that county, and to the patient. We find that Dr. Royal did all that he was required to do under the law. He performed the evaluation and made his report as he was required to do under N.C. Gen. Stat. § 15A-1002. He did not have the authority to involuntarily commit Russell to a treatment facility for an extended period of time. Under the controlling statutes in effect during 1981, N.C. Gen. Stat. § 122-58.1, *et seq.*, involuntary commitment was a judicial proceeding with the commitment decision being made by a judicial official. (The 1985 Session of the General Assembly revised many mental health statutes, repealing Chapter 122. The new involuntary commitment statutes, found in

Chapter 122C, continue the policy of involuntary commitment decisions being made by judicial officials.)

Plaintiff contends that the defendant is liable nonetheless because, under N.C. Gen. Stat. § 15A-1002, Dr. Royal could have confined Russell for a maximum of 60 days, which would have had Russell confined until 18 October 1981, 10 days past the date Russell assaulted plaintiff. Plaintiff argues that the State is liable because the State could have confined Russell to a date beyond the date upon which the assault occurred. This contention is without merit. Dr. Royal testified that Russell was returned to the court in Warren County as soon as all of the requirements of the 19 August 1981 court order had been met. He further testified that so many defendants were sent to the Forensic Unit for evaluation that, if all were kept for 60 days, the facility would be overwhelmed. For that reason, individuals are discharged from the unit as soon as the court-ordered evaluations have been completed, which, in some cases, would be as short as 24 hours.

We find that Dr. Royal completely fulfilled his duty under the law to evaluate Russell and submit an evaluation to the District Court of Warren County. No legal duty of care was violated, and the Industrial Commission correctly denied plaintiff's claim.

In a separate assignment of error, the plaintiff contends that the Commission erred in not receiving into evidence a report made by Dr. Royal on 13 October 1981, three days after Russell assaulted plaintiff. Plaintiff contends the report should have been admitted because this subsequent report reaffirmed the diagnosis Dr. Royal had made about Russell in September.

Plaintiff failed to include in the record or the transcript the exhibit to which this argument refers. This omission appears to have been a clerical error on the plaintiff's part because the transcript includes two copies of the 22 September discharge report. Nonetheless, we are unable to consider plaintiff's argument because Rule 9(a) and Rule 18 of the Rules of Appellate Procedure require that review in this Court is "solely upon the record on appeal and the verbatim transcript of proceedings." N.C. Rules of Appellate Procedure, Rule 9(a). The tendered exhibit was not made a part of the record or the transcript, and we cannot review the denial of its admission. We observe, however, that the plaintiff's brief appears to show no basis for a finding of

prejudicial error, given the date of the report (after the injury to plaintiff), and the nature of the information contained therein (repetitious of the September report).

For the reasons stated, the decision of the Industrial Commission is affirmed.

Affirmed.

Judge GREENE concurs.

Judge PHILLIPS concurs in the result.

STATE OF NORTH CAROLINA v. TRAVIS OSBORNE PHILLIPS

No. 8724SC722

(Filed 2 February 1988)

1. **Narcotics § 1.3— coffee as food or eatable substance**

Coffee is a food or eatable substance within the meaning of N.C.G.S. § 14-401.11(a), which prohibits placing a controlled substance in a position of human accessibility.

2. **Criminal Law § 73— placing LSD in coffee—hearsay statement of coconspirator—admissible**

The trial court did not err in a prosecution for placing LSD in a pot of coffee at a restaurant at Appalachian State University by allowing a witness to testify that a coconspirator had said "we are going to do this." Statements made in reassurance that the transaction which is the subject of the conspiracy will indeed occur are made in furtherance of the conspiracy and are therefore admissible as an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 801(d)(E).

3. **Criminal Law § 102.7— putting LSD in coffeepot—argument by prosecutor—no error**

In a prosecution for putting LSD in a coffeepot at Appalachian State University, the district attorney's closing argument concerning his opinion as to who was telling the truth and his personal reasons for granting concessions to both of the alleged codefendants did not rise to the level of prejudice which would require the granting of a new trial.

4. Criminal Law § 138.8— sentencing—victim impact statements—violation of constitutional rights

While N.C.G.S. § 15A-825 specifically authorizes the use by the trial court of victim impact statements, that statute cannot supersede defendant's constitutional right to confront and cross-examine witnesses against him; a defendant must therefore be given a reasonable notice and knowledge of the statements that are to be used against him during the sentencing phase so that he may have the opportunity to call to the sentencing hearing the victim or other party making the written statement. If defendant does not wish to call the party, he then waives his right to cross-examine that party at the hearing and the district attorney may present the statements as allowed by statute. Sixth and Fourteenth Amendments to the U. S. Constitution, Art. I, § 17 of the North Carolina Constitution.

APPEAL by defendant from *Griffin (Kenneth A.), Judge.* Judgment entered 27 February 1987 in Superior Court, WATAUGA County. Heard in the Court of Appeals 13 January 1988.

On 12 May 1986, defendant, Brian Patrick Truitt, Stephen Gregory Travis and two others were at Truitt's apartment in Boone, North Carolina. While at the apartment, they took Lysergic Acid Diethylamide (LSD) which defendant had received in the mail from California. Early the next morning, defendant and Stephen Travis discussed doing something "outrageous" because it was the end of the school year. Stephen Travis suggested that they put LSD in a pot of coffee at the Sweet Shop, a restaurant located on the campus of Appalachian State University. Defendant and Stephen Travis diluted the LSD into a cup of boiling water. Defendant and Travis then started to walk out of the apartment and Travis said "we are going to do this." Truitt testified at trial that he told defendant and Stephen Travis that what they were going to do was wrong and he wanted no part of it. Defendant and Stephen Travis then left Truitt's apartment and went to the Sweet Shop. Travis later called Truitt and asked him to bring a newspaper to the restaurant. Brian Truitt took the paper to the Sweet Shop but left soon thereafter. While Truitt was there he noticed that defendant and Travis still had the cup containing LSD liquid.

At least eight people drank the coffee at the Sweet Shop that morning and had drug induced hallucinations. Two of the eight drove vehicles after consuming the coffee and some had to be hospitalized. The coffee in one of the cups sold to a customer was analyzed and found to contain LSD.

Defendant was indicted by a grand jury and charged with placing a controlled substance in a position of human accessibility in violation of G.S. 14-401.11(a)(2) and possession of a controlled substance in violation of G.S. 90-95(a)(3). Brian Truitt testified at the trial under a grant of immunity. Defendant was found guilty of both counts. At the sentencing hearing, the State produced evidence that defendant had three previous convictions. The State, through the district's Victim-Witness Assistant Ben Blackburn, also presented victim impact statements from two of the parties who consumed the coffee on the morning of 13 May 1986. Blackburn also testified concerning economic losses suffered by some of the victims and Appalachian State University.

Defendant was sentenced to a term of ten years imprisonment for his conviction of violating G.S. 14-401.11(a)(2), seven years in excess of the presumptive term. For his conviction of violating G.S. 90-95(a)(3), defendant received a sentence of five years in prison, three years more than the presumptive term. From this judgment, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Charles J. Murray, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Louis D. Bilionis, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the State failed to prove a crime under G.S. 14-401.11(a)(2) because coffee is not a "food or eatable substance." We disagree.

G.S. 14-401.11(a) states that

> It shall be unlawful for any person to knowingly distribute, sell, give away or otherwise cause to be placed in a position of human accessibility, any food or eatable substance which that person knows to contain:
>
> * * * *
>
> (2) Any controlled substance included in any schedule of the Controlled Substances Act.

Defendant's argument that coffee is a "beverage" and not a "food or eatable substance" is unpersuasive.

> The word "food" is a very general term and applies to all that is eaten for the nourishment of the body. . . . The term has been held to include . . . *coffee grounds* . . . and numerous other articles used for entering into the composition of, or intended as an ingredient in, the preparation of food for man.

35 Am. Jur. 2d *Food* § 1 (1967) (emphasis added). Implying that the mixture of coffee grounds and water does not create a food item pursuant to the statute is ridiculous. The legislature obviously intended for a beverage such as coffee to be included within the State's definition of "food or an eatable substance." Defendant's argument is totally without merit.

[2] Defendant also contends that the trial court erred in allowing Brian Truitt to testify, in violation of the hearsay rule, that as defendant and Stephen Travis were leaving Truitt's apartment, Stephen Travis stated "we are going to do this." We disagree.

"A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . a statement by a coconspirator of such party during the course and in furtherance of the conspiracy." G.S. 8C-1, Rule 801(d)(E). Defendant argues that this statement was not "in furtherance of the conspiracy" and thus was inadmissible. Statements made in reassurance that the transaction which is the subject of the conspiracy will indeed occur are made in furtherance of the conspiracy. *State v. Lipford*, 81 N.C. App. 464, 344 S.E. 2d 307 (1986). Stephen Travis's statement "we are going to do this" involves such reassurance. The trial court did not err in admitting the statement.

[3] Defendant next contends that "by permitting the District Attorney to argue, over objection, (A) His personal opinion that Brian Truitt was telling the truth and (B) His personal reasons, unsupported by the evidence, for granting concessions to both of the alleged codefendants, the trial court committed reversible error." We disagree.

At trial, defendant objected to the following portion of the district attorney's closing argument:

Now, Ladies and Gentlemen, you're citizens of our community, and you have a right for public officials such as myself to give you an accounting of my activities. And let me ask you this, a few questions. If this case had happened and if you were charged with the responsibility of overseeing an investigation and trying to solve it, a crime so terrible as this, and if it got to the point where it appeared to you in order to solve a crime that the honest people, those who were altogether innocent, knew nothing, and that the confederacy of criminals must somehow be penetrated, then what would you have done? Would it have been reasonable for you to say among the three possibilities, Truitt, Phillips, or Travis, which one was most likely to be receptive to a grant of immunity?

Mr. Phillips has pleaded not guilty, in effect saying I didn't do anything.

Mr. Travis said, I did part of it, but not all. Be the judge of what he says.

And the other person appeared receptive to come here and tell us things. I thought that was a valid consideration when this decision was made among the three possibilities, which person appeared more receptive. And I thought it was a legitimate thing for me to consider among the three possibilities, who is most likely to tell the truth, and I made a decision. That's very much an issue now in something that you need to decide. Among the three possibilities, and there were only three, Truitt, Phillips, and Travis, who was most likely to tell the truth.

You have before you the comparison, the ability to compare what Travis said. You heard his testimony. We made a plea arrangement with him which in effect required him to come here, and I did so for several purposes, one of which I thought it very relevant that you hear from the Defendant, and the only way that I—I can't make a Defendant testify, but the only way we can is let him plead to one, and testify truthfully, and it happened.

So you have now the basis of comparing. Do you believe Truitt more so than Travis? I made a decision based on how

we—those of us who worked with this case, visualized who was most likely to tell the truth.

MR. SPEED: I object to his testimony, Your Honor.

THE COURT: Sir?

MR. SPEED: I'd object to his testimony during his argument.

THE COURT: Objection overruled.

These statements by the district attorney do not rise to the abusive and inflammatory level creating such prejudice which would require the granting of a new trial for defendant. *See State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971). Defendant's contention is without merit.

[4] Defendant's final contention deals with the use of victim impact statements during the sentencing phase of the trial. Defendant argues that "the court, by unquestioningly receiving and considering victim impact statements offered at sentencing in documentary and testimonial form, erred in violation of the defendant's right to due process, his right to confrontation, and his rights under the Fair Sentencing Act."

G.S. 15A-825 directly allows for and, in fact, encourages the use of victim impact statements.

> To the extent reasonably possible and subject to available resources, the employees of law-enforcement agencies, the prosecutorial system, the judicial system, and the correctional system should make a reasonable effort to assure that each victim and witness within their jurisdiction:
>
> * * * *
>
> (9) Has a victim impact statement prepared for consideration by the court.

G.S. 15A-825. The use of victim impact statements, however, is not without limitation.

G.S. 15A-1334(b) specifically states that at the sentencing hearing "[t]he defendant and prosecutor may present witnesses and arguments on facts relevant to the sentencing decision *and*

may cross-examine the other party's witnesses." (Emphasis added.) Also, it is well established in North Carolina that "[a]ll 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." *State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962). Further, the Sixth Amendment right to confront witnesses and cross-examine them is a fundamental right made applicable to the states by the Fourteenth Amendment. U.S. Const. amends. 6 and 14; *State v. Bumper*, 275 N.C. 670, 170 S.E. 2d 457 (1969). The "law of the land" guaranteed by Article I, Section 17 of the North Carolina Constitution is synonymous with "due process" and it preserves the right of confrontation and cross-examination to an accused party. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970).

Allowing a district attorney to conceal victim impact statements until the sentencing hearing where the victim or other party in the written statement may not be at the hearing would be in direct conflict with a defendant's established rights. The legislature has the authority and power to create or alter any rule of evidence *except* those which have been expressly sanctioned by the Constitution such as the right of confrontation or cross-examination of opposing witnesses. *State v. Scoggin*, 236 N.C. 19, 72 S.E. 2d 54 (1952). More directly, while G.S. 15A-825 specifically authorizes the use by the trial court of victim impact statements, this statute cannot supersede defendant's constitutional right to confront and cross-examine the witnesses against him.

Realizing that these statements can be introduced at the sentencing hearing without the victim actually being present, we hold that in order to preserve a defendant's constitutional right to confrontation and cross-examination, a defendant must be given reasonable notice and knowledge of the statements that are to be used against him during the sentencing phase. This would allow a defendant time to gather evidence for refutation. It would also give a defendant the opportunity to call to the sentencing hearing the victim or other party making the written statement, thus allowing him his right to confront and cross-examine. If the defendant does not wish to call the party, then he waives his right to cross-examine that party at the hearing and the district

attorney may present the statements to the court as allowed by statute.

By way of dicta, we emphasize that in the case *sub judice* we fail to see how defendant was prejudiced by the trial court's action. However, to hold otherwise would violate the fundamental fairness standard implicit in the due process clause of the Fourteenth Amendment.

This case is remanded for a new sentencing hearing where defendant shall have reasonable advance notice of what will be used against him.

No error at trial; remanded for resentencing.

Judges WELLS and SMITH concur.

JACQUELIN S. ALLSUP v. GUY L. ALLSUP, JR.

No. 8726DC666

(Filed 2 February 1988)

1. **Divorce and Alimony § 21.8— South Carolina alimony order—registered under URESA**

The North Carolina court did not err by confirming registration of South Carolina alimony orders under North Carolina's Uniform Reciprocal Enforcement of Support Act because North Carolina's version of URESA clearly embraces alimony orders. N.C.G.S. § 52A-9.

2. **Constitutional Law § 26.6; Divorce and Alimony § 21.8— registration of modifiable foreign order—no full faith and credit protection—comity recognition**

Registration under N.C.G.S. § 52A-26 *et seq.* cannot entitle a foreign alimony order that is retroactively not modifiable in the jurisdiction of its rendition to full faith and credit protection under the U. S. Constitution; however, states are free to recognize non-final foreign judgments under the principle of comity, even though not required to do so by the full faith and credit clause.

3. **Divorce and Alimony § 21.8— foreign alimony order—rights and defenses available in original jurisdiction**

An obligee may not strip an obligor of rights and defenses otherwise available by the simple expedient of litigating under URESA rather than N.C.G.S. § 50-16.9(c); at any enforcement proceeding under N.C.G.S. § 52A-50 the obligor may apply for a new order modifying or superseding the foreign

order to the extent that it could have been so modified in the jurisdiction where granted, and N.C. law applies prospectively from the date of registration.

4. **Constitutional Law § 26.6; Divorce and Alimony § 21.8— foreign alimony order —full faith and credit—harmless error**

In an action involving enforcement of disputed South Carolina alimony orders, the North Carolina trial court's error in ruling that the disputed orders were entitled to full faith and credit was harmless and no denial of due process rights ensued where the trial court did no more than recognize those portions of the foreign orders which it found duly and properly rendered in South Carolina, as comity entitled it to do.

5. **Constitutional Law § 20; Divorce and Alimony § 21.8— foreign alimony order enforceable in North Carolina—no violation of equal protection**

Unequal protection did not result from enforcement by the North Carolina courts of an alimony award obtained in South Carolina merely because South Carolina's law of alimony is not identical to North Carolina's.

6. **Divorce and Alimony § 20.3— enforcement of foreign alimony award—attorney's fee—error**

The North Carolina court erred by awarding attorney fees to the petitioner in an action for the enforcement of South Carolina alimony orders in North Carolina.

APPEAL by respondent from *Bissell, Marilyn R., Judge.* Order entered 29 December 1986 in MECKLENBURG County District Court. Heard in the Court of Appeals 4 January 1988.

This protracted domestic relations matter began in South Carolina in 1978, and since that time there have been some 44 motions filed and numerous orders entered. We summarize the history of the proceedings antecedent to this appeal as follows.

On 29 November 1979 the Family Court of the Fourth Judicial Circuit of South Carolina granted the parties a divorce based on one year's separation and, *inter alia*, ordered respondent to pay petitioner alimony in the sum of $600.00. Shortly after the rendition of this order the parties privately agreed that Ms. Allsup would retain, instead of transmitting to respondent, the social security payments she was receiving in respect to her two minor children and because of her disability (she is a paraplegic), and that respondent would forward each month to petitioner $209.69, representing the difference between the retained social security payment and the $600.00 monthly alimony decreed. By Order entered 15 April 1981 the South Carolina Family Court adopted the

aforesaid private agreement of the parties. In October of 1984 Ms. Allsup filed a Rule to Show Cause, alleging that respondent had failed to comply with the terms of the 15 April 1981 Order. A hearing was held and, on 13 October 1984, the South Carolina Family Court ordered, *inter alia*, that respondent pay the sum of $1,120.00 in arrearages and increase his alimony payments by $280.00 per month—this because petitioner's social security allowance had decreased by that sum when the elder of her two children attained majority. Finally, by Order entered *ex parte* on 15 November 1984 the South Carolina Family Court ruled that respondent was in contempt, issued a warrant for his arrest, and ordered him to pay $1,605.00 in arrearages.

On 12 March 1985 petitioner filed, pursuant to N.C. Gen. Stat. § 52A-26 *et seq.* in Mecklenburg County, North Carolina, a Statement of Fact for Registration of Foreign Support Order and a Notice of Registration of Foreign Support Order, seeking to register the four South Carolina orders referenced above under North Carolina's Uniform Reciprocal Enforcement of Support Act (URESA). Petitioner's Registration of Foreign Support Order was confirmed by Order entered 10 July 1985, then set aside on or about 24 July, then reinstated on 12 August 1985. Thereafter, the parties engaged in discovery. On 17 July 1986 petitioner filed her First Set of Motions seeking, *inter alia*, alimony arrearages, attorney fees, and asking that respondent be adjudged in willful contempt for failure to comply with the South Carolina alimony orders. Mr. Allsup responded by filing a Motion to Modify and Reply to Motion for Contempt, seeking a modification of the alimony award. Soon thereafter respondent also filed a Motion to Amend Pleadings and an affidavit of financial standing. The matter came on for hearing in Mecklenburg County District Court on 20 August 1986. On 29 December 1986, the district court entered the Order and Judgment from which this appeal was taken.

Petree Stockton & Robinson, by J. Neil Robinson, for petitioner-appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., and Barbara J. Hellenschmidt, for respondent-appellant.

WELLS, Judge.

In the 29 December Order appealed from the court below ordered, *inter alia*, (1) that the South Carolina alimony support

orders were entitled to full faith and credit and enforcement in North Carolina, (2) that respondent pay petitioner $11,829.99 in alimony arrearages owing through 1 September 1986, (3) that respondent's alimony obligation continue to accrue subsequent to 1 September in the amount of $769.69 per month, (4) that respondent pay petitioner $800.00 in attorney fees, (5) that petitioner's Motion for Contempt be denied, (6) and that respondent's Motion to Amend be allowed and his Motion for Modification be determined at a subsequent hearing. Respondent assigns multifarious errors to the trial court's order and judgment. For the reasons set forth below, we affirm the result of the trial court's decree as to respondent's support obligation. We reverse the award of attorney fees.

[1] Respondent contends that the trial court erred in confirming registration of the South Carolina alimony orders because (1) the provisions of North Carolina's URESA do not apply to foreign alimony orders and (2) orders pursuant to URESA violate respondent's right to due process and equal protection under the Constitutions of the United States and North Carolina. We disagree. North Carolina's version of URESA clearly embraces alimony orders. N.C. Gen. Stat. § 52A-9 expressly provides: "*All* duties of support including the duty to pay arrearages are enforceable by action irrespective of relationship between the obligor and obligee." (Emphasis added.) We agree with Professor Lee that the language "all duties of support" of G.S. § 52A-9 includes "all common law duties of support and all statutory duties of support, duties growing out of judgments or decrees for alimony or child support, both as to amounts in arrears and as to amounts owed currently or in the future." 2 R. E. Lee, *North Carolina Family Law* § 169 at 342 (4th ed. 1980).

[2] Respondent's contention that registration of the out-of-state alimony orders under North Carolina's URESA results in a denial to him of due process and equal protection rights cannot succeed. G.S. § 52A-30(a) of our URESA provides:

> (a) Upon registration, the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State. It has the same effect and is subject to the same procedures, defenses, and proceedings

> for reopening, vacating or staying as a support order of this State and may be enforced and satisfied in like manner.

Respondent contends, and petitioner concurs, that once a foreign alimony order is registered under North Carolina's URESA, such order loses its identity as an order of the foreign court and becomes an order of the North Carolina court for all purposes. The thrust of respondent's complaint is that G.S. § 52A-30 impermissibly authorizes the extension of full faith and credit to alimony orders that are modifiable as to past-due installments in South Carolina, strips retroactively (by transubstantiating the foreign orders into North Carolina ones) the obligor of rights and defenses available to him in South Carolina in a manner inconsistent with G.S. § 50-16.9(c), and authorizes North Carolina courts to enforce modifiable foreign orders without a hearing in North Carolina as to the rights and duties established by those orders. Petitioner answers that respondent had an opportunity to present evidence at each and every proceeding conducted in South Carolina and that respondent is not entitled to a new day in court in North Carolina. We are thus called upon not only to appraise the merits of a due process and an equal protection challenge to G.S. § 52A-30 but also to construe that statute *in pari materia* with G.S. § 50-16.9(c), which latter statute provides as follows:

> (c) When an order for alimony has been entered by a court of another jurisdiction, a court of this State may, upon gaining jurisdiction over the person of both parties in a civil action instituted for that purpose, and upon a showing of changed circumstances, enter a new order for alimony which modifies or supersedes such order for alimony *to the extent that it could have been so modified in the jurisdiction where granted.* [Emphasis added.]

We agree with respondent that registration under G.S. § 52A-26 *et seq.* cannot entitle a foreign alimony order that is retroactively modifiable in the jurisdiction of its rendition to the full faith and credit protection of the United States Constitution, since the full faith and credit clause is applicable only to judgments that are unconditional and certain, or at least capable of being made so. 47 Am. Jur. 2d *Judgments* §§ 1267-68 (1969); Lee, *supra*, § 152 at 243 and § 167. Under South Carolina law alimony awards are fully modifiable as to past-due installments, *Alliegro*

v. Alliegro, 287 S.C. 154, 337 S.E. 2d 252 (1985), and therefore conditional and uncertain. However, states are free to recognize such non-final foreign judgments under the principle of comity, even though not required to do so by the full faith and credit clause. 47 Am. Jur. 2d, *supra*, § 1270; Lee, *supra*, § 167 at 323; *see also Ellison v. Hunsinger*, 237 N.C. 619, 75 S.E. 2d 884 (1953). We hold that G.S. § 52A-30 authorizes the courts of our State by comity to extend to foreign alimony orders the selfsame recognition and effect due them in the jurisdiction of their rendition.

[3] This Court held in *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E. 2d 633 (1977), that the provisions of G.S. § 52A-29 and G.S. § 52A-30 contemplate a two-step process: (1) registration and (2) enforcement. The registration is a ministerial duty of the clerk not exercising any power over the obligor's person or property. *Id.* Such registration cannot lawfully transform foreign alimony orders that are modifiable as to past-due installments in the jurisdiction of rendition into North Carolina orders subject to North Carolina law retrospectively. On the contrary, alimony orders registered pursuant to G.S. § 52A-26 *et seq.* retain, for their life span prior to registration, their foreign identity, and the laws of the foreign jurisdiction apply in any subsequent enforcement proceeding. This means that at any enforcement proceeding under G.S. § 52A-30 the obligor may apply, just as at a civil action instituted under G.S. § 50-16.9(c), for a new order modifying or superseding the foreign order "to the extent that it could have been so modified in the jurisdiction where granted." North Carolina law applies prospectively from the date of registration. An obligee may not strip an obligor of rights and defenses otherwise available by the simple expedient of litigating under URESA rather than G.S. § 50-16.9(c).

[4] In the case at bar, even though the trial court technically erred in ruling that the disputed out-of-state alimony orders were entitled to full faith and credit, such error was harmless, and no denial of due process rights ensued. The trial court specifically concluded that the contempt provisions of the South Carolina order of November 1984 were not entitled to enforcement because respondent had not been served as required under South Carolina law. The trial court also ruled to allow respondent's Motion to Amend and to hold open for a later determination his Motion for Modification. It is clear that the trial court did no more

than recognize (as comity entitled it to do) those portions of the foreign orders which it found duly and properly rendered in South Carolina.

[5] Respondent's equal protection argument is meritless. It is idle to contend that unequal protection results where our court enforces an alimony decree obtained in South Carolina merely because South Carolina's law of alimony is not identical to ours. A wife need not relitigate the underlying merits of her claim in every state into which her recalcitrant spouse may stray. Lee, *supra*, § 167 at 324.

[6] We have carefully considered respondent's other assignments of error and find them meritless, bar one. We agree with respondent that the award of attorney fees was without basis in law. Petitioner candidly concedes in his brief that he can find no authority to support this award. Accordingly, we reverse the award of $800.00 in attorney fees.

The order appealed from is

Affirmed in part; reversed in part.

Judges ARNOLD and SMITH concur.

DARLENE SUGGS v. RUTH THOMPKINS NORRIS, ADMINISTRATRIX CTA OF THE ESTATE OF JUNIOR EARL NORRIS

No. 8713SC540

(Filed 2 February 1988)

1. Contracts § 6.2; Quasi Contracts and Restitution § 2— cohabiting couple— agreements regarding finances and property—enforceable if consideration not sexual services

Agreements regarding the finances and property of an unmarried cohabiting couple, whether express or implied, are enforceable as long as sexual services or promises thereof do not provide the consideration for such agreements; moreover, where appropriate, the equitable remedies of constructive and resulting trusts should be available as should recovery on *quantum meruit*.

2. Quasi Contracts and Restitution § 2.1— unmarried cohabiting couple—business relationship preceding cohabitation—quantum meruit not barred

In an action to recover the value of services involving companionship and housekeeping as well as the operation of a produce business, the trial court did not err by denying defendant's motion for a judgment n.o.v. on the *quantum meruit* claim for business services where there was evidence that plaintiff began work for defendant in his produce business several years before she began cohabiting with him. There was therefore sufficient evidence for the jury to have inferred that plaintiff's work comprised a business relationship with decedent which was separate and independent from their cohabiting relationship.

3. Quasi Contracts and Restitution § 2.1— unmarried cohabiting couple—business services not gratuitous

The trial court did not err in submitting a *quantum meruit* issue to the jury where the evidence was sufficient to permit the jury to find a mutual understanding between plaintiff and decedent that plaintiff's work was not free of charge and where plaintiff's work was not of the character usually found to be performed gratuitously.

APPEAL by defendant from *Stephens, Donald W., Judge.* Judgment entered 29 January 1987 in COLUMBUS County Superior Court. Heard in the Court of Appeals 1 December 1987.

Plaintiff instituted this action to recover the value of services rendered to decedent, Junior Earl Norris, involving both companionship and housekeeping services as well as her operation of a produce business on decedent's behalf. The action came on for trial before a jury on 12 January 1987. At the close of all the evidence, defendant moved for a directed verdict on all issues which motion was granted with respect to the claim for relief for companionship services. The motion was denied with respect to plaintiff's claim for compensation for services rendered in raising, harvesting and selling the produce. A Motion for Directed Verdict on a claim to recover the reasonable value of decedent's farm was likewise denied. The trial court refused to submit to the jury any issues concerning plaintiff's recovery for housecleaning and domestic services. The jury returned a verdict finding that plaintiff had failed to show the existence of any express or implied-in-fact contract between plaintiff and decedent regarding the division of earnings, profits and assets derived from the produce business. The jury did find however that plaintiff was entitled to recover $35,000 on a *quantum meruit* or quasi-contract theory for her services "involving the raising, harvesting and sale of pro-

duce." At the end of trial, defendant moved for judgment notwithstanding the verdict and, in the alternative, a new trial. From a denial of these motions, defendant appeals.

Williamson & Walton, by Benton H. Walton, III, for plaintiff-appellee.

C. Franklin Stanley, Jr. for defendant-appellant.

WELLS, Judge.

The overriding question presented by this appeal is whether public policy forbids the recovery by a plaintiff partner to an unmarried but cohabiting or meretricious relationship, from the other partner's estate, for services rendered to or benefits conferred upon the other partner through the plaintiff's work in the operation of a joint business when the business proceeds were utilized to enrich the estate of the deceased partner.

Defendant argues under her first three assignments of error that any agreement between plaintiff and the decedent providing compensation to plaintiff for her efforts in the raising and harvesting of produce was void as against public policy because it arose out of the couple's illegal cohabitation. While it is well-settled that no recovery can be had under either a contractual or restitutionary (*quantum meruit*) theory arising out of a contract or circumstances which violate public policy, *Pierce v. Coble*, 161 N.C. 300, 77 S.E. 350 (1913), defendant's application of the rule to the present case is misplaced.

This Court has made it clear that we do not approve of or endorse adulterous meretricious affairs, *Collins v. Davis*, 68 N.C. App. 588, 315 S.E. 2d 759, *affirmed*, 312 N.C. 324, 315 S.E. 2d 759 (1984). We made it clear in *Collins*, however, that cohabiting but unmarried individuals are capable of "entering into enforceable express or implied contracts for the purchase and improvement of houses, or for the loan and repayment of money." 68 N.C. App. at 592, 315 S.E. 2d at 762. Judge Phillips, writing for the majority, in *Collins*, was careful to point out that if illicit sexual intercourse had provided the consideration for the contract or implied agreement, all claims arising therefrom, having been founded on illegal consideration, would then be unenforceable.

While our research has disclosed no other North Carolina cases which address this specific issue, we do find considerable guidance in the decisional law of other states. Most notable is Justice Tobriner's landmark decision in *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P. 2d 106, 134 Cal. Rptr. 815 (1976) which held that express contracts between unmarried cohabiting individuals are enforceable unless the same are based solely on sexual services. 18 Cal. 3d at 684, 557 P. 2d at 122, 134 Cal. Rptr. at 831.

The *Marvin* Court also held that an unmarried couple may, by words and conduct, create an implied-in-fact agreement regarding the disposition of their mutual properties and money as well as an implied agreement of partnership or joint venture. *Id.* Finally, the court endorsed the use of constructive trusts wherever appropriate and recovery in *quantum meruit* where the plaintiff can show that the services were rendered with an expectation of monetary compensation. *Id.*

Other jurisdictions have fashioned and adhered to similar rules. In *Kinkenon v. Hue*, 207 Neb. 698, 301 N.W. 2d 77 (1981), the Nebraska Supreme Court confirmed an earlier rule that while bargains made in whole or in part for consideration of sexual intercourse are illegal, any agreements not resting on such consideration, regardless of the marital status of the two individuals, are enforceable. *Id.* at 703, 301 N.W. 2d at 80.

Likewise, the New Jersey Supreme Court held as enforceable an oral agreement between two adult unmarried partners where the agreement was not based "explicitly or inseparably" on sexual services. *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A. 2d 902 (1979). In *Fernandez v. Garza*, 88 Ariz. 214, 354 P. 2d 260 (1960), the Arizona Supreme Court held that plaintiff's meretricious or unmarried cohabitation with decedent did not bar the enforcement of a partnership agreement wherein the parties agreed to share their property and profits equally and where such was not based upon sexual services as consideration. *See also Restatement of Contracts* § 589 (1932); Comment, 90 *Harvard L. Rev.* 1708 (1977).

[1] We now make clear and adopt the rule that agreements regarding the finances and property of an unmarried but cohabiting couple, whether express or implied, are enforceable as long as sexual services or promises thereof do not provide the considera-

tion for such agreements. Moreover, where appropriate, the equitable remedies of constructive and resulting trusts should be available as should recovery under a quasi-contractual theory on *quantum meruit.*

[2] In the present case, the question is before this Court on an appeal of the trial court's denial of defendant's Motion for Judgment Notwithstanding the Verdict; therefore, our standard of review is whether the evidence viewed in the light most favorable to plaintiff is sufficient to support the jury verdict. *Wallace v. Evans,* 60 N.C. App. 145, 298 S.E. 2d 193 (1982). Applying the foregoing standard, we find that plaintiff's evidence that she began to work for the decedent in his produce business several years before she began cohabiting with him and that at the time she began work she believed the two of them were "partners" in the business, was sufficient evidence for the jury to have inferred that plaintiff's work comprised a business relationship with decedent which was separate and independent from and of their cohabiting relationship. Therefore, the jury may have inferred that sexual services did not provide the consideration for plaintiff's claim. We therefore hold that plaintiff's claim for a *quantum meruit* recovery was not barred as being against public policy. Defendant's first three assignments of error are overruled.

[3] Defendant next argues under assignments of error 4 and 5 that the trial court erred in submitting a *quantum meruit* recovery issue to the jury because any services rendered by plaintiff were either gratuitous or incidental to an illegal relationship. As we have already addressed the issue of illegality we are concerned here only with the question of whether there existed sufficient evidence to submit the issue of recovery in *quantum meruit* to the jury.

The trial court placed the following issue regarding a quasi-contract or *quantum meruit* recovery before the jury:

> *Issue Four:*
>
> 4. Did DARLENE SUGGS render services to JUNIOR EARL NORRIS involving the raising, harvesting and sale of produce under such circumstances that the Estate of JUNIOR EARL NORRIS should be required to pay for them?
>
> ANSWER: Yes

Recovery on *quantum meruit* requires the establishment of an implied contract, *Lindley v. Frazier*, 231 N.C. 44, 55 S.E. 2d 815 (1949). The contract may be one implied-in-fact where the conduct of the parties clearly indicates their intention to create a contract or it may be implied-in-law based on the restitutionary theory of quasi-contract which operates to prevent unjust enrichment. D. Dobbs, *Handbook on the Law of Remedies* § 4.2 (1973). An implied-in-law theory required the plaintiff to establish that services were rendered and accepted between the two parties with the mutual understanding that plaintiff was to be compensated for her efforts. *Twiford v. Waterfield*, 240 N.C. 582, 83 S.E. 2d 548 (1954); *Lindley, supra.* Moreover, plaintiff's efforts must not have been gratuitous as is generally presumed where services are rendered between family or spousal members. *Twiford, supra; Francis v. Francis*, 223 N.C. 401, 26 S.E. 2d 907 (1943).

In the present case, the evidence clearly showed that the plaintiff had from 1973 until the death of the decedent in 1983 operated a produce route for and with the decedent. According to several witnesses' testimony, plaintiff had worked decedent's farm, disced and cultivated the soil, and harvested and marketed the produce. Plaintiff, working primarily without the decedent's aid, drove the produce to various markets over a 60 mile route. She handled all finances and deposited them in the couple's joint banking account. Finally, the evidence showed that the decedent, an alcoholic, depended almost entirely on plaintiff's work in the produce business and as well her care of him while he was ill. Because of plaintiff's efforts the couple had amassed seven vehicles valued at $20,000; some farm equipment valued at $4,000; $8,000 in cash in the account, and all debts which had attached to the farm when plaintiff began working with decedent in 1973 were paid—all due to plaintiff's efforts. Additionally, plaintiff testified that when she began work with the decedent in 1973 she believed they were partners and that she was entitled to share in one-half the profits.

The foregoing evidence clearly establishes a set of facts sufficient to have submitted a quasi-contractual issue to the jury and from which the jury could have inferred a mutual understanding between plaintiff and the decedent that she would be remunerated for her services. Plaintiff's efforts conferred many years of

benefits on the decedent and the decedent, by all accounts, willingly accepted those benefits.

Because the evidence viewed in the light most favorable to plaintiff was clearly sufficient to permit the jury to find a mutual understanding between plaintiff and decedent that plaintiff's work in the produce business was not free of charge and because plaintiff's work in the produce business was not of the character usually found to be performed gratuitously, *Twiford, supra; Francis, supra,* defendant's Motions for Directed Verdict and Judgment Notwithstanding the Verdict were properly denied.

No error.

Judges PHILLIPS and PARKER concur.

STATE OF NORTH CAROLINA v. CALVIN ANDERSON

No. 873SC612

(Filed 2 February 1988)

1. **Criminal Law § 89.6— misuse of county property—decision of appeals referee on unemployment benefits—not admissible**

The trial court did not err in an action in which defendant was convicted of misuse of county property by refusing to admit evidence of the decision of an appeals referee of the North Carolina Employment Security Commission determining eligibility for unemployment benefits. The evidence defendant sought to have admitted was not relevant for impeachment but was simply offered to show that defendant did not intend any wrongdoing.

2. **Public Officers § 11; Criminal Law § 2— misuse of county property—criminal intent not required**

The trial court did not err by denying defendant's motion to dismiss a charge of using tires and rims purchased by the county on his private vehicle in violation of N.C.G.S. § 14-248 (1986) where there was uncontroverted evidence that defendant used tires and rims purchased by the county upon his personal vehicle while an employee of Craven County. The statute under which defendant was convicted contains no language setting forth any specific level of intent as an element of the crime; moreover, instructions which required only an intent to do the act without criminal intent were correct.

State v. Anderson

APPEAL by defendant from *George M. Fountain, Judge.* Judgment entered 12 February 1987 in Superior Court, CRAVEN County. Heard in the Court of Appeals 9 December 1987.

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

David P. Voerman, P.A., by David P. Voerman for defendant-appellant.

BECTON, Judge.

Defendant, Calvin Anderson, was indicted for two counts of embezzlement of county property by an employee and one count of using tires and rims purchased by the county on his private vehicle in violation of N.C. Gen. Stat. Sec. 14-248 (1986). A jury acquitted him of the embezzlement charges but found defendant guilty of the misdemeanor misuse of county property offense. Defendant was sentenced to thirty days, suspended for two years, was fined $50.00, and was ordered to pay court costs of $245.00. From that judgment, defendant appeals. We find no error.

I

The following relevant facts are undisputed. Defendant was employed from July 1981 until May 1986 by Craven County as the supervisor of the county garage, where he supervised the work of three other employees in repairing and maintaining county vehicles. Among other duties, defendant was responsible for maintenance of Craven County Sheriff Department automobiles, and preparation of replaced vehicles for resale at auction.

Defendant's only instructions for preparing vehicles for auction was to make them look as good as possible. He was given no specific guidelines, procedures, or directives governing how to do so, or governing the replacement and disposal of parts and accessories from cars brought to the garage. The State introduced in evidence an employee handbook which stated that an employee could be dismissed, suspended, or demoted for personal misconduct, including "misuse of county property," but which did not define that term.

New tires for Sheriff Department vehicles were supplied and installed by a private business, Hutchinson Tire Company, under

contract with the county. At some point, it came to defendant's attention that the used tires were being kept and used or sold by Hutchinson Tire employees. Thereafter, upon defendant's suggestion, some of the Sheriff's deputies began bringing their used tires to the county garage where the tires were used on county vehicles being prepared for auction or were given to county employees for their own personal use or resale.

Robert Allen, Director of the Department of Operational Services for Craven County and defendant's immediate supervisor, testified that there was no policy or authorization from him allowing defendant or other county employees to take any county property for personal use. Captain George Brown, Administrative Officer of the Sheriff's Department, testified that he became aware in 1985 that deputies were taking tires to the county garage, and that he immediately ordered that the practice stop. George Sawyer, the Assistant County Manager, also testified that he had been unaware of the practice and that the County Manager, Tyler Harris, stopped it when he found out.

The State presented evidence, and defendant admitted, that sometime in 1984, Deputy Larry Peele requested defendant to replace the blue rally rims and tires on his car with plain rims and whitewall tires so that the car would be less recognizable as a Sheriff Department vehicle. Defendant replaced the tires and rims with tires and rims from a car turned in for auction by Captain George Brown. He replaced the Brown car's tires and rims with some of his own and kept the blue rims and three of the Peele car's tires, eventually giving them away to a third party. Defendant further admitted that, on another occasion in July 1985, he placed the tires and rims from a county vehicle being prepared for auction on his own personal vehicle and replaced them with his own rims and with tires given him by another deputy. He contended that his purpose in making the swap was to make the county vehicle look better for resale. Defendant consistently contended that he did not intend to steal or misuse county property and was unaware that his actions were unlawful.

These matters were brought to the attention of a county commissioner by an ex-employee of the county garage. An investigation into the matter began in May 1986, and, as a result of his actions, defendant's employment was terminated.

II

[1] Defendant first assigns as error the trial court's refusal to admit in evidence the Decision of an appeals referee of the North Carolina Employment Security Commission in which defendant was determined to be eligible for unemployment benefits following the termination of his employment with Craven County. The decision included findings of fact and a memorandum of law, and concluded that the evidence failed to show defendant was discharged for "substantial fault" or "misconduct" connected with his job as those terms were defined for purposes of the Employment Security Law of North Carolina, *see* N.C. Gen. Stat. Sec. 96-14(2) and (2A) (1985).

North Carolina law prohibits the use, in another case, of the judgment or findings of a court or tribunal as evidence of the facts found unless the existence of the same issues and parties cause the principles of collateral estoppel or *res judicata* to apply. *See Brandis on North Carolina Evidence*, Section 143 (2d revised ed. 1982); *Masters v. Dunstan*, 256 N.C. 520, 526, 124 S.E. 2d 574, 578 (1962); *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 787, 336 S.E. 2d 108, 110 (1985), *disc. rev. denied*, 316 N.C. 379, 342 S.E. 2d 897 (1986). Defendant contends the findings of the appeals referee should have been admitted to "impeach" the use of the Craven County Personnel Handbook against him. However, "impeachment" is an attack upon the credibility of a witness, *see McCormick on Evidence* Section 33 *et seq.* (3rd ed. 1984), and is accomplished by such methods as showing the existence of bias; a prior inconsistent statement; untruthful or dishonest character; or defective ability to observe, remember, or recount the matter about which the witness testifies. *Id.* The evidence defendant sought to have admitted was not relevant to the purposes of impeachment but was simply offered to show that defendant did not intend any wrongdoing by his actions. The ruling of the appeals referee was not admissible for that purpose. This assignment of error is overruled.

III

[2] Defendant's remaining three assignments of error are to 1) the denial of defendant's motion to dismiss at the close of the evidence, 2) the trial court's instructions regarding the level of intent required for violation of N.C. Gen. Stat. Sec. 14-248, and 3)

the trial court's refusal to instruct the jury that a reasonable belief by defendant that he had authorization to take county property for his own use would constitute a defense to the charge. Each of these assignments of error present the same issue: What level of intent is necessary for a violation of N.C. Gen. Stat. Sec. 14-248?

Defendant contends that a violation of the statute requires an intent to do something in violation of the law. We disagree.

It is well established that the Legislature may declare the doing of an act to be a crime regardless of the intent of the person who performs the act. *See, e.g., Watson Seafood and Poultry Co. v. George W. Thomas, Inc.*, 289 N.C. 7, 13, 220 S.E. 2d 536, 541 (1975); *State v. Hales*, 256 N.C. 27, 30, 122 S.E. 2d 768, 771 (1961); *State v. Howard*, 78 N.C. App. 262, 273, 337 S.E. 2d 598, 605 (1985), *disc. rev. denied and appeal dismissed*, 316 N.C. 198, 341 S.E. 2d 581 (1986). In such cases, the performance of the act which is expressly prohibited by statute constitutes the crime, *see, e.g., Hale*, and "the knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt." *Watson Seafood* at 13, 220 S.E. 2d at 541. Such statutes "place upon the individual the burden to know whether his conduct is within the statutory prohibition." *Watson Seafood* at 15, 220 S.E. 2d at 542.

The statute under which defendant was convicted provides:

> It shall be unlawful for any officer, agent or employee to have any privately owned motor vehicle repaired at any garage belonging to the State or to any county, or any institution or agency of the State, or *to use any tires*, oils, gasoline, *or other accessories purchased by* the State, or *any county*, or any institution or agency of the State, *in or on any such private car.* N.C. Gen. Stat. Sec. 14-248 (1966) (emphasis added).

The statute contains no language setting forth any specific level of intent as an element of the crime.

There is uncontroverted evidence in the record that defendant, while an employee of Craven County, used tires and rims purchased by the county upon his personal vehicle. Because proof of the commission of the proscribed act is sufficient to support a

guilty verdict, the trial court did not err by denying defendant's motion to dismiss.

In addition, the court instructed the jury in pertinent part:

> . . . The only intent . . . which is necessary to constitute guilt of this particular offense is the intent to do the thing. That is to say, if the defendant took tires that belonged to Craven County and used them on his own automobile, that would constitute guilt of the offense charged. . . . If he did that and knew that he was doing it, then it is a crime whether he knew it was criminal or not.

Based on the foregoing discussion, we conclude that this was a proper instruction on the intent required for violation of the statute. Moreover, because a lack of specific criminal intent is not a valid defense to the crime, the trial court did not err by refusing to give the additional instructions requested by defendant.

These assignments of error are overruled.

IV

In conclusion, we hold that defendant received a fair trial free of error.

No error.

Judges EAGLES and COZORT concur.

IN THE MATTER OF: TOMMY ARENDS, JANIE ARENDS, PRESTON ARENDS

No. 8722DC201

(Filed 2 February 1988)

1. Parent and Child §§ 2.3, 6.3— child neglect—mother in North Carolina—father in Arizona—jurisdiction of North Carolina court

In an action in which children who were neglected in North Carolina had a father in Arizona who subsequently sought custody through a domestic action in Arizona, the juvenile court of Davidson County retained continuing jurisdiction over the minor children where the juvenile court acquired jurisdiction when service of process was completed on the mother in North Carolina and

no custody action or order in Arizona existed when the juvenile court entered an order allowing DSS to retain temporary and legal custody of the children. N.C.G.S. § 7A-523, N.C.G.S. § 7A-524.

2. **Courts § 16; Parent and Child § 6.3— neglected children—jurisdiction—lack of notice to father**

The juvenile court of Davidson County did not err by denying an Arizona father's motion to terminate jurisdiction based on lack of process or notice where the juvenile court acquired jurisdiction when a summons was served on a parent as required by N.C.G.S. § 7A-565.

3. **Constitutional Law § 24.6— child neglect—due process rights of nonresident father—adequately protected**

The due process rights of an Arizona father whose children were placed in DSS custody in North Carolina were adequately protected where the exigencies of the situation required DSS to take appropriate action to find temporary shelter for the children and the juvenile court subsequently retained legal custody of the children with DSS and physical custody with the mother. N.C.G.S. § 7A-657.

4. **Parent and Child § 6.3— neglected children—nonresident father—jurisdiction**

The Arizona courts did not acquire jurisdiction over all the parties in conformity with the Uniform Child Custody Jurisdiction Act in a case involving neglected children in Davidson County, North Carolina because the order entered by the juvenile court was a trial placement of custody rather than an order for permanent custody, because this was a temporary placement of neglected children pursuant to the North Carolina Juvenile Code rather than a custody contest between natural parents, and because the North Carolina court acquired jurisdiction of the subject matter before any order was entered by the Arizona court.

5. **Parent and Child § 2.3— neglected children—Arizona father—North Carolina order binding**

An order of a North Carolina juvenile court established and continued to establish that an Arizona father's children were dependent where the children had been in custody of their mother in North Carolina and where a subsequent Arizona court order awarding the father custody of the children found him to be a fit parent.

APPEAL by petitioner from *Cathey, Judge.* Order entered 18 October 1986 in District Court, DAVIDSON County. Heard in the Court of Appeals 24 September 1987.

This case arises out of an order denying Thomas J. Arends' motion to terminate the court's jurisdiction over his children. Thomas J. Arends (father) and Frankie R. Arends (mother) were married in Mesa, Arizona on 31 December 1982. They resided in Arizona until their separation in September 1984. In September

1984, Mrs. Arends left Arizona and brought the three children of the marriage, Tommy, Janie, and Preston, to North Carolina.

On 23 September 1984, the Davidson County Department of Social Services (hereinafter DSS) received a referral from the children's uncle, Buddy Wilkins, stating that Mrs. Arends was drinking heavily and neglecting the children. When the Protective Services worker arrived at the home it was discovered that Mrs. Arends had taken an overdose of phenobarbital and had been taken to the hospital. The children's grandfather, Gilbert Collins, was intoxicated at the time, and there were no other relatives who were able to care for the children. DSS took custody of the children and all three were placed in a Receiving Home. Subsequently, on that same date, a juvenile petition was filed in Davidson County, alleging the children to be neglected and dependent.

On 26 September 1984, a juvenile summons was served on the mother, Frankie Arends. On 27 September 1984, an order was entered allowing the temporary legal and physical custody of the children to remain with DSS. On 1 November 1984, juvenile adjudication and disposition orders were entered which found that the three Arends children were neglected and dependent and ordered that legal and physical custody of the children be placed with DSS.

On 6 November 1984, the father filed a petition of dissolution of marriage in Superior Court of Arizona in which he asked for custody of his minor children. On 3 December 1984, an Arizona summons and petition were personally served on Mrs. Arends in Davidson County. On 31 December 1984, Mrs. Arends filed a verified answer to the petition in Arizona.

On 3 January 1985, the Juvenile Court of Davidson County continued legal custody of the children with DSS and returned physical custody to the mother. On 11 July 1985 and 16 January 1986, the Juvenile Court retained legal custody of the children and continued physical custody of the children with the mother. Meanwhile, no notice of any hearings in Juvenile Court was served on Mr. Arends in Arizona.

On 17 January 1986, the Arizona court entered an order dissolving the marriage between the parents and awarding cus-

tody of the three children to the father. On 7 March 1986, the Arizona order was filed in the Clerk's office in Davidson County.

On 16 April 1986, the father filed a motion in District Court of Davidson County requesting the court to enforce the Arizona order. On 7 May 1986, the District Court of Davidson County entered an order finding that the Arizona order awarding custody of the children to the father was valid and effective as to the mother, but had no effect on DSS. On 16 May 1986, the father filed a motion in the Juvenile Division requesting the court to terminate jurisdiction. On 26 June 1986, a hearing was held on petitioner-father's motion. On 18 October 1986, an order was entered denying petitioner's motion to terminate jurisdiction and retaining legal custody of the children with DSS and physical custody with the mother. Petitioner appeals.

Lambeth, McMillan and Weldon, by Wilson O. Weldon, Jr., for petitioner-appellant.

James F. Mock, for Department of Social Services, respondent-appellee.

Charles E. Frye, III, Guardian Ad Litem, for Tommy Arends, Janie Arends, and Preston Arends, minors.

JOHNSON, Judge.

We note at the outset that petitioner has failed to address one of his Assignments of Error in his brief. We deem it abandoned and decline to review it. N.C.R. App. P. Rule 28. Petitioner's remaining four Assignments of Error all relate to one issue: whether the trial court erred in denying petitioner's motion to terminate jurisdiction. We find no error and affirm the trial court's ruling.

[1] First, petitioner contends that the court's original order of neglect and dependency and subsequent orders upon review were temporary and did not establish continuing jurisdiction for custody. We disagree. Petitioner submits to this Court the contention that Chapter 50A should control although the proceedings in juvenile court were brought under Chapter 7A. This argument is untenable.

G.S. sec. 7A-523 gives the district court "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent, undisciplined, abused, neglected, or dependent." Furthermore, pertaining to retention of jurisdiction, G.S. sec. 7A-524 provides in pertinent part:

> When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until he reaches his eighteenth birthday. . . . Nothing herein shall be construed to divest the court of jurisdiction in abuse, neglect or dependency proceedings.

"[O]nce jurisdiction of a court attaches it exists for all time until the cause is fully and completely determined." *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 11, 102 S.E. 2d 469, 476 (1958).

In the case *sub judice*, the Juvenile Court of Davidson County acquired jurisdiction over the Arends children as of 26 September 1984 when service of summons was completed on a parent. Thus on 27 September 1984, when the Juvenile Court entered an order allowing DSS to retain temporary and legal custody of the Arends children, the jurisdiction of the court had attached. No custody action or order in Arizona existed at the time this order was entered. Thus, as authorized by G.S. sec. 7A-523 and 7A-524, the juvenile court retained continuing jurisdiction over the minor children.

[2] Petitioner next contends the trial court erred in denying his motion to terminate jurisdiction because he was never served with process or notice of the juvenile proceedings. We disagree.

According to G.S. sec. 7A-565, summons should be personally served upon the parent and if that parent cannot be located, the judge may authorize service of summons and petition by mail or by publication. Furthermore, it is the service of the summons, rather than the return of the officer that confers jurisdiction. *In re Leggett*, 67 N.C. App. 745, 314 S.E. 2d 144 (1984). Also, in order to have a child declared dependent, it is not necessary to serve the petition on both parents, but only on one of them. *In re Yow*, 40 N.C. App. 688, 253 S.E. 2d 647, *cert. denied*, 297 N.C. 610, 257 S.E. 2d 223 (1979). The juvenile court acquired jurisdiction over the subject matter when the summons was served upon a parent.

the mother, although it was not served upon the father. Thus, having acquired jurisdiction upon service of summons on a parent, as required by G.S. sec. 7A-565, the court had the authority to decide the issue of neglect and dependency of the three Arends children.

[3] As to the father, the failure to serve him with notice of the neglect and dependency proceedings raises the question of whether the father has been deprived of his right to due process and does not raise the question of whether the court acquired jurisdiction of the subject matter. "It has been held that the giving of notice in cases involving child custody is subject to due process requirements." *Yow*, 40 N.C. App. at 692, 253 S.E. 2d at 650. As in *Yow*, where a child was alleged as dependent, service of process was had on the father, no service was had on the child's mother, a hearing was held declaring the child dependent, and custody of the child placed with a third party, we are faced with balancing of interests. The State has an interest in the welfare of children. Children have a right to be protected by the State if they have been abused or neglected. The father has some right to custody of his children. The evidence revealed that at the time the children were placed in temporary custody with DSS, the mother had overdosed on phenobarbital and was in the hospital. The children's grandfather, who was taking care of them, was intoxicated, and the exigencies of the situation required DSS to take appropriate action to find temporary shelter for the children. G.S. sec. 7A-657 provides for review of custody orders made by the juvenile court. By this statute, the judge is required to conduct a review within six months of the date the order was entered and annually thereafter. In addition, this section contemplates that a child may be returned to the parent(s) from whose custody it was taken if the trial court finds sufficient facts to show the child will receive proper care and supervision from the parent(s). However, before custody is restored to that parent, the trial court also must find that such placement is deemed to be in the best interest of the child. *In re Shue*, 311 N.C. 586, 319 S.E. 2d 567 (1984). As in *Yow*, "balancing the interest of the State that a helpless infant should not suffer with that of the [petitioner] that [he] not be arbitrarily deprived of [his] right to custody of [his children], and considering the right of protection that belongs to the [children]" in conjunction with the potential for placement of the children to be returned to the parent(s) after review by the

court, we hold that petitioner's due process rights were adequately protected. *Yow*, 40 N.C. App. at 692, 253 S.E. 2d at 650. The order of 18 October 1986 retaining legal custody of the children with DSS and physical custody with the mother is binding on the petitioner.

[4] Petitioner next contends that the Arizona court properly acquired jurisdiction over all parties in conformity with the Uniform Child Custody Jurisdiction Act (hereinafter UCCJA). We disagree. The jurisdictional prerequisites of the UCCJA would only govern in permanent custody situations. The order entered by the juvenile court was a trial placement of custody of the children and was not an order for permanent custody. Petitioner's contention is misguided. Temporary placements of neglected children are made pursuant to the North Carolina Juvenile Code. Custody contests between natural parents are determined in a custody proceeding pursuant to G.S. sec. 50-13.1, *et seq.* Nevertheless, the North Carolina court acquired jurisdiction over the subject matter of this proceeding before any order was entered by the Arizona Court.

[5] Petitioner's final contention is that the children are no longer neglected or dependent children. This argument is without merit. Petitioner contends that since the Arizona order awarding him custody of the children found him to be a fit parent, then the children had a parent to negate the court's finding of dependency. We have heretofore concluded that the order of 18 October 1986 was binding on petitioner. Thus, the order entered by the court established, and continues to establish, that the children are dependent until and unless the court terminates its jurisdiction or the court makes another disposition. For all the aforementioned reasons, the order of the juvenile court is

Affirmed.

Judges BECTON and PARKER concur.

KAREN A. SMITH v. DONALD HOWARD DAVIS

No. 873DC643

(Filed 2 February 1988)

Divorce and Alimony § 24.11— child support—Soldiers and Sailors Relief Act—order reopened

The trial court erred by denying defendant's motion to reopen a *nunc pro tunc* child support order under the Soldiers and Sailors Relief Act where defendant made no appearance in the case and did not hire or otherwise obtain an attorney to appear for him; the court did not appoint an attorney for defendant before rendering its verdict; defendant's motion was timely in that he was still serving in the Marine Corps; defendant's military service did prejudice his ability to defend the child support action in that he was on active duty in the United States Marine Corps stationed in California assigned to a unit that could be sent to the Western Pacific at any time and in that he had not been paid for four months; and defendant alleged facts sufficient to constitute a legal defense in that he had not been paid for four months.

APPEAL by defendant from *Rountree, Judge*. Order entered 7 April 1987 in District Court, CARTERET County. Heard in the Court of Appeals 4 December 1987.

Defendant, Donald Howard Davis, appeals the trial court's denial of his motion to reopen a child support judgment pursuant to 50 U.S.C. App. 520, the Soldiers' and Sailors' Civil Relief Act (the "Act"). Defendant is a sergeant in the United States Marine Corps stationed at El Toro, California.

On 16 October 1980 an order of paternity was entered in Craven County District Court reciting that defendant had acknowledged paternity of plaintiff's daughter, Rhonda Lee Smith. On 21 May 1985 plaintiff filed a complaint reciting that defendant had paid $100 per month in child support until December 1984. The complaint seeks child support of "not less than $150.00 per month" from defendant. In response defendant sent a letter to plaintiff's attorney dated 23 June 1985 admitting receipt of service of process but requesting that plaintiff's attorney "recognize [his] rights under the Solders and Sailors Relief Act." Neither defendant nor an attorney representing him appeared at the child support hearing. The court did not appoint an attorney to represent defendant. The Honorable James E. Martin entered an order on 16 August 1985 *nunc pro tunc* that defendant pay $225.00 per month in child support.

Defendant filed a motion entitled "motion to reopen judgment under the Soldier's and Sailor's [sic] Civil Relief Act." Defendant submitted his affidavit in support of the motion. The affidavit alleged that at the time of the child support hearing he was on active duty in the United States Marine Corps stationed at El Toro, California and that due to his military obligations he was unavailable to defend at that hearing. Defendant further indicated that upon his arrival at El Toro he had experienced administrative and financial difficulties which caused him not to be paid for four months. From an order dated 7 April 1987 denying his motion, defendant appeals.

Hugh C. Talton, Jr., for plaintiff-appellee.

Robert G. Bowers for defendant-appellant.

EAGLES, Judge.

The sole issue here is whether the trial court erred in refusing to reopen the child support order entered 16 August 1985 *nunc pro tunc*. We hold that the court erred in denying defendant's motion to reopen and, accordingly, we reverse and remand.

Section 520 of the Act, in pertinent part, states:

> (1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court con-

ditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act [sections 501 to 591 of this Appendix]. Whenever, under the laws applicable with respect to any court, facts may be evidenced, established, or proved by an unsworn statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury, the filing of such an unsworn statement, declaration, verification, or certificate shall satisfy the requirement of this subsection that facts be established by affidavit.

* * *

(4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and *it appears that such person was prejudiced by reason of his military service in making his defense* thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; *provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof.* Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act [said sections] shall not impair any right or title acquired by any bona fide purchaser for value under such judgment. (Emphasis added.)

We start with the proposition that the Act is to be liberally construed to protect the rights of those serving in the armed forces of our country. *Boone v. Lightner*, 319 U.S. 561, 87 L.Ed. 1587, 63 S.Ct. 1223 (1943). The purpose of section 520 in particular is to protect persons in the military from having default judgments entered against them without their knowledge and without an opportunity to defend their interests. *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E. 2d 441 (1980).

In order to reopen a default judgment under this section there first must have been a default of appearance by the defendant. *Flagg v. Sun Investment & Loan Corporation*, 373 P. 2d 226 (Okla. 1962). Any appearance by the defendant or his counsel in the case in which default judgment has been rendered extinguishes the protections granted under section 520 of the Act and the judgment may not be vacated or set aside. *Cloyd v. Cloyd*, 564 S.W. 2d 337 (Mo. App. 1978). Here, no appearance was made by the defendant. Further, defendant did not hire or otherwise obtain an attorney to represent him or appear for him at the child support hearing. The judgment was, in fact, a default judgment. Consequently, all the protections afforded defendant under section 520 of the Act remain available to him.

Section 520(1) further directs that in the event defendant is in the military service, no judgment may be made against him without the court first appointing an attorney to protect the defendant's interests. The court did not appoint an attorney for defendant before rendering its judgment. This was error.

This error, however, does not necessarily *require* reversal. In *Allen v. Allen*, 30 Cal. 2d 433, 182 P. 2d 551 (1947), the California Supreme Court pointed out that section 520(4) authorizes the trial court to set aside a judgment where, because of his military service, the defendant was prejudiced in making his defense. This section "would be mere surplusage had Congress intended to condemn as void those judgments and orders entered contrary to the directions of other provisions of section [520]." *Id.*, 182 P. 2d at 553. Therefore, the court held that failure to comply with section 520(1) made those default judgments voidable, not void. We agree. Accordingly, nothing else appearing, failure to appoint an attorney to represent an absent service member does not constitute reversible error by the trial court. *Accord Davidson v. General Finance Corporation*, 295 F. Supp. 878 (N.D. Ga. 1968); *Rentfrow v. Wilson*, 213 A. 2d 295 (D.C. 1965). *Contra McDaniel v. McDaniel*, 259 S.W. 2d 633 (Tex. Civ. App. 1953); *see Akers v. Bonifasi*, 629 F. Supp. 1212 (M.D. Tenn. 1984).

Defendant's remedy is in section 520(4) of the Act. To avail himself he must comply with the limitations of the Act. First, the defendant must make his motion to reopen no later than ninety days after the termination of his military service. Here defendant

alleges he is still serving in the Marine Corps. Accordingly, his motion is timely. Next, defendant must show that he was prejudiced in making his defense because of his military service, *Bell v. Niven*, 225 N.C. 395, 35 S.E. 2d 182 (1945), and that he has a meritorious or legal defense to the action. *Courtney v. Warner*, 290 So. 2d 101 (Fla. Dist. Ct. App. 1974). If the trial court finds that no meritorious or legal defense is presented, this finding is binding on appeal, when supported by competent evidence. *Lightner v. Boone*, 228 N.C. 199, 45 S.E. 2d 261 (1947).

Defendant's affidavit asserts that his military obligations prevented him from appearing and making his defense at the child support hearing. At the time of the hearing he was on active duty in the United States Marine Corps stationed in California assigned to a unit that at any time could be sent to the western Pacific area of the world. Defendant further claimed that he was under a financial hardship, not of his own making, so that he had not been paid for four months. The Supreme Court in *Boone* said "[t]he discretion that is vested in trial courts . . . is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial." *Boone*, 319 U.S. at 575, 87 L.Ed. at 1596. *See also Chenausky v. Chenausky*, 128 N.H. 116, 509 A. 2d 156 (1986). We conclude that defendant's military service did prejudice his ability to defend the child support action.

Defendant must also show that he has a meritorious or legal defense to the action. Here, defendant must have alleged facts which at the time of the child support hearing would have demonstrated a meritorious or legal defense to plaintiff's child support complaint.

On 16 October 1980 an order of paternity was entered in the Craven County District Court establishing defendant's paternity of Rhonda Lee Smith. G.S. 49-15 indicates that once paternity is established custody and support rights "may be determined and enforced in the same manner, as if the child were the legitimate child of such father and mother." G.S. 49-15; *see Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976). Plaintiff may enforce defendant's support obligations pursuant to G.S. 50-13.4. G.S. 50-13.4(c) requires that any

> [p]ayments 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.

Here defendant alleges that he had financial hardships due to his not receiving any pay for four months. This problem adversely affects defendant's estate and his ability to pay child support. Our courts have held that a child support order will be vacated when no evidence is presented concerning a parent's ability to pay, *Dixon v. Dixon*, 67 N.C. App. 73, 312 S.E. 2d 669 (1984), or when the estate of a party is not considered. *See Walker v. Tucker*, 69 N.C. App. 607, 317 S.E. 2d 923 (1984). Defendant has alleged facts which at the time of the child support hearing were sufficient to constitute a legal defense to plaintiff's petition.

Because the Act is to be construed liberally to protect the rights of our armed services personnel and defendant presents a legal defense to this action to increase child support, we hold that the court below erred in denying defendant's motion to reopen and, accordingly, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

Judges BECTON and COZORT concur.

IN RE: CONDITIONAL APPROVAL OF CERTIFICATE OF NEED APPLICATION OF HEALTH CARE & RETIREMENT CORPORATION OF AMERICA (PROJECT I.D. NO. Q-2155-84) AND DENIAL OF CERTIFICATE OF NEED APPLICATION OF BRITTHAVEN, INC. (PROJECT I.D. NO. Q-2142-84) (BERTIE COUNTY) 85 DFS 28

No. 8710DHR345

(Filed 2 February 1988)

1. Hospitals § 2.1— certificate of need—site of hospital—completeness of application

There was no merit to petitioner's contention that respondent's application for a certificate of need for a health care facility was incomplete because information furnished about the project site was vague and indefinite, since respondent assured the project analyst for the Bertie County review that it would forward the information about the site as soon as it was available, and the specific information requested was furnished after an option was obtained; the site information did not change the proposal in any material or practical sense and was not unauthorized, and so there was no improper amendment of respondent's application; and it was not erroneous that the Hearing Officer conditioned her approval of respondent's application upon information to be furnished later, since the Hearing Officer's decision was reviewed and adopted as its own by the Secretary of the Department of Human Resources, and N.C.G.S. § 131E-185 authorizes the Department to issue the certificate of need with or without conditions.

2. Hospitals § 2.1— certificate of need—community support—showing supplied by competitor

A finding that respondent's application for a certificate of need had community support was supported by several letters furnished by petitioner and other applicants stating that any nursing facility built in Bertie County would be well received and supported and by testimony at the hearing, elicited by petitioner, that Bertie County Hospital would support the facility regardless of who built it.

3. Hospitals § 2.1— certificate of need—one application financially superior to another—sufficiency of showing

The finding that respondent's application for a certificate of need for a health care facility was financially superior to petitioner's was supported first by the analysis of a CPA who reported that petitioner's parent company was thinly capitalized, had little net worth, was heavily in debt, and that its project would probably sustain losses in operating the facility the first two years that it could not cover; and second by evidence that respondent had substantial cash reserves which could be applied to its project, that its plan was financially more feasible over the long run, and that it was financially able to cover the start up losses.

In re Conditional Approval of Certificate of Need

APPEAL by petitioner Britthaven, Inc. from the decision of the North Carolina Department of Human Resources, Division of Facility Services, filed 7 November 1986. Heard in the Court of Appeals 21 October 1987.

In June, 1984, the State Medical Facilities Plan identified a need for 82 nursing beds in Bertie County. Britthaven, Inc. applied for the privilege of meeting that need by proposing to construct a three purpose facility that provided 118 beds—42 for a skilled nursing facility, 40 for an intermediate care facility, and 38 for housing the elderly. Health Care & Retirement Corporation of America proposed to meet the need by constructing a three purpose facility containing 100 beds—40 for skilled nursing, 42 for intermediate care, and 18 for the elderly. After Britthaven's application was received on 9 November 1984 the project analyst for the Bertie County review notified it that certain additional information was needed to complete its application, and on 26 November 1984 Britthaven furnished the information requested. On 26 November 1984 the analyst asked Health Care & Retirement Corporation of America for additional information concerning the site of its proposed facility and the willingness of local human service agencies and physicians to refer patients to the facility. Though Health Care's response was that it had not selected a site or sought proof of community support, but would forward that information after it had taken both steps, on 30 November 1984 the analyst deemed both applications to be complete and scheduled them for review. On 20 December 1984 Health Care notified the project analyst that it had selected a site for the proposed facility and acquired an option for its purchase that could be extended until 26 June 1985. On 23 January 1985 the applications were reviewed by the Eastern Carolina Health Systems Agency, which recommended that Britthaven's application be approved; but after the analyst for the Certificate of Need Section reviewed the applications she recommended that Health Care's application be approved and that recommendation was accepted by the Department of Human Resources. Pursuant to Britthaven's request a contested case hearing was then held, following which a final agency determination was made to approve Health Care's application subject to it showing that the site it identified during the review was still available. Britthaven's appeal is from that determination.

In re Conditional Approval of Certificate of Need

Attorney General Thornburg, by Assistant Attorney General Barbara P. Riley and Assistant Attorney General Richard A. Hinnant, Jr., for appellee N.C. Department of Human Resources.

Hunton & Williams, by Edward S. Finley, Jr. and John R. McArthur, for appellee Health Care & Retirement Corporation of America.

Bode, Call & Green, by Robert V. Bode, Nancy O. Mason, and S. Todd Hemphill, for appellant Britthaven, Inc.

PHILLIPS, Judge.

Our review of this appeal is governed by G.S. 150A-51, the most pertinent parts of which state that:

> 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:
>
> . . . .
>
> (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.

Britthaven first argues that the findings of fact and conclusions of the analyst are not supported by substantial evidence. In reviewing this contention we must consider the whole record. G.S. 150A-51(5); *Hospital Group of Western North Carolina, Inc. v. North Carolina Department of Human Resources*, 76 N.C. App. 265, 332 S.E. 2d 748 (1985). In doing so we must "examine all of the competent evidence, pleadings, etc., which comprise the 'whole record' to determine if there is substantial evidence *in the record* to support the administrative tribunal's findings and conclusions." *Community Savings & Loan Association v. North Carolina Savings & Loan Commission*, 43 N.C. App. 493, 497, 259 S.E. 2d 373, 376 (1979). (Emphasis in original.) The three main findings and conclusions that Britthaven contends are not supported by evidence are those indicating that Health Care has a suitable site for the project, community support and financial feasibility. None of these contentions has merit.

[1] 10 N.C. Admin. Code Sec. 3R.1119 states:

> (a) A proposal to provide new or expanded skilled nursing and/or intermediate care services must specify the site on which the services are to be operated. If such site is neither owned by nor under option to the proponent, the proponent must provide a written commitment to diligently pursue acquiring the site if and when health planning approvals are granted, must specify a secondary site on which the services could be operated should acquisition efforts relative to the primary site ultimately fail, and must demonstrate that the primary and secondary sites are available for acquisition.

Britthaven contends that Health Care's application was incomplete under this criteria because the information furnished about the project site was vague and indefinite. But Health Care had assured the analyst it would forward the information about the site as soon as it was available and the specific information requested was furnished after an option was obtained. Nor was this an improper amendment of Health Care's application, as Britthaven contends. The site information did not change the proposal in any material or practical sense and was not unauthorized. *See, In re Humana Hospital Corporation, Inc. v. North Carolina Department of Human Resources*, 81 N.C. App. 628, 345 S.E. 2d 235 (1986). Nor was it erroneous, as Britthaven further complains, that the Hearing Officer conditioned her approval of Health Care's application upon information to be furnished later, rather than return the case to the analyst for further review. The Hearing Officer's decision was reviewed and adopted as its own by the Secretary of the Department of Human Resources and G.S. 131E-185 authorizes the Department to issue the Certificate of Need with or without conditions.

[2] The second insufficiency in Health Care's application that Britthaven complains about is its failure to provide, as the application form requested, "any documented evidence of specific support for your proposal from physicians, community and social service organizations, or health-related agencies." But the analyst's finding that Health Care's application had community support is supported by several letters furnished by Britthaven and other applicants stating *that any nursing facility built in Bertie County would be well received and supported,* and by testi-

mony at the hearing, elicited by Britthaven, that Bertie County Hospital would support the facility, regardless of who built it. Though not presented by Health Care, this evidence was pertinent to the issue of community support and was properly considered by the Hearing Officer. *In re Application of Wake Kidney Clinic, P.A.*, 85 N.C. App. 639, 355 S.E. 2d 788 (1987).

[3] And the finding that Health Care's application is financially superior to Britthaven's is supported first by the analysis of a Certified Public Accountant, who reported that Britthaven's parent company is thinly capitalized, has little net income, is heavily in debt, and that its project would probably sustain losses in operating the facility the first two years that it could not cover; and second by evidence that Health Care has substantial cash reserves that can be applied to their project, that its plan is more financially feasible over the long run, and that it is financially able to cover the start up losses.

Britthaven's other contentions that the decision was arbitrary and capricious, and that Health Care's witnesses, Jenkins and Grissom, were erroneously permitted to testify as experts under the provisions of Rule 702, N.C. Rules of Evidence, are likewise without merit. Since we have determined that the Department decision is supported by substantial evidence, the contention that the decision was arbitrary and capricious requires no discussion; nevertheless, we note that the record indicates that the analyst methodically checked each individual application against the 21 review criteria, confined her analysis to the evidence and information submitted, requested additional information when needed, sought outside assistance in areas where she lacked expertise, and that the decision was fairly made after carefully considering the evidence received. And the record shows that both witnesses complained of were well qualified by knowledge and experience to testify as experts, one having been a Certificate of Need project analyst for over five years, during the course of which she had reviewed over 200 projects, and the other having conducted over 500 Certificate of Need reviews.

Affirmed.

Judges BECTON and GREENE concur.

JOAN DRISCOL PERKINS v. STUART LEE PERKINS

No. 8712DC382

(Filed 2 February 1988)

1. **Rules of Civil Procedure § 41— ex mero motu dismissal for failure to prosecute**

The trial court did not err in the *ex mero motu* dismissal of plaintiff's claims for divorce and alimony without prejudice for failure to prosecute when neither the parties nor their attorneys appeared for the call of the calendar where no pleading had been filed in the case in almost two years, and the case had been placed on two prior clean-up calendars without any resulting activity or disposition. N.C.G.S. § 1A-1, Rule 41(b).

2. **Rules of Civil Procedure § 60.2— dismissal for failure to prosecute—denial of motion to vacate judgment**

The trial court did not err in denying plaintiff's Rule 60(b)(1) motion to vacate a judgment dismissing plaintiff's divorce and alimony claims without prejudice for failure to prosecute on the ground that her failure to appear at the call of the clean-up calendar was due to her counsel's mistake, inadvertence or excusable neglect where the court found that no pleadings, notices, or other documents had been filed in the case in almost two years; the case was twice previously placed on clean-up calendars without any disposition; the attorneys for the parties had not changed and there was no justification for the parties' failure either to try or settle the case; plaintiff's counsel requested by letter that the case be placed on inactive status because the parties were engaged in settlement negotiations; and defendant denied that any negotiations were underway.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Sol G. Cherry, Judge.* Orders entered 12 January 1987 and 9 February 1987 in District Court, CUMBERLAND County. Heard in the Court of Appeals 27 October 1987.

Womble, Carlyle, Sandridge & Rice, by Carole S. Gailor for plaintiff-appellant.

Sullivan & Pearson, by Mark E. Sullivan for defendant-appellee.

BECTON, Judge.

I

On 8 October 1984, plaintiff Joan Driscol Perkins brought this action against defendant Stuart Lee Perkins seeking divorce

from bed and board, temporary and permanent alimony, equitable distribution of property, injunctive relief, and attorney fees. A consent order was entered granting plaintiff alimony *pendente lite* and attorney fees on 9 March 1985. The remaining matters were calendared for disposition on 12 January 1987 CIVIL DISTRICT CLEAN-UP CALENDAR. Neither plaintiff, defendant nor their respective attorneys appeared in court on that date. On 14 January 1985, the presiding judge entered an order dismissing plaintiff's and defendant's unlitigated claims *ex mero motu* for failure to prosecute. The order provided, however, that a new action based on the same claims might be commenced within one year from that date, and that all previous orders regarding the action continued in full force and effect.

Plaintiff filed a Motion to Reopen, pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, on 19 January 1987. The presiding judge denied the motion. Plaintiff appeals. We affirm.

II

Plaintiff raises two issues on appeal: whether the trial judge erred by dismissing her claims *ex mero motu*; and whether the trial judge erred by denying her Motion to Reopen or Vacate Judgment.

A

[1] Plaintiff first contends that the trial judge lacked authority to dismiss her claims for failure to prosecute *ex mero motu*. The question whether a trial court may dismiss an action on its own motion was decided in *Blackwelder Furniture Co. v. Harris*, 75 N.C. App. 625, 331 S.E. 2d 274 (1985) when this court held that a trial judge may, depending upon the facts and circumstances surrounding the particular case, dismiss a claim under N.C. Gen. Stat. Sec. 1A-1, Rule 41(b) (1983), for failure to prosecute, without a motion by defendant.

In the instant case, the trial judge found, and the parties concede, that plaintiff and defendant failed to appear for the call of the calendar. Plaintiff also urges this court to consider the following circumstances. (1) Plaintiff's counsel wrote a letter to the court on 19 December 1986 requesting that the case be placed on inactive status because the parties were involved in settlement negotiations. (2) Counsel sent a copy of the letter to defendant's

counsel and he neither responded to her nor filed any motions. (3) Plaintiff's counsel's secretary telephoned the Clerk of Court to follow up on the request and was advised that she would be notified if the request presented any problems. (4) Counsel did not receive any further notice until she received the order of dismissal. Although plaintiff's counsel's conduct may have been reasonable under the circumstances she described, we cannot review with an omniscient eye circumstances that do not appear from the record to have been before the trial judge at the time he entered the order of dismissal. Based on the parties' failure to appear, the fact that no pleading had been filed in almost two years, and the fact that the case had been placed on two prior clean-up calendars, dismissal without prejudice was proper.

B

[2] Plaintiff next contends that the trial judge erred by denying her Rule 60(b)(1) Motion to Reopen or Vacate Judgment. Rule 60(b)(1) provides:

> (b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court *may* relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect. (Emphasis added.)

Plaintiff argues that her failure to appear at the call of the clean-up calendar was due to her counsel's mistake, inadvertence or excusable neglect. We agree that the evidence would have permitted a finding that plaintiff's failure to proceed was due to mistake, inadvertence, or excusable neglect under Rule 60(b)(1). Nevertheless, "a motion under Rule 60(b) is addressed to the sound discretion of the trial court and the court's ruling will not be disturbed without a showing that the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E. 2d 532, 541 (1975); *accord, Carter v. Carter*, 68 N.C. App. 23, 314 S.E. 2d 281 (1984). The following findings by the trial judge are supported by the record. (1) No motions, pleadings, notices, orders or other documents were filed regarding the case from 7 March 1985 through 12 January 1987. (2) The case was twice previously

placed on clean-up calendars without any resulting activity or disposition. (3) Each party was represented by the same attorney, leaving no justification for the parties' failure to either try or settle the case. (4) Through a letter dated 29 December 1986, plaintiff's counsel requested that the case be placed on "inactive status" because the parties were engaged in settlement negotiations. (5) Defendant did not object to dismissal and denied that any negotiations were under way. In light of these findings, we hold that the trial judge did not abuse his discretion in denying plaintiff's motion. This is not merely a case, such as those cited by plaintiff in her brief, where a party mistakenly failed to appear. Moreover, the plaintiff's claims were dismissed without prejudice, thereby preserving the judicial preference for deciding cases on the merits. This assignment of error is overruled.

Judgment is affirmed.

Judge GREENE concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Since plaintiff's dismissed claims—all the claims in the case, as defendant asserted none and none have been finally litigated—could have been conveniently revived immediately by simply filing a new action, as the order permitted, it is surprising that plaintiff did not do that rather than pursue this appeal with all the delay, expense, inconvenience and risk that it entails. Nevertheless, in my opinion the court erred in entering the order and in declining to set it aside for two reasons: *First*, the order is a nullity on its face because it undertakes to do two fatally inconsistent things—keep in effect a prior order for alimony *pendente lite* while dismissing the litigation in which the order was entered. 49 C.J.S. *Judgments* Sec. 48, p. 111 (1947). *Second*, the court had no basis for sanctioning plaintiff at all, much less by dismissing her case, though it had ample grounds for sanctioning both lawyers for not attending the calendar call. Both the order and the majority opinion are apparently based upon the notion that the efficient administration of our civil trial courts requires that each plaintiff attempt to try his case at the earliest opportunity and to keep on

doing so until the case is finally concluded. This is a false notion. Untried domestic cases that have no pressing issues requiring trial are no burden to the courts and the longer they remain quiescent the better it is for the courts, parties, and the public alike for reasons that are both obvious and incontestable. This action is essentially for divorce from bed and board and alimony, as the other claims involving the property rights of the parties cannot be adjudicated until an absolute divorce, not yet sought, is entered. In the case plaintiff had a consent alimony *pendente lite* order based upon a stipulation that established defendant's marital fault, plaintiff's right to alimony, and the amount to be paid; and so far as the record shows the order had served, and was serving, her and the defendant just as well as would a final order following trial. For the order had been in effect twenty-two months and the record contains no indication that during that time either party had become dissatisfied with it or had an issue that required the further attention of the court. In that setting plaintiff had no reason to either press for a trial or to suppose that the court expected her to do so, and the court's implicit action and holding to the contrary was without rational basis.

IN THE MATTER OF THE WILL OF: JESSIE P. EVERHART, DECEASED

No. 8722SC681

(Filed 2 February 1988)

1. Wills § 21.4— undue influence—evidence sufficient

The evidence was sufficient to submit the issue of undue influence to the jury where there was evidence that for a period of at least four to six years before the execution of the 1985 will, the testator had told friends and relatives of his intention to give his property to Robert Farris and his son, the beneficiaries of the 1985 will, if Robert moved to the neighborhood and helped care for the testator and his wife; there was testimony that Robert Farris did move to the neighborhood, visited the testator often to help with work around the farm and in the house, and that one caveator, Everett Everhart, lived nearby but did not visit often or help take care of testator, and that James Everhart, the other caveator, had not visited the testator for several years; one of testator's nieces testified that his mental and physical capacity underwent a constant gradual downhill grade; the 1985 will was drafted by an attorney who had done legal work for the testator in the past and had discussed

with the testator his desire to leave his property to the Farris family; the 1986 will was drafted by an attorney who did not know the testator but had done work for Everett Everhart and his wife, Thelma; a lifelong friend of testator testified that the testator had said that Thelma Everhart had invited the testator to visit the mountains, that testator had told the friend he had to go back to the mountains to sign something, and the testator subsequently did not know what he had signed because Thelma had promised to tell him but had not done so.

2. Wills § 20— caveat proceeding—contested will properly admitted

A contested will was properly admitted into evidence in a caveat proceeding even though neither the two witnesses nor the notary specifically remembered an oath being administered where each of the witnesses identified the paper writing before the court as the will which he had witnessed; each of the witnesses testified that the testator signed the will in his presence and in the presence of the other witnesses; each witness signed the will in the testator's presence and in the presence of each other; the notary public corroborated the witnesses' testimony; the notary testified that she read the will to the testator and that he acknowledged it to be his will; and, although one witness could not recall whether the will was read to the testator, the other witness was the attorney who drafted the will and recalled that he explained the terms of the will to the testator and that the notary read the will to the testator before it was signed. N.C.G.S. § 31-18.1(a)(1).

APPEAL from *Davis, Judge.* Judgment entered 20 May 1987 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 4 January 1988.

Jessie P. Everhart died on 9 December 1986. On 10 December 1986, a will dated 10 May 1985 was filed for probate in Davidson County. The beneficiaries of the 1985 will were Robert M. Farris, the testator's great-nephew, and Robert's minor son, Max Ramsey Farris. On 11 December 1986, a will dated 5 June 1986 was filed in Davidson County. Two of the testator's nephews, William Everett Everhart and James D. Everhart, were the beneficiaries of the 1986 will. On 12 January 1987, the Everharts filed a caveat to the 1985 will requesting a jury trial on the issue of *devisavit vel non.* In response to the caveat, the Farrises alleged the 1986 will was procured through fraud, undue influence and duress.

Robert Farris was appointed guardian *ad litem* for his son, and a jury trial was held. The jury found the 1986 will was procured through undue influence and the 1985 will was the testator's last will. A judgment was entered declaring the 1986 will null and void and the 1985 will the last will of the testator. The Everharts appealed.

Theodore M. Molitoris for caveators-appellants.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for propounders-appellees.

SMITH, Judge.

Appellants bring forward three assignments of error. First, they contend the trial court erred in submitting to the jury the issue of undue influence in the execution of the 1986 will. Second, they assign error to the entry of judgment on the jury's finding of undue influence. Finally, they contend the 1985 will was not properly authenticated and the trial court erred by admitting it into evidence. We have examined each assignment of error and find no prejudicial error in the trial below.

Appellants' first two assignments of error relate to the issue of undue influence in the execution of the 1986 will. At the close of the evidence, appellants' motion for a directed verdict on the issue of undue influence was denied. Following the jury finding of undue influence in the execution of the 1986 will, appellants' motion for judgment notwithstanding the verdict was also denied. Appellants assign error contending there was insufficient evidence of undue influence either to submit the issue to the jury or to enter judgment on the jury's finding. We disagree.

In reviewing the trial court's rulings on appellants' motions, we must consider the evidence "in the light most favorable to the [appellees], deeming their evidence to be true, resolving all conflicts in their favor, and giving them the benefit of every reasonable inference." *In re Will of Dupree*, 80 N.C. App. 519, 521, 343 S.E. 2d 9, 10 (1986); *In re Will of Fields*, 75 N.C. App. 649, 331 S.E. 2d 193 (1985). Direct proof of undue influence is not necessary and is rarely available; circumstantial evidence may be considered. *In re Will of Beale*, 202 N.C. 618, 163 S.E. 684 (1932). In fact, "[t]he more adroit and cunning the person exercising the influence, the more difficult it is to detect the badges of undue influence and to prove that it existed." *In re Andrews*, 299 N.C. 52, 54, 261 S.E. 2d 198, 199-200 (1980). To prove undue influence in the execution of the 1986 will, the burden is on the appellees to "show more than mere influence or persuasion. They must show some controlling force sufficient to destroy the free agency of the [testator], such as to make the will properly the expression of the

wishes of one other than the [testator]." *Dupree*, 80 N.C. App. at 522, 343 S.E. 2d at 10. *Accord Fields, supra.*

Our Supreme Court has listed several factors relevant to a determination of undue influence:

1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.

In re Will of Mueller, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915). Undue influence is proved by looking at " 'a number of facts, each of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence.' " *Id.* at 29, 86 S.E. at 719, *quoting In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910). *Accord Andrews, supra.*

[1] In the present case, the evidence was sufficient to submit the issue of undue influence to the jury. Appellees presented evidence that for a period of at least four to six years before the execution of the 1985 will the testator had told friends and relatives of his intention to give his property to Robert Farris and his son, Max Ramsey Farris, the beneficiaries of the 1985 will, if Robert moved to the neighborhood and helped care for the testator and his wife. There was testimony that Robert Farris did move to the neighborhood and that he and his wife visited the testator often to help with work around the farm and in the house. There was also testimony that although Everett Everhart lived nearby he did not visit often or help take care of the testator in the period before the testator's death. According to one witness, James Everhart had not visited the testator for several years.

One of testator's nieces testified that his mental capacity and physical ability underwent "a gradual, downhill grade constantly"

from the time his wife died in April 1986 until his death in December. The 1985 will was drafted by attorney Jerry Peace, the ex-husband of testator's great-niece, who had done legal work for the testator in the past and had discussed with the testator his desire to leave his property to the Farris family. The 1986 will was drafted by an attorney who did not know the testator but who had done legal work for Everett Everhart and his wife, Thelma. The testator's lifelong friend, Samuel Howard Shoaf, testified that he and the testator discussed the execution of the 1986 will. The testator told Shoaf that Thelma Everhart had invited the testator to visit the mountains. Afterwards, the testator told Shoaf he had to go back to the mountains and sign something. After the second trip, the testator did not know what he had signed; Thelma had promised to tell him what he was signing but had not done so. Appellees' evidence, if believed, is sufficient to allow the court to submit the issue of undue influence in the execution of the 1986 will to the jury and to support the jury's finding. In this case, "the jury could have reached a different result, but the verdict reached was not so against the greater weight of the evidence to mandate its being set aside." *Fields*, 75 N.C. App. at 651, 331 S.E. 2d at 194. Appellants' first two assignments of error are overruled.

[2] Appellants' final assignment of error is that the trial court erred by admitting the 1985 will into evidence. Appellant contends that because neither of the two witnesses nor the notary specifically remembers an oath being administered, the 1985 will was not properly proved as required by G.S. 31-18.1. We disagree. For a will to be admitted to probate, G.S. 31-18.1(a)(1) requires that the will meet the requirements of G.S. 31-3.3 and that two of the attesting witnesses testify before the court. Each of the witnesses to the 1985 will identified the paper writing before the court as the will which he witnessed. Each of the witnesses further testified that the testator signed the will in his presence and in the presence of the other witness and that each of them signed the will in the testator's presence and in the presence of each other. The notary public present at the execution corroborated the witnesses' testimony. She also testified that she read the will to the testator and that he acknowledged it to be his will. One witness could not recall whether the will was read to the testator, but the other witness, attorney Jerry Peace, recalled that he ex-

plained the terms of the will to the testator and that the notary read the will to the testator before it was signed. Thus, the 1985 will meets the requirements of G.S. 31-18.1(a)(1) and was properly admitted. This assignment of error is overruled.

No error.

Judges ARNOLD and WELLS concur.

LAURENE MCALLISTER, EXECUTRIX FOR THE ESTATE OF THE LATE FRANK S. MCALLISTER v. CONE MILLS CORPORATION

No. 8719SC556

(Filed 2 February 1988)

1. **Courts § 9.4— summary judgment—lack of subject matter jurisdiction—previous ruling by another judge**

The trial court did not err in granting summary judgment for defendant on the ground that plaintiff's action in the superior court was barred by the Workers' Compensation Act after another superior court judge had previously ruled upon the same issue in denying defendant's jurisdictional motions since a court must dismiss the case if it finds at any stage of the proceedings that it lacks subject matter jurisdiction.

2. **Master and Servant § 68— bladder cancer—exposure to carcinogens at work—occupational disease—jurisdiction of Industrial Commission**

The Industrial Commission rather than the superior court has original subject matter jurisdiction of an action for wrongful death from bladder cancer allegedly caused by decedent's exposure to carcinogens in his employment since plaintiff's complaint states a claim for compensation of an occupational disease under the provisions of N.C.G.S. § 97-53(13). The last sentence of N.C.G.S. § 97-53 did not exclude plaintiff's claim because the statute nowhere mentions cancer in connection with the chemicals to which decedent was exposed.

APPEAL by plaintiff from *Helms (William H.), Judge.* Judgment entered 5 March 1987 in Superior Court, ROWAN County. Heard in the Court of Appeals 1 December 1987.

Gene H. Kendall for plaintiff-appellant.

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

PARKER, Judge.

The primary issue for consideration on this appeal is whether the Superior Court or the Industrial Commission has original subject matter jurisdiction of plaintiff's claim. We hold that original jurisdiction was vested in the Industrial Commission and affirm the trial court's entry of summary judgment.

Plaintiff Laurene McAllister, executrix of the estate of decedent, Frank S. McAllister, instituted this wrongful death action on 21 March 1986. The complaint alleged that defendant, decedent's employer, negligently required decedent to perform tasks which exposed decedent to known carcinogens, thereby causing decedent's cancer of the bladder and resulting death. The complaint further alleged that defendant had express knowledge that decedent's job exposed him to carcinogenic substances and that defendant failed to implement safety procedures that would have reduced such exposure. Plaintiff sought all damages recoverable for wrongful death under G.S. 28A-18-2 and also sought punitive damages for defendant's failure to take precautions when it knew of the risk to decedent.

Defendant's answer substantially denied the allegations in the complaint. Defendant also moved to dismiss the complaint for failure to state a claim upon which relief could be granted and for lack of personal and subject matter jurisdiction on the ground that the action is barred by the North Carolina Workers' Compensation Act. In addition, defendant made alternative motions for judgment on the pleadings and summary judgment.

On 28 April 1986, defendant's jurisdictional motions were heard before the Honorable Robert A. Collier, Jr. At the hearing, Judge Collier considered defendant's motions, defendant's brief, arguments of counsel, and the affidavit of David V. Brooks, Chairman of the North Carolina Industrial Commission. Chairman Brooks averred that during the time of decedent's employment, defendant and its employees were subject to the Workers' Compensation Act; that defendant had complied with the provisions of the Act; and that defendant had been qualified as a self-insured corporation by the Industrial Commission. Judge Collier denied the jurisdictional motions. Defendant duly noted its exception and cross-assigns error to this ruling on appeal.

On 12 January 1987, defendant filed a motion for summary judgment. The motion was supported by the pleadings filed in the case, affidavits, plaintiff's answers to interrogatories, and depositions. Judge Helms heard and granted the motion and ordered that plaintiff's complaint be dismissed.

[1] Plaintiff first contends that Judge Helms erred in considering the same issues that had previously been decided in plaintiff's favor by Judge Collier. This argument is based on the principle that one superior court judge may not overrule the judgment of another superior court judge in the same case on the same legal issue. *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). Plaintiff contends that Judge Helms permitted defendant to argue and present evidence on the jurisdictional issues that were previously decided by Judge Collier. Although Judge Helms did not specify the grounds for summary judgment, defendant's supporting materials clearly relate to the issue of jurisdiction and defendant does not argue any other basis for summary judgment in its brief. We presume, therefore, for purposes of this appeal, that Judge Helms granted defendant's motion for summary judgment on the ground that plaintiff's action is barred by the North Carolina Workers' Compensation Act. This same issue was previously ruled upon by Judge Collier in his denial of defendant's jurisdictional motions.

Under the circumstances of this case, however, Judge Helms did not err in considering the jurisdiction issue. The issue of whether plaintiff's claim is barred by the Workers' Compensation Act is a question of subject matter jurisdiction. *See, e.g., Burgess v. Gibbs*, 262 N.C. 462, 137 S.E. 2d 806 (1964). The denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable, *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982); but the question of subject matter jurisdiction may be raised at any time, even on appeal. *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E. 2d 83, 85 (1986). If a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction. *Burgess v. Gibbs*, 262 N.C. at 465, 137 S.E. 2d at 808.

[2] We turn therefore to the issue of whether the superior court has jurisdiction over the subject matter of this action. Defendant

contends that, under the allegations of the complaint, plaintiff's action is barred by the Workers' Compensation Act. The Act provides that its remedies are the only remedies an employee has against his or her employer for claims covered by the Act. *Lemmerman v. Williams Oil Co.*, 318 N.C. at 579, 350 S.E. 2d at 85; G.S. 97-10.1. If an employee's action would be barred by the Act, then a wrongful death action brought by the employee's representative is also barred. *Horney v. Pool Co.*, 267 N.C. 521, 148 S.E. 2d 554 (1966). Even where the complaint alleges willful and wanton negligence and prays for punitive damages, the remedies under the Act are exclusive. *Barrino v. Radiator Specialty Co.*, 315 N.C. 500, 340 S.E. 2d 295 (1986). An employee cannot elect to pursue an alternate avenue of recovery, but is required to proceed under the Act with respect to compensable injuries. *Freeman v. SCM Corporation*, 311 N.C. 294, 316 S.E. 2d 81 (1984) (per curiam); *see also Stack v. Mecklenburg County*, 86 N.C. App. 550, 359 S.E. 2d 16, *disc. rev. denied*, 321 N.C. 121, 361 S.E. 2d 597 (1987).

In this case, plaintiff does not contend that decedent was not subject to the Act or that her claim does not arise out of decedent's employment with defendant. Plaintiff's only argument is that, as a matter of law, her claim is not compensable under the Act and that an action for wrongful death is her sole remedy.

For plaintiff's claim to be compensable under the Act, decedent's death must have been the result of an "accident arising out of and in the course of the employment" or an "occupational disease." *Booker v. Medical Center*, 297 N.C. 458, 465, 256 S.E. 2d 189, 194 (1979). The complaint alleges that decedent's cancer was caused by frequent and recurring exposure to carcinogens over a period of years. Decedent's death is not therefore the result of an "accident," but is compensable only if it resulted from an occupational disease. G.S. 97-52. Only those diseases and conditions enumerated in G.S. 97-53 are occupational diseases within the meaning of the Act. *Hansel v. Sherman Textiles*, 304 N.C. 44, 51, 283 S.E. 2d 101, 105 (1981).

The specific carcinogenic substances to which decedent was allegedly exposed were aniline dyes. General Statute 97-53 provides:

> The following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:
>
> . . . .
>
> (12) Poisoning by benzol, or by nitro and amido derivatives of benzol (dinitrolbenzol, *anilin*, and others). (Emphasis added.)

Plaintiff concedes that G.S. 97-53(12) includes the chemicals which allegedly caused decedent's cancer. Plaintiff contends, however, that causing cancer is not "poisoning" and that decedent's death is not compensable under G.S. 97-53(12).

Assuming, but not deciding, that plaintiff's argument is correct, decedent's death would nevertheless be compensable. The Act also provides compensation for:

> Any disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

G.S. 97-53(13). Plaintiff's claim clearly comes within the language of G.S. 97-53(13). Plaintiff concedes as much, but contends that decedent's cancer is excluded by the last sentence of G.S. 97-53 which provides:

> Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned *only when* as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause *the occupational disease mentioned in connection with such chemicals.* (Emphasis added.)

Plaintiff argues that this sentence excludes her claim because the statute nowhere mentions cancer in connection with the chemicals to which decedent was exposed. We disagree.

The last sentence of G.S. 97-53 is intended to limit compensable diseases to those that are actually caused by on-the-job exposure to hazardous substances rather than to limit the number

of diseases that are compensable. Plaintiff's interpretation of the statute, requiring that a particular disease be mentioned in connection with a particular chemical, would render the catch-all provision in G.S. 97-53(13) almost entirely meaningless. Such an interpretation would be contrary to the clear intent of the General Assembly in enacting the current version of G.S. 97-53(13), which was to provide comprehensive coverage for occupational diseases. *Booker v. Medical Center*, 297 N.C. at 469, 256 S.E. 2d at 196. This Court has held that a disease is compensable under G.S. 97-53(13) where neither the chemical causing the disease nor the disease itself is mentioned in the statute. *Carawan v. Carolina Telephone & Telegraph Co.*, 79 N.C. App. 703, 340 S.E. 2d 506 (1986).

For the above-stated reasons, we hold that plaintiff's complaint states a claim within the scope of the Workers' Compensation Act. The Superior Court has been divested by statute of original jurisdiction of all actions which come within the provisions of the Act. *Lemmerman v. Williams Oil Co.*, 318 N.C. at 579, 350 S.E. 2d at 85. The order of Judge Helms granting defendant's motion for summary judgment and dismissing the complaint is therefore affirmed.

Finally, we note that this decision is limited to the jurisdiction issue only and in no way is intended to express an opinion as to the merits or actual compensability of plaintiff's claim if properly brought before the Industrial Commission.

Affirmed.

Judges WELLS and PHILLIPS concur.

STATE OF NORTH CAROLINA v. MARVIN PATRICK

No. 872SC640

(Filed 2 February 1988)

1. Searches and Seizures § 6— execution of search warrant—defendant on premises—plain view

The trial court properly denied defendant's motion to suppress cocaine where officers were searching a house under a search warrant; defendant and

another man arrived after the search began; the officers identified themselves and told the men to remain because they might be searched as well; defendant fled the scene and was tackled by an officer; and a small packet containing a white powdery substance fell from defendant's clothing as he was being assisted to a standing position. Defendant was subject to detention because he arrived on the premises while the officers were executing the warrant and the seizure of the packet of cocaine was authorized under the plain view doctrine.

2. Searches and Seizures § 7— cocaine—search after warrantless arrest—probable cause to arrest

The trial court properly denied defendant's motion to suppress cocaine seized from defendant's person as a result of a search incident to arrest where an officer had received information that controlled substances were being used at a certain residence; the officer went to that residence and observed several men, including defendant, using a device commonly used to smoke controlled substances; the officer left to obtain a search warrant and returned to an empty house; defendant and another man appeared approximately five minutes after the search began and were told to remain because they might be searched; defendant fled the scene and was tackled by an officer; a packet of cocaine fell from defendant's clothing as he was assisted to his feet; defendant was arrested; and another packet of cocaine was found during a subsequent pat search for weapons. N.C.G.S. § 15A-401(b).

APPEAL by defendant from *Lewis (John B., Jr.), Judge.* Judgment entered 14 January 1987 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 11 January 1988.

Defendant was charged in a proper bill of indictment with possession of more than one gram of cocaine. He was convicted as charged and appeals the judgment entered thereon.

The evidence for the State tends to show that on the evening of 5 September 1986, SBI agent David Barrington received information that controlled substances were being used at the residence of Bobby Kolikas. Acting on that information, Barrington went to that residence, approached the house and observed Kolikas and two unidentified males. One of these men, later identified as defendant, was using a "bong," a device commonly used to smoke controlled substances. Barrington left to obtain a search warrant for the residence and a van parked outside the house. He returned approximately thirty minutes later with the warrant and Plymouth police officer Stanley James. The officers knocked on the front door but received no answer. As they started to leave, Bobby Kolikas drove up in his van. After talking briefly with Barrington, Kolikas fled the scene. The officers then returned to the house and knocked on the door, identifying them-

selves and giving their authorization to search the premises. When no answer was received, they entered through the unlocked door and began the search.

Agent Barrington testified that defendant and another man appeared approximately five minutes after the search began. Barrington identified himself and informed both men that he had a search warrant for the premises. He also told them that they should remain because they might be searched as well. Both men sat down on the sofa but after a moment defendant fled the scene. Officer James pursued defendant and tackled him in the front yard. Agent Barrington testified that he and Officer James handcuffed defendant before lifting him from the ground. He also testified that as they assisted defendant to a standing position, a small packet containing a white powdery substance, found later to be cocaine, fell from defendant's clothing to the ground. The officers seized the packet and defendant was placed under arrest. Thereafter, the officers took defendant back into the house and made a pat search of his person to see if he was carrying a weapon. This search revealed another packet containing a white substance, also later found to be cocaine.

At trial, defendant made a motion to suppress the cocaine evidence on the grounds that he was merely a visitor at the residence described in the warrant and that there was no probable cause to search him. After hearing the evidence on the motion to suppress, the trial court made findings of fact and concluded that the search of defendant's person was proper. Defendant's motion was denied.

Defendant testified that on the evening of 5 September 1986 he attended a party at Kolikas's house. Defendant left the residence to purchase some beer. When he returned, he found two men inside the residence. He testified that he ran from the house when he learned the men were law enforcement officers because he knew there was an outstanding warrant against him for child support. Defendant denied ever using cocaine or knowing anything about the cocaine which was seized.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gayle L. Moses, for the defendant-appellant.

SMITH, Judge.

[1] In his sole assignment of error, defendant contends the trial court erred in denying his motion to suppress the controlled substance seized in violation of G.S. 15A-256, the North Carolina Constitution and the Fourth Amendment to the United States Constitution. He contends that he was not subject to detention and search pursuant to G.S. 15A-256 since he was not present at the time the officers entered the premises to conduct the search. He contends also that he was subject to an unreasonable search in violation of G.S. 15A-256 and the Fourth Amendment because law enforcement officers searched him prior to completing the search of the premises designated in the warrant. We disagree.

Defendant was properly detained under G.S. 15A-256. It provides in pertinent part:

> *An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant.* (emphasis added.) If the search of such premises or vehicle and of any persons designated as objects of the search in the warrant fails to produce the items named in the warrant, the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person. . . .

Defendant arrived on the premises while the officers were executing the warrant and was thus subject to detention.

The second sentence of G.S. 15A-256 governing the search of persons present when a search warrant of private premises and vehicles is being executed does not apply in this case. The seizure of the first packet of cocaine was not the result of any search. Evidence presented indicated that the packet of cocaine fell out of defendant's pocket as he was being assisted by the officers. It was in plain view when the officers discovered it.

Constitutional guarantees against unreasonable searches and seizures do not apply where a search warrant is not necessary and where contraband is fully disclosed to the eye and hand. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). When such

evidence is in plain view of law enforcement officers who legally have a right to be in a position to view the evidence, it is subject to seizure and admissible at trial. *State v. Mitchell*, 300 N.C. 305, 266 S.E. 2d 605 (1980), *cert. denied*, 449 U.S. 1085, 66 L.Ed. 2d 810, 101 S.Ct. 873 (1981).

The officers were lawfully on the premises pursuant to a valid search warrant, and they were authorized under G.S. 15A-256 to initially detain defendant in the house. Their discovery of the first packet of cocaine was the result of lawful detention and the seizure of that packet was authorized under the "plain view" doctrine.

[2] Once the first packet had been discovered, the two officers had probable cause to arrest defendant without benefit of a warrant. G.S. 15A-401(b) authorizes a law enforcement officer to arrest a person without a warrant when the officer has probable cause to believe that such person has committed a felony and will evade arrest if not immediately taken into custody.

Probable cause exists if at the time of arrest, ". . . facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon." *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E. 2d 140, 145 (1984), *cert. denied*, --- U.S. ---, --- L.Ed. 2d ---, 108 S.Ct. 359 (1987). "It [probable cause] is a pragmatic question to be determined in each case in light of the particular circumstances and the particular offense involved." *State v. Harris*, 279 N.C. 307, 311, 182 S.E. 2d 364, 367 (1971). *Accord Zuniga, supra.*

In this case, the facts and circumstances known to Officer James and Agent Barrington clearly warranted a belief that a felony had been committed, that defendant had committed it, and that he would evade arrest if not promptly taken into custody. Evidence set forth at trial and in the record reveals that Barrington received reliable information regarding drug activity in Bobby Kolikas's house and that prior to obtaining a search warrant he personally observed defendant in the Kolikas home using a "bong," a device often used to smoke controlled substances. These facts coupled with defendant's flight from the house after learning of the officers' identities and their purpose for being there and the discovery of the packet of white powder which had fallen

from defendant's clothing, gave the officers the probable cause they needed to arrest defendant without a warrant.

"Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime." *Harris*, 279 N.C. 311, 182 S.E. 2d at 367. Thus, the second packet of cocaine found as a result of a search incident to defendant's arrest was properly seized and admissible at trial. We hold that the trial court properly denied defendant's motion to suppress.

No error.

Judges ARNOLD and WELLS concur.

ROBERT R. LUCAS, EMPLOYEE, PLAINTIFF v. THOMAS BUILT BUSES, INC., EMPLOYER, AND NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8710IC714

(Filed 2 February 1988)

1. **Master and Servant § 96.6— workers' compensation—finding that plaintiff was not temporarily totally disabled—insufficiency of evidence**

A conclusion by the Industrial Commission that there was no evidence that plaintiff was temporarily totally disabled after 12 March 1985 was not supported by the record where there was testimony by a second physician that after April 1985, when the physician first saw plaintiff, plaintiff was still unable to work, and the physician diagnosed plaintiff as having a bulging disc, the same diagnosis originally made by the first physician following plaintiff's accident.

2. **Master and Servant § 75— workers' compensation—payment of doctor's bill denied—improper basis**

The Industrial Commission erred in denying treatment expense for the services rendered plaintiff by a physician based on the fact that the physician was plaintiff's second physician of choice, since the determinations for the Commission to make were whether there was Commission approval of plaintiff's choice of the named physician and whether treatment was to effect a cure or rehabilitation.

3. **Master and Servant § 96.6— admission of liability by employer—Commission's conclusion that no causation shown—denial of award improper**

In a workers' compensation case where the employer admitted liability, the Industrial Commission's conclusion that there was no evidence to show causation was not a basis for denying plaintiff's award.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award filed 28 April 1987 before the Full Commission. Heard in the Court of Appeals 6 January 1988.

Plaintiff's claim before the North Carolina Industrial Commission alleged temporary total disability as a result of a back injury sustained while working for defendant-employer on 12 November 1984. Plaintiff, Robert Lucas, injured his back in the performance of his employment on 12 November 1984. He was initially sent to a medical clinic selected by defendant-employer. On 4 December 1984, after experiencing little improvement, plaintiff sought treatment from Russell Blaylock, M.D. Dr. Blaylock treated plaintiff for back strain and performed a CAT scan which revealed signs of a bulging disc in plaintiff's lower back. Blaylock was also of the opinion that plaintiff was developing arthritis. Plaintiff was found to be temporarily totally disabled until 12 March 1985 when, upon advice of Dr. Blaylock, plaintiff returned to work without restriction. Still in pain, plaintiff contacted orthopedic surgeon Dr. James Maultsby in April 1985. Dr. Maultsby concurred with Dr. Blaylock's conclusions regarding plaintiff's condition, but found that plaintiff was still disabled and unable to work. On 3 October 1985 plaintiff was released by Dr. Maultsby for modified work but defendant had no work for him at that time. On 16 December 1985, Dr. Maultsby released plaintiff to return to work without restrictions but no positions were available. At that same time, Dr. Maultsby found plaintiff had five to seven and one-half percent (5-7½%) residual disability of his back due to arthritic changes, radiculitis and the possibility of a bulging disc.

Under two compensation agreements, Industrial Commission (IC) Forms 21 and 26, plaintiff received disability payments from 10 December 1984 until 14 March 1985. In April 1985 defendant-carrier filed an IC Form 24 request to discontinue plaintiff's disability payments citing as reasons: 1) Dr. Blaylock's release of plaintiff to return to work without restriction; 2) plaintiff's alleged unauthorized change of physicians; and 3) carrier's desire not to accept any more temporary total disability. A hearing on this request was granted at plaintiff's behest.

The Deputy Commissioner concluded that there was no evidence that plaintiff was disabled after 12 March 1985 when Dr. Blaylock released him and that there was no evidence that plain-

tiff's current complaint related to his accident. The Deputy Commissioner also concluded that Dr. Maultsby was plaintiff's second and unauthorized choice of physicians, and therefore defendant-carrier was not obligated to pay his bill. Plaintiff's claim for further compensation was denied. The Deputy Commissioner's Opinion and Award was adopted by the Full Commission, with one dissent. Plaintiff appeals.

Hunter, Hodgman, Greene, Donaldson, Cooke and Elam, by Robert S. Hodgman, for plaintiff-appellant.

Smith, Helms, Mulliss and Moore, by J. Donald Cowan, Jr., for defendants-appellees.

SMITH, Judge.

[1] Plaintiff assigns as error the Commission's finding of fact and conclusion of law that plaintiff was not disabled after 12 March 1985. Plaintiff contends that the Commission erred in concluding that there was no evidence to show a work-related disability after 12 March 1985. We agree. Dr. Maultsby testified before the Deputy Commissioner as to his treatment and diagnosis of plaintiff's condition. It was Maultsby's testimony that 1) after April 1985 (when Maultsby first saw plaintiff), plaintiff was still unable to work; 2) on 3 October 1985, he released plaintiff for light work; 3) on 16 December 1985, he released plaintiff for unrestricted work; and 4) plaintiff presently had 5-7½% residual disability in his back. The Deputy Commissioner found as a fact that Dr. Maultsby had diagnosed plaintiff as having a bulging disc, the same diagnosis originally made by Dr. Blaylock following plaintiff's accident.

It is the exclusive province of the Industrial Commission to weigh and evaluate the evidence before it and find the facts. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965). Indeed, the Workers' Compensation Act provides that the Commission's findings of fact are conclusive. G.S. 97-86. On the other hand, a reviewing court's function is to determine whether the Commission's findings of fact are supported by competent evidence and whether the conclusions of law are correct. *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649 (1969); *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950); *Smith v. Paper Co.*, 226 N.C. 47, 36 S.E. 2d 730 (1946). In the case at bar, the Com-

mission's conclusion that there was no evidence that plaintiff was temporarily totally disabled after 12 March 1985 is not supported by the record.

Defendants contend that there was competent evidence to support the Commission's finding that plaintiff reached maximum medical improvement on 12 March 1985, and that therefore the Commission's findings are conclusive under G.S. 97-86. It is true that competent evidence was presented by Dr. Blaylock as to such improvements. However, defendants' contention is misplaced. The error is not in the Commission's finding but in its conclusion that there was no evidence that plaintiff was disabled after 12 March 1985. Conclusions of law are reviewable by this court to determine their evidentiary basis. *Walston v. Burlington Industries*, 49 N.C. App. 301, 271 S.E. 2d 516 (1980), *rev'd on other grounds*, 304 N.C. 670, 285 S.E. 2d 822 (1982). In light of Dr. Maultsby's testimony regarding plaintiff's further disability, this conclusion of "no evidence" is not supported by the record. The decision whether to believe Maultsby, Blaylock, or both is within the discretion of the Commission, but that decision must be supported by the evidence. *McGill v. Lumberton*, 218 N.C. 586, 11 S.E. 2d 873 (1940); *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980).

[2] Plaintiff also assigns as error the Commission's denial of treatment expense for the services rendered by Dr. Maultsby based on the fact that Maultsby was plaintiff's second physician of choice. In Conclusion of Law No. 2, the Commission states that plaintiff had a right to a second opinion if he had not already exercised that right. A reading of G.S. 97-25, regarding medical treatment of employees, fails to indicate any limitation on the number of physicians an employee may choose. The only requirements are that the physician be approved by the Commission, and treatment must facilitate recovery and rehabilitation. *Schofield v. Tea Co.*, 299 N.C. 582, 264 S.E. 2d 56 (1980). The determinations for the Commission to make are whether there was Commission approval of plaintiff's choice of Dr. Maultsby and whether treatment was to effect a cure or rehabilitation.

[3] Finally, plaintiff assigns error to the Commission's Conclusion of Law No. 1 that plaintiff was not entitled to compensation because there was no evidence showing a causal connection be-

tween the accident and plaintiff's condition after 12 March 1985. We agree. The record contains two agreements, IC Forms 21 and 26, in which defendants agree to pay compensation for plaintiff's back injury. The record also reveals that the only issue before the Commission was whether plaintiff's compensation should continue, not whether his alleged disability was the result of his accident. G.S. 97-17 provides that, "no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of matters set forth, unless it shall be made to appear . . . that there had been error due to fraud, misrepresentation, undue influence or mistake." This is a case of admitted liability and the Commission's conclusion that there was no evidence to show causation is not a basis for denying plaintiff's award.

For the reasons set forth above, the Order of the Commission is vacated and the matter remanded for such order as may be appropriate consistent with this opinion.

Vacated and remanded.

Judges ARNOLD and WELLS concur.

COLLEEN S. STANFORD v. MOUNTAINEER CONTAINER COMPANY

No. 8728SC479

(Filed 2 February 1988)

Landlord and Tenant § 19— month-to-month tenant—notice of rent increase—acceptance of prior rent amount

A landlord's notice to a month-to-month tenant of a rent increase constituted an offer to create a new contract or tenancy at the increased rent, and the rental increase became effective only when the tenant by words or conduct clearly indicated its assent to the new term. Plaintiff landlord's continued acceptance of the rent previously paid by defendant tenant after the notice and effective date of the rent increase constituted a continuation of the previous tenancy and established a rejection by defendant of the offer to create a new tenancy at an increased rental amount.

APPEAL by defendant from *Downs, James U., Judge.* Judgment entered 11 February 1987 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 18 November 1987.

Plaintiff lessor brought this action to recover back rent from defendant corporate lessee, which comprised the difference between a demanded rent increase and the rent previously paid by defendant. The case was heard before the trial court on 12 January 1987 which rendered judgment in plaintiff's favor and awarded her $50,400.00 together with interest.

The pertinent facts found by the trial court were that defendant corporation leased a certain building from plaintiff. Defendant utilized the building as an office and warehouse from which its business operated. At no time since the beginning of the lease relationship in 1976 had the parties executed a written lease agreement nor had there been any express agreement regarding the terms of future rent increases.

The trial court found that initially the parties had mutually agreed defendant would pay such rent as it could afford as defendant was just beginning business and had limited cash flow. Subsequently, at plaintiff's request, the rent was raised to $2,625.00 a month but as was their practice, defendant determined the amount of the rent increase.

In July 1982, plaintiff, through her attorney, mailed a notice to defendant indicating that the rent would increase to $4,200.00 a month effective 1 August 1982. Nevertheless, defendant continued to tender each month and plaintiff accepted, the amount of rent defendant previously paid ($2,625.00), until March 1985. During this time, plaintiff made no attempts to evict defendant, nor did plaintiff communicate anything further to defendant about the rental increase until late 1984 or early 1985 when she told Ronald E. Stanford (president of defendant corporation and plaintiff's son) that she needed more money. Several months later, defendant began paying an increased rent of $3,000.00 a month in March 1985 and continued to do so up through and including the date of the trial.

The trial court concluded that the parties had created a "tenancy at will on a month to month basis" and that defendant corporation's silence or non-response to plaintiff's letter of rent

increase "is conduct tantamount to acceptance of plaintiff's offer to allow the defendant to remain on said premises on the condition the rental was increased to the amount specified by the plaintiff." The trial court also concluded however that plaintiff's acceptance in March 1985 of defendant's payment of $3,000.00 which represented a rental increase, constituted an acceptance of the lesser amount thus preventing plaintiff's recovery for back rent after March 1985. From the award of $50,400.00 and interest representing the value of the difference between $4,200.00 a month and $2,625.00 for 32 months—or August 1982 through March 1985, defendant appeals.

Morris, Golding, Phillips & Cloninger, by William C. Morris, Jr., for plaintiff-appellee.

Roberts, Stevens & Cogburn, P.A., by Gwynn G. Radeker and Glenn S. Gentry, for defendant-appellant.

WELLS, Judge.

The sole question for review and apparently one of first impression before our appellate courts is whether a landlord may recover back rent from a month-to-month periodic tenant at will where despite the landlord's prior notice of a rental increase, the tenant continued to pay and the landlord to accept without objection, the same amount of rent as earlier paid. We answer in the negative.

Defendant corporation contends in its first three assignments of error that the trial court erred in concluding, as a matter of law, that defendant's failure to respond to plaintiff's rental increase notice (hereinafter "notice") effectively constituted an acceptance and agreement to pay the increased monthly rent of $4,200.00. We agree with defendant. As a matter of basic contract law, there can be no contract unless there exists a "meeting of the minds," *Richardson v. Storage Co.*, 223 N.C. 344, 26 S.E. 2d 897 (1943). Implicit in this rule is the corollary that a party to a contract may not have terms imposed upon him by the other party. "Contract requires a conscious assent to terms proposed by another." *Corbin on Contracts*, § 59 (1963).

Although we have found no previous North Carolina case directly on point, we are guided by our Supreme Court's decision

in *Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 98 S.E. 2d 871 (1957) which held that a landlord's acceptance of rent with full knowledge of tenant's breach constituted a waiver of the landlord's right to forfeiture. Although the case did not raise the issue of a landlord's right to back rent, the court's analysis and application of principles of waiver appear to require our application of the waiver principle in this case to defeat plaintiff's claim.

The *Spiegel* court noted that the expiration of the deadline required by the lessor company for the lessee to cure the breach gave rise to the landlord's right to elect whether to continue the lease (despite the breach) or terminate the tenancy. If the lessor chose to continue accepting rent he implicitly continued the tenancy; otherwise, the lessor's refusal to accept rent would allow the company to terminate the tenancy and recover damages for wrongful possession of the tenant's holdover. The Court held that the landlord's acceptance of rents after the expiration of the "cure deadline" constituted a waiver of tenant's breach and an implied continuation of the tenancy contract. 246 N.C. at 467-68, 98 S.E. 2d at 878.

The *Spiegel* court relied on *Winder v. Martin*, 183 N.C. 410, 111 S.E. 708 (1922) from which we also derive direction:

> It is the generally accepted rule that if the landlord receive rent from his tenant, after full notice or knowledge of a breach of a covenant or condition in his lease, for which 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.

We therefore hold the rule to be that a landlord's notice of rent increase constitutes an offer to create a new contract or tenancy at the increased rent. The rental increase becomes effective and binding upon the tenant only where the tenant by words or conduct clearly indicates the tenant's assent to the new term.

Under the foregoing rule then, plaintiff lessor's continued acceptance of the rent ($2,625.00 a month) previously paid by defendant after the notice and effective date of the rent increase in August 1982, constituted a continuation of the previous tenancy and establishes a rejection of the offer to create a new tenancy at

the rental amount of $4,200.00 a month. The plaintiff was therefore not entitled to recover the back rent as awarded by the trial court. This portion of the judgment below is reversed. The trial court's judgment with respect to the $3,000.00 rent paid on and after March 1985 is affirmed.

Because of the result we have reached, it is unnecessary for us to determine defendant's other assignments of error.

Reversed in part; affirmed in part.

Judges JOHNSON and COZORT concur.

BARBARA M. AILLS AND LOVELL R. AILLS v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 8714SC653

(Filed 2 February 1988)

Insurance § 110— automobile liability insurance—underinsured motorists clause—amount of recovery

Pursuant to the underinsured motorists coverage of plaintiffs' insurance policy with defendant, each plaintiff was entitled to recover from defendant $50,000, representing the difference between the sum already received pursuant to the tortfeasor's exhausted liability policy and the $100,000 "each person" limit provided for in the policy with defendant; furthermore, the policy's "each accident" provision meant that $100,000 was the outer aggregate limit of defendant's exposure per accident. Plaintiffs' recovery should not be reduced by the $5,000 each received in medical payments or by the amount of a sum collected by one plaintiff in disability benefits from another insurance company.

APPEAL by defendant from *Brannon, Anthony M., Judge.* Judgments entered 27 April 1987 in DURHAM County Superior Court. Heard in the Court of Appeals 10 December 1987.

Plaintiffs brought separate actions against defendant for sums allegedly owing under the underinsured motorists coverage provisions of an insurance policy. On 27 April 1987 the trial court, finding no genuine issue of material fact, entered summary judgment in favor of each plaintiff. Defendant appealed. Since the cases contained identical questions of law and matters of fact, the

trial court ordered them consolidated for the purpose of further proceedings.

King, Walker, Lambe & Crabtree, by Guy W. Crabtree, for plaintiff-appellees.

Bryant, Patterson, Covington & Idol, P.A., by Lee A. Patterson, II, for defendant-appellant.

WELLS, Judge.

Summary judgment is appropriately entered where the materials before the trial court "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." *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

The underlying question is what was the scope of the underinsured motorists coverage of plaintiff Mr. Aills' insurance policy with defendant. The facts are not in dispute. On 21 July 1983 Mr. and Mrs. Lovell R. Aills, plaintiffs herein, were severely injured in an automobile accident. The other driver was at fault. A court, sitting without a jury, awarded Mr. Aills $399,091.43 and his wife $274,561.16 in damages. The tortfeasor's insurer paid $50,000.00 to Mr. Aills and the same amount to his wife. Mr. Aills' automobile was insured by defendant at the time of the collision. His policy included underinsured motorists coverage with limits of $100,000.00 per person and $100,000.00 per accident. Because their damages were far in excess of the amounts paid out by the tortfeasor's insurer, each plaintiff made demand upon defendant for payment under the underinsurance coverage of the policy. The defendant denied liability.

N.C. Gen. Stat. § 20-279.21(b)(4) defines an underinsured motor vehicle as "a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the owner's policy." Plaintiffs contend that the tortfeasor was, with respect to them, an underinsured motorist, because the limits of his liability—$50,000.00 per person and $100,000.00 per accident—were less than the limits of the underinsurance coverage—$100,000.00 per person and $100,000.00

per accident. But defendant contends that, as a result of payments to plaintiffs by the tortfeasor's insurer—$50,000.00 to each claimant, $100,000.00 total—the per accident exposure of $100,000.00 of the underinsurance portion of the policy was met and no further payment was due.

Underinsured motorists coverage is not required by law (since the insured may reject the coverage), and therefore the terms of the coverage are within the control of the parties. *See* G.S. §§ 20-279.21(b)(4) and (g). It follows that we look to the insurance contract itself to determine the rights of the parties. The limits of defendant's underinsurance liability (set forth as a subset of the *uninsurance* liability) are spelled out on page 12 of the owner's policy, to wit:

> The limit of bodily injury liability shown in the Declarations for "each person" for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident. Subject to this limit for "each person," the limit of bodily injury liability shown in the Declarations for "each accident" for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury resulting from any one accident.

These provisions are susceptible to differing constructions. Our Supreme Court has held that when language is used in an insurance policy which is reasonably susceptible to differing constructions, the policy must be given the construction most favorable to the insured, since the insurance company prepared the policy and chose the language. *See Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978); *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E. 2d 775 (1984).

The key words in the above excerpt are "subject to." Plaintiffs contend that these words subordinate, or subserviate, the "each accident" liability limit of the policy to the "each person" limit. We agree. The "each person" coverage applies first and is to be looked to first. Hence, each plaintiff was entitled to recover from defendant $50,000.00, representing the difference between the sum already received pursuant to the tortfeasor's exhausted liability policy and the $100,000.00 "each person" limit provided for in the policy with defendant. We construe the policy's "each

accident" provision to mean that $100,000.00 is the outer aggregate limit of defendant's exposure per accident (should there be multiple claims). Thus, had there been four covered claimants instead of two, each having received $50,000.00 from the tortfeasor's insurer, then, under the terms of Mr. Aills' policy, each of the four claimants would receive $25,000.00, representing his pro rata share of the outer limit coverage.

Defendant further contends that plaintiffs' recovery should be reduced by the $5,000.00 each has received in medical payments. We disagree. To be sure, the policy provides that underinsurance coverage "shall be reduced by all sums paid because of the bodily injury. . . ." However, the policy goes on specifically to authorize reduction for "all sums paid out under part B." No express mention is made of part C, which is the portion of the policy dealing with medical payments. Applying the rule of construction in *Grant v. Insurance Co., supra,* we construe these apparently conflicting provisions favorably to the plaintiffs insureds and hold that defendant is not entitled to credit for medical payments. We further hold that defendant is not entitled to a credit in the amount of $397.14, representing the sum collected by plaintiff Lovell Aills in disability benefits on 3 April 1987 from Travelers Insurance Company. The policy with defendant provides for reductions for all sums "paid . . . because of the bodily injury under any . . . disability benefits law." There is no showing that the sum received by Mr. Aills was in payment under any disability benefits *law.*

The orders of summary judgment entered by the trial court did not establish the date from which computation of interest runs. When recovery is had for breach of contract the amount awarded on the contract bears interest from the date of the breach. N.C. Gen. Stat. § 24-5 (1986). In the present case the breach occurred when defendant denied plaintiffs' demand for payment. The record does not identify this date. Therefore, we remand to the trial court for the limited purpose of ascertaining the breach date and for appropriate amendment of the judgments to show the date from which interest shall accrue.

Affirmed and remanded for amendment of judgments.

Judges PHILLIPS and PARKER concur.

MARY LOU ADAMS v. JACK M. BASS

No. 8710DC774

(Filed 2 February 1988)

Principal and Surety § 1— suit against principal on original instrument—10-year statute of limitations applicable

Plaintiff surety who elected to sue the principal on the original instrument, a note under seal, rather than to sue for reimbursement on the surety agreement, had the same rights the bank had on the original note, and the ten-year statute of limitations thus applied. N.C.G.S. § 26-3.1.

APPEAL by plaintiff from *Payne, Judge*. Judgment entered 18 March 1987 in District Court, WAKE County. Heard in the Court of Appeals 13 January 1988.

Plaintiff instituted this action on 11 July 1986 alleging that defendant executed a note under seal for a 90-day loan on 16 July 1976 to North Carolina National Bank. Plaintiff further alleged that on the same date at defendant's request, plaintiff became a guarantor of defendant's note by executing an "Assignment For . . . Certificates of Deposit" in the amount of $7,500.00 as collateral for defendant's obligation. This assignment was executed under seal by both plaintiff and defendant. It reads, in part, as follows:

> FOR VALUE RECEIVED, the undersigned hereby assigns, transfers and sets over to North Carolina National Bank . . . all the right, title and interest of the undersigned in and to that certain Savings Renewable Certificate of Deposit . . . as collateral for a loan in the amount of $7,500.00 . . . to Jack M. Bass and Mary Lou Adams . . . .
>
> The said Bank is hereby authorized to pay to North Carolina National Bank upon demand a sufficient portion of the funds on deposit . . . to satisfy all indebtedness, direct or indirect, of the borrower as certified by said bank.
>
> WITNESS their hands and seals this 16 day of July, 1976.
>
> s/ Jack M. Bass (SEAL)
>
> s/ Mary Lou Adams (SEAL)

Defendant defaulted and on 3 March 1977 the bank exercised its rights under the assignment by deducting $7,500.00 from plaintiff's certificate of deposit.

Plaintiff seeks recovery of $7,500.00 with interest from 3 March 1977 and asserts that she is entitled to be subrogated to the rights of the bank. Defendant answered and pleaded the statute of limitations in addition to other denials.

Plaintiff filed a motion for summary judgment and an affidavit containing the same general facts as alleged in the complaint. In the affidavit, plaintiff also stated that she was not a signatory to the note and received none of the loan proceeds.

Defendant also moved for summary judgment without supporting affidavits. The trial court denied plaintiff's motion for summary judgment and granted defendant's motion. Plaintiff appeals.

Merriman, Nicholls, Crampton, Dombalis & Aldridge, P.A., by Nicholas J. Dombalis, II, and Elizabeth Anania, for plaintiff-appellant.

Nonnie F. Midgette for defendant-appellee.

SMITH, Judge.

Plaintiff assigns as error the trial court's ruling that the action was barred by the three-year statute of limitations, G.S. 1-52, and the subsequent dismissal of her action. Plaintiff asserts that she was the guarantor of the defendant's note and entitled to subrogation with the same rights as the original creditor. The assignment of collateral, however, makes her primarily liable for payment of the note.

Though it is not necessary to discuss the technical distinctions existing between surety and guarantor in deciding this case, our Supreme Court has previously contrasted the differences:

> Although contracts of guaranty and suretyship are, to some extent, analogous, and the labels are used interchangeably, there are, nevertheless, important distinctions between the two undertakings. A guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is

himself primarily liable for such payment or performance. *A surety is a person who is primarily liable for the payment of the debt or the performance of the obligation of another.* While both kinds of promises are forms of security, they differ in the nature of the promisor's liability. A guarantor's duty of performance is triggered at the time of the default of another. On the other hand, *a surety is primarily liable for the discharge of the underlying obligation, and is engaged in a direct and original undertaking which is independent of any default.*

Trust Co. v. Creasy, 301 N.C. 44, 52-53, 269 S.E. 2d 117, 122 (1980) (citations omitted) (emphasis added). Under the present assignment of the certificate of deposit, plaintiff is a surety as her obligation and the bank's right to demand were not dependent upon default by defendant. *Colonial Acceptance Corp. v. Northeastern Printcrafters, Inc.*, 75 N.C. App. 177, 330 S.E. 2d 76 (1985).

It has been repeatedly held that a suit on a surety contract is controlled by the three-year statute of limitations, G.S. 1-52. *Fleet Real Estate Funding Corp. v. Blackwelder*, 83 N.C. App. 27, 348 S.E. 2d 611 (1986), *disc. rev. denied*, 319 N.C. 104, 353 S.E. 2d 109 (1987); *Bernard v. Ohio Casualty Ins. Co.*, 79 N.C. App. 306, 339 S.E. 2d 20 (1986). This rule applies even though the surety agreement is under seal. *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E. 2d 323 (1960); *Davis v. Alexander*, 207 N.C. 417, 177 S.E. 417 (1934). These cases, however, do not involve any allegations regarding subrogation. Additionally, these cases involved suits against the surety on the surety agreement. This is a suit against the maker of the note under seal by the surety who paid the obligation.

G.S. 26-3.1 provides:

(a) A surety who has paid his principal's note, bill, bond or other written obligation, may either sue his principal for reimbursement or sue his principal on the instrument and may maintain any action or avail himself of any remedy which the creditor himself might have had against the principal debtor. No assignment of the obligation to the surety or to a third-party trustee for the surety's benefit shall be required.

(b) The word "surety" as used herein includes a guarantor, accommodation maker, accommodation endorser, or other person who undertakes liability for the written obligation of another.

Though not cited by either the appellant or appellee, this statute is controlling. The statute allows a surety to sue a principal on the original instrument or for reimbursement on the surety agreement. After three years, a suit on the latter theory would be barred by G.S. 1-52. The plaintiff, having elected to sue on the underlying note under seal, has the same rights the bank had on the original note. *Exxon Chemical Americas v. Kennedy*, 59 N.C. App. 90, 295 S.E. 2d 770 (1982). Thus, the ten-year statute of limitations applies in this instance. G.S. 1-47.

Defendant has filed no affidavit in support of his motion for summary judgment or contrary to plaintiff's affidavit and may not rely on the mere denials in his answer. *See Savings and Loan Assoc. v. Trust Co.*, 14 N.C. App. 567, 188 S.E. 2d 661, *rev'd on other grounds*, 282 N.C. 44, 191 S.E. 2d 683 (1972).

The trial court is reversed and the case is remanded with instructions to grant summary judgment for plaintiff.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

IN THE MATTER OF: OFFICER J. L. MITCHELL

No. 8726SC238

(Filed 2 February 1988)

1. **Administrative Law § 4— punishment imposed by administrative agency—subsequent punishment for same offense—res judicata**

Punishment imposed on a police officer by the City of Charlotte Civil Service Board was invalid on the ground of *res judicata* because it was imposed for the same offense, residing outside the county, for which the Charlotte Police Department, through its Chain of Command Review Board, had punished him earlier.

2. Administrative Law § 4— quasi-judicial nature of administrative decision—res judicata

A determination made by the police department Chain of Command Review Board, following a hearing held at the instance of the Chief of Police, was clearly quasi-judicial in nature and thus *res judicata*, since the city code authorized the Chief of Police to suspend officers for up to thirty days and also to cite them before the city's Civil Service Board; required that charges against employees be stated in writing; and provided for the Chief's decision to be reviewed *de novo* by the city's Civil Service Board and for that decision to be reviewed by the superior court.

APPEAL by respondent City of Charlotte Civil Service Board from *Lewis, Robert D., Judge.* Order entered 30 October 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 September 1987.

In pertinent part the record indicates the following: The Charlotte City Code authorized (a) the Chief of Police to suspend for thirty days without pay any officer that violated a department rule or regulation; (b) an appeal by an officer so punished to the City's Civil Service Board; (c) the Civil Service Board in hearing the matter *de novo* to impose such punishment as it deemed "just and proper" up to dismissal or suspension without pay for ninety days. In August, 1981 the Charlotte Police Department adopted a procedure for processing misconduct or rule violation charges against officers. The procedure provided for an initial hearing before a department agency known as the Chain of Command Review Board, authorized charged officers to obtain a *de novo* determination by the Civil Service Board and permitted the Chief of Police to simultaneously cite an officer to both the Chain of Command Review Board and the Civil Service Board. Rules of Conduct adopted at the same time included a Class B rule requiring employees to reside within Mecklenburg County; the first violation of which was punishable by a two-day suspension from duty, the second by a five day suspension, and the third was treatable as a more serious Class A offense. Unbeknownst to Police Chief Vines, two months earlier the City Council had adopted a policy that subjected employees to possible dismissal if they resided outside of Mecklenburg County after being employed for six months.

J. L. Mitchell, an officer with the Charlotte Police Department since 15 September 1982, resided with his mother in neighboring Cabarrus County for approximately six weeks ending on 1

July 1984. On 10 July 1984 Chief of Police Vines charged Mitchell with violating the residency rule and two other rules that no longer concern us. On 11 July 1984 the charges were heard and upheld by the Police Department's Chain of Command Review Board, which recommended that Mitchell be suspended from duty without pay for fifteen days. The recommendation was accepted by Chief Vines, who notified the City's Civil Service Board of the punishment imposed. Mitchell did not appeal to the Civil Service Board and under the provisions of the Charlotte City Code the decision became final fifteen days later. On 6 November 1984 Police Chief Vines, having learned of the more stringent City policy against employees residing outside the county, "updated" the police department's Rules of Conduct and notified all department personnel that punishment for violating the residency code had been changed and that "any employee found in violation . . . will be subject to immediate termination." On 19 November 1984 Chief Vines cited Mitchell to the City's Civil Service Board for the same residency violation that the police department, through its Chain of Command Review Board, heard and decided the preceding July. The Civil Service Board, after denying Mitchell's motion to dismiss the proceeding, upheld the charge and suspended him from duty without pay for ninety days. Pursuant to Mitchell's appeal to the Superior Court, the decision was vacated and the Charlotte Civil Service Board appealed.

Haywood, Menser & Yurko, by Lyle J. Yurko, and Merryman, Dickinson, Ledford & Rawls, by Eben T. Rawls, III, for petitioner appellee.

Senior Assistant City Attorney F. Douglas Canty for respondent appellant City of Charlotte Civil Service Board.

PHILLIPS, Judge.

[1, 2] The punishment imposed on Officer Mitchell by the City of Charlotte Civil Service Board is invalid on the grounds of *res judicata* because it was imposed for the same offense that the Charlotte Police Department, through its Chain of Command Review Board, punished him for earlier. In our jurisprudence it is axiomatic that no one ought to be twice vexed for the same cause. Comment, *Res Judicata in Administrative Law*, 49 Yale L.J. 1250 (1940). This fundamental principle of law applies to administrative decisions. *Maines v. City of Greensboro*, 300 N.C. 126, 265 S.E. 2d

155 (1980). Whether an administrative decision is *res judicata* depends upon its nature; decisions that are "judicial" or "quasi-judicial" can have that effect, decisions that are simply "administrative" or "legislative" do not. 2 Am. Jur. 2d *Administrative Law* Sec. 497 (1962). Though the distinction between a "quasi-judicial" determination and a purely "administrative" decision is not precisely defined, the courts have consistently found decisions to be quasi-judicial when the administrative body adequately notifies and hears before sanctioning, and when it adequately provides under legislative authority for the proceeding's finality and review. *See, Russ v. Board of Education of Brunswick County,* 232 N.C. 128, 59 S.E. 2d 589 (1950); 2 Am. Jur. 2d *Administrative Law* Sec. 498 (1962). Here, the Charlotte City Code (1) authorized the Chief of Police to suspend officers for up to thirty days and to also cite them before the City's Civil Service Board; (2) required that charges against employees be stated in writing; (3) provided for the Chief's decision to be reviewed *de novo* by the City's Civil Service Board and for that decision to be reviewed by the Superior Court. Thus, the determination made by the Department Chain of Command Review Board, following the hearing held at the instance of the Chief of Police, was clearly quasi-judicial in nature, and since neither the officer nor the Chief pursued the matter further, as each had a right to do, the proceeding was final and the attempt eight months later to punish Mitchell a second time for the same offense was invalid. Under the circumstances, the extensive and intricate arguments of the parties concerning constitutional due process need not be discussed.

Affirmed.

Judges COZORT and GREENE concur.

CREIGHTON C. BECKER v. BYRON GUSTAVE BECKER

No. 8721DC601

(Filed 2 February 1988)

1. **Divorce and Alimony § 30— equitable distribution—rental value of residence after separation—no marital property**

The trial court in an equitable distribution proceeding erred in classifying as marital property the rental value of the marital residence during the post-separation period when it was occupied by defendant, since, for the purpose of classification of property, the marital estate is frozen as of the date of separation; however, the trial court is not foreclosed from considering the post-separation use of the marital residence in reaching its decision as to whether an equal distribution is equitable.

2. **Divorce and Alimony § 30— equitable distribution—oriental rugs and furniture—marital property**

Evidence in an equitable distribution proceeding was sufficient to allow the trial court to draw the reasonable inference that oriental rugs and an antique secretary were gifts to the parties' marriage and hence were marital property, or that the rugs and secretary were acquired by defendant during the marriage, but not by gift, hence making them marital property.

APPEAL by defendant from *Burleson, Lynn P., Judge.* Judgment entered 21 January 1987 in FORSYTH County District Court. Heard in the Court of Appeals 3 December 1987.

Plaintiff filed a complaint on 12 June 1984 seeking an absolute divorce and equitable distribution. On 7 November 1984 defendant was granted an absolute divorce. On 21 January 1987 the trial court entered its equitable distribution judgment distributing the marital property of the parties. Defendant appealed.

Morrow, Alexander, Tash, Long & Black, by John F. Morrow and Ronald B. Black, for plaintiff-appellee.

White and Crumpler, by Fred G. Crumpler, Jr. and Christopher L. Beal, for defendant-appellant.

WELLS, Judge.

The trial court concluded that an equal division of the marital estate was equitable in this case. Defendant does not take issue with this conclusion. Defendant's two assignments of error deal with the trial court's classifying as marital property: (1) the rent-

al value of the marital residence for a period of approximately three years, during which time defendant occupied the marital residence to the exclusion of the plaintiff; and (2) classifying as marital property five oriental rugs and an antique secretary. We deal with these questions in order.

[1] The trial court found that the marital residence had a rental value during the post-separation period when it was occupied by defendant. Defendant does not take issue with the value component found by the trial court, but argues that the trial court was without authority to include any such value in the marital estate. We agree with defendant. N.C. Gen. Stat. § 50-20(b)(1) provides:

> (1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties. . . .

Thus, the statute makes it clear that for the purpose of *classification* of property (as either marital or separate) the marital estate is frozen as of the date of separation. While its components clearly may increase in value after separation and before distribution, *see e.g. Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E. 2d 237 (1986), no new property may be added to the marital estate after the date of separation.

Our decision does not mean that a trial court is foreclosed from considering the post-separation use of the marital residence in reaching its decision as to whether an equal distribution is equitable. G.S. § 50-20(c) contains provisions pertinent to this issue as follows:

> (c) There shall be an equal division . . . unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:
>
> . . .
>
> (11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and

(12) Any other factor which the court finds to be just and proper.

The evidence and findings in the present case show that during the period of separation, for about three years, defendant had the exclusive use of the marital residence, but maintained it and paid taxes and insurance on it. All of these are factors the trial court may consider on remand in making its determination as to whether an equal distribution is equitable; or, if not, what unequal but equitable distribution should be made.

[2] In its judgment, the trial court found that five oriental rugs and an antique secretary in the parties' residence were marital property. Defendant contends that the evidence at trial clearly showed that the rugs and secretary were gifts to him from his mother and therefore should have been classified as his separate property. We disagree. The evidence was conflicting as to how the rugs and secretary came to the parties' residence. In a non-jury trial, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. *See Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979); *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). The reasonable inferences to be drawn from the evidence are for the trial court's determination. *See Hodges v. Hodges*, 257 N.C. 774, 127 S.E. 2d 567 (1962). We conclude that the evidence on this issue allowed the trial court to draw the reasonable inference that the oriental rugs and the secretary were gifts to the parties' marriage and hence were marital property, or that the rugs and secretary were acquired by defendant during the marriage, but not by gift, hence making them marital property. *See* G.S. § 50-20(b)(1). Defendant's second assignment of error is overruled.

We do not require a new trial, but order that the trial court reconsider its judgment on the existing record, and enter a new judgment consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges PHILLIPS and PARKER concur.

REBA C. SMITH, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ARCHIE WAYNE SMITH v. JOHNNIE WADE STARNES

No. 8722SC678

(Filed 2 February 1988)

Automobiles and Other Vehicles § 45— wrongful death action—evidence that defendant had liability insurance on vehicle two months before accident

The trial court in a wrongful death action did not err in excluding evidence that defendant had certified that he had liability insurance on the vehicle in question some two months before the accident giving rise to this action, since this evidence did not show agency, ownership or control on the later date within the purview of N.C.G.S. § 8C-1, Rule 411.

APPEAL by plaintiff from *Davis, Judge*. Judgment entered 5 March 1987 and order entered 11 March 1987 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 11 January 1988.

Plaintiff administratrix instituted this action to recover damages for the alleged wrongful death of her intestate on 7 August 1980 as a result of an automobile collision. The complaint alleges, in part, that on the date of the accident defendant was the owner of a 1970 Chevrolet automobile negligently operated by David Allen Graf, as agent of and with the authority, consent and knowledge of defendant. Defendant answered and denied all allegations as to agency, ownership of the vehicle and negligence.

On 18 February 1987, the trial court allowed defendant's motion pursuant to G.S. 1A-1, Rule 42(b) to sever the agency issue from issues of negligence and damages. On the same date, the trial court also allowed defendant's motion *in limine* prohibiting introduction of any evidence of liability insurance defendant may have had on the 1970 Chevrolet.

At trial, plaintiff introduced in evidence certified copies of the title records of the Division of Motor Vehicles tending to show that on 7 August 1980 registered title to the 1970 Chevrolet was in the name of defendant. Plaintiff had available for introduction certified copies of the registration certification and financial responsibility certification from the Division of Motor Vehicles which would have shown that on 29 May 1980 the defendant certified that he had liability insurance on the vehicle. In accordance

with the court's ruling on the motion *in limine*, all reference to defendant having certified that he had liability insurance on the vehicle on 29 May 1980 was deleted from the copy of the registration certification received in evidence.

Defendant offered evidence tending to show that in July 1980 he traded the 1970 Chevrolet to Christopher Brandow who thereafter retained possession of the vehicle. Defendant testified he did not know Graf and had never had any contact with him at all.

The agency issue was submitted to the jury and was answered in favor of defendant. From a judgment entered for defendant and an order denying plaintiff's motion for a new trial, plaintiff appeals.

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

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

SMITH, Judge.

Plaintiff asserts as error the trial court's granting of defendant's motion *in limine* precluding the introduction of any evidence that defendant had liability insurance on the 1970 Chevrolet. Plaintiff contends that evidence of liability insurance was admissible pursuant to G.S. 8C-1, Rule 411 to show agency, ownership and control of the automobile in question.

G.S. 8C-1, Rule 411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

The only items which appear of record concerning liability insurance are the registration certification and the financial responsibility certification. The record fails to disclose that plaintiff made any offer of proof of these entire documents containing the insurance certifications as required by G.S. 8C-1, Rule 103(a)(2).

This Court, however, has considered the assignment of error in the interest of justice. G.S. 8C-1, Rule 103(d).

Both records which plaintiff now contends should have been admitted merely tend to show that defendant had certified that he had liability insurance on the vehicle on 29 May 1980. The fact that defendant may have had liability insurance on the vehicle some two months before the accident does not tend to show agency, ownership or control on the later date.

As the items in question do not tend to show agency on the date of the accident, G.S. 8C-1, Rule 411 has no application. Further, the documents are not relevant and are thus inadmissible. G.S. 8C-1, Rule 401 and 402.

Affirmed.

Judges ARNOLD and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 FEBRUARY 1988

BECKER v. WORSLEY OIL No. 8712SC619	Cumberland (86CVS931)	Affirmed
GRAY v. N.C. DEPT. OF MOTOR VEHICLES No. 8726SC886	Mecklenburg (87CVS129)	Appeal Dismissed
HART v. TOWN OF NORTH WILKESBORO No. 8723SC545	Wilkes (86CVS298)	Affirmed
HOWELL v. NATIONWIDE MUT. INS. CO. No. 876DC885	Halifax (87CVD280)	Reversed and Remanded
IN RE MANUS v. MULLIS No. 8720DC814	Union (83J004) (83J090)	Affirmed
KINDLEY v. KINDLEY No. 8719SC628	Randolph (86CVS454)	Affirmed
LEE v. NGO No. 8726SC835	Mecklenburg (85CVS5294)	Appeal Dismissed
McLEOD v. HUTCHINS No. 8710SC874	Wake (86CVS3181)	Affirmed
STATE v. CANNON No. 878SC844	Lenoir (86CRS9491)	Remanded for resentencing
STATE v. GRAVES No. 8726SC376	Mecklenburg (86CRS57643)	New Trial
STATE v. HICKS No. 879SC421	Franklin (85CRS1441)	No Error
STATE v. JACOBS No. 8716SC858	Robeson (87CRS2980) (87CRS2981)	No error at trial. Remanded for new sentencing hearing
STATE v. JENKINS No. 8716SC887	Robeson (87CRS3919)	Remanded
STATE v. JOHNSON No. 874SC913	Onslow (86CRS17885)	No Error

STATE v. LENDON No. 8713SC894	Columbus (86CRS7223) (86CRS7224)	No Error
STATE v. MOLLETT No. 871SC849	Dare (85CRS1985) (85CRS5713)	Affirmed
STATE v. MOORE No. 8727SC865	Gaston (86CRS28369)	No Error
STATE v. RICHARDSON No. 8719SC820	Randolph (86CRS7874) (86CRS8111) (86CRS8112)	No Error
STATE v. SCARBOROUGH No. 871SC883	Dare (86CRS1236)	No Error
STATE v. WALKER No. 879SC878	Person (84CRS1063)	No Error

NORTHWESTERN BANK v. NCF FINANCIAL CORPORATION (FORMERLY KNOWN AS CAROLINA FINCORP, INC.) AND NORTH CAROLINA FEDERAL SAVINGS AND LOAN ASSOCIATION

No. 8723SC576

(Filed 16 February 1988)

1. **Principal and Agent § 5.2— agent's signing of letters of credit—express and apparent authority—sufficiency of evidence**

Testimony by defendant's vice president that he had previously signed letters of credit on behalf of defendant and that he had authority to do so even when a letter of credit was not accompanied by a guaranty letter from defendant's parent company was sufficient to show that the vice president had the express authority to execute letters of credit on behalf of defendant; furthermore, evidence was also sufficient to show that he was clothed with the apparent authority to issue letters of credit where there was no showing of a limitation on his authority to approve letters of credit and no showing that plaintiff had notice of any limitation.

2. **Uniform Commercial Code § 39.1— letter of credit—no demand for payment on underlying agreement—no requirement of letter of credit**

There was no merit to defendant's contention that plaintiff was not entitled to present a draft on a letter of credit issued by it because plaintiff failed to make a demand for payment from the original borrower in the underlying agreement, since such a demand was not a term of the letter of credit in question. N.C.G.S. § 25-5-114(a).

3. **Fraud § 4— fraudulent procurement of letter of credit—no knowledge by beneficiary—no showing of fraud**

The trial court did not err in refusing to submit to the jury an issue of fraud in the procurement of a letter of credit where defendant maintained that a fiduciary relationship existed between it as issuer of the letter and the original borrower by virtue of her position as an assistant secretary for the parent corporation of defendant, and constructive fraud should have been presumed from the transaction, since the beneficiary must have known of the fraudulent procurement of the letter of credit at the time it extended credit based on the letter as collateral, and defendant did not request that an issue of knowledge be submitted to the jury, thereby waiving its right to a jury trial on this issue.

APPEAL by defendant NCF Financial Corporation from *Rousseau, Jr., Judge.* Judgment entered 19 March 1987 in Superior Court, WILKES County. Heard in the Court of Appeals 2 December 1987.

Francis C. Clark, Petree, Stockton & Robinson, by John T. Allred and Adam H. Broome, and Smith, Helms, Mulliss & Moore, by Robert B. Cordle and William R. Purcell, II, for plaintiff-appellee.

Bailey, Patterson, Caddell & Bailey, by Allen A. Bailey and H. Morris Caddell, Jr., for defendant-appellant.

GREENE, Judge.

This is a civil action to recover on an irrevocable letter of credit held by plaintiff Northwestern Bank (hereinafter "Northwestern"). Defendant NCF Financial Corporation (formerly known as Carolina Fincorp, Inc., and hereinafter "NCF") issued the letter of credit but has refused to pay plaintiff. Plaintiff brought this suit to obtain payment under the letter of credit. The jury found in favor of plaintiff and the trial court entered judgment in the amount of $250,000 plus interest. Defendant appeals.

In March or April 1984, Lynn Sheppard and her husband met with Guy Cline, a Northwestern loan officer, seeking a personal loan for the purpose of beginning operation of a dye processing plant, Val-Dye, Inc. The Sheppards requested a loan of $250,000, and proposed using a letter of credit to be issued by NCF as collateral for the loan. At the time of the request, Mrs. Sheppard was employed as an assistant secretary and administrative assistant for North Carolina Federal Savings and Loan Association (hereinafter "Federal"). NCF is a wholly owned subsidiary of Federal. Mrs. Sheppard mailed a draft of the proposed letter of credit to Northwestern so it could review the letter to determine if it complied with Northwestern's requirements. This draft contained a signature line for Herman Parnell, vice president of NCF.

Northwestern reviewed the draft and made revisions to the letter so that it would meet their requirements. Northwestern also investigated NCF's authority to issue letters of credit. After determining that NCF could issue letters of credit, Cline telephoned Parnell and informed him of the revisions required by Northwestern. Northwestern inquired as to whether Parnell had the authority to issue letters of credit for NCF and was assured by Parnell that he did.

In mid-April 1984, Cline received the revised letter of credit issued by NCF. The letter authorized draws of up to an aggregate amount of $250,000 for the account of the Sheppards and/or Val-Dye, Inc., and was signed by Parnell as vice president of NCF. Northwestern investigated the Sheppards' credit history and approved the loan, relying on the letter of credit as collateral. The Sheppards executed a note for $250,000, a credit agreement, and a security agreement in favor of Northwestern, all of which were dated 1 May 1984. The letter of credit provided that "drafts are to be accompanied by your certified statement that the loan is in default and past due." By 5 June 1984, the loan was fully funded.

The Sheppards made the first two quarterly interest payments on the note but defaulted on the quarterly interest payment due in February 1985. Pursuant to the letter of credit, Northwestern then submitted a draft to NCF for $250,000, along with a certified statement that the loan was in default. When NCF refused to pay, Northwestern brought this action to enforce the letter of credit.

At the close of plaintiff's case, defendants rested without offering evidence. The issues submitted to the jury were: (1) whether NCF authorized Parnell to issue the letter of credit; and (2) whether plaintiff properly complied with the terms of the letter in requesting payment from the defendant. The jury answered both issues affirmatively and judgment was entered in favor of plaintiff. Defendant NCF appeals the trial court's denial of its motion for a directed verdict against plaintiff at the close of plaintiff's evidence. In addition, NCF assigns as error the trial court's failure to submit to the jury NCF's proposed issues concerning fraud in the procurement of the letter of credit.

This appeal presents the following issues: I) Whether there was sufficient evidence to overcome NCF's motion for a directed verdict on the issues of (A) whether Parnell had the actual or apparent authority to issue the letter of credit; (B) whether Northwestern was entitled to present a draft on the letter of credit; and II) whether alleged fraud in procuring the letter of credit entitled NCF to a directed verdict and relieved it of the duty to honor the letter of credit, or alternatively, whether the trial court erred in refusing to submit the issue of fraud to the jury.

I

A motion for directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure, N.C.G.S. Sec. 1A-1 (1983), presents the question of whether plaintiff's evidence was sufficient to carry the case to the jury:

> In passing on this motion, the trial judge must consider the evidence in the light most favorable to the non-movant, and conflicts in the evidence together with inferences which may be drawn from it must be resolved in favor of the non-movant. The motion may be granted only if the evidence is insufficient to justify a verdict for the non-movant as a matter of law.

Arnold v. Sharpe, 296 N.C. 533, 537, 251 S.E. 2d 452, 455 (1979) (citation omitted).

A

[1] Defendant first contends that the evidence was not sufficient to show that Parnell had either the actual or apparent authority to execute the letter of credit on behalf of NCF. A corporation is bound by a contract made by its agent acting within the scope of his actual or apparent authority. *See George E. Shepard, Jr., Inc. v. Kim, Inc.*, 52 N.C. App. 700, 706-07, 279 S.E. 2d 858, 863, *disc. rev. denied*, 304 N.C. 392, 285 S.E. 2d 831 (1981). "[T]he agent's power to bind the corporation may be ' "inferred from the conduct of the corporation in the transaction of its business and the power which the corporation has customarily permitted the . . . agent to exercise." ' " *Fuller v. Southland Corp.*, 57 N.C. App. 1, 11, 290 S.E. 2d 754, 760, *disc. rev. denied*, 306 N.C. 556, 294 S.E. 2d 223 (1982) (quoting *Yaggy v. The B.V.D. Co.*, 7 N.C. App. 590, 601, 173 S.E. 2d 496, 504 (1970)).

Parnell testified that he had previously signed letters of credit on behalf of NCF. Although he normally signed a letter of credit when it was accompanied by a guaranty letter from Federal, he testified that he nevertheless could sign without it. An agent's direct testimony is competent to show both the proof of agency and the nature and extent of the relationship. *Sealey v. Albany Ins. Co.*, 253 N.C. 774, 777, 117 S.E. 2d 744, 746-47 (1961). No evidence was introduced contradicting this testimony. There-

fore, the evidence was sufficient to show that Parnell had the express authority to execute letters of credit on behalf of NCF.

Even without this evidence concerning Parnell's express authority, the evidence was also sufficient to show that he was clothed with the apparent authority to issue letters of credit. In *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 31, 209 S.E. 2d 795, 799 (1974), our Supreme Court held a principal's liability for an agent's acts may be determined by the authority a third person exercising reasonable care believes the principal has conferred upon the agent. The Court also stated: "When a corporate agent acts within the scope of his apparent authority, and the third party has no notice of the limitation on such authority, the corporation will be bound by the acts of its agent . . . ." *Id.* at 30, 209 S.E. 2d at 799.

NCF contends that because the letter of credit was not accompanied by a guaranty letter from Federal at the time the loan was made, Northwestern knew that Parnell had exceeded his authority. However, Parnell testified he had issued letters of credit without guaranty letters in the past, and further testified that NCF had no written or formal policy concerning the issuance of letters of credit. The letter of credit sent to Northwestern contained no limitation on Parnell's authority to sign nor did it contain any reference to a guaranty letter. Northwestern's loan officer, Cline, also telephoned Parnell and discussed the revisions to the letter Northwestern required. *See Edgecombe Bonded Warehouse Co. v. Security Nat'l Bank*, 216 N.C. 246, 253, 4 S.E. 2d 863, 868 (1939) ("when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority"). Even if there was a limitation on Parnell's authority to approve letters of credit, which we do not believe the evidence necessarily demonstrates, the evidence was sufficient to show that Northwestern had no notice of the limitation. Therefore, the trial court correctly denied NCF's motion for a directed verdict on this issue.

B

[2] NCF next contends that Northwestern was not entitled to present a draft on the letter of credit because it failed to make a demand for payment from the Sheppards. NCF alleges that the

underlying agreement between the Sheppards and Northwestern required Northwestern to make a demand on the Sheppards for payment when the loan became overdue before presenting a draft to NCF under the letter of credit. However, whether Northwestern complied with the terms of the underlying agreement with the Sheppards is not material to NCF's obligations as issuer of the letter of credit. Section 25-5-114(1) (1986) of the North Carolina General Statutes states: "An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary."[1] *See, e.g., O'Grady v. First Union Nat'l Bank*, 296 N.C. 212, 232, 250 S.E. 2d 587, 600 (1978) (a letter of credit is independent of the underlying contract between the customer and the beneficiary).

With limited exceptions, Section 25-5-114(1) "imposes on the issuer a duty to honor drafts where there has been compliance with the terms of credit." *O'Grady*, 296 N.C. at 232, 250 S.E. 2d at 600. The letter of credit in this case, which was printed on Carolina Fincorp stationery and signed by Parnell as vice president, provided for due honor of drafts that were accompanied by a "certified statement that the loan is in default and past due." While the beneficiary must strictly comply with the terms of a letter of credit in order to make a demand from the issuer, *see Dubose Steel, Inc. v. Branch Banking and Trust Co.*, 72 N.C. App. 598, 602, 324 S.E. 2d 859, 862, *disc. rev. denied*, 314 N.C. 115, 332 S.E. 2d 480 (1985), defendant does not contend plaintiff failed to comply with the letter of credit terms here. In any event, the evidence tended to show Northwestern complied with the terms and delivered the required certified statement to NCF. Assuming there was a requirement of demand on the Sheppards, it was not a term of the letter of credit and therefore NCF's contention is without merit.

II

[3] NCF also argues the trial judge erred in denying its motion for a directed verdict on the ground that the letter of credit was

1. "An 'issuer' is a bank or other person issuing a credit" while a " 'customer' is a buyer or other person who causes an issuer to issue a credit." "A 'beneficiary' of a credit is a person who is entitled under its terms to draw or demand payment." N.C.G.S. Sec. 25-5-103(1)(c), (g) and (d).

procured through fraud which it contends would excuse its performance. Alternatively, NCF argues it was entitled to a submission of the issue of fraud to the jury. NCF maintains a fiduciary relationship existed between it and Mrs. Sheppard by virtue of her position as an assistant secretary for Federal, the parent corporation of NCF. *See* N.C.G.S. Sec. 55-35 (1982) (officers of a corporation occupy a fiduciary position in relation to the corporations they serve). It argues that, when Mrs. Sheppard obtained the letter of credit, constructive fraud should have been presumed from the transaction. *See Bumgarner v. Tomblin*, 63 N.C. App. 636, 641, 306 S.E. 2d 178, 182 (1983) (where a fiduciary relationship exists, constructive fraud is presumed from the breach of a fiduciary duty). For the reasons set out below, we hold defendant was entitled to neither a directed verdict nor a jury instruction on the issue of fraud.

Professors White and Summers have noted in their treatise on the Uniform Commercial Code:

> [T]he customer might have fraudulently induced the issuer to enter this contract, or the consideration promised by the customer might have failed, or the customer might have gone bankrupt after issue and rendered the issuer's eventual claim for reimbursement highly uncertain or worthless. Even so, the issuer may not utilize these and analogous grounds as a justification for refusal to honor.

J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* Sec. 18-2 at 712 (2d ed. 1980). *See also id.* Sec. 18-4 at 726 (presuming that once an irrevocable letter of credit is established "as regards the beneficiary," the issuer may not unilaterally cancel the credit even where the customer fraudulently induced the establishment of the credit).

Regarding the limited exceptions to an issuing bank's duty to honor drafts drawn on letters of credit, our Supreme Court has stated:

> The only exceptions to the issuer's duty to honor documents which on their face comply with the terms of the credit are those listed under G.S. 25-5-114(2). These exceptions are: (1) the failure of certain documents to conform to certain specified warranties, (2) the presentment of forged or "fraudulent" documents, and (3) "fraud in the transaction."

. . . .

> . . . Given the independence of the issuer's obligation to the beneficiary, and the commercial purposes which this independent obligation serves, it would appear that an injunction should issue to enjoin payment of a draft only in those instances where there is some action by the beneficiary which vitiates the transaction between the beneficiary and the issuer.

O'Grady, 296 N.C. at 232-33, 250 S.E. 2d at 600-01. While *O'Grady* dealt with an injunction against honor, we note that "[t]he fraud that would justify dishonor by the issuer is the same as the fraud that would justify the customer's obtaining an injunction against honor on the ground of fraud." 7 R. Anderson, *Uniform Commercial Code* Sec. 5-114:12 at 331 n.13 (1985).

These exceptions to honor concern merely the genuineness of the documents presented for honor. *O'Grady*, 296 N.C. at 233, 250 S.E. 2d at 601. Specifically, the *O'Grady* Court found that " 'fraud in the transaction' . . . refer[s] to the beneficiary's accompanying his draft with documents or declarations which have absolutely no basis in the facts of the underlying performance." *Id.* at 234, 250 S.E. 2d at 601. As an example, the Court cited *Sztejn v. Schroder Banking Corp.*, 177 Misc. 719, 31 N.Y.S. 2d 631 (1941), where a seller-beneficiary totally misrepresented the nature of goods shipped to a buyer-customer in documents presented to the issuer for the purpose of honor under the terms of a letter of credit, when in fact the seller-beneficiary had shipped fifty cases of rubbish instead of fifty cases of the goods ordered.

The *O'Grady* Court further discussed the "presentment of fraudulent documents" exception to an issuer's duty to honor. A "fraudulent document" is one "that is completely forged or drawn up without any underlying basis in fact, one that is but partly spurious or a document which has been materially altered." *Id.* at 234, 250 S.E. 2d at 601.

The Court then held that,

> the knowing and intentional attachment of a guaranty letter of credit, as collateral security, to a negotiable instrument which that letter was not intended to secure, and the eventual presentation of these documents to the issuing bank for

> purposes of honor of the letter of credit, would amount to a presentment of fraudulent documents under G.S. 25-5-114(2). In such a case, though the note may be valid as against other parties to the note, the documents, considered as a whole, are nonetheless fraudulent insofar as the letter of credit was not intended to secure that particular note, and the beneficiary had knowledge of this fact.
>
> . . . .
>
> . . . If such is found to be the case, the documents would be fraudulent in that the portion of the . . . note listing the letter of credit as collateral would have no basis in the facts of the agreement between the parties. In that case, the documents would not be those which gave rise to the establishment of credit referred to in the letter itself.

Id. at 234-35, 250 S.E. 2d at 601-02.

The only document required by the letter of credit to accompany the drafts was the certified statement of default. Northwestern accompanied its draft with the statement that correctly indicated the loan was in default and past due. Because there is no misstatement in this document as it reflects the underlying nature of the default, and because the letter of credit was intended to secure this particular note, given the *O'Grady* definition of the exceptions, it appears that neither exception applies. *O'Grady*, 296 N.C. at 234, 250 S.E. 2d at 601 ("[s]ince the documents in the present case, the note and notice of default, do reflect the nature of the underlying performance and default, there are no grounds here for a claim of fraud in the transaction"); *but cf. American Bell International, Inc. v. Iran*, 474 F. Supp. 420, 424 (S.D.N.Y. 1979) (recognizing that some authorities refer to "transaction" as encompassing the totality of circumstances). However, it may be argued that where a beneficiary extends a loan relying on a letter of credit which he knows was procured through fraud on the issuer, the statement of default of the underlying loan is a product of the fraud entitling the issuer to one of the exceptions. *See O'Grady*, 296 N.C. at 233, 250 S.E. 2d at 601 (holding that Section 25-5-114(2) "permits dishonor . . . in situations where the documents presented are themselves the product of some sort of fraud"). *Cf.* N.C.G.S. Sec. 25-1-203 ("Every

contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement.").

However, we need not determine whether this action would fall within one of the exceptions, since in any event, we hold the beneficiary must have known of the fraudulent procurement of the letter of credit at the time it extended credit based on the letter as collateral. *See O'Grady*, 296 N.C. at 234, 250 S.E. 2d at 601-02. While defendant requested the trial court to submit the issue of fraud to the jury, it did not request an issue submitted to the jury concerning plaintiff's knowledge of the alleged fraudulent procurement of the letter of credit. Therefore, defendant waived its right to a jury trial on this issue under Rule 49(c) of the Rules of Civil Procedure. Since the issue of knowledge of the alleged fraud was not submitted to the jury, and the trial court did not make a finding on the issue, the court is "deemed to have made a finding in accord with the judgment entered." N.C.G.S. Sec. 1A-1, Rule 49(c). *See also Petty v. City of Charlotte*, 85 N.C. App. 391, 399, 355 S.E. 2d 210, 215 (1987).

Even if defendant had proposed the issue, there was not sufficient evidence to submit it to the jury. *See Gunter v. Winders*, 256 N.C. 263, 265, 123 S.E. 2d 475, 477 (1962) (an issue "must not only arise on the pleadings, but it must be supported by competent evidence" in order to justify its submission to the jury). Defendant presented no evidence that plaintiff knew of any actual fraud, nor was there evidence that plaintiff knew of the alleged breach of a fiduciary duty by Mrs. Sheppard, assuming that she was a fiduciary in relation to NCF. The fact that Northwestern may have known she was an officer of Federal was not enough to give Northwestern knowledge of constructive fraud. In any event, all the evidence indicated Mrs. Sheppard did not have any power to approve letters of credit in her capacity as assistant secretary.

Therefore, the trial court's denial of defendant's motion for a directed verdict on the issue of fraud was not error nor was its refusal to submit the issue of fraud to the jury.

III

The defendant made other assignments of error which are without merit. For the reasons above, the trial court committed no error in denying NCF's motion for a directed verdict on the

issue of Parnell's actual or apparent authority to issue the letter of credit. The trial court was correct in denying NCF's motion for a directed verdict on the issue of whether Northwestern was entitled to present a draft on the letter of credit and on whether fraud excused NCF's performance under the letter of credit. Finally, the trial court did not commit error in refusing to submit to the jury an issue of fraud in the procurement of the letter of credit.

No error.

Chief Judge HEDRICK and Judge MARTIN concur in the result.

Judge MARTIN concurred in this opinion prior to 31 December 1987.

STATE OF NORTH CAROLINA v. JUDY FAYE WATSON

No. 8725SC423

(Filed 16 February 1988)

1. **Obscenity § 2— definition based on statute—jury instruction—inadequate**

A jury instruction on the definition of obscenity which is derived directly and solely from N.C.G.S. § 14-190.1(b) is necessarily incomplete and inadequate, and a proper charge would direct the jury (1) to determine patent offensiveness, like appeal to prurient interest, by applying community standards, (2) to determine value from each work "taken as a whole," and (3) to decide whether a reasonable person would find serious literary, artistic, political, or scientific value in the material, taken as a whole. Where defendant requested the first two of these instructions either expressly or in substance, the trial court's failure to include them in its charge was prejudicial error.

2. **Obscenity § 3— dissemination of obscenity—material constitutionally privileged—defendant not entitled to instruction**

Defendant in a prosecution for disseminating obscenity was not entitled to a jury instruction on N.C.G.S. § 14-190.1(b)(4) as to whether the material in question was constitutionally privileged or protected, since that is a question of law, not one of fact for the jury, and a correct instruction would not be augmented by the addition of this requirement.

3. Obscenity § 3— dissemination—no "statewide" community standard

The trial court in a prosecution for dissemination of obscenity did not err in failing to charge the jury to apply a "statewide" community standard.

4. Obscenity § 3— dissemination—defendant's knowledge of content of materials—sufficiency of evidence

In a prosecution of defendant for dissemination of obscenity, evidence was sufficient to allow a reasonable inference that defendant knew the character and content of the materials she disseminated where the evidence tended to show that the items purchased by a police officer were selected from a room in the bookstore containing sexually oriented devices, as well as sexually explicit materials with illustrated covers, grouped and displayed on bookshelves which were labeled according to the viewer's sexual interest; defendant was not merely a sales clerk but the store manager, from which it could reasonably be inferred that she had knowledge of and authority over the store's inventory and its arrangement; and the magazine cover and film box which the officer bought were captioned and graphically illustrated.

5. Obscenity § 3— dissemination—"comparable materials" excluded—no error

In a prosecution of defendant for dissemination of obscenity the trial court did not err in excluding "comparable materials" consisting of four magazines involved in other obscenity cases in which the defendants were acquitted, since three of the magazines offered were involved in prosecutions in Durham County and were therefore of little relevance in establishing the community standard in Catawba County, and though the fourth magazine was involved in a Catawba County case, there was no evidence that the acquittal was based on a jury finding that the material was not obscene.

6. Obscenity § 2— definition—material of significant educational value not excluded—no error

There was no merit to defendant's contention that failure to exclude from the definition of obscenity material which has serious educational value results in a violation of the right to education guaranteed by Article I, Section 15 of the N. C. Constitution, since any serious educational value of sexually explicit materials must be derived, in turn, from some serious literary, artistic, political, or scientific value.

APPEAL by defendant from *Claude S. Sitton, Judge.* Judgments entered 4 December 1986 in Superior Court, CATAWBA County. Heard in the Court of Appeals 17 November 1987.

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

Arthur M. Schwartz, P.C., by Arthur M. Schwartz and Michael W. Gross, Denver, Colorado; and James McElroy & Diehl, P.A., by Edward T. Hinson for defendant-appellant.

BECTON, Judge.

Defendant, Judy Faye Watson, was charged in two bills of indictment with four counts of disseminating obscenity in violation of N.C. Gen. Stat. Sec. 14-190.1 (1986) and was convicted by a jury of two of the four counts. From judgments entered on the verdicts, defendant appeals. Her arguments on appeal relate to 1) five alleged errors in the jury instructions, 2) the denial of her motion to dismiss for insufficient evidence of scienter, 3) the exclusion of "comparable" materials offered by defendant as evidence of the community standard, and 4) the denial of her motion to dismiss the indictments based on the unconstitutionality of N.C. Gen. Stat. Sec. 14-190.1 *et seq.* For errors in the jury instructions regarding the definition of obscenity, we award defendant a new trial.

I

The State presented evidence that on 8 October 1985, Officer Steve Mueller of the Hickory Police Department entered the Imperial Popular Newsstand and Adult Bookstore in Hickory, North Carolina. After browsing for a few minutes, he selected from the materials on display the empty box for an eight millimeter film entitled *Stormy Weather #263, Swedish Erotica* and a magazine entitled *Naked Snatch,* which was encased in a clear plastic wrapper. He took the items to the cash register where defendant, manager of the store, retrieved the appropriate film from behind the counter, placed it in the box, and rang up the sale. The following day, Officer Mueller returned to the bookstore and purchased from defendant another magazine encased in clear plastic entitled *Decadent Sex Parties #1* and a videotape entitled *Hot and Juicy Videos—Intimidation.* Subsequently, defendant was arrested and charged with disseminating obscenity for the sale of these four items.

At trial, Officer Mueller described the layout and contents of the bookstore. The magazines, videotape, and film purchased by him were received in evidence and shown to the jury.

Defendant did not testify. Defense counsel called as an expert witness Dr. Charles Winick, a psychiatrist, who testified that, in his opinion, the materials were not patently offensive, did not appeal to the average person's prurient interest in sex, and

had serious scientific and other value. Similar opinion testimony was also received from Dr. Terry Cole, an expert in the field of speech and communication. The trial court refused to admit certain "comparable" sexually-oriented magazines offered by defendant as evidence of the community standard.

The jury returned a verdict acquitting defendant of the charges involving the sale of the videotape and of the magazine, *Naked Snatch*, but convicted defendant of disseminating obscenity in the sale of the eight millimeter film, *Stormy Weather*, and the magazine, *Decadent Sex Parties #1*.

II

We begin by addressing defendant's first three arguments concerning alleged errors in the trial court's charge to the jury on the definition of obscenity.

A

The United States Supreme Court, in *Miller v. California*, 413 U.S. 15, 37 L.Ed. 2d 419, *reh'g denied*, 414 U.S. 881, 38 L.Ed. 2d 128 (1973), set forth a three-pronged test for determining whether material is obscene:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24, 37 L.Ed. 2d at 431 (citations omitted). While the definition of obscenity in *Miller* includes "contemporary community standards" only with reference to "prurient interest," subsequent cases applying and clarifying the *Miller* test have established that both of the first two prongs—appeal to prurient interest *and patent offensiveness*—are to be judged by a jury applying contemporary community standards. *See Pope v. Illinois*, --- U.S. ---, 95 L.Ed. 2d 439 (1987); *Smith v. United States*, 431 U.S. 291, 52 L.Ed. 2d 324 (1977); *State v. Roland*, 88 N.C. App. 19, 362 S.E. 2d 800 (1987); *State v. Anderson*, 85 N.C. App. 104, 354 S.E. 2d 264,

review allowed, 320 N.C. 171, 358 S.E. 2d 55 (1987). On the other hand, the third, or "value," prong of the *Miller* test must be assessed with reference to a "reasonable person" standard. *Pope; Roland.* The North Carolina Legislature, in N.C. Gen. Stat. Sec. 14-190.1(b)(1), (2), and (3), has codified the *Miller* Court's formulation almost verbatim, the only significant variation being the omission of the language "taken as a whole" from the third prong of the test. Consequently, the statute does not expressly state the requirements, clarified in *Smith* and *Pope*, that the jury assess "patent offensiveness" by applying a contemporary community standard and "value" by applying a reasonable person standard.

B

[1] In this case, the trial court's instructions to the jury on the three-part definition of obscenity simply parroted the language of the statute, and thus failed to inform the jury (1) that contemporary community standards establish the measure by which "patent offensiveness" must be judged, (2) that the literary, artistic, political, or scientific value of each work must be decided with reference to the work "taken as a whole," and (3) that a reasonable person standard is the measure by which such value must be assessed. In her first three challenges to the jury instructions, defendant contends that each of these three omissions constitutes prejudicial error.

The State argues that the instructions given were not erroneous because they complied with *Miller* and with the statute, and because this Court has already decided the second issue in *Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305 (1986). We cannot agree.

In *Cinema I*, this Court simply held, in pertinent part, that the absence of the "taken as a whole" language in N.C. Gen. Stat. Sec. 14-190.1(b)(3) (codifying the third prong of the *Miller* test) does not render the statute unconstitutional *on its face. See id.* at 552-54, 351 S.E. 2d at 311-312. In affirming that opinion, our Supreme Court pointed out that "[f]act situations are readily conceivable in which the statutes at issue, if improperly applied, would be unconstitutional." *Cinema I Video, Inc. v. Thornburg*, 320 N.C. 485, 491, 358 S.E. 2d 383, 385 (1987). In our view, a conviction under the statute is rendered constitutionally invalid if the statute is not *applied* substantially in accordance with the

Miller test, both as initially formulated and as subsequently construed and explained by the United States Supreme Court. This means, in part, that a jury instruction on the definition of obscenity which is derived directly and solely from our statute is necessarily incomplete and inadequate.

We thus agree with defendant's first two contentions that a proper jury charge would have directed the jury (1) to determine patent offensiveness, like appeal to prurient interest, by applying community standards, and (2) to determine value from each work "taken as a whole." Defendant requested each of these instructions, either expressly or in substance, and we therefore hold the trial court's failure to include them in its charge was error.

Moreover, we are not convinced that these omissions from the jury instructions were "harmless" errors. In instructing the jury, it is incumbent upon the trial court to "*correctly* declare and explain the law as it relates to the evidence." (Emphasis added.) *State v. Watson*, 80 N.C. App. 103, 106, 341 S.E. 2d 366, 369 (1986). Most cases in which our appellate courts have held a failure to give requested, proper jury instructions to be harmless have involved prosecutions for offenses to persons or property in which the immaterial nature of the error, the existence of strong or uncontroverted evidence that a defendant committed the act constituting a crime, or other circumstances have rendered it improbable that the error had a significant impact upon the jury's verdict. *See, e.g., State v. Patton*, 80 N.C. App. 302, 341 S.E. 2d 744 (1986); *State v. Staley*, 37 N.C. App. 18, 245 S.E. 2d 110 (1978). In obscenity cases, however, a critical issue of fact for jury determination is not merely whether a defendant did the act of disseminating, but whether the materials disseminated were obscene. In such cases, as in the present case, the sole or primary evidence offered by the State of the obscenity of materials is usually the materials themselves, the very effect or significance of which must be decided by the jury based upon the instructions it receives as to the legal definition of obscenity. Consequently, the manner in which the jury is instructed to evaluate whether a work is obscene is of fundamental importance.

The instructions given in the present case permitted an unconstitutional application of the statute because they allowed the jury to judge the obscenity of the materials in a manner inconsist-

ent with the guidelines articulated by the Supreme Court in *Miller*, *Smith*, and *Pope*. We cannot tell what standard the jury employed in assessing patent offensiveness, nor whether the jury may have judged the material's value based on isolated passages or depictions rather than on each work taken as a whole. Under these circumstances, we conclude that these errors in the instructions were material and prejudicial, entitling defendant to a new trial.

Because defendant did not request an instruction incorporating a reasonable person standard into the third prong of the obscenity test nor object to the instruction given on that ground, that issue is not properly before us on this appeal. However, we agree with defendant that, under *Pope*, such an instruction is required, and we therefore direct the trial court, if there is a retrial, to instruct the jury that the third prong of the test requires them to decide "whether a reasonable person would find [serious literary, artistic, political, or scientific] value in the material, taken as a whole." *Pope* at ---, 95 L.Ed. 2d at 445.

III

As defendant's remaining contentions concern issues which may arise upon retrial, we also address them briefly, beginning with two further challenges to the jury instructions defining obscenity.

[2] In addition to reiterating the tripartite *Miller* test, N.C. Gen. Stat. Sec. 14-190.1(b) includes a fourth component in the statutory definition of obscenity:

> (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

Defendant contends that she was entitled to a jury instruction including this portion of the statute. We disagree.

Whether material is constitutionally privileged or protected is a question of law, not one of fact for the jury. In our opinion, correct instruction on the three elements of the *Miller* test enables the jury to properly determine whether material is obscene. Such an instruction would not be augmented in any useful way by the addition of this "fourth element" since material found

to be obscene pursuant to a correct application of the first three tests is necessarily without constitutional protection.

[3] Defendant's remaining contention with respect to the jury instructions is that the trial court erred by failing to charge the jury to apply a "statewide" community standard. This issue has been decided adversely to defendant in *State v. Mayes*, 86 N.C. App. 569, 359 S.E. 2d 30, *appeal dismissed, disc. review on additional issues allowed*, 321 N.C. 122, 361 S.E. 2d 599 (1987) and, consequently, we conclude this argument is without merit.

IV

[4] Defendant next argues that the trial court erred by denying her motion to dismiss the charges because the State presented insufficient evidence of her intent and guilty knowledge. She correctly maintains that, to sustain a conviction, the prosecution must establish that she had knowledge of both the content and character of the materials disseminated, *see Hamling v. United States*, 418 U.S. 87, 41 L.Ed. 2d 590, *reh'g denied*, 419 U.S. 885, 42 L.Ed. 2d 129 (1974); *Roland.* And, in fact, the jury was properly instructed to that effect.

However, we are not persuaded by the contentions of defendant that neither her employment in a business that sells sexually explicit materials nor the information on the cover of a film or magazine is evidence that she knew the contents of particular materials. The State presented evidence that the items purchased by Officer Mueller were selected from a room in the bookstore containing sexually oriented devices, as well as sexually explicit materials with illustrated covers, grouped and displayed on bookshelves which were labeled according to the viewer's sexual interest—gay sex, lesbian sex, sadism, etc. Defendant was not merely a sales clerk but the store manager, from which it could be reasonably inferred that she had knowledge of and authority over the store's inventory and its arrangement. Moreover, the magazine cover and the box containing the film were captioned and graphically illustrated with photographs of males and females engaged in oral, vaginal, and group sex. This, in our opinion, may reasonably be considered some indication of the materials' contents.

We hold that the foregoing, when viewed in the light most favorable to the State, constitutes sufficient circumstantial evidence to allow a reasonable inference that defendant knew the character and content of the materials she disseminated. Therefore, this assignment of error is overruled.

V

[5] We next address defendant's assignment of error to the trial court's exclusion of "comparable materials" offered to show that the materials for which defendant was prosecuted are not patently offensive and do not appeal to a prurient interest in sex. As evidence of the community standard, defendant attempted to introduce four sexually-explicit magazines which had been involved in prior obscenity prosecutions in which the defendant had been acquitted.

In our view, this evidence was properly excluded. Three of the magazines were involved in prosecutions in Durham County and were, in light of *Mayes*, of little relevance in establishing the community standard in Catawba County. Although the fourth magazine was involved in a Catawba County case in which the person charged was acquitted, there was no evidence that the acquittal was based on a jury finding that the material was not obscene. Under these circumstances, we agree with the trial court's conclusion that any relevance of the material was so limited as to be outweighed by the dangers of misleading or confusing the jury.

We are not here confronted with, nor do we decide, the question of whether such material would be admissible if it had specifically been found not to be obscene by a jury within the same county. Nor do we address the broader question whether comparable materials whose relevance has otherwise been established may ever be admitted as evidence of community standards.

This assignment of error is overruled.

VI

Finally, we summarily reject defendant's constitutional challenges to the statute. Most of the arguments have been previously raised, and rejected by this Court, in *Cinema I*, *Mayes*, and *Roland*. Defendant also attempts to incorporate into her brief con-

stitutional arguments presented in the briefs filed in another case not yet decided by this Court. Any arguments presented there are not now properly before us inasmuch as former subsection (d) of Rule 28 of the Rules of Appellate Procedure which permitted incorporation of such material was repealed in 1981, and the material sought to be incorporated was not submitted as part of this record on appeal. *See State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980).

[6] The only constitutional issue properly raised by defendant which has not yet been ruled upon by our appellate courts is whether the exclusion of the term "educational" from N.C. Gen. Stat. Sec. 14-190.1(b)(3) renders the provision invalid. Defendant maintains that failure to exclude from the definition of obscenity material which has serious educational value results in a violation of the right to education guaranteed by Article I, Section 15 of the Constitution of North Carolina.

However, we are not convinced that the right to an education involves a right to disseminate material which, but for its use in an educational context, would otherwise be deemed obscene. In our view, any serious educational value of sexually-explicit materials must be derived, in turn, from some serious literary, artistic, political, or scientific value.

This assignment of error is overruled.

VII

For prejudicial error in the trial court's failure to instruct the jury that patent offensiveness is to be determined by applying contemporary community standards and that whether a work possesses serious value must be judged from the work taken as a whole, we order a

New trial.

Judges PHILLIPS and GREENE concur.

MARGARET CHURCH WEAVER (MARSH) v. JACKIE BROOKS WEAVER

No. 8718DC264

(Filed 16 February 1988)

1. **Divorce and Alimony § 24.4— establishment of trust—proceeds for support of plaintiff and children—no error**

Where the trial court established a trust consisting of the parties' real and personal property, appointed the parties' attorneys as co-trustees, and ordered that trust proceeds should be used for the support and maintenance of plaintiff and the parties' minor children, the trial court did not err in failing to establish a receiver for the property and to provide for accountability by the trustees. N.C.G.S. § 50-13.4(e), 50-16.7(a) & (c).

2. **Rules of Civil Procedure § 33— videotaped deposition not allowed—interrogatories used**

Where defendant's counsel filed notice of an intention to depose plaintiff's counsel and to videotape the proceeding, the trial court did not err in granting plaintiff's counsel's motion for a protective order, noting that an oral deposition would not be had but defendant would be allowed to use interrogatories, since the type of information defendant was attempting to elicit, an accounting of sorts, regarding the marital trust of the parties could easily be gathered by the use of interrogatories.

3. **Divorce and Alimony § 24.4— violation of child support order—contempt—method of purging discretionary with trial court**

Where the trial court found plaintiff in contempt for removing certain items of personalty from the marital home and ordered that she purge herself of contempt by providing to defendant an itemized list of the personalty removed, the appellate court was without jurisdiction to consider whether the method for purging contempt should have been more severe.

4. **Divorce and Alimony § 18.11— alimony pendente lite—plaintiff as dependent spouse—sufficiency of evidence**

There was no merit to defendant's contention that the trial court erred in concluding that plaintiff was a dependent spouse entitled to alimony pendente lite, since there was substantial evidence of the parties' income and expenses upon which the court could properly base its order; moreover, defendant had previously stipulated that sufficient grounds for awarding alimony pendente lite to plaintiff existed.

5. **Divorce and Alimony § 18.16— attorney's fees—reasonableness—effect of plaintiff's contempt of court on right to fees**

Plaintiff, the dependent spouse, was properly entitled to counsel fees pendente lite, and the amount of the fees, $17,015.30, was reasonable; moreover, there was no merit to defendant's contention that plaintiff was not entitled to attorney's fees because she had removed valuable personalty from the marital home, since she had been found in contempt for that act but had

purged herself and had not disposed of the property, and the removal of the property and request for fees were unrelated matters.

APPEAL by defendant from *Daisy, William L., Judge.* Judgment entered 30 October 1986 in District Court, GUILFORD County. Heard in the Court of Appeals 1 October 1987.

Margaret Church Weaver [Marsh] commenced this domestic action on 17 October 1983 against Jackie Brooks Weaver seeking alimony pendente lite, "permanent alimony," custody of the two minor children, child support, and reasonable attorney's fees. On 5 December 1983, prior to defendant filing an answer, the matter came on for hearing to determine the issues of child custody, child support, and alimony pendente lite. The question of attorney's fees was deferred for a later hearing.

In its order of 19 January 1984, the court awarded custody of the two minor children and temporary support and maintenance to the plaintiff. The court also ordered that plaintiff's attorney, A. Doyle Early, Jr. and defendant's attorney, C. Richard Tate, Jr. become co-trustees over a trust, consisting of the couple's real property and designated personal property, i.e. antique automobiles. Plaintiff and defendant were ordered to transfer title to the marital home, owned as tenants by the entirety, title to a commercial building, also owned as tenants by the entirety, and title to certain antique automobiles, to the co-trustees for the purpose of selling the properties and accumulating the net sale proceeds for the support and maintenance of plaintiff and minor children.

The order was made pursuant to a determination by the trial court that the establishment of the trust would be in the best interests of the parties and the minor children. The court reached this conclusion by reasoning that because both mortgages on the real properties were in arrears, and defendant had sustained substantial indebtedness in his own name, such an order was necessary to protect the parties' property from creditors and to secure a fund from which child support and maintenance could be paid.

On 26 January 1984, one week later, the order was amended to specifically provide that neither plaintiff nor defendant held the authority to dispose of any property absent the court's per-

mission, and such permission could not be granted in the absence of notice to the opposing party and an opportunity to be heard.

Subsequent orders entered in this cause to which defendant appeals are as follows: an order entered on 16 January 1985, finding plaintiff in contempt for removing personal property from the marital home in violation of a previous court order, and ordering her to purge herself of contempt by providing defendant with an itemized list of the property removed; a 5 March 1985 order allowing a judgment against defendant for attorneys' fees in the amount of $17,015.30; and a protective order entered on 26 February 1986, pursuant to a motion by plaintiff's counsel, allowing defense counsel to serve interrogatories upon plaintiff's attorney but denying the taking of a videotaped deposition; and a 26 February 1986 order quashing a subpoena duces tecum served upon plaintiff's counsel. On 7 April 1986 plaintiff's counsel, A. Doyle Early, submitted answers to the set of interrogatories.

Defendant does not appeal from the final order entered on 30 October 1986, but rather from certain interlocutory orders entered in this cause which have been hereinbefore noted.

Douglas Ravenel Hardy Crihfield & Moseley and Wyatt Early Harris Wheeler & Hauser, by A. Doyle Early, Jr., for plaintiff-appellee.

Debra I. Johnson, for defendant-appellant.

JOHNSON, Judge.

Pursuant to this appeal, we are called upon to review four orders entered in four different civil sessions of the Guilford County District Court, High Point Division.

[1] By his first Assignment of Error, defendant challenges an order entered by Bencini, Robert E., Judge, on 19 January 1984, establishing a marital trust for the couple's real and personal property and appointing counsel for plaintiff and defendant as co-trustees. Defendant contends that the trial court erred in failing to establish a receiver for the property, and in failing to provide for accountability by the trustees. We find no error.

G.S. 50-13.4(e) provides that, "[p]ayment for the support of a minor child shall be paid by lump sum payment, periodic pay-

ments, or by transfer of title or possession of personal property of any interest therein, . . . as the court may order." In utilizing this provision, the trial court is vested with broad discretion, and is not limited to ordering any one of the designated methods of payment. In keeping with the powers vested, an order under this section will be upheld barring an abuse of that discretion. *Buff v. Carter*, 76 N.C. App. 145, 331 S.E. 2d 705 (1985); *Warner v. Latimer*, 68 N.C. App. 170, 314 S.E. 2d 789 (1984); *Moore v. Moore*, 35 N.C. App. 748, 242 S.E. 2d 642 (1978).

The pertinent provisions governing the method of payment of alimony provides that:

> (a) [a]limony or alimony pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court may order. . . .
>
> (c) If the court requires the transfer of real or personal property or an interest therein as a part of an order for alimony or alimony pendente lite as provided in subsection (a) *or for the securing thereof*, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

G.S. 50-16.7 (emphasis added).

Defendant complains that when the trial court created the trust consisting of certain real and personal property owned by the couple, it failed to establish a receiver for the property and to provide for accountability by the trustees; however, he has presented no facts to support either contention. The court determined, in the exercise of its discretion, that the creation of this trust, and the order to convey title to the property in question to the trustees for the purpose of sale, was necessary to secure payment of both alimony and child support.

A. Doyle Early, Jr. and C. Richard Tate, Jr. attorneys for plaintiff and defendant, respectively, were appointed as co-trustees. As such, certain duties and responsibilities not specifically enumerated are inherent within the office. One of the duties is to provide an accounting at such time as the court having jurisdiction may direct. *See* 90 C.J.S. *Trusts* sections 377, 378 (1955).

The court exercised its discretion in applying the provisions of G.S. 50-13.4(e) and G.S. 50-16.7(a), (c) to create this trust. The essentials of a trust are also present, i.e. sufficient words to raise it, a definite subject, and ascertained object. *Wachovia Bank & Trust Co. v. Taylor*, 255 N.C. 122, 120 S.E. 2d 588 (1961); *Thomas v. Clay*, 187 N.C. 778, 122 S.E. 852 (1924). We therefore find no abuse of discretion and affirm this order.

[2] Defendant next assigns as error, the 26 February 1986 order entered by Morton, J. Bruce, Judge, granting plaintiff's counsel's motion for a protective order. The motion was made pursuant to a notice filed on 3 February 1986, by defendant's counsel, of an intention to depose plaintiff's counsel and to videotape the proceeding. The court noted that an oral deposition would not be had but defendant would be allowed to use interrogatories as provided in Rule 33 of the N.C.R. Civ. Pro.

A trial court, when considering a motion for a protective order may, "make any order which justice requires . . . including . . . (iii) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery"; N.C.R. Civ. Pro. 26(c). It is also well noted that orders regarding matters of discovery are within the trial court's discretion and are reviewable only for abuse of that discretion. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975); *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E. 2d 46 (1977), *rev'd on other grounds*, 294 N.C. 146, 240 S.E. 2d 360 (1978). We find no abuse of discretion here.

The evidence before us indicates that the type of information defendant was attempting to elicit, an accounting of sorts, regarding the marital trust could easily be gathered by the use of interrogatories, the method of discovery authorized by the court.

[3] Thirdly, defendant assigns as error the 16 January 1985 order entered by Foster, Thomas G. Jr., Judge, finding plaintiff in contempt of court for removing certain items of personalty from the marital home, and ordering her to purge herself of contempt by providing to the defendant an itemized list of the personalty removed. Defendant contends that the trial court should have imposed sanctions, such as crediting his obligation to pay alimony pendente lite, dismissing plaintiff's claim for alimony pendente lite altogether, or denying attorney's fees pendente lite.

Once again, we are faced with a question of the trial court's discretion. It has been held by our Supreme Court that the purpose of civil contempt is not to punish the contemnor, but is to be utilized to coerce compliance with court orders. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980); *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E. 2d 220 (1986); *Ferree v. Ferree*, 71 N.C. App. 737, 323 S.E. 2d 52 (1984). On appeal, the reviewing court may only consider whether the findings of fact are supported by competent evidence and are sufficient to support the judgment. *Amick v. Amick*, 80 N.C. App. 291, 341 S.E. 2d 613 (1986); *Brooks v. Gooden*, 69 N.C. App. 701, 318 S.E. 2d 348 (1984).

Therefore, it is without the jurisdiction of this Court to consider as, defendant would warrant, whether the method for purging contempt should have been more severe. The trial court found plaintiff in contempt for having violated a court order to leave the marital personalty status quo. It then provided the means by which plaintiff could purge herself of contempt and plaintiff complied by submitting inventory sheets of the property removed. We find that the findings of fact are sufficient to support the judgment, and we, therefore, are not at liberty to further consider this assignment of error.

[4] Next, defendant contends that in the 19 January 1984 order, noted in the first question hereinbefore considered, the trial court erred in concluding that plaintiff was a dependent spouse entitled to alimony pendente lite. The issue concerning an award of attorneys fees pendente lite is reserved for the final question.

Under the factual situation presented, the court determined that plaintiff was entitled to alimony pendente lite as she met the conditions set forth in *Gardner v. Gardner*; (1) that she was the dependent spouse, (2) that she was entitled to the relief demanded in the action and (3) that she was without sufficient means to subsist during the prosecution of the suit. 40 N.C. App. 334, 252 S.E. 2d 867 (1979).

The court reached this conclusion after extensive review, rendering detailed and extensive findings of fact. It is also of substantial note that defendant had previously stipulated that sufficient grounds for awarding alimony pendente lite to the plaintiff existed. In finding of fact No. 4, the court stated:

> [f]or the purposes of this pendente lite hearing only, the defendant stipulates in open Court that the plaintiff is entitled to custody, child support and temporary support and maintenance for the plaintiff . . .

It evades reason why defendant now contests an award of alimony pendente lite.

Defendant bases his argument upon a presumption that the court reached the conclusion of plaintiff's entitlement solely by determining that defendant "was a man of substantial resources due to the extent of his valuable real estate and personal property holdings." The evidence of record clearly refutes this contention. In its findings of fact the court noted that plaintiff was employed and earned a net monthly income of $449.00 from which an insurance premium for herself and the children was deducted. Her individual monthly needs totaled $300.00 per month, and fixed monthly expenses totalled $1,619.23 which included $950.00 in home mortgage payments.

With respect to defendant's financial status, the court found that he was employed and earned a net monthly income of $1,060.11. He contended that his personal expenses totalled $1,186.00.

From this evidence and other pertinent financial considerations, the court concluded that plaintiff was entitled to $400.00 per month for support and maintenance. We find no reason to disturb this order.

[5] Finally, defendant contends that in its order of 28 February 1985 entered by Foster, Thomas G. Jr., Judge, the trial court erred when it awarded plaintiff counsel fees in the sum of $17,015.30.

The requirements which a spouse must meet before a request for attorneys fees pendente lite can be granted are as follows: (1) the party requesting the award must be a "dependent spouse" as defined in G.S. 50-16.1(3); (2) the party must be entitled to alimony pendente lite; and (3) the court must find that the dependent spouse is without sufficient means to subsist during the prosecution or defense of the suit and to defray the attendant expenses thereof. G.S. 50-16.4; G.S. 50-16.3; *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 280 S.E. 2d 787 (1981).

The plaintiff in the case *sub judice* met the requirements named above, and was subsequently awarded attorneys fees pendente lite. We find no abuse of discretion regarding the amount awarded, a finding which is required to reverse such an award, when the statutory requirements have been met. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). Plaintiff was found to be the dependent spouse and designated as such. She had become entitled to alimony pendente lite both by stipulation and by findings of fact. She earned gross pay of $4.00 per hour for approximately 12-14 hours per week and reimbursement of 20 cents per mile. Her earnings had substantially diminished because she had been terminated from her former employment. She then met the requirement of having "insufficient means to subsist during the prosecution or defense of this suit." *Fungaroli, supra.*

Defendant contends that plaintiff was not entitled to an attorneys fees award since she had removed valuable personalty from the marital home. He contends that this action simultaneously placed her in a position of substantial wealth and rendered her request for attorneys fees a "bad faith" request. We cannot agree. Plaintiff removed the personalty, she was held in contempt, but purged herself thereof by providing defendant with an itemized list of the property removed, as the court ordered. In addition, although in temporary possession of the property, she had been ordered by the court not to dispose of the property in any way. There is no evidence that she attempted to do so. Thirdly, this finding of contempt does not have the singular effect of reducing her legitimate request for attorneys fees to a "bad faith" request. The removal of property and the request for attorneys fees were unrelated instances.

Our inquiry now focuses upon the reasonableness of the attorneys fees award. The proper order awarding counsel fees in a child support or alimony action must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered, the time and skill required, and the attorney's hourly rate in comparison to the customary charges of attorneys practicing in that general area. *See Fungaroli* at 274-75, 280 S.E. 2d at 790.

Defendant stipulated to the reasonableness of the hourly rate charged, but contended that a substantial portion of the time expended was in the performance of the duties pursuant to the administration of the marital trust created by court order and was therefore not in prosecution of the action. He seems to overlook the fact that the trust was in fact created to secure a fund from which alimony and child support could be paid. Therefore, we find his contention untenable.

The court found that all the services were rendered on behalf of the plaintiff and minor children. This finding is conclusive and we find no abuse of discretion and therefore no reason to disturb the ruling on appeal.

Affirmed.

Judges BECTON and PARKER concur.

SOUTH CAROLINA INSURANCE COMPANY v. HALLMARK ENTERPRISES, INC.; BAILEY'S TUNNEL ROAD CAFETERIA, INC.; AND GURTHA HUGGINS v. MCNEIL-PATTERSON AGENCY, INC.

No. 8728SC547

(Filed 16 February 1988)

Process § 12; Insurance § 66— failure to maintain agent for corporate service of process—service of process effective—failure to give notice to insurer

Where a patron of defendant cafeteria slipped and fell, the trial court properly entered judgment in favor of plaintiff, defendant cafeteria's insurer, finding that plaintiff was not liable for any judgment received by the patron in her action against the cafeteria, since the patron's service of process upon defendant was effective; defendant failed to comply with N.C.G.S. § 55-13 by failing to maintain an agent and address for corporate service of process and because of this failure was estopped from complaining it did not receive the patron's complaint and summons forwarded by the Secretary of State; defendant failed to forward to plaintiff insurer the summons and complaint as required by its insurance contract prior to entry of the default judgment; and as a result of defendant's failure, plaintiff's ability to defend against the patron's action was materially prejudiced.

APPEAL by defendant Gurtha Huggins from *Lewis (Robert D.), Judge.* Judgment entered 19 March 1987 in Superior Court,

BUNCOMBE County. Heard in the Court of Appeals 1 December 1987.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon and Allan R. Tarleton, attorneys for plaintiff-appellee.

Reynolds & Stewart, by G. Crawford Rippy, III, attorney for defendant-appellant.

ORR, Judge.

Plaintiff South Carolina Insurance Company (S.C. Ins. Co.) moved for a declaratory judgment to determine its liability for the judgment obtained by defendant Gurtha Huggins (Huggins), against S.C. Ins. Co.'s policyholder, Bailey's Tunnel Road Cafeteria (Bailey's). In response to the declaratory judgment action, Huggins counterclaimed for the payment of a default judgment previously entered against Bailey's. S.C. Ins. Co. replied to Huggins' claim by cross-claiming against Bailey's' insurance agent, McNeil-Patterson Agency, Inc., for indemnity.

The trial court, sitting without a jury, entered judgment in S.C. Ins. Co.'s favor, finding it was not liable for any judgments received by Huggins in her action against Bailey's.

The undisputed facts of this case are as follows:

On 15 April 1981 Huggins fell on Bailey's' premises and was injured. At the time of the accident, Bailey's' general manager prepared an accident report which his superior submitted to Bailey's' insurance agent, McNeil-Patterson Agency, Inc. The insurance agent did not forward notice of the accident to Bailey's' insurer, S.C. Ins. Co.

On 3 February 1984 Huggins filed a negligence suit against Bailey's to recover damages for the injuries she suffered in her 15 April 1981 fall. Huggins served process for her action by sending the summons and complaint, pursuant to N.C.G.S. § 55-15, to the office of the Secretary of State on 8 February 1984.

The Secretary of State's office forwarded the documents by certified mail to E. O. Hall at 4808 Montclair Avenue, Charlotte, North Carolina, the registered agent and address listed by Bailey's with the Secretary of State, pursuant to N.C.G.S. § 55-13.

Hall, however, had moved to Spartanburg, South Carolina in July 1973 and had failed to notify the Secretary of State, as required by N.C.G.S. § 55-14, of his change of address. Consequently, the summons and complaint were returned to the Secretary of State marked "return to sender, not deliverable as addressed, unable to forward."

Huggins proceeded to trial in her action, and on 27 June 1984 she requested and received a default judgment for $121,126 against Bailey's.

Approximately one year later on 9 July 1985 Huggins notified Bailey's of the judgment and demanded payment. Bailey's immediately called its insurance agent, McNeil-Patterson Agency, Inc., which then contacted Bailey's' insurer, S.C. Ins. Co.

Bailey's sought to overturn Huggins' default judgment. However, this Court in *Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 351 S.E. 2d 779 (1987), affirmed the judgment's enforceability on appeal.

S.C. Ins. Co. denied insurance coverage to Bailey's for Huggins' judgment, contending Bailey's had failed to comply with the following notice requirements, contained in its insurance contract.

> D. INSURED'S DUTIES IN THE EVENT OF OCCURRENCE, CLAIM OR SUIT:
>
> 1. In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable.
>
> 2. If claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

Based upon the above facts the trial court concluded as a matter of law: (1) Huggins' service of process upon Bailey's was effective; (2) Bailey's failed to comply with N.C.G.S. §§ 55-13 and 66-68 and because of this dereliction was estopped from complain-

ing it did not receive Huggins' complaint and summons forwarded by the Secretary of State; (3) Bailey's failed to forward to S.C. Ins. Co. the summons and complaint as required by its insurance contract prior to entry of the default judgment; (4) as a result of Bailey's' failure, S.C. Ins. Co.'s ability to defend against Huggins' action was materially prejudiced. The trial court then held S.C. Ins. Co. was not liable for any of Huggins' claims or judgments against Bailey's.

I.

On appeal, Huggins listed three exceptions in her brief. However, she argued and cited authority in support of only one exception; therefore, she is presumed to have abandoned the two unsupported exceptions. N.C.R. App. P. 28(b)(5); *State v. West*, 317 N.C. 219, 345 S.E. 2d 186 (1986).

II.

The single issue before this Court on appeal is whether entry of the trial court's judgment was proper.

When entry of a judgment is challenged and no exceptions to the evidence or the trial court's findings of fact are made, the questions presented for appellate review are (1) whether the facts found are sufficient to support the conclusions of law and the entry of the judgment, and (2) whether the judgment is proper in form. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975); *State v. Johnson*, 64 N.C. App. 256, 307 S.E. 2d 188 (1983), *remanded on other grounds*, 310 N.C. 581, 313 S.E. 2d 580 (1984). A challenge to entry of the judgment does not bring up for review the sufficiency of the evidence to support the trial court's findings. *Modica v. Rodgers*, 27 N.C. App. 332, 219 S.E. 2d 260 (1975).

Defendant Huggins argues entry of the judgment was error as a matter of law because Bailey's never received notice of Huggins' lawsuit before entry of the default judgment and, therefore, could not have complied with the contract notice provision by giving notice of the lawsuit to its insurer, S.C. Ins. Co., at an earlier time.

Notice provisions in insurance contracts have long been recognized as valid in North Carolina. *Davenport v. Indemnity Co.*,

283 N.C. 234, 195 S.E. 2d 529 (1973); *Poultry Corp. v. Insurance Co.*, 34 N.C. App. 224, 237 S.E. 2d 564 (1977). "The purpose and intention of an insurance contract's notice provision is to enable the insurer to begin its investigation and to initiate other procedures as soon as possible after a claim arises, and to avoid any prejudice that might be caused by a delay in receiving notice." H. Ralston, *Great American Insurance Co. v. C. G. Tate Construction Co.: Interpretation of Notice Provisions in Insurance Contracts*, 61 N.C. L. Rev. 167 (1982); *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981).

The enforcement of notice provisions was specifically addressed by the Supreme Court in *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769, where it adopted the modern rule of reasonable expectations. This promotes the social policy of compensating the injuries of the innocent public, fulfills the reasonable expectations of the insurer, and protects the insurer's ability to defend its own interests. It is embodied in the following three-part test which states:

> When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, *e.g.*, that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

Insurance Co. v. Construction Co., 303 N.C. at 399, 279 S.E. 2d at 776.

First, to determine if notice was given as soon as practicable, the trial court must examine the specific facts and circumstances of each case. *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769. A notice provision will not be "given a greater scope than required to fulfill its purpose . . . [of protecting] the ability of the insurer to defend by preserving its ability fully to investigate [and litigate] the accident . . . . If, under the circumstances of a particular case, the purpose behind the requirement has been met, the insurer will not be relieved of its obligations. If, on the other hand, the purpose of protecting the insurer's ability to de-

fend has been frustrated, the insurer has no duty under the contract." *Insurance Co. v. Construction Co.*, 303 N.C. at 396, 279 S.E. 2d at 774-75.

Three of the trial court's findings of fact address the circumstances surrounding Bailey's' receipt of notice of Huggins' lawsuit, and state:

> (1) When Hallmark purchased its 80% share of Bailey's in 1972, the name and address of the registered agent for both corporations were changed in the Secretary of State's office to E. O. Hall, 4808 Montclair Avenue, Charlotte, North Carolina. Hall moved from Charlotte to Spartanburg, South Carolina in July, 1973. Thereafter, neither Hallmark nor Bailey's maintained a registered agent in North Carolina.
>
> (2) The original Summons in Case No. 84 CVS 0277 was issued on February 3, 1984 and was directed to the "Honorable Thad Eure, Secretary of State of North Carolina, Raleigh, North Carolina 27611, Civil Process Agent for Bailey's Tunnel Road Cafeteria, Inc., C/O E. O. Hall, Registered Agent, 4808 Montclair Avenue, Charlotte, North Carolina." The Summons was served by the Sheriff of Wake County upon the Secretary of State's office on February 9, 1984. The Secretary's office did forward by certified mail a copy of the Summons and Complaint to Bailey's, in care of E. O. Hall, 4808 Montclair Avenue, Charlotte, North Carolina. The Summons and Complaint were returned by the U.S. Postal Office to the Secretary of State marked "Return to Sender, Not Deliverable as Addressed, Unable to Forward."
>
> (3) Hall first learned of both lawsuits more than a year later in July of 1985 from a telephone call from Huggins' attorney. Following that call he received from Huggins' attorney copies of the suit papers and forwarded these to the Third-Party Defendant, McNeil-Patterson Agency, Inc., an agent for Plaintiff. On July 11, 1985, McNeil-Patterson notified South Carolina Insurance of Huggins' claim by sending a loss notice.

These findings clearly show that Bailey's failed to receive notice of Huggins' lawsuit in February 1984, when the Secretary of State forwarded a copy of the summons and complaint to Hall

at 4808 Montclair Avenue, Charlotte, North Carolina, because it failed to properly maintain an agent and address for service of process.

The listing of an agent for corporate service of process with the Secretary of State is not a voluntary action, subject to the discretion of the corporation. This listing is legislatively mandated by N.C.G.S. § 55-13. Furthermore, this Court has held that service of process on the Secretary of State, when a corporation has complied with N.C.G.S. § 55-13, is reasonably calculated to give parties to an action actual notice and the opportunity to defend. *Business Funds Corp. v. Development Corp.*, 32 N.C. App. 362, 232 S.E. 2d 215, *disc. rev. denied*, 292 N.C. 728, 235 S.E. 2d 784 (1977).

Based on the facts and law discussed above, we conclude that Bailey's may not rely on its violation of N.C.G.S. § 55-13 to justify its failure to receive notice in February 1984. Consequently, Bailey's did not give notice of the suit to S.C. Ins. Co. at the time it was reasonably expected to receive actual notice of the action, February 1984. Therefore, Bailey's failed to notify S.C. Ins. Co. as soon as practicable.

In addition we hold that the findings of fact discussed above support the trial court's Conclusions of Law Nos. 2 and 3, which address this question and state:

> 2. Bailey's failed to comply with the provisions of G.S. 55-13 and G.S. 66-68 and is estopped to complain that it did not receive the Complaint and Summons forwarded to it by the Secretary of State when its own dereliction resulted in those documents being returned undelivered.
>
> 3. Bailey's failed to forward to Plaintiff copies of the Complaint and Summons as required by the policy prior to entry of judgment against it.

Secondly, the trial court must determine whether Bailey's acted in good faith when it failed to give timely notice of Huggins' suit to S.C. Ins. Co.

The test "of good faith involves a two-part inquiry: (1) Was the insured aware of his possible fault, and (2) Did the insured purposefully and knowingly fail to notify the insurer?" *Great*

American Ins. Co. v. C. G. Tate Construction Co., 315 N.C. 714, 720, 340 S.E. 2d 743, 747 (1986).

"The good faith test is phrased in the conjunctive: both knowledge *and* the deliberate decision not to notify must be met for lack of good faith to be shown. If the insured can show that either does not apply, then the trial court must find that the insured acted in good faith." *Id.* (emphasis supplied).

In the present case, Finding of Fact No. 12 states, in pertinent part: "Hall [i.e. Bailey's] first learned of both lawsuits more than a year later in July 1985 from a telephone call from Huggins' attorney."

This finding shows that Bailey's did not know of the lawsuit and, therefore, could not have deliberately failed to notify S.C. Ins. Co. of the pending action prior to July 1985.

Although Bailey's' failure to comply with N.C.G.S. § 55-13 prevented it from notifying S.C. Ins. Co. as soon as practicable, under the standard articulated above, this failure does not constitute bad faith.

Finally, the trial court must determine whether S.C. Ins. Co. was materially prejudiced by Bailey's' delay in giving notice.

S.C. Ins. Co. bears the burden of proving it was materially prejudiced by Bailey's' delay. *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769. To meet this burden S.C. Ins. Co. must show that the changed circumstances caused by the delay "materially impair[ed] its ability to investigate the claim or defend and, thus, to prepare a viable defense." *Insurance Co. v. Construction Co.*, 303 N.C. at 398-99, 279 S.E. 2d at 776.

The trial court made the following findings pertaining to this question:

> (1) On February 3, 1984, Huggins filed a second lawsuit against Bailey's in Case 84 CVS 0277 with nearly the same allegations she had asserted against Hallmark, but alleged that her April 15, 1981 fall occurred on Bailey's['] premises.
>
> (2) Huggins moved for entry of default on May 19, 1984, and the Clerk entered Bailey's['] default that same day. Judge C. Walter Allen heard the default and inquiry without a jury

and entered a default judgment against Bailey's in the amount of $121,126.00 on June 27, 1984.

(3) Hall first learned of both lawsuits more than a year later in July of 1985 from a telephone call from Huggins' attorney. Following that call he received from Huggins' attorney copies of the suit papers and forwarded these to the Third-Party Defendant, McNeil-Patterson Agency, Inc., an agent for Plaintiff. On July 11, 1985, McNeil-Patterson notified South Carolina Insurance of Huggins' claim by sending a loss notice.

From these findings it is clear S.C. Ins. Co. did not receive notice of Huggins' action until more than a year after the default judgment was entered in Huggins' favor. As a result of Bailey's' delay, S.C. Ins. Co. was prevented from either investigating or litigating Huggins' action, and instead, was presented with a valid and enforceable default judgment. Accordingly we conclude that Bailey's' delay materially prejudiced S.C. Ins. Co.'s ability to protect its interests.

These findings fully support the trial court's Conclusion of Law No. 4, which states:

4. Plaintiff's ability to defend the action brought by Huggins against Bailey's was materially prejudiced by that failure [to notify].

A review of the trial court's judgment discloses that the findings of fact support the conclusions of law drawn therefrom.

Further review shows that these findings and conclusions sufficiently address each of the three inquiries contained in the test promulgated by the Supreme Court in *Insurance Co. v. Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769; thus, permitting this Court to find, based upon the evidence before it, that Bailey's' failure to comply with the notice provisions relieved S.C. Ins. Co. from liability under its insurance contract.

For the reasons discussed above, this Court concludes that the judgment was proper in form and that the facts found by the trial court were sufficient to support its conclusions of law and the entry of its judgment.

Affirmed.

Judges ARNOLD and JOHNSON concur.

BRENDA GAIL PITTS v. JOHN D. BROYHILL

No. 8724DC205

(Filed 16 February 1988)

1. **Divorce and Alimony § 19.5— separation agreement incorporated into divorce decree—contract to alter agreement proper**

The parties could enter into a contract to alter the terms of a separation agreement which had been incorporated into a divorce decree.

2. **Divorce and Alimony § 19.5— separation agreement incorporated into divorce decree—contract to alter agreement supported by consideration**

The parties' agreement which in effect altered their separation agreement after it had been incorporated into a divorce decree was supported by consideration where plaintiff, by making the new agreement, agreed to give up her right to seek judicial enforcement of paragraph 9 of the separation agreement, and plaintiff gave up her ownership of a lot upon which defendant was obligated to build her a house based upon defendant's promise in the new agreement to procure a substitute residence for plaintiff.

3. **Contracts § 27.2— contract to make mortgage payments—sufficiency of evidence of breach**

The trial court properly found that defendant breached the parties' contract where the contract provided that defendant would make the mortgage payments on a deed of trust, and he admitted in his pleadings that he did not.

4. **Contracts §§ 21.3, 27.2— anticipatory breach—no allegation or evidence—finding improper**

In an action to recover on the parties' contract which required defendant to purchase a house for plaintiff where the pleadings showed that defendant breached the contract by failing to make mortgage payments, the trial court erred in finding an anticipatory breach damaging plaintiff in the amount of $46,000, since plaintiff requested only specific performance and damages for failure to pay in the past, and there was no allegation or evidence that defendant had shown by words or conduct that he had repudiated the future performances due on the entire contract.

5. **Rules of Civil Procedure § 52— judgment improper in form**

The trial court's judgment was improper in form where it contained findings of fact and conclusions of law, but did not direct the entry of the appropriate judgment. N.C.G.S. § 1A-1, Rule 52(a)(1).

APPEAL by defendant from *Ginn, Judge.* Judgment entered 25 September 1986 in District Court, WATAUGA County. Heard in the Court of Appeals 25 September 1987.

Finger, Watson, di Santi & McGee by Linda M. McGee for plaintiff appellee.

Robert T. Speed and Lisa Boutelle Hardin for defendant appellant.

COZORT, Judge.

On 11 August 1972, Brenda Gail Pitts, plaintiff below, and John D. Broyhill, defendant below, were married. On 16 November 1978, the parties entered into a separation agreement. In paragraph nine of that agreement, defendant promised to build for plaintiff, on a lot she owned, a three bedroom, two-bath home, for a price not to exceed forty thousand dollars. This amount did not include the cost of the lot. The text of paragraph 9 is as follows:

> John D. Broyhill hereby agrees that he shall construct and build for Brenda Gail Broyhill a three (3) bedroom, two (2) bath home on Lot 6 of the High Heather Estates in Blowing Rock, North Carolina. The parties shall consult and agree on the plans and specifications for said house prior to construction on the house. The construction of said house, not including the cost of the lot shall not exceed FORTY THOUSAND DOLLARS $40,000.00. After the computation stated above, John D. Broyhill shall maintain and pay all mortgage payments on the construction loan and permanent financing loan against the constructed house not to exceed FORTY THOUSAND DOLLARS ($40,000.00). John D. Broyhill hereby agrees to maintain a mortgage insurance premium on the loan to assure payment of said mortgages.

The separation agreement, including paragraph 9, was incorporated verbatim into the judgment of absolute divorce rendered on 20 November 1978 in the District Court of Watauga County.

On 3 November 1980, the parties executed a notarized document entitled AMENDMENT TO SEPARATION AGREEMENT ["Exhibit C" in the trial below], in which the following pertinent language appeared:

THAT WHEREAS the parties originally signed a Separation Agreement on the 16th day of November, 1978; and,

THAT WHEREAS, the parties desire to amend paragraph (9) of said Agreement.

NOW, THEREFORE, the parties agreed as follows:

(1) Paragraph (9) of the original agreement is deleted in its entirety;

(2) The following paragraph (9) is substituted and made a part of the original agreement, being the new paragraph (9) as follows:

John D. Broyhill hereby agrees to purchase a 1.169 acre tract from Steven C. Floyd and wife, Anna T. Floyd, said tract being all of Lot 21 and a portion of Lot 24, Section A, Mayview Park Subdivision in Blowing Rock, North Carolina. John D. Broyhill further agrees to obtain financing with Piedmont Federal Savings and Loan Association in the amount of Fifty Thousand Dollars ($50,000.00), and to maintain and pay all mortgage payments on said loan. John D. Broyhill agrees to maintain a mortgage insurance premium on the loan to assure payment of said mortgage.

John D. Broyhill agrees to convey the aforesaid property to Brenda Gail Pitts, subject to the mortgage and and [*sic*] subject to the conditions herein.

On 22 January 1986, the plaintiff filed a complaint alleging that the defendant had failed to comply with the terms of the 3 November 1980 document. She alleges that defendant had become delinquent in the mortgage payments on the substitute property and that he had failed to keep current mortgage insurance on the property. The plaintiff's complaint prayed for specific performance, damages for interest on loans the plaintiff allegedly had to acquire to make the mortgage payments which defendant failed to pay, punitive damages, reasonable attorney's fees, and costs.

In his answer, the defendant admitted the specific language of paragraph nine and its incorporation into the 20 November 1978 divorce decree. The defendant denied that he was in any way bound by the obligations contained therein. The defendant

further admitted that he failed to make continuous mortgage payments to Piedmont Federal, and that Piedmont notified him that foreclosure proceedings were imminent.

This case was heard before the Honorable C. Phillip Ginn, District Court Judge, at the 22 September 1986 Session of Civil District Court for Watauga County. The plaintiff offered evidence tending to show that she and the defendant had entered into a written separation agreement which was incorporated into their judicial divorce decree. Both subsequently signed a document calculated to amend their separation agreement. The plaintiff's evidence also tended to show that the defendant persuaded her to convey property she owned, described in paragraph nine in the original separation agreement, to a third party. She testified that she received no proceeds from this exchange; the Floyd home, described in the 3 November 1980 document, was to compensate her for allowing him to be excused from his prior construction obligation. After the purchase of the substitute property by the defendant and transfer of it to the plaintiff, the defendant made mortgage payments until the plaintiff remarried.

Defendant offered no evidence at trial.

In a Judgment signed 25 September 1986, the trial judge found that "the Amendment to Separation Agreement dated 3 November 1980 . . . is a valid contract" and that the plaintiff suffered damages in the amount of $9,864.64, plus $107.06 interest as a result of the defendant's breach. The court also found that the defendant's "continual refusal to pay the required deed of trust payments . . . has resulted in an anticipatory breach of the contract in the amount of the present payoff on the deed of trust to Watauga Savings and Loan in the amount of $46,000.00." The court then entered conclusions of law consistent with those findings. The Judgment contained no language, however, directing the defendant to make any payments.

The defendant urges this Court to reverse the judgment of the trial court for four reasons: first, because the trial court's judgment contained no order; second, because the document entitled "Amendment to Separation Agreement" was not a valid contract; third, that because there was no contract there could be no breach; and fourth, that it was error to award plaintiff $46,000.00 on the theory that the defendant had committed an an-

ticipatory breach of the contract. We affirm the trial court's finding of a valid contract, breach thereof, and finding of damages thereon of $9,864.64, plus interest. We vacate the portion of the "Judgment" finding an anticipatory breach and award of $46,000.00 in damages, and we remand for further proceedings.

[1] We first address the contention that the "Amendment To Separation Agreement" was not a valid contract. The crux of defendant's argument is that the contract is not supported by consideration. Before deciding that question, however, we must first decide whether the parties could enter into a contract to alter the terms of a separation agreement which had been incorporated into a divorce decree.

Defendant contends, and we agree, that once a separation agreement is incorporated into a court order, it loses its character as a contract and becomes a court order which must then be enforced through the contempt powers of the court. *See Walters v. Walters*, 307 N.C. 381, 386, 298 S.E. 2d 338, 342 (1983). Defendant contends further that "the agreement, now a court order, cannot be modified by agreement of the parties, but must be modified by the court." We have found no case in this jurisdiction specifically addressing the point raised here, whether the parties by a new agreement can agree themselves, without court action, to change the terms of a separation agreement which has been incorporated into a divorce decree. *Walters* stated that, once the contract has been approved by the court, it will no longer be treated as a contract. *Id.* In *Doub v. Doub*, 313 N.C. 169, 170-71, 326 S.E. 2d 259, 260-61 (1985), the Supreme Court stated that, once the separation agreement has come before the courts, the parties no longer have the option of electing to pursue contract remedies; they must pursue their rights through the contempt powers of the court. In *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 658-59, 347 S.E. 2d 19, 24 (1986), the Supreme Court held that a party may *not* seek specific performance for payments under a separation agreement for the time after the separation agreement was incorporated into the divorce decree. Thus, we are of the opinion that the plaintiff here would not have been able to prevail *if* she had brought an action for specific performance of paragraph 9 of the original separation agreement of 16 November 1978 which was incorporated into the divorce decree of 20 November 1978.

[2] Nonetheless, we find the circumstances below are *not* controlled by *Walters, Doub* and *Cavenaugh.* Plaintiff brought an action for specific performance of a document which we find to be a *new,* valid contract, executed *after* the divorce decree. Plaintiff had the right to seek judicial enforcement of the original separation agreement. By agreeing to the document of 3 November 1980, she agreed to give up her right to seek judicial enforcement of paragraph 9 of the 1978 agreement. That forbearance constituted consideration for the new 1980 agreement. It is the law in North Carolina that "valuable consideration need not be money. Any benefit to the promisor or any loss to the promisee, including the promisee doing something he is not bound to do or refraining from exercising a right, suffices as consideration for a promise." *Bumgarner v. Tomblin,* 63 N.C. App. 636, 642, 306 S.E. 2d 178, 183 (1983). We hold that contractual surrender of plaintiff's right to bring an action to enforce paragraph nine of the divorce decree is sufficient legal detriment to constitute consideration under the new agreement.

We also find the new contractual agreement was supported by other consideration. Plaintiff's evidence tended to show that the original agreement required defendant to construct a "home on lot 6 of the High Heather Estates in Blowing Rock, North Carolina." This specific piece of property was owned by plaintiff. She testified that defendant promised her that if she would allow him to sell the lot at High Heather, then he would procure a substitute residence for her. To this plaintiff agreed, relying on defendant's promise. Contemporaneous with the transfer of the lot at High Heather, defendant was excused from his duty to construct her a home upon it on the grounds of impossibility of performance, a detriment sufficient to support the agreement.

Thus, we affirm the trial court's finding that the 3 November 1980 agreement created a valid, enforceable contract supported by consideration and breached by defendant. In North Carolina,

> [c]onsideration is the glue that binds the parties to a contract together. A mere promise, without more, is unenforceable. However, consideration is present when there is some benefit or advantage to the promisor or loss or detriment to the promisee. *Wolfe v. Eaker,* 50 N.C. App. 144, 272 S.E. 2d 781 (1980), *pet. for disc. review denied,* 302 N.C. 222, 277 S.E.

> 2d 69 (1981). It has also been held that consideration exists when the promisee, in exchange for the promise, does anything he is not legally bound to do, or refrains from doing anything he has a right to do, whether there is any actual loss to him as a benefit to the promisor.

In re Foreclosure of Owen, 62 N.C. App. 506, 509, 303 S.E. 2d 351, 353 (1983). We hold the 3 November 1980 agreement constituted a new, valid contract supported by consideration.

[3] One of the elements of the contract was that Mr. Broyhill make the mortgage payments on the executed deed of trust. He admitted in his pleadings that he did not. The trier of fact determined that his failure to do so was a breach. The trial court's finding is affirmed.

[4] We next examine the defendant's contention that the trial court erred in finding an anticipatory breach damaging the plaintiff in the amount of $46,000.00. We agree that this finding was error.

The plaintiff's complaint prays that the "[d]efendant be ordered to specifically perform the contract entered into by the parties . . . dated November 3, 1980." Since the plaintiff requested only specific performance and damages for failure to pay in the past, we find the trial judge committed error by granting damages on the theory of anticipatory breach.

> Anticipatory breach is defined as: "A breach committed before there is a present duty of performance, and is the outcome of words evincing intention to refuse performance in the future." [Citations omitted.] . . . .
>
> . . . [Further] [p]arties to an executory contract for the performance of some act or services in the future impliedly promise not to do anything to the prejudice of the other inconsistent with their contractual relations and, if one party to the contract renounces it, the other may treat renunciation as a breach and sue for his damages at once, provided the renunciation covers the entire performance to which the contract binds the promisor.

Cook v. Lawson, 3 N.C. App. 104, 107-08, 164 S.E. 2d 29, 32 (1968).

The only allegations in this case were that defendant had failed to perform. There is no allegation or evidence that he had shown, by words or conduct, that he had repudiated the future performances due on the entire contract. Without this allegation and evidence, defendant cannot be held accountable for breaches that have yet to occur. Consequently, we find that the trial court's finding of damages based on this theory must be vacated. Additionally, we were unable to find any evidence in the record to justify the $46,000.00 figure found by the court.

[5] Finally, we also agree with the defendant's contention that the trial court's judgment in this case was improper in form. "In all actions tried upon the facts without a jury . . . the court shall find the *facts* specially and state separately its *conclusions of law* thereon and direct the entry of the *appropriate judgment*." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (emphasis added). The order in this action contained the first two elements of a proper order, but was defective because it did not contain the last. The remedy to correct this deficiency, however, is not a new trial, but rather a remand for entry of a proper judgment. *Davidson and Jones, Inc. v. N.C. Dept. of Administration*, 69 N.C. App. 563, 576, 317 S.E. 2d 718, 725 (1984), *aff'd in part, rev'd in part and remanded*, 315 N.C. 144, 337 S.E. 2d 463 (1985).

In summary, we hold: (1) The trial court's findings and conclusions that plaintiff and defendant entered into a valid contract, supported by adequate consideration, is affirmed. (2) The court's findings and conclusions that defendant breached that agreement and that the damages were $9,864.64, plus $107.06 in interest, are affirmed. (3) The findings and conclusions relating to anticipatory breach are vacated. (4) The cause is remanded for the trial court to consider the plaintiff's claim for specific performance and to make appropriate findings and conclusions. The trial court is authorized to take additional evidence if requested by either party, or deemed necessary by the court, or both. Anticipatory breach need not be considered unless properly raised by the pleadings and the evidence. (5) Any final order shall contain findings, conclusions, and an order.

Affirmed in part, vacated in part and remanded.

Judges PHILLIPS and GREENE concur.

STATE OF NORTH CAROLINA v. NIGEL McKINNEY

No. 878SC610

(Filed 16 February 1988)

1. **Criminal Law § 101.1— comments of prospective juror—defendant not prejudiced**

The trial court did not abuse its discretion in denying defendant's motion for a new trial based on comments by a prospective juror who worked at a correctional facility that he knew defendant's brother who was incarcerated at the facility and that "it ran in the family," since the trial court excused the juror, instructed the remaining jurors that they were to decide the case upon the evidence presented and the law in the case and nothing else, and carefully inquired with a series of questions if any juror had been prejudiced by the comment.

2. **Criminal Law § 138.23— voluntary manslaughter—sentence—carrying pistol to nightclub—aggravating factor**

Defendant's possession and use of a pistol could not be used as a factor in aggravation of voluntary manslaughter, but the trial court considered defendant's conduct in carrying the pistol to a nightclub, which created circumstances leading to the crime, rather than the use of the pistol in the crime, to be the real aggravating factor.

3. **Criminal Law § 138.29— voluntary manslaughter—sentence—same evidence used to find two aggravating factors—error**

The trial court could properly find as a non-statutory aggravating factor that defendant returned with a loaded pistol to a location where he previously had had trouble and had been told to stay away, since this conduct clearly increased defendant's culpability with respect to the crime; however, the trial court erred in using the same evidence to find the two separate factors of carrying a pistol to the club and returning to the club.

4. **Criminal Law § 134.4— defendant not sentenced as committed youthful offender—reasons not required**

There was no merit to defendant's contention that the trial court erroneously believed that it could not sentence him as a committed youthful offender, since the trial court made specific findings as to both offenses that defendant should not obtain the benefit of release as a committed youthful offender, and the court was not required to state the reasons for its findings in the record.

APPEAL by defendant from *Allsbrook (Richard B.), Judge.* Judgments entered 16 January 1987 in Superior Court, WAYNE County. Heard in the Court of Appeals 8 December 1987.

Defendant was indicted for second degree murder and assault with intent to kill. At trial, State's evidence tended to show the

following: On the night of 20 June 1986, a teenage dance was being held at the Scirrocco Club in Goldsboro. At about 10:30 p.m., Charles Bryant, the owner of the club, was informed by his doorman that somebody was fighting outside the club. When Bryant went out to investigate, he saw defendant walking away with a gun in his hand. Bryant told defendant to leave and asked him not to return. Defendant left peacefully.

Later that evening, two customers at the club got into an argument. The two arguers went outside, and a crowd gathered around them. The crowd grew larger as the argument became more heated. Anthony Bryant and his cousin, Clinton Bryant, were in the crowd, and they got involved in the argument. At this point defendant, who had returned to the vicinity of the club, fired a shot in the air. The crowd's attention was distracted from the argument and the crowd began to move toward defendant. Anthony Bryant approached defendant and said "what's up with that gun." Defendant then shot Anthony in the leg. Clinton Bryant approached defendant and asked him why he shot Anthony, and defendant shot Clinton in the stomach. Clinton later died from the gunshot wound.

Defendant testified that he went by the club a second time that night because it was on his way home. He stated that the crowd, led by Anthony Bryant, approached him in a threatening manner before he ever fired a shot. He then fired a shot in the air, but the crowd kept coming. Defendant claimed that he was trying to shoot at the ground when he shot both Anthony and Clinton.

The jury returned verdicts finding defendant guilty of voluntary manslaughter and assault with a deadly weapon. Judge Allsbrook found factors in aggravation and mitigation of punishment with respect to the manslaughter conviction, and found that the factors in aggravation outweighed the factors in mitigation. From judgments imposing sentences of fifteen years for voluntary manslaughter and two years for assault with a deadly weapon, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Kim L. Cramer, for the State.

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

PARKER, Judge.

Defendant has brought forward four assignments of error: that the trial court erred (i) in failing to grant his motion for a mistrial after a prospective juror made improper comments during jury selection; (ii) in finding as a non-statutory aggravating sentencing factor that defendant was carrying a loaded pistol when the shooting occurred; (iii) in finding a non-statutory aggravating sentencing factor not reasonably related to the purposes of sentencing and in using the same evidence to prove two aggravating factors and (iv) in failing to sentence defendant as a committed youthful offender.

[1] Defendant first assigns error to the trial court's failure to grant his motion for a mistrial. The motion was made on the grounds that a prospective juror had made improper comments during jury selection and that the comments were heard by the other jurors, thereby precluding a fair trial for defendant.

Although there is no transcript of the jury selection proceedings, the record of the trial court's consideration of defendant's motion shows that the parties and the court were generally agreed as to what had transpired. The juror in question worked at a correctional facility. Upon being questioned as to whether his employment would bias him in defendant's trial, the juror responded that he knew defendant's brother, who was incarcerated at the facility. The juror apparently also made a statement to the effect that "it ran in the family."

The trial court excused the juror and instructed the remaining jurors that they were to decide the case upon the evidence presented and the law in the case and nothing else. Before the jury was impaneled, Judge Allsbrook addressed the jury as follows:

> [Y]ou are to disregard any statement made by any prospective juror in answer to any question during jury selection as it might bear upon the defendant's guilt or innocence. Is there any juror who cannot do that? [Negative response.] Is there any juror who would let any statement made by any prospective juror during jury selection affect your verdict in any way? [Negative response.] Is there any juror who will not be able to give the State and the defendant a fair and impar-

> tial trial based upon the evidence presented, the argument of counsel and the charge of the Court as to the applicable law? Is there any juror who cannot do that? [Negative response.]

Defendant contends that, notwithstanding the trial court's instructions and inquiry, the comments of the prospective juror were so prejudicial as to require a mistrial. We disagree.

The decision whether to grant a mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Barts*, 316 N.C. 666, 682, 343 S.E. 2d 828, 839 (1986). In *State v. Daniels*, 59 N.C. App. 442, 297 S.E. 2d 150 (1982), a prospective juror stated before the entire panel that a codefendant who was being tried jointly with defendant "used to go with [her] daughter and also . . . took [her] car at one time." *Id.* at 444, 297 S.E. 2d at 152. This Court found no abuse of discretion in the denial of the motion for mistrial, noting that the trial court had inquired as to whether any of the jurors could not be fair and impartial; that the defendants had the opportunity to examine the jurors concerning the remarks; and that neither defendant had exercised all his peremptory challenges or exercised any challenges for cause. *Id.* at 444-45, 297 S.E. 2d at 152. *See also State v. Bruton*, 66 N.C. App. 449, 311 S.E. 2d 603 (1984) (mistrial not warranted when prospective juror stated that defendant had been involved in an auto accident in which two of the juror's relatives were killed).

Even though the prospective juror's comments in this case were improper, the burden of establishing prejudice was on the defendant. *State v. Bruton*, 66 N.C. App. at 451, 311 S.E. 2d at 605. As in *Bruton*, *supra*, and *Daniels*, *supra*, the record in this case does not show that defendant was denied the opportunity to question the jury regarding possible prejudice or that defendant used his peremptory challenges or his challenges for cause. This case is distinguishable from *State v. Mobley*, 86 N.C. App. 528, 358 S.E. 2d 689 (1987) in that the potentially prejudicial statements concerned defendant's brother and did not reveal any incriminating facts about defendant himself. Further, the trial court here not only instructed the remaining jurors not to consider the comment, but also carefully inquired with a series of questions if any juror had been prejudiced by the comment. No juror gave an

affirmative response. Under these circumstances, the trial court did not abuse its discretion in denying the motion for mistrial.

Defendant's next two assignments of error concern the trial court's finding of two non-statutory aggravating factors for sentencing purposes. These two assignments of error will be considered together.

[2] The only aggravating factors found by the trial court were the following non-statutory factors:

(a) The defendant carried a loaded 380 pistol to the night club where the incident occurred.

(b) After having had previous trouble at the night club that night and being told by the owner to leave, he later returned just before the shooting occurred.

Defendant contends that the trial court erred in finding factor (a) because the evidence used to prove it was also necessary to prove the offense of voluntary manslaughter. As to factor (b), defendant contends that it is not reasonably related to the purposes of sentencing and it is based on the same evidence used to prove factor (a).

We first consider defendant's argument concerning factor (a). General Statute 15A-1340.4(a)(1) provides in pertinent part: "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation. *State v. Robbins*, 309 N.C. 771, 777, 309 S.E. 2d 188, 191 (1983). As the State points out in its brief, the use of a deadly weapon is not an essential element of voluntary manslaughter. In a recent decision, however, our Supreme Court gave a broader meaning to the term "element of the offense" as used in G.S. 15A-1340.4(a)(1).

In *State v. Evangelista*, 319 N.C. 152, 353 S.E. 2d 375 (1987), the defendant was convicted of involuntary manslaughter. The conviction was based on evidence that he had shot and killed the victim, and the trial court found as an aggravating factor that the defendant was armed with a deadly weapon. The Supreme Court held:

> For the jury to convict the defendant of involuntary manslaughter . . . it necessarily found that the defendant was armed with and discharged a firearm. Therefore, the possession and discharge of the firearm in effect became an element of the offense, and the same evidence could not be considered as a factor aggravating the manslaughter for sentencing.

State v. Evangelista, 319 N.C. at 165, 353 S.E. 2d at 384. The facts of the present case come squarely within the holding in *Evangelista*. *See also State v. Green*, 62 N.C. App. 1, 4, 301 S.E. 2d 920, 921-22, *modified and aff'd per curiam*, 309 N.C. 623, 308 S.E. 2d 326 (1983). Therefore, defendant's possession and use of a pistol cannot be used as a factor in aggravation of the voluntary manslaughter.

On the facts of this case, however, it is clear that the trial court's finding that defendant carried a loaded pistol to the club contemplated more than mere possession and use of the pistol. When a homicide is committed with a firearm, defendant's conduct with regard to the firearm may be an aggravating factor if such conduct helped to create the circumstances leading to the crime. *See State v. Green*, 62 N.C. App. at 4-5, 301 S.E. 2d at 922 (Although the use of a gun was not a proper aggravating factor, concealment of the gun could be considered as an aggravating factor because it was "a factor in the occurrence of the crime."). The owner testified that he told defendant to "take that gun and get off my property and please don't come back no more." This testimony demonstrates that the owner was concerned that defendant's presence with a gun would lead to trouble. Moreover, we note that the trial court did not find the statutory aggravating factor that "[t]he defendant was armed with or used a deadly weapon at the time of the crime." G.S. 15A-1340.4(a)(1)(i). Significantly, the trial court felt compelled to find a different, non-statutory factor. This fact, in our view, indicates that the court considered defendant's conduct in carrying the pistol to the club, rather than the use of the pistol in the crime, to be the real aggravating factor.

[3] Under these facts, we are of the opinion that the trial court could properly have found as a non-statutory aggravating factor that defendant returned to the club carrying a loaded pistol after

his encounter with the owner. However, since G.S. 15A-1340.4(a)(1) provides that "the same item of evidence may not be used to prove more than one factor in aggravation," the trial court erred in using the same evidence to find the two separate factors of (i) carrying a pistol to the club, and (ii) returning to the club. *See State v. Higson*, 310 N.C. 418, 423-24, 312 S.E. 2d 437, 440-41 (1984). Defendant's *return* to the club still carrying the loaded pistol precipitated the crime.

In view of our analysis above, we find no merit in defendant's argument that the aggravating factor of his return to the club is not reasonably related to the purposes of sentencing. Evidence which increases a defendant's culpability may properly be considered as an aggravating factor. *State v. Perry*, 316 N.C. 87, 110-11, 340 S.E. 2d 450, 464-65 (1986); G.S. 15A-1340.3. Defendant in this case returned with a loaded pistol to a location where he previously had had trouble and had been told to stay away. He thus created a dangerous situation which resulted in the shooting. This conduct clearly increased his culpability with respect to the crime.

[4] Defendant's final assignment of error is that the trial court was acting under a misapprehension of law when it failed to sentence defendant as a committed youthful offender. Defendant contends that the trial judge erroneously believed that defendant was not eligible to be treated as a youthful offender pursuant to G.S. 148-49.11, 49.14.

Defendant was eighteen years old at the time of his trial and therefore came within the statutory definition of "youthful offender." G.S. 148-49.11. The trial court was free, however, to decline to sentence defendant as a committed youthful offender. G.S. 148-49.14. The only basis for defendant's argument is the trial court's statement that it "could not" sentence defendant as a committed youthful offender.

Defendant's argument is frivolous. Any doubts as to the trial court's knowledge of the applicable law were erased when it made specific findings as to both offenses that defendant should not obtain the benefit of release as a committed youthful offender. Such findings are required by G.S. 148-49.14, and the trial court was not required to state the reasons for its findings in the record.

State v. White, 37 N.C. App. 394, 399, 246 S.E. 2d 71, 74 (1978). The assignment of error is overruled.

We find no error in defendant's trial. Because we find that the trial court erred in its findings of aggravating factors and imposed a sentence greater than the presumptive term for voluntary manslaughter, that case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

No. 86CRS8237—no error (assault).

No. 86CRS8236—sentence vacated and remanded for rehearing (manslaughter).

Judges WELLS and PHILLIPS concur.

ELIZABETH M. BARBER, PLAINTIFF, AND JOHN S. BARBER, ROBERT D. BARBER, AND SUSAN M. BARBER, INTERVENING PLAINTIFFS v. WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, A CORPORATION, DEFENDANT

No. 8729SC599

(Filed 16 February 1988)

1. **Appeal and Error § 6.2— order allowing amendment of complaint—appeal premature**

Defendant's appeal from that portion of the trial court order allowing the original plaintiff to amend her complaint is dismissed as premature, since the order allowing amendment did not deprive appellant of a substantial right which would be lost if not reviewed before final judgment on the original plaintiff's complaint.

2. **Insurance § 29.1— life insurance—no change of beneficiaries**

The trial court properly granted summary judgment for plaintiff intervenors in their action to recover proceeds from a life insurance policy where the policy was in full force and effect at the time of insured's death; the certificate designated the original plaintiff and the intervening plaintiffs as beneficiaries; no request for change of beneficiary had been received by defendant; the only action insured took regarding the certificate since its issuance was to write defendant requesting information regarding the status as to death benefit, total cash value, ownership and beneficiary designation; and this letter did not rise to the level of a manifestation of intent or attempt by the insured to change the designated beneficiaries.

APPEAL by defendant from *Helms, William H., Judge.* Order entered 28 January 1987 in Superior Court, HENDERSON County. Heard in the Court of Appeals 8 December 1987.

This action was instituted 23 October 1985 by Elizabeth M. Barber (hereinafter original plaintiff) against Woodmen of the World Life Insurance Society, a corporation (hereinafter defendant) seeking payment to her of the entire amount due under two insurance policies issued on the life of her deceased husband Leonard B. Barber, Jr. On 2 February 1986, John S. Barber, Robert D. Barber, and Susan M. Barber, children of the deceased Leonard B. Barber, Jr., were allowed to intervene as party plaintiffs (hereinafter intervenors). They filed their complaint seeking payment to them of an amount equal to seventy-five percent (75%) of both policies.

On 28 January 1987 the court entered an order (1) granting the original plaintiff's motion to amend her complaint to allege additional causes of action for breach of fiduciary duty and for unfair trade practices under North Carolina General Statutes 75-1.1, (2) granting the intervenors' motion for summary judgment for payment to them of an amount equal to seventy-five percent (75%) of policy No. 3485452; but denying their motion as to policy No. 3482260. The order also provided that the original plaintiff preserved her right to pursue her claim for payment to her in full on both policies. From the provisions of the order granting the original plaintiff's motion to amend her complaint and granting the intervenors' motion for summary judgment as to policy No. 3485452, defendant appeals.

Toms and Bazzle, P.A., by James H. Toms, Ervin W. Bazzle and Eugene M. Carr, III, for original plaintiff appellee.

Robert G. McClure, Jr., for intervening plaintiff appellees.

Francis M. Coiner, for defendant appellant.

JOHNSON, Judge.

The facts are undisputed. On 15 October 1970, Leonard B. Barber, Jr., the original plaintiff's deceased husband, applied for and was granted membership in the Woodmen of the World Life Insurance Society. As a member, defendant issued two certificates of insurance on the life of Leonard B. Barber, Jr.: Certifi-

cate No. 3050629 and Certificate No. 2455146. Both certificates were issued with the following designated as beneficiaries: Susan M. Barber, John S. Barber, and Robert D. Barber.

Upon the written application and request of the insured for a change of certificate and beneficiaries, certificate No. 3482260 was issued to replace certificate No. 2455146. The named beneficiaries on the new certificate were Elizabeth M. Barber, wife; John S. Barber, son; Robert D. Barber, son; and Susan M. Barber, daughter. On 23 May 1977, the insured submitted to defendant a written request by application to again change the named beneficiaries on certificate No. 3482260 to the following: Elizabeth M. Barber, wife, in one sum, if living; otherwise, to John S. Barber, son; Robert D. Barber, son; and Susan M. Barber, daughter, equally, in one sum.

On 30 May 1977, the insured, upon written application to defendant, requested a change of certificate No. 3050629 and its designated beneficiaries. In compliance with the insured's request, defendant replaced certificate No. 3050629 with certificate No. 3485452 with the beneficiaries being designated as follows: Elizabeth M. Barber, wife; John S. Barber, son; Robert D. Barber, son; and Susan M. Barber, daughter.

On 18 July 1983, Leonard B. Barber, Jr. wrote the following letter to defendant requesting information regarding the status of the two policies.

July 18, 1983

RE: WOODMAN [sic] OF THE WORLD—3485452 and 3482260

Dear Sirs:

Would you please give me the status of the above named policies with regard to net death benefit, total cash value, ownership and beneficiary designation. A prompt reply would be appreciated.

Sincerely,

Dr. Leonard Barber

On 27 July 1983, defendant answered with the following letter.

July 27, 1983

213 NC

Leonard B. Barber, Jr.
820 Fleming
Hendersonville, NC 28739

Dear Sovereign Barber:

Certificate 3485452
" 3482260

Thank you for your letter.

Certificates 3485452 and 3482260 were issued to you effective April 1, 1977 for the face amounts of $81,400 and $8,140 respectively. The accidental death benefit was included when Certificate 3482260 was issued.

Effective August 1, 1983, the cash surrender values will be $10,943.36 on Certificate 3485452 and $1,106.90 on Certificate 3482260. The certificates have no indebtedness.

In the event these certificates become claims at this time, the beneficiary would receive $100,000 from Certificate 3485452 and $10,000 from Certificate 3482260.

The beneficiaries are Elizabeth M. Barber, wife, in one sum, if living, otherwise to John S. Barber, son, Robert D. Barber, son, and Susan M. Barber, daughter, equally, in one sum. Enclosed is a photocopy of the beneficiary endorsement for your information.

If we may be of service in the future, please write.

Fraternally,

(Mrs.) Kathy J. Cochran
Certificate Change Section
Membership Services Department

kjc/wb
enc.

The referred enclosed photocopied beneficiary endorsement reads:

3482260

BENEFICIARY ENDORSEMENT

In accordance with the Application, payment of the Death Benefits shall be made as follows:

Elizabeth M. Barber, wife, in one sum, if living, otherwise to John S. Barber, son, Robert D. Barber, son, and Susan M. Barber, daughter, equally, in one sum. ----------

Leonard B. Barber, Jr. died 13 July 1985. Both certificates were in full force and effect at the time of his death. On 13 July 1985, certificate No. 3485452 in the amount of $100,000.00 designated Elizabeth M. Barber, wife; John S. Barber, son; Robert D. Barber, son; and Susan M. Barber, daughter as beneficiaries to share equally in the proceeds of the policy. On 13 July 1985, Certificate No. 3482260 in the amount of $10,000.00 carried an endorsement designating the following beneficiaries: Elizabeth M. Barber, wife, in one sum, if living; otherwise, to John S. Barber, son; Robert D. Barber, son; and Susan M. Barber, daughter, equally, in one sum.

[1] By its first Assignment of Error, defendant contends that the court erred in allowing the original plaintiff to amend her complaint.

It is axiomatic that no appeal lies from an interlocutory order or ruling of the trial judge, and will be dismissed as fragmentary and premature unless the order or ruling deprives the appellant of a substantial right which he would lose if the order or ruling is not reviewed before final judgment. G.S. 1-277; G.S. 7A-27; *Blackwelder v. State Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E. 2d 777 (1983). It is also well settled that an order of the trial court allowing a motion to amend the complaint is interlocutory and is not immediately appealable. *Howard v. Ocean Trail Convalescent Center*, 68 N.C. App. 494, 315 S.E. 2d 97 (1984). The order allowing the original plaintiff to amend her complaint does not deprive appellant of a substantial right which would be lost if not reviewed before final judgment on the original plaintiff's complaint. Therefore, defendant's appeal from that portion of the trial court order allowing the original plaintiff to amend her complaint is dismissed as being premature.

[2] Next, defendant contends the trial court erred in granting the intervenors' motion for summary judgment on policy No. 3485452.

Summary judgment is a drastic measure and should be considered with diligence. *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E. 2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E. 2d 321 (1976). It should be granted only when 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 the moving party is entitled to judgment as a matter of law. *Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 268 S.E. 2d 12, *cert. denied*, 301 N.C. 527, 273 S.E. 2d 452 (1980). An issue is material if the facts alleged would constitute a legal defense or would affect the result of the action. *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976).

It is undisputed that at the time of the insured's death on 13 July 1985 both certificates, No. 3482260 and No. 3485452, were in full force and effect; that certificate No. 3485452, at the time of the insured's death, designated the beneficiaries as Elizabeth M. Barber, wife; John S. Barber, son; Robert D. Barber, son; and Susan M. Barber, daughter. The certificate also provided that the proceeds be paid to the four named beneficiaries in equal shares. Certificate No. 3482260, at the time of the insured's death, carried an endorsement designating the beneficiaries as Elizabeth M. Barber, wife, in one sum, if living; otherwise to John S. Barber, son; Robert D. Barber, son; and Susan M. Barber, daughter. Both certificates provided that the beneficiary may be changed by written request and submission of the certificate for endorsement to the home office of the defendant.

The forecast of evidence clearly shows from the original plaintiff's request for admissions and defendant's answers thereto and the depositions of Kathy Cochran, defendant's text operator; Scott J. Darling, supervisor of defendant's life benefits section; and Lana Stevens, supervisor of defendant's certificate of change section, that no request for change of beneficiary endorsement has been received by defendant on certificate No. 3485452 since it was issued to replace the original certificate No. 3050629. Further, the forecast of evidence shows that the only action the in-

sured took regarding certificate No. 3485452 since its issuance was to write defendant on 18 July 1983 requesting information regarding the status of both certificates (3485452 and 3482260) as to their death benefit, total cash value, ownership, and beneficiary designation.

An insurance policy is a contract and its provisions govern the rights and duties of the parties thereto, and those persons entitled to the proceeds of a life insurance policy must be determined in accordance with the contract. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 348 S.E. 2d 794 (1986), *citing Harrelson v. State Farm Mutual Automobile Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968); and *Bullock v. Expressman's Mutual Life Insurance Co.*, 234 N.C. 254, 67 S.E. 2d 71 (1951). The intention of the parties controls any interpretations or construction of the contract, and intention must be derived from the language employed. *Lineberry v. Security Life & Trust Co.*, 238 N.C. 264, 77 S.E. 2d 652 (1953). The contract must be construed and enforced as written, without rewriting the contract or disregarding the express language used. *York Industrial Center v. Michigan Mutual Liability Co.*, 271 N.C. 158, 155 S.E. 2d 501 (1967). Only when the contract is ambiguous does strict construction become inappropriate. *Duke v. The Mutual Life Insurance Co.*, 286 N.C. 244, 210 S.E. 2d 187 (1974), *reh'g denied*, 286 N.C. 547 (1975).

Policy 3485452, the subject of this appeal, clearly designates the original plaintiff and the intervenors as beneficiaries to share equally in the proceeds. It further provides in unambiguous terms that

> The beneficiary of this certificate may be changed by written request and submission of this certificate for endorsement to the Home Office of the Society. When so endorsed the change will become effective as of the date it was signed. . . .

Where a contract provides for a change in beneficiaries, the rights of the designated beneficiary do not vest until the death of the insured. *Harrison v. Winstead*, 251 N.C. 113, 110 S.E. 2d 903 (1959). The policy provision governing any changes in the beneficiary in the case *sub judice* is unambiguous. The insured's letter of 18 July 1983 is not a request to change beneficiaries nor does it rise to the level of a manifestation of intent or attempt by the insured to change the designated beneficiaries. The original plain-

tiff and the intervenors remained the designated beneficiaries to share equally in the policy proceeds when the insured died and they acquired vested rights to the proceeds at that time. In that there is no genuine issue of material fact existing on the questions of the entitlement to the proceeds, the trial court properly granted the intervenors' motion for summary judgment on policy No. 3485452.

In summary, we dismiss the appeal from the order allowing the original plaintiff's motion to amend her complaint, and affirm the order granting the intervenors' motion for summary judgment.

Dismissed in part, affirmed in part.

Judges ARNOLD and ORR concur.

HELEN RUTH HOGSED, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN SCOTT HOGSED, DECEASED v. DAVID EUGENE RAY, SR. AND DAVID EUGENE RAY, JR., BY HIS GUARDIAN AD LITEM, MERINDA S. WOODY

No. 8730SC292

(Filed 16 February 1988)

1. Automobiles § 50.1— wrongful death—teenager falling out of truck bed—failure to keep proper lookout and maintain control of vehicle

The trial court did not err in denying defendants' motion for judgment n.o.v. in a wrongful death action where the evidence tended to show that defendant teenager was operating a four-wheel drive vehicle and transporting a group of his friends back to his cabin; two rode in the cab with him while the remaining five assumed various positions in the truck bed; decedent sat on the edge of the truck bed behind the driver with his feet on the floor of the bed; he held onto the roll bar with one arm and onto the truck body with his other hand; as the truck turned into a curve on the gravel road, defendant leaned over to adjust the radio; the truck began to swerve and did so three times; as the truck began to straighten, deceased tumbled onto the edge of the road; such evidence would support a conclusion that when defendant reached up to adjust the radio, his attention was diverted; and such a conclusion if reached would be probative on the issues of whether defendant failed in his duty to keep a proper lookout and to maintain control over his vehicle.

2. Witnesses § 8.1— cross-examination not improperly limited

There was no merit to defendants' claim in a wrongful death action that the trial court erred in refusing to allow them to cross-examine a witness as to a response elicited in a prior recorded statement, since defendants questioned the witness several times regarding the response in question.

3. Evidence § 50.4— post-concussion syndrome—expert testimony properly excluded

The trial court in a wrongful death action did not err in preventing a physician from testifying as to the symptoms of post-concussion syndrome, since there was no evidence at trial that deceased experienced post-concussion syndrome at the time of his death or had suffered from a concussion at all.

APPEAL by defendants from *Allen, C. Walter, Judge.* Judgment entered 24 October 1986 in Superior Court, CLAY County. Heard in the Court of Appeals 19 October 1987.

Helen Ruth Hogsed, administratrix of the estate of Scott Benjamin Hogsed, having been so appointed on 20 November 1984, instituted this civil action on 4 April 1985 alleging negligence which resulted in the wrongful death of decedent.

Scott Benjamin Hogsed died on 28 August 1984, as a result of severe head injuries sustained on 21 August 1984 when he fell from the back of a 1971 Ford pickup in which he was a passenger.

The plaintiff submitted evidence at trial which tended to show that the decedent, who was 15 years old at the time of the accident, travelled to a cabin located on Fires Creek Road outside of Hayesville with five friends on 20 August 1984 for an overnight stay. David Eugene Ray, Jr., transported four members of the group in his father's pickup truck to the cabin which his family owns. While en route they met four other friends who decided to join them there. The members of the second group left for the night and three of them returned early the next day. When they arrived at around 10:00 a.m., everyone went "four-wheeling," which is riding in a four-wheel drive truck up into the mountains. They returned to the cabin and then decided to go for a swim. After swimming for approximately thirty minutes, the group started back down Fires Creek Road to the cabin.

David Eugene Ray, Jr. drove for the group and was accompanied in the truck's cab by Jennifer Martin and Tim Gray. The remaining five teenagers rode on the back of the truck and either sat on the edge of the bed or stood. Scott Hogsed, decedent, was

positioned on the left-hand side of the truck bed and was sitting on the edge with his feet on the floor. He had his right hand on the side of the truck and his left hand around the roll bar, which is a steel apparatus protruding from the cargo bed, and wrapping around the cab of the truck at the same approximate height. Elwin Pittman, Jr., who was riding in the truck bed at the time of the accident, testified that David Eugene Ray, Jr. was travelling "[t]wenty-five to thirty miles an hour maybe less, maybe a little more," while the driver stated in his deposition that he never exceeded ten to fifteen miles per hour.

As they came around a curve, the driver leaned over to adjust the radio. The vehicle then swerved two to three times and slid a little, as the road was covered in gravel. Sam Hogsed then looked back and saw the decedent rolling on the ground. David Eugene Ray, Jr. heard Sam Hogsed yell, "Stop, David. Scott fell out." He then stopped the truck immediately and ran to assist decedent.

The defendants submitted no evidence at trial and moved for a directed verdict at the conclusion of plaintiff's evidence on the grounds that the evidence was insufficient to show negligence on the part of defendant. The jury returned a verdict in favor of the plaintiff in the amount of $35,000.00. Defendants then made a motion for judgment notwithstanding the verdict and for a new trial. Both motions were denied. Defendants appeal.

Philo, Spivey & Cabe, P.A., by James Y. Cabe and David C. Spivey, for plaintiff appellee.

Roberts Stevens & Cogburn, P.A., by Steven D. Cogburn and Glenn S. Gentry, for defendants appellants.

JOHNSON, Judge.

[1] Defendants first call upon us to decide whether the trial court erred in denying their motion for judgment notwithstanding the verdict on the grounds that plaintiff's evidence was insufficient to establish actionable negligence as a matter of law. It is a quite familiar rule of civil procedure that:

> [A] [motion] [for] [j]udgment notwithstanding the verdict should be granted only when the evidence is insufficient as a matter of law to support the verdict. Where the evidence ad-

mitted at trial, taken in the light most favorable to the non-moving party with all reasonable inferences drawn in his favor, is sufficient to support the verdict, it should not be set aside.

Beal v. K. H. Stephenson Supply Co., 36 N.C. App. 505, 507, 244 S.E. 2d 463, 465 (1978).

In this cause of action alleging negligence, it was therefore incumbent upon the plaintiff to submit evidence from which a jury could determine that defendant breached his duty to exercise ordinary care in the operation of his vehicle. *See Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969).

The evidence which the jury was presented was to the effect that defendant was operating a four-wheel drive vehicle and transporting a group of his friends back to his cabin. Two of them rode with him in the cab while the remaining five assumed various positions in the truck bed. Scott Hogsed, decedent, was seated on the edge of the truck bed on the driver's side turned inwardly with his feet on the floor. He held onto the roll bar with one arm and onto the truck body with his other hand. As the truck rode into a curve on the gravel road, defendant leaned over to adjust the radio. The truck then began to swerve. It swerved a total of three times, first to the right at about a 35 degree angle, then to the left, and then to the right again. As the truck began to straighten, Sam Hogsed saw decedent tumble onto the edge of the road.

Defendants argue that plaintiff's evidence was devoid of any facts from which a jury could possibly conclude that defendant negligently operated the vehicle in question. We cannot agree. As we are required to view the evidence in the light most favorable to the non-moving party, *Beal* at 507, 244 S.E. 2d at 465, we must consider the possibility that when defendant reached up to adjust the radio, his attention was diverted. The evidence could support such a conclusion, and such a conclusion if reached would be probative on the issues of whether defendant failed in his duty to keep a proper lookout and to maintain control over his vehicle.

As a general rule "it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and

vehicles upon the highway. This duty also requires that the operator must be reasonably vigilant . . ." *Bowen* at 367, 168 S.E. 2d at 51 (1969), *quoting Adams v. Service Co.*, 237 N.C. 136, 141, 74 S.E. 2d 332, 336 (1953).

Although we agree with defendant that mere causation does not establish negligence and that "skidding itself does not [without more] imply negligence," we conclude that these rules and the many cases cited in support thereof are distinguishable from our facts. The facts adduced at trial clearly were sufficient to support the finding which the jury ultimately made.

[2] Next, defendants assign as error the trial court's refusal to allow a witness to be cross-examined as to a response elicited in a prior recorded statement. Defendants contend that the trial court incorrectly sustained an objection made when defendants' counsel attempted to cross-examine witness Sam Hogsed as to whether in a prior recorded statement, he had agreed that "the swerve that [he] mentioned was not anything that was careless or reckless or anything out of the normal." The trial court sustained the objection and stated no reason for the ruling. We find no error.

The transcript testimony reveals that the trial court sustained an objection made by counsel for the plaintiff regarding a prior recorded statement Sam Hogsed made during a taped conversation at his home on 29 October 1984. On cross-examination of Sam Hogsed, defense counsel questioned him regarding his taped testimony as follows:

> Q. Isn't this a transcript of a recorded statement that you gave to Mr. Jones on October 29th, 1984, at the home of Mr. and Mrs. Hogsed in Hayesville? Isn't this it?. . .
>
> Q. And then, didn't he ask you this question:
>
> "So the swerve that you mentioned was not anything that was careless or reckless or anything out of the normal?" Didn't he ask you that question?
>
> A. Yes.
>
> Mr. Spivey: [Counsel for the plaintiff] Objection.
>
> The Court: Objection sustained.

Mr. McClure: Your Honor, I'd like for his answer in the record.

The Court: Put it in. . . .

Defense counsel also questioned him regarding his deposition concerning the same question as follows:

Q. Didn't Mr. Cogburn ask you this question: "So this swerving you're talking about wasn't any sharp swerving back and forth in the road, was it?" Didn't he ask you that question in your deposition?

A. He probably did. I don't—like I said, I was trying to block everything out. . . .

Q. And so didn't Mr. Cogburn ask you this question—can you see that?

A. Where?

Q. Right there (indicating). Didn't he ask you: "So this swerving you're talking about wasn't any sharp swerving back and forth in the road, was it?" And didn't you say: "It wasn't real sharp." Isn't that what you said?

A. It wasn't real sharp. It was a swerve. It was a fishtail like.

Defendants rely upon an assertion that the basis for the trial court's ruling was an incorrect interpretation of the since abrogated "jury province rule." This reliance is misguided, as no reason was given by the trial court in sustaining the objection. The reasoning upon which they erroneously rely was addressed to the questioning of another witness, Tim Gray. The court stated that it had sustained an objection to a question asked of Tim Gray on direct examination for the reason that "it had to do with the ultimate fact to be found by the jury and not by [the] witness." This reasoning was not given to support any ruling regarding Sam Hogsed's testimony.

In addition, defendants were not prejudiced by the court's sustaining of the objection, since they questioned the witness several times regarding the same inquiry. In fact, Samuel Hogsed was recalled to testify and defendants' counsel again cross-examined him regarding this question as follows:

Q: So the swerving that you mentioned was not anything that was careless or reckless or anything out of the norm?

The Court: That's it.

Mr. McClure: And then I asked him if that question had been asked of him by Mr. Jones, and you sustained the objection.

The Court: That's right.

Mr. McClure: And I'll ask him that.

Q: (By Mr. McClure) Didn't you tell Mr. Jones that, or didn't you say—let me start over. Didn't Mr. Jones ask this question: So the swerve that you mentioned was not anything that was careless or recklessly or anything out of the normal, and didn't you answer "no" to Mr. Jones?

A: Yes, to him.

Q: Sir?

A: To him, I guess I did.

Therefore, it is clear that any claim by defendants that they were unable to cross-examine Sam Hogsed is feckless.

[3] By their third Assignment of Error, defendants contend that the trial court erred in preventing Dr. Elaine Huffman from testifying as to the symptoms of post-concussion syndrome. We cannot agree.

At trial, plaintiff called Dr. Elaine Huffman to testify and defendants' counsel attempted to cross-examine her regarding post-concussion syndrome. Counsel for the plaintiff objected to the questions asked and the objections were sustained.

The cases upon which defendants rely are inapposite to our facts. For example, they cite *State v. Grady*, 38 N.C. App. 152, 247 S.E. 2d 624 (1978), for the principle that a medical expert may testify about the causal relationship between a victim's prior medical condition and a subsequent accident. While this is an accepted rule, it does not permit testimony of a causal relationship founded upon speculation or mere possibility. *Ballenger v. Burris Industries*, 66 N.C. App. 556, 311 S.E. 2d 881 (1984). Since there was no evidence introduced at trial that decedent was experienc-

ing post-concussion syndrome at the time of his death or had suffered from a concussion at all, evidence regarding the condition would be irrelevant and therefore inadmissible. N.C.R. Evid. 402. In short, the trial court properly sustained the objections to the testimony regarding post-concussion syndrome.

It is for the foregoing reasons that we find no error.

No error.

Judges WELLS and COZORT concur.

TERESA DEBRA DANNA v. BRUCE R. DANNA

BRUCE R. DANNA v. TERESA DEBRA DANNA

No. 8712DC509

(Filed 16 February 1988)

1. **Divorce and Alimony § 23.6— child custody—plaintiff's misconduct in removing child from Florida—refusal of North Carolina court to take jurisdiction**

The trial court properly declined to assume jurisdiction over a child custody dispute pursuant to N.C.G.S. § 50A-8 based on plaintiff's misconduct in removing her children from Florida without the prior written consent of defendant or court approval; moreover, the court was not required to assume jurisdiction on "emergency" grounds pursuant to N.C.G.S. § 50A-3(3) based on defendant's alleged abuse of plaintiff and the children, since the trial court had before it no evidence, other than plaintiff's bare allegations, that defendant posed a threat to the children, and the Florida court, which was exercising jurisdiction at the time, was as capable of resolving the abuse issue and protecting the children as the North Carolina court.

2. **Divorce and Alimony § 23.6— child custody—plaintiff's claims of domestic violence—court's refusal to assume jurisdiction proper**

The trial judge, having properly declined to exercise jurisdiction under the Uniform Child Custody Jurisdiction Act, did not err by failing to address plaintiff's claims of domestic violence under N.C.G.S. Chap. 50B, since that chapter is not designed to establish alternative grounds for jurisdiction over custody disputes apart from those set forth in Chapter 50A.

APPEAL by plaintiff, Teresa Debra Danna, from *Lacy H. Hair, Judge*, interlocutory order entered 26 January 1987; and from *Sol*

G. Cherry, Final Order entered 27 February 1987 and Order denying Rule 60(b) Motion entered 23 March 1987 in District Court, CUMBERLAND County. Heard in the Court of Appeals 7 December 1987.

David H. Rogers for plaintiff-appellant.

Nance, Collier, Herndon, Guthrie & Jenkins, by Joel S. Jenkins, Jr. for defendant-appellee.

BECTON, Judge.

In this interstate child custody dispute, the dispositive issue on appeal is whether, pursuant to North Carolina's Uniform Child Custody Jurisdiction Act (UCCJA), N.C. Gen. Stat. Sec. 50A-1, *et seq.* (1984 and Cum. Supp. 1987), the Cumberland County District Court of North Carolina properly declined to exercise jurisdiction to modify a Florida custody decree. We hold that the refusal to assume jurisdiction was not error, and therefore we affirm the decision of the District Court.

I

The marriage of Teresa Debra Danna and Bruce R. Danna was dissolved by a 16 March 1983 judgment of the Circuit Court for the 17th Judicial District in Broward County, Florida. The Florida divorce decree directed the parties to exercise "Shared Parental Responsibility" for their two minor children, pursuant to Florida Stat. Sec. 61.13 (1981) with primary physical custody awarded to the mother, subject to reasonable visitation rights of the father. The judgment also incorporated, in its entirety, a separation agreement between the parties, which, in part, prohibited Mrs. Danna from removing the children from the State of Florida without either the prior written consent of Mr. Danna or court approval.

In January 1985, Mrs. Danna, without the prior approval of the Florida court or the written consent of Mr. Danna, relocated from Florida to North Carolina with her children. Mr. Danna apparently orally agreed or acquiesced to a temporary move to extend as long as two years.

At some point a dispute arose between the parties concerning the father's exercise of visitation rights, and on 22 August

1986, Mr. Danna filed a motion in the Florida court, seeking temporary custody, or in the alternative, the return of the children to Florida. Mrs. Danna responded by filing a complaint in Cumberland County District Court on 17 September 1986 (Case No. 86CVD4577) by which she sought to have the North Carolina Court assert jurisdiction over the matter, enjoin the removal of the children from North Carolina, and affirm her primary physical custody of them.

What followed was a series of proceedings in the courts of Florida and North Carolina during which Mr. Danna besought the Florida court to award primary physical custody to him, the Florida court refused Mrs. Danna's request that it relinquish jurisdiction in favor of North Carolina, and the North Carolina court declined to assert jurisdiction. Specifically, on 29 January 1987, District Court Judge Lacy H. Hair entered an order which, although denying a motion of Mr. Danna to dismiss Mrs. Danna's action for lack of jurisdiction, ordered that any further proceedings in North Carolina were stayed "in favor of the pending proceedings in the State of Florida."

Although Mrs. Danna had participated in the Florida proceedings initially, she participated in them no further following the Florida court's refusal to transfer the matter to North Carolina's jurisdiction. On 6 February 1987, she amended her complaint to allege acts of physical and verbal abuse by Mr. Danna against herself and the children. She further alleged that she and the children were in immediate danger of further such acts entitling her to emergency relief from domestic violence pursuant to Chapter 50B of the North Carolina General Statutes. Her prayer for relief was amended to include requests that the court lift the 29 January stay and deny Mr. Danna visitation until the Court determined that he was unlikely to further abuse her or the children.

Thereafter, on 10 February 1987, following a hearing at which Mrs. Danna chose not to appear, the Florida Court awarded primary physical custody of the children to their father. The following day, Mr. Danna came to North Carolina armed with the Florida decree, instituted an action to enforce the Florida order (Case No. 87CVD732), and obtained an *ex parte* order from

District Court Judge Sol G. Cherry awarding him immediate custody.

Finally, on 16 February 1987, Judge Cherry held a combined hearing on both Mrs. Danna's action to modify the initial Florida decree, and Mr. Danna's motion to enforce the 10 February Florida decree; and on 27 February 1987, he entered a final order dismissing Mrs. Danna's action for lack of jurisdiction and according full faith and credit to the 10 February Florida decree which awarded primary custody to Mr. Danna. Thereafter, Mrs. Danna filed a Rule 60(b) motion to vacate the final order, which was denied by order of Judge Cherry entered 23 March 1987.

Mrs. Danna now appeals to this Court from (1) the 29 January 1987 stay entered by Judge Hair, (2) the 27 February 1987 final judgment declining jurisdiction, and (3) the 23 March 1987 denial of her Rule 60(b) motion.

II

At the outset, we decline to address the propriety of the 29 January 1987 stay ordered by Judge Hair since Mrs. Danna has no right of appeal from that interlocutory order. Moreover, we are not persuaded that Judge Hair's action in staying the North Carolina proceedings in favor of Florida adversely affected the ultimate outcome of this case; and, in view of our resolution of the jurisdictional issues discussed hereafter, we conclude the issues arising from that order have been rendered moot by the entry of Judge Cherry's final order.

III

We first consider whether Judge Cherry erred in his 11 February 1987 order by declining to assume jurisdiction over the custody dispute. In that order, the judge made findings of fact and conclusions of law. Four of the conclusions of law, to which Mrs. Danna excepts, indicate that jurisdiction was declined because (1) Florida had retained jurisdiction over the custody issue, (2) North Carolina lacked jurisdiction to modify the Florida decree under N.C. Gen. Stat. Sec. 50A-14, (3) simultaneous proceedings in Florida barred the assumption of jurisdiction pursuant to N.C. Gen. Stat. Sec. 50A-6, and (4) Mrs. Danna's conduct in violating the Florida decree justified declining jurisdiction pursuant to N.C. Gen. Stat. Sec. 50A-8. If any one of these conclu-

sions constitutes a proper basis for the trial court's dismissal of Mrs. Danna's claims, we must uphold the court's decision.

[1] For reasons we need not discuss here, we conclude that the first three conclusions of law are unsupported by adequate findings of fact and thus do not justify the dismissal. However, in our opinion, the court's decision to decline jurisdiction must be upheld on the basis of N.C. Gen. Stat. Sec. 50A-8. That provision operates, in certain situations, to either require or allow a North Carolina court, which otherwise has jurisdiction under some other section of the UCCJA, to decline to exercise its jurisdiction due to misconduct of the petitioner. Specifically, if the petitioner wrongfully withheld a child from the person entitled to custody, Section 50A-8(b) *prohibited* the court from exercising its jurisdiction to modify the custody decree of another state, unless the court concludes such exercise is required in the interest of the child. On the other hand, if the petitioner has violated any other provision of a custody decree of another state, Section 50A-8(b) provides that the court, in its discretion, "*may* decline to exercise its jurisdiction if this is just and proper under the circumstances."

In the present case, the trial court found as facts (1) that the Florida decree of 16 March 1983 required Mrs. Danna to obtain the prior written consent of Mr. Danna or court approval in order to remove the children from the State of Florida, (2) that Mrs. Danna had removed the children from Florida without the permission of Mr. Danna or the Florida court, (3) that Mrs. Danna remained outside the State of Florida and informed Mr. Danna that she did not intend to return, and (4) that in remaining and keeping the children outside of Florida, Mrs. Danna violated the 16 March 1983 Florida judgment. These facts are supported by evidence in the record.

However, Mrs. Danna seems to suggest in her brief that, because she alleged abuse by Mr. Danna as a basis for the assumption of jurisdiction on "emergency" grounds, pursuant to N.C. Gen. Stat. Sec. 50A-3(3), it was in some way unjust or improper under the circumstances for the court to decline jurisdiction because of her violation of the Florida decree. If in fact the record clearly demonstrated that North Carolina had jurisdiction to modify the other state's decree under N.C. Gen. Stat. Sec. 50A-14, and there was evidence of abuse before the court, we

might be inclined to agree. However, the record does not show that the trial judge had before him any evidence, other than Mrs. Danna's bare allegations, that Mr. Danna posed a threat to the children. Moreover, the Florida court was, at the relevant time, exercising jurisdiction over the dispute and was, presumably, as capable of resolving the abuse issue and protecting the children as the North Carolina court. Under these circumstances, we conclude the trial judge did not abuse his discretion in declining to exercise jurisdiction.

[2] We also reject the contention of Mrs. Danna that the trial court was required to consider her claims of domestic violence under Chapter 50B irrespective of its rulings on jurisdiction under Chapter 50A. Chapter 50B "authorizes the district courts to enter such temporary orders as may be necessary to protect a spouse or a minor child from domestic violence." *Story v. Story*, 57 N.C. App. 509, 514, 291 S.E. 2d 923, 926 (1982). Among the types of relief available under Chapter 50B are orders awarding temporary custody of minor children and establishing temporary visitation rights. However, the Act is not designed to establish alternative grounds for jurisdiction over custody disputes apart from those set forth in Chapter 50A. In our view, whenever the relief sought under Chapter 50B is a determination of custody or visitation rights, the existence of subject matter jurisdiction over the action is governed by the UCCJA just as it is in any other custody dispute. Therefore, we hold that the trial judge, having properly declined to exercise jurisdiction under the UCCJA, did not err by failing to address Mrs. Danna's Chapter 50B claims.

IV

Finally, we consider whether the trial judge erred by denying Mrs. Danna's motion to vacate the 27 February 1987 final order made pursuant to Rule 60(b)(2) and (6) of the North Carolina Rules of Civil Procedure.

First, Mrs. Danna offered, as evidence that the Florida court acquiesced in her residence in North Carolina, copies of a Florida court order dated 12 December 1986 and a 10 November 1986 "Report of the General Master" incorporated therein, in which the court expressly declined to order Mrs. Danna to return the children to Florida at that time. However, these documents do not specifically address the question whether Mrs. Danna had

violated the 16 March 1983 custody order, and we thus conclude that their production did not require the District Court judge to vacate his previous ruling.

Second, Mrs. Danna offered affidavits of several persons and other documents with which she attempted to bolster her claims of violence and abuse by Mr. Danna. Nothing in these materials constitutes proof that Mr. Danna actually abused the children, and, in any event, proof of abuse alone would not necessitate asserting jurisdiction since these claims could have been presented in the Florida court.

A Rule 60(b) motion "is addressed to the sound discretion of the trial court and the court's ruling will not be disturbed without a showing that the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E. 2d 532, 541 (1975). Having carefully reviewed the documents submitted by Mrs. Danna in support of her motion, we find nothing therein which convinces us the trial judge abused his discretion by refusing to vacate the 27 February order.

Mrs. Danna's challenge to the denial of her 60(b) motion is overruled.

V

For the foregoing reasons, the orders appealed from are

Affirmed.

Judges HEDRICK and GREENE concur.

JAMES W. MILLER, D/B/A JIM'S HEATING, PLUMBING & ELECTRICAL v. CONNIE GAIL P. ENSLEY, R. KEITH ENSLEY AND D. JACK PHARR

No. 8726DC371

(Filed 16 February 1988)

Unfair Competition § 1— father building house for daughter—representation that house was his—no unfair or deceptive trade practice

The trial court erred in finding and concluding that defendant's actions constituted an unfair or deceptive trade practice where defendant, a travel

agency owner, entered the home building arena to help his children build homes; in so doing he represented that the land upon which the house would be built was still his, when in fact it was not; this misrepresentation or deception had no impact on the damages to plaintiff, a heating, plumbing and electrical contractor who was able to protect his rights by a lien claim under Chapter 44A; and defendant's actions did not rise to the harm proscribed under Chapter 75.

APPEAL by defendants from *Sherrill, Judge.* Judgment entered 2 January 1987 in District Court, MECKLENBURG County. Heard in the Court of Appeals 26 October 1987.

Mitchell & Rallings by Thomas B. Rallings, Jr., for plaintiff appellee.

Weinstein & Sturges by L. Holmes Eleazer, Jr., E. Fitzgerald Parnell, III, and T. L. Odom, for defendant appellants.

COZORT, Judge.

The plaintiff in this action, James W. Miller, is a heating, plumbing and electrical contractor doing business as Jim's Heating, Plumbing and Electrical. The defendants R. Keith and Connie Gail P. Ensley, husband and wife, are record owners of a parcel of real property located at 6500 Long Road, Mint Hill, Mecklenburg County, North Carolina. Defendant D. Jack Pharr, father of Connie Ensley, is the previous owner of the Long Road property.

On 6 April 1983, Pharr and his wife conveyed the Long Road property to the Ensleys so that their daughter and her husband would have land upon which they could construct a home. After the construction was underway, in June of 1983, plaintiff Miller was hired to perform some of the work on the Ensleys' home.

Specifically, Miller was hired by Pharr to install plumbing pipes and fixtures for $3,974.00; 200 Amp electrical service with panel and breakers, receptacles, plates, and switches for $3,600.00; a U. S. Central Vacuum System for $1,230.00; and two Mammoth Sol-A-Terra II Hydrobank heat pumps with a "closed loop" for $11,900.00. The first two jobs were agreed to by the parties on "Proposal" forms that were signed only by Miller and Pharr. Work to be performed, material to be used, price and method of payment were all spelled out on both "Proposal[s]." On the face of each "proposal" appeared the following language:

> All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate.

For the other two jobs, the agreement to perform the work was oral. The only written evidence of completed performance was the work orders presented by Miller to Pharr.

The total amount of the work orders presented by Miller to Pharr was $20,704.00. Pharr paid $12,000.00 leaving, according to plaintiff's Exhibit No. 7, a balance due of $8,704.00.

It was at this point in the transactions that a dispute arose. Miller alleged that the jobs he had been requested to perform had been completed and Pharr owed the balance. Pharr, maintaining that the heating and air system Miller installed did not work properly, refused to pay the balance due until the system worked properly. As a result of that dispute, Miller filed this action alleging that the defendants were jointly and severally liable to him in the amount of $8,704.00, plus interest. Miller alleged further that defendant Pharr had represented that he was the record owner of the Long Road property after he had in fact conveyed it to the defendants Ensley, and that because Miller would not have entered into the contract if he had known the truth, defendant Pharr's representation of ownership constituted unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1.

Plaintiff and defendants offered evidence at the trial. At the close of all the evidence, the jury determined that each of the three defendants either "breach[ed] or repudiate[d]" the contracts with Miller; that they were jointly and severally liable to him in the amount of $8,594.00; that defendant Pharr represented that he was the owner of the Long Road property in spite of the fact that he was not; and lastly, that the conduct of defendant Pharr was in or affected commerce.

The trial judge then found:

> 1. The aforesaid contract[s] between Plaintiff and Defendants were for the construction of improvements by Plaintiff upon that real property . . . owned continuously by the De-

fendants Ensleys at all times during which Plaintiff supplied labor and materials to said property.

* * * *

5. The Defendants have deposited with the Clerk of Superior Court for Mecklenburg County the sum of $8,704.00 in cash, pursuant to the provisions of GS § 44A-16(5) and the aforesaid Claim of Lien has been discharged pursuant thereto.

6. That the aforesaid actions of the Defendant Pharr as found by the jury were willful.

7. That there was an unwarranted refusal by the Defendant Pharr to fully resolve this matter.

The court then concluded that, as a matter of law, the actions

of the Defendant Pharr as found by the jury do constitute unfair or deceptive acts or practices in or affecting commerce in violation of GS § 75-1.1, and that the Damages awarded the Plaintiff herein from the Defendant Pharr should be trebled pursuant to GS § 75-16; that the Plaintiff should recover of the Defendant Pharr a reasonable attorney fee pursuant to GS § 75-16.1; and that based upon the Claim of Lien filed by the Plaintiff herein, the aforesaid proceeds deposited with the Clerk of Superior Court for Mecklenburg County shall be applied to the judgment rendered herein pursuant to GS § 44A-16(5).

The court then ordered

that the Plaintiff have and recover of the Defendants, Connie Gail P. Ensley, R. Keith Ensley, and D. Jack Pharr, jointly and severally, the sum of $8,594.00 plus interest thereon at the rate of 8% per annum from and after April 11, 1984; that the Clerk of Superior Court for Mecklenburg County, North Carolina, shall make payment to the Plaintiff of the sum of $8,704.00 heretofore deposited by the Defendants with said Clerk, which sum shall be applied to the Judgment rendered herein against the Defendants Connie Gail P. Ensley, R. Keith Ensley, and D. Jack Pharr; that the Plaintiff have and recover of the Defendant, D. Jack Pharr, the additional sum of $17,188.00 plus interest thereon at the rate of 8% per an-

num from and after April 11, 1984; that the Plaintiff recover of the Defendants, Connie Gail P. Ensley, R. Keith Ensley and D. Jack Pharr, jointly and severally, the costs of this action to include the sum of $505.80 for deposition expenses incurred by Plaintiff; and recover additional costs from the Defendant Pharr for attorneys fees in the sum of $6452.50.

From entry of that judgment the defendants appealed. On appeal they allege that the court erred when it (1) charged the jury on repudiation of contracts, (2) entered judgment awarding plaintiff damages against the defendants for breach of contract and denying damages against the plaintiff for breach of contract on the ground that the evidence before the jury was insufficient to support the verdict, and (3) awarded Miller costs, treble damages, and attorney's fees. We agree that the facts of this case do not constitute an unfair and deceptive trade practice under N.C. Gen. Stat. § 75-1.1, and reverse the trial court's awards pursuant to that statute; the remainder of the order below is affirmed.

We first consider the defendant Pharr's argument that the trial court erred in finding and concluding that his actions constituted an unfair or deceptive trade practice. N.C. Gen. Stat. § 75-1.1 states that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful," and when damages have been fixed as a result of violations of the chapter, they must be trebled. *Id.* at § 75-16. In interpreting Chapter 75, our Supreme Court has held that "[t]he concept of 'unfairness' is broader than and includes the concept of 'deception.' [Citation omitted.] A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscruplous, [*sic*] or substantially injurious to consumers." *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980). The court noted specifically that the language of the statute contemplated "two distinct grounds for relief," but noted also that "[w]hile an act or practice which is unfair may also be deceptive, or vice versa, it need not be so for there to be a violation of the Act." *Id.* Succinctly, "[w]hat is . . . unfair or deceptive . . . usually depends upon the facts of each case and the impact the practice has in the marketplace." *Id.* at 262-63, 266 S.E. 2d at 621.

In this case, the finding of a violation of Chapter 75 is based on one factor: that Pharr told Miller that he owned the land upon which the improvements were to be made by Miller. At trial, Miller testified that when he was a subcontractor, prior to his dealings with Pharr, he

> had no recourse on anything when the contractor went out of business and then went bankrupt. But I could do nothing but come back on the contractor, and it was just a good lesson at that time, and I found out that the people either had to be landowners for me to be able to place a lien on the property for me to get paid for my work where I get no recourse whatsoever, and so I still do that today.

The trial judge concluded that since the finder of fact had determined that Miller had been deceived on this point, Chapter 75 remedies were appropriate. We hold that this was error.

Not every commercial transaction resulting in litigation forms a basis for an action under Chapter 75, and every false statement does not constitute a "deceptive" act under Chapter 75. To be actionable under Chapter 75, an act of deception must have some adverse impact on the individual or entity deceived. In the case below, Pharr's "deception," that he was the owner of the tracts did not affect Miller's rights adversely. Miller was able to protect his rights by a lien claim under Chapter 44A. Thus, the harm caused by Pharr's deception was, at most, theoretical, and not actual.

Furthermore, we do not believe Pharr's actions, *i.e.*, a father acting as a contractor to build a house for his daughter, rise to the harm proscribed under Chapter 75. In a recent case before this Court, Chapter 75 damages were found to be proper when a contractor breached a contract with a glass company. *Jennings Glass Co. v. Brummer*, 88 N.C. App. 44, 362 S.E. 2d 578 (1987). In that case, the defendant, a developer and builder, had engaged in "a pattern of deceitful and misleading" practices in the construction of a residence in the Asheville area. He had secured the services and materials of various businesses and contractors, including plaintiff Jennings, without payment of just compensation and "'without the intent to pay just compensation.'" *Id.* at 53, 362 S.E. 2d at 584. The defendant's actions were so

egregious that a review of his activities led "unerringly to a Chapter 75 claim." *Id.*

We find the facts below distinguishable. Defendant Pharr, a travel agency owner, entered the home-building arena to help his children build homes. In so doing, he represented that the land upon which the house would be built was still his, when in fact, it was not. This misrepresentation, or "deception," had no impact on the damages to Miller. Quite simply, we find no deceptive trade practice, as prohibited in Chapter 75. The trial court's order finding and concluding to the contrary must be reversed.

The defendant has also argued assignments of error dealing with the sufficiency of the evidence to support a verdict for the plaintiff and dealing with the trial court's charging the jury on repudiation of contracts. We have reviewed the record below, and we find no merit to either assignment of error. The portion of the trial court's order awarding damages for breach of contract is affirmed.

In summary, we reverse the portion of the trial court's judgment trebling damages and awarding attorney's fees under Chapter 75. We affirm the portion awarding $8,594.00, plus interest, for breach of contract.

Affirmed in part; reversed in part.

Judges WELLS and JOHNSON concur.

In re Foreclosure of Allan & Warmbold Constr. Co.

IN RE: FORECLOSURE OF DEED OF TRUST FROM ALLAN & WARMBOLD CONSTRUCTION CO., INC., ORIGINAL MORTGAGOR, TO KEMP M. CAUSEY, TRUSTEE, DATED OCTOBER 27, 1980 AND RECORDED IN BOOK 4363, PAGE 001, MECKLENBURG COUNTY PUBLIC REGISTRY; REFERENCE BEING MADE TO SUBSTITUTION OF TRUSTEE RECORDED IN BOOK 4839, PAGE 0284, MECKLENBURG COUNTY PUBLIC REGISTRY, AND TO SUBSTITUTION OF TRUSTEE RECORDED IN BOOK 4933, PAGE 0743, OF THE MECKLENBURG COUNTY PUBLIC REGISTRY, AND TO SUBSTITUTION OF TRUSTEE RECORDED IN BOOK 5105, PAGE 0083, MECKLENBURG COUNTY PUBLIC REGISTRY

No. 8726SC428

(Filed 16 February 1988)

1. **Mortgages and Deeds of Trust § 40.1— order withdrawing upset bid and directing resale—authority of court on appeal to consider validity**

The court on appeal was not barred from considering the validity of an order withdrawing an upset bid and directing a resale of foreclosed property because appellants did not appeal from it within the time required by Rule 3, N.C. Rules of Appellate Procedure, since N.C.G.S. § 1-278 permitted the court on appeal, incident to an appeal from a final judgment or order, to review intermediate orders "involving the merits and necessarily affecting the judgment," and the order striking the upset bid and requiring a resale was such an order; furthermore, the order withdrawing the bid could not have been appealed immediately, as it merely interrupted and delayed the foreclosure proceeding and had no ascertainable effect upon the appellants' rights, since the ordered resale could end with a bid of the same amount or even higher.

2. **Mortgages and Deeds of Trust § 30— order allowing withdrawal of upset bid—error**

The trial court erred in allowing appellee to withdraw his upset bid and requiring a resale of foreclosed property where the record showed that appellee entered his upset bid on the mistaken belief that he was bidding on three parcels of land rather than two; appellee was not entitled to equitable relief since his own testimony established that he negligently failed to inform himself as to the number of parcels involved when the simplest inquiry would have apprised him of that fact; to allow withdrawal of the bid would have the inequitable effect of shifting the consequences of appellee's careless mistake to the innocent mortgage debtors, for, except for his bid, the two parcels of land would have been sold to the first bidder for $108,000 more than was obtained by the ordered resale, and this loss must be borne by someone; and the resale must stand and the matter must be remanded for a determination as to the amount appellee is indebted to the trustee.

APPEAL by Allan & Warmbold Construction Co., Inc. and Carmel Chace II from *Gray, Judge*. Orders entered 21 July 1986 and 5 December 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 October 1987.

Parker Whedon and Waggoner, Hamrick, Hasty, Monteith, Kratt, Cobb and McDonnell, by James D. Monteith, for appellants Allan & Warmbold Construction Co., Inc. and Carmel Chace II.

Wray, Layton, Cannon, Parker & Jernigan, by David R. Cannon, for appellee Substitute Trustee David A. Layton.

Miller, Johnston, Taylor & Allison, by Steven D. McClintock and Steele B. Windle, III, for appellee Robert R. Rhyne, Jr.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Fred T. Lowrance and Sally Nan Barber, for appellee North Carolina Federal Savings and Loan Association.

PHILLIPS, Judge.

This proceeding to foreclose on three parcels of Mecklenburg County real estate is based upon the failure of the appellant mortgage debtors, Allan & Warmbold Construction Co., Inc. and Carmel Chace II, to make the payments required by a note and deed of trust held by North Carolina Federal Savings and Loan Association, and the correctness of the proceeding through the first resale following an upset bid to the first public sale is not questioned. The appellants question only the validity of an order that permitted the upset bidder to withdraw his bid, then the last and highest, and directed that the property be resold, and the refusal of the trustee to start the resale with the bid that stood before the upset bid was filed. The appellee upset bidder, Robert R. Rhyne, Jr., questions the validity of the appeal because the appellants did not appeal from the resale order, but from the final order confirming the second resale four months later. The facts that determine these questions follow:

The land that was being foreclosed was described in the deed of trust and the trustee's notices of sale as (a) an 8.51 acre tract, (b) a 2.61 acre tract on which twelve specifically numbered condominium units are situated, and (c) a 1.4 acre tract. The trustee's notice stated, as G.S. 45-21.8(b) permits and the deed of trust expressly authorized, that the parcels of land would be sold separately and as a whole for the highest amount realizable. At the public sale on 27 January 1986, the trustee read the notice in its entirety and offered the 8.5 and 1.4 acre parcels for sale separately, but no bid was made on either parcel; he then offered those

two parcels for sale as a whole and North Carolina Federal Savings and Loan Association bid $388,534.99, enough to satisfy the secured debt, and no attempt was made to sell the condominium parcel either in whole or part. The report of sale stating that a portion of the land described in the deed of trust had been sold for $388,534.99 was filed by the trustee, who attached to the report an accurate description of the parcels sold. In filing the report the Clerk of Court wrote on it the last date an upset bid could be made and the amount such a bidder would have to deposit. Within the time allowed Robert R. Rhyne, Jr., a Charlotte commercial real estate broker with twenty-five years experience, filed an upset bid in the amount of $408,034.99, and the Clerk ordered that the property be resold. At the resale no additional bid was received, and upon the trustee asking Rhyne to complete the purchase he refused and filed a motion to withdraw his bid upon the ground that it was made in the mistaken belief that the property being sold included the condominiums. The motion was denied by the Clerk, but upon appeal the Superior Court granted it on condition that Rhyne pay the resale expenses and interim interest. In reselling the two tracts of land the trustee refused to start with North Carolina Federal's initial bid of $388,534.99, as the appellants demanded, the only bid made was by North Carolina Federal in the amount of $280,500 and the sale at that price was confirmed, first by the Clerk and then by the Superior Court judge. Appellants' appeal is from the latter order, though they excepted to the earlier order permitting the upset bid to be withdrawn.

In making the upset bid Rhyne was acting for some undisclosed parties interested in obtaining the condominiums and he thought that the property sold included the condominiums. He had not attended the sale, though he received copies of the notices of sale, and before making the bid he neither examined the report of sale nor inquired of North Carolina Federal Savings and Loan, Allan & Warmbold, Carmel Chace II, the Clerk of Court, the trustee, or anyone else officially connected with the sale as to the identity of the land that he bid upon. Immediately before making the bid Rhyne met attorney John Ray in the Clerk's office, handed him the file and asked him if "that description covered all the property," and Ray told him it did. Ray did not represent Rhyne or anyone directly involved in the foreclosure

and had not attended the sale or seen the report of sale either. In granting Rhyne's motion, after finding facts somewhat as stated above, the court concluded that Rhyne was not negligent and justice required that the bid be withdrawn.

[1] First, we dispose of the appealability issue. Contrary to Rhyne's contention we are not barred from considering the validity of the order withdrawing his upset bid and directing a resale of the foreclosed property because the appellants did not appeal from it within the time required by Rule 3, N.C. Rules of Appellate Procedure. G.S. 1-278 permits us, incident to an appeal from a final judgment or order, to review intermediate orders "involving the merits and necessarily affecting the judgment," and the order striking the upset bid and requiring a resale is such an order. Furthermore, as G.S. 1-277 makes plain, the order withdrawing the bid could not have been appealed immediately, as it merely interrupted and delayed the foreclosure proceeding and had no ascertainable effect upon the appellants' rights since the ordered resale could end with a bid of the same amount or even higher. Thus, an appeal at that time would have been a premature, speculative and futile waste. *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976). Appellees' argument that the appellants' situation here is similar to that of the defendant in *Gualtieri v. Burleson*, 84 N.C. App. 650, 353 S.E. 2d 652, *disc. rev. denied*, 320 N.C. 168, 358 S.E. 2d 50 (1987) is mistaken. The order that affected *Burleson*, as plainly stated in that opinion, concerned the court's jurisdiction over his person and was immediately appealable at his option under the provisions of G.S. 1-277(b); but no statute authorizes an immediate appeal from an interlocutory order, the effect of which cannot be known until a future event of uncertain result occurs.

[2] We now consider the validity of the order permitting Rhyne to withdraw his upset bid and requiring a resale of the foreclosed property. In our opinion the order is erroneous. Conceding, as the court found, that Rhyne made his bid in the mistaken belief he was bidding on all three parcels of land covered by the deed of trust, there is, nevertheless, no equitable basis for allowing him to withdraw it. For when the bid was accepted by the trustee as the last and highest—(and it was accepted, his argument in the brief that it was ambiguous being untenable, since his only contention in the trial court was that he was mistaken and the issue

was tried on that basis)—a contract was made, G.S. 45-21.30(d); *Econo-Travel Motor Hotel Corp. v. Foreman's Inc. and Econo-Travel Motor Hotel Corp. v. Foreman*, 44 N.C. App. 126, 260 S.E. 2d 661 (1979), *disc. rev. denied*, 299 N.C. 544, 265 S.E. 2d 404 (1980), the mistake was entirely his own, and "the mere mistake of one party alone is not sufficient to avoid the contract." *Cheek v. Southern Railway Co.*, 214 N.C. 152, 156, 198 S.E. 626, 628 (1938). Though, in order to prevent manifest injustice, equity can relieve a contracting party of his mistakenly assumed obligation, *Pittsburgh Plate Glass Co. v. Forbes*, 258 N.C. 426, 128 S.E. 2d 875 (1963), equity does not aid parties who mistakenly enter into contracts after negligently failing to ascertain what the truth is, *Capehart v. Mhoon*, 58 N.C. 178, 180 (1859); and contrary to the trial court's conclusion, Rhyne's own testimony establishes that he negligently failed to inform himself as to the land that he was bidding on. Though he had received copies of the sale notices stating that the three parcels of land would be sold either separately or in combination according to the best price received, and did not know from attending the sale or otherwise what tracts had been sold, and though he could have made certain about the matter by simply examining the sale report or asking either the trustee, the Clerk of Court, or the mortgage holder, *his own testimony, when sifted down, shows that his actions and inquiries concerning the identity of the land being sold before he made his upset bid consisted only of the following*: He had Ray call the Clerk's office and find out if the bid had been raised and the deposit required for an upset bid; upon Ray telephoning that information to him he drew a check for the deposit and went to the Clerk's office and got the file; he did not go through the file to determine what land was being sold (the court's finding that he did has no evidentiary basis), as he had received the notice, thought he "knew what was being sold," and did not think "it necessary" to ask the Clerk to help him figure what property had been sold; in double checking what property was being sold he reviewed the notice of sale and handed the description to Ray and asked him if that covered all three tracts and Ray said that it did. This was only the merest semblance of an inquiry, one not designed to obtain the information that the circumstances and ordinary prudence required before entering into a contract of such magnitude. Since he failed to ascertain, as he could have readily and conveniently done, what property he was bidding upon, and

was not deceived or misled by anyone directly connected with the proceeding, as he admitted, he is not entitled to equitable relief and must be deemed to have bought at his own risk. *See, Smathers v. Gilmer*, 126 N.C. 757, 36 S.E. 153 (1900). Another reason for denying Rhyne equitable relief is that it would have the inequitable effect of shifting the consequences of his careless mistake to the innocent mortgage debtors; for except for his bid the two parcels of land would have been sold to the first bidder for $108,034.99 more than was obtained by the ordered resale, and this loss must be borne by someone. Certainly, it cannot be avoided by enforcing the bid that Rhyne upset, as the appellants alternatively contend, because it is inherent in selling land to the last and highest bidder that the acceptance of a higher bid, which creates a conditional contract, releases the lower bid previously accepted. *See, Richmond County v. Simmons*, 209 N.C. 250, 183 S.E. 282 (1936).

Though the court erred in not holding Rhyne to his contract and in ordering that the two tracts be resold, the law of damages and the exigencies of the situation require that the resale that was achieved not be disturbed. Thus, we affirm the order confirming the resale of the two tracts involved to North Carolina Federal Savings and Loan for $280,500, reverse the order withdrawing Rhyne's upset bid in the amount of $408,034.99, and remand the matter to the Superior Court for the entry of a judgment establishing the amount Rhyne is indebted to the trustee. In computing the sum due, heed should be taken of subparagraphs (d) and (e) of G.S. 45-21.30 and the fact that his default occurred on 15 April 1986 when he refused to complete the purchase; and credit should be given to him for any sums that he paid under the erroneous order.

Affirmed in part; reversed in part; and remanded with instructions.

Judges BECTON and GREENE concur.

STATE OF NORTH CAROLINA v. BIENVENIDO DIAZ

No. 872SC560

(Filed 16 February 1988)

1. **Narcotics § 3.1— trafficking in marijuana—weight of marijuana—evidence properly admitted**

In a prosecution of defendant for trafficking in marijuana, the foundation was adequate for admission of the evidence of weight of the marijuana in question where the SBI agent who was present at the weighing described the procedure by which the weight was taken; the officers transported three trucks to a fertilizer store where they were weighed full; the marijuana was then unloaded and the trucks were weighed empty; the cargo weighed 43,450 pounds; the scales had been certified within seven months of the weighing; and the weight taken exceeded the minimum weight charged by more than 30,000 pounds, thus making the weight issue less critical.

2. **Narcotics § 3.1— trafficking in marijuana—weight tickets—admissibility**

The trial court in a prosecution for trafficking in marijuana did not err in admitting weight tickets into evidence where defendant opened the door for this evidence by questioning whether the numbers which an SBI agent claimed to have read from the scales were actually a reflection of the weight measured by the scales, and the weight tickets corroborated his testimony.

3. **Criminal Law § 33— trafficking in marijuana—evidence of other smuggling activities—error not prejudicial**

Though the trial court erred in a marijuana trafficking case in permitting an admitted smuggler to testify regarding other smuggling activities which supposedly led to this marijuana trafficking operation, such error was not prejudicial, since defendant was not implicated in any of the previous activities.

4. **Criminal Law § 117.4— accomplice testimony—jury instructions proper**

The trial judge properly instructed on accomplice testimony where he instructed that such testimony should be examined with the greatest care and caution but, if believed, should be treated the same as any other believable evidence.

APPEAL by defendant from *William Z. Wood, Judge.* Judgment entered 14 November 1986 in Superior Court, HYDE County. Heard in the Court of Appeals 7 December 1987.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Debbie K. Wright, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Geoffrey C. Mangum, for defendant appellant.

BECTON, Judge.

Defendant Bienvenido Diaz was first tried and convicted of "trafficking in more than 10,000 pounds of marijuana" in January 1985. Upon appeal, the North Carolina Supreme Court granted defendant a new trial. *State v. Diaz*, 317 N.C. 545, 346 S.E. 2d 488 (1986). In November 1986, defendant was tried and convicted of the same offense again, was sentenced to 35 years in prison and was fined $200,000. Defendant appeals. We find no prejudicial error.

I

The State's evidence at trial showed the following: State Bureau of Investigation (SBI) Agent Malcolm McLeod testified that he and a combined force including officers from the SBI, the Hyde and Dare Counties Sheriffs' Departments, and the State Wildlife Office raided a marijuana smuggling operation at the point where Long Shoal River debouches into Pamlico Sound on 2 May 1984. The officers converged on an area known locally as Fifth Avenue after conducting an extensive surveillance operation. During the raid, the officers confiscated 755 bales of marijuana and several vehicles, including a tractor-trailer rig, several Ryder rental trucks, some flat-bottomed boats, and a Buick Regal automobile.

The smugglers ran into the marsh and the sound to avoid capture. A number of individuals were taken into custody within minutes of the raid. The next day, four individuals were arrested at the Wahoo Fishing Center near Stumpy Point, twelve miles north of Fifth Avenue. On Friday, 4 May, another individual was found hiding inside a boat near the Highway 264 bridge over Long Shoal River and a second person was apprehended walking south along Highway 264 approximately one-half mile south of Fifth Avenue. On Saturday, 5 May, defendant was arrested as he walked along Highway 264 approximately ten miles from the site of the raid.

The parties stipulated that the samples taken from each of the 755 bales were identified by an SBI chemist as marijuana.

The State also presented testimony of three of the smugglers. Dean Harrelson said he, along with his partner Jack Spratt, were the North Carolina organizers for Frank Concepcion and Al-

berto Jimenez of Miami. Harrelson said he saw defendant at a house at Duck (one of the smugglers' hidden refuges) and drove him with Luis Concepcion to Norfolk to rent the Buick Regal. During the night of the offloading, Harrelson said defendant attempted to operate one of the flat-bottomed boats but was unsuccessful due to engine problems.

Reinerio Fonseca testified that he "believed" he saw defendant at the house in Duck.

Eugene Andrews said he recalled seeing defendant at the house in Duck shortly before he left to meet the "mothership" offshore.

Defendant presented evidence that he was at the Norfolk airport; that Rolando Tudela borrowed his credit card to rent a car; that he was not at the house at Duck; and that he was not at the Fifth Avenue site.

Defendant also presented testimony of eleven people who had entered guilty pleas to trafficking charges for the same incident. All of defendant's witnesses testified that they did not see defendant in Duck or at Fifth Avenue.

II

Defendant makes four arguments on appeal. We will address them in order.

A

[1] Defendant first contends that the trial court erred in overruling his objection to testimony by SBI Agent McLeod concerning the weight of the marijuana because the State did not establish a foundation for that testimony. Defendant argues that the State failed to demonstrate that the person who conducted the weighing was qualified and also failed to show that the scales were in good working order on the day of the weighing. He argues that the weighing was inadequate because the State failed to adhere to all of the technical requirements set out in N.C. Gen. Stat. Sec. 81A (1985) for weighing commodities.

Weight is one of the essential elements of the crime charged in this case; thus, the State bears the burden of proving beyond a reasonable doubt that the weight of the marijuana was 10,000

pounds or more. N.C. Gen. Stat. Sec. 90-95(h)(1)(d) (1985); *State v. Gooch*, 307 N.C. 253, 297 S.E. 2d 599 (1982). Unlike tests that are prescribed by statute such as the breathalyzer test, the criminal statutes do not provide specific procedures for obtaining weights of contraband. Thus ordinary scales, common procedures, and reasonable steps to ensure accuracy must suffice. In the instant case, Agent McLeod, who was present at the weighing, described the procedure by which the weight was taken. The officers transported three trucks to Hoover Curthrell's fertilizer store where they were weighed full. The marijuana was then unloaded, and the trucks were weighed empty. According to Mr. Curthrell's scales, the cargo weighed 43,450 pounds. Agent McLeod stated that the scales were certified within seven months of the weighing. We hold that the foundation was adequate for admission of the evidence of weight. Moreover, this Court has often noted that "the weight element upon a charge of trafficking in marijuana becomes more critical if the State's evidence of the weight approaches the minimum weight charged." *See State v. Anderson*, 57 N.C. App. 602, 608, 292 S.E. 2d 163, 167, *cert. denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982). In the case *sub judice* the weight taken exceeded the minimum weight charged by more than 30,000 pounds.

This assignment of error is overruled.

B

[2] Defendant next contends that the trial court erred in overruling his objection to the admission of weight tickets in evidence because the State failed to establish a foundation for them and they were inadmissible hearsay. Defendant argues that the weight tickets were not admissible for any of the nonhearsay purposes outlined in Rule 803 of the North Carolina Rules of Evidence. The State argues, on the other hand, that the tickets were offered to corroborate Agent McLeod's previous testimony and to refute testimony elicited on cross-examination. We agree with the State. Defendant opened the door for this testimony by questioning whether the numbers that Agent McLeod claimed to have read from the scales were actually a reflection of the weight measured by the scales. The weight tickets corroborated his testimony. *See State v. Burns*, 307 N.C. 224, 229, 297 S.E. 2d 384, 387 (1982), *citing Brandis on North Carolina Evidence*, Secs. 49 and 52

(2nd rev. ed., 1982); *See State v. McKeithan*, 293 N.C. 722, 239 S.E. 2d 254 (1977). This assignment of error is overruled.

C

[3] Defendant next contends that the trial court erred in permitting admitted smuggler Dean Harrelson to testify regarding the other smuggling activities which, supposedly, led to this marijuana trafficking operation, because the testimony was irrelevant and prejudicial. Harrelson testified that he became involved in the drug smuggling operation in May of 1983. He then outlined several other smuggling jobs, some aborted, others completed. He did not implicate defendant in any of these previous activities. He did testify to defendant's involvement in the operation that led to the charges in this case. The State argues that this "background information" was essential to the jury's understanding of the events that led to the arrest in this case. We disagree. We fail to see the relevance of any of these previous crimes to the crime charged. Indeed, the trial judge sustained defendant's objections to questioning regarding the two aborted smuggling ventures; however, the trial judge failed to instruct the jury to ignore Harrelson's testimony, and permitted him to recount the details of other smuggling ventures.

The question then, for us to resolve, is whether the defendant was prejudiced by the erroneously admitted testimony. The State presented abundant evidence of the drug smuggling operation that led to defendant's arrest. There was no disputing that a huge drug smuggling operation was uncovered by the raid. The question for the jury was whether defendant was one of the operation's many participants. Because defendant was not implicated in any of the other alleged activities, we find that he was not prejudiced by the trial judge's erroneous ruling to admit the testimony and his failure to properly caution the jury. Thus, we hold that the error was harmless.

D

[4] Defendant lastly contends that the trial court erred in instructing the jury that "an accomplice is interested in the outcome of the trial and his testimony should, therefore, be examined with the greatest care and caution," because the instruction constituted a comment on the credibility of defendant's

witnesses in violation of N.C. Gen. Stat. Sec. 15A-1232 (1983). We disagree. When all the evidence shows a witness to be an accomplice, then the trial judge may, upon timely request, instruct that the witness's testimony should be carefully scrutinized. *State v. Harris*, 290 N.C. 681, 699, 228 S.E. 2d 437, 447 (1976). The trial judge must further advise the jury that if the testimony is believed, it should be given the same weight as any other credible evidence. *State v. Pryor*, 59 N.C. App. 1, 13, 295 S.E. 2d 610, 618 (1982). The trial judge instructed the jury as follows:

> There is evidence which tends to show that certain witnesses were an accomplice [sic] in the commission of the crime charged in this case. An accomplice is a person who joins with another in the commission of a crime. The accomplice may actually take part in acts necessary to accomplish the crime or he may knowingly help or encourage another in the crime, either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case. You should examine every part of the testimony of the accomplice witness with the greatest care and caution. If, after you do so, you believe the testimony of the witness in whole or in part, you should treat what you believe the same as any other believable evidence in the case.

The admonition applied to the State's witnesses as well as to defendant's. This assignment of error is without merit.

No prejudicial error.

Chief Judge HEDRICK and Judge GREENE concur.

NCNB NATIONAL BANK OF NORTH CAROLINA v. WESTERN SURETY COMPANY

No. 8728SC233

(Filed 16 February 1988)

1. **Assignments § 1; Subrogation § 1— claims against used car dealer—proper assignment to plaintiff—plaintiff subrogated to rights of purchasers**

Where a used car dealer sold used vehicles with unpaid first liens to eight customers who could not obtain certificates of title, and plaintiff bank entered into agreements with each of the customers which provided that plaintiff would pay off the prior liens and in return the customers would assign to plaintiff their claims against the seller and defendant which had bonded the seller, the assignment operated as a valid transfer of the customers' rights to sue the auto dealer on the bonds issued by defendant; furthermore, there was no merit to defendant's contention that plaintiff was a volunteer to the extent that it would be precluded from pursuing its subrogation rights against defendant, since plaintiff's status as a volunteer was of no import because the debt of the purchasers was assigned to plaintiff and was evidenced by an express agreement.

2. **Automobiles § 6.5— fraud in sale of vehicles—liability of surety**

The act of selling used automobiles with outstanding liens was in violation of Article 12, Chapter 20 of N.C.G.S., thereby invoking the liability of defendant surety to pay on the bonds issued by it to protect purchasers of motor vehicles against fraud by the seller. N.C.G.S. § 20-288(e).

APPEAL by defendant from *Saunders, Judge*. Judgment entered 10 November 1986 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 29 September 1987.

Hendersonville Truck City, Inc. (hereinafter Truck City) was bonded as a licensed automobile dealer by defendant Western Surety. The bonds, in the amounts of $15,000, $5,000, and $5,000 respectively, protected purchasers of motor vehicles against fraud by Truck City. Thereafter, while the bonds were still in force, Truck City sold used vehicles with unpaid first liens to eight customers. Due to the existence of the unpaid first liens, the customers could not obtain certificates of title. Plaintiff NCNB had financed the encumbered vehicles, taking a security interest in them. Because the customers were unable to obtain clear title, NCNB entered into agreements with each of the customers which provided that NCNB would pay off the prior liens and in return the customers would assign their claims against Truck City and Western Surety to NCNB. Pursuant to these agreements, NCNB

extinguished all prior liens on the encumbered vehicles and the customers received title to their vehicles reflecting NCNB as first lienholder. The total amount of liens paid was $28,523.25. Subsequently, on 1 April 1985, Truck City filed a petition in bankruptcy in the United States Bankruptcy Court for the Western District of North Carolina pursuant to Chapter 11 of the United States Bankruptcy Code. On 17 October 1985, plaintiff filed its complaint against defendant alleging it was subrogated to the rights and claims of the purchasers based on the assignment, thereby entitling plaintiff to indemnification of $25,000 under the terms of the motor vehicle surety bonds issued by defendant. On 13 December 1985, defendant filed its answer asserting that the bond issued by defendant was issued pursuant to G.S. 20-288 and was intended to protect purchasers of motor vehicles and not plaintiff. Defendant asserted further that plaintiff paid money on the liens voluntarily and that plaintiff is not subrogated to any claim formerly owned by the eight (8) purchasers.

On 22 October 1986, plaintiff filed a motion for summary judgment and on 3 November 1986, defendant filed a motion for summary judgment. On 10 November 1986, after considering the pleadings, admissions, stipulations of facts and briefs, the trial court denied defendant's motion for summary judgment and granted plaintiff's motion for summary judgment in the amount of $19,469.54 plus interest and costs. Defendant appeals.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Russell P. Brannon and Michelle Rippon, for plaintiff appellee.

Morris, Golding, Phillips & Cloninger, by William C. Morris, Jr., for defendant appellant.

JOHNSON, Judge.

Defendant contends the trial court erred in denying its motion for summary judgment and in granting plaintiff's motion for summary judgment. We disagree. "The judge's role in ruling on a motion for summary judgment is to determine whether any material issues of fact exist that require trial. It necessarily follows that when the only issues to be decided in the case are issues of law, summary judgment is proper." *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 3-4, 249 S.E. 2d 727, 729 (1978). The burden is on the movant to show the

lack of any triable issue of fact. *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976).

Defendant contends that plaintiff is not entitled to sue on the bond because (1) plaintiff is not subrogated to any claim against defendant, (2) plaintiff is a volunteer with no interests assigned to it and (3) Truck City did not violate Article 12 of Chapter 20 of N.C.G.S. and the bond is only liable for such violations.

[1] Plaintiff contends that (1) it is a purchaser within the meaning of N.C.G.S. 20-288(e), thereby entitling plaintiff to recover against defendant surety on the bonds, (2) it is not a volunteer to the extent that it would be precluded from pursuing its subrogation rights against defendant, (3) public policy favors recovery pursuant to N.C.G.S. Sec. 20-288 on a theory of subrogation, and (4) fraud and fraudulent representation may be the basis of a claim under N.C.G.S. Sec. 20-288(e). The bond issued by Western is almost verbatim the language of bonds construed by this Court in *Taylor v. Johnson*, 84 N.C. App. 116, 351 S.E. 2d 831 (1987), and *Triplett v. James*, 45 N.C. App. 96, 262 S.E. 2d 374, *disc. rev. denied*, 300 N.C. 202, 269 S.E. 2d 621 (1980), wherein we determined that such bonds were issued to comply with G.S. 20-288(e).

G.S. 20-288(e) provides in pertinent part:

> Each applicant approved by the Division for license as a motor vehicle dealer, . . . shall furnish a corporate surety bond, . . . Any purchaser of a motor vehicle who shall have suffered any *loss or damage by any act* of a motor vehicle dealer that *constitutes a violation of this Article* shall have the right to institute an action to recover against . . . the surety. (Emphasis added.)

It is clear that the eight customers who purchased the cars are "purchasers" within the meaning of G.S. 20-288(e) and as such had a right to sue the automobile dealer on the bonds issued by defendant Western Surety.

In exchange for that right, the purchasers elected to obtain the title to the automobiles by assigning all their rights to sue the automobile dealer and surety to plaintiff NCNB. This assignment of rights was obtained pursuant to a business contract entered into by the parties involved, NCNB and the purchasers.

Choses in action are assignable. *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921). An assignment operates as a valid transfer of title of a chose in action, and an assignee becomes a real party in interest who may maintain an action thereon in his own name and acquire such right, title, and interest as the assignor had. *Gillespie v. DeWitt*, 53 N.C. App. 252, 280 S.E. 2d 736, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 832 (1981). Therefore, NCNB, as assignee, obtained all the rights, claims, and title of the assignor.

In addition to obtaining an assignment of all rights, claims, and title, NCNB paid off the liens on the vehicles and pursuant to the terms of the contract, was to be entitled to subrogation of all claims that the assignors had against the defendant.

Defendant contends that plaintiff is a volunteer to the extent that it would be precluded from pursuing any subrogation rights. We disagree. "[A] mere volunteer or intermeddler who, having no interest to protect and without any legal or moral obligation, pays the debt of another, is not entitled to subrogation *without an agreement to this effect, or an assignment of the debt . . .*" (Emphasis added.) *Journal Publishing Co. v. Barber*, 165 N.C. 478, 483, 81 S.E. 694, 697 (1914). We believe the facts give rise to the doctrine of "conventional subrogation." Conventional subrogation arises from an express agreement of the parties as opposed to equitable subrogation which rests not on contract but on principles of equity. *Publishing Co., supra; Powell v. Wake Water Co.*, 171 N.C. 290, 88 S.E. 426 (1916). The record establishes that NCNB entered into agreements with each purchaser respectively, wherein the agreements all state in part:

> . . . IT IS AGREED BETWEEN THE PARTIES [NCNB & Purchasers] . . .
>
> 1. NCNB herewith agrees to pay the Prior Liens or hold the Customer harmless from the same.
>
> . . .
>
> 5. Each Customer herewith assigns unto NCNB all of his right, claim and title and interest in and to its claim against the Dealer and its bonding company [Western Surety] arising out of the sale of the Vehicle with a prior encumbrance of record which the Dealer has not cleared and the Dealer's fail-

> ure to deliver good title to the Customer. With respect to such assignment each Customer further
>
> . . .
>
> c. Agrees that by performing under paeragraph [sic] 1, NCNB is subrogated to all of Customer's claims arising out of the Prior Lien on the Vehicle against Dealer.

Therefore, pursuant to this express agreement, NCNB was subrogated to all the claims of the customers against the defendant. Thus, plaintiff's status as a volunteer is of no import because the debt of the purchasers was assigned to NCNB and was evidenced by an express agreement. *Publishing Co., supra.*

[2] Finally, defendant contends that Truck City did not violate Article 12 of Chapter 20 of N.C.G.S. and that the bond is only liable for such violation. We disagree. In defendant's brief, it is admitted by defendant that the sale of used cars with outstanding liens is illegal, but it contends it is not a violation of the article which would give rise to liability on the bonds issued. Defendant further contends that the defrauding of a retail buyer is not made a violation of Article 12. This contention is without merit. In *Triplett, supra,* this Court ruled that G.S. 20-294 which sets out the grounds for which the State may suspend or revoke a (motor vehicle dealers') license "does not enlarge the coverage of G.S. 20-288(e) to any parties *other than a purchaser.*" (Emphasis added.) 45 N.C. App. at 99, 262 S.E. 2d at 376. In all the other cases dealing with interpretation of the term "purchaser," the parties were claiming the rights of purchasers indirectly. However, in the case *sub judice,* plaintiff is claiming directly through the actual purchasers of the automobiles. A dealer may lose his license for defrauding any person in the conduct of his business, and the bond required by G.S. 20-288(e) is a source of indemnity to purchasers only. *Triplett, supra.* The assignment of claims to NCNB placed them in the shoes of the purchasers. Under the facts of this case, defendant's act of selling used automobiles with outstanding liens was in violation of Article 12, Chapter 20 of N.C.G.S., thereby invoking the liability of the surety to pay on the bonds issued.

We hold that plaintiff as assignee of the rights, claims and title of the purchasers was subrogated to the claims of the pur-

chasers. As such, plaintiff was entitled to sue on the motor vehicle surety bonds issued to Truck City by defendant Western Surety in the amounts of $15,000, $5,000, and $5,000 respectively. Having concluded that NCNB is entitled to recover on the bonds issued by defendant, this Court in no way attempts to abrogate or dilute the intent of the legislature when they enacted this remedial statute, G.S. 20-288(e), in favor of purchasers. It is only by virtue of the direct relationship of the parties, i.e.—the assignment of all claims to NCNB by the purchasers—, that we come to this conclusion.

Therefore, the judgment of the trial court is

Affirmed.

Judges BECTON and PARKER concur.

PETER M. FOLEY v. L & L INTERNATIONAL, INC. AND LYLE LATHE

No. 8710SC215

(Filed 16 February 1988)

1. **Corporations § 1.1— corporation as defendant's mere instrumentality—insufficiency of evidence**

The trial court properly dismissed plaintiff's claims against the individual defendant based on the allegation that defendant corporation was his "mere instrumentality," since plaintiff's evidence tended to show only that plaintiff and his family held a majority of the corporate stock, but more evidence than that is required before a corporation can be found to be a sham and the mere instrumentality of one of its officers.

2. **Contracts § 27.2— contract to deliver car—breach—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury on plaintiff's claim for breach of contract where it tended to show that plaintiff made a down payment on a car which defendant promised to deliver within 90 days or refund the deposit; defendant did not deliver the car as promised or refund the deposit, but instead continued to make false statements for seven months concerning his efforts to obtain the promised vehicle and its shipping status; and the 90-day delivery promise was some evidence that defendant regarded 90 days as a reasonable period for performing the contract.

3. Contracts § 27.3— contract to deliver car—damages not limited to refund of deposit

A contract for the sale of a vehicle which promised delivery within 90 days or plaintiff's deposit would be refunded did not limit plaintiff's relief to refund of the deposit, since the contract did not state that a refund was plaintiff's exclusive remedy; plaintiff did not exercise the option of settling for the return of his deposit; and even if the contract gave defendant the option of terminating the agreement by returning plaintiff's deposit, defendant clearly forfeited that right by repeatedly claiming after the 90-day period expired that it was in the process of performing the contract.

4. Unfair Competition § 1— keeping down payment on car—failure to order car—unfair and deceptive trade practice

Plaintiff's evidence that defendant kept his down payment on a car for seven months without even attempting to get the car he had promised to obtain, while falsely claiming that the car had been obtained and would be delivered shortly, was some evidence of a deceptive trade practice which N.C.G.S. § 75-1 condemns and makes recoverable, and the trial court therefore erred in dismissing plaintiff's claim.

5. Fraud § 9— failure to allege reliance on misrepresentation—fraud claim properly dismissed

The trial court properly dismissed plaintiff's claim for fraud in the sale of a vehicle where plaintiff sufficiently alleged defendant's fraudulent purpose, but there was no allegation that plaintiff relied upon defendant's false representations and no allegation as to what that reliance resulted in. N.C.G.S. § 1A-1, Rule 9(b).

APPEAL by plaintiff from *McLelland, Judge.* Judgment entered 9 December 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 25 September 1987.

Peter M. Foley, pro se, plaintiff appellant.

Zimmer and Zimmer, by Samuel A. Mann, for defendant appellees.

PHILLIPS, Judge.

This action is based upon the failure to receive a foreign car that the corporate defendant contracted to sell plaintiff. The corporate defendant, though not an authorized dealer for any automobile manufacturer, through various sources in Europe and elsewhere gets foreign cars of particular makes and models and sells them to individual purchasers; it is situated in New Hanover County and the individual defendant is its President. On 31 August 1985 the corporate defendant contracted in writing to sell

plaintiff a new 1986 British Racing Green Jaguar XJ Sovereign with biscuit-colored leather interior for $30,500, of which plaintiff paid $4,575 and agreed to pay the balance upon delivery. The contract contains the following clause:

> Due to shipping arrangements, the exact date of delivery cannot be given at this time. We do however, guarantee that the automobile described above will be delivered to the shipper and the Bill of Lading will be dated no more than ninety (90) days from the date of this contract or we will refund, in full, all funds deposited on the automobile described above.

In late November 1985 plaintiff inquired of the defendants about the delivery date and was told that two Jaguars had been received but because of a mix-up neither satisfied plaintiff's order and the car would be there by Christmas or the first of the year. The car has never been delivered and on 25 March 1986 plaintiff brought suit, alleging breach of contract, deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes, and fraud; he alleged that the individual defendant is liable for the corporate defendant's contract and misdeeds because it was his "mere instrumentality." At trial a verdict was directed against all his claims at the end of plaintiff's evidence.

[1] The dismissal of plaintiff's claims against the individual defendant, based on the allegation that the corporation was his "mere instrumentality," was manifestly correct because evidence to support that allegation was not presented. In essence, plaintiff's evidence on this point tends to show only that defendant and his family held a majority of the corporate stock, and as *Glenn v. Wagner*, 313 N.C. 450, 329 S.E. 2d 326 (1985) makes plain, more evidence than that is required before a corporation can be found to be a sham and the mere instrumentality of one of its officers. But plaintiff's evidence amply supports the breach of contract and deceptive trade practices claims against the corporate defendant and the judgment directing a verdict against those claims is vacated.

[2] In brief, plaintiff's evidence, when viewed in its most favorable light, tends to show by documents elicited during discovery that defendant did not even ask its German agent to obtain the car plaintiff ordered until 24 February 1986; that defendant never had an invoice or bill of lading showing that the

car had been bought or shipped, as copies of such documents, requested and promised several different times, were never given plaintiff; nevertheless, that between Christmas 1985 when delivery of the car was promised and 25 March 1986, when suit was filed, Lathe and another company employee told plaintiff several times and the Attorney General's office once in various telephone conversations that though the car had been obtained it had not been delivered for various reasons, none of which were so. The statements, all but one to plaintiff, were as follows: In early January 1986 that the car had been delayed by bad weather at sea, but was en route to Nova Scotia, New York and Wilmington; on 18 January 1986 that the ship had arrived in this country but they would not know whether the car was aboard until the documents were received the next week; the next week that his car had been shipped to Houston; a few days later that an auto transport truck would pick up the car in Houston and deliver it to Wilmington; a few days after that that the car had not been delivered because the truck had engine trouble; a few days later that a truck could not deliver the car here until it had a full load to this area and the man in Houston would send the title documents; still later that a Gary Graham in Houston had his car (though Graham told plaintiff when he called that while he had a car fitting the description of plaintiff's order the defendants had not talked to him about buying it); around 10 February 1986 that a car for him had been bought but the seller had failed to deliver it and he had sued the seller; in late February or early March that his car was shipped from Germany on 27 February 1986 and would get here in seventeen days; on 5 March 1986 (to Ms. Grimes of the Attorney General's office) that he had talked to the European dealer and the car would be shipped the following day and would arrive in twenty days; two days later that the car was "on the water," and the title information would be telexed immediately.

[3] To say the least, the foregoing is certainly *some* evidence that the corporate defendant breached its contract to deliver the car that it contracted to obtain and the jury, rather than the court, should have determined that claim. Since the contract did not state when delivery was to be made and it is for the sale of goods it is governed by the Uniform Commercial Code. G.S. 25-2-309 provides that when the time for delivery is not stated "the

time . . . shall be a reasonable time." Defendant does not argue that the seven months that it had to perform the contract was not a reasonable time; and it would be vain to do so, of course, since its guarantee in the contract to refund plaintiff's down payment if delivery was not made within ninety days, if not an implied promise to deliver within that time, is at least an indication that defendant regarded ninety days as a reasonable period for performing the contract. But defendant does argue that the contract limits plaintiff's relief to the refund of his down payment. This argument has no merit for three reasons: *First*, the contract does not state that a refund is plaintiff's *exclusive* remedy. G.S. 25-2-719 provides that a remedy stated in the contract "is optional unless the remedy is expressly agreed to be exclusive," and in *Williams v. Chrysler-Plymouth, Inc.*, 48 N.C. App. 308, 269 S.E. 2d 184, *disc. rev. denied*, 301 N.C. 406, 273 S.E. 2d 451 (1980), we held that that provision means what it says. *Second*, plaintiff did not exercise the option of settling for the return of his deposit. *Third*, even if the contract gave defendant the option of terminating the agreement by returning plaintiff's deposit, and we do not so interpret it, defendant clearly forfeited that right by repeatedly claiming after the ninety day period expired that it was in the process of performing the contract. *Hutchins v. Davis*, 230 N.C. 67, 52 S.E. 2d 210 (1949).

[4] It is equally clear, we think, that keeping a customer's down payment on a car for seven months without even attempting to get the car it had promised to obtain, while falsely claiming that the car had been obtained and would be delivered shortly, as plaintiff's evidence indicates, is *some* evidence of a deceptive trade practice that G.S. 75-1, *et seq.* condemns and makes recoverable.

[5] But the directed verdict against plaintiff's claim for fraud was correct and must be upheld, because that claim was not adequately stated under our Rules of Civil Procedure. As to that claim plaintiff alleged in Count IV of his complaint that "the actions of the Defendants, as set forth above, have been intentional and constitute a fraud." The actions referred to were statements the defendants allegedly made to him, which he alleged "were untrue, were known by Defendants to be untrue when made, and were designed by Defendants to frustrate Plaintiff in the attempt to coerce Plaintiff into cancelling the agreement because the cost

of new Jaguars had increased so that Defendants' profit on the sale of the vehicle was minimal or non-existent." While this is an adequate statement of defendant's fraudulent purpose, it says nothing either directly or by reference about plaintiff relying upon the false representations or what that reliance resulted in; and though under our present system of notice pleading many omissions can be overlooked or supplied by construction, this omission is fatal to the claim. For Rule 9(b) of our Rules of Civil Procedure provides that "[i]n . . . fraud . . . the circumstances constituting fraud . . . shall be stated with particularity," and this rule has been interpreted to require allegations as to all of the elements of fraud, including the plaintiff's reasonable reliance. *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E. 2d 63 (1979). Since a valid fraud claim was not before the court, refusing to permit the jury to consider the fraud issue was not error.

Affirmed in part; vacated in part; and remanded.

Judges COZORT and GREENE concur.

SHIRLEY PATTON v. DAVID E. PATTON

No. 8714DC838

(Filed 16 February 1988)

1. **Divorce and Alimony § 30— equitable distribution—value of closely held corporation—sufficiency of finding of fact**

In an action for child support, alimony, attorney's fees, and equitable distribution, there was no merit to defendant's contention that the trial court failed to make a sufficient finding of fact as to the value of defendant's interest in his closely held corporation, since the Supreme Court in an earlier appeal of the case held that the finding of fact should be more than a mere enumeration of the factors considered by the trial court in determining the value of defendant's interest; the finding of fact was subsequently replaced with a detailed finding which indicated what the trial court attributed to each factor; and the new finding complied with the Supreme Court's requirement of a statement of a more complete basis for the conclusion rendered.

2. **Divorce and Alimony § 30— equitable distribution—value of closely held corporation—more evidence not required on remand**

The trial court on remand was not required to hear more evidence of valuation with regard to defendant's closely held corporation, since the Supreme

Court did not indicate more evidence was needed but instead said that the finding of fact needed to more fully explain the basis for the valuation.

3. **Divorce and Alimony § 21.5— failure to pay alimony—contempt—evidence of ability to pay**

The trial court did not err in holding defendant in willful contempt for failure to pay alimony, and the absence of a specific finding of ability to pay was immaterial, where there was sufficient evidence that defendant was capable of complying with the order in that his salary was $2,000 per month, he was paid by his business in the form of fringe benefits, and the retained earnings of his corporation had grown more than $22,000 since the original order.

4. **Divorce and Alimony § 19.3— modification of alimony—evidence of income—insufficient showing of change of circumstances**

Defendant failed to show a substantial change of circumstances to warrant modification of an alimony order where his arguments were based only on income of the parties.

5. **Divorce and Alimony § 18.16— award of attorney's fees proper**

The trial court did not err in awarding additional attorney's fees to plaintiff where it had already been decided that plaintiff was entitled to the relief prayed for; she was a dependent spouse earning less income than defendant; plaintiff had been unable to pay her attorney and was in debt $13,000 prior to the contempt hearing; and she could not defray the expenses of the contempt proceeding.

APPEAL by defendant from *LaBarre, Judge.* Judgment entered 31 March 1987 in District Court, DURHAM County. Heard in the Court of Appeals 3 February 1988.

This is an action for child support, alimony, attorney's fees and equitable distribution. The parties were divorced on 1 December 1983. On 29 August 1984 plaintiff was awarded $1,000 per month in alimony, $500 per month in child support, the marital residence and personal property therein and attorney's fees of $3,000. Defendant was awarded his interest in businesses Patco, Inc., and Wick-and-Leather, Inc., as well as personal property already removed from the marital residence.

This Court, in *Patton v. Patton*, 78 N.C. App. 247, 337 S.E. 2d 607 (1985), affirmed the trial court except in regard to attorney's fees. The case was remanded for proper findings of fact and entry of judgment as to attorney's fees. The North Carolina Supreme Court, in *Patton v. Patton*, 318 N.C. 404, 348 S.E. 2d 593 (1986), then affirmed this Court as to attorney's fees but reversed this

Court and remanded the case for proper findings of fact concerning the value of defendant's interest in a closely-held corporation.

By order filed 31 March 1987 the trial court replaced the original finding of fact as to the attorney's fees. The new finding outlined the nature and scope of the services rendered by plaintiff's attorney. The judge noted the amount of time spent on plaintiff's case, what reasonable fees would be per hour, and the necessity and reasonableness of the representation in light of defendant's refusals to pay. The conclusion of law based upon this finding and the order requiring payment of attorney's fees were then reaffirmed.

The court also replaced the original finding as to the value of defendant's closely-held corporation. The judge found that defendant's interest in Patco, Inc. was at least $85,000. In so finding, the judge considered an insurance proposal valuing defendant's interest at $207,000, financial statements by the corporation's accountants and retained earnings of the corporation. The judge further considered the nature and success of the business, and also used a formula to determine a capitalization of earnings ratio which showed a value above "book value." The conclusion of law based upon this finding and the order dividing marital assets were then reaffirmed.

The court further held defendant in contempt of court for failure to make payments, held that there should be no reduction in defendant's alimony payment as requested, and ordered defendant to pay an additional $4,500 in attorney's fees.

Defendant appealed.

Maxwell, Freeman & Beason, P.A., by James B. Maxwell, for plaintiff, appellee.

Clayton, Myrick, McClanahan & Coulter, by Robert W. Myrick and Robert D. McClanahan, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first argues the trial court again failed to make a sufficient finding of fact as to the value of defendant's interest in his closely-held corporation. In *Patton v. Patton*, 318 N.C. 404, 348 S.E. 2d 593 (1986), the Supreme Court held that the finding of

fact should be more than a mere enumeration of the factors considered by the trial court in determining the value of defendant's interest. The finding of fact has now been replaced with a detailed finding which indicates what the trial court attributed to each factor. The Supreme Court did not require a total recitation of evidence considered, but only required a more complete basis for the conclusion rendered. The new finding complies with this requirement. Defendant raised no issue as to the sufficiency of evidence. He only challenged the sufficiency of the finding of fact. Since the new finding is sufficiently detailed, this argument has no merit.

[2] Defendant next argues "the trial court committed reversible error in excluding the testimony of Paul J. Gworek at the supplemental equitable distribution hearing." At the supplemental hearing defendant wanted additional testimony to be heard, but the judge made it clear that he did not want to "retry this case again."

This Court has previously said that on remand it is not necessary for a trial court to hear more evidence on a valuation question if no additional evidence is needed to make an appropriate finding of fact. *Harris v. Harris*, 84 N.C. App. 353, 352 S.E. 2d 869 (1987). In this case, the Supreme Court did not indicate more evidence was needed, but instead said that the finding of fact needed to more fully explain the basis for the valuation. The trial court determined there was no need for more evidence and such a decision was within its discretion.

[3] Defendant further contends the trial court erred in holding him in willful contempt for failure to pay alimony because "there was no finding of fact that he had the ability to comply." If the evidence plainly shows the defendant was capable of complying with the alimony order, then absence of a specific finding is immaterial. *Daugherty v. Daugherty*, 62 N.C. App. 318, 302 S.E. 2d 664 (1983).

In this case, by the time the motion for contempt was heard in March 1987 defendant had failed to make 33 payments of $1,000 each. This failure to pay occurred even after this Court in *Patton v. Patton*, 78 N.C. App. 247, 337 S.E. 2d 607 (1985), held the amount was reasonable and after the Supreme Court denied defendant's Petition for Discretionary Review on the alimony issues.

Upon reviewing the evidence relied upon by the trial court, we find there was sufficient evidence that defendant was capable of complying with the order. Although the court found defendant's salary to be $2,000 per month, other findings of fact indicate defendant was paid by his business in the form of fringe benefits and that the retained earnings of his corporation had grown more than $22,000 since the original order. Defendant challenges none of these findings except for the finding that defendant's present wife is supplied with an automobile by defendant's corporation. Defendant argues there is no evidence to support this finding and that his wife actually makes the payments on the vehicle. There is contradictory evidence in the record as to this issue, but even if there is insufficient evidence as to this one finding, there remain ample findings to support the court's conclusions and order. This argument has no merit.

[4] Defendant next argues the court erred by "failing to retroactively reduce, or to reduce or terminate, the defendant's alimony obligation." We have already addressed the past payments due to plaintiff and it is clear there should be no retroactive reduction. As to reduction in future payments, there must be a substantial change of circumstances to warrant a modification. *Medlin v. Medlin*, 64 N.C. App. 600, 307 S.E. 2d 591 (1983). There cannot be a conclusion of substantial change in circumstances based solely on change in income. *Id.* The overall circumstances of the parties must be compared with those at the time of the award.

Defendant has not met his burden in this case. His arguments are based only on income of the parties. Defendant fails in his arguments to consider financial standing of plaintiff and her accustomed standard of living. Although plaintiff, at the time of the hearing, made $22,788 per year, she had a debt of $20,000. Much of this debt is attributable to defendant's failure to make past alimony payments. For these reasons, the trial court did not err in failing to reduce defendant's alimony payments.

[5] Finally, defendant argues the trial court erred in awarding additional attorney's fees to plaintiff. The requirements for awarding attorney's fees are found in *Clark v. Clark*, 301 N.C. 123, 135-36, 271 S.E. 2d 58, 67 (1980):

> In order to receive an award of counsel fees in an alimony case, it must be determined that the spouse is en-

titled to the relief demanded; that the spouse is a dependent spouse; and that the dependent spouse is without sufficient means whereon to subsist during the prosecution of the suit, and defray the necessary expenses thereof.

Plaintiff is entitled to the relief prayed for as has already been decided. It is also clear she is a dependent spouse earning less income than defendant. The record also shows plaintiff has not been able to pay her attorney and was in debt $13,000 prior to the contempt hearing. Obviously, she cannot adequately defray the expenses of the contempt proceeding. Defendant has shown no abuse of discretion by the trial court in awarding the fees, and this argument fails.

Affirmed.

Judges BECTON and SMITH concur.

GRACE W. CURD, TRUSTEE UNDER TRUST AGREEMENTS BETWEEN THOMAS H. S. CURD, JR., GRANTOR, AND GRACE W. CURD AS TRUSTEE FOR THE BENEFIT OF GRACE CHANDLER CURD, DATED NOVEMBER 18, 1974, AND RECORDED IN DEED BOOK 565, PAGE 658, IN THE OFFICE OF THE REGISTER OF DEEDS FOR ROWAN COUNTY, NORTH CAROLINA; FOR THE BENEFIT OF THOMAS H. S. CURD, III DATED NOVEMBER 18, 1974, AND RECORDED IN DEED BOOK 565, PAGE 659, IN THE OFFICE OF THE REGISTER OF DEEDS FOR ROWAN COUNTY, NORTH CAROLINA; AND FOR THE BENEFIT OF WALTER H. S. CURD, DATED NOVEMBER 18, 1974, AND RECORDED IN DEED BOOK 565, PAGE 660, IN THE OFFICE OF THE REGISTER OF DEEDS FOR ROWAN COUNTY, NORTH CAROLINA v. JOHN ELMER WINECOFF, JR., AND WIFE, JIMMIE E. WINECOFF; CARMI L. WINECOFF AND WIFE, GERTRUDE WINECOFF; RAY E. WINECOFF AND WIFE, LORRAINE WINECOFF; LUCILLE W. WALLACE AND RONALD W. ISENHOUR

No. 8719DC535

(Filed 16 February 1988)

1. **Adverse Possession § 25.2— conclusion unsupported by sufficient findings of fact**

In an action for adverse possession, the trial court's conclusion that plaintiff was not entitled to a certain portion of property forming a part of plaintiff's yard was not supported by sufficient findings of fact where the only finding was that plaintiff's tenant never considered such portion of the yard to be owned by plaintiff, and the finding did not specify the factual basis the trial court relied on in reaching its conclusion of law.

2. Easements § 7.2— insufficient findings of fact

The trial court's findings of fact failed to list facts from which it could be determined whether defendants' actions were sufficient to establish the essential elements of either an implied or a prescriptive easement across plaintiff's property.

APPEAL by plaintiff from *Montgomery, Judge.* Judgment entered 9 January 1987 in District Court, ROWAN County. Heard in the Court of Appeals 1 December 1987.

Ford & Parrott, by S. Edward Parrott, attorney for plaintiff-appellant.

No brief for defendant-appellees.

ORR, Judge.

Plaintiff filed suit in February 1986 to acquire title to defendants' property by adverse possession.

In her complaint, plaintiff alleged she and her predecessors in title had constructed buildings on and fenced in 3.276 acres owned by defendants lying east of a line between points 187 and 273 as shown on a map introduced at trial. Plaintiff further alleged that the use of this property had been open, notorious, hostile, adverse and continuous for more than twenty years. Defendants denied plaintiff's material allegations and counterclaimed for a permanent easement over plaintiff's roadway for access to their property.

After hearing the evidence without a jury, the trial court made findings of fact and conclusions of law. Based upon these findings and conclusions, the trial court awarded plaintiff (1) title to defendants' land west of the line lying between points 49 and 273 and (2) a permanent easement over a private roadway constructed by plaintiff on defendants' property. The trial court awarded defendants a permanent easement over a roadway on plaintiff's property.

From this judgment, plaintiff appeals.

Plaintiff contends on appeal that the trial court's findings of fact are insufficient to support two of its conclusions of law.

> G.S. § 1A-1, Rule 52(a)(1) of the Rules of Civil Procedure requires a trial judge hearing a case without a jury to make

> findings of fact and conclusions of law. To comport with Rule 52(a)(1), the trial court must make 'a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.' *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982) (citation omitted). Rule 52(a)(1) does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Chemical Realty Corp. v. Home Fed'l Savings & Loan, 65 N.C. App. 242, 249, 310 S.E. 2d 33, 37 (1983), *disc. rev. denied*, 310 N.C. 624, 315 S.E. 2d 689, *cert. denied*, 469 U.S. 835, 83 L.Ed. 2d 69 (1984) (citations omitted).

When the conclusions of law are unsupported by determinative facts, the case must be remanded to the trial court for further findings. *Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E. 2d 270 (1965); *Mills, Inc. v. Transit Co.*, 265 N.C. 61, 143 S.E. 2d 235 (1965).

I.

[1] First plaintiff challenges Conclusion of Law No. 3, which addresses her claim for adverse possession and concludes:

> The Plaintiff is not entitled to any portion of the property lying to the east of the line between points 49 and 273 by adverse possession.

To support this conclusion the trial court's findings must find as a fact that plaintiff failed to establish one or more of the essential elements necessary for the adverse possession of this specific piece of property.

To acquire title to land through adverse possession, plaintiff must show actual, open, hostile, exclusive, and continuous possession of the land claimed for twenty years under known and visible lines and boundaries. *Board of Education v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970); *Scott v. Lewis*, 246 N.C. 298, 98 S.E. 2d 294

(1957); *Casstevens v. Casstevens*, 63 N.C. App. 169, 304 S.E. 2d 623 (1983); N.C.G.S. § 1-40 (1983).

The trial court's Finding of Fact No. 6 discusses the contested property forming part of plaintiff's yard, lying east of points 273 and 49 and finds:

> A certain portion of the yard which has been used and maintained by the Plaintiff extends to the east of the line between points 273 and 49; that Plaintiff's tenant, Albert Morgan testified that he never considered such portion as owned by Plaintiffs.

This finding does not specify what factual basis the trial court relied on in reaching its Conclusion of Law No. 3.

Accordingly, we conclude the trial court's findings were insufficient to support Conclusion of Law No. 3.

II.

[2] Next plaintiff challenges Conclusion of Law No. 4, which addresses defendants' claim for an easement across plaintiff's property and concludes:

> The Defendants are entitled to a permanent easement and right of way across Plaintiff's property, in the exact location as evidence upon the ground will show the use of said roadway, to be determined by a later survey, if desired.

Defendants, in the case *sub judice*, may acquire an easement over plaintiff's property either by implication or by prescription.

> An easement [by implication] is generally established by proof: (1) that there was common ownership of the dominant and servient parcels and a transfer which separates that ownership; (2) that, before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was apparent, continuous and permanent; and (3) that the claimed easement is 'necessary' to the use and enjoyment of the claimant's land.

Knott v. Washington Housing Authority, 70 N.C. App. 95, 98, 318 S.E. 2d 861, 863 (1984); *Dorman v. Ranch, Inc.*, 6 N.C. App. 497, 170 S.E. 2d 509 (1969).

"[A]n 'easement from prior use' may be implied 'to protect the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer.'" *Knott v. Washington Housing Authority*, 70 N.C. App. at 97-98, 318 S.E. 2d at 863, quoting P. Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary,"* 58 N.C.L. Rev. 223, 224 (1980).

An easement by prescription is created by adverse possession. To establish one, defendants must prove: (1) that their use of the roadway was adverse, hostile or under claim of right; (2) that this use was open and notorious such that plaintiff had notice of the claim; (3) that this use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there was substantial identity of the easement claimed throughout the twenty year period. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

Furthermore, defendants must rebut the presumption that their use of the road was made with the plaintiff's permission, since a permissive use of a roadway can never ripen into a prescriptive easement. *Id.*

To support Conclusion of Law No. 4, the trial court's findings of fact must show that defendants fulfilled all the requirements necessary to establish an easement under either theory. *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); *Mills, Inc. v. Transit Co.*, 265 N.C. 61, 143 S.E. 2d 235.

The only finding made by the trial court on defendants' claim for an easement, said:

> Although there are other properties which adjoin the property of the Defendants, the Defendant, J. E. Winecoff, testified that they have used a State maintained road over the last 30 or more years for access to a point within the Plaintiff's property and that their only access from the end of said State road to their property has been over a former logging road, which still appears on the ground as a driveway and which runs from said public road to the western boundary of the Defendant's property, at a point south of the house and outbuildings maintained by the Plaintiff's tenant farm

manager, Albert Morgan, as shown upon the survey map of James T. Hill.

This statement fails to list facts from which we can determine whether defendants' actions were sufficient to establish the essential elements of either an implied or a prescriptive easement.

Consequently, we find Conclusion of Law No. 4 unsupported by the trial court's findings of fact.

For the above reasons, we vacate the portion of the trial court's order holding that plaintiff did not adversely possess the land lying east of the line between points 49 and 273 and that defendants were entitled to a permanent easement over plaintiff's property. We remand these two issues to the trial court for further findings of fact in accordance with this opinion.

Vacated and remanded.

Judges ARNOLD and JOHNSON concur.

RAFE V. WILLIAMS AND EDNA H. WILLIAMS v. LEE BRICK & TILE, INCORPORATED

No. 8711SC567

(Filed 16 February 1988)

1. **Negligence § 39— last clear chance—instructions proper**

In an action to recover for injuries sustained by plaintiff when he was struck by a forklift, there was no merit to plaintiffs' contention that the trial judge erroneously instructed the jury on the issue of last clear chance where the challenged instruction properly summarized the evidence submitted at trial with regard to when plaintiff dismounted the forklift.

2. **Negligence § 39— last clear chance—instructions proper**

In an action to recover for injuries sustained by plaintiff when he was struck by a forklift, the trial court did not err in instructing the jury that in order for the last clear chance doctrine to apply, the driver of the forklift "must have had a last clear chance, not a last possible chance."

3. **Negligence § 22— motion to amend complaint denied—no error**

In an action to recover for injuries sustained by plaintiff when he was struck by a forklift, the trial court did not err in denying plaintiffs' motion to

amend their complaint at the close of their evidence and at the close of all the evidence to allege that defendant was negligent directly for failing to warn truck drivers like plaintiff of the danger in riding forklifts and for not prohibiting drivers from riding, since plaintiffs did not present any evidence that the failure to warn was a proximate cause of plaintiff's injury.

APPEAL by plaintiffs from *Donald W. Stephens, Judge.* Judgment entered 26 November 1986 in Superior Court, LEE County. Heard in the Court of Appeals 2 December 1987.

Moretz & Silverman, by J. Douglas Moretz and Jonathan Silverman for plaintiff-appellants.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Sanford W. Thompson, IV and Reid Russell for defendant-appellee.

BECTON, Judge.

Plaintiffs, Rafe V. Williams and Edna H. Williams, brought this action against defendant Lee Brick & Tile, Incorporated to recover damages for injuries Rafe V. Williams sustained due to the negligence of Lee Brick's employee, Charles Buffkin. A jury found: 1) that Williams was injured by Buffkin's negligence; 2) that Williams was contributorily negligent; and 3) that Buffkin did not have the last clear chance to avoid the accident. The plaintiffs appeal. We find no error.

I

Rafe Williams was a 70-year-old truck driver for N.P. Sloan Trucking Company (Sloan). Williams' route required him to transport brick from various Lee County brick plants. On 28 August 1985, Williams arrived at the Lee Brick brickyard at approximately 2:30 p.m. to load his brick for the following day. Charles Buffkin, a Lee Brick forklift operator, loaded Williams' trailer. Williams stood on the forklift running board and rode with Buffkin as Buffkin drove the final load of brick toward Williams' trailer.

There was conflicting evidence regarding the occurrence and sequence of some events immediately preceding the accident.

Williams testified that just before the forklift reached the point where Buffkin normally aligned the vehicle with his trailer

for unloading, he advised Buffkin that he was dismounting, and Buffkin replied, "okay." The forklift was moving very slowly or was stopped. After he walked two steps, he was struck on the side by the rear of the then turning forklift. He fell to the ground, and Buffkin drove the forklift over his leg.

Buffkin testified that he stopped the forklift, three feet in front of Williams' trailer, when he felt a bump. He did not know that Williams had dismounted. He did not hear Williams advise him that he was about to dismount. Williams did not touch him before he dismounted.

No one else saw the accident.

Operating instructions were mounted on the forklift, and instruction number 8 warned: "Do not permit riders on forks or machine at any time."

II

The plaintiffs made eight assignments of error on appeal, some of which relate to liability while the remainder relate to damages. We will first address the issues concerning liability.

A

[1] In their first assignment of error, the plaintiffs contend that the trial judge erroneously instructed the jury on the issue of last clear chance by instructing the jury as follows:

> . . . before you could answer this issue yes in favor of the plaintiff, in the event you reach this issue, the plaintiff must have satisfied you by the greater weight of the evidence that Charles Buffkin, at the time he turned the forklift, knew or by the exercise of reasonable care should have known, that Rafe Williams had already dismounted from the forklift and that Rafe Williams was still in the area near the forklift which would cause Mr. Williams to be struck by the forklift's turn.

The plaintiffs argue that the above instructions displaced the jury's role as fact finder because it precluded them from finding either that Buffkin knew Williams had dismounted before he began the turn, or that the forklift was in a gentle turn when Williams stepped off. They argue under both of these scenarios

that Buffkin had the last clear chance to avoid the accident, but the jury could not have drawn either inference from the given instruction. We disagree.

The essential elements of the last clear chance doctrine have been described in several North Carolina cases. Recently, in *Pegram v. Pinehurst Airline, Inc.*, 79 N.C. App. 738, 740, 340 S.E. 2d 763, 765 (1986), *citing Wray v. Hughes*, 44 N.C. App. 678, 262 S.E. 2d 307, *disc. rev. denied*, 300 N.C. 203, 269 S.E. 2d 628 (1980), this court enumerated the following five prerequisites for application of the doctrine:

> (1) Plaintiff, by his own negligence, placed himself in a position of peril from which he could not escape; (2) defendant saw, or by the exercise of reasonable care should have seen and understood, the perilous position of plaintiff; (3) defendant had the time and the means to avoid the accident if defendant had seen or discovered plaintiff's perilous position; (4) the defendant failed or refused to use every reasonable means at his command to avoid impending injury to plaintiff; and (5) plaintiff was injured as a result of defendant's failure or refusal to avoid impending injury.

In the case *sub judice* the instruction did not prevent the jury from deciding the point at which Williams dismounted the forklift. The instruction presupposes that Williams was struck when the forklift turned. Both witnesses agreed that Williams was struck during the turn. The jury remained free to determine when Williams dismounted. Thus, the instruction properly summarized the evidence submitted at trial. This assignment of error is without merit.

B

[2] In their second assignment of error, the plaintiffs contend that the trial judge erred in instructing the jury that in order for the last clear chance doctrine to apply, "Charles Buffkin must have had a last clear chance, not a last possible chance." They argue that the trial judge erroneously relied on the caution given in *Hughs v. Gragg*, 62 N.C. App. 116, 302 S.E. 2d 304 (1983) because that case involved a pedestrian struck by a car at night. Although the facts of a case affect the applicability of the doctrine, the facts do not determine its definition. The caution given

by the trial judge was accurate; the last clear chance does not mean a last *possible* chance. This assignment of error is overruled.

C

[3] In their third assignment of error, the plaintiffs contend that the trial judge erred in denying their motion to amend their complaint, made at the close of their evidence and at the close of all the evidence, alleging that Lee Brick was negligent directly for failing to warn truck drivers of the danger in riding on forklifts and for not prohibiting drivers from riding. They argue that they were prejudiced by the trial judge's denial of their motion because Williams' contributory negligence would not have been a valid defense to Lee Brick's negligent failure to warn. Assuming, *arguendo*, that Lee Brick had a duty to warn truck drivers of the dangers in riding forklifts, the plaintiffs did not present any evidence that the failure to warn of the danger was the proximate cause of Rafe Williams' injury. Williams testified that he was familiar with the way the forklift operated—the fact that the rear end swung out during a turn. He did not assert that if he had been warned of the danger, then either he would not have ridden on the forklift or that he would not have dismounted in the manner he chose. The motion to amend was properly denied. This assignment of error is overruled.

D

In their fifth assignment of error, the plaintiffs contend that the trial judge erred by failing to strike Charles Buffkin's answer to a question posed by Lee Brick in which Buffkin estimated the amount of time that passed from the moment Rafe Williams stepped off the forklift and the moment Buffkin struck him. The plaintiffs argue that the response was mere speculation by the witness. We disagree. Buffkin was asked specifically to estimate the elapsed time between the moment he last saw Rafe Williams standing on the running board and the moment he felt a bump which caused him to stop the forklift. He answered that it was "a couple or three seconds, I guess." The witness was asked to make an estimate based on facts he observed. The answer was not speculative. This assignment of error is overruled.

E

In their eighth assignment of error, the plaintiffs contend that the trial judge erred in denying their motion for a new trial. For the reasons already discussed above when addressing the plaintiffs' previous assignments of error on the issue of liability, the motion for a new trial was properly denied.

III

In their fourth, sixth, and seventh assignments of error, the plaintiffs contend that the trial judge committed various errors on the issue of damages. Because their claim was barred by Rafe Williams' contributory negligence, we need not and do not address those assignments of error.

We find no error.

Judges EAGLES and COZORT concur.

MINNIE J. JACOBS v. HILL'S FOOD STORES, INC.

No. 8713SC270

(Filed 16 February 1988)

Negligence § 58— fall in parking lot by store customer—contributory negligence

In an action to recover damages for injuries sustained by plaintiff when she fell over a concrete barrier located in a walkway leading from defendant's store to the parking lot, the trial court properly entered summary judgment for defendant where plaintiff's testimony established that she never saw the concrete block; she had traveled the same route where the walkway was located for a period of ten years; the parking lot and store were adequately lit and there was nothing to prevent her from seeing the concrete block at any time; and this evidence established that defendant did not breach any duty owed plaintiff and that plaintiff was negligent herself in failing to watch where she walked.

APPEAL by plaintiff from *Brewer, Judge.* Judgment entered 14 October 1986 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 1 October 1987.

Plaintiff filed this action seeking to recover damages for injuries she sustained 21 November 1984 when she fell over a concrete barrier located in a walkway leading from defendant's store

to the parking lot. Plaintiff alleged that defendant was negligent in permitting a concrete barrier to be placed in a walkway without proper lighting when it knew or should have known that persons of advanced age and limited physical ability would use the walkway; and in failing to maintain the walkway in a safe condition and properly supervise the walkway to prevent its blockage by a concrete barrier.

Defendant denied that it was negligent and alleged that plaintiff was contributorily negligent in failing to see, through the exercise of ordinary care, the open and obvious condition of the concrete block.

Defendant moved for summary judgment. At the hearing on the motion, the court had before it the pleadings and the depositions of plaintiff. These materials tended to show the following: On 21 November 1984 plaintiff, who was 78 years of age, was driven by her daughter to defendant's grocery store in Lake Waccamaw to shop for groceries. At approximately 7:00 p.m., plaintiff exited the defendant's store after purchasing groceries. Plaintiff walked down the ramp accompanied by her sister-in-law and an employee of the defendant who was pushing a shopping cart containing the plaintiff's groceries. Plaintiff testified that she was to wait near the parking lot for her daughter to come pick her up, but she did not realize her daughter had already gone outside and was coming to get her, so she proceeded to walk on out and into the parking lot; that after she walked a short distance down the ramp, she stumped her foot on a concrete barrier and fell on the ground. She testified further that the concrete barrier was about ten feet long and one foot high, that she never saw or noticed the concrete barrier when she went in or out of the store, that the lights were on in front of the store and in the parking lot; that she shopped at the store a "couple of times a week" for the past ten years; and that she had exited the store the same way she had entered.

From summary judgment for defendant, plaintiff appealed.

Lee, Meekins & Viets, by Fred C. Meekins, Jr., for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by William Robert Cherry, Jr., for defendant appellee.

JOHNSON, Judge.

The question presented for review is whether the trial court erred in allowing defendant's summary judgment motion. For the reasons that follow we affirm.

On motions for summary judgment, the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, must show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. N.C. Gen. Stat. sec. 1A-1, Rule 56(c) (1983); *Stanley v. Walker*, 55 N.C. App. 377, 285 S.E. 2d 297 (1982). The moving party has the burden of establishing the absence of any triable issue of fact. *Brenner v. Little Red Schoolhouse, Ltd.*, 302 N.C. 207, 274 S.E. 2d 206 (1981). While summary judgment is generally not appropriate in negligence cases, it may be appropriate when it appears that there can be no recovery for plaintiff even if the facts as alleged by plaintiff are taken as true. *Stoltz v. Burton*, 69 N.C. App. 231, 316 S.E. 2d 646 (1984); *Frendlich v. Vaughan's Foods of Henderson, Inc.*, 64 N.C. App. 332, 307 S.E. 2d 412 (1983).

A *prima facie* case of negligence liability is alleged when a plaintiff shows that defendant owed her a duty of care, defendant breached that duty, the breach was the actual and proximate cause of plaintiff's injury, and damages resulted from the injury. *Southerland v. Kapp*, 59 N.C. App. 94, 295 S.E. 2d 602 (1982). Taking all the facts alleged by plaintiff as true, we conclude that defendant has shown that it has not breached any duty owed to plaintiff.

Plaintiff had entered the defendant's place of business to purchase groceries from the defendant, and therefore occupied the status of an invitee of the defendant. *Morgan v. Great Atlantic & Pacific Tea Co.*, 266 N.C. 221, 145 S.E. 2d 877 (1966).

A storekeeper owes to his business invitees the duty to exercise ordinary care to maintain the approaches and entrances to his store in a reasonably safe condition and to warn his customers of any hidden dangers or unsafe condition of which it knew or in the exercise of reasonable supervision should have known. *Frendlich, supra.* A storekeeper is not an insurer of the safety of his customers and is liable only for injuries resulting from negli-

gence on his part. *Id.* He is under no duty to warn invitees of obvious dangers of which they have equal or superior knowledge. *Wrenn v. Hillcrest Convalescent Home, Inc.*, 270 N.C. 447, 154 S.E. 2d 483 (1967); *Stansfield v. Mahowsky*, 46 N.C. App. 829, 266 S.E. 2d 28, *cert. denied*, 301 N.C. 96 (1980).

In *Frendlich*, the plaintiff fell when she failed to see a second curb outside the defendant's store. Four feet from the store entrance was the first curb which, due to the slope of the street, varied in height. Plaintiff observed and safely negotiated the first curb, but fell and struck her car when she failed to see the second curb at the street. Plaintiff testified that she was unfamiliar with the area and did not see the second curb because she was looking straight ahead. Plaintiff contended that the defendant was negligent in maintaining a double curb at the entrance of the store and in failing to post signs or warnings which instructed patrons of the danger presented by the double curb. The plaintiff further contended that the double curb was not readily visible to patrons who carried groceries from the store.

This Court rejected plaintiff's contentions and held that the defendant had no duty to warn plaintiff of the obvious condition since (1) the curb was in plain view in broad daylight; (2) the plaintiff's view was unobstructed; (3) defendant did nothing to distract plaintiff's attention; and (4) plaintiff simply failed to focus attention on the curb.

In the case *sub judice*, plaintiff's testimony in the deposition established that she never saw the concrete block, that she had traveled the same route where the walkway was located for a period of ten years, that the parking lot and store were adequately lit and that there was nothing to prevent her from seeing the concrete block at any time. This evidence shows that the concrete block was an obvious condition and that plaintiff either knew or should have known of the location of the concrete block on the walkway. Defendant had no duty to warn plaintiff of an obvious condition. Thus, plaintiff's own evidence establishes that defendant did not breach any duty owed to plaintiff. Moreover, plaintiff's own testimony demonstrates her own negligence in failing to watch where she was walking.

On the record before this Court, there exists no genuine issue of material fact to be determined by the jury, and, based on

the evidence, defendant is entitled to judgment as a matter of law. Accordingly, the order below allowing defendant's motion for summary judgment was proper.

Affirmed.

Judges BECTON and PARKER concur.

JOHNNY GRIFFIN v. MARY ANN ROBERTS, FREDERICK D. HALL, SUBSTITUTE TRUSTEE, AND FARMERS HOME ADMINISTRATION, AN AGENCY OF THE U.S. GOVERNMENT

No. 874SC729

(Filed 16 February 1988)

Mortgages and Deeds of Trust § 40— setting aside foreclosure—inadequacy of purchase price plus irregularity required—no showing of irregularity

To set aside a foreclosure sale, the inadequacy of the purchase price must be coupled with some other irregularity in the sale, and alleged erroneous information from the clerk's office that plaintiff was the high bidder at the last sale did not amount to such an irregularity.

APPEAL by plaintiff from *Small (J. Herbert), Judge.* Orders entered 3 March 1987 and 12 June 1987 in Superior Court, DUPLIN County. Heard in the Court of Appeals 6 January 1988.

Defendant Hall, substitute trustee under a deed of trust, instituted foreclosure proceedings on two parcels of land owned by Lucille J. Torrans. Both parcels were sold at public auction. Plaintiff, husband of Torrans' granddaughter, entered upset bids and both parcels were resold on 7 November 1985. Defendant Roberts was the high bidder on one parcel and defendant Farmers Home Administration (FHA) was the high bidder on the other parcel. This sale was confirmed, and on 15 July 1986 plaintiff brought this action against the trustee and the purchasers, Roberts and FHA, to set aside the 7 November sale and to compel the trustee to conduct a resale.

On 3 March 1987, the trial court entered an order granting defendants Roberts' and Hall's motions to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). On 12 June 1987, the trial court entered

an order denying plaintiff's motion to reconsider the 3 March 1987 order. Plaintiff appeals from both orders.

Miles B. Fowler and M. Alexander Biggs, by M. Alexander Biggs, for plaintiff-appellant.

Ingram and Ingram, by Carolyn B. Ingram and Charles M. Ingram, for defendant-appellee Mary Ann Roberts.

Richard L. Burrows for defendant-appellee Frederick C. Hall.

SMITH, Judge.

Plaintiff brings forward two assignments of error. First, he contends the trial court erred by granting defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Second, plaintiff assigns error to the trial court's refusal to set aside the judgment dismissing the complaint. Because plaintiff has not met the requirements to set aside a foreclosure sale under North Carolina case law, we affirm the trial court's rulings.

In his complaint, plaintiff sets forth that the properties securing the deeds of trust were sold at public auction on 7 August 1985 and resold on 5 September 1985 and 7 October 1985, each resale following an upset bid. After the 7 October 1985 sale, plaintiff entered an upset bid on both parcels. The complaint alleges that on 5 November 1985 plaintiff was told by a deputy clerk of Superior Court of Duplin County that if he did not attend the scheduled 7 November resale his upset bids would be the opening bids and that if he was not the high bidder at the sale he would have ten days to enter new upset bids. Plaintiff did not attend the sale, and Hall and FHA were the high bidders. Plaintiff's brother-in-law telephoned the clerk's office on 12 November 1985 and was told that plaintiff was the high bidder at the 7 November sale. On 14 November 1985, plaintiff personally called the clerk's office and was given the same information. The complaint also alleges that on 18 November 1985, the last day to enter upset bids, both plaintiff and his brother-in-law were told by the clerk's office that plaintiff was the high bidder. The next day, plaintiff's father-in-law went to an attorney who had been hired to finalize plaintiff's purchase of the property. After an inquiry, the attorney discovered that plaintiff was not the high bidder at the 7

November sale. This final sale was confirmed on 26 November 1985.

On 15 July 1986, plaintiff instituted this action to set aside the sale and compel another sale. Plaintiff alleged the purchase price for both parcels was grossly inadequate. Roberts purchased parcel one for $16,500.00, and FHA purchased parcel two for $21,525.00. Plaintiff alleged the reasonable fair market value of parcel one was $40,000.00 and the reasonable fair market value of parcel two was $25,500.00. Plaintiff contends the inadequate purchase price and the misinformation from the clerk's office combine to allow him to set aside the sale under *Swindell v. Overton*, 310 N.C. 707, 314 S.E. 2d 512 (1984). We disagree.

It is a well-established rule in North Carolina that "[a]llegations of inadequacy of the purchase price realized at a foreclosure sale which has in all other respects been duly and properly conducted in strict conformity with the power of sale will not be sufficient to upset a sale." *Swindell v. Overton*, 310 N.C. at 713, 314 S.E. 2d at 516. To set aside the sale, the inadequacy of the purchase price must be coupled with some other irregularity in the sale. *Hill v. Fertilizer Co.*, 210 N.C. 417, 187 S.E. 577 (1936); *Roberson v. Matthews*, 200 N.C. 241, 156 S.E. 496 (1931); *Swindell v. Overton, supra.*

> [I]t is the materiality of the irregularity in such a sale, not mere inadequacy of the purchase price, which is determinative of a decision in equity to set the sale aside. Where an irregularity is first alleged, gross inadequacy of purchase price may then be considered on the question of the materiality of the irregularity.

Swindell v. Overton, 310 N.C. at 713, 314 S.E. 2d at 516.

Plaintiff has not shown an irregularity entitling him to set aside the sale. The alleged erroneous information from the clerk's office does not amount to such an irregularity. *See, e.g., Swindell v. Overton, supra* (trustee sold as one parcel land held under two separate deeds of trust; held, trustee's *en masse* sale of both tracts constitutes an irregularity sufficient for the court to consider setting aside sale); *Foust v. Loan Asso.*, 233 N.C. 35, 62 S.E. 2d 521 (1950) (trustee erroneously reported that land valued between $5,500.00 and $6,000.00 was sold for $6,400.00 when it was

in fact sold for $825.00; held, trustee's erroneous report was sufficient for the court to consider setting aside the sale); *Hill v. Fertilizer Co., supra* (record discloses no actual fraud, oppression or unfairness by trustee in the advertising and sale of the land; held, mere inadequacy of purchase price alone is not sufficient to upset a duly made sale); *Roberson v. Matthews, supra* (record contains no evidence of actual fraud, oppression or unfairness in the advertising and sale of the land; held, mere inadequacy of purchase price alone is not sufficient to set aside sale). These cases stand for the proposition that if the trustee faithfully performs his duties under the power of sale then there is no irregularity in the sale which would allow a court of equity to set aside the sale. "It is a uniform rule that where a decree of foreclosure has been rendered and a sale of property has been made thereunder, it cannot be attacked collaterally and the title thus acquired overthrown, except on the ground that the sale was void." 55 Am. Jur. 2d *Mortgages* Sec. 830 (1971). Plaintiff has alleged no fraud, oppression or unfairness by the trustee in fulfilling his duties under the power of sale but seeks to set aside the sale for an alleged error by the clerk's office. Plaintiff has not stated a claim upon which relief can be granted.

Plaintiff's assignments of error are overruled and the rulings of the trial court are affirmed.

Affirmed.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. RONALD BANKS

No. 8721SC608

(Filed 16 February 1988)

Searches and Seizures § 15— leased premises—standing of defendant to challenge lawfulness of search

Without any showing that defendant occupied or maintained control of the entirety of the premises by way of the lessor's permission, an informal lease agreement, or by some evidence that he paid rent for the premises, defendant failed to show the required expectations of privacy respecting the remainder

of the house outside his bedroom sufficiently to give him standing to challenge a search of the house.

APPEAL by defendant from *Collier, Robert A., Judge.* Judgment entered 5 March 1987 in FORSYTH County Superior Court. Heard in the Court of Appeals 8 December 1987.

Defendant appeals his conviction for possession of a controlled substance with intent to sell pursuant to N.C. Gen. Stat. § 90-95(a)(1) (1985). Defendant moved to suppress evidence obtained under a warrant which the trial court had ruled invalid due to the absence of the issuing deputy clerk's signature as required under N.C. Gen. Stat. § 15A-246 (1983). Defendant's pretrial Motion to Suppress was denied.

The State's evidence at trial tended to show that on 24 September 1986, Detective V. J. Hutchinson applied for a warrant to search a residence located at 619 Mt. Vernon Street, Winston-Salem. Hutchinson made application for the warrant with an affidavit stating probable cause based on a tip received from an informant that sales of cocaine had been observed at the above address. Hutchinson, unaware of the deputy clerk's failure to sign the warrant, executed the warrant.

On execution of the warrant, the police entered the front door of the residence which led into the living room. Another door was located directly before the front door which led to a "back room." The "back room" door was locked with a slide lock. A small hole was located about chest high in the door. A "keep out" sign hung on the door. A door on the right of the living room led to a bedroom.

The search of the entire house resulted in locating cocaine in various containers in the back room. The back room also contained a police scanner and a police call radio guide. The bedroom contained men's clothing, a bed, a picture of defendant, a stereo system and documents bearing defendant's name. The remaining rooms contained a tap alert attached to the telephone along with two hand-rolled marijuana cigarettes, a small birthday cake, several beer cans and cups.

Detective Hutchinson found a rental agreement bearing the name of Ella Simpson as lessee for the residence at 619 Mt. Ver-

non Street. The evidence further showed that both the electric and water bills were addressed to Simpson. Defendant's name was listed neither on the lease agreement nor on the utility bills. However, the key to the entire residence was found on defendant's person.

When the police arrested defendant he stated, "I don't have nothing on me. I don't live here." At that time, defendant denied living at, owning or leasing the residence. The defendant later recanted and claimed to live at the house when Hutchinson went through the inventory of seized property.

Defendant filed a Motion for Bond Reduction after his arrest in which he claimed that he only rented the bedroom in the house and disclaimed any control over or relation to the back room in which the cocaine was found.

Testimony of defendant's friend, Charles T. Wright, and co-defendant indicated that defendant had lived at the above address five or six months and that defendant had held cookouts and socials at the house. Defendant had on one occasion leased a stereo system which was delivered to the residence in question.

At trial, defendant renewed his Motion to Suppress and the trial court granted the motion only with respect to his bedroom. The trial court, however, ruled that because defendant did not have legitimate expectations of privacy in the remainder of the house, he lacked standing to object to the admission of evidence found outside the bedroom. On the basis of this ruling, defendant appeals his conviction.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Charles H. Hobgood, for the State.

Office of the Appellate Defender, by Appellate Defender Malcolm Ray Hunter, Jr., for defendant.

WELLS, Judge.

The defendant's only argument raised on appeal is that the trial court erred in denying defendant's Motion to Suppress evidence found in the area of the house outside his bedroom. We believe the trial court's ruling was correct.

Under the Fourth Amendment to the United States Constitution and its derivative, the exclusionary rule, a defendant may object to the admission of evidence obtained through an illegal or unreasonable governmental search only where defendant can demonstrate legitimate expectations of privacy to the place or item searched. *U.S. v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed. 2d 619 (1983); *State v. Austin*, 320 N.C. 276, 357 S.E. 2d 641 (1987); *State v. Alford*, 298 N.C. 465, 259 S.E. 2d 242 (1979). Determination of whether defendant has sufficient privacy expectations to the area searched depends upon whether defendant can show that his conduct indicated that he held an actual expectation of privacy (subjective) and whether defendant sought to preserve an item or place private and free from governmental invasion. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978); *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed. 2d 1154 (1968); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). And secondly, defendant must show that his expectation is one society is willing to recognize. *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed. 2d 220 (1979).

Further, defendant must show that he has some control or dominion over the area or thing searched, *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960) (as by having the owner's permission to reside in place searched even when defendant resides there temporarily and does not pay rent—and in addition defendant has key to premises) such may be sufficient to confer standing to object. (Although the *Jones* "Legitimately on the premises" test has been significantly circumscribed, the defendant's authorized presence on the premises searched and control factors are no less valid today.) *Rakas, supra.*

In the present case, defendant's several disclaimers of having any property or possessory interest in the residence serve to undermine his claims regarding his expectations of privacy. Moreover, although defendant had utilized the house at 619 Mt. Vernon Street as a residence for some five or six months and possessed a key to the entire house, the Record fails to make clear the arrangement by which defendant came to reside in the house or by what authority defendant remained there. The evidence shows only that the premises were leased out to an Ella Simpson, whose identity and relationship with defendant remains unknown. Even if, as defendant contends, he leased the bedroom in the house,

that alone would not be sufficient to confer standing. Defendants, who are lessees, have standing only with respect to the premises leased by them—not any other areas however adjacent or connected to the leased premises. 29 Am. Jur. 2d "Evidence," § 419 (1967).

Defendant relies heavily on our Supreme Court's decision in *State v. Austin, supra,* in which the Court found legitimate expectations of privacy where defendant had actively lived in the premises searched, received mail there, kept his clothes there, gardened the surrounding yard and as evidenced by joint rent receipts, apparently paid some rent for the premises. In the case at bar, defendant's early disclaimers of ownership in the premises coupled with the lack of any evidence (i.e. lease agreement bearing defendant's name; utility bills addressed to defendant or any indication that defendant paid rent there) suggesting a rental relationship or possessory interest in the premises outside that of the bedroom served to take defendant's argument out from under *Austin.* Without any further showing that defendant occupied or maintained control of the *entirety* of the premises by way of the lessor's permission, an informal lease agreement or by some evidence that he paid rent for the premises, defendant has failed to show the required expectations of privacy respecting the remainder of the house outside his bedroom sufficiently to constitute standing. Defendant's assignment of error is overruled.

No error.

Judges PHILLIPS and PARKER concur.

GEORGE A. BRYANT, JR., AND NANCY M. BRYANT, PLAINTIFFS v. JOHN T. EAGAN, JR., RONALD A. MATAMOROS, MARY M. EAGAN, WATERFORD—A PARTNERSHIP, DEFENDANTS

No. 8721SC735

(Filed 16 February 1988)

1. Fraud §§ 6, 9— failure to prove injury—summary judgment properly entered on fraud claim

The trial court properly granted summary judgment for defendants on plaintiffs' claim for fraud where plaintiffs alleged that they purchased one con-

dominium unit but another one was conveyed to them by mistake; the evidence showed that the mistake was discovered two months later and corrected at no cost to plaintiffs; and plaintiffs therefore did not suffer any injury.

2. Appeal and Error § 4— fraud claim asserted at trial—negligence claim improperly asserted on appeal

Plaintiffs could not assert on appeal a claim of negligence against defendant attorney, since plaintiffs asserted only a claim of fraud against him in their complaint and the negligence claim could not be asserted for the first time on appeal.

APPEAL by plaintiffs from *Wood, Judge.* Order entered 8 April 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 February 1988.

This is a civil action wherein plaintiffs seek to recover damages for alleged fraud and misrepresentation from Waterford, a general partnership that owns and develops property in Forsyth County known as "Mayfair at Country Club." Defendants John T. and Mary M. Eagan are partners in Waterford. Plaintiffs also seek to recover damages for alleged fraud and misrepresentation from Ronald A. Matamoros, an attorney who was selected by Waterford to handle the sale of a condominium unit by Waterford to the plaintiffs. For the benefit of the Mayfair Condominiums Homeowners' Association, plaintiffs further seek an order establishing an escrow account and an order for an outside CPA audit of the Association's books and records.

The record discloses the following: On 21 September 1985 plaintiffs executed a contract to purchase Unit 187 of the Mayfair Condominiums located at 632 Balfour Road. At the closing on 11 October 1985, defendant Ronald Matamoros served as closing attorney and mistakenly deeded a condominium unit located at 626 Balfour Road. Plaintiffs took possession of Unit 187 at 632 Balfour Road and the mistake was not discovered until December 1985. Upon discovery of the error Matamoros notified plaintiffs and plaintiffs executed a deed conveying the unit located at 626 Balfour Road back to Waterford. Waterford then executed a deed conveying the unit located at 632 Balfour Road to plaintiffs. At the 11 October 1985 closing Matamoros failed to collect from plaintiffs the common area charge required to be collected by the Mayfair Condominiums Homeowners' Association. Waterford also failed to collect the monthly assessments due the Mayfair Con-

dominiums Homeowners' Association from certain other homeowners.

Defendants moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Defendants' motion was supported by the affidavits of John T. Eagan and Ronald A. Matamoros. Eagan, in his affidavit, admits being a partner in Waterford and selling a condominium unit to plaintiffs. He further states that plaintiffs failed to pay Waterford the balance of the note due and payable to Waterford on 11 October 1986. Consequently, Waterford instituted foreclosure proceedings against the plaintiffs' property. Prior to the foreclosure sale of plaintiffs' property a sheriff's sale was held pursuant to a judgment obtained against plaintiffs in an unrelated claim. Waterford was the highest bidder and purchased the unit at the sheriff's sale. A foreclosure sale was then held, Waterford was again the highest bidder, and the Sheriff of Forsyth County conveyed the property to Waterford by Sheriff's Deed. On 27 January 1987 Waterford took a voluntary dismissal without prejudice of its foreclosure proceedings. Subsequent to the sale plaintiffs moved from the premises and no longer possess any ownership interest in any of the Mayfair development.

In his affidavit, Ronald Matamoros admitted to mistakenly delivering to plaintiffs the deed to 626 Balfour Road. He stated the error was corrected without cost to plaintiffs and "without any legal exposure threto [sic]." Matamoros then went on to reiterate Eagan's account of the foreclosure of plaintiffs' property.

After a hearing the trial court granted defendants' motion for summary judgment on 8 April 1987 and dismissed plaintiffs' action with prejudice. Plaintiffs appealed.

George A. Bryant, Jr., appearing pro se for plaintiffs, appellants.

Petree Stockton & Robinson, by Daniel R. Taylor, Jr., and James P. Cain, for defendants, appellees.

HEDRICK, Chief Judge.

Plaintiffs' sole contention on appeal is the trial court erred in granting defendants' motion for summary judgment. It is a fun-

damental principle of law that summary judgment should be granted only when the materials submitted to the court establish that there is no genuine issue as to a material fact and that a party is entitled to judgment as a matter of law. *Parker Marking Systems, Inc. v. Diagraph-Bradley Industries, Inc.*, 80 N.C. App. 177, 341 S.E. 2d 92 (1986). The party moving for a summary judgment has the burden of clearly establishing the lack of any triable issue of fact. *Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp.*, 52 N.C. App. 633, 279 S.E. 2d 918, *disc. rev. denied*, 304 N.C. 196, 285 S.E. 2d 101 (1981).

According to the pleadings and affidavits in the record, the parties are in agreement as to the material facts in this case. While there are some deviations and differences, they are not sufficient to raise a genuine issue of material fact. This conclusion does not end the inquiry. If there are no genuine issues of material fact the evidence offered in support of the motion must be examined in light of the substantive rules of law as they relate to a plaintiff's claim for relief in order to determine whether a party is entitled to a judgment as a matter of law. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

[1] Plaintiffs seek damages for fraud and misrepresentation from John T. Eagan, Jr., and Ronald A. Matamoros. To support an action for fraud, plaintiffs must show:

> (a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that defendant knew the representation was false when it was made or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that defendant made the false representation with the intention that it should be relied upon by plaintiffs; (e) that plaintiffs reasonably relied upon the representation and acted upon it; and (f) that plaintiffs suffered injury.

Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 253, 266 S.E. 2d 610, 615 (1980).

In an action for fraud, a defendant may prevail on a motion for summary judgment if the defendant can present material which effectively negates even one of the essential elements of fraud. *Russo v. Mountain High, Inc.*, 38 N.C. App. 159, 247 S.E. 2d

654 (1978). "It is not necessary that defendant's material negate *all* of the essential elements. . . ." *Id.* at 162, 247 S.E. 2d at 656.

While it is possible for there to be a genuine issue of material fact regarding the representations or omissions of defendants here, plaintiffs have shown no evidence of any injury resulting from the alleged representations. The only damage claimed by plaintiffs in their complaint is that "the property at 632 Balfour Road is not a [sic] attractive investment. . . ." Plaintiffs failed to further substantiate this assertion in their affidavits or pleadings and summary judgment is appropriate where the damages alleged are at best speculative. *Harris v. Maready*, 84 N.C. App. 607, 353 S.E. 2d 656 (1987). Therefore, defendants have presented material that negates the last essential element of fraud, i.e. "that the plaintiff suffered injury." The granting of summary judgment for defendants on plaintiffs' alleged claim for fraud was proper.

In their brief plaintiffs only argue their claim for negligence against Ronald A. Matamoros and fraud on the part of Waterford and John T. Eagan. Plaintiffs are thereby deemed to have abandoned their other claims of relief pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure. *See Brown v. North Carolina Wesleyan College, Inc.*, 65 N.C. App. 579, 309 S.E. 2d 701 (1983).

[2] Furthermore, plaintiffs cannot assert on appeal a claim of negligence against Matamoros. Plaintiffs, in their complaint, only assert a fraud claim against Matamoros. The claim for negligence, which was not asserted before the trial court, cannot be raised for the first time on appeal. *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 330 S.E. 2d 280 (1985), *rev'd on other grounds*, 317 N.C. 321, 345 S.E. 2d 201 (1986); *Rheinberg-Kellerei GMBH v. Vineyard Wine Co.*, 53 N.C. App. 560, 281 S.E. 2d 425, *disc. rev. denied*, 304 N.C. 588, 289 S.E. 2d 564 (1981). However, even if the claim was properly before this Court, plaintiffs' contention would be without merit. Plaintiffs have failed to demonstrate that any of Matamoros' actions proximately caused any damages whatsoever.

The decision of the trial court granting defendant's motion for summary judgment is

Affirmed.

Judges BECTON and SMITH concur.

JERRY W. WHITEHURST v. HERBERT S. COREY AND WIFE JO ANNE COREY

No. 873DC177

(Filed 16 February 1988)

Bills and Notes § 20— material fact dispute as to fiduciary relationship—performance of fiduciary duties as part of consideration for execution of note—entry of partial summary judgment erroneous

The trial court erred in entering partial summary judgment for plaintiff on his claim on a promissory note where defendants' verified pleadings revealed a material fact dispute concerning the alleged existence and effect of a fiduciary relationship between the parties, and these alleged facts were clearly material since plaintiff's performance of the alleged fiduciary duties was allegedly part of the consideration for defendants' execution of the promissory note.

APPEAL by defendants from *E. Burt Aycock, Judge.* Partial summary judgment entered 2 September 1986 in District Court, PITT County. Heard in the Court of Appeals 23 September 1987.

Charles L. McLawhorn, Jr. for plaintiff-appellee.

Hugh D. Cox for defendant-appellants.

GREENE, Judge.

In his verified complaint, plaintiff alleged defendants had defaulted on a promissory note executed in the original amount of $11,000. Plaintiff attached a copy of the promissory note to his complaint. Having alleged his acceleration of the balance due, plaintiff therefore claimed $8,000, plus interest and attorney's fees. In response, defendants' verified answer conceded execution of the note but alleged defendants had relied on plaintiff's performance of certain fiduciary duties in executing the note. Defendants claimed plaintiff's alleged breach of those duties constituted a defense to any action on the note. Defendants also counterclaimed for damages arising from plaintiff's alleged breach of these fiduciary duties. Based upon these verified pleadings, the

trial court entered partial summary judgment for plaintiff on his promissory note claim. Defendants appealed, arguing their verified pleadings raised material issues of fact precluding the court's partial summary judgment.

These facts present the following issues: I) whether the partial summary judgment against defendants affected a "substantial right" such that the interlocutory appeal is allowable under N.C.G.S. Sec. 1-277(a) (1983) and N.C.G.S. Sec. 7A-27(d)(1) (1986); and II) if so, whether defendants' pleadings have raised a genuine issue of material fact precluding the trial court's entry of partial summary judgment under N.C.G.S. Sec. 1A-1, Rule 56 (1983).

I

As the trial court failed to adjudicate defendants' counterclaims, we note the court failed to determine there was no just reason for delay of the appeal under N.C.G.S. Sec. 1A-1, Rule 54(b) (1983). The court's summary judgment is therefore interlocutory and not otherwise appealable except under Section 7A-27 and Section 1-277. *See J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E. 2d 812, 815 (1987). Section 7A-27(d) and Section 1-277(a) both provide for the appeal of any order which affects a "substantial right."

Defendants' defense to the promissory note claim and their counterclaims are both founded on proving plaintiff's breach of a fiduciary relationship with defendants. A party has a "substantial right" to avoid separate trials of the same legal issues. *See Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E. 2d 593, 596 (1982) (substantial right to avoid inconsistent determination of same legal issues was prejudiced if appeal delayed). Given the allegation of plaintiff's breach of a fiduciary relationship in both the original claim and counterclaim, we conclude defendants' substantial right will be prejudiced absent our immediate review. *See generally Slurry*, 88 N.C. App. at 9, 362 S.E. 2d at 817.

II

Rule 56(e) states in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not

> rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. [Emphasis added.]

Plaintiff argues defendants' failure to present "specific facts" in opposition to plaintiff's verified pleadings demonstrates there is no genuine issue of material fact in the case.

We disagree. Defendants' verified answer and counterclaim constitute an "affidavit" for purposes of determining either party's right to summary judgment. *See Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E. 2d 208, 213 (1972) (to extent verified pleadings meet requirements of Rule 56(e), pleadings are "affidavit"). It is true that Rule 56(e) also requires that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated [t]herein." However, while defendants' verified pleadings arguably do not conform to the formal requirements of Rule 56(e), plaintiff's failure to move to strike these allegations waives any objection to their formal defects. *See North Carolina Nat'l Bank v. Harwell*, 38 N.C. App. 190, 192, 247 S.E. 2d 720, 722, *disc. rev. denied*, 296 N.C. 410 (1979) (failure to object to form or sufficiency of pleadings and affidavits waives objection on summary judgment); *Noblett v. General Electric Credit Corp.*, 400 F. 2d 442, 445 (10th Cir. 1968), *cert. denied*, 393 U.S. 935 (1969) (affidavit not conforming to Rule 56(e) is subject to motion to strike, but objection waived absent motion); *see also* 10A C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 2738 at 507-09 (1983) (party must move to strike affidavit not conforming with Rule 56(e) before appeal).

Therefore, although plaintiff objects to the admissibility of any allegation of a parol stock sale agreement, plaintiff has waived such objection. The promissory note itself states that the note was given in exchange for plaintiff's stock. Furthermore, we note "it is rather common for a promissory note to be intended as only a partial integration of the agreement in pursuance of which it was given, and parol evidence as between the original parties

may well be admissible so far as it is not inconsistent with the express terms of the note." *Borden, Inc. v. Brower*, 284 N.C. 54, 61, 199 S.E. 2d 414, 419-20 (1973).

Construing defendants' verified pleadings in their favor as non-movant reveals a material fact dispute concerning the alleged existence and effect of a fiduciary relationship between plaintiff and defendants. These alleged facts are clearly "material" since plaintiff's performance of the alleged fiduciary duties was allegedly part of the consideration for defendants' execution of the promissory note. We also reject plaintiff's argument that defendants have alleged no facts showing detrimental reliance in support of their apparent fraud claim. Defendants' purchase of plaintiff's stock may well evidence their detrimental reliance on plaintiff's alleged representations concerning his intended fiduciary obligations.

Accordingly, we must conclude that defendants have raised material issues of fact precluding entry of summary judgment. We reverse the trial court's partial summary judgment and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. JUANITA HAYES

No. 8718SC815

(Filed 16 February 1988)

Homicide § 28.1— evidence of self-defense—refusal to instruct error

Defendant's plea of not guilty to the felony of second degree murder entitled her to offer evidence that the killing was committed in self-defense, by accident, or both; and the trial court erred in refusing to instruct the jury on self-defense where the jury could have believed the State's evidence that the stabbing was intentional while also believing that part of defendant's evidence that she pulled the knife to protect herself from serious injury.

State v. Hayes

APPEAL by defendant from *Walker (Russell G., Jr.), Judge.* Judgment entered 13 March 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 1 February 1988.

Defendant was indicted on 3 February 1986 for the first degree murder of Keith Brown. A trial was had upon defendant's plea of not guilty to the felony of second degree murder.

There were material variations in the testimony of State's witnesses and defendant's witnesses as to what actually happened on the morning in question. The State's evidence generally tends to show that Brown and several other men were drinking alcoholic beverages in the parking lot of an apartment complex in Greensboro, North Carolina. At approximately 4:00 a.m., defendant and her friend Rhonda Braxton arrived at the parking lot. An argument ensued among Brown, defendant and Braxton. The argument escalated, and Brown struck defendant on at least one occasion and either threw or pushed her to the ground on one or more occasions. Defendant then departed in the direction of her home. Several minutes later defendant returned with a knife. The argument began anew and defendant, knife in hand, began chasing Brown. Brown stopped running, and the State's evidence conflicts as to what happened next. Brown either remained stationary or advanced on defendant. He was stabbed in the chest and died as a result of a stab wound which pierced his heart and liver.

Defendant's evidence generally tends to show that on the date alleged in the indictment she and Braxton went to the parking lot where Brown was present with some of his friends. Defendant testified she had left home carrying a knife for protection and that she had the knife in her possession when she arrived at the parking lot. An argument ensued between defendant, Brown and Braxton. The argument continued and escalated. Brown struck defendant several times and either pushed or threw her to the ground. Defendant left and started towards her home. While en route, she began to worry about Braxton's safety and returned to the parking lot. Brown came over to defendant and threw her to the ground again. Defendant, believing that Brown was trying to seriously injure her, pulled the knife. Brown then "charged" defendant and impaled himself on the knife. Defendant testified she did not intend to stab Brown.

The trial court submitted to the jury the possible verdicts of guilty of second degree murder, guilty of voluntary manslaughter, guilty of involuntary manslaughter and not guilty. The trial court instructed the jury on the theories of accident, misadventure, and culpable negligence but refused defendant's request to charge on self-defense. From a verdict of guilty of second degree murder and the judgment entered thereon, defendant appeals.

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

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

SMITH, Judge.

By her first assignment of error, defendant contends the trial court erred in refusing to instruct the jury on self-defense. We agree. Defendant's plea of not guilty to the felony of second degree murder entitled her to offer evidence that the killing was committed in self-defense, by accident or both; no election was required. *State v. Wagoner*, 249 N.C. 637, 107 S.E. 2d 83 (1959); *State v. Adams*, 2 N.C. App. 282, 163 S.E. 2d 1 (1968).

In this case, the State's evidence tends to show the killing was intentional while defendant's evidence tends to show that although defendant brandished the knife to protect herself from serious injury, the killing was unintentional. In evaluating the testimony, the jury is free to believe all, some or none of a particular witness's testimony. *State v. Magnum*, 245 N.C. 323, 96 S.E. 2d 39 (1957); *State v. Simpson*, 244 N.C. 325, 93 S.E. 2d 425 (1956).

> Before the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there *any* evidence that the defendant in fact formed a belief that it was necessary to kill [her] adversary in order to protect [herself] from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given.

State v. Bush, 307 N.C. 152, 160, 297 S.E. 2d 563, 569 (1982) (emphasis added). In the case *sub judice* the jury could have believed that portion of the State's evidence tending to show an intentional stabbing while also believing that part of defendant's evidence tending to show defendant pulled the knife to protect herself from serious injury at the hands of Brown. "The contradictory statements made [at trial] do not cancel out the testimony given . . . . Evidence of contradictory statements bear on the weight to be given the testimony—[a question] for the jury." *State v. Wagoner*, 249 N.C. at 639, 107 S.E. 2d at 85.

This case is distinguishable from *State v. Wallace*, 309 N.C. 141, 305 S.E. 2d 548 (1983), in which the Supreme Court held no instructions on self-defense were required. In that case, there was no evidence from which the jury could have found that defendant believed it necessary to kill the deceased in order to save himself from death or great bodily harm or from which it could have found defendant intentionally killed the deceased while protecting himself. In this case, the facts not only required the instructions given by the trial court but also required an instruction on self-defense.

> [D]efendant's evidence, if believed, could support a verdict of involuntary manslaughter on the theory that the killing was the result of . . . reckless, but unintentional use of [a] knife. In essence, defendant's position in the case is that the killing was unintentional and accidental for which no criminal responsibility should attach. At most, the killing was the result of [her] reckless use of the knife which would amount to involuntary manslaughter. If, however, the jury should conclude that [she] intentionally wielded the knife, then it [could] acquit [her] on the grounds of self-defense. We think all of these alternatives are supported by the evidence.

State v. Buck, 310 N.C. 602, 606, 313 S.E. 2d 550, 553 (1984).

Defendant also assigns error to the State's peremptory removal of a potential juror. In view of our decision that defendant is entitled to a new trial, it is not necessary to discuss this assignment of error.

If, at a subsequent trial, the evidence is substantially the same as presented at the initial trial, all of the above instructions must be given to the jury.

New trial.

Chief Judge HEDRICK and Judge BECTON concur.

STATE OF NORTH CAROLINA v. STEVEN RAY NOLL

No. 875SC789

(Filed 16 February 1988)

Criminal Law § 146.5— guilty plea—no right of appeal

Defendant was not entitled to appeal as a matter of right where he entered a plea of guilty to ten misdemeanors. N.C.G.S. § 15A-1444(e).

APPEAL by defendant from *Griffin, Judge*. Judgments entered 22 June 1987 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 1 February 1988.

Defendant was charged in proper bills of indictment with eight counts of feloniously and intentionally distributing and dispensing a Schedule III controlled substance without a prescription in violation of G.S. 90-108(a)(2), intentionally furnishing false and fraudulent material information in a document he was required to keep and file as a dispenser of controlled substances in violation of G.S. 90-108(a)(11), and selling and delivering a Schedule III controlled substance in violation of G.S. 90-95(a)(1).

Defendant entered a plea of guilty to ten counts of refilling a prescription more than five times after the date of the prescription, misdemeanors, all in violation of G.S. 90-106(c) and G.S. 90-108(a)(2). The transcript of plea discloses the following:

> 11. Have you agreed to plead as part of a plea arrangement? Before you answer, I advise you that the Courts have approved plea negotiating, and if there is such, you may advise me truthfully without fear of incurring my disapproval.
>
> Answer: Yes sir.
>
> 12. [If applicable] The prosecutor and your lawyer have informed the Court that these are all the terms and conditions of your plea. Upon plea to above, all remaining charges

against the Defendant will be dismissed. The State will make no argument regarding sentencing.

(a) Is this correct as being your full plea arrangement? Answer: Yes sir.

(b) Do you now personally accept this arrangement? Answer: Yes sir.

Upon defendant's plea of guilty in accordance with the plea arrangement the court sentenced defendant to two years imprisonment for two consolidated counts, two years for two other consolidated counts, and two years each for the remaining six counts of refilling a prescription more than five times after the date of the prescription. All the sentences were suspended, and defendant was placed on unsupervised probation. As a special condition of probation the judge ordered defendant to surrender his "License for the Practice of Pharmacy to the Pharmaceutical Licensing Board for 12 Months and not engage in the Practice of Pharmacy for this period of time." Defendant appealed.

Attorney General Lacy H. Thornburg, by Gerald M. Swartzberg, for the State.

Shipman & Lea, by Gary K. Shipman, for defendant, appellant.

HEDRICK, Chief Judge.

Although the State has failed to recognize or discuss the matter, we must consider the appealability of these cases now before us.

G.S. 15A-1444(e) in pertinent part provides:

> Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

G.S. 15A-1444(a1) in pertinent part provides:

A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, 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.

G.S. 15A-979(b) states that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty."

Defendant has entered a plea of guilty to ten misdemeanors. Since none of the above exceptions apply in this case, defendant is not entitled to appeal as a matter of right. Defendant has not filed a petition for writ of certiorari and so the appeal must be dismissed.

Appeal dismissed.

Judges BECTON and SMITH concur.

JOYCE MORLEY v. E. K. MORLEY

No. 8729SC305

(Filed 16 February 1988)

Divorce and Alimony § 21; Interest § 2— promissory note—payment into clerk's office—accrual of interest—not stopped

In an action to recover on a promissory note, the trial court did not err in requiring defendant to make payment with interest, and there was no merit to defendant's contention that his payment of an amount into the clerk's office pursuant to an *ex parte* order stopped the accrual of interest.

APPEAL by defendant from *Snepp, Judge*. Order entered 29 December 1986 in Superior Court, HENDERSON County. Heard in the Court of Appeals on 19 October 1987.

John E. Shackelford for plaintiff appellee.

E. K. Morley, pro se, defendant appellant.

COZORT, Judge.

Plaintiff initiated this action upon defendant's failure to pay on a promissory note. From an order requiring him to make payment with interest, defendant appeals. We affirm.

On 5 December 1983, defendant executed and delivered to plaintiff a promissory note for $30,000. The note was given to plaintiff as settlement for her interest in the household goods and furnishings acquired during the time plaintiff and defendant were married to each other. The terms of the note provided for repayment on 15 January 1985, or on the date of the parties' divorce, whichever occurred last.

On 29 April 1985, plaintiff filed a complaint alleging that the note became due on 12 April 1985, and that although demand had been made, defendant had failed to make payment. Defendant answered on 11 June 1985, alleging as a defense for nonpayment that prior to signing the note, plaintiff had promised him that she would have an English longcase clock bonnet and face professionally repaired and delivered to him. Defendant then alleged that plaintiff's nonperformance of this promise was a failure of consideration on the promissory note.

As an additional defense, defendant offered a 10 June 1985 court order which required him to pay $29,000 to the clerk of court. Defendant had obtained this order *ex parte*, without notice to plaintiff after she filed her complaint and before he filed his answer. Under the order, defendant voluntarily surrendered $29,000 to the court so that it could be applied against his indebtedness under the note, pending a determination by the court as to the amount of money owed plaintiff. Defendant also counterclaimed for unperformed repairs to the clock and requested that the court set off the amount of damages due for such by $1,000.

Pursuant to plaintiff's motion for judgment on the pleadings and defendant's motion for summary judgment, the trial court entered an order which stated that $30,000 was due plaintiff on the note, subject to a setoff of $755 for the unrepaired damages to the clock. The trial court also ordered that defendant pay interest on

the net balance at the rate of eight percent per annum from the day the suit was filed.

Once the order was entered, the clerk of court paid plaintiff $29,245 from the funds deposited by defendant. This satisfied the court's order, except as to the award of interest. Defendant made a motion for a new trial or to alter or amend the judgment to delete any requirement that he pay interest on the grounds that tender of payment into the court stopped the accrual of interest. The trial court denied defendant's motion, concluding that "the [tender] made by the Defendant, [was] not effective to prevent the running of interest on the Judgment." From this order, defendant appeals.

Defendant argues that the trial court erred in concluding that the tender of payment pursuant to a court order did not prevent the running of interest. We disagree.

There is no dispute that the $30,000 note was due and that defendant failed to pay. The only dispute concerned the amount to be set off from the $30,000 for repairs to the clock. Defendant contended that the clock was damaged in the amount of $1,000 and the award should be set off by that amount, while plaintiff believed that damages were much less. Regardless of the amount of damages, it is undisputed that defendant owed plaintiff at least $29,000.

Rather than paying $29,000 directly to plaintiff, defendant paid the money into court, pursuant to an *ex parte* order which he obtained without plaintiff's notice. Plaintiff had no access to this money unless she accepted defendant's claim for $1,000 in damages. Since she disagreed as to the amount of damages to the clock, plaintiff was deprived of the use of the money from the day it was due until a final judgment on damages was entered. "A debt draws interest from the time it becomes due. When interest is not made payable on the face of the instrument, it is in the nature of damages for the retention of the principal debt." *Bank v. Insurance Co.*, 209 N.C. 17, 19, 182 S.E. 702, 704 (1935). By obtaining the *ex parte* order, defendant retained the $29,000 and prevented plaintiff from enjoying its use. He should be required to pay interest for the time he retained it.

The order of the trial court is

Affirmed.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. KENNETH EDWARD LYTTON

No. 8727SC667

(Filed 16 February 1988)

Larceny § 7.10— possession of recently stolen property—four days between taking and possession—sufficiency of evidence

Evidence was sufficient to raise the doctrine of possession of recently stolen property where it tended to show that only defendant and his cohort in crime exercised any possession or control over stolen guns; the interval between the larceny and defendant's possession could have been as long as four days; and this possession was soon enough to support an inference that defendant helped steal the guns.

APPEAL by defendant from *Lamm, Judge.* Judgment entered 11 May 1987 in Superior Court, GASTON County. Heard in the Court of Appeals 10 December 1987.

Attorney General Thornburg, by Special Deputy Attorney General Guy A. Hamlin, for the State.

R. Locke Bell for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of feloniously stealing two .22 rifles, two Remington shotguns, and several other articles from the home of Jim Funderburk near Bessemer City on or about the 4th day of December 1986. That the articles were stolen from Funderburk's house between 30 November 1986 and 5 December 1986 while Funderburk was out of state is not questioned. What is questioned by defendant's only assignment of error is whether the evidence was sufficient to raise the doctrine of "recent possession," which permits the jury to infer that one who possesses stolen goods recently after their larceny did the stealing. *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972). The evidence was sufficient to raise the doctrine in our opinion and the assignment is overruled.

In addition to showing that Funderburk's home was broken into and his guns and other articles stolen, *the State's evidence*, in pertinent part, indicates that: Defendant, Joe Teague, and another man lived with defendant's half-sister in a trailer in Bessemer City that she rented; around 8 o'clock in the evening of 4 December 1986 defendant was arrested on the streets of Bessemer City for driving while impaired and he remained in custody until about 1 o'clock the next morning when Jimmy Bell picked him up at the jail and drove him home; on the way defendant asked Bell if he wanted to buy some guns, but Bell said he did not because he had no money; nevertheless, when they got to the trailer Bell went in with defendant and looked at the guns, which were standing up in a closet; the trailer was a "little old bitty" thing and the other three occupants were all there; Bell went back to the trailer the next day and bought two of the guns and the day after that he went back and bought the other two; in the first transaction defendant and Teague established the price of the guns at "$150 and something," Bell told defendant he would give $125, defendant checked the price with Teague, and Bell handed defendant the money; in the second purchase Bell gave the money to Teague. *Defendant's evidence* indicates that Teague pled guilty to breaking into Funderburk's house and stealing the guns and was then in prison.

Defendant contends that the evidence fails to raise the recent possession doctrine in two respects, the first of which is that it does not show that the stolen property was in his *exclusive* custody or possession, as *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981) requires. But *exclusive* possession does not necessarily mean sole possession, as that decision makes clear; it means possession "to the exclusion of all persons not party to the crime," *State v. Maines, supra*, at 675, 273 S.E. 2d at 294, and the evidence here tends to meet that test. For Teague was a party to the crime and the evidence does not suggest that anyone other than defendant and Teague possessed, controlled, or had anything to do with the guns; instead, it tends to show that only they had and controlled the guns by showing them to Bell, offering to sell them, setting their price, and receiving the purchase money. The other contended deficiency in the evidence is that it does not show that defendant's possession of the guns was soon enough after their larceny to be "recent." The interval between the

larceny and defendant's possession according to the evidence could have been as long as four days; for the guns could have been stolen the day Funderburk left town and defendant offered to sell them immediately after leaving the jail, which indicates that he had them before he was arrested the evening before. What period after a larceny is recent depends upon the circumstances, *State v. Blackmon*, 6 N.C. App. 66, 76, 169 S.E. 2d 472, 479 (1969), and since guns are not usually traded between individuals as easily and often as many other articles, we believe that the evidence is sufficient to show that defendant's possession of the guns was soon enough after their larceny to support the inference that he helped steal them.

No error.

Judges EAGLES and PARKER concur.

CARY FAMILY MEDICINE, A NORTH CAROLINA CORPORATION, AND KAREN M. POWER v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

No. 8710SC651

(Filed 16 February 1988)

Insurance § 38.4— group health insurance—misrepresentations as to medical examinations and disorders—plaintiff not entitled to coverage

The trial court properly determined that plaintiff was not entitled to insurance coverage under a group policy written by defendant where plaintiff made material misrepresentations with regard to examinations by doctors during the previous five years and indications of any disorders not disclosed in other questions, since plaintiff indicated no examinations and no knowledge of any disorders when in fact she had known about a lump in her hand for one and one-half years, had seen three physicians about the lump, and was scheduled to have the lump surgically excised at the time she made application for insurance coverage, and the lump proved to be a rare form of cancer requiring extensive treatment.

APPEAL by plaintiffs from *Barnette, Judge*, at the 10 March 1987 Civil Non-Jury Session of Superior Court, WAKE County. Heard in the Court of Appeals 4 December 1987.

William A. Smith, Jr., for plaintiff appellants.

Emanuel and Emanuel by Robert L. Emanuel for defendant appellee.

COZORT, Judge.

Plaintiff Karen Power, an employee of plaintiff Cary Family Medicine, Inc. (CFM), submitted a written application to be included in CFM's group medical insurance plan provided by defendant Prudential Insurance Company of America (Prudential). Power submitted the application on 7 June 1984, and Prudential provided coverage for her beginning 14 June 1984. On 10 July 1984 Power had a small tumor removed from her hand. Pathological studies revealed a rare form of cancer. Power submitted claims to Prudential for the numerous treatments and extensive medical expenses which followed discovery of the malignancy. Prudential refused to pay the claims. On 12 September 1985 Power and CFM filed a Declaratory Judgment action asking the court to declare that a valid contract of insurance existed between Power and defendant Prudential. After defendant filed its answer and substantial discovery was conducted, Prudential moved, on 26 April 1986, for summary judgment. The trial court filed a judgment on 12 March 1987 declaring that Power was not entitled to coverage under Prudential's contract with CFM. Plaintiffs appeal. We affirm.

Plaintiffs submit one argument on appeal: That the trial court erred by entering judgment for defendant because there are genuine issues of material fact which should be tried before a jury. We disagree. Defendant's denial of coverage was based on Power's answers to questions in the application relating to examinations by physicians within the past five (5) years and the existence of any disorder or disease not disclosed in the answer to previous questions. Specifically, Power answered the pertinent questions as follows:

> 9. Have you, within the past 5 years, consulted or been attended by or been examined by any doctor or other practitioner?
>
> No.

10. Have you any deformity, or any indication of any physical or mental disorder or any disease not disclosed in the answers to Questions 6, 7, 8 or 9?

No.

11. Give below details of "Yes" answers:

* * * *

9. Annual OB/GYN check up—2-84 . . . Dr. Telfer, Cary, N. C. All OK—clean bill of health.

During discovery, uncontroverted evidence was established that Power knew she "probably" had a lump on her hand for about a year and a half prior to 7 June 1984 and that she had seen three physicians about the lump within that year and a half. At the time she made application for insurance coverage, she was scheduled to have the lump surgically excised, although the exact date of surgery had not been established. None of these facts were disclosed in the application for coverage. Defendant submitted an affidavit from one of its underwriting officials testifying that, had these facts been disclosed in the application, Power would have been rejected for coverage under CFM's policy, consistent with defendant's established underwriting practices, policies and procedures.

We hold this uncontroverted evidence is a sufficient basis for the trial court's granting of summary judgment.

N.C. Gen. Stat. § 58-30 provides:

> All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy.

Our review of the record below leads us to the inescapable conclusion that Power's responses to questions 9, 10, and 11 must be deemed material misrepresentations and that the defendant was justified in denying coverage when the facts became known. Power's answers were clearly false, and their materiality cannot be seriously debatable, given the affidavit of defendant's underwriting official.

Plaintiffs argue that the defendant must show, in addition to the fraudulent and material statements, that the statements were *knowingly* and *willfully* made, and that those two issues should be passed on by the jury. Plaintiffs rely on *Bryant v. Nationwide Insurance Company*, 313 N.C. 362, 329 S.E. 2d 333 (1985). Their reliance is misplaced; *Bryant* is distinguishable.

In *Bryant*, the Supreme Court held that it was a jury question on whether the insured had misrepresented his marital status and financial condition during the insurer's investigation of his claim. *Id.* at 372, 329 S.E. 2d at 339. The court found there was a question of the materiality of the facts misrepresented. *Id.* at 372, 329 S.E. 2d at 340. Further, the insured had limited education; there was repeated extensive questioning by the insurer; and there were questions as to whether the insured's answers were to the best of his ability. *Id.* at 374-75, 329 S.E. 2d at 340-41.

None of those facts or issues are present in the case below. The materiality of Power's answers are obvious. The other issues present in *Bryant* were simply nonexistent below. Judgment for defendant was correct, and the trial court is

Affirmed.

Judges BECTON and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 FEBRUARY 1988

BOONE v. LINDLEY No. 8715SC603	Alamance (86CVS207)	Affirmed
CALCUTTA OFFICE CONDOMINIUMS v. FAIRWAY, LTD. No. 8726SC826	Mecklenburg (84CVS9593)	Affirmed
CAROLINA STEAMSHIP CO. v. INTERNATIONAL LONGSHOREMEN No. 875SC705	New Hanover (87CVS524)	Appeal Dismissed
EDWARDS v. PARKWAY HOMES No. 8710IC487	Ind. Comm. (953636)	Dismissed
GEE v. GEE No. 8710DC673	Wake (85CVD6619)	Remanded
HEDRICK v. HEDRICK No. 8730DC890	Cherokee (84CVD249)	Vacated
IN RE HASSELL No. 871DC738	Dare (87J5)	Appeal Dismissed
JUDA v. N.C. NATIONAL BANK CORP. No. 8715SC288	Orange (86CVS454)	Vacated and Remanded
SAKIEWICZ v. RICKS No. 8710SC614	Wake (86CVS2268)	No Error
SARANT v. SARANT No. 8712DC538	Cumberland (86CVD2461)	Affirmed
STATE v. BROWN No. 876SC716	Halifax (86CRS1267)	Affirmed
STATE v. HAGAN No. 876SC472	Halifax (86CRS8423)	No Error
STATE v. McDOWELL No. 8729SC906	Polk (86CRS1930) (86CRS1931) (86CRS1932) (87CRS37)	No Error

STATE v. MARTIN No. 8722SC847	Davidson (84CRS13949) (84CRS13950) (84CRS13951) (84CRS13952) (84CRS13953) (84CRS13954) (84CRS13955) (84CRS13956) (84CRS13957) (84CRS13958) (84CRS13959) (84CRS13960) (84CRS13961) (84CRS13962) (84CRS13963) (84CRS13964) (84CRS13965) (84CRS13966) (84CRS13967) (84CRS13968) (84CRS13969) (84CRS13970) (84CRS13971) (84CRS13972) (84CRS13973)	Reversed
STATE v. PARKS No. 8716SC917	Scotland (85CRS7230)	No Error
STATE v. PUGH No. 8713SC743	Brunswick (86CRS6376) (86CRS6377) (87CRS479) (87CRS480)	Affirmed in part; reversed in part.
STATE v. SPENCER No. 8720SC767	Richmond (86CRS6770)	No Error
STATE v. WIGGINS No. 877SC929	Nash (86CRS16986) (86CRS16987)	No Error
STATE EX REL. BOWE v. MARTIN No. 871DC754	Camden (84CVD5)	Affirmed
STATE EX REL. PENDER COUNTY CHILD SUPPORT v. BROWN No. 875DC163	Pender (85CVD152)	No Error

SUTTON v. SUTTON No. 8719DC624	Rowan (84CVD1072)	Affirmed
WALLACE v. ANDREWS No. 8724DC823	Watauga (86CVD353)	Affirmed
WILSON v. WILSON No. 8727DC641	Cleveland (81CVD57)	Vacated and Remanded

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

§ 2. Accounts Stated

Defendant's acknowledgment and promise to pay an indebtedness coupled with her failure to object to receipt of several notices regarding the indebtedness did not constitute an account stated. *G. R. Little Agency, Inc. v. Jennings*, 107.

ADMINISTRATIVE LAW

§ 4. Procedure, Hearings and Orders of Administrative Boards

Punishment imposed on a police officer by the City of Charlotte Civil Service Board for residing outside the county was invalid on the ground of res judicata where the officer had earlier been punished for the same offense by the police department Chain of Command Review Board. *In re Mitchell*, 602.

ADVERSE POSSESSION

§ 25.2. Particular Cases where Evidence Was Insufficient

The trial court's conclusion in an adverse possession case that plaintiff was not entitled to a certain portion of property forming a part of plaintiff's yard was not supported by sufficient findings of fact where the only finding was that plaintiff's tenant never considered such portion of the yard to be owned by plaintiff. *Curd v. Winecoff*, 720.

APPEAL AND ERROR

§ 4. Theory of Trial in Lower Court

A claim of negligence could not be asserted against defendant attorney for the first time on appeal. *Bryant v. Eagan*, 741.

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

The trial court's summary judgment dismissing plaintiff's claims affected a substantial right such that it was immediately appealable in that there was the possibility of an inconsistent verdict on defendants' counterclaim trial. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 1.

Plaintiff's appeal from an order setting aside a default judgment was premature and must be dismissed. *Horne v. Nobility Homes, Inc.*, 476.

Defendant's appeal from that portion of the court's order allowing the original plaintiff to amend her complaint is dismissed as premature. *Barber v. Woodmen of the World Life Ins. Society*, 666.

§ 14. Appeal and Appeal Entries

Notice of appeal was not timely given where the jury returned a verdict on 29 January 1987, Patel's motion for judgment n.o.v. or for a new trial was denied in open court on 30 January, the order denying Patel's motion was not signed until 9 February and notice of appeal was given on 18 February. *Patel v. Mid Southwest Electric*, 146.

§ 16. Powers of Trial Court after Appeal

The trial court had no jurisdiction to grant a new trial when notices of appeal were filed the same day as the motion for a new trial even though defendants had filed motions for stay of proceedings one minute before filing their notices of appeal. *Seafare Corp. v. Trenor Corp.*, 404.

APPEAL AND ERROR — Continued

§ 42.2. Presumptions with Respect to Record

The trial court's finding of an assignment of a lease from the original lessor to plaintiff was presumed to be supported by competent evidence where an officer of plaintiff testified to the assignment and six minutes of his testimony were missing but no effort was made to summarize or reconstruct his testimony. *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig,* 418.

ARBITRATION AND AWARD

§ 4. Proceedings by Arbitrators

The arbitrators conducted a hearing contrary to the provisions of G.S. 1-567.6 in their basic refusal to hear evidence which would have interfered with their desire to dispose of the controversy as quickly as possible. *Wildwoods of Lake Johnson Assoc. v. L. P. Cox Co.,* 88.

ARREST AND BAIL

§ 6.2. Resisting Arrest; Sufficiency of Evidence

The trial court erred by denying defendant's motions to dismiss charges of resisting a public officer where deputies entered defendant's home to arrest him without his consent on an arrest order for civil contempt which was not in the deputy's possession. *S. v. Hewson,* 128.

ASSAULT AND BATTERY

§ 5.3. Assault with Deadly Weapon; Relation to other Crimes

Defendant was not placed in double jeopardy by convictions for discharging a firearm into an occupied vehicle and assault with a deadly weapon. *S. v. Messick,* 428.

§ 14.2. Sufficiency of Evidence of Assault with Deadly Weapon where Weapon Is Firearm

The trial court was not required to dismiss one of two assault charges against defendant because defendant was unaware that there were two people in the car upon which he fired with a semi-automatic rifle. *S. v. Messick,* 428.

§ 14.6. Sufficiency of Evidence of Assault on Law Enforcement Officer

Law officers who were investigating an accident in an off-street parking lot at a dentist's office were performing a duty of their office so as to support defendant's conviction of feloniously assaulting the officers in the performance of their duties even though an investigation may not have been required by statute in this case. *S. v. Adams,* 139.

The State's evidence was sufficient to support defendant's conviction of assaulting two law officers with a deadly weapon where it showed that defendant threatened to kill the officers if they tried to touch him and began cleaning his fingernails with a knife. *Ibid.*

ASSIGNMENTS

§ 1. Rights and Interests Assignable

Legal title to an action may be partially assigned. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.,* 1.

CONSTITUTIONAL LAW — Continued

it protection under the U.S. Constitution, but states are free to recognize non-final foreign judgments under the principle of comity. *Allsup v. Allsup*, 533.

§ 45. Right to Appear Pro Se

Where defendant waived the right to counsel and was told at a pretrial hearing that a non-lawyer could sit beside defendant and assist as he represented himself but would not be permitted to address the court or speak on defendant's behalf, the trial judge was not required to make a de novo determination of whether defendant wished to have the assistance of counsel when the trial judge informed defendant that a non-lawyer could not sit with defendant at counsel table but could only sit behind him. *S. v. Messick*, 428.

CONTRACTS

§ 6.2. Contracts Relating to Domestic Relationships

Agreements regarding the finances and property of an unmarried cohabiting couple are enforceable as long as sexual services or promises do not provide the consideration for such agreements. *Suggs v. Norris*, 539.

§ 7.1. Contracts Restricting Competition between Employers and Employees

A provision in plaintiff physician's employment contract precluding post-termination benefits if plaintiff engages in a "similar" medical practice in Wake County within three years after his initial employment with defendant was not a covenant not to compete subject to strict public policy limitations. *Newman v. Raleigh Internal Medicine Assoc.*, 95.

§ 21. Sufficiency of Performance

Evidence that defendant merely asked noteholders to sign a release of a lot from a deed of trust did not show substantial performance by defendant of his contractual obligation to furnish the release. *Hinkle v. Bowers*, 387.

§ 21.3. Anticipatory Breach

The trial court erred in finding an anticipatory breach of a contract requiring defendant to make mortgage payments on a house purchased for plaintiff. *Pitts v. Broyhill*, 651.

§ 23. Waiver of Breach

The trial court properly dismissed plaintiffs' complaint for breach of contract based on an alleged agreement by defendants to sell plaintiffs a house free from termites. *Robertson v. Boyd*, 437.

§ 27.2. Sufficiency of Evidence of Breach

The evidence was sufficient for the jury on plaintiff's claim for breach of a contract to deliver a Jaguar automobile to plaintiff within a certain time for a certain price. *Foley v. L & L International*, 710.

The trial court properly found that defendant breached the parties' contract by failing to make the payments on a deed of trust. *Pitts v. Broyhill*, 651.

§ 27.3. Sufficiency of Evidence of Damages

A contract for the sale of a vehicle which promised delivery within 90 days or plaintiff's deposit would be refunded did not limit plaintiff's relief to refund of the deposit. *Foley v. L & L International*, 710.

CRIMINAL LAW — Continued

chased drugs from another person was not inadmissible pursuant to Rule of Evidence 404(b) but was admissible to establish a positive identification of defendant. *S. v. Fielder*, 463.

§ 73. Hearsay Testimony in General

The trial court did not err in a prosecution for placing LSD in a coffeepot at a restaurant at Appalachian State University by allowing a witness to testify that a co-conspirator had said "we are going to do this." *S. v. Phillips*, 526.

§ 89.6. Impeachment of Witnesses

The trial court did not err in an action in which defendant was convicted of misusing county property by refusing to admit the decision of the North Carolina Employment Security Commission determining eligibility for unemployment benefits. *S. v. Anderson*, 545.

§ 101.1. Statements of Prospective Jurors

The trial court did not err in denying defendant's motion for a new trial based on comments by a prospective juror that he knew defendant's brother who was incarcerated in a correctional facility at which he worked and that "it ran in the family." *S. v. McKinney*, 659.

§ 102.7. Jury Argument; Comment on Credibility of Witnesses

The district attorney's closing argument concerning his opinion as to who was telling the truth and his personal reasons for granting concessions to alleged codefendants did not rise to the level of prejudice requiring a new trial. *S. v. Phillips*, 526.

§ 117.4. Charge on Credibility of Accomplices

The trial judge properly instructed the jury on accomplice testimony. *S. v. Diaz*, 699.

§ 128.2. Particular Grounds for Mistrial

The trial court did not err in refusing to grant a mistrial in a prosecution for disseminating obscenity when an officer testified that his opinion was that the materials in question were obscene. *S. v. Roland*, 19.

§ 134.4. Sentence for Youthful Offenders

The record shows that the trial court did not refuse to sentence defendant as a committed youthful offender because it thought defendant was not eligible for such treatment. *S. v. McKinney*, 659.

§ 138.8. Severity of Sentence; Opportunity for Defendant to Introduce Evidence in Rebuttal or Mitigation

G.S. § 15A-825, authorizing victim impact statements, cannot supersede a defendant's constitutional right to confront and cross-examine witnesses against him. *S. v. Phillips*, 526.

§ 138.23. Severity of Sentence; Aggravating Factor of Use of Deadly Weapon

Defendant's possession and use of a pistol could not be used as a factor in aggravation of voluntary manslaughter, but the trial court could properly find as a non-statutory aggravating factor that defendant returned with a loaded pistol to a location where he previously had had trouble and had been told to stay away. *S. v. McKinney*, 659.

CRIMINAL LAW — Continued

§ 146.5. Appeal from Sentence Imposed on Plea of Guilty

Defendant was not entitled to appeal as a matter of right where he entered a plea of guilty to ten misdemeanors. *S. v. Noll*, 753.

DAMAGES

§ 9. Mitigation of Damages

The evidence supported the trial court's finding that plaintiff attempted to mitigate its damages after defendant breached an equipment lease. *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig*, 418.

The trial judge in an automobile accident case committed no error in failing to instruct the jury that plaintiff's failure to fasten his seat belt could be used to reduce or minimize damages. *Hagwood v. Odom*, 513.

§ 10. Credit on Damages

Defendants' right to have plaintiff's damages reduced by the amount of settlements with codefendants was not conditioned on the application of the Uniform Contribution among Tort-Feasors Act but was based on the principle that plaintiff could have only one recovery for its injury, and the trial court properly credited defendants with the right amount. *Seafare Corp. v. Trenor Corp.*, 404.

The trial court erred in reducing plaintiff's damages by the amount of settlements with original codefendants before rather than after trebling the jury's award of damages. *Ibid.*

§ 11.1. Punitive Damages; Circumstances where Appropriate

Punitive damages were properly awarded in an action to recover for the supply and installation of glasswork where the evidence and findings supported the trial court's conclusion that defendant defrauded plaintiff. *Jennings Glass Co. v. Brummer*, 44.

§ 17.4. Instructions; Use of Mortuary Tables

Where the issue of permanent injury was raised by plaintiff's evidence, the court properly instructed the jury on plaintiff's life expectancy as shown by the mortuary tables even though the tables were not introduced into evidence. *Thomas v. Dixson*, 337.

DEEDS

§ 20.4. Restrictive Covenants in Subdivisions; Architectural and Aesthetic Restrictions

Three radio towers are "structures" within the meaning of subdivision restrictive covenants so that written approval of the Architectural Control Committee was required before they could properly be erected on a subdivision lot. *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 83.

§ 20.8. When Restrictions in Subdivisions Will Be Declared Unenforceable

A subdivision property owners association did not waive its right to enforce a restrictive covenant requiring written approval of plans for any structures against three radio towers erected by a subdivision resident when it gave another resident oral permission to erect a single radio tower. *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 83.

DIVORCE AND ALIMONY

§ 17. Alimony upon Divorce from Bed and Board

A finding of constructive abandonment as a grounds for alimony may be supported by willful spousal misconduct notwithstanding the absence of evidence of physical cruelty or willful failure to provide economic support. *Ellinwood v. Ellinwood*, 119.

§ 18.11. Alimony Pendente Lite; Findings as to Dependency

The trial court's determination that plaintiff was a dependent spouse entitled to alimony pendente lite was supported by the evidence and by a stipulation. *Weaver v. Weaver*, 634.

§ 18.16. Attorney's Fees

The trial court did not err in awarding additional attorney fees to plaintiff in a contempt proceeding based on defendant's failure to pay alimony. *Patton v. Patton*, 715.

Plaintiff dependent spouse was entitled to counsel fees pendente lite even though she had been found in contempt for removing personalty from the marital home. *Weaver v. Weaver*, 634.

§ 19.3. Modification of Alimony Decree; Requirement of Changed Circumstances

Defendant failed to show a substantial change of circumstances to warrant modification of an alimony order where his arguments were based only on income of the parties. *Patton v. Patton*, 715.

§ 19.5. Modification of Alimony Decree; Effect of Separation Agreements

The parties could enter into a contract to alter the terms of a separation agreement which had been incorporated into a divorce decree, and the contract to alter the terms of a separation agreement in this case was supported by consideration. *Pitts v. Broyhill*, 651.

§ 20.2. Divorce as Affecting Right to Alimony; Effect of Separation Agreements and Consent Decrees

The trial court erred in finding that a monthly $400 payment from defendant to plaintiff required by a consent judgment was a part of a property settlement rather than alimony and that defendant's obligation to pay thus did not terminate upon plaintiff's remarriage. *Garner v. Garner*, 472.

§ 20.3. Divorce as Affecting Right to Alimony; Attorney's Fees

The North Carolina court erred by awarding attorney fees to the petitioner in an action for the enforcement of South Carolina alimony orders in North Carolina. *Allsup v. Allsup*, 533.

§ 21. Enforcement of Alimony Awards Generally

Defendant's payment of an amount into the clerk's office pursuant to an ex parte order did not stop the accrual of interest on a promissory note, and the trial court did not err in requiring defendant to make payment of the note with interest. *Morley v. Morley*, 755.

§ 21.5. Enforcement of Alimony Awards; Punishment for Contempt

The trial court did not err in holding defendant in willful contempt for failure to pay alimony without a specific finding of ability to pay where there was sufficient evidence that defendant was capable of complying with the court's order. *Patton v. Patton*, 715.

DIVORCE AND ALIMONY — Continued

§ 21.8. Enforcement of Foreign Alimony Awards

The North Carolina court did not err by confirming registration of South Carolina alimony orders under North Carolina's Uniform Reciprocal Enforcement of Support Act. *Allsup v. Allsup*, 533.

An obligee may not strip an obligor of rights and defenses otherwise available by the simple expedient of litigating under URESA rather than G.S. 50-16.9(c). *Ibid.*

§ 23.6. Child Custody; Refusal to Take Jurisdiction

The trial court properly declined to assume jurisdiction over a child custody dispute based on plaintiff's misconduct in removing her children from Florida without the prior written consent of defendant or court approval. *Danna v. Danna*, 680.

§ 24.4. Enforcement of Child Support Orders

Where the trial court established a trust consisting of the parties' real and personal property, appointed the attorneys of the parties as co-trustees, and ordered that the trust proceeds be used for the support of plaintiff and the parties' minor children, the court did not err in failing to establish a receiver for the property and to provide for accountability by the trustees. *Weaver v. Weaver*, 634.

§ 24.11. Review of Child Support Orders

The trial court erred by denying defendant's motion to reopen a nunc pro tunc child support order under the Soldiers and Sailors Relief Act. *Smith v. Davis*, 557.

§ 30. Equitable Distribution

The trial court's findings in an equitable distribution action were sufficient to support the court's conclusion that the parties separated on 26 December 1983 rather than in 1979 when plaintiff's employment was transferred to Boston, Mass. *Hall v. Hall*, 297.

Stock options granted to an employee by his or her employer which are exercisable upon the date of separation or which may not be cancelled and are thus vested as of the date of separation are marital property. *Ibid.*

The trial court in an equitable distribution action did not err when ruling that a professor of economics was qualified to testify as an expert witness in valuing plaintiff's employee savings and investment plan, pension plan, and stock options, and in valuing the "human capital" or earning capacity of the parties. *Ibid.*

The evidence did not support the trial court's valuation of a limited partnership tax shelter purchased by plaintiff husband. *Ibid.*

The facts found by the trial court did not compel an unequal division of the marital assets in defendant wife's favor. *Ibid.*

The presumption of a marital gift for entireties property purchased by a spouse with separate property is still the law in this state. *McLean v. McLean*, 285.

The trial court did not err in finding that defendant husband failed to rebut the presumption of a gift to the marital estate of funds inherited from his father which were used to purchase a house and an office building placed in the names of both spouses as tenants by the entireties. *Ibid.*

A promissory note given in exchange for the husband's separate property remained the husband's separate property even though the names of both spouses were on the note. *Ibid.*

DIVORCE AND ALIMONY — Continued

The trial court did not err in classifying corporate stock issued in the name of defendant husband alone as marital property although defendant testified that the stock was a gift from the corporation's president. *Ibid.*

The trial court did not err in the admission of the opinion of plaintiff wife's expert witness regarding the value of defendant husband's law practice. *Ibid.*

The trial court's valuation of defendant's law practice at $35,000 was not supported by the evidence. *Ibid.*

The trial court in an equitable distribution action should have credited defendant with the amount by which he decreased the principal amount of the joint debt on the home of the parties by payments made from his separate property after the date the parties separated. *Ibid.*

The trial court did not err in ordering the distribution of personal property in a manner different than that agreed upon in a handwritten memorandum where the agreement was not acknowledged before a certifying officer. *Ibid.*

The location in North Carolina of some personal property in which the nonresident defendant might have an interest because of the equitable distribution statutes did not give the North Carolina courts jurisdiction over defendant in an equitable distribution action. *Carroll v. Carroll*, 453.

The trial court in an equitable distribution proceeding erred in classifying as marital property the rental value of the marital residence during the post-separation period when it was occupied by defendant. *Becker v. Becker*, 606.

The evidence supported the trial court's finding that oriental rugs and an antique secretary were marital property in that they were either gifts to the parties' marriage or were acquired by defendant during the marriage but not by gift. *Ibid.*

The trial court on remand was not required to hear more evidence of valuation of a closely held corporation and made a sufficient finding of fact as to the value of defendant's interest in the corporation. *Patton v. Patton*, 715.

EASEMENTS

§ 6.1. Easements by Prescription; Evidence

Plaintiffs in a prescriptive easement case presented sufficient evidence of a continuous use of a farm road for a definite twenty-year period. *Presley v. Griggs*, 226.

Plaintiffs presented sufficient evidence in a prescriptive easement action that the use of a farm road was hostile, adverse, and under a claim of right. *Ibid.*

Plaintiffs in an action for a prescriptive easement over a farm road presented sufficient evidence to allow the jury to infer that the farm road constituted a sole means of access to their tract of land. *Ibid.*

§ 7.2. Actions to Establish Easements; Findings

The trial court's findings of fact were insufficient to support a conclusion as to whether defendants' actions fulfilled the essential elements of either an implied or a prescriptive easement across plaintiff's property. *Curd v. Winecoff*, 720.

ELECTRICITY

EMINENT DOMAIN

EVIDENCE

EVIDENCE — Continued

§ 31.1. Examples of Best Evidence

Testimony by plaintiff's employee concerning assignment of a lease to plaintiff did not violate the best evidence rule. *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig*, 418.

Testimony by plaintiff's employee concerning a "Notice of Acceptance and Assignment," coupled with the existence of the document in plaintiff's business records, is some evidence that the document is what it purports to be so that the document is admissible even though it was unexecuted. *Ibid.*

§ 33. Hearsay Evidence in General

Declarations offered to prove that plaintiff's restaurant property was deeded to one defendant in trust for plaintiff and that defendant who purchased it had knowledge of that fact was not hearsay. *Seafare Corp. v. Trenor Corp.*, 404.

§ 33.2. Examples of Hearsay Testimony

Statements by agents of a subdivision developer to purchasers of a subdivision lot that a radio tower was not a "structure" within the meaning of the subdivision restrictive covenants were inadmissible as hearsay. *Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 83.

§ 40.1. Inadmissible Statements of Opinions and Conclusions

The trial court properly excluded questioning of a detoxification center's director concerning the center's internal investigation of the incident in question and properly excluded the director's personal opinion of whether an unconscious person presented a medical emergency, but the court erred in refusing to permit the director to testify as to his personal knowledge of the center's written policies concerning whether a state of unconsciousness was a medical emergency. *Klassette v. Mecklenburg County Area Mental Health*, 495.

§ 41. Opinion Evidence; Invasion of Province of Jury

The trial court did not err by allowing nonexpert witnesses to express their opinions regarding the existence of a partnership. *G. R. Little Agency, Inc. v. Jennings*, 107.

§ 47. Expert Testimony in General

An expert witness's opinion testimony as to the cause of a fire was not excludable because the expert admitted on voir dire that there were other possible causes of the fire. *Barbecue Inn, Inc. v. CP&L*, 355.

An architect's opinion testimony as to whether the stairway in defendant's store complied with requirements of the N.C. Building Code was admissible in an action to recover for injuries sustained by plaintiff when she fell down the stairway. *Thomas v. Dixson*, 337.

§ 47.1. Expert Testimony; Necessity for Statement of Facts as Basis for Opinion

Testimony by an expert fire investigator that one cause of a fire was the failure of defendant power company to form drip loops at a service connection could not be excluded by the trial court on the ground that there was not a sufficient factual basis for the opinion. *Barbecue Inn, Inc. v. CP&L*, 355.

A neurologist's opinion testimony as to the time at which plaintiff suffered irreversible brain damage was not speculation and was properly admitted. *Klassette v. Mecklenburg County Area Mental Health*, 495.

EVIDENCE — Continued

§ 50.4 Other Subjects of Testimony by Medical Experts

The trial court in a wrongful death action did not err in preventing a physician from testifying as to the symptoms of post-concussion syndrome. *Hogsed v. Ray*, 673.

FIDUCIARIES

§ 2. Evidence of Fiduciary Relationship

The trial court properly submitted an issue as to whether a fiduciary relationship existed between plaintiff and one defendant where plaintiff's evidence tended to show that plaintiff transferred property to defendant so that defendant could sell its property for a good price and enable plaintiff to pay its debts, but defendant's evidence tended to show that plaintiff's property was transferred to defendant in order to deceive plaintiff's creditors. *Seafare Corp. v. Trenor Corp.*, 404.

FRAUD

§ 4. Knowledge and Intent to Deceive

The trial court did not err in refusing to submit to the jury an issue of fraud in the procurement of a letter of credit. *Northwestern Bank v. NCF Financial Corp.*, 614.

§ 6. Damage

The trial court properly granted summary judgment for defendants on plaintiffs' claim for fraud where the wrong condominium unit was conveyed to plaintiffs by mistake but the mistake was discovered and corrected two months later at no cost to plaintiffs. *Bryant v. Eagan*, 741.

§ 9. Pleadings

Plaintiffs' complaint was sufficient to state a claim against defendant realtors for fraud in failing to disclose to plaintiffs that a major thoroughfare extension was planned to come close to property being purchased by plaintiffs. *Powell v. Wold*, 61.

The trial court properly dismissed plaintiff's claim for fraud in the sale of a vehicle where there was no allegation that plaintiff relied upon defendant's false representations and no allegation as to what that reliance resulted in. *Foley v. L & L International*, 710.

§ 11. Competency of Evidence

Declarations offered to prove that plaintiff's restaurant property was deeded to one defendant in trust for plaintiff and that defendant who purchased it had knowledge of that fact was not hearsay. *Seafare Corp. v. Trenor Corp.*, 404.

§ 13. Instructions

The trial judge properly instructed the jury that fraud was presumed once plaintiff had shown the existence of a confidential relationship between plaintiff and one defendant and a transfer of plaintiff's property from the fiduciary to another. *Seafare Corp. v. Trenor Corp.*, 404.

FRAUDS, STATUTE OF

§ 6.1. Contracts Affecting Realty; Cases where Statute of Frauds Is Inapplicable

The statute of frauds does not apply when a party seeks to prove an oral agreement with respect to the disposition of proceeds from a sale of land rather than to force or prevent the conveyance of the land itself. *Rongotes v. Pridemore*, 363.

HOMICIDE

§ 28.1. Duty of Trial Court to Instruct on Self-Defense

The trial court in a murder case erred in refusing to instruct the jury on self-defense where the jury could have believed the State's evidence that the stabbing was intentional while also believing that part of defendant's evidence that she pulled the knife to protect herself from serious injury. *S. v. Hayes*, 749.

HOSPITALS

§ 2.1. Selection of Hospital Site

Respondent's application for a certificate of need for a health care facility was not incomplete on the ground that information furnished about the project site was vague and indefinite where specific information about the site was furnished after an option was obtained. *In re Conditional Approval of Certificate of Need*, 563.

A finding that respondent's application for a certificate of need had community support was supported by several letters furnished by petitioner and other applicants. *Ibid.*

The evidence supported a finding that respondent's application for a certificate of need for a health care facility was financially superior to that of petitioner. *Ibid.*

HUSBAND AND WIFE

§ 4.1. Contracts between Husband and Wife; Confidential Relationship

Plaintiff wife was not entitled to set aside a separation and property settlement agreement on the ground of fraud by defendant husband in allegedly violating their confidential relationship by misrepresenting or concealing from her advice he received from his lawyer concerning alimony and his military pension. *Avriett v. Avriett*, 506.

§ 11.2. Construction of Separation Agreements

The trial court erred in finding that a monthly $400 payment from defendant to plaintiff required by a consent judgment was a part of a property settlement rather than alimony and that defendant's obligation to pay thus did not terminate upon plaintiff's remarriage. *Garner v. Garner*, 472.

INSANE PERSONS

§ 11. Restoration of Sanity and Discharge

There was no evidence that defendant Department of Human Resources violated any duty owed to plaintiff in releasing a woman from a State mental hospital so as to be liable for injuries received by plaintiff when he was assaulted by the woman. *Paschall v. N.C. Dept. of Correction*, 520.

INSURANCE

§ 29.1. Life Insurance; Change of Beneficiary

A letter from the insured to the insurer requesting information regarding the status as to death benefit, cash value, ownership and beneficiary designation of a life insurance policy did not show an intent or attempt by the insured to change the designated beneficiaries. *Barber v. Woodmen of the World Life Ins. Society*, 666.

§ 38.4. Group Health Insurance

Plaintiff was not entitled to insurance coverage under a group medical policy written by defendant because of plaintiff's misrepresentations in her application with regard to examinations by doctors during the previous five years of a lump in her hand which proved to be a rare form of cancer. *Cary Family Medicine v. Prudential Ins. Co.*, 760.

§ 66. Accident Insurance; Notice and Proof of Loss

Plaintiff liability insurer was not liable for a default judgment obtained by a patron against defendant cafeteria where defendant did not receive the patron's complaint and summons forwarded by the Secretary of State because it failed to maintain an agent and address for corporate service of process, and defendant thus failed to forward to plaintiff insurer the summons and complaint as required by its insurance contract prior to the entry of the default judgment. *South Carolina Ins. Co. v. Hallmark Enterprises*, 642.

§ 75.3. Subrogation and Actions against Tortfeasor; Partial Payment by Insurer

An insurer was only a partial assignee and plaintiff consequently retained some legal interest in its claims where plaintiff assigned to its insurer a legal interest in the subject matter of all its claims to the extent of the insurer's payment. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 1.

§ 87.2. Automobile Liability Insurance; "Omnibus" Clause; Proof of Permission to Use Vehicle

Where an automobile lessee loaned his rented car to an unlicensed driver who was involved in a wreck, the accident was not covered to the full extent of the limits of the rental company's business automobile liability insurance policy because the driver did not have the express or implied permission of the company to drive the car, but the policy provided coverage for the accident within the mandatory liability coverage required for automobile lessors by G.S. 20-281 since the driver was in lawful possession of the car. *Ins. Co. of North America v. Aetna Life & Casualty Co.*, 236.

§ 110. Automobile Liability Insurance; Payment; Extent of Liability of Insurer

Pursuant to the underinsured motorists coverage of plaintiffs' insurance policy with defendant, each plaintiff was entitled to recover from defendant $50,000, representing the difference between the sum already received pursuant to the tortfeasor's exhausted liability policy and the $100,000 "each person" limit provided for in the policy with defendant. *Aills v. Nationwide Mutual Ins. Co.*, 595.

INTEREST

§ 2. Time and Computation

Defendant's payment of an amount into the clerk's office pursuant to an ex parte order did not stop the accrual of interest on a promissory note, and the trial court did not err in requiring defendant to make payment of the note with interest. *Morley v. Morley*, 755.

JUDGMENTS

§ 4. Definiteness of Judgment

An order in a medical malpractice case dismissing plaintiff's case if plaintiff failed to produce certain x-ray film within 30 days was conditional and therefore void. *McCraw v. Hamrick*, 391.

§ 30. Procedure to Attack Judgment; Motion in the Cause

The trial court had no authority to interpret or correct a memorandum of judgment settlement pursuant to a motion in the cause. *Home Health and Hospice Care, Inc. v. Meyer*, 257.

§ 46. Priorities

Defendant attorney complied with the requirements of G.S. 44-50 when she deducted her fee of 25% from the proceeds of a personal injury settlement and then divided the balance equally between the injured party and the medical care providers. *N.C. Baptist Hospitals, Inc. v. Mitchell*, 263.

§ 55. Right to Interest

The trial judge did not err in an automobile accident case by awarding prejudgment interest against defendant where the record revealed no evidence indicating that defendant did not have liability insurance. *Hagwood v. Odom*, 513.

JURY

§ 9. Alternate Jurors

The trial court did not abuse its discretion in excusing a juror and substituting an alternate juror whose inattentiveness had been noted by the court earlier in the trial. *York v. Northern Hospital District*, 183.

LANDLORD AND TENANT

§ 5. Lease of Personal Property

Plaintiff's employee could properly testify about plaintiff's records and their significance so long as the records themselves were admissible under the business records exception to the hearsay rule and the witness was familiar with the system by which the records were made and maintained. *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig*, 418.

Testimony by plaintiff's employee concerning assignment of a lease to plaintiff did not violate the best evidence rule. *Ibid.*

Testimony by plaintiff's employee concerning a "Notice of Acceptance and Assignment," coupled with the existence of the document in plaintiff's business records, is some evidence that the document is what it purports to be so that the document is admissible even though it was unexecuted. *Ibid.*

The evidence was sufficient to support the trial court's finding that a lease allegedly breached by defendants had been assigned to plaintiff. *Ibid.*

§ 19. Rent and Actions Therefor

A landlord's notice to a month-to-month tenant of a rent increase constituted an offer to create a new contract or tenancy at the increased rent, and the landlord's continued acceptance of the rent previously paid by the tenant after the notice and effective date of the rent increase constituted a continuation of the previous tenancy and established a rejection by the tenant of the offer to create a new tenancy at an increased rental amount. *Stanford v. Mountaineer Container Co.*, 591.

LARCENY

§ 7.5. Sufficiency of Evidence of Larceny from the Person

Defendant's conviction of larceny from the person cannot stand where the evidence showed that property was stolen from an unattended grocery cart, but the evidence and verdict will support a conviction of the lesser included offense of misdemeanor larceny. *S. v. Lee*, 478.

§ 7.10. Sufficiency of Evidence; Possession of Stolen Property

The doctrine of possession of recently stolen property applied where the evidence showed that only defendant and his cohort in crime exercised any possession or control over stolen guns and that the interval between the larceny and defendant's possession could have been up to four days. *S. v. Lytton*, 758.

LIMITATION OF ACTIONS

§ 4.6. Accrual of Cause of Action for Breach of Particular Contracts

Plaintiff's claims against defendants for breach of a lease of office equipment were barred only as to those installment payments which were due more than three years prior to the time the action was filed. *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig*, 418.

MASTER AND SERVANT

§ 8.1. Compensation of Employee

Plaintiff's present medical practice is "similar" to defendant's practice within the meaning of a provision of plaintiff's employment contract with defendant precluding post-termination benefits if plaintiff engages in a "similar" practice in Wake County within three years after beginning employment with defendant. *Newman v. Raleigh Internal Medicine Assoc.*, 95.

§ 10.2. Actions for Wrongful Discharge

Summary judgment should not have been granted on plaintiff's claim for wrongful discharge arising from his workers' compensation claim. *Burrow v. Westinghouse Electric Corp.*, 347.

The trial court did not err in an action for wrongful discharge by granting summary judgment for defendants on plaintiff's claim that he had been wrongfully discharged for refusing to drive under unsafe conditions; *Sides v. Duke University* was based on the employer's willful violation of public policy and the violation of a federal regulation does not create an exception to the employment at will doctrine in North Carolina. *Ibid.*

§ 11.1. Covenants not to Compete

A provision in plaintiff physician's employment contract precluding post-termination benefits if plaintiff engages in a "similar" medical practice in Wake County within three years after his initial employment with defendant was not a covenant not to compete subject to strict public policy limitations. *Newman v. Raleigh Internal Medicine Assoc.*, 95.

§ 65.2. Workers' Compensation; Back Injuries

Injury and pain do not have to occur simultaneously for an employee to establish that a back injury was the result of a specific traumatic incident and thus compensable. *Roach v. Lupoli Construction Co.*, 271.

MASTER AND SERVANT — Continued

§ 68. Workers' Compensation; Occupational Diseases

The Industrial Commission rather than the superior court has original subject matter jurisdiction of an action for wrongful death from bladder cancer allegedly caused by decedent's exposure to carcinogens in his employment. *McAllister v. Cone Mills Corp.*, 577.

§ 69.1. Workers' Compensation; Meaning of "Disability"

The Industrial Commission's conclusion that plaintiff realtor was totally and permanently disabled from a fall suffered while showing clients a house was supported by the evidence despite testimony that plaintiff had a 60 percent disability of the leg below the knee. *Niple v. Seawell Realty & Insurance Co.*, 136.

§ 75. Workers' Compensation; Medical Expenses

The Industrial Commission erred in denying treatment expense for the services rendered plaintiff by a physician based on the fact that the physician was plaintiff's second physician of choice. *Lucas v. Thomas Built Buses*, 587.

§ 94.1. Workers' Compensation; Sufficiency of Industrial Commission's Findings of Fact

The Industrial Commission exceeded the scope of its instructions on remand by vacating its earlier findings and revising its entire opinion in a workers' compensation proceeding, and the matter is again remanded for the Commission to make findings as to the existence and nature of any injury sustained by plaintiff. *Jackson v. Fayetteville Area Sys. of Transp.*, 123.

§ 96.6. Workers' Compensation; Scope of Review; Specific Instances where Findings not Supported by Evidence

A conclusion by the Industrial Commission that there was no evidence that plaintiff was temporarily totally disabled after 12 March 1985 was not supported by the record. *Lucas v. Thomas Built Buses*, 587.

The Industrial Commission's conclusion that there was no evidence to show causation was not a basis for denying an award to plaintiff where the employer had admitted liability. *Ibid.*

§ 101. Unemployment Compensation; "Employees" within Coverage of Law

The Employment Security Commission properly determined that drivers for a taxicab company were employees rather than independent contractors and that respondent owner was liable for unemployment insurance contributions for such drivers. *State ex rel. Employment Security Comm. v. Faulk*, 369.

§ 111. Unemployment Compensation; Appeal and Review of Proceedings before Employment Security Commission

The Employment Security Commission had no duty to state its reasons for overruling respondents' exceptions to its decision that unemployment insurance contributions were due. *State ex rel. Employment Security Comm. v. Faulk*, 369.

MORTGAGES AND DEEDS OF TRUST

§ 25. Foreclosure by Exercise of Power of Sale in the Instrument

Mortgagors waived their right to appeal to the superior court from an order of the clerk authorizing a foreclosure sale under a purchase money deed of trust when they executed a consent order which authorized the clerk to enter an order of

MORTGAGES AND DEEDS OF TRUST — Continued

MUNICIPAL CORPORATIONS

NARCOTICS

§ 1.3. Elements and Essentials of Statutory Offenses Relating to Narcotics

Coffee is a food or eatable substance within the meaning of G.S. 14-401.11(a). *S. v. Phillips*, 526.

§ 3.1. Competency and Relevancy of Evidence

An adequate foundation was shown for admission of evidence of the weight of marijuana where three trucks loaded with marijuana were weighed at a fertilizer store, the marijuana was then unloaded, and the trucks were weighed empty. *S. v. Diaz*, 699.

The trial court in a prosecution for trafficking in marijuana properly admitted weight tickets into evidence to corroborate the testimony by an SBI agent concerning the weight of marijuana as measured by scales. *Ibid.*

NEGLIGENCE

§ 1.3. Violation of Ordinance

The building code imposes liability on any person who constructs, supervises construction, or designs a building or alteration thereto and violates the code such that the violation proximately causes injury or damage. *Olympic Products Co. v. Roof Systems, Inc.*, 315.

§ 2. Negligence Arising from Performance of a Contract

Plaintiffs' complaint was sufficient to state a claim against defendant realtors for negligent misrepresentation in telling plaintiffs during negotiations for the purchase of a residence that they knew of no factors that would adversely affect the value of the property when they knew or should have known that a major thoroughfare extension was planned to come close to the property. *Powell v. Wold*, 61.

A building owner need not prove privity of contract with a roof manufacturer in order to prove that the manufacturer owed it a duty. *Olympic Products Co. v. Roof Systems, Inc.*, 315.

§ 5.2. Dangerous Agencies or Instrumentalities; Duty as to Warnings and Safeguards

Reroofing a building is not within the purview of intrinsically dangerous or especially hazardous work. *Olympic Products Co. v. Roof Systems, Inc.*, 315.

§ 7. Willful or Wanton Negligence

The trial court in an action resulting from the collapse of a roof did not err by granting summary judgment for defendant on a claim for willful and wanton negligence. *Olympic Products Co. v. Roof Systems, Inc.*, 315.

§ 13.1. Contributory Negligence; Degree and Standard of Care in Discovery and Avoidance of Danger

The trial court did not err in a negligence action arising from an automobile accident by not allowing evidence on whether plaintiff was wearing his seat belt. *Hagwood v. Odom*, 513.

§ 19. Imputed Contributory Negligence

Where a building owner brought an action against a roofing consultant and roofing contractor after its roof collapsed, the agents were not allowed to implead the negligence of each other to bar the principal's claim under the doctrine of imputed contributory negligence. *Olympic Products Co. v. Roof Systems, Inc.*, 315.

NEGLIGENCE — Continued

§ 22. Sufficiency of Complaint

The trial court did not err in denying plaintiffs' motion to amend their complaint at the close of the evidence to allege that defendant was negligent directly for failing to warn truck drivers like plaintiff of the danger in riding forklifts and for not prohibiting drivers from riding where plaintiffs did not present any evidence that the failure to warn was a proximate cause of plaintiff's injury. *Williams v. Lee Brick and Tile*, 725.

§ 27. Competency and Relevancy of Evidence

The trial court did not err in ruling that an architect's testimony concerning the structure and appearance of a stairway in defendant's store was relevant and had considerable probative value in an action to recover for injuries sustained by plaintiff when she fell down the stairway even though the architect did not examine the stairway until two years after plaintiff's fall. *Thomas v. Dixson*, 337.

An architect's opinion testimony as to whether the stairway in defendant's store complied with requirements of the N.C. Building Code was admissible in an action to recover for injuries sustained by plaintiff when she fell down the stairway. *Ibid.*

The trial court properly excluded questioning of a detoxification center's director concerning the center's internal investigation of the incident in question and properly excluded the director's personal opinion whether an unconscious person presented a medical emergency, but the court erred in refusing to permit the director to testify as to his personal knowledge of the center's written policies concerning whether a state of unconsciousness was a medical emergency. *Klassette v. Mecklenburg County Area Mental Health*, 495.

§ 29.1. Particular Cases where Evidence of Negligence Is Sufficient

The evidence in an action arising from the collapse of a roof after reroofing was sufficient to demonstrate that the roof manufacturer breached its duty to the building owner to inspect the roof and report any variations from the manufacturer's specifications. *Olympic Products Co. v. Roof Systems, Inc.*, 315.

§ 29.2. Sufficiency of Evidence; Duty of Care

Where a supervisor of a county detoxification center refused to admit the unconscious plaintiff to the center as a client after he was informed that plaintiff had suffered a drug overdose but decided that plaintiff was intoxicated with alcohol, the supervisor was required by statute and the center's written policies to use due care in deciding whether to transfer plaintiff to another facility for treatment. *Klassette v. Mecklenburg County Area Mental Health*, 495.

The supervisor of a county detoxification center assumed a duty of care toward plaintiff by his conduct when he locked the unconscious plaintiff in plaintiff's car at the center's main entrance and regularly monitored plaintiff's condition throughout the night. *Ibid.*

§ 30.1. Particular Cases where Evidence Is Insufficient

There was no evidence that defendant Department of Human Resources violated any duty owed to plaintiff in releasing a woman from a State mental hospital so as to be liable for injuries received by plaintiff when he was assaulted by the woman. *Paschall v. N.C. Dept. of Correction*, 520.

NEGLIGENCE — Continued

§ 34.2. Particular Cases where Evidence of Contributory Negligence Is Insufficient

In an action arising from the collapse of a roof due to blocked drains after reroofing, a directed verdict for defendant based on plaintiff building owner's negligence through a roofing consultant was erroneous where the evidence was sufficient for the jury to have found that the building owner did not have the right to control the details of the roofing consultant's work. *Olympic Products Co. v. Roof Systems, Inc.*, 315.

§ 35.2. Cases where Contributory Negligence Is Not Shown as a Matter of Law

In an action arising from a collapsed roof due to partially blocked drains, the trial court erred by granting a directed verdict for defendant based on the actions of plaintiff building owner's v.p. in charge of engineering. *Olympic Products Co. v. Roof Systems, Inc.*, 315.

In an action arising from a collapsed roof, a directed verdict against plaintiff building owner on the grounds of contributory negligence based on reliance on a roofing consultant was not proper where the evidence was sufficient to show that plaintiff's reliance on the consultant was reasonable. *Ibid.*

Plaintiff was not contributorily negligent in having its building reroofed in that it did not have a structural engineer investigate the building for structural weaknesses. *Ibid.*

Plaintiff's voluntary intoxication from drugs did not constitute contributory negligence which barred plaintiff's recovery against a county detoxification center for negligence in failing to refer plaintiff to another facility for medical treatment. *Klassette v. Mecklenburg County Area Mental Health*, 495.

§ 39. Instruction on Last Clear Chance

The trial court did not err in instructing the jury that in order for the last clear chance doctrine to apply, the driver of a forklift "must have had a last clear chance, not a last possible chance." *Williams v. Lee Brick and Tile*, 725.

§ 57.4. Sufficiency of Evidence in Actions by Invitees; Falls on Steps

In an action to recover for personal injuries sustained by plaintiff invitee when she fell down a stairway in defendant's store, plaintiff's evidence was sufficient to present a jury question as to defendant's negligence in failing to maintain his premises in a reasonably safe condition and did not disclose contributory negligence by plaintiff as a matter of law. *Thomas v. Dixson*, 337.

§ 57.11. Cases Involving other Injuries to Invitees where Evidence Is Insufficient

In an action to recover damages for injuries sustained by plaintiff steel erector when a barrel of concrete sealant below him was ignited by his welding torch and exploded, plaintiff's evidence was insufficient for the jury to find that defendant general contractor was negligent in failing to warn plaintiff of the danger created by the barrel of flammable sealant. *Wellmon v. Hickory Construction Co.*, 76.

§ 58. Nonsuit for Contributory Negligence of Invitee

In an action to recover damages for injuries sustained by plaintiff when she fell over a concrete barrier located in a walkway leading from defendant's store to the parking lot, the evidence established that defendant did not breach any duty owed plaintiff and that plaintiff was negligent in failing to watch where she walked. *Jacobs v. Hill's Food Stores, Inc.*, 730.

OBSCENITY

§ 2. Definition of Obscenity

The obscenity statute does not violate equal protection because it does not require the application of a statewide community standard in determining what materials are obscene. *S. v. Roland*, 19.

There was sufficient evidence in a prosecution for disseminating obscenity that the material was obscene where each film was admitted into evidence. *S. v. Wilds*, 69.

The trial court's instructions defining obscenity were erroneous in failing to direct the jury to determine patent offensiveness by applying community standards and to determine value from each work "taken as a whole." *S. v. Watson*, 624.

The trial court's failure to exclude from the definition of obscenity material which has serious educational value did not result in a violation of the right to education guaranteed by Art. I, § 15 of the N.C. Constitution. *Ibid.*

§ 3. Prosecutions for Disseminating Obscenity

The trial court erred in instructing the jury in a prosecution for disseminating obscenity that it should assess the value of the materials based on its "own views" rather than on a reasonable man standard, but such error was harmless because no rational juror could have found value in the materials in question. *S. v. Roland*, 19.

Any error in the district attorney's jury argument in an obscenity case that the test was whether the materials were "shameful" and "offensive" was not prejudicial to defendant. *Ibid.*

The evidence in a prosecution for disseminating obscenity was sufficient to support a jury finding that defendant exhibited and agreed to sell the material. *S. v. Wilds*, 69.

The trial court in a prosecution for disseminating obscenity correctly instructed the jury on defendant's intent and guilty knowledge. *Ibid.*

The trial court did not err in its instructions in a prosecution for disseminating obscenity by including masturbation in its definition of sexual conduct which could render material obscene. *Ibid.*

The trial court did not err in a prosecution for disseminating obscenity by refusing to define certain terms such as sale and agreeing to sell as proposed in defendant's requested instructions. *Ibid.*

The trial court did not err in a prosecution for disseminating obscenity arising from the purchase of two films in one transaction by failing to arrest judgment on one of the counts. *Ibid.*

Defendant was not entitled to a jury instruction concerning whether the material in question was constitutionally privileged or protected since that is a question of law. *S. v. Watson*, 624.

The trial court in a prosecution for dissemination of obscenity did not err in failing to charge the jury to apply a statewide community standard. *Ibid.*

The evidence was sufficient to permit the jury to find that defendant knew the character and content of the materials she disseminated. *Ibid.*

The trial court in a prosecution for dissemination of obscenity did not err in excluding "comparable materials" consisting of four magazines involved in other obscenity cases in which the defendants were acquitted. *Ibid.*

PARENT AND CHILD

§ 2.3. Child Neglect

The juvenile court of Davidson County retained continuing jurisdiction over minor children where the juvenile court acquired jurisdiction from service of process on the mother in North Carolina and the father subsequently sought custody through a domestic action in Arizona. *In the Matter of Arends*, 550.

An order of a juvenile court established and continued to establish that an Arizona father's children were dependent where the children had been in custody of their mother in North Carolina. *Ibid.*

§ 6.3. Proceedings to Determine Custody

The Arizona courts did not acquire jurisdiction over all the parties in conformity with the Uniform Child Custody Jurisdiction Act in a case involving neglected children in Davidson County, North Carolina. *In the Matter of Arends*, 550.

PARTNERSHIP

§ 1.1. Formation and Existence of Partnership

The trial court, sitting without a jury, correctly concluded that defendant was not a partner with her former husband in his farming and agribusiness enterprises. *G. R. Little Agency, Inc. v. Jennings*, 107.

There was no partnership by estoppel based on defendant's communications with plaintiff's insurance agents. *Ibid.*

The trial court did not err by introducing pleadings and other documents concerning the husband's bankruptcy proceeding in an action to collect unpaid insurance premiums based on plaintiff's contention that defendant was her ex-husband's partner. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 15. Malpractice; Competency of Evidence

The trial court did not err in refusing to allow a nurse to read statements from a textbook regarding the care of a mother in labor and of a newborn infant. *York v. Northern Hospital District*, 183.

§ 15.1. Malpractice; Expert Testimony

In an action to recover for injuries sustained during the birth of a child, the trial court did not err in excluding a neurologist's opinion as to "what went wrong," questions to an expert witness on redirect examination as to administering glucose to the infant in question, and testimony by a nurse concerning the standard of care required of a surgeon or anesthesiologist and the standard of care applicable to similarly situated hospitals. *York v. Northern Hospital District*, 183.

§ 15.2. Malpractice; Who May Testify as Experts

An affidavit of a specialist in obstetrics and gynecology concerning when defendant pediatrician should have referred a patient to a neurosurgeon was not incompetent in a summary judgment hearing because the affiant was not a pediatrician and was not practicing in a similar community. *White v. Hunsinger*, 382.

§ 20.1. Causal Connection between Malpractice and Injury; Particular Cases

An affidavit of plaintiff's medical expert stating his opinion that plaintiff's son's chances of survival would have been greater if he had been referred by defendant pediatrician to a neurosurgeon earlier was sufficient to raise a genuine issue as to

PROFESSIONS AND OCCUPATIONS

§ 1. Generally

The trial court properly dismissed plaintiffs' claim against defendant exterminator for negligent preparation of a termite report. *Robertson v. Boyd*, 437.

PUBLIC OFFICERS

§ 11. Criminal Liability of Public Officers

The trial court did not err by denying defendant's motion to dismiss a charge of using tires and rims purchased by the county on his private vehicle. *S. v. Anderson*, 545.

QUASI CONTRACTS AND RESTITUTION

§ 1.2. Unjust Enrichment

The trial court did not err in an action for an accounting for profits upon the sale of real estate by failing to submit to the jury issues pertaining to improvements defendants made to the property. *Rongotes v. Pridemore*, 363.

§ 2. Actions to Recover on Implied Contracts Generally

Plaintiff was entitled to the value of his written contract plus the value of additional services not contemplated by the contract for which defendant had agreed to pay an additional cost. *Jennings Glass Co. v. Brummer*, 44.

§ 2.1. Actions to Recover on Implied Contract; Sufficiency of Evidence

The trial court did not err by denying defendant's motion for judgment n.o.v. on a quantum meruit claim for business services in an action to recover the value of companionship and housekeeping services as well as the value of the operation of a produce business. *Suggs v. Norris*, 539.

RAPE AND ALLIED OFFENSES

§ 4.1. Proof of other Acts or Crimes

The trial court in an attempted rape case did not err in allowing the State to present evidence concerning an incident two years earlier involving defendant's assault on a female. *S. v. Schultz*, 197.

§ 5. Sufficiency of Evidence

The State presented sufficient circumstantial evidence to permit the jury to infer defendant's intent to engage in vaginal intercourse with the victim by force and against her will so as to support the defendant's conviction of attempted second degree rape. *S. v. Schultz*, 197.

REFORMATION OF INSTRUMENTS

§ 9. Rights of Third Persons

The description in a deed from the individual defendants to plaintiff could be reformed to affect the intervening judgment lien held by defendant partnership. *Arnette v. Morgan*, 458.

RETIREMENT SYSTEMS

§ 2. Creation, Nature, and Existence

A statute impairing pension rights of local government employees does not violate the contract clause of the U.S. Constitution if the impairment was reasonable and necessary to serve an important public purpose. *Simpson v. N.C. Local Gov't Employees' Retirement System*, 218.

RULES OF CIVIL PROCEDURE

§ 12.1. Defenses; When and How Presented

Where defendants' motions to dismiss plaintiff's complaint for failure to state a claim was granted by the trial court, the court's subsequent order granting defendants' motions for judgment on the pleadings was redundant. *Robertson v. Boyd*, 437.

Defendants waived the defense that service of process on one defendant by leaving a copy of the complaint with his wife at his office was defective. *Seafare Corp. v. Trenor Corp.*, 404.

§ 15. Amended Pleadings

The trial court did not err in a condemnation action by denying a defendant's motion to amend his crossclaim. *Raleigh-Durham Airport Authority v. Howard*, 207.

§ 17. Parties

Plaintiff remained a real party in interest in an action arising from the disappearance of an aircraft where it assigned to its insurer a legal interest in the subject matter of all its claims to the extent the insurer's payment compensated its losses. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 1.

§ 19. Necessary Joinder of Parties

An insurer acquired some enforceable legal interest in the subject matter and was a necessary party where plaintiff assigned to its insurer a legal interest in the subject matter of its claims to the extent the insurer's payment compensated its losses. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 1.

§ 33. Interrogatories

The trial court did not err in granting a protective order from a videotaped oral deposition of plaintiff's counsel where the type of information sought by defendant could be gathered by the use of interrogatories. *Weaver v. Weaver*, 634.

§ 37. Failure to Make Discovery; Consequences

North Carolina does not adhere to the rule that a dismissal with prejudice is a sanction of last resort for failure to comply with discovery. *Fulton v. East Carolina Trucks, Inc.*, 274.

The trial court did not abuse its discretion in dismissing plaintiffs' claim for failure to answer interrogatories. *Ibid.*

§ 41. Dismissal of Actions Generally

The trial court did not err in the ex mero motu dismissal of plaintiff's claims for divorce and alimony for failure to prosecute. *Perkins v. Perkins*, 568.

§ 52. Findings by Court

The trial court's judgment was improper in form where it did not direct the entry of the appropriate judgment. *Pitts v. Broyhill*, 651.

RULES OF CIVIL PROCEDURE — Continued

§ 52.1. Findings by Court; Particular Cases

The trial court did not err in an automobile accident case by failing to make findings of fact of the grounds upon which it granted a new trial where defendant made no timely request for findings. *Strickland v. Jacobs*, 397.

§ 59. New Trials

The trial court in an automobile negligence case did not abuse its discretion by granting plaintiff's motion for a new trial without findings of fact. *Strickland v. Jacobs*, 397.

The trial court did not abuse its discretion in an action for breach of fiduciary obligation arising from securities fraud by denying plaintiff's motion for a new trial on the issue of damages. *Blow v. Shaughnessy*, 484.

§ 60.2. Grounds for Relief from Judgment or Order

The trial court did not err in an automobile accident case by denying defendant's Rule 60(b) motion requesting that the court modify its judgment assessing prejudgment interest. *Hagwood v. Odom*, 513.

The trial court did not err in denying plaintiff's Rule 60(b)(1) motion to vacate a judgment dismissing plaintiff's divorce and alimony claims without prejudice for failure to prosecute on the ground that her failure to appear at the call of the clean-up calendar was due to her counsel's mistake, inadvertence or excusable neglect. *Perkins v. Perkins*, 568.

SEARCHES AND SEIZURES

§ 6. Particular Methods of Search; Particular Cases

The trial court properly denied defendant's motion to suppress cocaine discovered on his person while officers were searching a house under a search warrant. *S. v. Patrick*, 582.

§ 7. Search and Seizure Incident to Arrest

The trial court properly denied defendant's motion to suppress cocaine seized from defendant's person as a result of a search incident to arrest. *S. v. Patrick*, 582.

§ 15. Standing to Challenge Lawfulness of Search

Defendant failed to show a reasonable expectation of privacy with respect to the remainder of a house outside his bedroom so as to give him standing to challenge a search of the house. *S. v. Banks*, 737.

STATE

§ 8.3. Negligence of State Employee; Particular Actions; Prisoners

The Industrial Commission properly found that a sexual assault against plaintiff inmate was proximately caused by the negligence of employees of the Department of Correction in placing plaintiff and his assailant in the same segregation cell and in failing to make normal rounds to check on the inmates. *Taylor v. N.C. Dept. of Correction*, 446.

SUBROGATION

§ 1. Generally

Where a used car dealer sold vehicles with unpaid first liens to eight customers who could not obtain certificates of title, and plaintiff bank entered into agreements with each of the customers to pay off the prior liens in return for assignments by the customers of their claims against the dealer and defendant which had bonded the dealer, plaintiff as assignee of the rights, claims and title of the purchasers was subrogated to the claims of the purchasers against the dealer on the bond issued by defendant surety. *NCNB v. Western Surety Co.*, 705.

TELECOMMUNICATIONS

§ 1.1. Regulation and Control of Phone Companies; Particular Matters

A Utilities Commission order did not violate the equal protection clauses of the United States and North Carolina Constitutions where the Commission directed that certain long distance carriers pay compensation for the unauthorized transmission of some long distance calls. *State ex rel. Utilities Comm. v. Southern Bell*, 153.

An order of the North Carolina Utilities Commission requiring some long distance carriers to pay compensation for the unauthorized transmission of some long distance calls was not unduly burdensome on interstate commerce and was a valid regulatory exercise of authority over intrastate telecommunications. *Ibid.*

§ 1.2. Determination of Rate Charged

An order of the Utilities Commission requiring certain long distance carriers to pay compensation for the unauthorized transmission of some long distance calls was not unlawfully confiscatory and thus a violation of the prohibition against the taking of property without due process. *State ex rel. Utilities Comm. v. Southern Bell*, 153.

TORTS

§ 4. Right of One Defendant to Have Others Joined for Contribution

The trial court's supplemental instruction on the definition of substantial assistance in an action for aiding and abetting breach of fiduciary obligations embodied all of the principles necessary to convey an appropriate definition of substantial assistance and did not mislead or misinform the jury. *Blow v. Shaughnessy*, 484.

§ 4.1. Right of One Defendant to Have Others Joined for Contribution; Limitations to Right

The trial court properly granted a directed verdict against an original defendant and third-party plaintiff who entered into a settlement with the original plaintiff but failed to affirmatively show that he had met the requirements of G.S. § 1B-1(d). *King v. Humphrey*, 143.

TRIAL

§ 3. Motions for Continuance

The trial court properly denied defendants' motion for a continuance although defendants were unaware of previous settlements by and dismissals of the other original codefendants and although they had been relying on their codefendants' attorneys to represent their interests. *Seafare Corp. v. Trenor Corp.*, 404.

TRIAL — Continued

§ 3.1. Motions for Continuance; Discretion of Trial Judge

The trial court did not abuse its discretion by denying a motion for a continuance where the motion was not supported by an affidavit or a forecast of expected testimony or evidence. *Raleigh-Durham Airport Authority v. Howard*, 207.

§ 3.2. Motions for Continuance; Particular Grounds

The trial court did not abuse its discretion in denying defendant's motion for a continuance on the ground that plaintiff's deposition of three defense witnesses would delay defendant's trial preparation or on the ground of serious illness. *Jennings Glass Co. v. Brummer*, 44.

§ 4. Nonsuit for Failure of Plaintiff to Appear or Prosecute His Action

The trial court did not err in a condemnation action by denying a default judgment for one defendant against another because the answer of the first defendant did not require a response. *Raleigh-Durham Airport Authority v. Howard*, 207.

§ 7. Pretrial

The trial court did not err in calling the matter to trial without a pretrial conference or the filing of a pretrial order. *Seafare Corp. v. Trenor Corp.*, 404.

§ 8. Consolidation of Actions for Trial

Defendant cannot complain that the trial court allowed his motion to consolidate claims when defendant was absent from the motion hearing. *Jennings Glass Co. v. Brummer*, 44.

§ 11.1. Argument of Counsel; Matters outside Evidence

The trial court did not err in permitting plaintiff's counsel, during closing argument, to read a passage from a treatise on trusts which stated a general principle of trust law which has been applied by the North Carolina courts. *Seafare Corp. v. Trenor Corp.*, 404.

§ 12. Rights and Conduct of Parties

The trial court did not err in failing to inquire as to the whereabouts of one defendant and in entering judgment against her in her absence. *Seafare Corp. v. Trenor Corp.*, 404.

§ 58. Findings and Judgment of the Court

The trial court sitting without a jury did not err by giving slight weight to matters admitted by defendant. *G. R. Little Agency, Inc. v. Jennings*, 107.

TRUSTS

§ 6.1. Discretionary or Imperative Powers of Trustee

The testator of a residuary trust created under a will clearly intended that the trustee pay all of the trust income to his wife during her lifetime. *Ward v. Ward*, 267.

§ 10. Duration and Termination of Trusts

The trial court did not err in an action to terminate a trust and distribute the assets by finding that there were four separate trusts. *Eldridge v. Morgan*, 376.

§ 11. Actions by Beneficiaries against Trustee

The trial court did not err by placing the burden of proof on a beneficiary claiming an interest in property. *Raleigh-Durham Airport Authority v. Howard*, 207.

TRUSTS — Continued

§ 19. Actions to Establish Resulting and Constructive Trusts; Sufficiency of Evidence

Summary judgment was properly granted for defendants in an action to force defendants to convey to plaintiff a tract of land. *Roper v. Edwards*, 149.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

Plaintiff was entitled to treble damages and attorney fees for an unfair trade practice where the court found that defendant engaged in a pattern of misleading practices whereby he secured the services and materials of various businesses and contractors, including plaintiff, without payment of just compensation and without the intent to pay just compensation. *Jennings Glass Co. v. Brummer*, 44.

Plaintiffs' complaint was sufficient to state a claim for an unfair trade practice where it was sufficient to state claims for fraud and negligent misrepresentation by defendant realtors. *Powell v. Wold*, 61.

An unfair trade practice claim did not lie against defendants who were private parties engaged in the sale of a residence. *Robertson v. Boyd*, 437.

Plaintiffs' complaint stated a claim against defendant realtor and defendant exterminator in an action for unfair or deceptive trade practices in the sale of a home with undisclosed termite damage. *Ibid.*

The trial court erred in reducing plaintiff's damages by the amount of settlements with original codefendants before rather than after trebling the jury's award of damages. *Seafare Corp. v. Trenor Corp.*, 404.

Plaintiff's evidence that defendant kept his down payment on a car for seven months without attempting to get the car he had promised to obtain while falsely claiming that the car had been obtained and would be delivered shortly was sufficient evidence of an unfair trade practice. *Foley v. L & L International*, 710.

A misrepresentation by defendant travel agency owner to a plumbing and electrical contractor that he still owned the land upon which a house was to be built was not an unfair or deceptive trade practice where defendant entered the home building arena only to help his children build homes. *Miller v. Ensley*, 686.

UNIFORM COMMERCIAL CODE

§ 39.1. Letters of Credit

Plaintiff was not required to make a demand for payment from the original borrower in the underlying agreement in order to present a draft on a letter of credit issued by defendant. *Northwestern Bank v. NCF Financial Corp.*, 614.

UTILITIES COMMISSION

§ 20. Regulation of Telegraph and Telephone Companies

An order of the Utilities Commission did not constitute a penalty and was statutorily authorized where, pursuant to the federally ordered breakup of AT&T, the Utilities Commission directed that certain long distance carriers pay compensation for the unauthorized transmission of some long distance calls. *State ex rel. Utilities Comm. v. Southern Bell*, 153.

WILLS — Continued

WORD AND PHRASE INDEX

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