NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

NORTH CAROLINA CHIROPRACTIC ASSOCIATION, INC.; DR. ROBERT HAY, DR. FLETCHER G. KEITH, DR. JOHN T. TIERNEY, DR. DEAN R. KENNY, DR. JOE CASE, DR. PHILLIP VAN CAMPEN, DR. GARY DACKOR, DR. JAMES WATKINS AND DR. JOSEPH DUFFY v. AETNA CASUALTY & SURETY CO., AMERISURE INSURANCE CO., CRAWFORD & COMPANY, HARTFORD ACCIDENT & INDEMNITY CO., THE HOME INSURANCE CO., LIBERTY MUTUAL INSURANCE CO., THE SHELBY MUTUAL INSURANCE COMPANY AND UNITED STATES FIDELITY AND GUARANTY CO.

No. 8727SC657

(Filed 1 March 1988)

Courts § 3.3; Master and Servant § 85— action by chiropractors against workers' compensation insurers—doctrine of primary jurisdiction

In an action by chiropractors alleging that defendant workers' compensation insurers have interfered with their contractual rights by refusing to honor employers' choices of chiropractors as providers of health care under the Workers' Compensation Act, have committed unfair trade practices in violation of N.C.G.S. § 75-1.1 by representing to employer insureds that their policies do not provide coverage for chiropractic treatment, and have committed an illegal restraint of trade in violation of N.C.G.S. § 75-1 in that they have conspired among themselves and with members of the medical profession to deprive plaintiffs of business opportunities by refusing to pay for chiropractic services provided in compliance with the Workers' Compensation Act, it was *held* that under the doctrine of primary jurisdiction, the plaintiffs cannot maintain such action in the superior court without first seeking a determination of the underlying workers' compensation issues by the Industrial Commission. Therefore, the trial court's order dismissing plaintiffs' action for lack of subject matter jurisdiction is vacated and the case is remanded to the superior court for entry of an order staying plaintiffs' action pending a determination of the underlying workers' compensation issues by the Industrial Commission.

APPEAL by plaintiffs from *Lamm (Charles C., Jr.), Judge.* Order entered 8 April 1987 in Superior Court, GASTON County. Heard in the Court of Appeals 10 December 1987.

Plaintiff North Carolina Chiropractic Association is a non-profit corporation composed of licensed chiropractors practicing in the State of North Carolina. The other individual plaintiffs are licensed chiropractors practicing in this State. Plaintiffs instituted this action on behalf of all licensed chiropractors doing business in North Carolina who were harmed by defendants' conduct, and moved for class certification in superior court.

The complaint alleges that defendants are corporations engaged in the business of insurance which provide policies of workers' compensation insurance to employers in North Carolina. Plaintiffs allege three causes of action against defendants. The first cause of action is entitled "malicious interference with contractual rights." Plaintiffs allege that defendants have interfered with their contractual rights by refusing to honor employers' choices of chiropractors as providers of health care treatment to employees under the Workers' Compensation Act. The second cause of action alleges that defendants have misrepresented to employer insureds that their workers' compensation policies do not provide coverage for chiropractic treatment, and that said misrepresentations are unfair and deceptive trade practices in violation of G.S. 75-1.1. The third cause of action alleges that defendants have conspired among themselves and with members of the medical profession to deprive plaintiffs of business opportunities by refusing to pay for chiropractic services provided in compliance with the Workers' Compensation Act. Plaintiffs allege that this conspiracy is an illegal restraint of trade in violation of G.S. 75-1 and 15 U.S.C. § 1.

All defendants moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the N.C. Rules of Civil Procedure. The trial court granted defendants' Rule 12(b)(1) motions on the ground that the North Carolina Industrial Commission had exclusive jurisdiction over the subject matter of plaintiffs' claims. From the order dismissing their complaint, plaintiffs appeal.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith and Martha A. Geer; and Carl J. Stewart for plaintiff-appellants.

Moore and Van Allen, by Joseph W. Eason, Donald S. Ingraham, and Denise Smith Cline, for defendant-appellee Hartford Accident & Indemnity Company.

Hedrick, Eatman, Gardner and Kincheloe, by J. A. Gardner, III, and LeBoeuf, Lamb, Leiby and MacRae, by David Turetsky, for defendant-appellee Home Insurance Company.

Golding, Crews, Meekins and Gordon, by Henry C. Byrum, Jr., and Michael K. Gordon, for defendant-appellee Liberty Mutual Insurance Company.

Underwood, Kinsey and Warren, by Ralph C. Kinsey, Jr., for defendant-appellee Aetna Casualty & Surety Company.

Parker, Poe, Thompson, Bernstein, Gage and Preston, by Kevin A. Dunlap, for defendant-appellee Amerisure Insurance Company.

Kennedy, Covington, Lobdell and Hickman, by F. Fincher Jarrell, for defendant-appellee Crawford & Company.

Wade and Carmichael, by R. C. Carmichael, Jr., for defendant-appellee Shelby Mutual Insurance Company.

Stott, Hollowell, Palmer and Windham, by James C. Windham, Jr., for defendant-appellee United States Fidelity and Guaranty Company.

PARKER, Judge.

The sole issue presented for review by this appeal is whether the trial court erred in dismissing plaintiffs' complaint for lack of subject matter jurisdiction. Plaintiffs contend that the Industrial Commission does not have exclusive jurisdiction over their claims, and that said claims are within the subject matter jurisdiction of the superior court. Plaintiffs further argue that the superior court must assert jurisdiction over their claims because they are unable to obtain relief for defendants' misconduct from the Industrial Commission. Defendants, on the other hand, argue that the statutory provisions governing payment of workers' compen-

sation mandate that jurisdiction of plaintiffs' claims lies in the Industrial Commission. Our research discloses no case in which the courts of this State have addressed the specific issue raised by this action: whether the superior court may properly hear claims which are within its jurisdiction when there are issues underlying these claims within the exclusive jurisdiction of an administrative agency.

Preliminarily, we note that one of plaintiffs' claims alleges a violation of a section of the Sherman Act, 15 U.S.C.A. § 1. The federal courts have exclusive jurisdiction over federal antitrust claims. *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440, 40 S.Ct. 385, 386, 64 L.Ed. 649, 652 (1920). Accordingly, any claim that plaintiffs may have under the Sherman Act cannot be brought in a state court.

All plaintiffs' claims are based on allegations of wrongdoing on the part of defendants with respect to workers' compensation insurance policies. By statute the Industrial Commission is vested with jurisdiction over "all questions arising under" the Workers' Compensation Act. G.S. 97-91. Therefore, to resolve this controversy, we need first to consider certain provisions of the Act.

Under the Workers' Compensation Act, an employee is generally required to obtain the employer's consent as to medical treatment. *Schofield v. Tea Co.*, 299 N.C. 582, 587, 264 S.E. 2d 56, 60 (1980). The employee may choose his own physician only if he obtains the approval of the Industrial Commission. *Id.* at 591, 264 S.E. 2d at 62; G.S. 97-25. If the employer and employee cannot agree on a course of treatment, then the Commission may order appropriate treatment to be provided at the employer's expense. G.S. 97-25. All fees for medical services provided pursuant to the Act must be approved by the Commission, G.S. 97-90, and the exclusive remedy for disputes as to medical treatment is a hearing before the Commission. *Worley v. Pipes*, 229 N.C. 465, 50 S.E. 2d 504 (1948). Thus, the Industrial Commission has ultimate control over the extent and cost of an employee's treatment under the Act.

General Statutes 97-98 and 97-99 provide that all insurance policies procured pursuant to the Act must comply with all relevant provisions of the Act. *Hartsell v. Thermoid Co.*, 249 N.C. 527, 532-33, 107 S.E. 2d 115, 119 (1959). Policy coverage is coexten-

sive with liability approved by the Commission under the Act. Therefore, plaintiffs' allegations that defendants have refused to provide coverage for treatment that has been agreed upon by employers and employees assert possible violations of the Act's provisions. Whether defendants' alleged conduct amounts to non-compliance with the Act depends on whether defendants have denied coverage for treatment that is authorized and approved under the Act. As noted above, what treatment is appropriate for a particular employee is a matter within the exclusive jurisdiction of the Industrial Commission.

Plaintiffs contend, however, that they are unable to pursue their claims with the Commission because only an employer or employee may institute such a proceeding. The question then is whether a provider of medical treatment may apply to the Commission for a determination of an insurer's obligations under the Act.

Although this issue has not been directly addressed in our courts, relevant case law indicates that plaintiffs could have obtained such a determination from the Commission. The Supreme Court has held in two cases that, when medical services are provided to an employee who has filed a claim under the Act, the provider must proceed under the Act to recover the cost of the services. *Matros v. Owen*, 229 N.C. 472, 50 S.E. 2d 509 (1948); *Worley v. Pipes*, 229 N.C. 465, 50 S.E. 2d 504 (1948). In both cases, a physician had brought an action seeking to recover the value of services rendered to an employee who was covered by the Act. The Supreme Court held that the physicians' sole remedies were under the Act. *Matros v. Owen, supra*; *Worley v. Pipes, supra.* In *Matros*, the Court stated: "the applicable remedy open to [the employee] and to [the physician], in respect to his bill for services rendered, was to make [an] application to the Industrial Commission . . . ." *Matros*, 229 N.C. at 475, 50 S.E. 2d at 511. Thus, the Court implicitly recognized the right of the physician to seek relief under the Act. Other jurisdictions have permitted providers of medical services to bring such claims before agencies charged with administering state workers' compensation acts. *See Smith v. Stephenson*, 641 S.W. 2d 900 (Tex. 1982); *Dump All, Inc. v. Grossman*, 475 So. 2d 976 (Fla. Dist. Ct. App. 1985).

The present case differs from the above-cited cases in that plaintiffs here are not seeking to collect for services rendered, but were apparently denied the opportunity to render their services when defendants refused to provide coverage. Under G.S. 97-98, an employee claiming compensation under the Act has the right to enforce the employer's workers' compensation insurance policy. *Hartsell v. Thermoid Co.*, 249 N.C. at 533, 107 S.E. 2d at 119. The employee's right to enforce the policy, however, arises from construing the contract of insurance as "a direct promise by the insurer to the person entitled to compensation enforceable in his name." G.S. 97-98. Although plaintiffs have not raised the issue in reference to G.S. 97-98, they have argued generally that the Commission may not hear their claims because they do not involve the rights of employees.

This argument is inconsistent with the allegations in plaintiffs' complaint. Plaintiffs have alleged that defendants have denied coverage for chiropractic services agreed upon by the employer and employee. This alleged conduct certainly affects the rights of employees who desire plaintiffs' services. Indeed, in the situations alleged, the employees could have applied to the Commission for relief. Questions regarding approval of a course of treatment and the liability of workers' compensation insurance carriers are properly brought before the Industrial Commission. *Greene v. Spivey*, 236 N.C. 435, 445, 73 S.E. 2d 488, 495-96 (1952); *Hedgepeth v. Casualty Co.*, 209 N.C. 45, 182 S.E. 704 (1935).

Although the conduct of which plaintiffs complain may have violated provisions of the Act and may initially be governed by the Act, plaintiffs are also asserting rights under the common law and G.S., Chap. 75. These causes of action raise issues that are clearly beyond the scope of the Act and the jurisdiction of the Industrial Commission. The Act does not take away common law rights that are unrelated to the employer-employee relationship. *See Bryant v. Dougherty*, 267 N.C. 545, 148 S.E. 2d 548, 28 A.L.R. 3d 1057 (1966) (Commission did not have jurisdiction over employee's malpractice claim against physician who treated employee's compensable injury); *Clark v. Ice Cream Co.*, 261 N.C. 234, 134 S.E. 2d 354 (1964) (Commission had no jurisdiction to reform workers' compensation policy when the rights of the employee were not involved).

Spivey v. General Contractors, 32 N.C. App. 488, 232 S.E. 2d 454 (1977) and *Wake County Hospital v. Industrial Comm.*, 8 N.C. App. 259, 174 S.E. 2d 292, *cert. denied*, 277 N.C. 117 (1970), cited by defendants, do not require a different conclusion. In *Spivey*, this Court held that the Commission had jurisdiction to determine whether the workers' compensation policy in question had been effectively cancelled before the date of the employee's injury. We noted that G.S. 97-99 provides for regulation of the cancellation of policies under the Act. *Spivey v. General Contractors*, 32 N.C. App. at 490, 232 S.E. 2d at 455. In *Wake County Hospital*, this Court held that the Commission had exclusive jurisdiction over an action brought by hospitals challenging the validity of the schedule of hospital charges under the Act. That decision was based on the Commission's statutory authority to regulate such charges. *Wake County Hospital v. Industrial Comm.*, 8 N.C. App. at 260-61, 174 S.E. 2d at 293. Thus, both *Spivey* and *Wake County Hospital* addressed issues clearly within the statutory jurisdiction of the Commission.

In support of their position, plaintiffs cite cases in which our Supreme Court has held that actions under G.S., Chap. 75 may be based on violations of other statutory regulatory schemes. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468-70, 343 S.E. 2d 174, 179 (1986) (action based on violations of provision of G.S., Chap. 58, Art. 3A, regulating insurance industry); *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 97, 331 S.E. 2d 677, 681 (1985) (action based on violations of provision of G.S., Chap. 95, Art. 5A, regulating personnel services). Plaintiffs contend that defendants' alleged misrepresentations to the effect that their policies do not provide coverage for plaintiffs' services are violations of G.S. 58-54.4, which defines unfair or deceptive trade practices in the insurance industry. In *Pearce, supra*, the Supreme Court held that a violation of G.S. 58-54.4 is, as a matter of law, a violation of G.S. 75-1.1. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. at 470, 343 S.E. 2d at 179.

Defendants argue, however, that whether they actually made such misrepresentations depends on whether they were obligated to provide coverage, which in turn depends on whether plaintiffs' services were authorized under the Act. As discussed earlier, this question is within the exclusive jurisdiction of the Industrial Commission. Thus, although plaintiffs' causes of action may not ulti-

mately be within the Commission's jurisdiction, the factual issues upon which defendants' liability depends are exclusively within its jurisdiction.

Pearce, supra, did not involve such a situation. The insurance statute considered in *Pearce*, G.S. 58-54.4, can be enforced by the Commissioner of Insurance. G.S. 58-54.5. The Commissioner's remedial power, however, is limited to issuing cease and desist orders. *Comr. of Insurance v. Insurance Co.*, 28 N.C. App. 7, 11, 220 S.E. 2d 409, 412-13 (1975). There is no authority in statutory or case law suggesting that the Commissioner of Insurance has exclusive jurisdiction over questions arising under G.S., Chap. 58.

In view of the foregoing, we are of the opinion that the present case is properly controlled by the doctrine of primary jurisdiction:

> [The doctrine of primary jurisdiction] is altogether different from the doctrines of exhaustion and of ripeness, which govern the timing of judicial review of administrative action. The doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision.
>
> The precise function of the doctrine of primary jurisdiction is to guide a court in determining *whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court.* (Emphasis added.)

3 K. Davis, Administrative Law Treatise § 19.01 at 2-3 (1958). Although the courts of this State have not had occasion to apply this doctrine, it has long been invoked by the federal courts in cases where, as here, conduct alleged to be in restraint of trade also constituted possible violations of regulatory statutes or rules. *See, e.g., Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed. 2d 525 (1973) (antitrust suit stayed pending ruling by Commodity Exchange Commission); *Hansen v. Norfolk and Western Ry. Co.*, 689 F. 2d 707 (7th Cir. 1982) (antitrust suit stayed pending determination by Interstate Commerce Commission of all matters within its jurisdiction).

The trial court did not make findings of fact and the record before this Court consists only of the complaint and defendants'

answers and motions. Both parties, however, suggested in their briefs that an aspect of this case involves Section 7 of the Industrial Commission's Rating Guide and Fee Schedule and the use of a certain Industrial Commission form authorizing chiropractic services. At this juncture we have no evidence to identify the specific instances or nature of defendants' alleged misconduct, but the Industrial Commission, charged with administration of the Workers' Compensation Act, is better suited than the Court to identify and regulate alleged abuses, if any, by insurance carriers and health care providers in matters under the Workers' Compensation Act.

In *Ricci v. Chicago Mercantile Exchange, supra,* the Court's decision rested on three premises: (i) that it would be essential for the antitrust court to determine whether maintenance of the antitrust action would be affected by the regulatory scheme; (ii) that some aspects of the dispute were within the statutory jurisdiction of the administrative agency; and (iii) that adjudication of the dispute by the agency would be of material aid in resolving the question of whether the regulatory scheme provided any immunity from the antitrust laws. 409 U.S. at 302, 93 S.Ct. at 580, 34 L.Ed. 2d at 535-36. The same factors are present in the case at bar. As plaintiffs state in their brief, their claims involve "essentially state antitrust issues." Some aspects of plaintiffs' claims are clearly within the Industrial Commission's jurisdiction, and resolution of these aspects could possibly also determine the resolution of plaintiffs' claims under the common law and G.S., Chap. 75. If, for instance, defendants are found to have complied with all provisions of G.S., Chap. 97, any cause of action under Chapter 75 would certainly be affected, if not barred. Similarly, the rights of the insurance carrier under the Act vis a vis agreements between the employer and employee for medical treatment and services are clearly pertinent to any determination whether the insurance carrier has interfered with contractual rights of a health care provider or has improperly refused to pay for health care services. At the very least, rulings by the Commission on matters within its jurisdiction will clarify the issues to be resolved in superior court.

We therefore hold that, under the facts as alleged in plaintiffs' complaint, they cannot maintain this action in superior court without first seeking relief from the Industrial Commission. The

federal courts, when faced with issues of primary jurisdiction, often do not dismiss the case but stay the action pending an administrative ruling. *Ricci v. Chicago Mercantile Exch., supra; Hansen v. Norfolk and Western Ry. Co., supra.* This procedure relieves the plaintiffs of the burden of reinstituting the action at a later date, and prevents any applicable statutes of limitations from barring future claims. *Hansen v. Norfolk and Western Ry. Co.*, 689 F. 2d at 714.

The order of the superior court dismissing plaintiff's action is vacated and the case remanded to the trial court for entry of an order staying plaintiffs' action pending a determination of the underlying workers' compensation issues by the Industrial Commission.

Vacated and remanded.

Judges WELLS and ORR concur.

STATE OF NORTH CAROLINA v. LUTHER FOWLER

No. 8728SC604

(Filed 1 March 1988)

1. Searches and Seizures § 23— probable cause for issuance of search warrant— evidence sufficient

There was adequate cause for the issuance of a search warrant where the first affidavit disclosed defendant's present street reputation as a dilaudid dealer and his past conviction for dilaudid possession; the informant's specific description at an earlier time as to how and when defendant purchased dilaudid; the informant's tip describing the time and day of departure, the estimated day of return and the mode of transportation to be used by defendant when he brought his next shipment of dilaudid to Asheville; the police confirmation of all of the details contained in the tip; the further confirmation of defendant's departure on a flight from Asheville, North Carolina, to Daytona Beach, Florida; and the second affidavit specifically referred to and incorporated the prior information and added information received from the informant that the defendant transported drugs in his anal cavity and that a police examination had disclosed a lubricant at the opening of defendant's anal cavity.

2. **Searches and Seizures § 39— body cavity searched—scope of warrant not exceeded**

Officers searching for dilaudid did not exceed the scope of a search warrant by a body cavity search where language in the challenged warrant said "You are commanded to search the premises, vehicle, person, and other place or item described in the application for the property and person in question," and the second affidavit accompanying the warrant "requested that the search be expanded to include body cavities."

3. **Searches and Seizures § 39— body cavity search—properly executed**

A rectal examination was properly conducted within the scope of a search warrant where the police initially asked defendant to submit to an abdominal x-ray and ordered a rectal examination only after defendant refused to comply, and the actual examination was conducted by a qualified physician in a hospital emergency room with the use of medically approved procedures.

4. **Searches and Seizures § 39— rectal examination for narcotics pursuant to search warrant—not unreasonable search procedure**

A rectal examination and the removal of dilaudid did not constitute an unreasonable search and seizure where the search and seizure were conducted pursuant to a valid search warrant and were performed by a physician in a hospital with the use of approved medical procedures.

APPEAL by defendant from *Downs, Judge.* Order entered 5 May 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 8 December 1987.

Defendant was arrested for possession of dilaudid in violation of N.C.G.S. § 90-95(a)(1). At trial defendant moved to suppress evidence of ninety-three tablets of dilaudid discovered on his person prior to his arrest. After conducting a voir dire hearing, the trial court denied defendant's motion. Subsequently, defendant was found guilty of possession of dilaudid in violation of N.C.G.S. § 90-95(a)(3) and sentenced to an active term of four years.

From the order denying defendant's motion to suppress, he appeals.

At the voir dire hearing on defendant's motion, the State's evidence tended to show the following.

Asheville Police Detective A. D. Jenkins applied on 23 October 1986 for a warrant to search defendant's person for dilaudid. After reviewing Detective Jenkins' application and affidavit to establish probable cause, a magistrate issued the requested warrant.

Detective Jenkins, with the aid of other officers, took defendant into custody on 23 October 1986 at the Asheville Airport and conducted a strip search of defendant's person in the airport security office.

The officers discovered no contraband during the strip search; however, an excessive amount of lubricant was found at the opening of defendant's anal cavity. When questioned, defendant denied the presence of contraband in his anal cavity. In response, the officers took defendant to Memorial Mission Hospital for further examination.

While defendant was being transported from the airport to the hospital, Detective Jenkins filed a second affidavit to establish probable cause with a second magistrate requesting authorization for a search of defendant's anal cavity. The magistrate reviewed the affidavit, signed it, and returned it to Detective Jenkins.

Detective Jenkins took the second affidavit, the first affidavit, and the search warrant to the Memorial Mission Hospital Emergency Room. After defendant refused to submit to an x-ray, a licensed medical doctor probed defendant's anal cavity with his finger. The rectal exam disclosed the presence of an object lodged in the cavity. The doctor, unable to retrieve the object by probing with either his finger or an instrument, performed an enema on defendant. This procedure produced a capsule containing ninety-three tablets of dilaudid. The discovery of the dilaudid resulted in defendant's arrest and subsequent conviction for possession of a controlled substance.

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

C. David Gantt, for defendant-appellant.

ORR, Judge.

I.

[1] On appeal, defendant contends the information provided by the confidential informant in the two affidavits was insufficient to establish probable cause for issuance of a search warrant.

When addressing defendant's contention, our Court is guided by the Supreme Court's decision in *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984), which adopted the "totality of the circumstances" analysis, set forth in *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed. 2d 527, *reh'g denied*, 463 U.S. 1237, 77 L.Ed. 2d 1453 (1983), for determining if probable cause existed for issuance of a search warrant based on information from an informant. *State v. Walker*, 70 N.C. App. 403, 320 S.E. 2d 31 (1984).

The standard applied for a totality of the circumstances analysis is stated as follows:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.

Illinois v. Gates, 462 U.S. at 238-39, 76 L.Ed. 2d at 548; *State v. Arrington*, 311 N.C. at 638, 319 S.E. 2d at 257-58.

The Supreme Court of North Carolina further emphasized in *Arrington* "that great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E. 2d at 258.

In the present case, Detective Jenkins presented two affidavits to establish probable cause for the search of defendant's person and anal cavity. The first affidavit contained the following statements:

> Within the past 48 hrs. Det. A. D. Jenkins with the Asheville Police Dept. interviewed a confidential informant. Informant stated that Luther Fowler was to leave on 10/22/86 in the evening, on a flight out of town to buy Dilaudid and would return within the next day or so. Informant has informed Affiant in the recent past of the actions of Luther Fowler, as to leaving town by airplane to buy Dilaudid, and would return in a day or so with a quanity [sic] of Dilaudid.

On 10/22/86 Det. J. S. Siske with the Asheville Police Dept. contacted a Piedmont Airlines reservation clerk in Winston-Salem, N.C. The clerk stated that they had a Luther Fowler on their reservation list, to depart the Asheville Airport at aprox. 6:00 p.m. on 10/22/86. The clerk stated that Luther Fowler cancelled the flight and wanted to book a flight for a departure of aprox. 1 hour later. The clerk stated that this flight was full and Fowler did not depart on 10/22/86. But did schedule a flight for 10/23/86 at 6:50 a.m. with a destination of Daytona Florida. The clerk stated that Luther Fowler was scheduled to return on 10/23/86 at aprox. 10:20 p.m.

On 10/23/86 Det. J. S. Siske talked with a clerk with Piedmont Airlines in Winston-Salem, N.C. and was told that Luther Fowler did board the 6:50 a.m. flight to Daytona Fla.

On aprox. 10/11/86 Det. A. D. Jenkins and Det. J. S. Siske while assisting patrol had the occasion to talk with Luther Fowler after being arrested for trespass, and while being intoxicated stated to Siske and Jenkins that he had just recently returned from Daytona, Fla. and offered to show the airline ticket.

In 1976 Luther Fowler was convicted for sale & delivery of Herion [sic], Cocaine, & Dilaudid in the state of N.C. Also convicted for Rape in 1956 and more recently for carrying a concealed weapon 8/27/86. Luther Fowler also has numerous other convictions in other states.

This affiant has received information in the recent past that Luther Fowler is a Dilaudid dealer.

An evaluation of the affidavit discloses for consideration by the magistrate the following factors: (1) defendant's present street reputation as a dilaudid dealer and his past conviction for dilaudid possession; (2) the informant's specific description, at an earlier time, as to how and when defendant purchased dilaudid; (3) the informant's tip describing the time and day of departure, the estimated day of return, and the mode of transportation to be used by defendant when he brought his next shipment of dilaudid to Asheville; (4) the police confirmation of all the details contained in the informant's tip; and (5) the further confirmation of defendant's

departure on a flight from Asheville, North Carolina to Daytona Beach, Florida on 23 October 1986.

The second affidavit to establish probable cause was a continuance of the first affidavit and said:

> The applicant swears to the following facts to establish probable cause for the issuance of this continuation of the original affidavit:
>
> In addition to the original information contained in the application for search warrant of Luther E. Fowler, same confidential informant further informed applicant that Luther E. Fowler is known to transport Dilauded [sic] within his anal cavity.
>
> Upon execution of search warrant, Fowler was searched by applicant Det. Dayton, and Special Agent David Barnes. Upon examination of Fowler, Det. Dayton and Special Agent Barnes observed what appeared to be a lubricant in the direct area of the anal opening.
>
> It is therefore requested that the search be expanded to include body cavities.

This affidavit was dated, sworn, and subscribed before a detached and neutral magistrate. It specifically referred to and incorporated the prior information given in the search warrant application and the first affidavit. In addition, the information received from the informant, that defendant transported drugs in his anal cavity, was supported by the police examination disclosing a lubricant at the opening of defendant's anal cavity.

Applying the practical common sense approach mandated by the "totality of the circumstances" analysis, this Court finds there was a substantial basis for the first magistrate's conclusion that defendant would possess dilaudid when he returned to the Asheville Airport the evening of 23 October 1986 and for the second magistrate's conclusion that the dilaudid possessed by defendant was secreted in his anal cavity. Accordingly, we conclude adequate probable cause, based upon the informant's tip and the police investigation, existed for issuance of the search warrant.

II.

Defendant further argues issuance of the search warrant violated N.C.G.S. § 15A. After reviewing this argument, we find it to be without merit and decline to discuss it.

III.

[2] Finally, defendant contends the search warrant, even if properly issued, was improperly executed; therefore, evidence disclosed pursuant to the warrant was improperly admitted at trial.

Defendant presents two arguments in support of his contention. First, he contends the search exceeded the scope of the warrant because the warrant did not specifically list his body cavity as an area to be searched. We disagree.

It is not necessary under these facts for the face of the warrant to list the specific bodily area to be searched. "[A] warrant may properly be construed with reference to the supporting affidavit for the purpose of sustaining the particularity of the description of the premises to be searched . . . . Such incorporation is proper, provided that the affidavit accompanies the warrant, and, in addition, the warrant uses suitable words of reference which will provide notice that the two documents are to be construed together so as to provide the requisite particularity of description." *Brooks, Comr. of Labor v. Enterprises, Inc.*, 298 N.C. 759, 763, 260 S.E. 2d 419, 422 (1979) (citations omitted); *State v. Shanklin*, 16 N.C. App. 712, 193 S.E. 2d 341 (1972), *cert. denied*, 282 N.C. 674, 194 S.E. 2d 154 (1973); *State v. Flowers*, 12 N.C. App. 487, 183 S.E. 2d 820, *cert. denied*, 279 N.C. 728, 184 S.E. 2d 885 (1971).

Language in the challenged warrant said "[y]ou are commanded to search the premises, vehicle, *person, and other place* or item *described in the application* for the property and person in question." (Emphasis added.) The application for the search warrant specifically referred to the attached affidavit. The second affidavit "requested that the search be expanded to include body cavities."

The second affidavit accompanied the warrant and the first affidavit, when defendant's body cavity was searched. Moreover, the language in the warrant and application incorporated the af-

fidavit by reference and gave sufficient notice that the documents were to be construed together. For this reason, we find defendant's argument without merit.

[3] Defendant assigns error in his second argument to the manner in which the body cavity search was executed.

Initially, the police asked defendant to submit to an abdominal x-ray to determine if he was concealing drugs in his anal cavity. Only after defendant refused to comply did police order a rectal exam.

The actual physical examination was conducted by a qualified physician, in a hospital emergency room, with the use of medically approved procedures.

"This kind of examination is a routine one which countless persons have undergone. It is an uncomplicated and non-hazardous procedure." *Blackford v. United States*, 247 F. 2d 745, 752 (9th Cir. 1957).

We conclude, under these facts, that the rectal exam was properly conducted within the scope of the warrant.

[4] Defendant next argues that the physician, when removing the dilaudid, excessively probed his rectum with a finger and an instrument before administering an enema. The physician's actions, defendant contends, were performed without his consent and, thus, constituted an unreasonable search and seizure.

The intensity of the alleged probing is not supported by the physician's medical record, which states that after attempting to reach the dilaudid with a finger and an instrument, the physician administered an enema, which successfully dislodged the drugs.

After review, we find that defendant was not under arrest at the time of the search; consequently, the immediate recovery of the dilaudid was necessary to justify his continued police detention. However, defendant was in custody pursuant to a valid search warrant authorizing a cavity search and seizure of dilaudid found therein, so defendant's consent was not required for conducting either the search or the removal. We further find that the dilaudid's removal was carried out by a qualified physician, in sterile medical surroundings, using approved medical procedures.

We refuse to accept defendant's argument that the rectal exam and the removal of drugs from his anal cavity are such an intrusion upon personal privacy and dignity as to be an inherently unreasonable search. As the Ninth Circuit Court of Appeals stated in *Blackford*, when faced with the same argument, "[t]here is nothing in the Bill of Rights which makes body cavities a legally protected sanctuary for carrying narcotics. It is not per se violative of the Constitution to remove foreign matter from body cavities (*Breithaupt v. Abram*, [352 U.S. 432, 1 L.Ed. 2d 448 (1957)]) any more than it is to force a person with narcotics in a clenched fist to open his hand. It is necessary to inquire into the particular circumstances to determine whether in the precise case before the court, the search and subsequent seizure are unlawful." *Blackford*, 247 F. 2d at 753.

In the present case, the search and seizure were conducted pursuant to a valid warrant, and were performed by a physician in a hospital with the use of approved medical procedures. Defendant's constitutional rights were adequately protected by the utilization of proper procedure by the law enforcement officers in securing the search warrants and in executing the search.

For the reasons given above, this Court finds the rectal exam and the removal of the dilaudid did not constitute an unreasonable search and seizure, and overrules this assignment of error.

This Court holds that defendant received a fair trial free from prejudicial error.

No error.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. ERNEST EUGENE SMITH, II

STATE OF NORTH CAROLINA v. DAVID MICHAEL SCHOCH

No. 8726SC320

(Filed 1 March 1988)

1. **Obscenity § 1— disseminating obscenity—constitutionality of statute**

The statute prohibiting the dissemination of obscenity is not unconstitutional for failing expressly to include the phrase "taken as a whole" in subsection (b)(3) or for failing to include an express "public place" requirement. Furthermore, the "contemporary community standards" test set forth in the statute for determining obscenity is constitutional.

2. **Obscenity § 3— value of material—reasonable man standard—instruction on community standard—harmless error**

The trial court in a prosecution for disseminating obscenity erred in instructing the jury that it should apply a community standard rather than a reasonable man standard in deciding the question of a work's value, but such error was harmless because no rational juror, properly instructed, could find value in the materials in question.

3. **Obscenity § 1— single transaction—sale of multiple items—separate offenses**

In enacting N.C.G.S. § 14-190.1(a) the legislature intended that a defendant could be convicted of a separate offense for each obscene item disseminated in a single sales transaction.

Judge WELLS concurring in part and dissenting in part.

APPEAL by defendants from *Lewis, Robert D., Judge.* Judgment entered 7 November 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 November 1987.

Defendants David Michael Schoch and Ernest Eugene Smith, II, were convicted in a jury trial of multiple violations of N.C.G.S. sec. 14-190.1, which prohibits the dissemination of obscene literature and exhibitions. The trial court imposed fines, costs of court, and active prison sentences on each defendant. Defendants appealed.

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

James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr., and Mark T. Calloway, for defendant-appellant Smith.

Ferguson, Stein, Watt, Wallas, and Adkin, P.A., by John W. Gresham, for defendant-appellant Schoch.

JOHNSON, Judge.

Defendants bring forward eleven assignments of error. For reasons stated below, we overrule all assignments.

The basic facts are not in dispute. On the afternoon of 1 October 1985, Officer H. F. Frye of the Charlotte City Police entered the Cinema Blue Bookstore in Charlotte, where defendant Schoch was the manager and defendant Smith worked as a clerk, and purchased from Schoch a package of magazines containing one entitled "Cum Up My Asshole" and a film entitled "Nature Lovers." Defendant Smith took no part in this first sale. Later that same afternoon, Sergeant T. G. Barnes, also of the Charlotte City Police, entered the same bookstore and purchased, from defendants Schoch and Smith together, a magazine entitled "Butt-Fucked Brunette," a magazine entitled "Bi-Bi Love No. 2," and a motion picture film entitled "Swedish Classics, No. 113, Play Ball." Defendant Schoch was subsequently indicted on five counts of violating G.S. sec. 14-190.1 (one count for each of the three magazines and two films he had sold to Officer Frye and Sergeant Barnes). Defendant Smith was indicted on three counts of violating the same statute (one count for each of the two magazines and one film he, together with Schoch, had sold to Sergeant Barnes). Neither defendant contests that he sold the materials.

[1] By their first Assignment of Error defendants contend that G.S. sec. 14-190.1 violates individual rights protected by the North Carolina and United States Constitutions. We have ruled on all of defendants' constitutional claims in prior cases. In *Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E. 2d 383 (1987), we rejected arguments that G.S. sec. 14-190.1 is unconstitutional for failing expressly to include the phrase "taken as a whole" in subsection (b)(3) or for failing to include an express "public place" requirement in its scheme. And in *State v. Mayes*, 86 N.C. App. 569, 359 S.E. 2d 30 (1987), we upheld the constitutionality of the "contemporary community standards" test for determining obscenity as a jury question.

[2] By part (c) of their tenth assignment, defendants correctly point out that the trial court's instructions on the value prong of the obscenity test were erroneous in light of the recent decision of the Supreme Court in *Pope v. Illinois*, 107 S.Ct. 1918

(1987). In *Pope* the Illinois trial court charged the jury that it should apply community standards in deciding the question of a work's value. On appeal, the Supreme Court held that the value question must be determined not in the light of community standards, but rather on an objective basis, i.e., the reasonable person standard. In the present case the trial court gave the same instruction held erroneous in *Pope*. However, the Supreme Court also held in *Pope* that the appealed convictions should stand "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the magazines." We have examined the materials introduced into evidence in the present case and have concluded that no rational juror, properly instructed, could find value in them. Hence, we conclude that the trial court's error was harmless.

We have carefully examined assignments two through nine, and parts A and B of assignment ten, and find them all to be without merit. However, we choose to discuss assignment four.

[3] By their fourth Assignment of Error, defendants contend that the State's "multiplicitous pleading" and subsequent prosecution violated constitutional guarantees against double jeopardy. As hereinbefore indicated, the basis for defendant Schoch's five convictions was the sale of three magazines and two films in two separate transactions; and the basis for defendant Smith's three convictions was his sale of two magazines and one film in one transaction. The State answers that the protection against double jeopardy does not bar the State from imposing multiple punishments for offenses arising out of one transaction if all charges are tried simultaneously and if the legislature intended the offenses to be punished separately.

We find that the Double Jeopardy Clause of the U.S. Constitution is irrelevant to the resolution of this case. The Double Jeopardy Clause bars (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969). Where multiple punishment is involved, the Double Jeopardy Clause prohibits courts from punishing cumulatively the same act or conduct under more than one statute absent clear legislative authorization. *See Missouri v. Hunter*, 459 U.S. 359 (1983). However, in the

case at bar, we are concerned not with the violation of two or more statutes by one transaction, but rather with multiple violations of *one* statute. Therefore, the question is: What is the allowable unit of prosecution?

The State contends and defendants concede, that the fixing of the unit of prosecution lies within the province and discretion of the General Assembly. However, defendants cite *Bell v. United States*, 349 U.S. 81 (1955), for the proposition that where a legislature's intent in this regard is ambiguous, the courts should resolve the ambiguity in favor of lenity toward the defendant. We are unconvinced and refuse to apply the reasoning of *Bell* to the facts of the case *sub judice*. The ambiguity which would allow us to "second-guess" the legislature and apply lenity toward the defendant in the absence of any ascertainable intent, is simply not present here. G.S. 14-190.1(a) provides in pertinent part:

> (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 . . .
>
> (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 supplied.)

We feel that the express statutory language used provides us with the clear intention that the "sale" of "any" obscene item constitutes a separate offense, regardless of whether, as here, defendants disseminated several items during each sales transaction. *See Educational Books, Inc. v. Commonwealth of Va.*, 228 Va. 392, 323 S.E. 2d 84 (1984) (interpreting Va. Code Ann. sec. 18.2-374

to consider the sale of each one of a number of obscene materials as a separate offense).

In addition, we are guided by the reasoning set forth in *State v. Wilds*, 88 N.C. App. 69, 362 S.E. 2d 605 (1987), this Court's most recent opportunity to consider the issue raised by this assignment. In *Wilds*, the defendant was convicted of two counts of disseminating obscenity based upon his sale of two films in a single transaction entitled "These Bases are Loaded," containing depictions of males engaging in oral and anal intercourse, and "Three Of A Kind," depicting a male and two females engaging in vaginal intercourse, oral stimulation and masturbation. Both convictions were upheld.

The Court found that the clear legislative intent of G.S. 14-190.1(a) is to consider the dissemination of each item listed within the statute as a "separate unlawful act." The Court also reasoned in reaching its conclusion, that it would be basically unsound to affix defendant's proposed unit of prosecution, i.e., allowing one indictment only for each transaction, irrespective of volume or quantity disseminated, because each item disseminated must be evaluated separately to determine whether it meets the legal definition of obscenity.

With this reasoning and decision we are in accord, and therefore affirm the convictions of both defendants, holding that they were properly convicted of separate offenses arising out of the dissemination of each item determined by the jury to be obscene.

No error.

Judge COZORT concurs.

Judge WELLS concurs in part and dissents in part.

Judge WELLS concurring in part and dissenting in part.

I concur with the majority in rejecting assignments of error 1-3 and 5-10. However, in my opinion, defendants' assignment of error 4 should be sustained.

As the majority indicates, the question presented by this assignment is: What is the allowable unit of prosecution under G.S.

§ 14-190.1? All sides agree that it lies within the province of the General Assembly to fix the unit of prosecution. Furthermore, the majority seems impliedly to endorse, in principle, the rule of statutory construction laid down in *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955)—that where a legislature fails clearly and unambiguously to establish the unit of prosecution, such ambiguity should be resolved in favor of lenity toward the defendant. But unlike the majority I discern in G.S. § 14-190.1 no clear expression of legislative intent to punish separately and cumulatively for *each and every* obscene item disseminated, regardless of the number of transactions involved.

In *Bell* the issue was whether the simultaneous interstate transportation of two women in violation of the Mann Act constituted two offenses or only one. The relevant provisions of the Act were: "Whoever knowingly transports in interstate or foreign commerce . . . *any* woman or girl for the purpose of prostitution or debauchery . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." (Emphasis added.) The Supreme Court refused to construe "any" as a mandate to punish separately and cumulatively for each and every woman unlawfully transported. The Supreme Court stated:

> When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, *to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.* And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. *It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a*

single transaction into multiple offenses. . . . [Emphasis added.]

The resemblance between *Bell* and the present case is obvious. As the Mann Act prohibited the unlawful interstate transportation of "*any* woman or girl," so our G.S. § 14-190.1 proscribes the dissemination of "*any* obscene writing, picture, record or other representation or embodiment of the obscene." I cannot espy in the word "any" an unambiguous mandate to punish separately for each "stick" in the transactional "faggot" any more than the Supreme Court could. Accordingly, applying the *Bell* rule of lenity, I construe "any" in the context of our statute to signify the number of transactions in which a defendant sells at least one obscene item.

The State contends that since each indictment charges with disseminating a different item, the determination whether each item was obscene must be made independently, thus justifying separate, and cumulative, punishments. However, by this reasoning the State could prosecute separately and cumulatively *each and every* obscene photograph in a large magazine on the ground that subsection (a)(1) prohibits the dissemination of "*any* obscene . . . picture." But I do not think the General Assembly intended to appoint the staple gun to be the arbiter of the unit of prosecution. I fully recognize that under my conception of the statute a retailer who sells a single obscene item may be subject to the same punishment as a distributor who delivers 100 obscene items to a store. However, until the General Assembly unambiguously declares a contrary intent, we should assume that a single sale in contravention of G.S. § 14-190.1 does not spawn multiple indictments.

In the present case, since the evidence showed that Schoch participated in two unlawful transactions, and Smith in only one, the trial court should have dismissed three of the indictments against Schoch and two of the indictments against Smith.

STATE OF NORTH CAROLINA v. SAMUEL LEON GETWARD

No. 875SC732

(Filed 1 March 1988)

1. **Rape and Allied Offenses § 3— rape of estranged wife—indictment sufficient**

An indictment for rape of defendant's estranged wife was sufficient where the indictment was drawn in accordance with N.C.G.S. § 15-144.1 and was sufficient to let defendant know that he was charged with the rape of his estranged wife and to allow him to prepare his defense. N.C.G.S. § 14-27.8 is not a separate rape offense and does not require a separate form of indictment.

2. **Rape and Allied Offenses § 1— marriage as defense—raised by plea in bar**

Marriage as a defense to rape is raised by a plea in bar; nothing in the wording of N.C.G.S. § 14-27.8 suggests that defendant must wait until prosecution is underway to offer proof concerning his marital status.

3. **Rape and Allied Offenses § 1— failure to dismiss rape of estranged wife—no order of divorce or written separation agreement—error**

The trial court erred by not granting defendant's motion for dismissal of the charge of raping his estranged wife where there was no written separation agreement and no final order granting a divorce from bed and board. At the time of the offense, N.C.G.S. § 14-27.8 specifically stated that the parties must be living separate and apart pursuant to a written agreement or a judicial decree.

4. **Kidnapping § 1— disjunctive charge—conviction dismissed**

Defendant's conviction for the second degree kidnapping of his estranged wife was reversed where the indictment charged kidnapping for the purpose of raping and terrorizing, the court charged the jury on raping *or* terrorizing, and defendant could not have been convicted for the rape of his wife under the law as it was when the incident occurred.

APPEAL by defendant from *Strickland (James R.), Judge.* Judgment entered 28 March 1986 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 January 1988.

Defendant was charged in separate bills of indictment with the first degree rape and first degree kidnapping of his wife Michelle D. Getward. He was found guilty of second degree rape and second degree kidnapping. Defendant appeals the judgment entered thereon.

The evidence for the State tends to show that on 25 February 1985 defendant confronted his estranged wife in a parking lot in Wilmington, North Carolina. He had parked his pickup truck in

front of her car and was leaning up against her car when she approached. He was carrying a pistol which was attached to his belt.

Defendant instructed his wife to get into her car and follow him. Fearing for her safety, she complied. As they left the parking lot, Mrs. Getward became aware that defendant had chained their cars together. Defendant later stopped and unhooked the vehicles. Again, he instructed her to follow him to his house. He threatened to shoot her if she did not do so. When they reached the house, Mrs. Getward refused to enter, and defendant pulled out his gun and threatened to kill her.

Subsequently, defendant and his wife left his residence in her car and drove around the Wilmington area. During this time, defendant repeatedly accused his wife of sexual misconduct and threatened to rape and kill her. He also struck her across the head with the pistol.

Defendant then had his wife drive to an isolated area in Pender County where defendant had sexual intercourse with her against her will. Testimony of the wife revealed that during this time defendant ripped her blouse off, struck her again with the gun, hit her several times and threatened to kill her. Afterwards defendant and his wife drove to another location where defendant left the vehicle threatening her and warning her about calling the police.

That same day, Mrs. Getward reported the events to personnel at the Women's Shelter of New Hanover County and to the police. She received medical treatment for various injuries including a black eye, bruised and swollen jaw, knots on the back of her head and a bruised arm. She was also examined in connection with her rape allegations.

Defendant was indicted in Pender County for the felony of rape and in New Hanover County for the felony of kidnapping. Defendant waived venue in Pender County and was tried on both charges in New Hanover County.

Defendant testified in his own behalf that his wife consented to and encouraged the sexual intercourse. He denied having a gun or forcing his wife to drive anywhere. Defendant also testified that he struck his wife in order to halt her advances or to return blows she gave to him.

At trial, evidence was admitted, over defendant's objection, which revealed that on 22 April 1984 Mrs. Getward had filed a complaint requesting a divorce from bed and board and a court order directing defendant to refrain from harassing her. Also admitted in evidence was a 30 April 1984 *ex parte* order, entered pursuant to G.S. 50B and pending further hearing, which in part prohibited defendant and Mrs. Getward from assaulting, molesting, harassing, or interfering with each other.

Attorney General Lacy H. Thornburg, by Associate Attorney General Robin A. Perkins, for the State.

William H. Dowdy for defendant-appellant.

SMITH, Judge.

[1] Defendant assigns as error the trial court's submission of the rape charge to the jury on the grounds that the requirements of G.S. 14-27.8 pertaining to interspousal rape were not sufficiently alleged in the indictment nor sufficiently proven at trial. We disagree that the rape indictment was insufficient but hold that G.S. 14-27.8 barred defendant's prosecution for rape.

The rape indictment against defendant stated that defendant "unlawfully, willfully and feloniously did ravish and carnally know MICHELLE D. GETWARD, a female person, by force and against her will by employing and displaying a dangerous and deadly weapon." Defendant contends that the indictment was deficient because the State was seeking a conviction for interspousal rape but the indictment failed to set forth the elements of G.S. 14-27.8 that defendant and his wife were married and separated pursuant to a written agreement or judicial decree. We do not agree.

G.S. 15-144.1 provides a short form indictment for the charge of rape. It states in pertinent part:

> [I]t is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of

> guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.

Our Supreme Court has held that a short form indictment is constitutionally sufficient to charge a defendant with first degree rape. *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978).

> An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in case of conviction.

Id. at 603, 247 S.E. 2d at 883. The State's failure to set forth the marital status of the parties involved is not fatal to the indictment. As mandated by our Legislature: "In indictments for rape it is not necessary to allege every matter required to be proved on the trial." G.S. 15-144.1. The rape indictment was drawn in accordance with G.S. 15-144.1 and was certainly sufficient enough to let defendant know that he was charged with the rape of his estranged wife and to allow him to prepare his defense.

[2] G.S. 14-27.8 is not a separate rape offense, as defendant contends. This statute does not require a separate form of indictment other than the one provided for by G.S. 15-144.1. However, marriage is not a defense to be raised by defendant only at trial, as the State contends. Marriage as a defense to rape is raised by a plea in bar to prevent trial of cases which do not meet the criteria of G.S. 14-27.8. Although now amended, G.S. 14-27.8 stated at the time of the alleged offense:

> A person *may not be prosecuted* under this Article *if* the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense unless the parties are living separate and apart pursuant to a written agreement or a judicial decree.

(Emphasis added.) The statute does not enumerate any additional elements of rape which must be proved by the State. Rather, it abolishes, in part, the common law defense of marriage. However, the wording of the statute does not suggest that defendant must wait until prosecution is underway to offer proof concerning his marital status. G.S. 14-27.8 has the effect of barring prosecution

altogether. A defendant who could show that he and his wife were not separated by "a written agreement or a judicial decree" at the time of a rape could not be brought to trial. G.S. 14-27.8.

"A plea in bar . . . sets forth matters which *per se* destroy the right of action and bars its prosecution absolutely." *U.S. v. Brodson*, 234 F. 2d 97, 99 (1956). Although there is no current case law which specifically holds that marriage as a defense to rape under G.S. 14-27.8 is to be asserted by a plea in bar, other courts have recognized that the defenses of statute of limitations, self-incrimination, former acquittal or conviction and pardon are proper for a plea in bar. *Commonwealth v. Geagan*, 339 Mass. 487, 159 N.E. 2d 870, *cert. denied*, 361 U.S. 895, 4 L.Ed. 2d 152, 80 S.Ct. 200 (1959). *Accord Brodson supra. See also U.S. v. Goldman*, 277 U.S. 229, 72 L.Ed. 862, 48 S.Ct. 486 (1928); *State v. Evjue*, 253 Wis. 146, 33 N.W. 2d 305 (1948). These cases have held that the purpose of the plea in bar "is to set up a ground not open under a plea of not guilty, which is an absolute defen[s]e, not only at the time of filing but for all time." *Geagan*, 339 Mass. at 495, 159 N.E. 2d at 878. G.S. 14-27.8, by its absolute language that a defendant "may not be prosecuted," falls directly into the proper category for a plea in bar.

In North Carolina double jeopardy is raised by a plea in bar. *State v. Davis*, 223 N.C. 54, 25 S.E. 2d 164 (1943). The court reasoned that such a plea is an inquiry not into a defendant's conduct but into whether the court had previously taken action against defendant for the same offense. By analogy, a plea in bar under G.S. 14-27.8 is not an inquiry into what defendant did but into whether defendant was married and not separated "pursuant to a written agreement or a judicial decree" at the time of the incident. This is an inquiry into status. As with double jeopardy, an answer in the affirmative would bar prosecution of a defendant. By presenting marriage as a defense to rape by a plea in bar, defendants and the State will be spared the cost and anxiety of unnecessary and frivolous prosecution.

[3] Defendant and his wife were separated on the date of the alleged rape. The undisputed evidence showed that on 22 March 1984 Michelle Getward filed a complaint seeking a divorce from bed and board pursuant to G.S. 50-7 and a protective order under G.S. 50B. On 30 April 1984, the district court entered an *ex parte*

protective order. No final order granting a divorce from bed and board was ever entered, and there was no written separation agreement between the parties.

The State contends that the *ex parte* order should be viewed as a valid judicial decree of separation for the purposes of a rape prosecution. It points to a legislative intent in enacting G.S. 14-27.8 to permit prosecutions for rape when there was evidence that the spouses had taken steps to alter the normal husband and wife relationship. The State cites Mrs. Getward's repeated attempts to separate herself legally from defendant. We cannot agree with the State's contention.

Under the common law, a husband could not be prosecuted for raping his wife unless he abetted another in committing the act. *State v. Dowell*, 106 N.C. 722, 11 S.E. 525 (1890). G.S. 14-27.8, by providing for prosecution of the husband in some cases, is in derogation of the common law. A statute which is in derogation of the common law must be strictly construed. *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919).

At the time of the offense, G.S. 14-27.8 specifically stated that the parties must be "living separate and apart *pursuant to* a written agreement or *a judicial decree*." G.S. 14-27.8 (emphasis added). Thus, under this statute, they must be separated by their own written agreement or by a judicial decree. The only judicial decree which will constitute a judicial separation is a decree for a divorce from bed and board. A divorce from bed and board is a judicial separation. *Harrington v. Harrington*, 286 N.C. 260, 210 S.E. 2d 190 (1974).

The *ex parte* order entered in this case is not a decree granting judicial separation; it is an order requiring defendant and his wife to stay away from one another and requiring defendant to halt his harassment of his wife. Such an order may be obtained independent of any action for a divorce from bed and board. G.S. 50B-2. Although the order does illustrate an effort to alter marital relations, it does not rise to the level of a judicial decree of separation required by G.S. 14-27.8.

Under the law as it was in 1985 when this incident occurred, defendant could not have been prosecuted for the rape of his wife because the essential requirement necessary to permit such pros-

ecution, namely a judicial separation, was missing. The trial court erred in not granting defendant's motion for dismissal of the rape charge at the conclusion of the State's evidence. Defendant's rape conviction is reversed.

In reaching this conclusion, we hasten to point out that the General Assembly was obviously aware of the harsh results which could arise (such as in this case). G.S. 14-27.8 was amended in 1987 to delete the requirement that a couple be living "separate and apart pursuant to a written agreement or judicial decree." As amended, a husband and wife need only be "living separate and apart." The Legislature's action thus ensures that the result reached here will not occur again.

Defendant sets forth other assignments of error regarding the rape conviction. Our reversal of that conviction disposes of those assignments of error, and therefore we will not further address them.

Defendant next assigns as error the court's submission of the kidnapping charge to the jury. He contends that charge was not supported by the indictment.

[4] The kidnapping indictment in this case alleged that defendant "unlawfully, willfully and feloniously did confine, restrain and remove from one place to another Michelle D. Getward . . . for the purpose of facilitating the felony of rape *and terrorizing* Michelle D. Getward . . . in violation of G.S. 14-39." (Emphasis added.) At trial evidence was presented which tends to show that defendant chained his wife's vehicle to his own and forced her to go with him. Additionally, the evidence tends to show that defendant had a gun which he used as a weapon to physically assault and threaten her.

The trial judge instructed the jury that they must find beyond a reasonable doubt "that the defendant removed the victim for the purpose of facilitating his, that is, the defendant's commission of rape of the victim *or* for the purpose of terrorizing the victim" in order to return a verdict of guilty of kidnapping. (Emphasis added.) After deliberation the jury returned a verdict of guilty of second degree kidnapping. It was possible from the charge given that the jury could have found defendant guilty of kidnapping either on the theory that he kidnapped his wife for

the purpose of terrorizing her or on the theory that he kidnapped her to facilitate the felony of rape. Because the trial court charged the jury in the disjunctive, this court cannot determine upon which basis their verdict was founded.

> Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and [the appellate court] cannot discern from the record the theory upon which the jury relied, this [c]ourt will not assume that the jury based its verdict on the theory for which it received proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

State v. Pakulski, 319 N.C. 562, 574, 356 S.E. 2d 319, 326 (1987). We therefore find it necessary to reverse the trial court and remand for a new trial on the charge of second degree kidnapping.

Our reversal of the trial court and remand for a new trial disposes of defendant's other assignments of error regarding the kidnapping conviction. Therefore, we will not further address them.

No. 85CRS10807—reversed.

No. 85CRS4288—new trial.

Judges ARNOLD and WELLS concur.

JOE D. WENTZ v. UNIFI, INC. AND NORRIS LEE BLEVINS

No. 8726SC551

(Filed 1 March 1988)

1. Negligence § 23; Rules of Civil Procedure § 8— contributory negligence—factual inconsistencies—proper under notice pleading

There was no error in an automobile accident case in submitting contributory negligence to the jury where the parties' pleadings were sufficient to give notice of all theories, claims and facts sought to be proven by each party.

2. Negligence § 34.1— contributory negligence—evidence

The evidence was sufficient in an automobile accident case to submit contributory negligence to the jury where there was substantial evidence tending to show that plaintiff was negligent in not keeping a proper lookout and not keeping his car under control, allowing it to swerve or drift into defendant's lane of travel.

3. Automobiles and Other Vehicles § 45.8— automobile accident—admission of driving record—harmless error

There was no prejudice in an automobile accident case from the erroneous admission of defendant's good driving record where the jury found defendant negligent.

4. Automobiles and Other Vehicles § 45.6; Evidence § 33.1— automobile accident—highway patrolman's report—admissible

A highway patrolman's accident reports were admissible in an automobile accident case as a business records exception to the hearsay rule and as official reports where the reports were fully authenticated and a proper foundation was laid, the patrolman did not express an opinion as to how the collision occurred but merely reported the versions given to him by plaintiff and defendant, and the patrolman testified as to the contents of the first report without objection by plaintiff and the contents of the second report clearly gave plaintiff's version. N.C.G.S. § 8C-1, Rule 803(6) (1986). N.C.G.S. § 8C-1, Rule 803(8).

5. Evidence § 20; Trial § 14— automobile accident—rebuttal evidence excluded—no abuse of discretion

The trial court did not abuse its discretion in an automobile accident case by excluding rebuttal evidence where the evidence plaintiff sought to introduce was collateral to the primary issue and too remote in terms of relevancy to have required admission; moreover, it is not at all clear that the evidence would have affected the jury's decision.

APPEAL by plaintiff from *Owens, Hollis M., Jr., Judge.* Judgment entered on the verdict 19 January 1987 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 1 December 1987.

Plaintiff instituted this action to recover personal and property damages arising out of the collision of defendant's (Unifi's) tractor-trailer with plaintiff's vehicle which allegedly resulted from the negligent driving of Unifi's employee, defendant Norris Lee Blevins. Defendants answered generally with denials and alleged as an affirmative defense plaintiff's contributory negligence.

At trial, plaintiff's pertinent evidence consisted of the testimony of plaintiff and his wife, Edna Wentz. Plaintiff testified that on 13 April 1983 while driving his Pinto station wagon north in the right lane of Interstate 77 he was overtaken by two tractor-trailer rigs traveling north in the left lane. As the truck driven by defendant Blevins pulled beside and then fell behind him, "something hit . . . , the left-hand rear of my car, and it took control of it." "I felt a bump on the rear of my car . . . , and it just pushed me sideways down the interstate, ... I know I was being pushed from the moment it struck my car, it never let up off my car . . . . I could see it like it was coming in on me, that big bumper, the front of the tractor." After the collision, plaintiff and Blevins remained at the scene. The other truck driver approached Blevins and said, "Did you not see him?" Blevins responded, "I didn't see him until I had him on my bumper."

Plaintiff observed the pavement at the scene and saw skid marks beginning near the right side of the northbound right lane and continuing across the left lane into the median where his car came to rest. While plaintiff and Blevins were still at the scene, Highway Patrolman Robby Yates arrived and talked with plaintiff and Blevins. Plaintiff pointed out the skid marks to Yates. During this time, plaintiff's wife, Edna Wentz, arrived on the scene. She observed and described the same skid marks observed by plaintiff. The next morning plaintiff returned to the scene and took photographs of the skid marks. These photographs were introduced into evidence and appear to show the skid marks plaintiff and Mrs. Wentz described.

Defendants' evidence consisted of the testimony of defendant Blevins, Patrolman Yates, and two accident investigation reports prepared by Yates. Blevins testified, in summary, that he was driving north in the left lane of I-77 when plaintiff's car suddenly appeared in the left lane at an angle in front of his truck, Wentz's car apparently being out of control. Blevins had been driving in the left lane for about a mile and had remained in the left lane until plaintiff's car appeared in front of him. Blevins "sat down" on his brakes, but collided with the left side of plaintiff's car. He felt no contact until Blevins' car appeared in front of him. Blevins left tire marks in the left lane while trying to avoid plaintiff's car. Blevins denied remarking to the other truck driver that the first time he saw plaintiff's car was when he was on Blevins' bumper.

Blevins and plaintiff talked with Patrolman Yates. Blevins told Yates ". . . we was coming up through there . . . and the car appeared in front of me and I bumped it and it went off into the median." On cross-examination, Blevins explained that he was not testifying that plaintiff's tire marks did not begin in the right lane, only that he did not notice them.

Patrolman Yates testified that after he arrived at the scene he talked with plaintiff and Blevins. Plaintiff told Yates that as he was traveling north in the right lane he felt a bump, his car went out of control, crossed over the passing lane and into the median. Blevins told Yates that he was in the passing lane, noticed a small car come in front of him, bumped the car as it came in front of him, and "the car went to the median." Yates then identified the accident report he prepared that evening, which reported what he had seen and been told by the drivers. Yates also identified a second report he prepared two or three weeks later, following further investigation. Yates then testified from the contents of his first report: "Vehicle Number 1 (which was the Wentz Pinto), was in the right lane of I-77 northbound. Vehicle Number 2, the tractor-trailer driven by Mr. Blevins, was in the passing lane of I-77 northbound. The driver of Vehicle Number 1 lost control of the vehicle and skidded into the path of Vehicle Number 2. Vehicle Number 1 was struck in the left side of the vehicle before traveling into the median and striking an embankment." Yates testified that as a result of letters written by plaintiff he and a supervisor conducted a second investigation, after which he prepared a second report. In his second report, Yates reported that plaintiff stated that "the truck, Vehicle Number 2, struck him causing him to lose control." Yates then testified that he had not been told the foregoing at the scene of the accident on April 13. Yates also testified that his second report depicted a more detailed drawing of the scene showing plaintiff's skid marks in the right lane and Blevins' skid marks in the left lane. Both of Yates' reports were admitted into evidence.

On cross-examination, Yates was asked to read his entire description of events in his second report. His response was: "Vehicle Number 1 was in the right lane of I-77 northbound. Vehicle Number 2 was in the passing lane of I-77 northbound. Vehicle Number 1 and Vehicle Number 2 made contact with each other causing Vehicle Number 1 to go out of control crossing in front of

Vehicle Number 2 into the median striking an embankment. The driver of Vehicle Number 1 stated that the truck, Vehicle Number 2, struck him, Vehicle Number 1, causing him to lose control. The driver of Vehicle Number 2 stated that as far as he knew, he made no contact with Vehicle Number 1 until Vehicle Number 1 crossed in front of him." The following colloquy then occurred:

> Q: Is that statement an accurate description of your understanding of what took place?
>
> A: No.
>
> Q: . . . [y]our report states that it's unable to determine whether any violation is indicated, does it not?
>
> A: Yes, sir, it doesn't show who was at fault.
>
> Q: That's right, you couldn't tell whether Mr. Blevins . . . committed any violations, or whether Mr. Wentz . . . committed any violations, is that correct?
>
> A: That's correct.

Other aspects of the evidence at trial will be discussed as necessary in our opinion.

The jury answered the issue of negligence against defendants and the issue of contributory negligence against plaintiff. From judgment entered on the verdict, plaintiff appeals.

Moore & Van Allen, by Randel E. Phillips and Charles E. Johnson, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Edward L. Eatman, Jr. and Mark C. Kurdys, for defendant-appellees.

WELLS, Judge.

[1] Plaintiff, in his first argument contends that because of the factual inconsistencies between the plaintiff's and defendants' pleadings, the trial court committed error in submitting the issue of contributory negligence to the jury. Relying on *Dennis v. VonCannon*, 272 N.C. 446, 158 S.E. 2d 489 (1968) and *Jackson v. McBride*, 270 N.C. 367, 154 S.E. 2d 468 (1967), plaintiff argues that acceptance of the facts which he alleges in his complaint must necessarily preclude the acceptance of facts alleged by defendants in their answers thereby negating defendants' affirmative defense of contributory negligence. We disagree.

The overriding concerns in both *Dennis* and *VonCannon* were premised upon the earlier pleading rules that any material variance between the pleadings and the proof offered at trial constituted a failure of proof. Where the complaint set forth facts indicating defendant's negligence, the facts asserted in defendant's answer to support the affirmative defense of contributory negligence were required to concur with, but not negate, the facts asserted by plaintiff. If defendant asserted facts logically irreconcilable with those in the complaint, defendant's defense of contributory negligence could not prevail and was defeated on its pleadings. This, however, is no longer the law.

North Carolina has since adopted the Rules of Civil Procedure, Chapter 1A-1 of the General Statutes (1967), which abolished the rigid and strict technical requirements of form pleading and replaced these requirements with the more liberal and flexible requirements of notice pleading. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E. 2d 844 (1986); *Note*, "Specificity in Pleading Under N.C. Rule 8(a)(1)," 48 N.C.L. Rev. 636 (1970). The adoption of the notice theory of pleading indicated the legislature's intention that controversies be resolved on their merits, ". . . following an opportunity for discovery, rather than resolving them on technicalities of pleading." *Smith*, 79 N.C. App. at 528, 339 S.E. 2d at 851.

In the present case, the parties' pleadings were sufficient to give notice of all theories, claims and facts sought to be proven by each party. We therefore hold that the trial court did not err in submitting the issue of contributory negligence to the jury. Plaintiff's first argument is overruled.

[2] As the second part of his argument, plaintiff contends that even if the issue of contributory negligence were properly submitted to the jury, the evidence was insufficient to have supported a finding thereof.

While defendant bears the burden of proving contributory negligence, the defendant is entitled to have the issue submitted to the jury if all the evidence and reasonable inferences drawn therefrom and viewed in the light most favorable to defendant tend to establish or suggest contributory negligence. *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970); *Coppley v. Carter*, 10

N.C. App. 512, 179 S.E. 2d 118 (1971). In the case before us, the evidence presented the question of whether defendant Blevins actually caused plaintiff to lose control of the car or whether plaintiff lost control first and swerved in front of defendant. There was substantial evidence tending to show that plaintiff was negligent in not keeping a proper lookout and not keeping his car under proper control, allowing it to swerve or drift into Blevins' lane of travel. Such evidence was sufficient for the jury to have found contributory negligence. Plaintiff's argument regarding the sufficiency of the evidence to support a finding of contributory negligence is overruled.

[3] Plaintiff next argues that the trial court erred by admitting evidence of defendant Blevins' prior good driving record. While Rule 404(b) of the N.C. Rules of Evidence prohibits admission of evidence of prior specific acts to show conformity therewith and evidence of a party's prior driving record is inadmissible in automobile cases, *Rouse v. Huffman*, 8 N.C. App. 307, 174 S.E. 2d 68 (1970), our concern on review is whether the admission constituted prejudice. N.C. Gen. Stat. § 1A-1, Rule 61 of the Rules of Civil Procedure, *Broyhill v. Coppage*, 79 N.C. App. 221, 339 S.E. 2d 32 (1986). Because the jury found the defendant negligent, we cannot see how the admission of defendant's good driving record could have influenced the jury's verdict to plaintiff's detriment. We therefore find no prejudicial error.

[4] In his next argument, plaintiff contends the trial court erred by admitting Patrolman Yates' two accident reports because each contained inadmissible hearsay and speculative opinions as to the positions of the vehicles involved in the collision. We disagree.

Under N.C. Gen. Stat. § 8C-1, Rule 803(6) (1986) of the N.C. Rules of Evidence, "Records of Regularly Conducted Activity," highway accident reports may be admissible, as a business records exception to the hearsay rule. To be admissible such reports must be authenticated by their writer, prepared at or near the time of the act(s) reported, by or from information transmitted by a person with knowledge of the act(s), kept in the course of a regularly conducted business activity, with such being a regular practice of that business activity unless the circumstances surrounding the report indicate a lack of trustworthiness. *Fisher v. Thompson*, 50 N.C. App. 724, 275 S.E. 2d 507 (1981). Such reports

may also be admissible as "official" reports under Rule 803(8), "Public Records and Reports," if properly authenticated.

In the present case, the reports were fully authenticated and a proper foundation laid by Trooper Yates' testimony. He stated that he had observed the scene of the accident, had spoken with both drivers and later prepared the first report as part of the standard protocol required of patrol officers—all of which complied with the business records exception.

Plaintiff contends that the reports were inadmissible because they were inherently untrustworthy. Because Yates did not actually witness the collision plaintiff claims the reports were unreliable and therefore incompetent as evidence. The business records exception expressly provides for the use of information from those having first-hand knowledge of the incident in question. Trooper Yates was entitled to report his understanding of the accident as told to him by both plaintiff and defendant. Our careful review of the reports and testimony persuades us that Patrolman Yates did not express an opinion as to how the collision occurred, but merely reported the versions given to him by plaintiff and Blevins during his investigation. In his cross-examination by plaintiff, Patrolman Yates clearly disavowed any assessment of fault on the part of plaintiff. We also note that Yates was allowed to testify as to the contents of his first report without objection by plaintiff, and that the contents of the second report, to which plaintiff did object, clearly gave plaintiff's version of the collision. We fail to see how plaintiff was prejudiced by these reports.

[5] Finally, plaintiff argues that the trial court erred in refusing to allow plaintiff to introduce evidence to rebut defendant's implication that plaintiff had deliberately excluded a second set of skid marks located in the left lane purportedly indicating that defendant's tractor-trailer had tried to stop well before impact. Plaintiff sought to put before the jury the fact that defendant Unifi made its own investigative photos of the accident site. Plaintiff argues that if the skid marks actually existed in the left lane, as defendants claimed, then defendant Unifi would have had photos of those marks and introduced them into evidence. We disagree for several reasons.

Rulings by the trial court regarding the admission of rebuttal evidence are reversible only by a showing of clear abuse of the trial court's discretion, *Gay v. Walter*, 58 N.C. App. 360, 283 S.E. 2d 797 (1981), *on rehearing*, 58 N.C. App. 813, 294 S.E. 2d 769 (1982). Moreover, plaintiff must show that the trial court's denial of plaintiff's request to introduce rebuttal evidence in some way prejudiced plaintiff's case. *Broyhill v. Coppage, supra; In re Lee*, 69 N.C. App. 277, 317 S.E. 2d 75 (1984).

The evidence plaintiff sought to introduce, while possibly helpful to his case, was collateral to the primary issue and too remote in terms of relevancy to have required its admission. At most, the trial court was entitled but not required to have allowed plaintiff's request and its denial, therefore, did not constitute abuse of discretion. Secondly, even if the evidence should have been introduced, it is not at all clear that making the jury aware of the existence of Unifi's photos would have affected their decision. Accordingly, we find

No error.

Judges PARKER and ORR concur.

MYERS & CHAPMAN, INCORPORATED v. THOMAS G. EVANS, INCORPORATED, ET AL.

No. 8726SC595

(Filed 1 March 1988)

1. Fraud § 3— applications based on knowledge, information and belief—no representations of past or existing facts

Plaintiff's evidence was insufficient for the jury on the issue of fraud by defendant corporate directors in submitting to plaintiff applications for construction payments misrepresenting that certain specialty items had been purchased and stored where one defendant asserted in the payment applications only that the work covered by the applications had been completed "to the best of his knowledge, information, and belief," and the payment applications thus made no representations of past or existing facts.

2. Corporations § 13— liability of directors—gross negligence—erroneous instructions

In an action to recover against corporate directors for gross negligence in failing to prevent fraud by corporate agents, the trial court erred in failing to

give the jury instructions to the effect that corporate directors ordinarily will not be held liable for isolated or occasional wrongdoing over which they have no practical control and in giving the jury an instruction suggesting that directors and managing officers are chargeable with an omniscient knowledge of the company's affairs and are liable for damages to third parties resulting from simple negligence.

3. Corporations § 13— reasonable reliance on project manager—no gross negligence by directors

In an action against corporate directors for gross negligence in permitting fraud by a corporate agent in the submission of applications to plaintiff for construction payments, evidence establishing that the project manager for the corporation had never given defendants cause to doubt his integrity entitled defendants to an instruction that defendants were not guilty of gross negligence if they reasonably relied on their project manager's representations in making the payment applications.

APPEAL by defendants from *Burroughs, Robert M., Judge.* Judgment entered 9 February 1987 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 4 January 1988.

Plaintiff general contractor Myers & Chapman, Inc. instituted this civil action on 25 March 1985 against defendants Thomas G. Evans, Inc. (Evans, Inc.), Thomas G. Evans, and his wife, Brenda, seeking damages for fraud. The action was tried by a jury, which returned a verdict against the defendants, jointly and severally, in the amount of $11,731 in compensatory damages. The court entered a judgment on 9 February 1987 that the actions of defendants constituted an unfair trade practice, trebled the damages, and awarded attorney fees to the plaintiff in the amount of $10,000, plus costs. Defendants appealed.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Samuel D. Walker, for plaintiff-appellee.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Fred T. Lowrance, for defendants-appellants.

WELLS, Judge.

Defendants bring forward twelve separate assignments of error. However, the salient issues in this appeal are (1) whether the evidence supports the jury's finding that individual defendants Mr. and Mrs. Evans committed fraud, and (2) whether the trial court's instruction on gross negligence to permit a fraud was defective.

The evidence presented at trial established the following: On 14 December 1984 defendant Evans, Inc. entered into a subcontract with plaintiff general contractor to furnish and install the heating, ventilating, and air conditioning system for a "strip" shopping center in High Point. The original contract price of $104,500 was later increased to $113,865. The contract called for Evans, Inc. to submit to plaintiff general contractor periodic applications for payment as the work progressed. Each payment application contained the following statement undersigned by Mr. Evans:

> The undersigned Contractor certifies that to the best of his knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by him for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.
>
> CONTRACTOR: Thomas G. Evans, Inc.
>
> By: _____ Date _____

Each such payment application was also notarized by Brenda Evans who, together with her husband, were the sole directors and officers of defendant corporation. On 25 April 1984 Evans, Inc. submitted Application for Payment No. 2 to the plaintiff. (Application No. 1 is irrelevant to this action.) Application No. 2 solicited payment for $33,227 for equipment purportedly ordered and stored in a local bonded warehouse for eventual installment, including $11,247 worth of specialty items—principally small, sophisticated electronic devices—which later could not be found. The typed Application for Payment No. 2 delivered to plaintiff was based on a handwritten application prepared by Mr. William Jay Gould, defendants' estimator and project manager. Mr. Gould's application, in turn, relied on a written confirmation of receipt of goods issued by the warehouse to which the equipment had been shipped for storage. In May 1984 plaintiff paid the subcontractor for all the materials claimed purchased and stored in the 25 April application. In Application for Payment No. 3, submitted 22 June 1984, Evans, Inc., recertified that the specialty items had been purchased and stored.

In late August 1984, Mr. Evans decided to wind up his firm's business. Since the work on the shopping center project was still

ongoing, Evans, Inc. arranged to subcontract to Custom Comfort, Inc. to finish the job. Plaintiff general contractor, Evans, Inc., and Custom Comfort, Inc. all agreed that the project would be completed by Custom Comfort, Inc. for the balance remaining in the contract between Evans, Inc. and the plaintiff. After commencing work Custom Comfort, Inc. was unable to locate the $11,247 in specialty items referenced above. The plaintiff reordered the specialty items, paid for them a second time and, eventually, brought this lawsuit to recoup his loss.

It is settled in our State's case law that directors of corporations may be held individually liable to injured third parties for fraudulent misrepresentations personally made by them. *Minnis v. Sharpe*, 202 N.C. 300, 162 S.E. 606 (1932); R. M. Robinson, *North Carolina Corporation Law and Practice* § 12-7 (3rd ed. 1983); *see also* Annot., 25 A.L.R. 3d 941 (1969). It is equally settled in our State that corporate directors may incur individual liability for grossly negligent failure to prevent fraudulent conduct by corporate agents. *Minnis, supra.* However, North Carolina does not impose upon corporate directors a duty of omniscience. Our courts have explicitly declared that directors are not insurers of the integrity of the corporate officers and agents and ordinarily will not be charged with notice of isolated or occasional fraud or mismanagement. *Id.* In addition, our Supreme Court has held that the selfsame individual liability for fraud and gross neglect as attaches to directors attaches equally to a corporation's "president or other managers," *Caldwell v. Bates*, 118 N.C. 323, 24 S.E. 481 (1896), in other words, to the *managing officers* of the corporate entity.

In the present case individual defendants Thomas G. Evans and his wife, Brenda, were directors and managing officers of the corporate defendant. As such, they could be held liable, under the law summarized above, for (1) fraud or (2) gross neglect in failing to prevent fraudulent conduct. Consequently, at trial plaintiff strove to prove that Mr. and Mrs. Evans falsely represented in Application for Payment Nos. 2 and 3 that $11,247 in specialty items had been purchased and stored, that said representations were known by defendants to be untrue at the time made, or were made in reckless disregard whether they were true or not. At the conclusion of the trial the court submitted nine issues to

the jury. Issues two through five, and the jury's responses, were as follows:

> 2. Did the individual defendants, Thomas G. Evans or Brenda Evans, commit a fraud by submitting the payment application of April 20, 1984 or June 22, 1984 to Myers & Chapman, Inc.?
>
> ANSWER: Thomas G. Evans yes
> Brenda Evans no
>
> 3. Did Thomas G. Evans or Brenda Evans act with such gross negligence as officers and directors of Thomas G. Evans, Inc., so as to permit a fraud to be committed on Myers & Chapman, Inc.?
>
> ANSWER: Thomas G. Evans yes
> Brenda Evans yes
>
> 4. Did Thomas G. Evans or Brenda Evans submit an application for payment to Myers & Chapman, Inc., knowing it to be false?
>
> ANSWER: Thomas G. Evans no
> Brenda Evans no
>
> 5. Did Thomas G. Evans or Brenda Evans act in such a grossly negligent way, in the submission of the application for payment so as to permit a fraud to be committed on Myers & Chapman, Inc.?
>
> ANSWER: Thomas G. Evans yes
> Brenda Evans yes

On the basis of these jury findings the trial court concluded in its judgment "that the actions of the defendants caused or allowed a false application and certificate for construction payments to be given to the plaintiff; [and] that said action was fraudulent and that the application and certificate was submitted under circumstances such that the defendants' actions were grossly negligent." On appeal defendants strenuously contend, *inter alia*, that there was insufficient evidence to support the jury's finding of fraud and that the trial court's charge on gross negligence to permit fraud was defective. We agree.

[1] As indicated above, the gravamen of plaintiff's complaint was that Application for Payment Nos. 2 and 3 fraudulently misrepresented that certain specialty items had been purchased and stored. But we conclude that the disputed payment applications make no representations of past or existing facts. In each application Mr. Evans vouches for no more than that "to the *best of his knowledge, information, and belief* the Work covered by this Application for Payment has been completed . . . ." (Emphasis added.) Such language does not assert a fact, but rather states an opinion, or recommendation, and, hence, cannot be actionable. *Myrtle Apartments v. Casualty Co.*, 258 N.C. 49, 127 S.E. 2d 759 (1962). Since plaintiff could not prove a representation, *ipso facto* he could not prove a fraud, inasmuch as representation is one of the essential elements of the action. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). In other words, plaintiff failed to make out a *prima facie* case, and the jury could not permissibly find as fact, in responding to issue two, that Mr. Evans committed fraud by submitting the payment applications. In fact, the same jury found, in response to issue four, that the individual defendants did not knowingly submit a false application for payment to plaintiff. In other words, the jury found no scienter, without which an action in deceit cannot be made out. *Id.* Since scienter was not found by the trier of fact, and since as a matter of law no representation of existing fact was made by defendants, it was error for the trial court to conclude in its Judgment that the actions of defendants were fraudulent.

[2] We further agree with defendants that the trial court incompletely and inaccurately charged the jury on whether defendants acted with such gross negligence so as to permit a fraud. The trial court took its instruction on this issue almost verbatim from *Minnis*, but omitted the following limiting language of that decision:

> Directors are not guarantors of the solvency of a corporation, nor are they insurers of the honesty and integrity of the officers and agents. Neither are they required to personally supervise all the details of business transactions.
>
> . . . .
>
> Ordinarily, of course, directors would not be charged with notice by virtue of desultory, occasional or disconnected

> acts of mismanagement or fraudulent transactions, but in cases where mismanagement and fraud has been persistently and continuously practiced for substantial periods of time a jury must determine whether the directors, in the exercise of that degree of care which the law imposes, should have known of such practices and that persons dealing with the corporation would be injured thereby.

These passages emphatically enunciate that directors ordinarily will not be held liable for isolated or occasional wrongdoing over which they have no practical control. A corporate contractor may have dozens of agents in his employ dispersed at sundry work sites scattered over a wide geographical area. A project site may be hundreds of miles from the home office. Directors and corporate management must rely, and our settled law permits them reasonably to rely, on their agents and employees. It was reversible error for the trial court to have selectively ignored the passages of *Minnis* which narrow the scope of directors' liability for gross negligence to permit fraud.

Not only did the court incompletely instruct on the law, it gratuitously appended the following embellishment:

> It is immaterial whether the defendants, Mr. or Mrs. Evans were cognizant of the fact that the equipment was not stored as certified. The law charges them with actual knowledge of the company's affairs and holds them responsible for damages sustained by others by reason of their negligence, fraud or deceit.

This instruction was erroneous because it suggested to the jury that directors and managing officers are chargeable with an omniscient knowledge of the company's affairs and are liable for damages to third parties resulting from simple negligence. This is not the law in North Carolina. The rule of *Minnis* provides that, ordinarily, directors are liable for failure to prevent fraud by corporate agents only where such fraudulent conduct has been engaged in "persistently and continuously . . . for substantial periods of time."

[3] In the present case, the evidence presented at trial established that Mr. William Jay Gould, project manager for Evans, Inc. at the High Point "strip" project, had never given the defend-

ants cause to doubt his integrity. Mr. Leroy R. Katz, estimation and project manager for plaintiff at the High Point job site, also testified to Mr. Gould's trustworthiness. This evidence entitled defendants to an instruction to the effect that if the jury should find that defendants reasonably relied on Mr. Gould's representations, then the issue as to gross neglect should be answered in their favor.

For the reasons stated, the judgment against the individual defendants for intentional fraud is reversed. On the issue of whether by their gross neglect the individual defendants permitted a fraud, there must be a new trial; accordingly, on new trial there must be a redetermination of the claim for treble damages.

We find no error in the trial as to Evans, Inc.

No error in part; reversed in part; new trial.

Judges ARNOLD and SMITH concur.

NELL BRYAN BROOKSHIRE v. ATWELL J. BROOKSHIRE

No. 8721DC336

(Filed 1 March 1988)

1. **Divorce and Alimony § 23.2— child custody—parallel Ohio action—jurisdiction in North Carolina**

An action for absolute divorce begun in Ohio did not preclude the exercise of jurisdiction by the district court of Forsyth County over plaintiff's action as it pertained to child custody and support where defendant's prayer for relief in Ohio made no mention of child custody and there was no showing of "satisfactory proof" of any of the charges of the divorce petition before defendant's voluntary dismissal, as required by Ohio law for the Ohio courts to obtain jurisdiction over child custody and support matters. N.C.G.S. § 50A-6(a).

2. **Divorce and Alimony § 23.2— child custody—jurisdiction—factual support sufficient**

The district court of Forsyth County properly exercised subject matter jurisdiction over custody of children in a divorce action where the court noted that the oldest two of the three minor children had been born in North Carolina, both plaintiff and defendant grew up in North Carolina, the maternal and paternal grandparents of the minor children resided within the state, plaintiff and the minor children had moved to North Carolina from Ohio with

the intention of becoming permanent residents, and at the time of the entry of the order they had become permanent residents of North Carolina. N.C.G.S. § 50A-3(a)(2).

3. Divorce and Alimony § 23.2; Process § 8— child custody action—nonresident defendant served within state

The North Carolina courts properly obtained jurisdiction over an Ohio defendant in a divorce and child custody action where the North Carolina long-arm statute was satisfied in that defendant was personally served while visiting his parents and children in Wilkes County and, under *Lockert v. Breedlove*, 321 N.C. 66, mere service of process upon a nonresident defendant while present within the state is sufficient to establish in personam jurisdiction without minimum contacts analysis. N.C.G.S. § 1-75.4(1)(a).

APPEAL by defendant from *Harrill, James A., Jr., Judge.* Order entered 10 November 1986 in District Court, FORSYTH County. Heard in the Court of Appeals 21 October 1987.

David B. Hough, for plaintiff-appellee.

McElwee, McElwee, Cannon & Warden, by William H. McElwee, III, for defendant-appellant.

JOHNSON, Judge.

Plaintiff commenced this domestic action on 19 June 1985 seeking alimony pendente lite, permanent alimony, custody of the couple's three minor children, child support and attorneys fees. On 15 July 1985 defendant filed a motion to dismiss the complaint on the grounds that he had instituted an action for absolute divorce on 3 June 1985 and such action was pending in Lorain County Court of Common Pleas, Domestic Relations Division, State of Ohio.

On 18 February 1986, the Ohio divorce action was voluntarily dismissed. No final order concerning child custody or child support was ever entered in that cause. However, various orders were entered by the Forsyth County District Court pursuant to plaintiff's action as follows: a 15 July 1985 order finding jurisdiction over the custody of the children as provided in G.S. 50A-3(2), and awarding to plaintiff primary custody of the minor children; a 21 August 1985 order awarding child support, alimony pendente lite and attorneys fees to plaintiff; and a 16 October 1985 order awarding to plaintiff permanent alimony and other various forms of relief.

On 6 August 1986, almost six months after having taken a voluntary dismissal in his Ohio divorce action, defendant made two motions to dismiss plaintiff's complaint, on the grounds that the District Court of Forsyth County lacked both subject matter jurisdiction and in personam jurisdiction. In pursuit of these motions, defendant, together with his attorney of record, made an appearance on 13 August 1986 at a chambers hearing of the District Court, Forsyth County to address the jurisdictional issues raised. After hearing testimony, reviewing the court file and considering the arguments of counsel, the court denied both motions and concluded, in its 10 November 1986 order, that it had subject matter jurisdiction at the time of the entry of all of its orders, and in personam jurisdiction over defendant at the time of the entry of all of its orders as well.

From the trial court's order, defendant appeals.

Defendant raises two issues by this appeal, challenging the court's conclusions that it had both subject matter jurisdiction and in personam jurisdiction at the time of the entry of all of its orders as well as of 13 August 1986, when defendant appeared before the court to challenge jurisdiction.

[1] By his first Assignment of Error, defendant contends that the action for absolute divorce which he instituted in the State of Ohio on 3 June 1985, precluded an exercise of jurisdiction by the District Court of Forsyth County over plaintiff's action as it pertained to child custody and support. He bases this argument upon an interpretation of G.S. 50A-6(a) of the Uniform Child Custody Jurisdiction Act, which states:

> If at the time of filing the petition a proceeding *concerning the custody of the child was pending in a court of another state* exercising jurisdiction substantially in conformity with this Chapter, a court of this State shall not exercise its jurisdiction under this Chapter, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

(Emphasis added.)

Our inquiry centers on whether an action "concerning the custody of the child[ren]" was actually "pending" in Ohio at the time plaintiff filed her complaint on 19 June 1985 in North Caro-

lina. In his prayer for relief in the Ohio divorce action, filed 3 June 1985, defendant requested that he "be granted an absolute divorce from [plaintiff], an equitable division of the property of the parties, and for such other relief as the Court may deem just and equitable." Defendant made no mention whatsoever of the issue of child custody. Even where a prayer for relief is silent on the issue, however, Ohio courts may exercise jurisdiction over child custody matters in a divorce action under certain conditions as follows:

> *Upon satisfactory proof of the causes* in the complaint for divorce, annulment, or alimony, the court of common pleas shall make an order for the disposition, care, and maintenance of the children of the marriage, as is in their best interests, and in accordance with section 3109.04 of the Revised Code.

Ohio Rev. Code Ann. sec. 3105.21(A) (Anderson 1987) (emphasis added).

The "satisfactory proof" basically required, is a showing of proof sufficient to enable the moving party to prevail on the petition for divorce or alimony. *Haynie v. Haynie*, 108 Ohio App. 342, 161 N.E. 2d 549 (1958), *aff'd*, 169 Ohio St. 467, 159 N.E. 2d 765 (1959). Where the complainant fails to make such a showing, the court has no jurisdiction over child custody matters.

> [U]ntil the production of 'satisfactory proof' of any of the charges in the petition for divorce or alimony in a hearing upon the merits, there is no authority in the Court of Common Pleas to make any permanent order with reference to custody of the children of the marriage or to certify the question of custody to the Juvenile Court.

Id. at 344, 161 N.E. 2d at 550.

It is evident upon a review of the facts in this case, that defendant made no showing of "satisfactory proof" of the charges in his petition for divorce. Defendant instituted the action for divorce on 3 June 1985 in Lorain County, Ohio, Court of Common Pleas. The only reported activity in the case was a 23 August 1985 order directing that an investigation and home evaluation be conducted on Nell Brookshire to aid the court in determining the issue of custody, and a voluntary dismissal taken on 18 February 1986. It is important to note here that the home evaluation was

ordered nearly three months after plaintiff, along with the minor children, had left the state and moved to North Carolina. Since defendant failed to produce satisfactory proof of any of the charges in his divorce petition, prior to voluntarily dismissing the action, the Ohio courts never obtained jurisdiction over the matters concerning child custody and support. *See Haynie, supra.*

Although defendant did not argue the point in his brief, it is also important for us to note that ordinarily where the party fails to produce sufficient proof of the causes in the complaint, the Ohio courts could still exercise jurisdiction over custody matters pursuant to Ohio Rev. Code Ann. sec. 3105.21(B) (Anderson 1987), which provides:

> Upon the failure of proof of the causes in the complaint, the court may make the order for the disposition, care, and maintenance of any dependent child of the marriage as is in the child's best interest, and in accordance with section 3109.04 of the Revised Code.

However, defendant may not avail himself of this provision because the statute is inapplicable to situations where, as in the case *sub judice*, the complaint for divorce was voluntarily dismissed. *Lilly v. Lilly*, 26 Ohio App. 3d 192, 499 N.E. 2d 21 (1985). Once the trial court sustains the motions to dismiss, it is without jurisdiction to make any further order, and the action is treated as if it had never been brought. *Lilly, supra.*

Therefore, the District Court of Forsyth County was not precluded from exercising subject matter jurisdiction over this action by G.S. 50A-6(a), as there was no proceeding concerning the custody of the minor children pending in a court of another state, namely Ohio, when plaintiff filed her complaint.

[2] The court found, in its 15 July 1985 order, that it had jurisdiction over the custody of the children pursuant to G.S. 50A-3(a)(2). This provision essentially confers jurisdiction where it is in the child's best interest, because the child and at least one parent have significant ties to the state, and where substantial evidence pertaining to the child's present or future well-being and activities exists within the state.

In factual support of this exercise of jurisdiction, the court noted that the oldest two of the three minor children had been

born in North Carolina, both plaintiff and defendant grew up in the state, both maternal and paternal grandparents of the minor children reside within the state, and that plaintiff and the minor children moved to the state from Ohio on 10 June 1985, with the intention of becoming permanent residents, and at the time of the entry of this order, had become permanent residents of the State of North Carolina.

Based upon the foregoing, we hold that the District Court of Forsyth County properly exercised subject matter jurisdiction over this action.

[3] Defendant next assigns as error the trial court's exercise of in personam jurisdiction over him. He maintains that he lived in Ohio, owned a home there, paid taxes there, was licensed to drive there and sent his children to school in that state. He further alleges that the only connection which he enjoyed with the State of North Carolina is the "fact that some members of his family live in this state," and therefore by exercising in personam jurisdiction over him, the State has failed to comply with the due process requirement of the Fourteenth Amendment. We do not agree and affirm the trial court's ruling for the following reasons.

When determining whether our state courts may exercise in personam jurisdiction over a defendant, we look to G.S. 1-75.4, commonly known as the "long-arm statute" for guidance. The provisions therein authorize the exercise of in personam jurisdiction over nonresident defendants to the fullest extent, tempered only by the due process clause of the Fourteenth Amendment. *American Rockwool, Inc. v. Owens-Corning Fiberglass Corp.*, 640 F. Supp. 1411 (E.D.N.C. 1986).

G.S. 1-75.4(1)(a) permits our state courts, having subject matter jurisdiction, to exercise in personam jurisdiction over a person served with process in accordance with G.S. 1A-1, Rule 4(j) or 4(j1), while present within the State.

It is undisputed that defendant was personally served with summons and complaint on 19 July 1985 while present within the State for the purpose of visiting his parents and children in Wilkes County. Therefore, the "long-arm" statute has been satisfied. Our focus now shifts to the question of whether due process has been satisfied.

The often quoted due process entitlement afforded nonresident defendants is that the defendant must possess sufficient "minimum contacts" with the forum state such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), *quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940). In addition, due process requires "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Our Supreme Court has recently applied the transient rule of jurisdiction recognized in *Pennoyer v. Neff*, 95 U.S. 714 (1878). *Lockert v. Breedlove*, 321 N.C. 66, 361 S.E. 2d 581 (1987), essentially holds that mere service of process upon a nonresident while present within the forum state is sufficient to establish in personam jurisdiction.

In *Lockert* as in the case *sub judice* defendant Breedlove was present in the state and was personally served a copy of the summons and complaint in accordance with G.S. 1A-1, Rule 4(j)(1). There was never any contention that the service of process was insufficient, nor that defendant's presence had been facilitated through fraud or deceit.

In affirming the decision rendered by the Court of Appeals, our Supreme Court concluded that where defendant is served while present within the forum state, the minimum contacts analysis articulated in *International Shoe* is wholly unnecessary. The Court reasoned that the minimum contacts analysis only applies when the nonresident defendant is served while outside the state's boundaries, as the analysis was developed to provide an alternative means for establishing in personam jurisdiction to address the problem presented when the nonresident defendant cannot be served within the forum state.

In response to the argument that the method employed for obtaining in personam jurisdiction fails to meet constitutional due process requirements, the Court determined that, "[i]n cases such as the present case, the defendant is given adequate notice of the suit by way of actual service of process upon [her]. Furthermore, maintenance of such a suit in the state in which personal service

of process upon the defendant is achieved is entirely fair and just." *Lockert* at 71, 361 S.E. 2d at 585, *citing Pennoyer, supra.*

Therefore, in accordance with the *Lockert* decision, we hold that the singular fact that defendant was served with process while present within the state was sufficient to establish in personam jurisdiction. Accordingly, we affirm the trial court's decision.

Affirmed.

Judges WELLS and COZORT concur.

AMOS A. ESTES v. NORTH CAROLINA STATE UNIVERSITY

No. 8710IC558

(Filed 1 March 1988)

Master and Servant § 69— sick and vacation leave not permissible in lieu of workers' compensation—employer's right to credit for payments

The State was required to pay workers' compensation for a work-related injury even though the employee, by electing to use accumulated sick and vacation leave, had received his full salary until he retired, since N.C.G.S. § 97-6 and N.C.G.S. § 97-7 prohibit employers, including the State, from providing other benefits in lieu of workers' compensation benefits. However, the cause is remanded for a determination by the Industrial Commission as to whether the sick and vacation leave payments were "due and payable" when made and thus whether the State is entitled to credit for such payments under N.C.G.S. § 97-42.

APPEAL by the State from the Opinion and Award of the North Carolina Industrial Commission filed 24 February 1987. Heard in the Court of Appeals 2 December 1987.

This case involves a workers' compensation claim. Plaintiff was employed as a farm supervisor by North Carolina State University. On 21 September 1984, plaintiff injured his back and left leg in a work related accident and was temporarily totally disabled until 15 August 1985. Plaintiff is permanently partially disabled, 25 percent in his back and 10 percent in his left leg. Plaintiff is physically unable to return to his job.

The University is self-insured and follows the policies in the Personnel Manual of the Office of State Personnel in paying workers' compensation benefits. As stated in the Personnel Manual, the policies in effect at the time of plaintiff's injury gave injured State employees three options in receiving benefits:

Option 1: Take accumulated sick and vacation leave, or any portion of either, and then go on workers' compensation leave and begin drawing workers' compensation.

Option 2: Take sick or vacation leave during the seven-day waiting period and then go on workers' compensation leave and begin drawing workers' compensation.

Option 3: Go immediately on workers' compensation leave and begin drawing workers' compensation after the seven-day waiting period. In this case, if the injury results in disability of more than 28 days, the compensation shall be allowed from the date of disability.

In all cases, unused leave may be retained for future use.

(Note: If an employee has over 240 hours of vacation leave at the time an injury occurs, depending on the nature and time of the injury and the anticipated time out of work, he/she should be advised to exhaust leave in excess of the 240 hours—particularly if the injury occurs late in the year when it would possibly cause a loss of vacation at the end of the year.)

The evidence is conflicting on whether plaintiff was fully aware of the above options and whether he specifically elected to take "Option 1." It is undisputed, however, that plaintiff requested that his overtime and vacation time in excess of 240 hours be used first, that he did not request workers' compensation, and that he received his full salary, based entirely on his accumulated vacation and sick leave, until he retired on 30 November 1985. Except for his injury related medical bills, the State has not paid plaintiff any workers' compensation benefits.

On 20 August 1985, plaintiff requested the Industrial Commission to set his workers' compensation claim for a hearing. At

the hearing on 7 February 1986, the State contended that plaintiff's election to receive his full salary based on his accumulated sick and vacation leave precluded an additional recovery of workers' compensation disability benefits. Deputy Commissioner Haigh disagreed, concluding that the State was required to pay workers' compensation notwithstanding the fact that plaintiff, by using his accumulated sick leave and vacation leave, had already received his full salary for the entire period of his temporary total disability and for part of the period for which he was entitled to permanent partial disability benefits. Deputy Commissioner Haigh's opinion and award only indirectly addressed the issue of whether the State was entitled to credit as against the amount of workers' compensation due for the paid sick and vacation leave, stating:

> [i]n passing, the undersigned notes that inasmuch as the benefits which plaintiff received were based on accumulated sick and vacation leave, as opposed to a mere salary continuation not based on accumulated service, defendant is not entitled to any credit therefor under the provisions of G.S. 97-42.

On appeal, the full Commission affirmed Deputy Commissioner Haigh's opinion and award without comment. The State appeals.

Gene Collinson Smith for the plaintiff-appellee.

Attorney General Thornburg, by George W. Lennon of Monroe, Wyne, Atkins & Lennon, for the State.

EAGLES, Judge.

The State contends that plaintiff made an election of remedies in choosing to receive payment for his accumulated sick and vacation leave in lieu of workers' compensation benefits and that the Commission erred in awarding plaintiff workers' compensation disability benefits. We disagree.

G.S. 97-6 provides that:

> [n]o contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer in whole or in part, of any obligation created by this Article, except as herein otherwise expressly provided.

G.S. 97-6. G.S. 97-7 extends the Workers' Compensation Act to the State. As an "employer" under the Act, the State may not "reject the provisions of [the] Article relative to payment and acceptance of compensation." G.S. 97-7; *see Shipyard, Inc. v. Highway Commission*, 6 N.C. App. 649, 171 S.E. 2d 222 (1969). Therefore, while the State, like any other employer, may provide additional benefits to its injured workers, it may not substitute those benefits for workers' compensation. *See Ashe v. Barnes*, 255 N.C. 310, 121 S.E. 2d 549 (1961) (employer may not escape liability for workers' compensation benefits through disability insurance policy taken out on employee). By giving its employees the choice of taking accumulated sick and vacation leave *in lieu of* accepting workers' compensation disability payments, the State is allowing the employee to reject the benefits of the Workers' Compensation Act in favor of other benefits.

G.S. 97-6, however, proscribes a plan permitting a rejection of benefits. The language of the statute is unequivocal; employers may not provide benefits in lieu of paying workers' compensation. *See Ashe v. Barnes, supra.* The State's argument ignores the mandate of the statute. Instead, the State argues that because plaintiff himself chose to receive his sick leave and vacation leave first and, as a result, obtained more in disability benefits than he would have received under the Workers' Compensation Act, the employee cannot complain about not receiving workers' compensation benefits. An employer's liability for workers' compensation benefits, however, arises from the Act itself, not from any contract with the employee. *Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979).

The Act contains no exception for cases where the employee, pursuant to a choice provided by the employer, elects to receive other benefits in lieu of workers' compensation benefits. There are any number of situations where a State employee's choice of "Option 1" could result in relieving the State of some or all of its obligations under the Act. For example, where a State employee with 30 days accumulated sick and vacation leave is temporarily totally disabled for a 60 day period and elects Option 1, the State would pay only 30 days of workers' compensation disability payments under G.S. 97-29. At the same time, the employee has used and lost the benefit of the 30 days of sick and vacation leave he earned as compensation for his employment. In return, he re-

ceives his full wage for the first 30 days of his disability, instead of the two-thirds of his wage he would receive in workers' compensation. Although, arguably, that might be a reasonable choice for an employee to make, it is a choice which G.S. 97-6 prohibits.

The State undoubtedly did not intend to pay plaintiff for all of his accumulated sick and annual leave as well as workers' compensation benefits. Because plaintiff was a long-time employee and had accumulated a large amount of leave time, it appears that the State may have already paid more in salary while the employee was on leave than it would have paid if it had paid the workers' compensation benefits first and then paid the employee what he was otherwise due for his accumulated sick and vacation leave prior to his retirement. The wisdom or propriety of the State's offering plaintiff the option of being paid in that manner is not before this Court. Whether to allow the State to make these payments as a substitute for workers' compensation is before us; we hold that G.S. 97-6 and 97-7 prohibit the State from doing so.

We emphasize that nothing in our holding here prevents an employer from conferring benefits *in addition* to those provided in the Act. The State is free to allow its employees to supplement their workers' compensation benefits with salary payments based on their accumulated sick leave and vacation leave. The State may also continue to provide other benefits for its employees. Our decision here is limited to holding that the State may not make payments based on sick leave and vacation leave as a substitute for workers' compensation benefits.

The State's argument that it is entitled to a set-off or credit, under G.S. 97-42, for the amounts already paid to plaintiff, is not properly before this Court. First, the Commission's statement that the State was not entitled to credit is more nearly a gratuitous comment than a conclusion of law. Second, even if we can say that the Commission did decide the issue, the State has failed to properly bring that issue before us. Rule 28(a) of our Rules of Appellate Procedure limits our review to questions raised and discussed in the parties' briefs. *See State v. Edwards*, 49 N.C. App. 547, 272 S.E. 2d 384 (1980). Rule 28(b)(5) requires the appellant's brief to separately state each question, state its contentions with respect to each question, and cite the authorities upon which it relies. The State's brief does not raise the set-off issue as

a separate argument, fails to state its contentions, and cites no authority for its position. The State's failure to discuss the issue or cite any authority in support of its position means its argument for a set-off should be deemed abandoned. *See Miller v. Henderson*, 71 N.C. App. 366, 322 S.E. 2d 594 (1984). The appellee's brief likewise contains no argument on the issue. The only citation of authority pertaining to the set-off issue is in a Memorandum of Additional Authority filed by the State. Therefore, this Court has not been properly briefed on the issues of whether the State is entitled to some relief under G.S. 97-42. In our discretion, pursuant to Rule 2 of the Rules of Appellate Procedure, however, we remand the case to the Commission for determination of the issue.

Assuming *arguendo* that the Commission's comment regarding the applicability of G.S. 97-42 constitutes a final decision on the question, the case must be remanded. G.S. 97-42 provides that:

> [a]ny payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payments.

The Commission apparently believed that G.S. 97-42 was not applicable since plaintiff's sick and vacation leave was a fringe benefit, earned as part of his compensation. Indeed, the authority on point generally holds that sick and vacation leave is a fringe benefit and, absent a specific statutory provision to the contrary, payments based on it may not be used as credit against the amount of workers' compensation owed. *See County of Mariopa v. Industrial Com'n of Az.*, 145 Ariz. 14, 699 P. 2d 389 (1985); *Pet Incorporated, Dairy Division v. Roberson*, 329 So. 2d 516 (Miss. 1976); 4 Larson, The Law of Workmen's Compensation, section 97.41(d) (1987). This was the rationale used in *Ashe v. Barnes, supra*, in addressing the set-off issue under G.S. 97-42.

Two recent Supreme Court decisions, however, make it clear that the analysis of whether an employer is entitled to credit under G.S. 97-42 is limited to a determination of whether the payments for which the employer seeks credit were "due and payable" when made. *See Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E. 2d 670 (1987); *Moretz v. Richards & Associates*, 316 N.C. 539, 342 S.E. 2d 844 (1986). Because the Commission here acted under a misapprehension of the applicable law, this case must be remanded. *See Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970). Although the Court in *Foster v. Western-Electric Co., supra*, did not say explicitly that *Ashe v. Barnes, supra*, had been overruled, it seems clear that the "fringe benefit" rationale followed by the *Ashe* Court in determining the issue of credit under G.S. 97-42, is no longer the appropriate basis for decision. *Foster v. Western-Electric Co., supra*, at 116, 357 S.E. 2d at 672. In workers' compensation claims the Commission has the sole power to find facts. *See Gamble v. Borden, Inc.*, 45 N.C. App. 506, 263 S.E. 2d 280, *disc. rev. denied*, 300 N.C. 372, 267 S.E. 2d 675 (1980). Therefore, we must remand this case for review and the factual determinations necessary under the rationale of *Moretz* and *Foster*.

We affirm the opinion and award of the Industrial Commission but remand the case for further review and a determination of whether the State is entitled to a set-off or credit against the workers' compensation award pursuant to G.S. 97-42.

Affirmed in part and remanded in part.

Judges BECTON and COZORT concur.

LARRY HIGGINS v. SAMUEL DAVID SIMMONS AND GREENSBORO NATIONAL BANK, GARNISHEE

No. 8718DC830

(Filed 1 March 1988)

Garnishment § 2.1— service upon garnishee—loan officer trainee—insufficient

A judgment against a garnishee bank was reversed where the person upon whom the garnishment papers were served was not the president, head,

secretary, cashier, treasurer, or director of the bank and had no express authority to receive service of process on behalf of the bank, and was not an agent impliedly authorized to receive process on behalf of the bank because he had no discretion and control with respect to the corporate business, had no official or supervisory powers, conducted his duties of employment wholly under the supervision of bank officials, was not left in charge of the office on the day the papers were served or on any other day, there was no evidence that he had significant business experience or any specific experience with garnishment proceedings, and he did not in fact communicate to his employers that the papers had been served on him. His limited authority to accept a loan payment check from a bank client and carry it to a teller for deposit under the supervision of the branch manager did not constitute receiving or collecting money on behalf of a corporation within the meaning of N.C.G.S. § 1-440.26(c).

APPEAL by garnishee from *Joseph R. John, Judge.* Judgment entered 5 May 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 3 February 1988.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Marion G. Follin, III, for plaintiff-appellee.

Barbee & Johnson, by Ronald Barbee, for garnishee-appellant.

BECTON, Judge.

This appeal arises from an attachment and garnishment proceeding instituted by plaintiff, Larry Higgins, against Greensboro National Bank (GNB), as garnishee, to satisfy a debt owed to Higgins by defendant, Samuel David Simmons, from funds of Simmons which were allegedly on deposit at GNB. From a final judgment in favor of Higgins against GNB in the amount of $4,200 with interest and costs, GNB appeals. We conclude that, due to the insufficiency of service of process upon GNB, the judgment must be reversed.

I

On 14 January 1983, Larry Higgins filed suit against Samuel David Simmons to enforce payment of an alleged debt of $4,200. Higgins also instituted supplemental attachment and garnishment proceedings against GNB. On 17 January 1983, the summons to garnishee, notice of levy, and order of attachment were personally served by the Guilford County Sheriff on Calvin L. Corbett, an employee of the bank. On 18 April 1985, following a non-jury trial, judgment was entered against Simmons in the amount of $4,200 with interest from 15 December 1982.

During the period between the date of service, 17 January 1983, and the date of judgment against Simmons, 18 April 1985, GNB did not respond to the summons to garnishee. On 14 September 1985, Higgins moved unsuccessfully for a conditional judgment against GNB, pursuant to N.C. Gen. Stat. Sec. 1-440.26, seeking to recover from GNB the amount of the judgment. Higgins appealed the denial of his motion to Superior Court.

Thereafter, on 28 October 1985, GNB filed a motion to dismiss the attachment and garnishment proceedings on the grounds that GNB was not properly served with the summons and notice of levy because Calvin Corbett was not a proper agent to receive service of process on behalf of the bank. A hearing was held in Superior Court at which GNB presented evidence concerning the nature of Mr. Corbett's employment. The trial judge then entered an order on 27 February 1986 in which he made findings of fact, concluded that the bank had been duly served, denied the motion to dismiss, and ordered GNB to respond to the summons by 3 March 1986.

Upon GNB's failure to respond as ordered, Higgins again moved for a conditional judgment against GNB. GNB challenged the motion by once again raising the issue of improper service of process. However, the trial judge concluded that the 27 February 1986 order was binding on that issue, and he entered a conditional judgment on 24 November 1986 which directed GNB to appear within ten days and show cause why the judgment should not be made final. Once again the bank took no action; and, on 5 May 1987, final judgment was entered against GNB for $4,200 with interest from 15 December 1982 and costs.

II

The dispositive issue on appeal is whether Calvin L. Corbett was a proper agent to accept service of process on behalf of GNB, since, if he was not, the trial court never acquired jurisdiction over GNB and the conditional and final judgments against it are void. For the reasons discussed hereafter, we conclude that service of the garnishment papers upon Mr. Corbett did not constitute valid service upon GNB.

A

N.C. Gen. Stat. Sec. 1-440.26 governs service of process in garnishment proceedings against a corporate garnishee. Pursuant to that statute, GNB could only be properly served by delivery of copies of the order of attachment, summons to garnishee, and notice of levy "to the president or other head, secretary, cashier, treasurer, director, managing agent, or local agent of the corporation." N.C. Gen. Stat. Sec. 1-440.26(a). Subsection (c) of the statute further provides that "[a] person receiving or collecting money within this State on behalf of a corporation is deemed to be a local agent of the corporation for the purpose of this section." Our Supreme Court, in *Carolina Paper Co. v. Bouchelle*, 285 N.C. 56, 203 S.E. 2d 1 (1974), further explained the meaning of the term "agent" in this context as follows:

> . . . [I]n defining the term agent it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him. [Citations omitted.]
>
> . . .
>
> . . . It is merely a question whether the power to receive service of process can reasonably and fairly be implied from the character of the agency in question. [Citations omitted.]
>
> In the absence of any express authority the question depends upon a review of the surrounding facts and upon the inference which the court might properly draw from them.

Id. at 61-62, 203 S.E. 2d at 4-5, *quoting Whitehurst v. Kerr*, 153 N.C. 76, 79-80, 68 S.E. 913, 914 (1910) *and McDonald Service Co. v. People's National Bank*, 218 N.C. 533, 536, 11 S.E. 2d 556, 558 (1940).

In *Bouchelle*, garnishment papers were served upon W. F. Lyon, an employee of the corporate garnishee, W. P. Cherry & Son, Inc. The evidence showed that Lyon was not the president or other head, secretary, cashier, treasurer, or director of the company. However, he had 15 years of business experience which included some experience with garnishment proceedings. Although Lyon had been employed by the company for only two months when the papers were served, he had been persuaded to accept the position by the owner and president of the company, Mr. Cherry, and was made president of a subsidiary company of the garnishee corporation shortly after his employment began. There also was testimony that Lyon was left in charge of the seventeen-employee office whenever Mr. Cherry and the bookkeeper, Mr. Ambrose, were out, and that neither Mr. Cherry nor Mr. Ambrose were in the office on the day the papers were served. Moreover, there was evidence that Lyon did, in fact, communicate to his company that process had been served upon him. Based on the foregoing, the court concluded that, under these circumstances, it could "reasonably and fairly be inferred" that Lyon was a proper agent to accept service of process for the company.

B

At the hearing on GNB's motion to dismiss for improper service of process, the undisputed testimony of the president of GNB showed that Calvin Corbett was not the president, head, secretary, cashier, treasurer, or director, of GNB and had no express authority to receive service of process on behalf of the bank. Thus, the question for our determination is whether, based upon his background and employment responsibilities, Corbett may be deemed an *implied* agent of GNB for service of process.

At the time the garnishment papers were served upon him, Corbett had been employed by the bank for two years and held the position of loan officer *trainee*, having been promoted from management trainee. His duties included interviewing loan applicants and recommending approval or disapproval of loan applications, but he had no authority to close loans. When in the bank doing business, he was authorized to receive loan payments from clients which he would take to a teller to be deposited and recorded. As a trainee, Corbett carried out his responsibilities under the instruction and supervision of GNB officials, his primary supervisor being the branch manager, Kenneth Faulkner.

In January 1983, GNB had approximately 17 employees in its principal office where Corbett worked. Corbett did not supervise any employees and held no power to act for the bank officially. Only officers of the bank were authorized to receive legal process for GNB, and, as standard policy and practice, there was always an officer in the building during business hours.

Corbett did not communicate to any officer of GNB that the papers had been served upon him, and GNB officials did not learn of the proceeding until 1985, following the denial of Higgins' first motion for a conditional judgment.

C

Applying the standard set forth in *Bouchelle* to these facts, we conclude that the power to receive service of process for GNB may not reasonably and fairly be implied from the extent of the authority given to and exercised by Corbett in January 1983. Unlike the person served in *Bouchelle*, Corbett had no discretion and control with respect to corporate business, had no official or supervisory powers, conducted his duties of employment wholly under the supervision of GNB officials, and was not left in charge of the office on the day the papers were served or any other day. Further, there was no evidence that Corbett had significant business experience or any specific experience with garnishment proceedings. Moreover, Corbett did not, in fact, communicate to his employer that the papers had been served on him.

In addition, we reject Higgins' contention that Corbett may be deemed a "local agent" pursuant to N.C. Gen. Stat. Sec. 1-440.26(c) because he "received" or "collected" money on behalf of GNB. In our view, Corbett's limited authority to accept a loan payment check from a bank client and carry it to a teller for deposit under the supervision of the branch manager does not constitute "receiving or collecting money on behalf of a corporation" within the meaning of the statute. *Cf., Mauney v. Luzier's, Inc.*, 212 N.C. 634, 194 S.E. 323 (1937) (former statute refers to agent who is employed regularly in making collections for goods sold).

For these reasons, we hold that Corbett was not an agent expressly or impliedly authorized to receive process on behalf of GNB and that service upon him was invalid under N.C. Gen. Stat. Sec. 1-440.26. Accordingly, the judgment against the garnishee,

GNB, is reversed. GNB raises two other issues on appeal which, in view of our disposition of the service of process question, we need not address.

Reversed.

Chief Judge HEDRICK and Judge SMITH concur.

BOBBY WAGONER, EMPLOYEE, PLAINTIFF v. DOUGLAS BATTERY MANUFACTURING COMPANY, EMPLOYER, AND HARTFORD INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8710IC410

(Filed 1 March 1988)

Master and Servant § 66— workers' compensation—mental illness after compensable injury—substance abuse as cause

The evidence supported a determination by the Industrial Commission that, although plaintiff's disabling hand injury was a contributing factor in his disabling mental illness, his willful abuse of various controlled substances, including marijuana, LSD, PCP, quaaludes and cocaine, was an intervening cause which prohibits an award of benefits for his mental illness pursuant to N.C.G.S. § 97-12(2).

APPEAL by plaintiff from Order of the North Carolina Industrial Commission, entered 2 December 1986. Heard in the Court of Appeals 28 October 1987.

This case appears before us for the second time on appeal. From an order entered 30 April 1985 by the Full Commission awarding benefits to the plaintiff, defendants appealed. On appeal, this Court reversed and remanded the case to the Full Commission, on the basis that the Commission erred by applying an improper standard to the evidence. *See Wagoner v. Douglas Battery Mfg. Co.*, 80 N.C. App. 163, 341 S.E. 2d 120 (1986). On 2 December 1986, the Full Commission entered an opinion and award denying plaintiff's claim, from which plaintiff now appeals.

Bobby Wagoner, plaintiff, began working for defendant Douglas Battery Manufacturing Company in October of 1979. On 26 July 1980, plaintiff sustained a serious work-related, compen-

sable injury when he caught his left hand in a conveyor belt wheel, while reaching to retrieve some battery decals. His hand was badly mangled, and his left index finger was amputated as a result. Plaintiff was released from the hospital within several days, and returned to work on 8 September 1980. Defendants have paid compensation to the plaintiff for the period between 26 July 1980 and 8 September 1980, as well as for the 100% permanent disability to his finger.

After having returned to work, plaintiff began to develop a mental disorder exhibited by paranoia, withdrawal, and delusions. In December of 1980, plaintiff began to see a psychiatrist, Dr. Ali Jarrahi, who determined that plaintiff was on the verge of a psychotic breakdown.

As diagnosed, plaintiff, in fact, experienced a breakdown on or about 10 January 1981. On that date, he quit his job and drove around all night listening to imaginary voices. His behavior became even more bizarre on the morning of the following day when he woke his household at around 4:00 a.m., and explained to his family that voices had told him that he was a prophet.

On 12 January 1981, plaintiff was committed for psychiatric hospitalization at Forsyth Memorial Hospital and remained there until 25 February 1981. He was again committed on 5 March 1981, at John Umstead Hospital. Dr. Jarrahi diagnosed plaintiff as having an acute pyschosis, *drug-induced versus schizo affective*. He further determined that three factors were possible contributing causes of plaintiff's condition: (1) plaintiff's drug use, including an increasing frequency of use immediately prior to his psychiatric hospitalization, (2) the stress associated with the amputation, and (3) plaintiff's pre-morbid personality and possible increased susceptibility to mental illness due to genetic influences. The possibility of genetic influences was supported by past hospitalizations of both his mother and younger brother at John Umstead for treatment of mental illness.

Some evidence of plaintiff's history of controlled-substance abuse presented before the Commission includes: an admission by plaintiff that he had smoked marijuana since the eighth grade, and that during the months following the accident his usage increased to almost daily; further admission that he had used quaaludes both while in high school and as recently as October 1980;

another admission that he had used LSD on several occasions and as late as 31 December 1980; and yet another admission that he had used cocaine on several occasions after the accident, including 31 December 1980.

Other evidence concerning the interrelationship between plaintiff's substance abuse and his mental disorder, was in the form of testimony by Dr. Jarrahi. In his testimony, he acknowledged the significance of plaintiff's drug use and testified that PCP and LSD, both of which plaintiff admitted using shortly prior to his admission to the hospital, are hallucinogens and are noted for producing severe and bizarre reactions as well as a loss of reality.

Based upon this evidence, the Full Commission entered the opinion from which plaintiff now appeals, concluding that, plaintiff's mental illness was proximately caused by his use of controlled substances, and that he is not entitled to benefits under the Act.

David B. Hough and Lawrence J. Fine, for plaintiff-appellant.

Petree Stockton & Robinson, by Robert J. Lawing and Jane C. Jackson, for defendants-appellees.

JOHNSON, Judge.

Plaintiff presents eight issues for review, all which question whether the Commission's findings of fact were supported by competent evidence from the record, and whether its conclusions of law were supported by the findings of fact. In his questions presented, plaintiff has enunciated the two-prong standard of review we must follow on appeal from an opinion and award of the Industrial Commission. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676 (1980); *Murray v. Biggerstaff*, 81 N.C. App. 377, 344 S.E. 2d 550 (1986).

Plaintiff primarily challenges the findings of fact concerning his drug usage, and contends that there is no evidence to support the finding that he has been using numerous controlled substances since he was in the eighth grade; the finding that he was successfully employed between 8 September 1980 and 12 January 1981 and consumed LSD, PCP, quaaludes, marijuana and cocaine recreationally during that time; nor the finding and ultimate con-

clusion of law that his willful use of controlled substances was an intervening cause of his mentally disabling condition.

We find that both the Commission's findings of fact and conclusions of law were amply supported by evidence from the record and, therefore, affirm the Commission's order and award in its entirety.

When evaluating an appeal from a final order of the Industrial Commission, this Court, when considering the evidence, determines only whether there is any substantive evidence in the record to support the Commission's findings. *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980). In order to disregard the findings, we must find that there is no competent evidence in the record to support them. *Carroll v. Burlington Industries*, 81 N.C. App. 384, 344 S.E. 2d 287 (1986); *Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E. 2d 747 (1981). Therefore, it follows that where there is any evidence to support the Commission's findings, we are bound to accept them, although some evidence may exist which would justify a different result. *Burlington Industries, supra.*

In evaluating the findings of fact concerning plaintiff's drug usage, we are met with a plethora of evidence from the record. On cross-examination, plaintiff made several admissions in response to questions about his drug use as follows:

> Q: Mr. Wagoner, you've been taking drugs since the eighth grade, have you not? . . .
>
> A: Taking drugs, not on no [sic] regular basis.
>
> Q: Well, when you were admitted to the hospital in January 12, '81, and your attorney has introduced a copy of the discharge summary, didn't you tell 'em that you had been using numerous drugs since the eighth grade, including Quaalude[s], LSD, acid, uppers and downers, cocaine and marijuana?
>
> A: I might have. I'm not totally sure.
>
> Q: Well, you told 'em that you had been taking drugs orally, sniffing, is that correct?
>
> A: Orally and sniffing. *Yes, I told them I had used drugs.*
>
> . . .

Q: Well, do you have knowledge of telling 'em that you had taken Quaaludes?

A: Quaaludes?

Q: Yes.

A: *I—yes, I had told 'em I had taken some Quaaludes. . . .*

Q: You told them you had taken LSD, didn't you?

A: *Yes. Not on that morning though.*

Q: You told 'em you had taken acid?

A: Not on that morning.

Q: Well, at times previous?

A: Yes, sir.

Q: And uppers and downers?

A: Yes, sir.

Q: Cocaine?

A: Yes, sir.

Further cross-examination regarding plaintiff's drug usage appears as follows:

Q: Did you tell the hospital staff, including the doctors and nurses, that you had used PCP?

A: That I had used PCP?

Q: Yes.

A: They told me that I showed it in my bloodstream, and I told 'em I had no knowledge of using it.

. . .

Q: Referring again to the hospital record, Mr. Wagoner, I will ask you again, sir, if you didn't tell 'em that the last time you used LSD was just before Christmas in 1980?

A: No, sir, I don't think I told 'em that. I think I told 'em the last time I used it was after Christmas of '80, around January the 1st.

Q: So, the way that you recall it, you told 'em that you used LSD on January the 1st, 1981?

A: December the 31st or 30th. It was New Year's Eve.

Dr. Ali Jarrahi, plaintiff's treating psychiatrist and the only medical witness presented, testified to the following: that he first saw plaintiff on 16 December 1980; that he recommended hospitalization at that time, but plaintiff did not agree; that the significant factors associated with plaintiff's disabling psychosis were the "issue of the stress of the accident," plaintiff's pre-morbid personality, and the issue of plaintiff's drug use; that plaintiff's final diagnosis was "acute psychosis" which could have been either drug induced or schizo-affective; that plaintiff had a history of poly substance abuse; and that PCP and LSD both of which plaintiff admitted taking were hallucinogens which can result in hallucinations and in a loss of touch with reality.

Based upon this evidence the Commission found the facts heretofore noted to which plaintiff objected, and ultimately reached the conclusion of law that plaintiff was not entitled to compensation pursuant to G.S. 97-12(2). This provision states that "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by: . . . (2) "[h]is being under the influence of any controlled substance listed in the North Carolina Controlled Substances Act, G.S. 90-86 *et seq.*, where such controlled substance was not by prescription by a practitioner."

The Commission further concluded that although plaintiff's hand injury was a contributing factor in his disabling psychosis, his willful substance abuse was an intervening cause which prohibits an award of benefits.

We hold, therefore, that the Commission's findings of fact were supported by evidence from the record, and its conclusions of law were supported by the findings. Although we are acutely aware of the policy favoring liberal treatment of employee claims under the Workers' Compensation Act, we have found no reason to disturb the order denying benefits to plaintiff.

Affirmed.

Judges WELLS and COZORT concur.

WILLIAM F. FREEMAN, INC. v. ALDERMAN PHOTO COMPANY

No. 8718SC592

(Filed 1 March 1988)

1. **Contracts § 10; Landlord and Tenant § 8.2— lease provisions concerning insurance—no waiver of liability for negligence**

Provisions of a lease which required both the lessor and lessee to insure their own property and required all insurance policies to include a waiver of subrogation against the other party did not constitute a waiver of liability for negligence. Therefore, the trial court erred in submitting to the jury an issue as to whether the parties intended such provisions to exempt defendant lessor from responsibility for damages suffered by plaintiff architecture firm when rain flooded plaintiff's leased premises while defendant was repairing the roof of the building.

2. **Damages § 17— destroyed architectural drawings—instructions on value**

The trial court did not err in instructing the jury on the actual value rather than the replacement cost measure of damages for architectural drawings destroyed when rainwater entered plaintiff architectural firm's leased premises where the evidence tended to show that plaintiff would never use most of the drawings and those which might be reused could be redrawn when needed; the replacement cost measure of damages would compensate plaintiff for recreating hundreds of potentially useless drawings; and the trial court's instruction appropriately allowed the jury to consider the reasonableness and practicability of recreating the drawings in determining their actual value.

3. **Damages § 13.3— destroyed architectural drawings—value—amount of insurance**

Evidence that plaintiff architectural firm maintained only $500 insurance coverage on drawings destroyed by rainwater leaking through the roof was relevant in determining the actual value of the drawings since no market existed for them.

APPEAL by plaintiff from *Walker, Judge*. Judgment entered 20 November 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 3 December 1987.

Plaintiff, an architectural firm, rented office space from defendant. While defendant was repairing the roof of the building, heavy rain flooded plaintiff's office library damaging or destroying hundreds of architectural drawings, work papers and surveys. Several pieces of office equipment and furniture were also damaged. In addition to the property loss, plaintiff's business was interrupted for several weeks.

Plaintiff filed suit on 22 August 1984. Defendant filed its answer and a counterclaim for unpaid rent on 26 October 1984. Approximately two years later and only fourteen days before trial, defendant filed a motion for leave to amend its answer pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure. The amendment raised a new defense based on a lease provision which required both lessor and lessee to insure their own property. The lease also required all insurance policies to include a waiver of subrogation against the other party. The trial court granted defendant leave to amend over plaintiff's objection.

After almost two weeks of trial, the trial court submitted three issues to the jury: (1) whether plaintiff was damaged by defendant's negligence; (2) if defendant was negligent, what amount was plaintiff entitled to recover; and (3) did the parties intend certain lease language to mean that each party would insure its own property and not look to the other for damages. The trial court instructed the jury to consider the third issue in isolation without regard to or influence by the answers to the first two issues.

The jury found defendant was negligent and that plaintiff suffered losses totaling $113,600 ($73,600 attributed to personal property damages and $40,000 to business interruption). The jury found, however, that plaintiff was not entitled to any recovery from defendant because of their lease agreement. The trial court rendered judgment pursuant to the verdict and entered a directed verdict for $59,803.63 in favor of defendant on its counterclaim for unpaid rent.

Citing numerous objections and exceptions, plaintiff appeals from the judgment below.

Frazier, Frazier & Mahler, by Harold C. Mahler and James D. McKinney, attorneys for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by William D. Caffrey and Clyde H. Jarrett and Fisher, Fisher, Gayle & Craig, by Scott C. Gayle, attorneys for defendant-appellee.

ORR, Judge.

[1] Plaintiff assigns as error the trial court's decision to submit Issue No. 3 to the jury. The issue reads as follows:

> Did the parties intend that the language in their lease: "INSURANCE: The Lessor shall carry, pay the premium, and be responsible for fire and extended coverage insurance upon the premises. In the event any improvements or alterations are made by the Lessee as provided hereinafter, the amount of such insurance shall be increased, following receipt, by Lessor, of written notice from Lessee, to such an extent as to cover said improvements and alterations. Unless the additional insurance coverage is increased to cover any improvements and alterations as aforesaid, the Lessor shall not be responsible for the replacement or restoration in the event of other casualty.
>
> The Lessee shall carry, pay the premiums, and be responsible for fire insurance and other insurance upon its property, contents and equipment and shall carry adequate and sufficient liability insurance for both the Lessee and Lessor and shall furnish the Lessor evidence of such coverage.
>
> The Lessee will not do, suffer or permit anything to be done in or about the premises that will affect, impair or contravene any policies of insurance against the loss or damage by fire, casualty or otherwise that may be placed thereon by the Lessee or the Lessor.
>
> All insurance policies shall be in the name of the Lessor and Lessee as their interests may appear. All insurance, whether carried by the Lessor or the Lessee, shall provide a waiver of subrogation against the other party," would mean that the Lessor, The Alderman Company, would insure its property and interests, and the Lessee, Freeman, Inc., would insure its property and interests, and, further, that one party would not be responsible for damage to or loss of the other party's property?

Defendant contends this language exempts both parties from liability arising out of their own negligence. We disagree. The above portions of the lease address insurance coverage and subrogation rights only. The lease does not contain an express waiver of liability for negligence.

Each party agreed to insure its own property and to include in all insurance policies, waivers of subrogation rights against the

other party. Subrogation is defined as "[t]he substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the . . . rights, remedies, or securities." Black's Law Dictionary 1279 (Rev. 5th Ed. 1979). "Subrogation is a normal incident of indemnity insurance, and, where the insurance contract is regarded as one of indemnity, the company on payment of the loss is subrogated to all of the rights of insured against the person whose fault or negligence caused the loss." 46 C.J.S. *Insurance* § 1209(a) (1946).

Appellee argues that one could infer from the above portions of the lease that the parties intended to waive personal liability for negligence and, therefore, a jury should resolve the issue. An inference, however, would be insufficient. In *Winkler v. Amusement Co.*, 238 N.C. 589, 79 S.E. 2d 185 (1953), our Supreme Court held that:

> [c]ontracts for exemption from liability for negligence are not favored by the law, and are strictly construed against the party asserting it. The contract will never be so interpreted in the absence of clear and explicit words that such was the intent of the parties.

238 N.C. at 596, 79 S.E. 2d at 190 (citations omitted). The lease contains no clear, explicit words waiving liability for negligence as required by *Winkler*. Therefore, the trial court should not have submitted Issue No. 3 to the jury.

[2] We now address plaintiff's contention that the trial court erred by using North Carolina Pattern Civil Instruction 810.96 on actual value rather than the replacement cost measure of 810.94.

The trial court instructed the jury as follows:

> Now, ladies and gentlemen, where damage to personal property which has no market value, including documents and drawings, is involved, the rule is that if plaintiff is entitled to recover at all, it is entitled to recover what you find to be the actual value of that property immediately before it was damaged less any salvage value, if any, that you find it had after its damage.
>
> The actual value of any property is the property's intrinsic value, that is, its value to its owner.

> In determining the actual value of such property, you may consider the age of the property, the degree to which such property has been [used] by the owner, the condition of the property just before and after it was damaged, the uniqueness of that property, the reasonableness and the practicability of recreating or replacing the property, the cost of recreating or replacing the property taking into account the degree to which it had been worn out with age, if any. And, finally, you may consider the opinion of its owner as to its value.

Plaintiff objects to the "actual value" measure of damages in the above instruction because it does not require the jury to award plaintiff a sum sufficient to recreate the drawings. The evidence, however, tended to show plaintiff would never use most of the drawings and those which might be used could be redrawn when needed. It would be unreasonable and impractical to recreate each drawing when most would never be used again.

The trial court's instruction was appropriate because it allowed the jury to consider the reasonableness and practicability of recreating the drawings in determining their actual value. Whereas the replacement cost measure of damages requested by plaintiff would compensate plaintiff for recreating hundreds of potentially useless drawings. We believe the trial court's instruction adequately permitted the jury to consider that some portion of the drawings might have to be recreated while most would not.

[3] Plaintiff further assigns as error the trial court's decision to admit testimony that plaintiff maintained only $500 insurance coverage on the drawings. According to plaintiff, this testimony was irrelevant and highly prejudicial. We disagree.

"Evidence of insurance coverage is generally inadmissible in negligence suits. . . . It is admissible, however, 'if it has some probative value other than to show the mere fact of its existence.'" *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 380, 301 S.E. 2d 439, 448, *disc. rev. denied*, 308 N.C. 678, 304 S.E. 2d 759 (1983) (citations omitted). Here the insurance coverage was probative for a reason other than its mere existence. Since no market exists for the drawings, we believe the amount of insurance coverage was relevant in determining actual value and was properly admitted. It was for the jury to decide how

much weight the testimony deserved. We do not believe the probative value of this testimony was outweighed by prejudicial impact on the jury.

Finally, plaintiff contends the trial court erred by directing the verdict in favor of defendant for $59,803.63 on its counterclaim for unpaid rent.

The parties stipulated that plaintiff owed $70,325.00 in unpaid rent as of 30 June 1984. They also agreed the rent should be abated by $10,521.37 because of damage to the building. The difference between these two figures is $59,803.63, the amount of the judgment.

Plaintiff believes the trial court should have submitted the issue of abatement to the jury. According to plaintiff, the jury could have reduced the total amount of rent due even more by abating the rent during the time period after 30 June 1984. Plaintiff, however, presented no evidence of abatement after 30 June 1984. Thus, no material issue of fact remained to be resolved by the jury. The trial court properly entered a directed verdict in favor of defendant.

After thoroughly examining the remaining assignments of error we find them either without merit or harmless error. We therefore reverse the trial court's decision to submit Issue No. 3 to the jury and order the trial court to modify its judgment to award plaintiff $113,600. In all other respects the decision of the trial court is affirmed.

Modified and affirmed.

Judges ARNOLD and JOHNSON concur.

In the Matter of N.C.L.

IN THE MATTER OF N.C.L., A JUVENILE

No. 873DC803

(Filed 1 March 1988)

Guardian and Ward § 1; Adoption § 2— dependent child—adoption of—responsibility of guardian ad litem

In an action arising from a guardian ad litem's motion to compel DSS to grant his request to visit the child and for information on prospective adoptive parents, a district court's order allowing DSS's motion to dismiss respondent as guardian ad litem and denying respondent's motion was reversed. It was the guardian ad litem's right and duty to inquire into DSS's handling of the adoption and the subsequent notice of an adoption petition did nothing to prevent the district court from entertaining the motion. A guardian ad litem's responsibility to a child is intact for ten days after receipt of written notice of the filing of an adoption petition, and any motion alleging abuse of discretion in the adoption process should be filed with the clerk of superior court within the ten day period. Since the adoptive parents choose where to file the petition, without the requested information a guardian ad litem would be totally unaware of the proper tribunal in which to assert any issues of abuse of discretion. N.C.G.S. § 7A-586, N.C.G.S. § 7A-659(f).

APPEAL by respondent James Bruner, guardian *ad litem* for N.C.L., from *Ragan (James E., III), Judge.* Order entered 31 July 1987 in District Court, PITT County. Heard in the Court of Appeals 1 February 1988.

On 14 October 1980, the Pitt County district court adjudged N.C.L., a juvenile, to be a dependent and placed the child in the custody of the petitioner, Pitt County Department of Social Services (DSS). On 4 September 1984, DSS petitioned the court to terminate parental rights. The court appointed respondent as N.C.L.'s guardian *ad litem.* Parental rights were terminated on 4 November 1986, and DSS began looking for adoptive homes for the child. During that time respondent allegedly made several requests of DSS to visit N.C.L. and to obtain information on any prospective adoptive parents. These requests were for the most part denied.

On 25 March 1987, respondent filed a motion in district court to compel DSS to grant his requests. A hearing was scheduled for 31 March 1987; however, on that date respondent received notice that a petition for adoption of N.C.L. had been filed. On 1 April 1987, petitioner filed a response to respondent's motion and asked

the court to relieve respondent of his responsibilities as guardian *ad litem* on the grounds that an adoption petition had been filed. A hearing was subsequently held on 2 April 1987 at which the court orally denied the motions of both respondent and petitioner.

On 7 April 1987, respondent filed another motion in the district court renewing his request to meet with N.C.L. and for information concerning the adoption process stating that such information was necessary for him to make a determination as to whether DSS had abused its discretion in the adoption selection process. Another hearing was held on 9 April 1987 at which the judge orally denied respondent's motion but granted petitioner's renewed motion to dismiss respondent as guardian *ad litem*. On 31 July 1987, the district court judge entered a written order denying all earlier motions based on lack of the district court's jurisdiction once the adoption petition had been filed. Respondent appeals.

David A. Leech for respondent-appellant

Everett, Everett, Warren & Harper, by Ryal W. Tayloe, Edward J. Harper, II, and Scott W. Warren, for petitioner-appellee.

SMITH, Judge.

Respondent assigns as error the district court's denial of his motion requesting visitation with the minor child, N.C.L., and information regarding potential adoptive homes. He contends that as guardian *ad litem* he is entitled to the requested information to determine any possible abuse of discretion on the part of DSS and that the district court retained jurisdiction pursuant to G.S. 7A-659(f) to consider the merits of his motion. We agree.

The duty of a guardian *ad litem* in a juvenile case is to see that the child's interests and needs are being met. This duty extends to involvement in the placement of juveniles for adoption. *In re Wilkinson v. Riffel*, 72 N.C. App. 220, 324 S.E. 2d 31 (1985). The guardian is empowered under G.S. 7A-659(f) to request information about and be consulted concerning the adoption selection process. This includes confidential adoption information regarding adoptive parents. *Id.* G.S. 7A-586 specifically provides that "the judge may grant the guardian *ad litem* the authority to demand information or reports *whether or not confidential* that may in

the guardian *ad litem's* opinion be relevant to the case." (Emphasis added.) It was respondent's duty and right to inquire into DSS's handling of N.C.L.'s adoption, and it was within the district court's jurisdiction to order DSS to turn over the requested information, despite its confidential nature.

Petitioner contends that the district court's jurisdiction ended the moment the notice of the filing of an adoption petition was received on 31 March 1987. We disagree. The district court, in this case, did have jurisdiction to entertain respondent's 25 March motion. It is generally held that once jurisdiction of a court attaches, it exists until the cause is *fully* determined and is not ousted by subsequent events. *In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978), *cert. denied*, 442 U.S. 929, 61 L.Ed. 2d 297, 99 S.Ct. 2859 (1979). This is true even if the subsequent event would have prevented jurisdiction from attaching at the outset. *Id.* Jurisdiction in this case attached on 25 March, five days prior to the receipt of notice of the adoption petition. The subsequent notice did nothing to prevent the district court from entertaining the motion. Our Supreme Court has noted:

> Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding. . . . If the converse of this were true, it would be within the power of the defendant to preserve or destroy jurisdiction of the court at his own whim.

In re Peoples, 296 N.C. at 146, 250 S.E. 2d at 911 (*quoting Silver Surprise, Inc. v. Sunshine Mining Co.*, 74 Wash. 2d 519, 523, 445 P. 2d 334, 336-37 (1968)). Upon a showing by respondent that the requested information is relevant to this case, the district court is still empowered to order DSS to release the information to respondent.

Petitioner next contends that once the petition for adoption was filed, the guardian *ad litem's* responsibility ended and that any further intervention would be intrusive and burdensome. To support this contention, it relies on our recent holding in *In re James S.*, 86 N.C. App. 364, 357 S.E. 2d 430 (1987), that a guardian *ad litem* has no further responsibility once an adoption petition has been filed. This reliance is misplaced. That court stated that "*[a]bsent* any responsibilities or duties to perform the guardian *ad*

litem is superfluous to an adoption proceeding." *Id.* at 366, 357 S.E. 2d at 431. (Emphasis added.) Yet the court also held that one of the guardian *ad litem's* responsibilities was to "raise any issue of the agency's abuse of discretion within ten days after [he] receives written notice of the filing of the adoption petition." *Id.*, 357 S.E. 2d at 431. The facts in *James S.* reveal that the guardian *ad litem* requested the adoption information *four months after* the adoption petition had been filed. In the case at bar, the guardian *ad litem* first made a motion to the court for information *five days before* receiving written notice that an adoption petition had been filed. It is clear that the guardian in this case still had a responsibility and a duty, pursuant to G.S. 7A-659(f), at the time he received notice of the adoption petition to raise any issue of abuse of discretion. It was, however, a responsibility which could not be fulfilled without the information to which he was entitled.

It being our conclusion that the guardian *ad litem's* responsibility to the child is intact for that ten-day period for the purpose of raising any issue of abuse of discretion, the question then becomes where such issue should be raised. G.S. 7A-659(f) is silent on this point. However, G.S. 48-12 provides that adoption proceedings shall be before the clerk of superior court. Thus, it is our view that any motion alleging abuse of discretion in the adoption process should be filed with the clerk of superior court within the ten-day period provided for in G.S. 7A-659(f). We would note that under G.S. 48-12 it is virtually within the adoptive parents' discretion where to file the adoption petition. It could be in any one of the one hundred North Carolina counties or out of the state. Additionally, G.S. 48-14 provides that the adoptive child's original name need not be set forth in the petition. Without the requested information, the guardian *ad litem* would be totally unaware of the proper tribunal in which to assert any issues of abuse of discretion and would thus be denied the opportunity to fulfill his responsibility.

The lower court's order allowing petitioner's motion to dismiss respondent as guardian *ad litem* is reversed. Likewise, the order denying respondent's motion is reversed. On remand, the district court has jurisdiction only for the purposes set forth in G.S. 7A-586. The granting of respondent's motion may be necessary for the guardian *ad litem* to make determinations that the child's best interests and needs are being met and that DSS

has not abused its discretion in the adoption selection process. G.S. 7A-586 and 7A-659(f). This would enable the guardian *ad litem* to make an informed decision as to whether he might attempt further action in the adoption proceeding.

This court is aware that the ten-day period after the filing of the adoption petition in which respondent could have raised any issue of abuse of discretion has passed. However, this fact does not preclude the district court from entertaining respondent's motion, which was filed prior to the petition for adoption. It is a factor to be taken into account when the district court considers the merits of respondent's request. We therefore remand this case to the district court with instructions to enter such orders as are in accord with this opinion.

Reversed and remanded.

Chief Judge HEDRICK and Judge BECTON concur.

DEMPSEY DELK v. JERRY HILL, MIKE HILL, AND MARY HILL

No. 8719SC680

(Filed 1 March 1988)

1. **Easements § 13— oral right-of-way—license**

An oral right-of-way creates a license, not an easement, which terminates upon the death of either the licensor or licensee, and use of land under a license is not adverse and cannot ripen into an easement.

2. **Easements § 6.1— prescriptive easement in road—notice of hostile use**

Use of a road across defendants' property by plaintiff's predecessors under a mistaken claim of right did not make their use of the road permissive as a matter of law, and evidence that plaintiff and his predecessors have maintained and repaired the road at great expense raised a genuine issue of material fact for the jury as to whether their use of the road was sufficient to give defendants notice that such use was adverse, hostile or under a claim of right.

3. **Easements § 7.1— easement by estoppel—jury question**

A jury question was presented as to whether plaintiff had an easement by estoppel in a road across defendants' land where plaintiff's evidence tended to show that defendants persuaded plaintiff to move the old road, at plaintiff's great expense, from one area of defendants' property to another and that he

moved the road because he believed he had an easement, and defendants' evidence was to the effect that plaintiff asked and was granted permission to build the new road.

APPEAL by plaintiff from *Washington, Judge.* Judgment entered 12 May 1987 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 11 December 1987.

Plaintiff brought this action in Randolph County District Court on 10 November 1986 claiming a prescriptive easement, or alternatively, an easement by estoppel over defendant's land. Additionally, plaintiff asked that defendant be enjoined from "obstructing or in any way interfering with the plaintiff's right to use the easement." At the same time plaintiff caused a temporary restraining order to be issued ordering defendant to remove any obstruction which might block plaintiff's claimed easement and to allow plaintiff the use of the easement. A preliminary injunction entered 19 December 1986 ordered defendant to allow plaintiff to use the easement pending further orders of the court. Defendant answered and denied that plaintiff owned an easement across his property. By consent of the parties the case was transferred to the Superior Court. Defendant submitted affidavits, interrogatories, and depositions and moved for summary judgment. Plaintiff submitted his and his wife's affidavit in opposition to defendant's motion. On 12 May 1987 the trial court granted defendant's motion for summary judgment. Plaintiff appeals.

Ivey Mason & Wilhoit, by Rodney C. Mason, for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Walter L. Hannah and David A. Senter, for defendant-appellees.

EAGLES, Judge.

Plaintiff appeals the trial court's grant of defendant's summary judgment motion in his action claiming a prescriptive easement or, alternatively, an easement by estoppel across defendant's property. We hold that genuine issues of fact exist and, therefore, the trial court's judgment must be vacated and the case remanded for further proceedings.

In reviewing the trial court's grant of summary judgment this Court must examine the evidence in the light most favorable

to the non-movant, determine whether a genuine issue of material fact exists, and determine whether the movant is entitled to judgment as a matter of law. *Frendlich v. Vaughan's Foods*, 64 N.C. App. 332, 307 S.E. 2d 412 (1983). Defendant's motion for summary judgment will be sustained if defendant here shows that an essential element of each of plaintiff's two alternative claims made is nonexistent or shows that the defendant-movant has a valid defense as to the claims presented as a matter of law. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

To overcome defendant's summary judgment motion plaintiff must raise, through his pleadings and affidavits, a genuine issue of material fact. *Id.* Additionally, he must allege each of the four elements necessary for a prescriptive easement:

> (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.

Perry v. Williams, 84 N.C. App. 527, 528-29, 353 S.E. 2d 226, 227 (1987). Defendant claims that plaintiff has failed to show that plaintiff's use was adverse or hostile. We disagree.

Viewed in the light most favorable to plaintiff, the evidence tended to show the following: Sometime around 1898 plaintiff's wife's grandfather, Joe Poole, bought the land now owned by plaintiff (the Poole property). Prior to 1939 Poole bought a right-of-way (the old road) from Virgil Hill, defendant's predecessor in title, through Hill's property in order to more easily reach other areas of the Poole property. Plaintiff did not present any written document evidencing this right-of-way and he admitted that he has never seen such a document. The old road can still be located on the ground. Poole died in 1943 and title to the Poole property then passed to other members of the Poole family.

In 1969 plaintiff and his wife bought the Poole property. During that same year defendant's immediate predecessors in title asked plaintiff to move the old road to another location. This new road runs generally west to northwest of the old road. The new road ends at plaintiff's house on the Poole property. Plaintiff

alleged that the Poole family, their tenants, and their licensees used the old road continuously until it was moved. Since 1969 plaintiff has continuously used the new road. Plaintiff further alleged that he and his predecessors in title have maintained and repaired the roads while defendant and his predecessors have never repaired the roads. After Poole bought the right-of-way, no one asked defendant's predecessors for permission to use the old road.

[1] No evidence appearing of a document granting plaintiff an express easement, we presume and defendant argues that Poole's right-of-way was conveyed to him orally. Defendant correctly argues that an oral right-of-way creates a license, not an easement. *See Sanders v. Wilkerson*, 285 N.C. 215, 204 S.E. 2d 17 (1974). *See generally* Hetrick, Webster's Real Estate Law in North Carolina, Section 344 (rev. ed. 1981) (license results from ineffective attempt to create easement).

Poole's use of defendant's land under a license is not adverse and cannot ripen into an easement. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974); *Williams v. Foreman*, 238 N.C. 301, 77 S.E. 2d 499 (1953). A license, however, terminates upon the death of either the licensor or licensee. Hetrick, *supra*, section 345. Based on this record Poole's license terminated at his death in 1943.

[2] After his death Poole's successors continued to use the old road. Plaintiff's affidavit indicates that he believed "they [Poole family] owned the road and that they used it under their claim of right and not by the defendants' license." Since what Poole bought was a license which expired at his death and not an easement, plaintiff's predecessors' claim of right was mistaken. Even so, relying on the rationale of *Walls v. Grohman*, 315 N.C. 239, 337 S.E. 2d 556 (1985), we hold that plaintiff's predecessors' mistaken claim of right does not make their use of the old road permissive as a matter of law. *See Walls v. Grohman, supra* (landowner's mistaken belief and use of adjoining property not belonging to him, constitutes adverse use).

Having shown that plaintiff's predecessors' use of the right-of-way prior to 1943 was under license and therefore permissive, plaintiff must now affirmatively show that the use of the right-of-way since Poole's death in 1943 was adverse. In North Carolina,

contrary to the majority rule, use of a right-of-way is presumed to be permissive. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1982). Plaintiff's evidence must demonstrate "a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E. 2d 873, 875 (1966). Plaintiff's evidence indicates that plaintiff and his predecessors have maintained and repaired the old road and the new road at great expense. The evidence raises a genuine issue of material fact for the jury as to whether the use was sufficiently "adverse, hostile or under claim of right" to give defendant notice.

When viewed in the light most favorable to the non-movant, plaintiff's evidence further indicates that the use of the old road was notorious as well as continuous and uninterrupted for more than twenty years. In addition, plaintiff's deposition sufficiently identified the claimed easement as "a road from State Road 1331 to the tract designated as 'Runway' " as diagramed on plaintiff's exhibit A. Plaintiff, therefore, has alleged each of the four essential elements of a prescriptive easement. Defendant has not demonstrated the nonexistence of the adverse element or any of the other elements of plaintiff's claim. Further, defendant's evidence has not forecast a valid defense to plaintiff's claim as a matter of law. Accordingly, we hold that the trial court improperly granted defendant's summary judgment motion as to plaintiff's claim for a prescriptive easement.

[3] Moreover, plaintiff's evidence entitles him to a factual determination of his easement by estoppel claim. Plaintiff's evidence shows that defendant persuaded plaintiff to move the old road, at plaintiff's great expense, from one area of defendant's property to another. Plaintiff alleged that he moved the old road because he believed that he had an easement. On the other hand, defendant claims that plaintiff asked and was granted permission to build the new road. Dean Hetrick indicates that "[a]n easement may arise where one cognizant of his own right keeps silent in the knowledge that another will be innocently and ignorantly induced to . . . expend money or labor in reliance on the existence of such an easement." Hetrick, *supra*, section 316. The parties' conflicting allegations raise a genuine issue of material fact; specifically, whether defendant granted plaintiff permission to build the road or whether plaintiff acted at defendant's request in

reliance on the easement's existence. This determination is for the jury. *See Sanders, supra.*

For the reasons set forth above, we vacate the trial court's order of summary judgment and remand the case for further proceedings consistent with this opinion.

Vacated and remanded.

Judges BECTON and GREENE concur.

STATE OF NORTH CAROLINA v. CHESTER DON WORTHINGTON

No. 878SC615

(Filed 1 March 1988)

Automobiles and Other Vehicles § 117— failure to decrease speed to avoid accident —not unconstitutionally vague

N.C.G.S. § 20-141(m) is not unconstitutionally vague and does not impose liability except in cases where a reasonable and ordinarily prudent person could and would have decreased his speed to avoid a collision.

APPEAL by the State from *Strickland, Judge.* Order entered 31 March 1987 in Superior Court, LENOIR County. Heard in the Court of Appeals 9 December 1987.

By criminal citation issued 12 November 1985, defendant was charged, pursuant to G.S. 20-141.4(a2), with misdemeanor death by vehicle. The basis of the charge was an alleged violation of G.S. 20-141(m). Defendant was convicted in district court and appealed to superior court for trial *de novo.* In superior court defendant moved to dismiss the charge on the grounds that G.S. 20-141(m) was unconstitutionally vague. The court granted the motion, holding that the statute failed to delineate a definite and ascertainable standard of what conduct was prohibited. The State appeals.

Attorney General Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Underwood & Leech, by David A. Leech, and Ward and Smith, by Robert D. Rouse, Jr., for the defendant-appellee.

EAGLES, Judge.

Principles of "due process" require courts to declare a criminal statute unconstitutionally vague if the statute fails to clearly define what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 33 L.Ed. 2d 222, 92 S.Ct. 2294 (1972); *State v. Evans*, 73 N.C. App. 214, 326 S.E. 2d 303 (1985). A statute is "void for vagueness" if it forbids or requires doing an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Coates v. Cincinnati*, 402 U.S. 611, 29 L.Ed. 2d 214, 91 S.Ct. 1686 (1971); *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), *affirmed* 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971). Only a reasonable degree of certainty is necessary, mathematical precision is not required. *Grayned v. City of Rockford, supra; State v. Martin*, 7 N.C. App. 532, 173 S.E. 2d 47 (1970).

G.S. 20-141.4(a2) makes it a misdemeanor to unintentionally cause the death of another person "while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving under G.S. 20-138.1, and commission of that violation is the proximate cause of the death." G.S. 20-141.4(a2). The basis of the charge against defendant is an alleged violation of G.S. 20-141(m). G.S. 20-141 is entitled "Speed Restrictions." It authorizes the Department of Transportation and local authorities to establish appropriate speed limits, sets a specific, maximum speed limit; and, under subsection (a), provides that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." G.S. 20-141(a). Subsection (m) provides:

> [t]he fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from the duty to decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, and to avoid injury to any person or property.

G.S. 20-141(m). We agree with the State that the trial court erred in declaring G.S. 20-141(m) unconstitutionally vague.

In *State v. Crabtree*, 23 N.C. App. 491, 209 S.E. 2d 299 (1974), *reversed on other grounds*, 286 N.C. 541, 212 S.E. 2d 103 (1975), this Court rejected a vagueness challenge to the statutory predecessor of G.S. 20-141(m), G.S. 20-141(c), which read as follows:

> [t]he fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and *speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway, and to avoid causing injury to any person or property either on or off the highway*, in compliance with legal requirements and the duty of all persons to use due care. [Emphasis added.] 1947 Sess. Laws, c. 1067, s. 17, as amended, 1955 Sess. Laws, c. 1042, s. 1.

In *Crabtree*, the Court, citing cases upholding the constitutionality of the reckless driving statute, held that the statute was not unconstitutionally vague. The Court noted the difficulty which the Legislature would face if it were required to draft traffic safety statutes with a fixed criminal standard, covering all contingencies. *See also Smith v. Goguen*, 415 U.S. 566, 39 L.Ed. 2d 605, 94 S.Ct. 1242 (1974) (vagueness doctrine demands greater degree of specificity in certain contexts, and regulation of some areas of conduct are not susceptible to precise standards).

Defendant contends that *Crabtree* is distinguishable because the statute addressed there listed specific driving situations to which it applied. That difference is not critical. First, the specific situations contained in former G.S. 20-141(c) are virtually all-inclusive. Second, defendant's argument is addressed to the statute's breadth, not its vagueness. Defendant does not argue that the General Assembly may not constitutionally punish a failure to reduce speed in circumstances other than those listed in former G.S. 20-141(c). The standard by which persons are adjudged liable is the same under both statutes: a motorist must reduce speed "as may be necessary to avoid" a collision. This

Court's decision in *Crabtree* is directly on point. Accordingly, we hold that G.S. 20-141(m) is not unconstitutionally vague.

Defendant also argues that G.S. 20-141(m) is unconstitutionally vague under *State v. Graham*, 32 N.C. App. 601, 233 S.E. 2d 615 (1977). In *Graham*, the Court stated that:

> where the legislature declares an offense in language so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal . . . [s]uch a statute is too vague, and it fails to comply with constitutional due process standards of certainty.

Id. at 607, 233 S.E. 2d at 620. *See also State v. Martin, supra* (statute making it unlawful to "snag" fish unconstitutionally vague because literal application of statute includes many cases of lawful conduct). Defendant argues that a literal application of G.S. 20-141(m) subjects a motorist to prosecution in almost any collision in which he is involved, whether or not he is at fault. Because the legislature obviously did not intend that result, defendant contends, the statute is unconstitutionally vague under the rule enunciated in *State v. Graham, supra*. Indeed, unlike the statute in its present form, former G.S. 20-141(c) contained language making it clear that a motorist had a duty to reduce speed to avoid a collision only when an ordinarily prudent person would have done so. 1947 Sess. Laws, c. 1067, s. 17; *see also Henderson v. Locklear*, 260 N.C. 582, 133 S.E. 2d 164 (1963) (applying the statute to a negligence action).

Defendant's literal interpretation of G.S. 20-141(m), however, is erroneous. It is a cardinal principle of statutory construction that, where possible, courts will construe statutes to avoid serious doubts about their constitutionality. *Delconte v. State*, 313 N.C. 384, 329 S.E. 2d 636 (1985); *see also Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966) (where two reasonable constructions are possible, the one that renders the statute constitutional will be adopted). Moreover, we must presume the Legislature acted with reason and did not intend to achieve an absurd or unjust result. *See Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980). Therefore, where a literal interpretation would lead to such a result and contravene the statute's manifest purpose, the strict letter of the statute should be disre-

garded. *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978). Even more specifically here, sections and subsections must be construed as a whole and in a manner which gives effect to the reason and purpose of the statute. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980); *In re Forestry Foundation*, 35 N.C. App. 414, 242 S.E. 2d 492 (1978), *affirmed*, 296 N.C. 330, 250 S.E. 2d 236 (1979). Additionally, statutes imposing criminal liability must be strictly construed so that the scope of the statute may not be extended by implication to include offenses not clearly made illegal. *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970).

Applying those rules, we construe G.S. 20-141(m) to impose liability on a motorist only when his failure to reduce speed to avoid a collision is not in keeping with the duty to use due care under the circumstances. The obvious purpose of G.S. 20-141 is to authorize specific speed limits and to establish a duty for all motorists to use due care in maintaining the speed of their vehicle. *See State v. Bennor*, 6 N.C. App. 188, 169 S.E. 2d 393 (1969). We have held that subsection (m) establishes that, "driving below the speed limit is not a defense to a charge of driving at a speed greater than is reasonable and prudent under existing conditions, and that regardless of the posted speed limit motorists have a duty to decrease speed if necessary to avoid a collision." *State v. Stroud*, 78 N.C. App. 599, 602-603, 337 S.E. 2d 873, 875-876 (1985). G.S. 20-141(m) must be construed consistent with G.S. 20-141(a)'s requirement that no person shall drive at a speed greater than is reasonable and prudent under the circumstances. G.S. 20-141(m) does not impose liability except in cases where a reasonable and ordinarily prudent person could, and would have, decreased his speed to avoid a collision. Interpreting the statute otherwise is contrary to well-established rules of statutory construction and achieves strained, unreasonable and wholly unintended results.

Reversed and remanded.

Judges BECTON and COZORT concur.

STATE OF NORTH CAROLINA v. JOSEPH GERALD ANTHONY

No. 8727SC661

(Filed 1 March 1988)

Rape and Allied Offenses § 4.3— indecent liberties—accusations against others—refusal to permit cross-examination of prosecutrix

The trial court in a prosecution for taking indecent liberties with a minor did not err in refusing to permit defense counsel to cross-examine the prosecutrix about whether she had previously accused her father and stepfather of sexually abusing her for the purpose of impeaching the prosecutrix's credibility where there was no evidence tending to show that the previous accusations were false.

APPEAL by defendant from *Long (James M.), Judge.* Judgment entered 24 July 1986 in Superior Court, LINCOLN County. Defendant's petition for writ of certiorari allowed 17 April 1987. Heard in the Court of Appeals 10 December 1987.

Defendant was convicted in the Lincoln County Superior Court of taking indecent liberties with a minor and sentenced to an active term of imprisonment on 24 July 1986. Prosecutrix was fourteen years old and living with her mother and brother in Denver, North Carolina when the incident from which this case arose occurred.

On 16 February 1986, defendant, forty-two-year-old Joseph Gerald Anthony, went to prosecutrix's home and told her mother that he and his wife and stepdaughter were going shopping in Charlotte. He asked permission to take prosecutrix with them. Prosecutrix's mother consented and defendant returned to pick up prosecutrix at approximately 3:00 p.m.

Defendant had known prosecutrix and her family for several years and had established a friendly relationship with them. He bought gifts and clothing for the children and had taken them ice skating many times.

Defendant's wife and stepdaughter did not accompany defendant and prosecutrix on their trip that day. Instead they drove by themselves to Lincolnton where defendant purchased some clothes for prosecutrix. According to prosecutrix, defendant then took her to Room 127 of the Town and Country Motel and had

sexual intercourse with her. Afterward, the two drove to a supermarket where they encountered prosecutrix's mother.

Prosecutrix's mother had become suspicious earlier in the afternoon when her boyfriend told her he had seen defendant and prosecutrix riding alone in defendant's car. She asked defendant why he lied to her about taking his wife and stepdaughter shopping in Charlotte. She also asked her daughter if anything had happened. Later that evening prosecutrix told her mother that defendant had engaged in sexual intercourse with her in Room 127 of the Town and Country Motel.

Prosecutrix's mother became very upset and angry. She took the clothes defendant purchased for her daughter and went to defendant's home. As she handed them to him, defendant asked: "Don't you want them?" She responded by asking him if the Town and Country Motel Room 127 meant anything to him. Defendant said, "I'm sorry."

Later prosecutrix admitted defendant had engaged in sexual intercourse with her on a weekly basis for the past two or three years. According to prosecutrix defendant used condoms and vaseline. She also said defendant took photographs of her in the nude.

After obtaining a warrant to search defendant's premises and vehicles, police found a locked briefcase in defendant's closet. The briefcase contained a pack of condoms and a photo album with a substantial number of photos of semi-nude young females. The girls' names, telephone numbers and body measurements were written on the back of the photos.

At trial defense counsel tried to elicit testimony from prosecutrix that she had accused her father and stepfather of sexually abusing her and that charges against both men were dropped. Upon objection by the State, the trial court held an in camera hearing to determine the admissibility of the evidence.

Prosecutrix testified at the in camera hearing that her stepfather took indecent liberties with her when she was seven or eight years old. She remembered going to court but did not recall testifying. Her mother contends she divorced the stepfather because he had oral sex with prosecutrix.

According to prosecutrix her biological father had sexual intercourse with her when she was eleven. After telling her mother about the incident she was taken to the doctor for examination. The doctor said prosecutrix's hymen was broken. Prosecutrix remembered going to court and being frightened by her father's attorney.

Prosecutrix did not know whether the court proceedings involving her stepfather and father were civil or criminal and, according to her testimony, the charges or "whatever" were dropped in both instances. Prosecutrix, however, still maintains her accusations were true. As a result of these previous incidents, prosecutrix received counseling from the Department of Social Services.

At the conclusion of the in camera hearing, the trial court ruled that the testimony of prosecutrix's prior accusations of sexual abuse by her stepfather and father were inadmissible for the following reasons. First, the proffered testimony was inadmissible under the Rape Shield Statute, N.C.G.S. § 8-58.6. Second, the testimony was irrelevant and third, even if relevant, it was outweighed by its potentially prejudicial effect.

Defendant appeals contending the trial court committed prejudicial error by preventing cross-examination concerning the two prior accusations.

Attorney General Lacy H. Thornburg, by Associate Attorney General LaVee Hamer Jackson, for the State.

Keith M. Stroud, for defendant-appellant.

ORR, Judge.

It has long been established that a defendant in a criminal case has a right to cross-examine adverse witnesses under the sixth amendment. The scope of cross-examination, however, lies within the sound discretion of the trial court and shall not be disturbed absent abuse of that discretion. *State v. Wrenn*, 316 N.C. 141, 144, 340 S.E. 2d 443, 446 (1986).

Defendant contends that the trial court erred by prohibiting him from cross-examining prosecutrix about her previous accusations of sexual misconduct against her father and stepfather. Ac-

cording to defendant this evidence is relevant to prosecutrix's credibility. He cites both *State v. Baron*, 58 N.C. App. 150, 292 S.E. 2d 741 (1982) and *State v. Durham*, 74 N.C. App. 159, 327 S.E. 2d 920 (1985) as authority for his contention. We believe both cases are distinguishable and therefore inapplicable to the case at bar.

In *Baron*, defense counsel sought to introduce evidence that the thirteen-year-old prosecutrix falsely accused a foster parent, her brother and a neighbor of sexual misconduct. The trial court ruled the evidence inadmissible under the Rape Victim Shield Statute, N.C.G.S. § 8-58.6. This Court granted a new trial. We stated that:

> Defense counsel sought only to introduce evidence of the prior allegedly false statements for impeachment purposes and advised the court of their intent. We believe that the Legislature intended to exclude the actual sexual history of the complainant, not prior accusations of the complainant.

State v. Baron, 58 N.C. App. at 153, 292 S.E. 2d at 743.

In *Durham*, a five-year-old awoke from a nightmare at 4:00 a.m. and told her mother that defendant (who was not her father) had touched her in an indecent manner. The child said her father had previously committed the same act.

Defendant sought to elicit testimony showing that the child suffered from "night terrors" of a sexual nature, allegedly caused by the father's previous misconduct. Defendant argued that the child imagined or fantasized that he touched her in the same manner her father had. This Court stated as follows:

> In these circumstances, we believe the child's accusation of the father was relevant to the child's credibility, and we believe the trial judge abused his discretion and violated defendant's constitutional rights by ruling such a subject irrelevant and by *completely foreclosing* any discussion of it . . . .

State v. Durham, 74 N.C. App. at 168, 327 S.E. 2d at 926 (emphasis supplied).

The common element in both *Baron* and *Durham* was the presence of some evidence tending to show that the previous ac-

cusations of sexual misconduct were false. (The *Baron* defendant was erroneously prohibited from introducing testimony that the prior accusations were false.) No evidence in the case *sub judice* was introduced from which the trial court could conclude that the allegations were false. The prosecutrix's recollection as to the disposition of the charges was inadequate to reach such a conclusion.

In *State v. Wrenn*, 316 N.C. 141, 340 S.E. 2d 443, our Supreme Court reached a similar conclusion. There defendant sought to impeach the prosecutrix's credibility with evidence that she accused a man, previously convicted of sexually assaulting her, of threatening her over the telephone after he was placed on probation. A probation revocation hearing was held and the judge did not revoke his probation. The trial court prohibited defendant from introducing this evidence. Our Supreme Court stated that:

> The fact that the defendant's probation was not revoked based on subsequent allegation that the defendant had called and threatened the victim is not sufficient, standing alone, to prove that the victim's accusation was false. There could be, and often are, other reasons why a judge does not revoke one's probation in a given case.

State v. Wrenn, 316 N.C. at 144-45, 340 S.E. 2d at 446.

Similarly, there are many reasons why the charges, if any, brought against prosecutrix's father and stepfather were dropped, if in fact they were dropped. The trial court conducted an in camera hearing and carefully weighed the probative value of the prior accusations against the danger that they would confuse or mislead the jury. It was determined that the probative value of the evidence was substantially outweighed by its prejudicial impact. We find no abuse of discretion or constitutional error in his decision. The judgment of the trial court is therefore affirmed.

No error.

Judges ARNOLD and JOHNSON concur.

JO ANN W. RAMSEY AND RICKY ALAN RAMSEY v. INTERSTATE INSURORS, INC., INTERSTATE CASUALTY INSURANCE COMPANY, AND DOUG CLARK D/B/A DOUG CLARK & ASSOCIATES

No. 8728SC800

(Filed 1 March 1988)

1. **Declaratory Judgment Act § 4.3— liability of insurance company—no genuine controversy between parties**

A declaratory judgment granted by the trial court on the issue of liability insurance coverage was reversed where no legal action had been taken against the insured regarding an automobile accident, the evidence and pleadings did not establish that litigation was imminent and unavoidable and, in the absence of any evidence that the policy so required, the insurer did not have a duty to investigate the accident and negotiate a settlement without any suit having been filed.

2. **Appeal and Error §§ 1, 5.1— subject matter jurisdiction—no exceptions or assignments of error—properly raised**

The issue of subject matter jurisdiction was properly before the Court of Appeals regardless of any failure to set forth exceptions or assignments of error relating to the issue because the Court may raise the issue of subject matter jurisdiction on its own motion even if it was not argued by the parties in their briefs.

APPEAL by defendants, Interstate Insurors, Inc. and Interstate Casualty Insurance Company, from *James U. Downs, Judge.* Judgment entered 1 April 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 1 February 1988.

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

Roberts, Stevens & Cogburn, P.A., by Steven D. Cogburn and Glenn S. Gentry for defendant-appellants.

BECTON, Judge.

This is an appeal by defendants, Interstate Casualty Insurance Company (Interstate) and its general agent, Interstate Insurors, Inc. (Interstate Insurors), from a judgment declaring that the liability provisions of an automobile insurance policy insuring the plaintiffs, Jo Ann W. Ramsey and her son, Ricky Alan Ramsey, were in full force and effect on 1 December 1985, the date on which Ricky Alan Ramsey was involved in a two-vehicle collision.

Because we find no actual controversy between the parties sufficient to invoke a court's jurisdiction to render a declaratory judgment, we reverse the judgment of the trial court.

I

The insurance policy in question—which was issued by Interstate to Mrs. Ramsey, named Ricky Alan Ramsey as an additional insured, and included both liability and collision coverage—was procured for the Ramseys by Doug Clark, an independent insurance agent. The stated original policy period was from 20 October 1984 to 20 October 1985. On 1 December 1985, Ricky Alan Ramsey was involved in a collision with another vehicle owned and operated by Theresa Stewart. At that time, the Ramseys had not paid an insurance renewal premium.

In February 1986, the Ramseys brought this action against Interstate, Interstate Insurors, and Doug Clark, alleging that the insurance policy was still in effect on the date of the accident because the defendants had failed to send the Ramseys a cancellation notice, premium renewal notice, or notice of intention not to renew pursuant to N.C. Gen. Stat. Sec. 20-310(f) and (g) (Cum. Supp. 1987). The Ramseys sought to recover $3,653.39 for property damage to their automobile, and requested declaratory relief ordering the insurance company to defend them in accordance with the policy provisions in the event a civil action was instituted against them by Theresa Stewart.

Subsequently, the action against Doug Clark was severed, and he is thus not a party to this appeal. The property damage claim was dismissed, upon motion of the defendants, for failure to state a claim for which relief could be granted, and no appeal was taken from this order. Defendants also moved to dismiss the claim for declaratory relief on the ground that the Ramseys merely sought an advisory opinion and no true controversy existed, but that motion was denied. The trial judge also denied the defendants' motions for judgment on the pleadings and for summary judgment.

The matter was heard 23 March 1987 without a jury. After considering stipulations of fact filed by the parties and arguments of counsel, the trial judge ruled that the Ramseys' liability insurance coverage was in full force and effect on the date of the

accident due to the failure of the insurer to cause a notice of cancellation or refusal to renew to be sent to Mrs. Ramsey.

II

[1] On appeal, the defendants raise challenges to the trial court's ruling on the merits and to the court's jurisdiction to render a declaratory judgment in this case. Because we conclude there is an insufficient actual controversy between the parties to establish jurisdiction for purposes of declaratory relief, we need not consider the merits of the case.

It is well-established by our case law that a court has no jurisdiction to render a declaratory judgment unless the pleadings and evidence disclose the existence of an actual, genuine, existing controversy between parties having adverse interests in the matter in dispute. *See, e.g., Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 347 S.E. 2d 25 (1986); *Gaston Board of Realtors, Inc. v. Harrison*, 311 N.C. 230, 316 S.E. 2d 59 (1984). Our Supreme Court, in discussing the "actual controversy" requirement in *Gaston Board of Realtors*, explained:

> Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E. 2d 178. Mere apprehension or the mere threat of an action or a suit is not enough. *Newman Machine Co. v. Newman*, 2 N.C. App. 491, 163 S.E. 2d 279 (1968), *rev'd on other grounds*, 275 N.C. 189, 166 S.E. 2d 63 (1969). Thus the Declaratory Judgment Act does not "require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Town of Tryon v. Power Co.*, 222 N.C. at 204, 22 S.E. 2d at 453 (1942).

Id. at 234, 316 S.E. 2d at 61-62.

A question concerning the liability of an insurance company under its policy is generally a proper subject for a declaratory judgment, provided a genuine controversy exists between the parties. *E.g., Nationwide Mutual Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654 (1964); *Nationwide Mutual Insurance Co. v. Aetna Casualty and Surety Co.*, 1 N.C. App. 9, 159 S.E. 2d 268

(1968). However, the cases in which a declaratory judgment has been found appropriate for determining the existence or extent of insurance coverage have involved situations in which legal action was pending, or judgment had been entered, against the insured. *See, e.g., Roberts; Lumber Mutual Casualty Insurance Co. v. Wells*, 225 N.C. 547, 35 S.E. 2d 63 (1945); *Hobson Construction Co. v. Great American Insurance Co.*, 71 N.C. App. 586, 322 S.E. 2d 632 (1984), *disc. rev. denied*, 313 N.C. 329, 327 S.E. 2d 890 (1985); *Bellefonte Underwriters Insurance Co. v. Alfa Aviation, Inc.*, 61 N.C. App. 544, 300 S.E. 2d 877 (1983), *aff'd*, 310 N.C. 471, 312 S.E. 2d 426 (1984); *Travelers Insurance Co. v. Curry*, 28 N.C. App. 286, 221 S.E. 2d 75, *disc. rev. denied*, 289 N.C. 615, 223 S.E. 2d 396 (1976).

It does not appear from the record in the present case that any legal action has been taken against the Ramseys regarding the automobile accident. Rather, the Ramseys apparently have pursued their claim in order to establish the existence of coverage *in case* a claim is brought in the future. Nor do the evidence and pleadings establish that litigation is imminent and unavoidable. The Ramseys merely alleged in amendments to their Complaint:

> 27. That Plaintiffs have been contacted by a representative of the insurance company for Theresa Stewart, driver and owner of the other vehicle involved in the accident of December 1, 1985, inquiring as to the insurance coverage of Plaintiffs. That based upon conversations with the representative of said insurance company, Plaintiffs believe that Theresa Stewart or her insurance company as subrogee may institute a civil action against Plaintiff seeking to recover for the alleged personal injuries and property damage sustained in the motor vehicle accident of December 1, 1985.
>
> 28. That upon information and belief, it is alleged that Teresa (sic) Stewart has contacted the Defendants Interstate Insurors Inc., and Interstate Casualty Insurance Company and made claims for damages which she suffered as a direct and proximate result of the accident complained of occurring on December 1, 1985. It is further alleged upon information and belief that Defendant[s] Interstate Insurors, Inc., and Interstate Casualty Insurance Company have denied said claim

and contend that Plaintiffs had no liability insurance in effect with said Defendants at the time of the accident complained of, to wit: December 1, 1985.

These allegations were denied by the defendants. No evidence was presented regarding the accident or the likelihood of a lawsuit arising from it.

In our view, neither the allegation that Theresa Stewart *may* file a civil action against the Ramseys nor the bare allegation, based upon information and belief, that she had made claims for damages upon Interstate establishes a genuine existing controversy. Moreover, in the absence of any evidence that the policy so required, we reject the Ramseys' contentions that the insurer had a duty to investigate the accident and negotiate a settlement without any suit having been filed, and that the existence of such a duty created a present controversy between the parties. Unless and until an actual claim arising out of the 1 December 1985 accident has been filed against the Ramseys or appears unavoidable, we conclude that their interest in the existence of insurance coverage for any such claim is purely academic and that the issue is not ripe for determination by declaratory judgment.

[2] In addition, we summarily reject the Ramseys' argument that the defendants have not properly raised the jurisdiction question on appeal due to the failure to set forth any exceptions or assignments of error relating to this issue. This Court may raise the question of subject matter jurisdiction on its own motion, even if it was not argued by the parties in their briefs, *see, e.g., Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E. 2d 567, 571 (1978), *cert. denied*, 296 N.C. 583, 254 S.E. 2d 32 (1979). Hence, we may address the issue in this case in which it *was* raised in the briefs, regardless of any technical defect in the record.

III

In conclusion, we hold that, because the record reveals no pending action against the Ramseys and no practical certainty of any future action against them, the "actual controversy" prerequisite for jurisdiction has not been satisfied. Therefore, the judgment of the trial court is

Reversed.

Chief Judge HEDRICK and Judge SMITH concur.

STATE OF NORTH CAROLINA v. MARTHA LYNN HEARN

No. 8726SC832

(Filed 1 March 1988)

Homicide § 28.4— self-defense—no duty to retreat in own home—instruction required

The trial court in a murder case erred in refusing to instruct the jury that defendant had no duty to retreat before using deadly force to repel an attack against her in her own home where defendant presented evidence tending to show that defendant and decedent resided in the same house; defendant loaded a gun in fear that decedent's father was coming to the house to "cut" her; defendant saw decedent approaching the house with what appeared to her to be a pipe or tire iron in his hand; decedent and defendant argued and decedent threatened defendant's life; and defendant shot decedent as he was coming at her with a pipe raised in his hand.

APPEAL by defendant from *Sitton (Claude S.), Judge.* Judgment entered 9 March 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 February 1988.

Defendant was indicted on 13 October 1986 for the first degree murder of David Eugene Martin. Defendant was tried and convicted of the felony of second degree murder. She appeals from the judgment entered thereon.

The State's evidence tends to show that prior to his death, the decedent and his girlfriend, Tina Pennex, lived at the home of decedent's grandmother, Maggie Martin. Defendant, her boyfriend, Donald Martin (decedent's uncle), and their two children also lived with Maggie Martin.

The State's evidence further tends to show that the events which led to David Martin's death on the evening of 13 August 1986 began in the late afternoon hours of that same day. Decedent and his parents, Eugene and Gloria Martin, had gone to the Bedford Lounge, a bar near their home, around 5:00 in the afternoon. While there, they encountered decedent's uncle, Roger Mar-

tin. Roger and decedent engaged in a fight. Eugene Martin entered the fight in his son's behalf and stabbed Roger. The stab wound was non-debilitating, and Roger left to go to Maggie Martin's house.

Shortly afterwards, decedent, accompanied by Tina Pennex and another friend, Mike Tyree, arrived at Maggie Martin's house. The fight between Roger and David resumed outside of the residence. During the fight, Tina went into the house to telephone her mother. Defendant prevented Tina from making the call and accused her of trying to call Eugene Martin. A fight ensued between the two women. Subsequently, both fights ended, and David and his friends decided to leave. As they were leaving defendant threatened to kill David if he returned.

Decedent returned to the Bedford Lounge where his mother advised him to move back in with her and Eugene. Eugene called Maggie Martin to determine whether Roger had left. She advised him that Roger had indeed left. Eugene then told his mother, Maggie, that David was on his way to her house and that if David was harassed, Eugene would come over and "kick some ass."

David arrived at Maggie Martin's house accompanied again by Tina Pennex and Mike Tyree. He went into the house and then to his bedroom to pack some clothes. Defendant stood just outside David's bedroom and exchanged angry words with him. She then raised a gun which she had previously taken from a dresser in her bedroom and shot David. He died as a result of the gunshot wound before the ambulance or police arrived.

Defendant testified on her own behalf that she never threatened to kill decedent. She further testified that she overheard Maggie Martin's telephone call with Eugene and gathered from the conversation that Eugene was on his way over to "cut" someone. Defendant became scared and loaded the gun which Donald Martin kept in their bedroom. When David arrived and approached the house, defendant saw that he had something in his hand. She retrieved the gun hoping it would deter any confrontation with David. David came into the house and went to the bedroom. He began arguing with defendant about the earlier fight between defendant and Tina and threatened to kill defendant. David then raised his hand in which he held an iron pipe. He

stepped toward defendant and the gun she was holding fired. Defendant testified that she did not remember firing it.

There was conflicting testimony at trial as to whether David Martin had any type of pipe or weapon in his hand when he entered the residence or whether he threatened defendant at all. Witnesses present either during or after the shooting testified that they did not see an iron pipe, although there was testimony that David did have something in his hand when he entered the house. Police who arrived soon after the incident testified that on an initial inspection of the crime scene they found no weapon or iron pipe but a subsequent inspection revealed a metal pipe on the bed beside decedent's body. There were no fingerprints or bloodstains on the pipe.

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

Public Defender Isabel Scott Day, by Assistant Public Defender Marc D. Towler, for defendant-appellant.

SMITH, Judge.

By her only assignment of error, defendant contends that the trial court erred in refusing to instruct the jury that defendant had no duty to retreat before using deadly force to repel an attack against her when there was evidence that defendant was in her own home. We agree.

In regard to the duty to retreat our courts have stated:

> [W]hen a person who is free from fault in bringing on a difficulty, is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self-defense, regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. This, of course, would not excuse the defendant if he used excessive force in repelling the attack and overcoming his adversary.

State v. Johnson, 261 N.C. 727, 729-730, 136 S.E. 2d 84, 86 (1964). This rule applies even when both defendant and victim reside in

the same dwelling. *State v. Browning*, 28 N.C. App. 376, 221 S.E. 2d 375 (1976).

In this case there was testimony as follows: 1) defendant and decedent resided in the same house; 2) defendant loaded a gun in fear that decedent's father was coming to the house to "cut" her; 3) defendant saw decedent approaching the house with what appeared to her to be a pipe or tire iron in his hand; 4) decedent and defendant argued and he threatened defendant's life; and 5) defendant shot decedent as he was coming at her with a pipe raised in his hand. " 'Where there is evidence that defendant was on [her] own premises when [she] was assaulted . . . without fault on [her] part, it is error for the court to fail to submit the question and to charge upon defendant's right to stand [her] ground without retreating.' " *Browning*, 28 N.C. App. at 380, 221 S.E. 2d at 378, *quoting* 4 Strong, N.C. Index 2d, Homicide, Sec. 28, pp. 248, 249.

The State contends that the trial court's refusal to instruct the jury that there was no duty to retreat was proper because there was overwhelming evidence to indicate that defendant was the initial and *only* aggressor in this incident. We do not agree with the State's contention. While there was evidence presented tending to show that defendant was the initial aggressor, there was also evidence that decedent was the aggressor and defendant was protecting herself. Such conflicts in evidence are for the jury to resolve. *See State v. Wagoner*, 249 N.C. 637, 107 S.E. 2d 83 (1959).

In reaching our conclusion here, we recognize our decision in *State v. Bennett*, 67 N.C. App. 407, 313 S.E. 2d 277 (1984), in which we held that a trial court's refusal to instruct the jury that there was no duty to retreat was not in error because there was evidence that defendant was the initial aggressor. We distinguish that case on the facts. There, unlike here, the evidence was uncontradicted. Defendant himself testified that he slapped the victim first before she allegedly assaulted him. Here, there was conflicting evidence as to who was the aggressor. When there is evidence that defendant was properly defending herself in her own home, then the trial court must instruct the jury that there was no duty to retreat. *Browning, supra.* In this case, the trial court was in error and defendant is entitled to a new trial.

New trial.

Chief Judge HEDRICK and Judge BECTON concur.

KAY FLINCHUM COLEMAN v. EARL WILSON COLEMAN, JR.

No. 8721DC781

(Filed 1 March 1988)

1. **Divorce and Alimony § 30— equitable distribution—valuation of marital home**

The trial court erred in an equitable distribution action by reducing the market value of the marital home because of the risk of foreclosure where there was no evidence whatsoever that the possibility of foreclosure reduced the market value of the home as found by the trial court.

2. **Divorce and Alimony § 30— equitable distribution—consideration of abandonment—dissipation of marital home—proper**

In an equitable distribution action which was remanded on other grounds, the trial court could not consider abandonment itself but could consider defendant's misconduct to the extent it dissipated the value of marital assets in determining whether equal is equitable. N.C.G.S. § 50-20(c)(12).

APPEAL by defendant from *Keiger, Judge.* Judgment entered 11 March 1987 in District Court, FORSYTH County. Heard in the Court of Appeals 7 January 1988.

Cofer, Mitchell and Tisdale by William L. Cofer for plaintiff appellee.

Leonard, Tanis, Cleland & Porter by Joseph J. Gatto; and David F. Tamer for defendant appellant.

COZORT, Judge.

The primary issue to be decided by this appeal is whether there is sufficient evidence to support the trial court's valuation of the marital home for purposes of equitable distribution of the marital property. We find no evidence to support the value set by the trial court, and we thus vacate the judgment and remand the cause for further proceedings.

Plaintiff-wife and defendant-husband were married on 9 August 1974, separated on 23 September 1983, and were granted an

absolute divorce on 18 December 1985. The case came on for equitable distribution of the marital property at the 23 February 1987 Session of Forsyth County District Court. Prior to the equitable distribution hearing, plaintiff and defendant had agreed on a division of most of the property. The court found two assets which qualified as marital property: (1) plaintiff's retirement benefits accumulated during the marriage; and (2) the marital residence. The trial court assigned a value to each asset, found that an equal division would be equitable, and ordered plaintiff, who was awarded the home, to pay to defendant one-half the net value of her retirement benefits and the home. Defendant appealed.

Although defendant brings forward six assignments of error in his brief, his arguments present two issues for our determination: (1) whether the trial court erred in finding that the net value of the marital home was $5,000.00; and (2) whether the trial court erred by finding that a jury had previously determined that defendant committed indignities against the person of the plaintiff and had abandoned the plaintiff. We first address the trial court's finding of the value of the marital residence.

[1] Generally, "[t]he trial court's finding of fact . . . are conclusive if supported by any competent evidence." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E. 2d 100, 104 (1986). In the case below, the trial court found that the property was appraised in October 1984 at $62,500.00. The court further found that the mortgage balance was $40,557.00. The court then found that, "because of its foreclosure status," the market value of the property at separation was only $45,557.00. Subtracting the mortgage balance, the court found the net value to be $5,000.00. We find no evidence in the record to support the court's finding that the risk of foreclosure reduced the market value of the residence at the date of separation to $45,557.00.

Defendant testified that the mortgage balance at the date of separation was $40,557.00. Both plaintiff and defendant testified that the appraised value of the residence in October of 1984, approximately a year after separation, was $62,500.00. Plaintiff testified that at the time of separation, foreclosure was imminent because of defendant's refusal to make mortgage payments. However, there was no evidence whatsoever that the possibility of foreclosure reduced the market value of the home to that found

($45,557.00) by the trial court. The trial court's conclusion of the amount of the reduced value is vague and nebulous. Such findings cannot be upheld on appeal. *Patton v. Patton*, 318 N.C. 404, 407, 348 S.E. 2d 593, 595 (1986). The cause must be remanded for the trial court to make additional findings of the value of the marital home at the time of separation. Since the only evidence of its value was the appraisal from October of 1984, the trial court may take additional evidence to better ascertain the value as of September of 1983.

The plaintiff argued in his brief that, when the defendant consented to the trial court's entering an amended judgment, which repeated the $5,000.00 valuation, the defendant consented to the valuation and is now bound by that figure. We disagree. Upon reviewing the record, we hold that the defendant consented only to the entry of an amended judgment, which is very similar to the practice of parties frequently consenting to the entry of a judgment out of county or out of term. In the amended judgment, the defendant renewed his exception to the court's finding of $5,000.00 as the net value of the house. The defendant consented only to the entry of the amended judgment and not to the findings contained therein.

[2] The second issue is whether the trial court erred by finding that the defendant had abandoned the plaintiff and committed indignities against the person of the plaintiff. We have elected to discuss this issue because it is likely to arise on remand. The defendant argues that the finding was a determination of marital fault and was irrelevant to the equitable distribution proceeding. We agree with defendant that marital fault is irrelevant in equitable distribution. However, it is not clear from the record below whether the trial court was considering the abandonment as marital fault, or as economic fault, which is an appropriate factor to consider in equitable distribution.

In *White v. White*, 312 N.C. 770, 776, 324 S.E. 2d 829, 832 (1985), the Supreme Court held that equal division of the marital property is mandatory unless the trial court determines that equal is not equitable. In *Smith v. Smith*, 314 N.C. 80, 81, 331 S.E. 2d 682, 683 (1985), the Supreme Court held that misconduct during the marriage which dissipates or reduces the value of the marital assets for non-marital purposes can be considered under

N.C. Gen. Stat. § 50-20(c)(12) in determining whether equal would be equitable. It can be inferred from the findings of fact made by the trial court below that the trial court considered abandonment only to the extent the abandonment resulted in a dissipation of the marital home. The finding of fact to which defendant objects and the three findings immediately thereafter read:

> 5. That a jury has heretofore determined that the defendant committed indignities against the person of the plaintiff and that he abandoned the plaintiff, without just cause or provocation, on September 22, 1983.
>
> 6. That shortly before abandoning the plaintiff, and at a time when the mortgage on their home was some three months in default and under threat of imminent foreclosure, the defendant told plaintiff and the mortgage holder (The Pfefferkorn Company) that he would contribute nothing further to mortgage payments and that the lender, for all he cared, could foreclose; (that, in point of fact, many of the payments defendant had made over the years were from monies plaintiff had borrowed from her credit union and advanced to him "to save his pride").
>
> 7. That the defendant made no further payments on the mortgage indebtedness, and the family residence was preserved only because plaintiff exhausted $12,000.00 she had inherited from her father to catch up arrearages and make subsequent mortgage installments.
>
> 8. That plaintiff did not intend to make a gift of her separate property (the $12,000.00 inheritance) to the defendant, the evidence being that she requested defendant to quitclaim his interest in the residence to her as a precondition to her redeeming it from foreclosure.

These findings, which are supported by evidence, could therefore be considered by the court in determining whether equal would be equitable. Thus, on remand, the trial court may consider defendant's misconduct to the extent it dissipates the value of marital assets in determining whether equal is equitable. The court may not consider abandonment itself, which is not germane to a division of marital property.

The trial court's equitable distribution judgment is vacated and the cause is remanded for further proceedings.

Vacated and remanded.

Judges PARKER and GREENE concur.

RITA B. STANALAND v. MARCUS D. STANALAND

No. 8713DC710

(Filed 1 March 1988)

Appearance § 1.1; Rules of Civil Procedure § 55— meeting with plaintiff and her attorney—appearance within purview of default statute—notice of default hearing

Defendant's meeting with plaintiff and her attorney to discuss the finances of a divorce constituted an appearance in plaintiff's divorce action within the meaning of N.C.G.S. § 1A-1, Rule 55(b)(2), so that plaintiff was required to give defendant written notice of her application for a default judgment in the divorce action at least three days prior to the hearing on such application.

APPEAL by defendant from *Gore, William C., Jr., Judge.* Order entered *nunc pro tunc* 30 April 1987 in BRUNSWICK County District Court. Heard in the Court of Appeals 6 January 1988.

This appeal derives from plaintiff's action for divorce from bed and board filed 16 October 1986 against defendant. Defendant was served with the Complaint 17 October 1986. Although defendant contacted an attorney after receipt of the Complaint, he at no time served a responsive pleading on plaintiff. Because of defendant's failure to respond, plaintiff filed a Motion for Entry of Default pursuant to N.C. Gen. Stat. § 1A-1, Rule 55(b)(1) on 22 January 1987 which Motion was granted. Plaintiff subsequently moved for and was granted a Default Judgment, entered in the action 29 January 1987.

On 9 February 1987, defendant filed a Motion to Set Aside the Entry of Default and Default Judgment which Motion was heard 23 April 1987 and denied by Order dated 30 April 1987.

At the 23 April 1987 hearing, the evidence tended to show that from 16 October 1986 until 21 January 1987, although defendant desired reconciliation, he nevertheless had agreed to meet and communicate with plaintiff and/or her attorney on matters concerning the divorce. Defendant also drafted and signed a statement dated 16 January 1987 by which plaintiff agreed to suspend criminal charges then pending against defendant in exchange for his agreement to meet with plaintiff and her attorney on 20 January 1987 at the attorney's office to discuss the finances of the divorce. Defendant did attend a meeting at the attorney's office, however, one day late due to rescheduling. Although defendant was prepared to discuss finances, he refused to sign a Consent Order drafted by plaintiff's attorney which Order represented a resolution to the divorce action. When defendant refused to sign the Consent Order, plaintiff's attorney informed him that plaintiff would go forward with her case but did not mention a default proceeding. Without further notice, written or otherwise being given to defendant, plaintiff filed a Motion for Entry of Default and Default Judgment on 22 January 1987 which Motion was granted by Judgment dated 29 January 1987.

Defendant at no time made any appearances before the court nor did he file an answer to plaintiff's Complaint.

From the trial court's denial of his Motion to Set Aside the Default Judgment, defendant appeals.

Anderson & McLamb, by Sheila K. McLamb, for plaintiff-appellee.

Fairley, Jess & Isenberg, by Elva L. Jess, for defendant-appellant.

WELLS, Judge.

By his first assignment of error, defendant contends that the trial court erred when it concluded as a matter of law that defendant had made no appearance in this action. We agree with defendant.

N.C. Gen. Stat. § 1A-1, Rule 55(b)(2), "Judgment: By the Judge" provides, in pertinent part:

> . . . If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with writ-

ten notice of the application for judgment at least three days prior to the hearing on such application . . . .

It has been held that an appearance within the meaning of Rule 55(b) is not always comprised of a direct response to a complaint. *Roland v. Motor Lines*, 32 N.C. App. 288, 231 S.E. 2d 685 (1977). In some cases, an appearance may arise by implication as when "a defendant takes, seeks or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff." *Roland v. Motor Lines, supra*; *See also Williams v. Jeannette*, 77 N.C. App. 283, 335 S.E. 2d 191 (1985).

Additionally, it has been held that negotiations for settlements or continuances whether by letter or by meeting, after the complaint is filed, constitute appearances within the meaning of Rule 55(b)(2). *N.C.N.B. v. McKee*, 63 N.C. App. 58, 303 S.E. 2d 842 (1983); *Webb v. James*, 46 N.C. App. 551, 265 S.E. 2d 642 (1980); *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E. 2d 806 (1975), *cert. denied*, 289 N.C. 619, 223 S.E. 2d 396 (1976).

In his Judgment dated 30 April 1987, Judge Gore made the following findings of fact and conclusions of law respecting the issue of defendant's appearance in the action:

FINDINGS OF FACT

. . .

4. The Defendant engaged in negotiations with his wife, the Plaintiff and the Attorney for the Plaintiff. During these negotiations, the Defendant acted for and in his behalf.

5. After being served with the complaint and prior to the Default, the Defendant sought the advice of counsel, Mr. Michael Ramos, Attorney in Shallotte, N.C. Mr. Ramos did not agree to represent Mr. Stanaland however, Mr. Ramos did advise him that he would need to file an answer or a judgment could be obtained against him.

6. The Defendant, at no time, filed an answer or any other responsive pleading. . . .

. . .

8. That although the Defendant did engage in negotiations with his wife and the attorney for his wife, these negotiations on his part were an attempt to reconcile and to resolve the financial matters of the parties.

9. On the occasions that the Defendant went to the office of the Plaintiff's attorney, Mrs. McLamb advised him that she would proceed with the action against him and would bring the matter to court for a hearing if the parties did not settle all issues before trial.

10. The Defendant made no appearance pro se or by counsel nor did he file any pleadings in this action.

. . .

CONCLUSIONS OF LAW

. . .

2. The Defendant made no appearance in this action prior to the Default Judgment therefore notice was not required as set for [sic] in North Carolina Rules of Civil Procedure Rule 55.

. . .

While the testimony given at the 23 April 1987 hearing supports Judge Gore's findings of fact, we nonetheless disagree with his analysis and application of the law giving rise to Conclusion of Law No. 2. We believe that defendant's meeting with plaintiff and her attorney was sufficient to constitute an appearance within the meaning of Rule 55(b)(2).

Although the evidence tends to show that defendant was, at best, an unwilling negotiator with respect to the consent order and discussions respecting the parties' divorce, his meeting with plaintiff and her attorney on 21 January 1987 at least met the *Roland* test in that defendant agreed to a "step" (to discuss finances and the divorce) in the proceeding which was beneficial to himself (i.e., to suspend the criminal proceedings against him). We therefore hold that defendant's agreement to meet with plaintiff and her attorney, although one day late, was sufficient to constitute an appearance within the meaning of Rule 55(b)(2).

Defendant correctly contends that the Default Judgment should be vacated because plaintiff failed to provide the three days' notice of the default hearing required by Rule 55(b)(2). *Miller v. Belk*, 18 N.C. App. 70, 196 S.E. 2d 44, *cert. denied*, 283 N.C. 665, 197 S.E. 2d 874 (1973). As we have already held that defendant had made an appearance in the plaintiff's action for the purposes of Rule 55, it follows that plaintiff was required to provide the three days' notice.

The facts gleaned from the Record indicate that on 26 January 1987 plaintiff made a calendar request for the default hearing to be held 28 January 1987. Neither the request nor calendar was served on defendant.

Although plaintiff claims to have warned defendant during the 21 January 1987 meeting that she would go forward with her case, such did not comprise the written notice required by Rule 55(b)(2). Plaintiff having failed to comply with the notice requirements of Rule 55(b)(2), forces us to vacate the Default Judgment rendered below.

Judgment vacated.

Judges ARNOLD and SMITH concur.

DAVID H. HOWELL, JR., PLAINTIFF v. DOROTHY MARIE HOWELL, DEFENDANT, AND HORACE M. DUBOSE, III, INTERVENOR

No. 8727DC898

(Filed 1 March 1988)

Appeal and Error § 6.2— motion to intervene for attorney's fees—interlocutory appeal

An appeal from the denial of an attorney's motion for a charging lien and to intervene in the underlying domestic action was dismissed as interlocutory because there had been no determination that the client was entitled to alimony *pendente lite* at the time the motion was filed, so that appellant was not yet entitled to attorney's fees under N.C.G.S. § 50-16.4; a charging lien is not available until there is a final judgment or decree to which the lien can attach; appellant is not entitled to intervene as of right; and the refusal to grant permissive intervention is an interlocutory order.

Howell v. Howell

APPEAL by movant, attorney Horace M. DuBose, III, from *Langson (Larry), Judge.* Orders entered 14 April 1987 and 27 April 1987 in District Court, GASTON County. Heard in the Court of Appeals 10 February 1988.

DuBose represented defendant on her counterclaims for alimony, equitable distribution and attorney's fees in a divorce action filed by plaintiff. On behalf of defendant, DuBose moved for summary judgment on the issue of alimony *pendente lite* and for attorney's fees on 6 November 1986. On or about 13 November 1986, defendant discharged DuBose as her attorney and obtained other counsel. On 4 December 1986, DuBose filed a notice of claim of an attorney's charging lien, and on 9 January 1987, he filed a motion to intervene pursuant to G.S. 1A-1, Rule 24(a) for the purpose of protecting the charging lien and securing attorney's fees. On 14 April 1987, an order was entered for matters done in open court on 9 January 1987. The 14 April order denied DuBose's request for attorney's fees as premature and ordered the notice of claim of a charging lien stricken since no judgment or order had been entered to which a lien could attach. On 27 April 1987, DuBose's motion to intervene was denied. DuBose appeals.

Richard L. Voorhees and Michael K. Hodnett for plaintiff-appellee.

Joseph B. Roberts, III, and Horace M. DuBose, III, for intervenor-appellant.

SMITH, Judge.

Appellant brings forward several assignments of error and makes three basic arguments in support of his position that the trial court should be reversed. First, he contends the trial court erred by denying his application for attorney's fees and expenses. By his second argument, he asserts the trial court erred by striking his notice of claim of an attorney's charging lien. Third, he contends the trial court erred in denying his motion to intervene as of right. In an assignment of error relating to a procedural matter, he assigns error to the trial court's decision to include in the record on appeal the answers to certain requests for admissions filed after notice of appeal was given. We conclude the appeal is interlocutory and dismiss the appeal without addressing the assignments of error.

"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 . . . 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). There is no right to appeal 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 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*, 301 N.C. 205, 210, 270 S.E. 2d 431, 434 (1980); *Waters v. Personnel, Inc., supra.*

In this case, the orders from which appellant seeks to appeal are interlocutory and do not affect a substantial right of appellant. The denial of attorney's fees under G.S. 50-16.4 was not a final order of the trial court. At the time appellant's motion was filed, there had been no determination that his client, defendant, was entitled to alimony *pendente lite* under G.S. 50-16.3. Thus, appellant was not yet entitled to attorney's fees under G.S. 50-16.4. The court did not refuse to make a determination whether or not appellant was entitled to attorney's fees but merely stated his claim was "premature." Appellant may appeal the denial of his motion after final judgment or may bring a separate lawsuit to collect fees. Thus, no substantial right of appellant is affected by our failure to entertain the interlocutory appeal on this issue.

Similarly, the ruling on the attorney's charging lien was not a final order. A charging lien is not available until there is a final judgment or decree to which the lien can attach. *Dillon v. Consolidated Delivery, Inc.*, 43 N.C. App. 395, 258 S.E. 2d 829 (1979); *Covington v. Rhodes*, 38 N.C. App. 61, 247 S.E. 2d 305 (1978), *disc. rev. denied*, 296 N.C. 410, 251 S.E. 2d 468 (1979). The trial court noted that "at this point in the proceedings" a charging lien was not appropriate since no final judgment had been entered in the underlying divorce action. Thus, the order was interlocutory. Again, appellant may either appeal from a final order or bring a

separate action to recover fees. Thus, his rights are protected despite our refusal to entertain the appeal on this issue. We note, however, that even after a final judgment in the divorce action appellant will not be entitled to an attorney's charging lien.

> The charging lien is an equitable lien which gives an attorney the right to recover his fees "from a fund recovered by his aid." 7 Am. Jur. 2d, Attorneys at Law, Sec. 281. The charging lien attaches not to the cause of action, but to the judgment at the time it is rendered. *Id.* Sec 296. At the time when this purported charging lien would have attached, the time of judgment in favor of defendant[ ]. . . , the judgment was not a fund recovered by [appellant's] aid, as he had been discharged. [Appellant] was entitled to no interest in the fund.

Covington v. Rhodes, 38 N.C. App. at 67, 247 S.E. 2d at 309. *Accord Clerk of Superior Court of Guilford County v. Guilford Builders Supply Co.*, 87 N.C. App. 386, 361 S.E. 2d 115 (1987), *disc. rev. denied*, 321 N.C. 471, 364 S.E. 2d 918 (1988).

The denial of appellant's motion to intervene is also an interlocutory order. Although appellant has moved to intervene as of right, he is not entitled to do so. He has no statutory right of intervention. G.S. 1A-1, Rule 24(a)(1). Further, he is not entitled to intervene as of right under G.S. 1A-1, Rule 24(a)(2). *Ellis v. Ellis*, 38 N.C. App. 81, 247 S.E. 2d 274 (1978). There are three prerequisites to nonstatutory intervention as a matter of right: "(1) an interest relating to the property or transaction; (2) practical impairment of the protection of that interest; and (3) inadequate representation of that interest by existing parties." *Id.* at 83, 247 S.E. 2d at 276. At best, appellant sought permissive intervention under G.S. 1A-1, Rule 24(b). The refusal to grant permissive intervention is an interlocutory order. *Horne v. Horne*, 205 N.C. 309, 171 S.E. 92 (1933). As noted above, appellant may either bring a separate action regarding his fees or appeal from a final order. No substantial right is affected by our failure to consider the interlocutory appeal.

Appeal dismissed.

Chief Judge HEDRICK and Judge BECTON concur.

JAMES HOWARD WIGGINS v. PARAMOUNT MOTOR SALES, INCORPORATED AND SPALDIN ALLISON, T/D/B/A ALLISON'S DITCHING & SEPTIC TANK SERVICES

No. 8730SC613

(Filed 1 March 1988)

1. **Automobiles and Other Vehicles § 50.3— negligence in leaving car unattended with motor running**

In an action to recover for injuries received when plaintiff's vehicle was struck by defendant's runaway flatbed truck after the truck was struck by defendant's runaway loaner car, plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence in leaving the loaner car unattended with the engine running when he knew that the car had transmission problems and a nonfunctional emergency brake.

2. **Automobiles and Other Vehicles § 68— loan of defective car not proximate cause of injury**

Even if defendant was negligent in loaning the codefendant a defective or unsafe car while the codefendant's vehicle was being repaired, the trial court properly directed a verdict for defendant in plaintiff's action where plaintiff's evidence shows that the negligence of the codefendant in leaving the loaner car unattended with the engine running was the sole proximate cause of plaintiff's injury.

APPEAL by plaintiff from *Hyatt, J. Marlene, Judge.* Judgment and Order entered 19 December 1986 in HAYWOOD County Superior Court. Heard in the Court of Appeals 8 December 1987.

Plaintiff seeks damages for injuries received from the collision of defendant Allison's runaway flatbed truck with plaintiff's pickup truck while plaintiff was parked in Allison's business parking lot. Allison's truck had been dislodged by yet another runaway vehicle, a 1973 Oldsmobile sedan, which had been loaned to him by defendant Paramount Motor Sales, Inc. Alleging various negligence and warranty theories, plaintiff named both Paramount and Allison in his complaint claiming that both were jointly and severally liable. Plaintiff further alleged that Allison acted as an agent for Paramount and that his negligence could therefore be imputed to Paramount.

The cause came on for trial 15 December 1986. Plaintiff's evidence tended to show that on Sunday, 5 February 1985, plaintiff sustained bodily injuries from the collision of Allison's flatbed truck with plaintiff's truck which was parked in Allison's parking

area. Allison had earlier released its emergency brakes and placed its gears in neutral in order to repair the truck's universal joint. To secure the truck's position, Allison had placed "scotch" blocks behind the truck's wheels.

The evidence further tended to show that the 1973 Oldsmobile loaned to Allison (while his car was being repaired by Paramount) had transmission problems, which Allison was aware of, and that the emergency brake was nonfunctional. Allison also noticed that the engine was difficult to start and idled at one-third full throttle when cold. Paramount had assured Allison that the Oldsmobile had just been serviced and was "mechanically sound."

Around 2:00 p.m. on that Sunday while gasing up the loaner car, Allison left it unattended but in "park" gear and with the engine running while he answered a phone call inside his shop. He had been on the phone for approximately two minutes when, as he was returning to the loaner car, he noticed plaintiff in his pick-up truck out in front of the shop. Plaintiff had stopped at Allison's business to talk to Allison.

After Allison had spoken with plaintiff for a few minutes, he heard wheels spinning and looked up to see the loaner car backing into the flatbed truck and knocking the truck off the scotch blocks. The two vehicles then rolled down the 2 percent (grade) incline together toward a front-end loader. The flatbed truck hit the bucket of the front-end loader which diverted the truck's course sending it rolling towards the plaintiff's truck. The flatbed truck crashed into the passenger side of plaintiff's truck before plaintiff could move, thereby injuring plaintiff.

At the close of plaintiff's evidence, defendants moved for a directed verdict pursuant to Rule 50(a) of the N.C. Rules of Civil Procedure. The trial court granted defendants' motions, dismissing the plaintiff's action with prejudice. From the trial court's Order granting the directed verdicts, plaintiff appeals.

Alley, Hyler, Killian, Kersten, Davis & Smathers, by Patrick U. Smathers and Robert J. Lopez, for plaintiff-appellant.

Morris, Golding, Phillips & Cloninger, by Thomas R. Bell, Jr., for defendant-appellee Paramount Motor Sales, Inc.

Roberts, Stevens & Cogburn, P.A., by Frank P. Graham and Glenn S. Gentry, for defendant-appellee Spaldin Allison, t/d/b/a Allison's Ditching & Septic Tank Services.

WELLS, Judge.

Plaintiff first contends that the trial court erred in granting defendants' Motions for a Directed Verdict. We agree as to defendant Allison and award a new trial, but we affirm the trial court's Order as to defendant Paramount Motor Sales, Inc.

A Motion for a Directed Verdict under N.C. Gen. Stat. § 1A-1, Rule 50(a) of the Rules of Civil Procedure 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 plaintiff's evidence must be taken as true and the evidence must be considered in the light most favorable to the plaintiff, giving the 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 that 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); *see also Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982). As our Supreme Court has recently stated, "[O]nly in exceptional cases is it proper to enter a directed verdict . . . against a plaintiff in a negligence case." *Taylor v. Walker*, 320 N.C. 729, 360 S.E. 2d 796 (1987). "Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury." *Id.*

Whether a motor vehicle is being operated on a public highway or elsewhere, the driver must use the care which a reasonable person would use in like circumstances to avoid injury to another. *McCall v. Dixie Cartage & Warehouse, Inc.*, 272 N.C. 190, 158 S.E. 2d 72 (1967) (accident at loading ramp of a warehouse); *Bennett v. Young*, 266 N.C. 164, 145 S.E. 2d 316 (1965) (construction site accident); *see also Speight v. Hinnant*, 61 N.C. App. 711, 301 S.E. 2d 520 (1983) (driveway accident).

N.C. Gen. Stat. § 20-163 (1983), "Unattended motor vehicles," provides, in pertinent part: "No person . . . in charge of a motor vehicle shall permit it to stand unattended on a public highway or public vehicular area without first stopping the engine [and] effectively setting the brake . . . ." We cite this statute for the purpose of indicating that due care in the operation of motor vehicles must be exercised in places other than upon public highways. *See McCall, supra.*

[1] We are persuaded that plaintiff's evidence tending to show that defendant Allison left his loaner car, which he knew to be without an emergency brake, parked with the engine running at a relatively high speed near the place where he was conversing with plaintiff was sufficient to take the case to the jury on the issue of whether defendant Allison was negligent in the operation of his loaner car. We therefore order a new trial as to defendant Allison.

We note at this point that in his Motion for a Directed Verdict, defendant Allison suggests as a grounds that plaintiff did not sue the right person, since the action was brought against defendant Allison, t/d/b/a Allison's Ditching & Septic Tank Services. This position is feckless and we reject it without discussion.

[2] Plaintiff also contends that the trial court erred in granting defendant Paramount Motors' Motion for a Directed Verdict. We disagree. Even if plaintiff's evidence tended to show that Paramount was negligent in loaning a defective or unsafe car to defendant Allison, *see Austin v. Austin*, 252 N.C. 283, 113 S.E. 2d 553 (1960); *Stilley v. Automobile Enterprises*, 55 N.C. App. 33, 284 S.E. 2d 684, *cert. denied*, 305 N.C. 307, 290 S.E. 2d 708 (1982), there is no evidence that such negligence was a proximate cause of plaintiff's injury. Rather, plaintiff's evidence clearly tends to show that the negligence of defendant Allison in leaving the car unattended with the engine running was the sole proximate cause of plaintiff's injury.

The result is:

As to defendant Paramount Motors,

No error.

As to defendant Allison,

New trial.

Judges PHILLIPS and PARKER concur.

STATE OF NORTH CAROLINA v. LINDA SUE PEEK

No. 8726SC637

(Filed 1 March 1988)

1. Criminal Law § 73.2— mail addressed to defendant discovered in search of defendant's home—not hearsay—admissible

Defendant's name and address, written or printed on an envelope or its contents, is neither a written assertion nor conduct intended as an assertion and therefore is not hearsay. N.C.G.S. § 8C-1, Rule 801(c).

2. Narcotics § 4.3— constructive possession—evidence sufficient

In an action involving possession of narcotics, narcotics paraphernalia, and a weapon of mass destruction, the trial court correctly denied defendant's motion to dismiss at the close of the evidence based on insufficient evidence of constructive possession of the contraband where the evidence showed that a telephone bill and other pieces of mail addressed to defendant were found in the bedroom of the house; that defendant's minor son appeared at the house during the course of the search; that an acquaintance of defendant who did not live at the house was present in the living room when officers arrived; that defendant was arrested inside the house ten days later; and that contraband was found in four different rooms, some of it in plain view and some of it hidden.

3. Narcotics § 4.6— constructive possession—instructions correct

The trial court did not err in an action for possession of narcotics, narcotics paraphernalia, and a weapon of mass destruction by instructing the jury that they could infer that defendant had constructive possession of the contraband if they found beyond a reasonable doubt that she had control of the premises. Defendant did not object to the trial court's instructions on those grounds and the court's instruction clearly left it to the jury to decide whether to make the inference of constructive possession of contraband from control of the premises.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 20 February 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 December 1987.

Defendant was indicted on four charges: possession of marijuana with intent to sell and deliver, possession of cocaine with intent to sell and deliver, possession of drug paraphernalia, and possession of a weapon of mass destruction. At trial, only the State offered evidence. It tended to show that on 1 August 1986 several Charlotte Police officers with a valid search warrant searched a single family house at 826 Squirrel Hill Road in Charlotte. Defendant was not present when the officers arrived and, when no one answered the door, they forced it open. Inside, the officers found Thomas Rice standing in the living room. Mr. Rice was acquainted with defendant but did not live in the house. During the course of the two hour search, defendant's sixteen or seventeen year old son arrived but defendant was not there. Defendant was arrested at the house ten days later.

The search uncovered numerous items of contraband in several different rooms. Behind a bar in the den, the officers found a box containing over 11 grams of cocaine in 10 small plastic bags. In the downstairs bedroom next to the den, the following items were discovered: a sawed-off shotgun, found behind a dresser; over 63 grams of marijuana, found in a green, plastic bag inside a cedar chest; 24 more grams of marijuana, some of it found on top of a dresser; a sifter containing cocaine residue; a teaspoon inside a plastic bag, which contained cocaine residue; two bottles of inositol, a white powder commonly used for diluting cocaine; a box of plastic sandwich bags; over 400 small manila envelopes; approximately 50 brown "coin envelopes"; and one hundred eighty seven one dollar bills, found inside the dresser. In an upstairs bedroom, the officers found a plate containing cocaine residue and a pipe containing marijuana residue. In the kitchen, a set of triple beam scales was found; it also contained cocaine residue. One thousand dollars in cash was found stuffed down in the side of a sofa in the living room. Several pieces of mail addressed to defendant at 826 Squirrel Hill Road, including a telephone bill, were also found in the downstairs bedroom. At the close of the evidence, the trial court denied defendant's motion to dismiss. The jury returned guilty verdicts on all four charges. From judgment and sentence imposed, defendant appeals.

Attorney General Thornburg, by Assistant Attorney General Douglas A. Johnston, for the State.

James H. Carson, Jr., for the defendant-appellant.

EAGLES, Judge.

[1] Defendant argues that the trial court erred in allowing into evidence copies of several pieces of mail addressed to her at 826 Squirrel Hill Road. Because they were offered to prove that she lived at that address, defendant contends the mail is inadmissible hearsay. We disagree.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. *Livermon v. Bridgett*, 77 N.C. App. 533, 335 S.E. 2d 753 (1985), *disc. rev. denied*, 315 N.C. 391, 338 S.E. 2d 880 (1986); G.S. 8C-1, Rule 801(c). A "statement" is either (1) an oral or written assertion, or (2) non-verbal conduct which is intended as an assertion. G.S. 8C-1, Rule 801(a). Defendant's name and address, written or printed on an envelope or its contents, is neither a written assertion nor conduct which is intended as an assertion and, therefore, is not hearsay evidence.

On its face, a written or printed name and address on an envelope asserts nothing. From the sender's conduct in writing or affixing the name and address and mailing the material so addressed, however, it may be inferred that the sender believes the person named lives at that address. As the Commentary to Rule 801 makes clear, conduct "offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved" is not a statement. Although evidence of the sender's conduct remains untested as to perception, memory, and narration, those "dangers are minimal in the absence of an intent to assert, and do not justify the loss of the evidence on hearsay grounds." G.S. 8C-1, Rule 801, Commentary. *See also* McCormick on Evidence, section 250 (3d ed. 1984). The sender's conduct in addressing and mailing the envelope undoubtedly implies that the sender believes the addressee lives at that address. Nevertheless, because no assertion is intended, the evidence is not hearsay and is admissible. *See United States v. Singer*, 687 F. 2d 1135 (8th Cir. 1982).

[2] Defendant next argues that the trial court erred in failing to grant her motion to dismiss at the close of the evidence. She contends that the evidence was insufficient to show she had constructive possession of the contraband. We find no error.

When determining whether the evidence is sufficient to go to the jury on the question of defendant's guilt, the trial court must view the evidence in the light most favorable to the State, giving it the benefit of all reasonable inferences which may be drawn therefrom. *State v. Rasnor*, 319 N.C. 577, 356 S.E. 2d 328 (1987). Evidence of constructive possession is sufficient if it would allow a reasonable mind to conclude that the defendant had the intent and capability to maintain control and dominion over the contraband. *State v. Beaver*, 317 N.C. 643, 346 S.E. 2d 476 (1986). Where contraband is found on premises under the control of the defendant, that in itself is sufficient to go to the jury on the question of constructive possession. *State v. Minor*, 290 N.C. 68, 224 S.E. 2d 180 (1976). In proving that the defendant had control of the premises, it is not necessary to show that defendant was present when the contraband was found. *See State v. Cockman*, 20 N.C. App. 409, 201 S.E. 2d 740, *cert. denied*, 285 N.C. 87, 203 S.E. 2d 61 (1974).

The evidence showed that a telephone bill and other pieces of mail, addressed to defendant at 826 Squirrel Hill Road, were found in the bedroom; that defendant's minor son appeared at the house during the course of the search; that an acquaintance of defendant, who did not live at the house, was present in the living room when the officers arrived; that defendant was arrested inside the house ten days later; and that contraband was found in four different rooms, some of it in plain view and some of it hidden. This is sufficient, taken in the light most favorable to the State, to show that defendant had the intent and power to control the contraband. *See State v. Edwards*, 85 N.C. App. 145, 354 S.E. 2d 344, *cert. denied*, 320 N.C. 172, 358 S.E. 2d 58 (1987); *State v. Cockman, supra.* The trial court did not err in denying defendant's motion to dismiss.

[3] Finally, defendant argues here that the trial court erred in instructing the jury that they could infer that she had constructive possession of the contraband if they found, beyond a reasonable doubt, that she had control of the premises. Defendant, however, did not object to the trial court's instructions on those grounds and, therefore, is barred from assigning it as error. N.C. R. App. Proc. 10(b)(2); *Martin v. Hare*, 78 N.C. App. 358, 337 S.E. 2d 632 (1985). Moreover, the trial court's instruction was not erroneous. The trial court may properly instruct the jury that it may

infer a defendant's constructive possession of contraband from his control of the premises if the instruction clearly leaves it to the jury to decide whether to make the inference. *See State v. Hamlet*, 15 N.C. App. 272, 189 S.E. 2d 811 (1972). Here, the trial court properly instructed the jury on the inference. Defendant's assignment of error is without merit.

No error.

Chief Judge HEDRICK and Judge GREENE concur.

WILBUR HINSON AND WIFE, IRENE HINSON v. DAVID HAROLD SMITH AND WIFE, MAMIE W. SMITH

No. 872SC868

(Filed 1 March 1988)

Dedication § 2.1 — beach area — private easement

The trial court erroneously granted summary judgment for defendants in an action in which plaintiffs sought a declaratory judgment that an area designated "Beach" in a subdivision developed by defendants' predecessors in title was dedicated to the private use of the owners and purchasers of lots in the subdivision. Both the street and the "Beach" became private easements when the plat of Crystal Beach Estates was recorded and one lot was sold in reference to the plat.

APPEAL by plaintiffs from *Llewellyn, Judge*. Judgment entered 13 April 1987 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 10 February 1988.

This is a civil action wherein plaintiffs seek a declaratory judgment that an area designated as a "Beach" in a subdivision developed by defendants' predecessors in title is dedicated to the private use of the owners and purchasers of lots in the Crystal Beach Estates subdivision. Plaintiffs also seek a judgment directing defendants to remove any fixtures erected thereon. Further, plaintiffs seek damages in the amount of $2,000.00 actual damages and $10,000.00 punitive damages, together with the cost of the action, including reasonable attorney's fees. Defendants moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

The record before us discloses the following: In August 1964 Carolina Land Developers, Inc. [hereinafter CLD] recorded a plat of the "Crystal Beach Estates" subdivision in Map Book 17, Page 30 of the Beaufort County Registry. Lots 5, 6, and 7 described on the recorded plat of Crystal Beach Estates were conveyed by CLD to Nannie Mae Hinson by deed recorded 20 August 1971 in Book 672, Page 356 of the Beaufort County Registry. These lots were ultimately conveyed to plaintiffs by deed recorded in Book 836, Page 719 of the Beaufort County Registry.

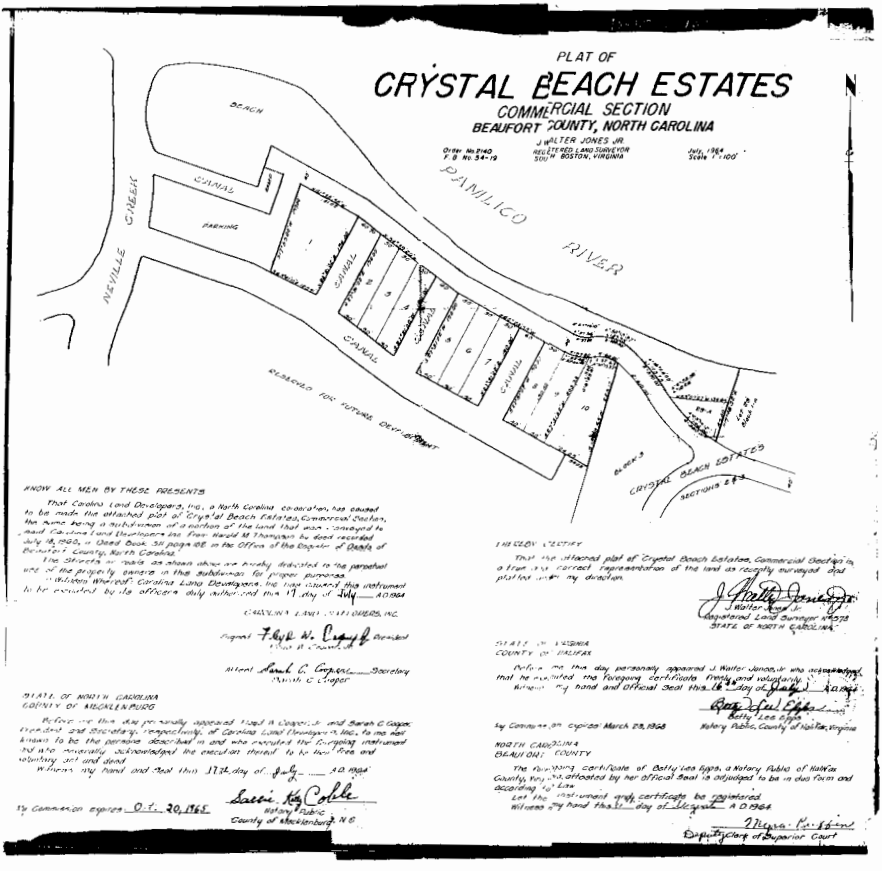
On 11 October 1971 CLD conveyed to defendants' predecessor in title Lot 29-A described in the recorded plat of Crystal Beach Estates and an additional tract described in metes and bounds. This additional tract was not a numbered lot described in the recorded plat. The additional tract lies approximately north and west of Lot 29-A, south of the Pamlico River, North of Driftwood Drive, and is the most easterly portion of the property designated as "Beach" on the plat of Crystal Beach Estates. The deed conveying Lot 29-A and the additional tract hereinbefore described to defendants stated:

> TO HAVE AND TO HOLD the aforesaid parcel of land together with all privileges and appurtenances thereunto belonging or in anywise appertaining unto Buyers, their heirs and assigns, in fee, forever, subject only to the following:
>
> . . .
>
> 3. Such rights, if any, as may have been dedicated to the other lot owners in Crystal Beach Estates by conveyances referring to that map entitled "Plat of Crystal Beach Estates, Commerical [sic] Section" by J. Walter Jones, Jr., Registered Land Surveyor dated July, 1964 which is recorded in Map Book 17, page 30 of the Beaufort County Registry.

The trial court granted defendants' motion for summary judgment and dismissed plaintiffs' claim for relief.

McLendon & Partrick, P.A., by Neal Partrick, Jr., for plaintiffs, appellants.

Charles L. McLawhorn, Jr., for defendants, appellees.



PLAT OF

CRYSTAL BEACH ESTATES

COMMERCIAL SECTION

BEAUFORT COUNTY, NORTH CAROLINA

J. WALTER JONES JR.
REGISTERED LAND SURVEYOR
SOUTH BOSTON, VIRGINIA

Order No. 5140
P. B. No. 34-19

July, 1964
Scale 1" = 100'

BEACH
CANAL
PARKING
NEVILLE CREEK
PAMLICO RIVER
CANAL
CANAL
CANAL
BULKHEAD FOR FUTURE DEVELOPMENT
BLOCK A
CRYSTAL BEACH ESTATES SECTION 2

KNOW ALL MEN BY THESE PRESENTS

That Carolina Land Developers, Inc., a North Carolina corporation, has caused to be made the attached plat of Crystal Beach Estates, Commercial Section, the same being a subdivision of a portion of the land that was conveyed to said Carolina Land Developers Inc. Fran Harold M. Thompson by deed recorded July 18, 1960, in Deed Book 311 page 68 in the Office of the Register of Deeds of Beaufort County, North Carolina.

The streets as shown thereon are hereby dedicated to the perpetual use of the property owners in this subdivision for proper purposes.

In Witness Whereof, Carolina Land Developers, Inc. has caused this instrument to be executed by its officers duly authorized this 17 day of July A.D. 1964

CAROLINA LAND DEVELOPERS, INC.

Signed: Floyd W. Cooper, President

Attest: Sarah C. Cooper, Secretary
Sarah C. Cooper

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

Before me this day personally appeared Floyd W. Cooper, Jr. and Sarah C. Cooper, President and Secretary, respectively, of Carolina Land Developers Inc., to me well known to be the persons described in and who executed the foregoing instrument and who severally acknowledged the execution thereof to be their free and voluntary act and deed.

Witness my hand and seal this 17th day of July A.D. 1964.

Sassie Kay Cobble
Notary Public
County of Mecklenburg N.C.

My Commission expires Oct. 20, 1965

I HEREBY CERTIFY

That the attached plat of Crystal Beach Estates, Commercial Section, is a true and correct representation of the land as roughly surveyed and platted under my direction.

J. Walter Jones Jr.
Registered Land Surveyor #1228
STATE OF NORTH CAROLINA

STATE OF VIRGINIA
COUNTY OF HALIFAX

Before me this day personally appeared J. Walter Jones, Jr. who acknowledged that he executed the foregoing certificate freely and voluntarily.

Witness my hand and official seal this 16 day of July A.D. 1964

Notary Public, County of Halifax, Virginia

My Commission expires March 28, 1968

NORTH CAROLINA
BEAUFORT COUNTY

The foregoing certificate of Betty Lee Epps, a Notary Public of Halifax County, Va., is attested by her official seal is adjudged to be in due form and according to Law.

Let the instrument with certificate be registered.

Witness my hand this 21 day of August A.D. 1964

Deputy Clerk of Superior Court

HEDRICK, Chief Judge.

The only question before us is whether the trial court erred in entering the judgment dismissing plaintiffs' claim and declaring that "as a matter of law, the Defendants are entitled to quiet enjoyment of the property in question," and that "as a matter of law, there is no dedication, either expressed or implied, of the controverted property."

Dedication of an easement may be in express terms or may be implied from the owner's conduct. *Tise v. Whitaker*, 146 N.C. 374, 59 S.E. 1012 (1907). Conduct which implies the intent to dedicate may operate as an express dedication, as where a plat is made and land is sold in reference to the plat. *Woody v. Clayton*, 1 N.C. App. 520, 162 S.E. 2d 132 (1968). In *Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E. 2d 30, 35-36 (1964), Justice Clifton Moore, writing for the Court, stated:

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. [Citations omitted.] It is said that such streets, parks and playgrounds are *dedicated* to the use of the lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. [Citations omitted.] It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. [Citations omitted.] This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. [Citations omitted.]

In the present case, when the plat of Crystal Beach Estates was recorded and one lot was sold in reference to the plat, both the street and the "Beach" became private easements to the individual purchasing the lot. The record clearly discloses that Lots 5, 6, and 7 were conveyed to plaintiffs' predecessors in title before Lot 29-A and the "additional tract" of land including a por-

tion of the "Beach" conveyed to defendants' predecessors in title. It is also clear that the conveyances of the lots refer to the recorded plat of Crystal Beach Estates. The deed conveying Lot 29-A and the "additional tract" to defendants even stated that the conveyance was made subject to

> [s]uch rights, if any, as may have been dedicated to the other lot owners in Crystal Beach Estates by conveyances referring to that map entitled "Plat of Crystal Beach Estates, Commerical [sic] Section" by J. Walter Jones, Jr., Registered Land Surveyor dated July 1964 which is recorded in Map Book 17, page 30, of the Beaufort County Registry.

Contrary to defendants' contentions, the area referred to as "Beach" is clearly identifiable. The recorded plat manifests the intention of CLD to set aside all the area north and west of Lot 29-A, south of the Pamlico River, east of Neville Creek, and north of Driftwood Drive to be a private easement for purchasers and owners of all of the lots described and enumerated on the plat of Crystal Beach Estates recorded in Map Book 17, Page 30 of the Beaufort County Registry.

Plaintiffs and other purchasers and owners of lots described in the recorded plat, therefore as a matter of law, had and have a private easement over and across all of the property designated as "Beach" on the recorded plat of Crystal Beach Estates. The judgment for defendants is reversed and the cause remanded to the Superior Court of Beaufort County for further proceedings consistent with this opinion.

Reversed and remanded.

Judges BECTON and SMITH concur.

MYRTLE K. JOHNSON v. SKYLINE TELEPHONE MEMBERSHIP CORPORATION; W. B. TRIBBLE; WILMA BLEVINS; H. B. QUESENBERRY AND WIFE, MRS. H. B. QUESENBERRY; HARRY W. TRIBBLE; CHARLES DELANO OSBORNE AND WIFE, BRENDA OSBORNE; LESTER PARKER, JR. AND WIFE, MILDRED K. PARKER; DAVID M. BAIRD AND WIFE, JUANITA M. BAIRD; LOIS P. DENT; DAVID J. LITTLE AND WIFE, JEANETTE T. LITTLE; GEORGE A. REEVES AND WIFE, GERTRUDE A. REEVES; T. G. REEVES; ZELLA LORRAINE MILLER; NORMAN BROWN AND WIFE, ZOLA F. BROWN; JAMES MILLER AND WIFE, DOROTHY L. MILLER; FRED RASH; LAVERN E. WATON; RICHARD K. ASHLEY AND WIFE, PHYLLIS R. ASHLEY; AND R. W. BLEVINS AND WIFE, OPAL BLEVINS

No. 8723DC876

(Filed 1 March 1988)

Dedication § 5— subdivision streets shown on plat—easements by lot purchasers—conveyance of easement to adjoining landowner

Where an owner subdivided his land and recorded a plat showing the existence of streets within the subdivision, the purchasers of lots within the subdivision were impliedly granted easements to use these streets. However, the owner still retained an interest in the streets, and where no governmental body had accepted the streets as dedicated property, the heirs of the now deceased owner could properly grant to an adjoining landowner an express easement to use the subdivision streets so long as such use of the streets does not interfere with the original easements of the subdivision lot owners.

APPEAL by defendants from *Gregory, Judge*. Judgment entered 1 June 1987 in District Court, ASHE County. Heard in the Court of Appeals 4 February 1988.

This is a declaratory judgment action. The parties stipulated to the following facts. In 1961, A. B. McNeill established a residential development known as the A. B. McNeill Subdivision (subdivision) and recorded a plat of the development designating certain strips of land as means of access. Plaintiff is the fee owner of an 11.8 acre tract of land which borders the northern edge of the subdivision. Defendants are all of the fee owners of the subdivision's lots. The heirs of A. B. NcNeill have never conveyed fee title to the subdivision's streets and all of them have executed duly recorded deeds conveying to plaintiff:

> An easement or right of way across and through all roads (including specifically Long Street) within the Andrew McNeill Subdivision as described in Plat Book 2 at page 63 of the Ashe County Registry. The purpose of this easement is to

> provide ingress and egress for Myrtle Johnson, her heirs and assigns from Highway 194 through the referenced subdivision to and for an 11.8 acre tract of land owned by Myrtle Johnson. This 11.8 acres is more particularly described in a deed recorded in Deed Book 119 at page 756 of the Ashe County Registry. The description contained therein is incorporated herein by reference.

In addition, although there is no stipulation stating that the streets have not been "dedicated" to public use, the parties in their briefs here agree that no governmental body has accepted the streets as dedicated property and there is nothing in the record to show the contrary.

Plaintiff filed this action on 18 November 1985, seeking a declaration that she, her heirs, and assigns have the right to use the subdivision's streets as a means of ingress and egress to her property. Based on the stipulated facts and the assumption that the streets have never been accepted by any governmental body as dedicated property, the trial court concluded that plaintiff had an express easement over all of the subdivision's streets. Defendants appeal.

McElwee, McElwee, Cannon & Warden, by William H. McElwee, III, for the plaintiff-appellee.

John T. Kilby, for the defendant-appellants.

EAGLES, Judge.

The sole issue here on appeal is whether the heirs of A. B. McNeill had the power to grant an express easement over the subdivision's streets to plaintiff. Defendants argue that, by subdividing the property, recording the subdivision plat, and selling all of the lots in the subdivision, A. B. McNeill relinquished all of his interest in the streets, dedicating them to the purchasers. Further, defendants contend that, since A. B. McNeill retained no interest in the streets, his heirs had no interest to convey to plaintiff. We disagree.

It is well established that an owner who subdivides his property and records a plat showing the existence of streets and roads within the subdivision impliedly grants to purchasers of lots in the subdivision the right to use these streets and roads.

Whichard v. Oliver, 56 N.C. App. 219, 287 S.E. 2d 461 (1982). Our case law often refers to a lot purchaser's right to use the streets as having been "dedicated" to him by the owner. *See Insurance Co. v. Carolina Beach*, 216 N.C. 778, 7 S.E. 2d 13 (1940); *Bryan v. Sanford*, 244 N.C. 30, 92 S.E. 2d 420 (1956). Since a "dedication" is made to the public, not just a part of the public, the right is more properly called an easement. *Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E. 2d 30 (1964); *see also Finance Corp. v. Langston*, 24 N.C. App. 706, 212 S.E. 2d 176, *cert. denied*, 287 N.C. 258, 214 S.E. 2d 429 (1975); 3 Powell on Real Property, section 409 (1987). Regardless of how it is denominated, the right of lot purchasers to use these streets may not be extinguished, altered, or diminished except by agreement or estoppel. *Realty Co. v. Hobbs, supra.*

It does not follow from defendants' right, as purchasers of the lots in the subdivision, to use the streets shown on the recorded plat, that their easement is exclusive or that A. B. McNeill was divested of all interest in the streets. The grantor of an easement retains fee title to the soil, subject to the burdens which the easement imposes. *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E. 2d 458 (1954). Consequently, the fee holder may use the land or convey additional easements over it so long as the use or conveyance does not interfere with the original easement. *See Light Co. v. Bowman*, 229 N.C. 682, 51 S.E. 2d 191 (1949). *See also* 25 Am. Jur. 2d, "Easements and License," section 89 (1966); 26 C.J.S., "Dedication," section 53 (1956). The record here does not establish that defendants own fee title to the streets in the subdivision or that their right to use them is exclusive. Accordingly, the conveyance of an additional easement to plaintiff is valid; plaintiff has an express easement over the subdivision's streets.

Defendants argue that their right to use the streets will be diminished due to greatly increased traffic and the possibility that plaintiff or her heirs will use them in a manner which is repugnant to their rights. By virtue of defendants' easement, plaintiff acquired the use of the streets only to the extent that the use does not diminish defendants' rights. No facts were presented to the trial court showing the nature of plaintiff's use. The trial court properly concluded that the mere use of the streets by plaintiff as a means of ingress and egress to her 11.8 acre tract of land did not diminish or interfere with defendants' rights. The

question of what use or uses may diminish those rights is not before us.

Affirmed.

Judges WELLS and GREENE concur.

STATE OF NORTH CAROLINA v. CLIFTON DARRELL WELCH

No. 8718SC851

(Filed 1 March 1988)

1. **Narcotics § 4— possession with intent to sell and deliver heroin—evidence sufficient**

The evidence was sufficient to convict defendant of possession with intent to sell and deliver heroin where defendant had an object the size of a cigarette pack in a paper sack when he got off an airplane; the sack was empty when he was searched; between the two times he had no opportunity to get rid of the object except while in telephone booths; the drugs were in the first telephone booth occupied by defendant within a minute after defendant was in it; no one else was seen around the booths; and the cigarette pack contained twenty-six packets of heroin.

2. **Narcotics § 3.1— presence at airport—possession of airline tickets in someone's name—relevant**

The trial court did not err in a prosecution for possession with intent to sell and deliver heroin on 8 August 1986 by admitting evidence of defendant's presence at the airport on 6 August 1986 with no luggage and of defendant's possession of airline tickets in someone else's names. The evidence was relevant and probative in that it helps to complete the picture of one continuous illegal act that was planned and prepared for and which made it more probable that defendant possessed the heroin involved. N.C.G.S. § 8C-1, Rule 401.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 6 May 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 February 1988.

Attorney General Thornburg, by Associate Attorney General Kim L. Cramer, for the State.

Assistant Public Defender Frederick G. Lind for defendant appellant.

PHILLIPS, Judge.

[1] Defendant, convicted of possession with intent to sell and deliver heroin, a controlled substance, in violation of G.S. 90-95(a)(1), contends that the evidence was insufficient to convict him. Defendant offered no evidence, and the State's evidence in pertinent part was to the following effect: On 6 August 1986 two State Bureau of Investigation detectives, Kevin West and Stephen Porter, saw defendant at the Greensboro airport with no luggage and holding a plane ticket with the name D. Massey printed on it; they next saw him on 8 August 1986 deplaning at the same airport carrying a paper sack, which had an object inside of it about the same size as a pack of Newport cigarettes that defendant held in his hand; the detectives followed defendant to the baggage retrieval area where he sat down in one of several open telephone booths that were divided by partitions, peeped over the edge of the partition at the detectives, and then moved to an adjacent booth; the detectives approached defendant, identified themselves, and asked to see his airline ticket; defendant showed them a ticket in the name of Charles Johnson and said that was his name; but after producing his Social Security card he admitted that his name was Welch and said someone else reserved the ticket for him; the detectives stated they were doing a narcotics investigation and asked defendant if he would mind being searched; he said he would not and in a quick pat down conducted in the airport's nearby security office the detectives found nothing in the paper sack and nothing of consequence on defendant; Detective West then ran to the first telephone booth defendant had sat down in and found a Newport cigarette pack containing twenty-six packets of a white powder; the detectives then ran after defendant, saw him trying to stuff his plane ticket under some bark chips, and arrested him; approximately sixty seconds elapsed from when the detectives first approached defendant in the phone booth and when Detective West found the cigarette pack, and during that time neither detective saw any other people around the booths; the white powder was later determined to be heroin.

That the white powder in the cigarette package found by Detective West was heroin and that heroin is a controlled substance under the North Carolina Controlled Substances Act, G.S. 90-86 to G.S. 90-113.8, is not contested; nor is it disputed that having

twenty-six little, individual bags of heroin is evidence of an intent to sell heroin. Thus, the only other element of the crime defendant was convicted of that the State's evidence has to show is that defendant possessed the heroin. *State v. Casey*, 59 N.C. App. 99, 296 S.E. 2d 473 (1982). In our opinion the State's evidence does that. Direct evidence of defendant's possession of the heroin was not required; it is sufficient that defendant's possession can reasonably be inferred from the evidence. *State v. White*, 293 N.C. 91, 95, 235 S.E. 2d 55, 58 (1977). From the evidence indicating that defendant had an object the size of a cigarette pack in a paper sack when he got off the plane, that the sack was empty when he was searched, that between the two times he had no opportunity to get rid of the object except while in the phone booths, that the drugs were in the phone booth within a minute after defendant was in it, and that no one else was seen around the phone booths, it can be reasonably inferred that defendant had the drug-filled cigarette package in the sack when he got off the plane and that he put it in the phone booth. The argument that this evidence gives rise only to "suspicion or conjecture" that defendant possessed the heroin is rejected; it meets the reasonable inference standard required by law. *See State v. Jones*, 303 N.C. 500, 504, 279 S.E. 2d 835, 838 (1981). Defendant's reliance upon *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967) is misplaced. The evidence in that case was different from the evidence in this case in several significant respects. In *Chavis* first, there was evidence that another person was with the defendant when the marijuana may have been put in a hat and left in a vacant lot; second, there was no evidence that the marijuana had ever been on Chavis' person or in his possession, the only connection to him being that the hat the marijuana was found in looked like the hat Chavis was wearing earlier; and third, approximately a half hour passed between the time Chavis and the other man were seen together near the vacant lot and when the hat with the marijuana in it was found.

[2] Defendants last two arguments are that the court erred in not excluding evidence of his presence at the airport on 6 August 1986 and his possession of airline tickets with someone else's names on them. He argues that this evidence was irrelevant and therefore inadmissible. Under Rule 401, N.C. Rules of Evidence, evidence is relevant if it makes "any fact that is of consequence

to the determination of the action more probable or less probable than it would be without the evidence," and Rule 402 states that except as otherwise provided "all relevant evidence is admissible," and we know of no constitutional, statutory, or other provision that forbids the receipt of this evidence. It is both relevant and quite probative in our opinion; for it helps to complete the picture of one continuous illegal act that was planned and prepared for and makes it more probable that defendant possessed the heroin involved.

No error.

Judges ARNOLD and COZORT concur.

IN THE MATTER OF MICHAEL CALVIN HULL, JAMES WILLIAM DOLLYHIGH, AND MICHAEL LEE REYNOLDS

No. 8717DC916

(Filed 1 March 1988)

1. **Infants § 20— juvenile delinquents—restitution order unsupported by evidence**

The trial court's order requiring juveniles to pay $3,000 as restitution to a mobile home owner who had suffered $8,000 in damages was unsupported by the evidence where the juveniles were adjudicated delinquent for throwing rocks through the windows of the mobile home, but there was no evidence as to the amount of damage caused by the rocks.

2. **Infants § 20— juvenile delinquent—restitution order unsupported by charge or adjudication**

The trial court erred in ordering a juvenile to pay restitution for damage to a car where the juvenile was neither charged with nor adjudicated delinquent for damaging the car. N.C.G.S. § 7A-631.

3. **Infants § 20— juvenile delinquents—joint and several liability**

If the trial judge on remand finds that three juveniles jointly participated in causing damage by throwing rocks through the windows of a mobile home, the juveniles should be held jointly and severally liable for the damage. N.C.G.S. § 7A-649(2).

APPEAL by juveniles from *Carter (Clarence), Judge.* Judgment entered 12 June 1987 in Juvenile Court, SURRY County. Heard in the Court of Appeals 9 February 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane Rankin Thompson, for the State.

Gardner, Gardner & Johnson, by John C. W. Gardner, Jr., for respondent-appellant Michael Calvin Hull.

Sarah Stevens for respondent-appellant James W. Dollyhigh.

W. David White, P.A., by Marion McNeil McKenzie, for respondent-appellant Michael Lee Reynolds.

GREENE, Judge.

This is a juvenile action in which the trial judge adjudicated several juveniles as delinquent and placed them on probation. The juveniles appeal.

Juveniles Hull and Dollyhigh were charged with damage to real and personal property. Juvenile Reynolds was only charged with damage to real property. Each of the three juveniles admitted they threw rocks through some windows in a mobile home owned by Kester Sink. Hull and Dollyhigh denied throwing rocks at certain automobiles and damaging them. Based on the admissions and evidence at the adjudicatory hearing, the trial judge found the three juveniles delinquent for damage to the mobile home of Kester Sink and found Hull and Dollyhigh delinquent for damage to the automobiles. In the dispositional order, the trial judge found the mobile home damaged in the amount of $8,000. The juveniles were placed on probation and the court required, among other things, that each juvenile pay restitution in the amount of $1,000 to Kester Sink and to pay $130.21 to Carolyn Moore for damage to her automobile.

The issues presented are: I) whether the trial court's orders requiring restitution in the total amount of $3,000 for damage to the mobile home are supported by competent evidence, II) whether the trial judge erred in requiring Reynolds to pay restitution for damage to the automobile owned by Carolyn Moore, and III) whether the court erred in not requiring joint and several liability of the juveniles for damage to Kester Sink's mobile home.

I

[1] The trial judge ordered restitution in the total amount of $3,000 for damage to the mobile home. Section 7A-651 (1986) of the North Carolina General Statutes requires a written dispositional order containing appropriate findings of fact and conclusions of law. The dispositional order here incorporated the terms of the probation order. Therefore, the order of restitution contained in the probation order must be supported by appropriate findings of fact. These findings must in turn be supported by some evidence in the record. *See In the Matter of Montgomery*, 311 N.C. 101, 110, 316 S.E. 2d 246, 252 (1984).

The order of the trial judge found as a fact that the mobile home was damaged in the amount of $8,000 and ordered restitution in the amount of $3,000. A trial judge is not required to order full restitution and may order partial restitution. N.C.G.S. Sec. 7A-649(2). However, the findings of fact entered by the trial court indicating damages by the juveniles in the amount of $8,000, and allowing restitution in the amount of $3,000, is totally without support in the record and cannot support the order of restitution.

A trial judge is permitted to order restitution only to persons who have suffered "loss or damages as a result of the offense committed by the juvenile." N.C.G.S. Sec. 7A-649(2). *See also In re Phillips*, 66 N.C. App. 468, 469, 311 S.E. 2d 365, 366 (1984). Although the record contains substantial evidence that Mr. Sink suffered great damage to his property, the juveniles were charged only with breaking windows and damaging the doors of his property. Furthermore, the juveniles admitted only to throwing rocks through some of the windows in the mobile home and nothing further. There is no evidence in the record as to the amount of damage caused by the rocks thrown by the juveniles.

Therefore, as the record is devoid of any evidence as to the amount of damage caused by the rocks thrown by the juveniles, the dispositional order must be vacated and this matter remanded for a new dispositional hearing. At the new hearing, the court must determine the amount of damages caused to the mobile home by the rocks thrown through the windows by the juveniles.

II

[2] The order requiring Reynolds to pay restitution to Carolyn Moore for the damage to her automobile was also in error. Reynolds was not petitioned nor adjudicated for the delinquent act of damaging the personal property of Carolyn Moore. Therefore, the court was without authority to order Reynolds to pay any restitution to Carolyn Moore. *See* N.C.G.S. Sec. 7A-631 (at adjudicatory hearing, juvenile has right to written notice of facts alleged in the petition to assure due process of law and adjudications are limited to allegations contained in the petition).

III

[3] The court found in the dispositional orders that all three juveniles were acting in concert with each other in causing the damage to the mobile home. However, from the order for restitution, it appears the trial court only found them individually responsible. Because we are unable to determine from the record whether the juveniles jointly participated in causing the damage, on remand, the trial judge should make this determination. If he finds the juveniles jointly participated in causing the damage, then they should be held jointly and severally liable for the damage caused by their rock throwing. *See* N.C.G.S. Sec. 7A-649(2) (when juveniles participate with others in causing damage or injury "all participants should be jointly and severally responsible for the payment of restitution").

Accordingly, the trial court on remand must determine whether the juveniles are responsible in restitution only for the damage they individually caused or whether there should be some form of joint and several liability. We find no merit in the remaining assignments of error raised by the juveniles.

IV

The dispositional hearing is vacated and this matter is remanded for a new dispositional hearing consistent with this opinion.

Vacated and remanded.

Judges WELLS and EAGLES concur.

IN THE MATTER OF: BRIDGET D. MCNEIL, PETITIONER v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. 8712SC841

(Filed 1 March 1988)

Master and Servant § 108.2— unemployment benefits—full-time student—otherwise eligible—findings inadequate

Where a full-time student who was laid off from a full-time job and who requested employment after 2:00 p.m. so that she could complete her last semester of college was denied benefits and appealed, the appeal was remanded for findings of fact to determine whether the provisions of N.C.G.S. § 96-13(a)(3) dealing with full-time students apply and whether petitioner was "otherwise eligible" for benefits.

APPEAL by petitioner from *Read (J. Milton, Jr.), Judge.* Judgment entered 19 May 1987 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 3 February 1988.

The trial court affirmed an order of the Employment Security Commission denying petitioner unemployment benefits from 24 August 1986 to 6 September 1986. Petitioner appeals.

Lumbee River Legal Services, Inc., by T. Diane Phillips, for petitioner-appellant.

T. S. Whitaker and Thelma M. Hill for respondent-appellee.

SMITH, Judge.

The testimony before the referee showed that petitioner was a full-time student at Methodist College and worked as a psychiatric technician on the 3:00 p.m. to 11:30 p.m. shift at Health Services of America Cumberland Hospital. She was laid off from her job due to a staff reduction and filed a claim for unemployment benefits for the weeks from 24 August 1986 to 6 September 1986. Petitioner sought employment through the Employment Security Commission (the Commission), requesting employment after 2:00 p.m. so she could complete her last semester of college during the day. An adjudicator found that petitioner had a shift restriction which rendered her ineligible for benefits for the entire period from 24 August to 6 September. He also found petitioner ineligible for benefits from 24 August to 30 August because she did not conduct an active search for work as required by law. On appeal,

the referee found petitioner's shift restriction rendered her not genuinely attached to the work force and ineligible for benefits. Petitioner appealed to the Employment Security Commission raising two issues: "i) Whether or not the findings of fact are supported by the record; and ii) Whether or not the findings of fact sustained the conclusion of law." The Commission entered an order vacating the referee's order and remanding for further proceedings to determine whether petitioner was available for work. On remand, the referee heard evidence on the types of jobs available during the hours petitioner sought work, determined she was not available for work and denied unemployment benefits. On appeal, the Commission affirmed the referee's opinion, and petitioner sought judicial review before the Superior Court. On 19 May 1987, the trial court entered a judgment affirming the Commission's decision. Petitioner appeals.

Petitioner makes four assignments of error relating to the determination that she was not "available for work" within the meaning of G.S. 96-13(a)(3). By her first assignment of error, she contends the trial court erred by affirming the Commission's finding that she was not "available for work" as a matter of law because she was concurrently a full-time student and a full-time employee when she was laid off by the hospital. By her other assignments of error, she assigns error to the findings that she had a shift restriction, that she was not genuinely attached to the work force, and that she had a type of job and wage restriction which rendered her unavailable for work. We vacate the trial court's judgment and remand for proper findings of fact and conclusions of law as to petitioner's eligibility for unemployment benefits.

To be eligible for unemployment benefits, an individual must be both "able to work" and "available for work." G.S. 96-13(a)(3). The statute provides that "[a]ny person who was engaged in full-time employment concurrent with his school attendance, who is otherwise eligible, shall not be denied benefits because of school enrollment and attendance." *Id.* The evidence before the Commission showed that petitioner was both a full-time student and a full-time employee when she was laid off from work. Thus, she cannot be denied unemployment benefits if she is "otherwise eligible" to receive those benefits. In determining whether she is otherwise eligible for benefits, the statute requires that she "not

be denied benefits because of school enrollment and attendance." *Id.*

In denying benefits to petitioner, the Commission apparently concluded that she was not otherwise eligible for benefits because she was not available for work within the meaning of the statute. "The phrase 'available for work' is not susceptible of precise definition, and whether a person is available for work differs according to the facts of each individual case." *In re Beatty*, 286 N.C. 226, 229, 210 S.E. 2d 193, 195 (1974). The phrase "available for work" means available for suitable work as the phrase "suitable work" is used in G.S. 96-14. *In re Miller*, 243 N.C. 509, 91 S.E. 2d 241 (1956). In *Miller*, petitioner refused to accept a job which would require her to work on her Sabbath. The Commission found she was ineligible for benefits because she had so limited her availability for work that she was not "available for work" within the meaning of G.S. 96-13. In rejecting the Commission's findings, the Supreme Court noted that under the Commission's view, "the *rationale* of the statute would seem to be that in order to be eligible for benefits a claimant must be 'available for work' at any and all times, night and day, Sunday and week days alike." *Miller*, 243 N.C. at 513, 91 S.E. 2d at 244 (emphasis in original). In this case, the Commission found petitioner was not "available for work" because she was only available for second shift jobs. However, petitioner was available for only second shift jobs because of her school attendance. The statute forbids denial of unemployment benefits solely because of school enrollment and attendance. As in *Miller*, petitioner is not required to be available for work at all times.

We note that there were no findings of fact addressing whether petitioner was a full-time student or a full-time employee when she was laid off from work. We remand the case to the trial court for further remand for proper findings of fact and conclusions of law to determine whether the provisions of G.S. 96-13(a)(3) dealing with full-time students apply in this case and whether petitioner is "otherwise eligible" for benefits within the meaning of the unemployment compensation statutes.

Vacated and remanded.

Chief Judge HEDRICK and Judge BECTON concur.

JERALD D. HARPER AND WIFE, VIRGINIA HARPER v. BILLY MORRIS, T/A MORRIS LOGGING COMPANY

No. 874SC769

(Filed 1 March 1988)

1. **Trespass § 8.2— unlawful cutting of trees and shrubs—diminished value of land—instructions on factors to be considered**

In an action to recover damages for the wrongful cutting of trees and shrubs from plaintiffs' land, the trial court did not err in instructing the jury that, in determining the diminished value of plaintiffs' property, it could consider the purpose for which the trees and shrubs were grown and maintained, the contemplated use of the land including aesthetic value to the landowners, and the cost of replacing or restoring the trees and shrubs to the extent that such is reasonable and practicable.

2. **Trespass § 8.2— wrongful cutting of trees and shrubs—evidence of replacement costs**

In an action to recover damages for the wrongful cutting of trees and shrubs from plaintiffs' land, testimony by plaintiffs' expert witness of the costs of replacing the trees and shrubs was relevant and properly admitted.

APPEAL by defendant from *Stevens, Judge.* Judgment entered 13 February 1987 in Superior Court, DUPLIN County. Heard in the Court of Appeals 6 January 1988.

This is an action in trespass, in which plaintiffs sought damages for defendant's unauthorized cutting of trees and shrubs from plaintiffs' land. Defendant by mistake or inadvertence cut approximately 180 trees and shrubs of various kinds and sizes from two acres of plaintiffs' property.

Plaintiffs testified that they planned to build a retirement home for themselves on this tract and were very disappointed when they discovered the trees and shrubs had been cut. Plaintiffs and their children and grandchildren went to this property often for recreational purposes. They enjoyed swimming in two man-made ponds located on the property. Plaintiffs do not know whether they will build their retirement cottage on this property now that the trees and shrubs are gone.

Defendant introduced the testimony of an expert in real estate appraisal that the market value of the tract was $6,000 before the cutting and $5,100 after. Plaintiff Jerald Harper, on direct examination, stated that he thought his property was di-

minished in value by $10,000. On cross-examination, however, Mr. Harper testified that the property was worth $50,000 before the cutting and that its value was "probably diminished by half" afterward. Over defendant's objection the trial court permitted plaintiffs to introduce the opinion of an expert nurseryman that it would cost approximately $30,000 to replace the trees and shrubs.

The jury returned a verdict in favor of plaintiffs for $10,000. Pursuant to its own motion, the trial court remitted the award to $6,500. Plaintiffs did not object to the remittitur. Defendant appeals.

Harrison, Heath and Simpson, P.A., by Fred W. Harrison, attorney for plaintiff-appellees.

Ward, Ward, Willey & Ward, by Joshua W. Willey, Jr., attorney for defendant-appellant.

ORR, Judge.

It is well settled law in our state that when trees are unlawfully cut from the land of another, "claimant is entitled to either the difference in fair market value of the land before and after the cutting or the market value of the timber at the time and place of its severance plus incidental damages caused in removal, whichever he elects." *Simpson v. Lee*, 26 N.C. App. 712, 715, 217 S.E. 2d 80, 82 (1975). Here the plaintiffs elected the diminished value measure, calculated by the difference in market value before and after the cutting.

[1] Defendant contends the trial court erred by instructing the jurors that they could consider certain factors in determining the diminished value of plaintiffs' property. These factors are:

> the purpose for which these particular trees and shrubs cut, were grown and maintained; the cost of replacement or restoration of the same to the extent that it is reasonable and practicable; that is, not being excessive in relation to the damage to the land itself; and the contemplated use of the particular lands from which the timber and shrubs were cut or removed, including any aesthetic value to the landowners of such trees and shrubs.

According to defendant, this instruction impermissibly expands the elements of damages recoverable in trespass actions.

We disagree. Each element of the instruction has some relevance in determining the diminished value of plaintiffs' property.

The purpose for which these trees and shrubs were grown and maintained and the contemplated use of the land including aesthetic value to the landowners, in our opinion, directly affects the market value of this property. Similarly the cost of producing the trees and shrubs has some bearing on the value of plaintiffs' land, and one factor in determining the diminished value would be the cost of replacing or restoring the trees and shrubs to the same extent as is reasonably practicable. *Diggs v. Railroad*, 131 Mo. App. 457, 110 S.W. 9 (1908). *See generally* Annot. "Measure of Damages for Injury to or Destruction of Shade or Ornamental Tree or Shrub," 95 A.L.R. 3d 508 (1979).

[2] Appellant next contends the trial court erred by admitting evidence of replacement cost.

We believe the testimony of the cost of replacing these trees and shrubs presented by plaintiffs' expert witness was relevant and properly admitted. Its probative value was not outweighed by any possible prejudicial impact on the jury, particularly where as here the trial court cautioned the jury to consider replacement cost only to the extent "that it is reasonable and practicable; that is, not being excessive in relation to the damage to the land itself . . . ." We find no error by the trial court in admitting this testimony.

We have examined defendant's remaining assignments of error and find them to be without merit. The judgment of the trial court is affirmed.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. MELINDA BAREFOOT WARREN AND CATHERINE POPKIN

No. 873SC889

(Filed 1 March 1988)

Declaratory Judgment Act § 4.3— excess insurance coverage—absence of justiciable controversy

Plaintiff insurer failed to allege a controversy justiciable under the Declaratory Judgment Act in seeking to determine whether an automobile liability policy issued to defendant driver's husband and insuring defendant driver provided excess coverage to defendant driver which would be available to satisfy any judgment against her by defendant passenger exceeding the limits of a liability policy issued to the automobile owner where plaintiff alleged that the owner's liability insurer is providing a defense to the driver in the passenger's action against the driver; there was no allegation that plaintiff has been called upon to defend or participate in any way in the passenger's action; and the amount of injury sustained by defendant passenger is not evident from plaintiff's complaint.

APPEAL by plaintiff from *Reid, Judge*. Judgment entered 20 August 1987 in Superior Court, PITT County. Heard in the Court of Appeals 10 February 1988.

This is an action pursuant to the Declaratory Judgment Act, G.S. 1-253 to 1-267. In its complaint, plaintiff alleged it had issued defendant Warren's husband an automobile liability insurance policy insuring defendant Warren. Both defendants were residents in the medical program at the East Carolina University Medical Center. As part of their residency program, defendants were to rotate among hospitals in the Eastern Area Health Education program.

On 29 January 1985 defendants were engaged in an eight-week rotation at a hospital in Wayne County. On that date, in an automobile driven by defendant Warren and provided by Eastern Area Health Education Agency, defendant Popkin was seriously and permanently injured as a result of an accident. Plaintiff's complaint further alleges that defendant Popkin has sued defendant Warren for the personal injuries arising out of the accident, and that the liability insurance carrier for Eastern Area Health Education Agency is providing a defense. Further allegations are:

> . . . the Plaintiff is informed and believes that both of the Defendants herein contend that the policy of insurance

> issued to [defendant Warren's husband] by the Plaintiff provides excess coverage to Melinda Barefoot Warren which would be available to satisfy any judgment which exceeded the limits of liability of the Eastern Area Health Education Agency's policy.

Plaintiff contends it is not liable under the policy it issued. It therefore prayed that the court "adjudge and determine that the Plaintiff is not obligated under the aforementioned policy," and "declare the rights of the parties." Both parties moved for summary judgment. Summary judgment was denied for plaintiff, but was granted for defendants, and judgment was entered. Plaintiff appealed.

Baker, Jenkins & Jones, P.A., by Ronald G. Baker, for plaintiff, appellant.

Henderson, Baxter & Alford, P.A., by B. Hunt Baxter, Jr., for defendant, appellee Melinda Barefoot Warren.

HEDRICK, Chief Judge.

Although the question has not been discussed by either party in its brief, we *ex mero motu* consider whether plaintiff, in its complaint, has alleged an actual justiciable controversy in support of a declaratory judgment action.

An actual controversy must exist for there to be an action under the Declaratory Judgment Act. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E. 2d 25 (1986). Determination of what is an actual controversy and how the act operates is found in *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E. 2d 404, 409 (1949):

> There is much misunderstanding as to the object and scope of this legislation. Despite some notions to the contrary, it does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. [Citations omitted.] This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice.

The existence of an actual controversy must be shown in the complaint. *Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E. 2d 264, *disc. rev. denied*, 298 N.C. 297, 259 S.E. 2d 300 (1979). It is not necessary that one party have an actual right of action against another, but there must be more than a mere disagreement. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E. 2d 25 (1986). This means it must be shown in the complaint that litigation appears unavoidable. *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 316 S.E. 2d 59 (1984).

In this case, the complaint alleges nothing more than the possibility that plaintiff may be responsible for any excess above Eastern Area Health Education Agency's liability coverage. It is not evident from the complaint how much injury was sustained by defendant Popkin. Indeed, plaintiff does not even allege that it has been called upon to defend the action or participate in any way. Plaintiff merely alleges that it is "informed and believes that both of the Defendants herein contend that the policy of insurance issued to Daryl A. Warren by the Plaintiff provides excess coverage to Melinda Barefoot Warren which would be available to satisfy any judgment which exceeded the limits of liability of the Eastern Area Health Education Agency's policy."

Mere threat of a suit is not enough to create jurisdiction for a declaratory judgment action. *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 316 S.E. 2d 59 (1984). In this case there is not even an allegation of a threat. The complaint totally lacks any allegation sufficient to give a court jurisdiction under the Declaratory Judgment Act. The act does not "require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E. 2d 450, 453 (1942). At this stage the court can only speculate with respect to the issues plaintiff attempts to raise in its complaint. Speculation is for the classroom, not the courtroom. It is the duty of the court to adjudicate, not to hypothecate.

For these reasons, we hold plaintiff has failed to allege sufficient facts to show the existence of an actual or justiciable controversy with regard to the insurance policy issued to defendant Warren's husband. Therefore, the court lacked jurisdiction to make any declaration under the Declaratory Judgment Act.

The judgment of the Superior Court entered 20 August 1987 is vacated, and the matter is remanded to the Superior Court of Pitt County for entry of an Order dismissing the proceeding.

Vacated and remanded.

Judges BECTON and SMITH concur.

STATE OF NORTH CAROLINA v. CARL J. PAYTON

No. 8712SC829

(Filed 1 March 1988)

1. **Criminal Law § 34.2— homicide—earlier misconduct—admission harmless error**

There was no prejudicial error in a prosecution for second degree murder and second degree kidnapping from the admission of testimony from the kidnapping victim that defendant had on an earlier occasion during an argument about another man beaten her, pulled a shotgun out of his vehicle, and threatened to kill himself. The unimpeached, uncontradicted evidence was that defendant shot and killed the victim in this case deliberately and without provocation.

2. **Homicide § 30.2— second degree murder—failure to submit manslaughter—no error**

The trial court did not err in a prosecution for second degree murder by failing to submit voluntary manslaughter as a possible verdict after telling the jury before closing arguments that the issue would be submitted where there was no evidence of manslaughter, the court gave both sides an opportunity to reargue the case, and the court instructed the jury to disregard the previous statement that voluntary manslaughter would be submitted.

APPEAL by defendant from *Read, Judge.* Judgments entered 15 April 1987 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 2 February 1988.

Defendant was convicted of second degree murder and second degree kidnapping. In pertinent part, the evidence tended to show that: Defendant and LaTonya McAllister lived together intermittently from 1982 until the spring of 1985 when she moved out with their two children and began living in a mobile home; on

20 November 1985 she, the children and a friend, Cedric Heyward, were in her mobile home when defendant arrived; after playing some with the children, talking with Ms. McAllister about going back together, and watching television for awhile, without any provocation whatever defendant shot Heyward three times with a pistol, the last time in the head at pointblank range, and forced her to leave the trailer with him; after going about 100 yards and telling her that he would leave her and the children alone if she helped him escape, he fled.

Attorney General Thornburg, by Assistant Attorney General William F. Briley, for the State.

John G. Britt, Jr. for defendant appellant.

PHILLIPS, Judge.

[1, 2] Defendant makes only two contentions, neither of which materially relates to his conviction or has merit. First, he contends that the court erred in allowing Ms. McAllister to testify that on an earlier occasion during an argument about another man he had beaten her, pulled a shotgun out of his vehicle, and threatened to kill himself. Assuming *arguendo* that this evidence was inadmissible, it could not have possibly affected the verdict since the unimpeached, uncontradicted evidence was that he shot and killed Heyward deliberately and without provocation. Defendant's other contention, that the court erred in not submitting voluntary manslaughter as a possible verdict, is not based upon a claim that the evidence raised that issue or that he requested that it be submitted; it is based only upon the fact that the court told the jury before the closing arguments were made that the issue would be submitted, but changed his mind after realizing that there was no evidence of manslaughter. In reversing itself the court gave both sides an opportunity to reargue the case, which neither accepted, and instructed the jury to disregard his previous statement that voluntary manslaughter would be charged on. Since the manslaughter issue was not raised by the evidence, the court certainly did not err in refusing to charge on it; and in the setting that existed the court's error in stating that the issue would be submitted was obviously a very minor and inconsequential one.

No error.

Judges ARNOLD and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 MARCH 1988

AMERICAN DEFENDER v. FIDELITY BANK No. 8710SC251	Wake (84CVS3905)	Vacated & Remanded
COX v. COX No. 8725DC793	Caldwell (85CVD1030)	No Error
EARLY v. EARLY No. 8721DC647	Forsyth (85CVD4102)	No Error
EARLY v. EARLY No. 8721DC859	Forsyth (85CVD4102)	Affirmed
GUY v. TOYOTA WORLD, INC. No. 8730SC369	Haywood (85CVS191)	Affirmed
HOLLOWAY v. SOUTHCHEM, INC. No. 8714SC600	Durham (85CVS01597)	Affirmed
IN RE GILL No. 8727DC846	Gaston (87-J-64) (350-87-0149)	Affirmed
MORGAN v. N.C. GRANGE MUT. INS. CO. No. 8720SC620	Union (85CVS0922)	Vacated & Remanded
NANCE v. WESTBROOK No. 8720SC819	Union (85CVD1113)	No Error
NEW BERN ASSOCIATES v. CELOTEX CORP. No. 878SC634	Wayne (85CVS486)	Reversed & Remanded
STATE v. CONWAY No. 8728SC805	Buncombe (86CRS3866)	No Error
STATE v. GORDON No. 8718SC837	Guilford (87CRS20415)	No Error
STATE v. HARRIS No. 8719SC875	Cabarrus (86CRS13890)	No Error
STATE v. NEWTON No. 879SC807	Vance (84CRS7256)	Affirmed
STATE v. SPEAKS No. 8721SC702	Forsyth (86CRS42307)	No Error

GLENN W. JOHNSON, ADMINISTRATOR OF THE ESTATE OF JAMES WAYLAND JOHNSON AND BARBARA K. JOHNSON AND GLENN W. JOHNSON v. RUARK OBSTETRICS AND GYNECOLOGY ASSOCIATES, P.A. (FORMERLY THE RUARK CLINIC, P.A.), L. JOSEPH SWAIM, THOMAS B. GREER, WARNER L. HALL, AND COURTNEY D. EGERTON

No. 8610SC942

(Filed 15 March 1988)

1. Rules of Civil Procedure § 12— only pleadings in record—standard applicable to judgment on the pleadings

Where the trial court's order indicated that the court had considered discovery materials in dismissing plaintiffs' claims, but the record on appeal contains only the parties' unverified pleadings and defendants have not shown that plaintiffs were required under Rule 56(e) to respond with specific facts showing a genuine issue for trial, the adequacy of plaintiffs' allegations will be judged by the standards appropriate to a judgment on the pleadings rather than by the standards applicable to summary judgment. N.C.G.S. § 1A-1, Rule 12(b)(6).

2. Death § 3— action for wrongful death of fetus—decision retroactive

The decision in *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E. 2d 489 (1987), permitting an action for the wrongful death of a viable fetus will be applied retroactively to an action commenced before the date of that decision.

3. Death § 3— wrongful death of "viable" fetus—sufficiency of complaint

Plaintiffs stated a claim under N.C.G.S. § 28A-18-2 for the wrongful death of a "viable" fetus where they alleged that defendant physicians negligently caused the stillbirth of a forty-week-old fetus by failing to treat plaintiff mother's diabetic condition at any time prior to the stillbirth.

4. Damages § 3.4; Negligence § 1.1— emotional distress from injuries to others—no absolute prohibition of recovery—public policy limitations—remoteness

While there is no longer an absolute prohibition of any recovery for the negligent infliction of emotional distress caused by concern for another, the trial judge may be required to weigh public policy limitations on negligence liability in deciding whether a plaintiff's injuries were too remote as a matter of law to be foreseen by the tort-feasor.

5. Damages § 3.4; Negligence § 1.1— emotional distress—sufficient allegation of physical injury

Plaintiff mother sufficiently alleged a physical injury to herself to support her claim for negligently inflicted emotional distress arising from the death of a viable fetus where she alleged that her own diabetes remained untreated by defendant physicians and that the fetus attached to her body died of malnutrition from defendants' failure to treat her diabetes, since the physical injury to the fetus was also a physical injury to plaintiff mother.

6. **Damages § 3.4; Negligence § 1.1— mental anguish from death of fetus—claim not barred by peril to another rule**

Plaintiff mother's claim for the negligent infliction of emotional distress arising from the death of a fetus could not properly be dismissed by the trial court on the ground that it involved emotional distress caused by concern for another since (1) a fetus physically connected to the mother is not "another" person for purposes of the peril to another rule, and (2) the mother's distress at the death of her fetus is not "remote" simply because the fetus may have reached a biological stage which renders it a legal "person" for purposes of the wrongful death statute.

7. **Damages § 3.4— claim for emotional distress—sufficient allegation of physical injury**

Plaintiff father's allegation that he suffered emotional and mental distress from the death of a fetus adequately alleged the element of physical injury required in order to avoid dismissal of his claim for the negligent infliction of emotional distress.

8. **Damages § 3.4— death of fetus—father's claim not barred by public policy**

Plaintiff father's claim for the negligent infliction of emotional distress from the death of a fetus was not too remote or unforeseeable to permit recovery as a matter of public policy.

9. **Damages § 3.5— damages for emotional distress**

In an action for the negligent infliction of emotional distress arising from the death of a fetus, costs associated with medical care and lost wages arising throughout the mother's pregnancy which exceeded the administrator's possible recovery under the wrongful death statute are compensable only in connection with the mother's injuries since the father's emotional injuries arose only at the end of the pregnancy. Furthermore, since the mother also alleged she was injured by the failure of defendant physicians to treat her diabetes, she is entitled to prove she incurred these other damages apart from her claim for emotional distress.

APPEAL by plaintiffs from *Bailey (James H. Pou), Judge.* Order entered 29 May 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 4 February 1987.

Lawrence, Evans & Mazer, by Steven L. Evans, for plaintiff-appellants.

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

GREENE, Judge.

Plaintiffs alleged the individual physician-defendants, formerly practicing as the Ruark Clinic, P.A., negligently caused the

stillborn birth of their forty-week-old fetus. Plaintiffs sought recovery for the wrongful death of their child, for their individual emotional distress, and for certain compensatory and punitive damages. Plaintiffs specifically alleged defendants' failure to treat Mrs. Johnson's diabetic condition caused their infant to die *in utero* of malnutrition. The court granted defendants' motion to dismiss those claims. Although defendants' motion and the court's order are both styled under summary judgment, the record on appeal contains only plaintiffs' and defendants' unverified pleadings. However, the trial court cited its review of the pleadings, briefs and "discovery materials" in dismissing all of plaintiffs' claims. Plaintiffs appeal.

The trial court's dismissal of these claims presents the following issues: I) whether the adequacy of plaintiffs' allegations should be judged by the standards appropriate to summary judgment or instead by those standards appropriate to a judgment on the pleadings; II) where plaintiff administrator alleged defendants' negligence caused the wrongful death *in utero* of his forty-week-old fetus, whether (A) plaintiff stated a claim under N.C.G.S. Sec. 28A-18-2 (1984 and Supp. 1985) for (B) the wrongful death of a "viable" fetus; III) whether the trial court properly dismissed the individual claims of (A) the mother and (B) the father for negligently inflicted emotional distress arising from the fetus's death; and IV) whether plaintiffs may recover increased medical expenses, funeral expenses and all costs associated with medical care and lost wages arising throughout the mother's pregnancy.

I

[1] Plaintiffs argue in their brief that the trial court's dismissal should be treated as a dismissal under N.C.G.S. Sec. 1A-1, Rule 12(b)(6) (1983) since "the total information available to the court at the time of the hearing was the unsworn complaint and unsworn answer." We note defendant-appellees' brief nowhere responds to plaintiffs' charge that only the pleadings were before the court. However, the record twice evidences the apparent existence of unspecified "discovery" materials: 1) the "Motion of Defendants for Summary Judgment" requested judgment based on "the pleadings, *discovery* and the record" and 2) the court's order granting summary judgment states the court had reviewed "the

pleadings, *discovery materials* and defendants' briefs . . ." (emphasis added). Since the only specific materials in the record on appeal indicate the trial court considered matters outside the pleadings, we cannot assume that the trial court limited its review to the pleadings in dismissing plaintiffs' complaint.

However, as defendants have not included any such "discovery materials" in the record, we cannot "carefully scrutinize" them to determine whether they support defendants' burden of "clearly establishing the lack of any triable issue of fact by the record properly before the court." *Page v. Sloan*, 281 N.C. 697, 704, 190 S.E. 2d 189, 195 (1972). Absent these discovery materials in the record, we are unable to determine whether "reasonable men could reach different conclusions on the evidentiary materials offered by defendants to support their motion for summary judgment." *Id.* at 708, 190 S.E. 2d at 195. As there is nothing in the record actually supporting defendants' motion other than their unverified pleadings, we thus cannot conclude that plaintiffs were required under Rule 56(e) to respond with any "specific facts" showing a genuine issue for trial. N.C.G.S. Sec. 1A-1, Rule 56(e) (1983) (non-movant risks dismissal if rests on allegations where motion "supported" as provided under rule); *see Coleman v. Shirlen*, 53 N.C. App. 573, 577, 281 S.E. 2d 431, 434 (1981) (where record did not reflect adequate support on material issues for defendant-movant, appellate court not required to determine whether plaintiff produced specific facts in response); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970) (under identical federal Rule 56(e), supporting affidavits must be in record to be considered by appellate court); J. Moore and J. Wicker, *Moore's Federal Practice* Sec. 56.15[7] (2d ed. 1987) (record must show no genuine issue of material fact).

Therefore, since defendants have not shown plaintiffs were required under Rule 56(e) to respond with specific facts and as the record otherwise reveals only the parties' unverified pleadings, the adequacy of plaintiffs' pleadings shall be judged by those standards appropriate to a judgment on the pleadings. *See Burton v. Kenyon*, 46 N.C. App. 309, 310, 264 S.E. 2d 808, 809 (1980) (where record on appeal contained only pleadings on which to base decision, court treated summary judgment motion as motion on pleadings); *Reichler v. Tillman*, 21 N.C. App. 38, 40, 203 S.E. 2d 68, 70 (1974). Accordingly, we are

> required to view the facts and permissible inferences in the light most favorable to the non-moving party. All well-pleaded factual allegations in the non-moving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the non-movant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E. 2d 494, 499 (1974) (citations omitted).

II

A

A claim for wrongful death under Section 28A-18-2 is ordinarily allowed "[w]hen the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor . . . ." N.C.G.S. Sec. 28A-18-2(a) (1984). At the time the trial court dismissed this wrongful death claim, the courts of this state held a stillborn fetus was not a "person" whose personal representative could sue for the fetus's wrongful death under Section 28A-18-2(a). *E.g., Cardwell v. Welch*, 25 N.C. App. 390, 393, 213 S.E. 2d 382, 384, *cert. denied*, 287 N.C. 464, 215 S.E. 2d 623 (1975) (based on court's construction of legislative intent); *accord Yow v. Nance*, 29 N.C. App. 419, 420, 224 S.E. 2d 292, 293, *disc. rev. denied*, 290 N.C. 312, 225 S.E. 2d 833 (1976); *see also Gay v. Thompson*, 266 N.C. 394, 402, 146 S.E. 2d 425, 431 (1966) (action denied since applicable version of statute only allowed "pecuniary" damages which court held too "speculative" when incurred prenatally).

[2] However, in *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E. 2d 489 (1987), our Supreme Court noted Section 28A-18-2 had been amended to allow non-pecuniary damages. Thus distinguishing its decision in *Gay*, the Court overruled *Cardwell* and *Yow* and instead held:

> The language of our wrongful death statute, its legislative history, and recognition of the statute's broadly remedial objectives compel us to conclude that the uncertainty in the

> meaning of the word 'person' [in Section 28A-18-2(a)] should be resolved in favor of permitting an action to recover for the destruction of a *viable* fetus *en ventre sa mere.*

Id. at 430, 358 S.E. 2d at 493 (emphasis added); *accord Ledford v. Martin*, 87 N.C. App. 88, 89, 359 S.E. 2d 505, 506 (1987). Although the instant action commenced before *DiDonato* was decided, we see no compelling reason why the Court's holding should not be applied retroactively to this case. *See generally Cox v. Haworth*, 304 N.C. 571, 573-76, 284 S.E. 2d 322, 324-26 (1981) (decisions are presumed retroactive unless contrary compelling reason).

As is customary, the trial court gave no specific basis for dismissing the instant wrongful death claim. However, insofar as the trial court's dismissal was based on those decisions denying representatives of a stillborn fetus the remedy of Section 28A-18-2, that basis is meritless after *DiDonato.*

B

The *DiDonato* Court extended the purview of the wrongful death remedy only to "the death of a *viable* fetus." *DiDonato*, 320 N.C. at 434, 358 S.E. 2d at 495 (emphasis added). If the pleadings in this case disclose as a matter of law that plaintiffs' intestate was not "viable" under *DiDonato*, then the trial court's dismissal of the wrongful death claim must be affirmed.

In its discussion of "viability," the *DiDonato* Court noted a preamble to an amendment of the statute "indicates that for purposes of the wrongful death statute, a 'person' is someone who possesses 'human life.' " *Id.* at 427, 358 S.E. 2d at 491. The Court then stated:

> A viable fetus, whatever its legal status might be, is undeniably alive and undeniably human. *It is, by definition, capable of life independent of its mother. A viable fetus is genetically complete and can be taxonomically distinguished from non-human life forms.* Again, this is some evidence that a viable fetus is a person under the wrongful death statute.

Id. at 427-28, 358 S.E. 2d at 491-92 (emphasis added). Of course, a fetus's capability to live independently of the mother is the long-established common law definition of viability. *See, e.g.*, Black's Law Dictionary 1737 (4th ed. 1968) (defining viability as denoting

power of continuing independent existence); *see also* Comment, *Wrong Without a Remedy—North Carolina and the Wrongful Death of a Stillborn*, 9 Campbell L. Rev. 93, 122 n. 189 (1986) (collecting similar definitions of "viable").

However, the *DiDonato* Court also stated that a "viable" fetus is "genetically complete" and "can be taxonomically distinguished from non-human life forms." Given the unique genetic structure of each species, the fetuses of all species are arguably not only genetically complete, but also taxonomically distinguishable from other species, at conception; however, we note the references to these concepts occur in connection with the Court's analysis of whether a fetus possesses "human life" as that phrase was used in the preamble to the amended version of the statute. *DiDonato*, 320 N.C. at 427, 358 S.E. 2d at 491. Rather than more specifically defining "viability," the *DiDonato* Court's references to genetic completeness and taxonomic distinctiveness merely express the Court's restricting the class of "persons" under the statute to those who are "undeniably alive and undeniably human." *Id.*

[3] We therefore conclude the definition of "viability" intended by the *DiDonato* Court is simply the common law definition of fetal capability to live independently of the mother. Although there is apparently no clear medical consensus as to the specific gestational age at which this capability is currently achieved, a gestational range of twenty to twenty-six weeks has been suggested. *See generally* Comment, 9 Campbell L. Rev. at 124; *cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed. 2d 788 (upholding statute defining "viability" as stage of fetal development when life may be continued indefinitely outside womb by natural or artificial means; Court rejected argument that specific gestational age required). However, as the determination of a fetus's viability is a question of fact, we cannot ourselves determine as a matter of law the viability of the Johnson fetus. As the United States Supreme Court stated in *Danforth*:

> [I]t is not the proper function of the legislature or the courts to place viability, which is essentially a medical concept, at a specific point in the gestational period. The time when viability is achieved may vary with each pregnancy . . . .

428 U.S. at 64, 49 L.Ed. 2d at 802.

In addition to alleging the death of a viable fetus entitling them to sue under Section 28A-18-2, plaintiffs must allege facts showing defendants breached a duty to the fetus such that "the decedent could have maintained an action for negligence or some other misconduct if he had survived." *DiDonato*, 320 N.C. at 426, 358 S.E. 2d at 491; *see also Harris v. Wright*, 268 N.C. 654, 658, 151 S.E. 2d 563, 566 (1966) (representative must allege defendant breached some duty owed decedent under circumstances). Of course, the *DiDonato* interpretation of the wrongful death statute would be futile if no duties are owed to any infants *in utero*. *See Ledford*, 87 N.C. App. at 91, 359 S.E. 2d at 507 (stating physician owes duty of care to both pregnant mother and fetus); *cf. Azzolino v. Dingfelder*, 315 N.C. 103, 108, 337 S.E. 2d 528, 532 (1985) (Court merely assumed duty to fetus *arguendo*).

We note that some portion of defendants' alleged negligence necessarily occurred after fetal viability was purportedly achieved since defendants' failure to treat the diabetic condition of the mother continued until the fetus reached forty weeks of gestational age—far longer than the suggested 20-26 week period mentioned earlier. At the least, plaintiffs have therefore sufficiently alleged defendants breached a duty owed their fetus *after* it had become viable. Accordingly, we need not determine whether defendants owed a duty to this fetus *prior* to its achieving viability or whether its achieving "viability" is merely a condition precedent to suit under Section 28A-18-2. *See Stam v. State*, 47 N.C. App. 209, 216, 267 S.E. 2d 335, 341, *aff'd*, 302 N.C. 357, 275 S.E. 2d 439 (1981) (former "live birth" requirement was "condition precedent" to exercise of property rights acquired by unborn child); *Cardwell*, 25 N.C. App. at 393, 213 S.E. 2d at 384 (allowing action when child viable at time of death but no action if child not viable at time of injury "does not solve but merely relocates the problem"); *see also Mackie v. Mackie*, 230 N.C. 152, 155, 52 S.E. 2d 352, 354 (1949) (legal personality is fiction imputed to unborn child for beneficial, but not detrimental, purposes; property interest taken at birth relates back to conception); *cf.* Note, *Azzolino v. Dingfelder: North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims*, 63 N.C.L. Rev. 1329, 1329 (1985) (fetus to whom Court assumed duty was first-trimester and thus presumably pre-viable).

Thus, given the apparent state of current medical capability and the ongoing nature of defendants' alleged failure to treat Mrs. Johnson's diabetes, plaintiffs' pleadings disclose no fact which would as a matter of law prohibit their proving defendants breached a duty of care to this fetus. We therefore reverse the summary dismissal of plaintiffs' wrongful death claim.

III

In their individual capacities, both parents claim damages arising from: (1) the alleged emotional distress of "enduring the labor with the knowledge that their unborn child was dead, and the delivery of a dead child" and (2) the mental distress "resulting from the dramatic circumstances surrounding the stillbirth of their child." Defendants challenge both individual claims for negligently inflicted emotional distress on two grounds.

First, defendants note our courts have stated on occasion that there can be no recovery for mental anguish caused by concern for the welfare or peril of another person. *See, e.g., Williamson v. Bennett*, 251 N.C. 498, 508, 112 S.E. 2d 48, 55 (1960) (where plaintiff erroneously believed she had run over child, Court denied recovery for her mental anguish in part because anxiety was for safety of another, to wit, an "imaginary and non-existent child"); *Ferebee v. Norfolk So. R.R. Co.*, 163 N.C. 351, 355, 79 S.E. 685, 686 (1913) (where plaintiff testified he worried about his physical injury's effect on family, Court excluded testimony since damage must be result of injury affecting plaintiff and not probable effect on family). Defendants argue both plaintiffs' claims for emotional distress arose from their concern for "another person," *i.e.* their unborn son. Second, defendants argue neither plaintiff alleged the necessary fact that his or her negligently inflicted emotional distress was the proximate result of an actual physical impact or resulted in genuine physical injury. *Cf. Williamson*, 251 N.C. at 503, 112 S.E. 2d at 52.

Peril-of-Another Prohibition

[4] In particular, defendants argue the case of *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925), supports their argument that there exists an *absolute* prohibition of any recovery for negligent infliction of emotional distress caused by concern for another. The *Hinnant* Court stated:

> In the law, mental anguish is restricted, as a rule, to such mental pain or suffering as arises from an injury or wrong to the person himself, as distinguished from that form of mental suffering which is the accompanying of sympathy or sorrow for another's suffering, or which arises from a contemplation of wrongs committed on the person of another.

Hinnant, 189 N.C. at 129, 126 S.E. at 312. We note this is the same rationale earlier employed by the *Ferebee* Court to deny recovery. *Ferebee*, 163 N.C. at 355, 79 S.E. at 686 (damages must be confined to those which are "natural and proximate result" of injury as affects plaintiff and concern for effect on another cannot be considered). We further note the *Williamson* Court expressly relied on *Hinnant* in denying that plaintiff's recovery for mental anguish resulting from her concern for an imaginary child. Thus, although *Hinnant* addressed a consortium claim, its "remoteness" rationale was also extended, as in *Williamson*, to bar recovery for emotional distress in non-consortium cases. *See also Michigan Sanitarium and Benevolent Ass'n v. Neal*, 194 N.C. 401, 403, 139 S.E. 2d 841, 842 (1927) (where mother claimed hospital's negligent treatment of her 27-year-old son caused her mental anguish, Court held damages too remote under *Hinnant*).

It is therefore highly significant that our Supreme Court expressly overruled *Hinnant* in *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. 295, 266 S.E. 2d 818 (1980). The *Nicholson* Court specifically rejected any notion that a spouse's emotional injury resulting from injury to the other spouse was too "remote" for measurement. 300 N.C. at 302, 266 S.E. 2d at 822; *see also* Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. Rev. 435, 450-51 n. 94 (1980) (stating mental anguish cannot be excluded from consortium claims given *Nicholson* Court's discussion of broad bonds of marital relationship); *Bailey v. Long*, 172 N.C. 661, 662, 90 S.E. 809, 810 (1916) (holding husband could recover for mental anguish caused by watching wife suffer from physician's negligence). After *Nicholson*, it follows that where some intimate relationships are affected, there is no longer any *absolute* prohibition against compensating emotional distress arising from injuries to others.

However, the existence of an intimate relationship between the plaintiff and the victim is not itself sufficient to permit com-

pensation for emotional distress which arises from plaintiff's sorrow or concern for the victim's injury. While there is no longer an absolute prohibition against such recovery, there are nevertheless limits of public policy inherent in the requirement that the plaintiff's injury be proximately caused by the tort-feasor since the definition of proximate cause necessarily includes two elements: (1) whether the action of the tort-feasor was the "cause-in-fact" of plaintiff's injuries; and (2) whether the tort-feasor's liability should as a matter of public policy extend to those injuries. *See generally* W. Keeton et al., *Prosser and Keeton on The Law of Torts* Sec. 42 (5th ed. 1984); *Wyatt v. Gilmore*, 57 N.C. App. 57, 61-62, 290 S.E. 2d 790, 793 (1982) (summarizing public policy limitations). However, the public policy limitations expressed by the "peril-of-another" prohibition have usually been discussed simply as issues of "remoteness." *See, e.g., Williamson*, 251 N.C. at 504, 112 S.E. 2d at 53 (discussing prohibition with respect to remoteness); *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E. 2d 325, 335 (1981) (stating recovery denied in *Williamson* because connection between minor accident and distress was too "tenuous" and "highly extraordinary"); *Ledford*, 87 N.C. App. at 92, 359 S.E. 2d at 507 (injury in *Williamson* was "too remote and unforeseeable").

While the prohibition against recovery for distress of another is no longer absolute after *Nicholson*, the trial judge may nevertheless be required to weigh public policy limitations on negligence liability where the plaintiff's injuries are arguably too remote as a matter of law. Consequently, while the jury normally determines whether a plaintiff has shown cause-in-fact and foreseeability, where it is contended that plaintiff's injuries are too remote as a matter of law, the trial court may be required to decide whether the tort-feasor was legally exempt from foreseeing plaintiff's injuries in the first place.

It is of course impossible to determine this question in advance for every situation with some fixed formula. However, the court should consider the facts before it in light of the following factors:

1) whether the injury is reasonably close in time and location to the act of the tort-feasor;

2) whether the extent of the injury is wholly out of proportion to the culpability of the tort-feasor;

3) whether, in retrospect, it is too highly extraordinary that the act of the tort-feasor caused the injury;

4) whether recovery would place an unreasonable burden upon those engaged in activities similar to that of the tort-feasor;

5) whether recovery would likely open the way for fraudulent claims; and

6) whether recovery would enter a field with no sensible or just stopping place.

See Wyatt, 57 N.C. App. at 62, 290 S.E. 2d at 793 (finding such public policy limitations did not prohibit claim for negligently inflicted emotional distress).

Physical Injury Requirement

As to the "physical injury" requirement for negligently inflicted emotional distress, we first note as a preliminary matter that a physical "injury" is not required in North Carolina where "coincident in time and place with the occurrence producing the mental stress, some actual physical impact" is caused to the plaintiff. *Williamson*, 251 N.C. at 503, 112 S.E. 2d at 52. However, absent some impact, the emotional distress claimant must manifest some resulting physical injury. *Id.* Furthermore, where the claim for emotional distress is otherwise proper, our courts do not bar recovery simply because strictly separating "physical" from "mental" injuries is difficult:

> [T]he general principles of the law of torts support a right of action for physical injuries resulting from either a willful or a negligent act none the less strongly because the physical injury consists of a wrecked nervous system instead of wounded or lacerated limbs, as those of the former class are frequently much more painful and enduring than those of the latter.

May v. Western Union Tel. Co., 157 N.C. 416, 422, 72 S.E. 1059, 1061 (1911); *accord Stanback v. Stanback*, 297 N.C. 181, 199 n. 1, 254 S.E. 2d 611, 623 n. 1 (1981). Given the difficulty distinguishing "physical" from "mental" injuries, we also note numerous courts have rejected requiring separate allegation or even proof of a physical injury in connection with negligently inflicted emotional

distress. *E.g., Saint Elizabeth Hosp. v. Garrard*, 730 S.W. 2d 649 (Tex. 1987); *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 616 P. 2d 813 (Cal. 1980).

A

[5] We first determine whether the mother has alleged a valid claim for negligently inflicted emotional distress. Treating the mother's allegations as true, she has suffered not one but two physical injuries as a result of defendants' alleged failure to treat her diabetes. First, her own incipient diabetes itself remained untreated for over nine months. *Cf. Ledford*, 87 N.C. App. at 91, 359 S.E. 2d at 90-91 (recovery for mental suffering allowed where mother suffered severe untreated abdominal pain and subsequent surgical removal of stillborn child); *Modaber v. Kelly*, 232 Va. 60, 348 S.E. 2d 233 (1986) (failure to treat mother's toxemia was physical injury to mother allowing her recovery for mental anguish). Second, the fetus attached to Mrs. Johnson's body allegedly died of malnutrition arising from defendant's failure to treat her diabetes. Under these circumstances, the physical injury to the Johnson fetus was also a physical injury to Mrs. Johnson which gave rise to her individual action for mental anguish. *See Modaber* (also holding injury to fetus was injury to mother for mental distress claim); *see also DiDonato*, 320 N.C. at 432 n. 3, 358 S.E. 2d at 494 n. 3 (mother's recovery for her mental anguish at having lost child would "presumably" be available in her own action).

Citing our decision in *Stam v. State*, 47 N.C. App. 209, 267 S.E. 2d 335, *aff'd in relevant part*, 302 N.C. 357, 275 S.E. 2d 439 (1981), defendants assert that our courts do not view an unborn child as part of the mother but rather as a separate entity. Defendants therefore assert that, contrary to the Virginia Supreme Court's decision in *Modaber*, this Court must hold that an injury to a fetus is not an injury to the mother justifying her recovery for emotional distress. On the contrary, we note the *Stam* Court simply held that a fetus is not a "person" enjoying the constitutional protections of Article I, Sections 1 and 19, of our state constitution. *Stam*, 47 N.C. App. at 218, 267 S.E. 2d at 342. The *Stam* Court's recognition that the legal fiction of "personhood" may or may not be imputed to a fetus for some purposes does not determine whether a physical injury to the Johnson fetus *in fact*

caused impact or resulting physical injury to Mrs. Johnson. *See Mackie*, 230 N.C. App. at 155, 52 S.E. 2d at 354 (legal personality "imputed" to unborn child for some, but not all, purposes). Whether Mrs. Johnson herself experienced an impact or physical injury as the result of injuries to this fetus must be determined by proof of physical, biological facts—not by the imputation of legal fictions. As the fetus is normally attached to the mother's uterine wall, we fail to see how a physical impact or injury to the fetus would not normally be an injury or impact to the mother. *Cf. Ledford*, 87 N.C. App. at 92, 359 S.E. 2d at 507 (fetus is connected to its mother "in the most intimate of ways"). We therefore hold Mrs. Johnson properly alleged a physical injury to herself sufficient to support her emotional distress claim.

[6] Furthermore, irrespective of any dispute concerning the scope of the prohibition of recovery for another's peril, we likewise reject defendants' argument that the prohibition has any application to Mrs. Johnson's individual mental anguish claim: so long as the fetus is physically connected to the mother, the fetus cannot be said to be "another" person for purposes of the prohibition. In light of those public policy limits discussed earlier, we in any event cannot conclude Mrs. Johnson's emotional distress at the death of this fetus was as a matter of law too remote. Where the fetus is so intimately attached to the mother, the mother's distress at the death of her fetus is not "remote" simply because the fetus may have reached a biological stage which, under *DiDonato*, renders it a legal "person" for purposes of the wrongful death statute. For these reasons, we hold the trial court erroneously dismissed the mother's claim for mental anguish arising from the death of this fetus.

B

[7] We next determine whether the father has alleged a valid claim for emotional distress. Citing our decision in *Woodell v. Pinehurst Surgical Clinic*, 78 N.C. App. 230, 336 S.E. 2d 716, *aff'd per curiam*, 316 N.C. 550, 342 S.E. 2d 523 (1986), defendants contend Mr. Johnson has failed to allege any impact or physical injury in connection with his emotional distress claim. In *Woodell*, we affirmed a trial court's summary judgment which had been entered after discovery was conducted. The *Woodell* plaintiff's forecast of evidence showed no physical injury where the plaintiff's

pregnancy went full term and resulted in the safe delivery of a healthy baby. *Id.* at 232, 336 S.E. 2d at 718; *see also Campbell v. Pitt County Memorial Hosp., Inc.*, 84 N.C. App. 314, 327, 352 S.E. 2d 902, 909-10, *aff'd*, 319 N.C. 458, 356 S.E. 2d 2 (1987) (at trial, father's evidence showed only genuine anguish without physical injury). Given the plaintiffs' failure in *Woodell* and *Campbell* to offer or even forecast evidence of any physical injury resulting from defendants' acts, those plaintiffs were not entitled to recover for mere mental anguish.

However, the facts of *Woodell* and *Campbell* do not determine Mr. Johnson's claim since defendants here must demonstrate under the standards of Rule 12(c) that *no* forecast of evidence could entitle him to recover on his claim as alleged. In *Stanback*, the Court specifically held that an allegation of "mental anguish" was itself sufficient to allege "physical injury" in connection with a claim for emotional distress:

> Although it is clear that plaintiff must show some physical injury resulting from the emotional disturbance caused by defendant's alleged conduct, given the broad interpretation of 'physical injury' in our case law, we think her allegation that she suffered great mental anguish and anxiety is sufficient to permit her to go to trial upon the question of whether the great mental anguish and anxiety (which she alleges) has caused physical injury.

Stanback, 297 N.C. at 198-99, 254 S.E. 2d at 623. While our Supreme Court later reversed itself in *Dickens* on requiring *any* proof of physical injury where the distress is intentionally inflicted, the *Dickens* Court approvingly referred to the *Stanback* holding quoted above. *Dickens*, 302 N.C. at 448, 276 S.E. 2d at 332. While the *Stanback* Court judged allegations of emotional distress against a motion under Rule 12(b)(6), we note Mr. Johnson's allegations are judged with equal indulgence where the motion is characterized as one under Rule 12(c). Therefore, we think the *Stanback* Court's reasoning on pleading "physical injury" is dispositive where the emotional distress is negligently inflicted.

As our Supreme Court has not rejected the physical injury requirement, we hold that Mr. Johnson's pleadings reveal no fact which would as a matter of law prohibit him from later more specifically forecasting or introducing evidence that his alleged

mental distress resulted in the necessary physical injury. *Cf. Crews v. Provident Finance Co.*, 271 N.C. 684, 690, 157 S.E. 2d 381, 385 (1967) (recovery allowed when distress resulted in nervousness, angina and elevated blood pressure); *Sparks v. Tennessee Mineral Products Corp.*, 212 N.C. 211, 212, 193 S.E. 31, 32 (1937) (recovery allowed where distress resulted in nervousness, weight loss, confinement in bed and other ailments); *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 809, 188 S.E. 625, 625 (1936) (recovery allowed where distress resulted in illness, pain and premature delivery); *see also Byrd*, 58 N.C.L. Rev. at 467 (stating Court has never held physical injury must be contemporaneous). We therefore hold the father's complaint adequately alleged the element of physical injury required in order to avoid dismissal of his emotional distress claim on the pleadings.

[8] We next must determine if the father's alleged emotional distress arising from his concern for his son was so tenuous or remote as to be barred as a matter of public policy. In light of those limiting factors set forth earlier, we hold the father may proceed with proof of his emotional distress claim. First, the father's alleged damages were not as a matter of law so removed in time or location from the injuries to his wife and child that recovery should be barred as a matter of public policy: we specifically note that both plaintiffs were allegedly at the hospital when advised the fetus was dead and both allegedly "endured" Mrs. Johnson's induced labor. Second, we fail to see how "it would be too highly extraordinary" that defendants' allegedly causing this fetus's death would in turn cause the father's emotional distress: on the contrary this would seem to be the ordinary result of such negligence. Third, we cannot say as a matter of law that allowing the father's claim for emotional distress for the death of this child would place a burden on physicians any less reasonable than that already imposed with respect to the physician's treatment of the mother; nor should there be an increased possibility of fraudulent claims given the clearly traumatic circumstances of this case as well as the showing of physical injury required of the father. *See Woodell*, 78 N.C. App. at 232, 336 S.E. 2d at 78 ("physical injury" requirement avoids multitude of suits for less serious distress).

Finally, allowing this father the opportunity to prove his emotional distress claim does not "open a field that has no sensible or just stopping point." *Wyatt*, 57 N.C. App. at 62, 290 S.E.

2d at 793; *cf. Byrd*, 58 N.C.L. Rev. at 452-55 (noting recovery for mental anguish in negligent embalming cases deliberately restricted to next of kin). We note that during pregnancy the physician's relationship with both parents is foreseeable and may be often required. *Compare Bailey*, 172 N.C. at 662, 90 S.E. at 809 (mental anguish recovery allowed where husband witnessed wife's suffering from doctor's negligent maintenance of hospital room) *with Hinnant*, 189 N.C. at 125, 126 S.E. at 310 (noting husband in *Bailey* was not "stranger" to doctor/patient relationship since contract existed between husband and doctor for treatment of wife); *cf. Gallagher v. Duke Univ.*, 638 F. Supp. 979, 982-83 (M.D.N.C. 1986) (allowing physician's liability to couple for negligent genetic counseling and noting couple's right to plan family). There is no similarly foreseeable relationship between the attending physician and the public at large. Most important, the *DiDonato* Court's characterization of a fetus's wrongful death as an injury to the "family unit" clearly provides a sensible limit to the scope of liability. *See DiDonato*, 320 N.C. at 433, 358 S.E. 2d at 495 (injury is to family unit consisting of fetus, mother and father).

Thus, allowing this particular father's claim for emotional distress does not on its face necessarily thwart any relevant public policy limits on defendants' liability. Construing the father's pleadings in light of those limits, we cannot say that as a matter of law his alleged emotional distress was too remote or unforeseeable to permit recovery. In light of our earlier discussion of the adequacy of his allegations of physical injury, we therefore reverse the trial court's dismissal of the father's claim for negligently inflicted emotional distress.

IV

[9] Plaintiffs also seek to recover certain increased medical expenses as well as funeral bills. Such damages can only be recovered by the administrator of the fetal estate pursuant to an action under Section 28A-18-2. *See DiDonato*, 320 N.C. at 434, 358 S.E. 2d at 495; *Boulton v. Onslow County Bd. of Education*, 58 N.C. App. 807, 295 S.E. 2d 246 (1982). While plaintiffs may not recover these damages in their individual capacities, we note plaintiffs have asked for all damages allowed under the wrongful death statute.

Both parents have also claimed "all costs associated with medical care and lost wages during the entire term of a full-term pregnancy which resulted in fetal death *in utero*." Insofar as such costs and lost wages exceed the administrator's possible recovery under the wrongful death statute, such damages are compensable only in connection with the mother's, rather than the father's, injuries since the father's emotional injuries only arose at the end of the pregnancy. *Cf. Jackson v. Baumgardner*, 318 N.C. 172, 182-83, 347 S.E. 2d 743, 750 (1986) (denying father's recovery for costs of child care arising from wrongful birth of child). However, since we have noted the mother was herself allegedly injured by defendants' failure to treat her diabetes, we cannot say as a matter of law that she has not stated a claim for damages apart from her emotional distress arising from the death of her child. We therefore hold Mrs. Johnson should be allowed to prove she incurred these other damages throughout her pregnancy as a result of defendants' alleged acts and omissions.

In summary, we hold the trial court erroneously dismissed the administrator's wrongful death claim as well as the parents' claims for negligently inflicted emotional distress and Mrs. Johnson's claim for other damages. The judgment of the trial court is therefore reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges WELLS and EAGLES concur.

IN THE MATTER OF: JULIE RENEE BULLABOUGH, JUVENILE

No. 8725DC720

(Filed 15 March 1988)

1. Infants § 10— juvenile delinquent—right to transcript of proceedings at State expense

Proceedings under Section 7A-636 of the Juvenile Code are to be reported and transcribed as other "civil trials" in accordance with N.C.G.S. § 7A-198, and a transcription of the record of this particular juvenile proceeding was "required," as the term is used in that statute, because a juvenile is presumed in-

digent; an indigent appellant is entitled to a copy of the trial transcript at State expense if needed to provide an adequate and effective appellate review; and the record disclosed no adequate alternative devices which would have fulfilled the same functions as the transcript.

2. Infants § 10— right of juvenile to transcript of delinquency hearing—reimbursement of attorney for transcription

A juvenile was not prejudiced by the court's failure to direct the clerk of superior court to transcribe the record, since the record was timely reduced to writing by the juvenile's attorney, but the attorney should be reimbursed for his reasonable expenses in having the transcript prepared, since the juvenile was entitled to the transcript at State expense.

3. Infants § 20— oral entry of juvenile order proper

Under Rule 58 of the Rules of Civil Procedure, a judge may make an oral entry of a juvenile order provided the order is subsequently reduced to written form as required by N.C.G.S. § 7A-651.

4. Infants § 18— juvenile delinquent—cross-examination about running away from home—admissibility of evidence

In a juvenile proceeding to consider detention of a juvenile who had violated conditions of her probation by running away from the home where she had been placed, there was no merit to the juvenile's contention that the assistant district attorney's cross-examination of her about twice running away from the county receiving home was error because this information was irrelevant, since the evidence was testimony by the juvenile herself and therefore reliable, accurate, and competent, and since the evidence was relevant in assisting the trial judge to determine the needs of the juvenile.

5. Infants § 21— juvenile delinquent—appeal—failure to set out omitted conclusions

The issue of the authority of a court counselor to issue a secure custody order was not properly before the appellate court where the juvenile failed to set out in the record on appeal the substance of any omitted findings or conclusions as required by N.C. R. App. P. 10(b)(2).

6. Infants § 20— juvenile delinquent—secure custody order—no grounds

No grounds existed for a secure custody order in this juvenile proceeding under the authority of N.C.G.S. § 7A-574(b)(2) where the juvenile had not willfully failed to appear, and there was no allegation that the juvenile committed any acts which damaged property or injured persons while on probation.

7. Infants § 21— unlawful detention of juvenile delinquent—issue not raised before trial court

A juvenile waived any right she had to assert her unlawful detention where the issue was not raised before the trial court, and the juvenile failed to file any habeas corpus action; furthermore, there was no showing that the unlawful detention in any way prejudiced the juvenile in the adjudicatory or dispositional hearing.

8. **Infants § 20— emergency commitment of juvenile improper—juvenile not prejudiced**

The trial court erred in ordering an "emergency commitment" of the juvenile to the Division of Youth Services without stating any reasons or findings of fact supporting the order, but the juvenile did not show that the error prejudiced her in the adjudicatory or dispositional hearings.

9. **Infants § 20— juvenile delinquent—finding that dispositional alternatives were unsuccessful or inappropriate—no supporting evidence**

The trial court's finding that alternatives to the commitment of a juvenile were either attempted unsuccessfully or were inappropriate was not supported by the evidence and was therefore error where the record was silent as to any evidence which would assist the court in determining the needs of the juvenile; there was no evidence that the court even considered non-custodial alternatives to commitment as outlined in N.C.G.S. § 7A-649; there was no evidence that the court considered any other "community-level resources" not referred to in the statute; and there was no evidence to support the finding that the juvenile would not adjust in her own home while "other services [were] being provided."

10. **Infants § 18— juvenile's unauthorized use of vehicle—juvenile not a threat to persons or property**

The unauthorized use of a motor vehicle, standing alone without further evidence, was insufficient to support a finding that a juvenile was a threat to persons or property.

APPEAL by juvenile from *Bogle (Ronald E.), Judge.* Order entered 24 February 1987 in District Court, CATAWBA County. Heard in the Court of Appeals 12 January 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David Gordon, for the State.

Simpson, Aycock, Beyer & Simpson, by Michael Doran, for respondent-appellant.

GREENE, Judge.

This is a juvenile proceeding in which the district court judge found that the juvenile, Julie Renee Bullabough, violated the terms of her juvenile probation. The trial judge committed the juvenile to the Division of Youth Services for an indefinite term not to exceed one year. The juvenile appeals.

On 31 July 1986, the district court adjudicated the juvenile as delinquent and placed her on juvenile probation for the unauthorized use of a motor vehicle. One of the conditions of the probation

required the juvenile to "[a]ccept whatever placement made by her custodian, Catawba County Department of Social Services, and not run away from that placement."

On 7 January 1987, the juvenile court counselor filed a motion requesting a court review of the 31 July 1986 dispositional order. In the motion, the court counselor alleged the juvenile violated the terms of her probation in that she failed to return to the Mills Home where she had been placed by the Catawba County Department of Social Services. Prior to filing the juvenile summons on 16 February 1987, the court counselor issued an "Order to Assume Custody" on 7 January 1987. The order directed placement of the juvenile in secure custody in the Gaston Regional Detention Center. On 13 February 1987, this order was served on the juvenile and the juvenile was placed in the detention center. On 18 February 1987, the district court judge entered an order directing continued secure custody for the juvenile until a hearing on the merits on 24 February 1987.

Among those present at the hearing on the merits were the attorney for the juvenile, representatives from the Department of Social Services, and the Assistant District Attorney. At the hearing, the juvenile admitted she had violated the terms of her probation. Based on that admission, the trial judge found her to be within the jurisdiction of the court as a delinquent. The court then proceeded to the dispositional hearing.

At the dispositional hearing, the Assistant District Attorney introduced into evidence a portion of the Catawba County Department of Social Services' (hereinafter the "Department") "custody review summary." In that summary, the Department recommended placement of the juvenile in "a more restrictive atmosphere such as training school." The Department's summary also stated "group home, foster home and treatment facilities have all been pursued and are not available." The court further considered the court counselor's report which indicated the juvenile was fifteen years old, one of seventeen children, and that the mother of the juvenile resided with one of her daughters, a sister of the juvenile. The court counselor also recommended commitment to training school.

Further evidence showed that on 9 September 1986, the juvenile was placed in a group home by the Department and remained

there until 4 January 1987, when she refused to return from a home visit with her mother. On cross-examination, the juvenile admitted that in March and May of 1986, she had run away from the county receiving home. She also admitted telling the Department that "the more places they put me at, the more I am going to run until they let me go home." The sister of the juvenile testified she owned a 34-acre farm, that the juvenile's mother lived with her and that the juvenile could live with her on the farm.

After hearing the evidence, the trial judge stated in open court that the juvenile had a frequent history of running away and found there was "no less intrusive means of assisting Julie than commitment to the Division of Youth Services and that her best interest [would] be served by the entry of this order." After committing her to the Division of Youth Services, the judge further ordered the commitment to be "an emergency commitment."

On 3 March 1987, the court filed a written order which included the following pertinent findings:

> [T]here are no community based facilities in Catawba County that will accept Julie . . .;
>
> . . . .
>
> (2) The juvenile has not or would not adjust in her own home on probation or while other services are being provided;
>
> (3) Community residential care has already been utilized or would not be successful or is not available;
>
> (4) The juvenile's behavior constitutes some threat to persons or property in the community;
>
> (5) The alternatives to commitment as contained in G.S. 7A-649 have been attempted unsuccessfully or are inappropriate.

On 27 April 1987, the court entered an order directing that the records of the hearing be reduced to a written transcript but denied the juvenile's request that this be done by the Office of the Clerk of Superior Court. The transcript was subsequently prepared by the juvenile's attorney from the tapes provided by the Clerk's office.

This appeal presents the following issues: (I) whether the Clerk of the Superior Court has a duty to reduce to a written transcript the electronically recorded tapes of a juvenile proceeding; (II) whether the written order which included findings not announced in open court was error; (III) whether the trial court committed error in allowing cross-examination of the juvenile as to behavior occurring prior to the delinquent act for which the defendant was on probation; (IV) whether holding the juvenile in secure custody pending the hearing was error because (A) the court counselor had no authority to issue a secure custody order or (B) N.C.G.S. Sec. 7A-574 does not authorize secure custody of a juvenile who is alleged to have violated probation; (V) whether the emergency commitment of the juvenile was error; (VI) whether there is evidence in the record to support the findings of fact that (A) alternatives to commitment to the Division of Youth Services had been attempted unsuccessfully or were inappropriate and (B) the juvenile's behavior constituted a threat to persons or property in the community.

I

[1] The adjudicatory and dispositional hearings were recorded by a tape recorder. An order was presented to the trial judge by the juvenile's attorney requesting that the records of the proceedings "be reduced to a written transcript by the Office of the Clerk of Superior Court." The trial judge refused to direct the Clerk to prepare the written transcript and simply ordered its preparation without stating who had that responsibility. An employee of the juvenile's attorney subsequently prepared the transcript. The juvenile contends the Clerk of Superior Court had the duty to transcribe the tape of the proceedings. In addition, the juvenile's attorney maintains he should be reimbursed for his costs in transcribing the proceedings.

Section 7A-636 (1986) of the North Carolina General Statutes requires the recording of juvenile adjudicatory and dispositional hearings by either stenographic notes or by electronic or mechanical means. The Juvenile Code is silent as to who has the duty to operate the recording device and the duty to transcribe the record. The Code does provide that the record shall be reduced to a written transcript only when "timely notice of appeal has been given." N.C.G.S. Sec. 7A-636.

At the time of this hearing on 24 February 1987, the Clerk of Superior Court had the duty in all district court "civil trials" not only to operate recording devices, but to transcribe the record as required. *See* N.C.G.S. Sec. 7A-198(c) (1986). (Effective 16 June 1987, the statute was amended to require the transcription of the record in "civil trials" by "any person designated by the Administrative Office of the Courts." *Id.* (Supp. 1987).) Therefore, we inquire into whether a juvenile probation hearing is a "civil trial" within the meaning of N.C.G.S. Sec. 7A-198.

Our courts have held that juvenile delinquency proceedings are not "criminal prosecutions." *In re Burrus*, 275 N.C. 517, 529, 169 S.E. 2d 879, 886 (1969), *aff'd sub nom., McKeiver v. Pennsylvania*, 403 U.S. 528, 550-51, 29 L.Ed. 2d 647, 664 (1971) (juvenile delinquency proceedings not equated with criminal prosecutions). Therefore, a Juvenile Code proceeding may be classified as either a civil action or a special proceeding.

With a few exceptions enumerated in the statute, the Legislature has designated the superior court division as the proper division to hear special proceedings. N.C.G.S. Sec. 7A-246. The listed exceptions are: proceedings under the Protection of the Abused, Neglected or Exploited Disabled Adult Act, proceedings for involuntary commitment to treatment facilities, and proceedings involving the appointment of guardians and administration of certain trusts. Proceedings under the Juvenile Code are not among these exceptions. As the district court division has exclusive original jurisdiction of Juvenile Code matters, N.C.G.S. Secs. 7A-523 and 7A-517(9) (1986 and Supp. 1987), actions under the Juvenile Code are not special proceedings. Furthermore, our courts have held that appeals *in forma pauperis* from juvenile proceedings are governed by N.C.G.S. Sec. 1-288 which refers to appeals from *civil actions* tried in district court. *See In re Burrus*, 275 N.C. at 535, 169 S.E. 2d at 890; *In re Shields*, 68 N.C. App. 561, 562, 315 S.E. 2d 797, 798 (1984). Accordingly, we hold proceedings under Section 7A-636 of the Juvenile Code are to be reported as other "civil trials" in accordance with N.C.G.S. Sec. 7A-198.

We now determine if the transcription of the record of the juvenile proceeding was "required" as that term is used in N.C.G.S. Sec. 7A-198(c). An indigent appellant is entitled to a copy

of the trial transcript at State expense if needed to provide an adequate and effective appellate review. *State v. Roux*, 263 N.C. 149, 157, 139 S.E. 2d 189, 195 (1964); *State v. Rich*, 13 N.C. App. 60, 63, 185 S.E. 2d 288, 290 (1971), *cert. denied*, 280 N.C. 304, 186 S.E. 2d 179 (1972). This appellant, as a juvenile, is presumed indigent. N.C.G.S. Sec. 7A-584(b). Whether a transcript was necessary for the appeal can be determined by considering:

> (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.

State v. Matthews, 295 N.C. 265, 289, 245 S.E. 2d 727, 741 (1978) (quoting *Britt v. North Carolina*, 404 U.S. 226, 227, 30 L.Ed. 2d 400, 403-04 (1971)), *cert. denied*, 439 U.S. 1128, 59 L.Ed. 2d 90 (1979).

[2] Here, the trial court ordered preparation of the transcript of the proceedings. The record discloses no adequate alternative devices that would have fulfilled the same functions as the transcript. *See Britt*, 404 U.S. at 230, 30 L.Ed. 2d at 405 (defendant claiming right to free transcript does not bear burden of proving inadequate alternatives suggested by the State in hindsight). Therefore, the transcript was necessary for this appellant to prepare her appeal and was "required" under N.C.G.S. Sec. 7A-198(c). The trial court was in error in failing to direct the Clerk of the Superior Court to transcribe the record. However, as the record was timely reduced to writing by the juvenile's attorney, there has been no prejudicial error. *See Glenn v. Raleigh*, 248 N.C. 378, 383, 103 S.E. 2d 482, 487 (1958) (in order to justify a new trial, error must be material and prejudicial with a different result likely).

The juvenile's attorney requests reimbursement for the expenses he incurred in transcribing the tapes. As we have determined the juvenile was entitled to the transcript at State expense, her attorney should be reimbursed for his reasonable expenses in having the transcript prepared. *See* N.C.G.S. Sec. 7A-450(b) ("it is the responsibility of the State to provide [an indigent] with counsel and the other necessary expenses of representation").

II

[3] The juvenile next argues that since the trial judge announced findings of fact and conclusions of law in open court he was precluded from entering a written order that included any findings of fact or conclusions of law not announced in open court.

Section 7A-651 of our General Statutes does not require the trial judge to announce in open court his findings and conclusions, mandating only that the *terms* of the disposition be stated in open court with "particularity." The terms of the disposition are to include the "kind, duration and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested." N.C.G.S. Sec. 7A-651. The statute does not require the written dispositional order to contain "appropriate findings of fact and conclusions of law." *Id.*

As noted earlier, actions under the Juvenile Code are in the nature of civil actions. As such, proceedings in juvenile matters are to be governed by the Rules of Civil Procedure, unless otherwise provided by the Juvenile Code or some other statute. *See* N.C.G.S. Sec. 7A-193 ("[e]xcept as otherwise provided in this Chapter, the civil procedure provided in Chapters 1 and 1A of the General Statutes applies in the district court division of the General Court of Justice"); N.C.G.S. Sec. 1A-1, Rule 1 (1983) (Rules of Civil Procedure govern "in all actions and proceedings of a civil nature except where a differing procedure is prescribed by statute"); *see also In re Clark*, 303 N.C. 592, 598 n. 3, 281 S.E. 2d 47, 52 n. 3 (1981) (proceedings to terminate parental rights are either civil actions or special proceedings, both of which are governed by the Rules of Civil Procedure, "except where a different procedure may be prescribed by statute"). Our review of the Juvenile Code reveals no statute except N.C.G.S. Sec. 7A-651 relating to the procedural requirements for the entry of a dispositional order. Therefore, we evaluate the procedural validity of the dispositional order in light of the Rules of Civil Procedure and N.C.G.S. Sec. 7A-651. *See In re Moore*, 306 N.C. 394, 400, 293 S.E. 2d 127, 130-31 (1982) (court applied Rule 58 to determine time of entry of order in termination of parental rights cases), *appeal dismissed*, 459 U.S. 1139, 74 L.Ed. 2d 987 (1983).

The juvenile argues the trial judge erred in making certain findings and conclusions in the written order which he did not

state in open court. However, the *terms* of the disposition in the oral and written statements were the same. Furthermore, no juvenile code statute precludes oral entry of a juvenile dispositional order. Therefore, under Rule 58 of the Rules of Civil Procedure, we hold a judge may make an oral entry of a juvenile order provided the order is subsequently reduced to written form as required by Section 7A-651.

Pursuant to Rule 58, the trial judge has the authority to "make a written judgment that conforms in general terms with an oral judgment pronounced in open court." *Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E. 2d 120, 126 (1987); *see also Hightower v. Hightower*, 85 N.C. App. 333, 337, 354 S.E. 2d 743, 745 (after "entry" of judgment in open court, a trial court retains authority to approve judgment and direct its prompt preparation and filing), *cert. denied*, 320 N.C. 792, 361 S.E. 2d 76 (1987). The written order here conforms generally with the oral announcement of the order in open court and therefore the written order was valid. Accordingly, the dispositional order entered by the trial judge was proper under both Section 7A-651 and Rule 58.

III

[4] The juvenile argues the Assistant District Attorney's cross-examination of her about twice running away from the county receiving home was error because this information was irrelevant. The acts about which she was questioned occurred prior to the delinquent act for which the juvenile was placed on probation and nothing in the record indicates she was adjudicated undisciplined for these acts.

The dispositional hearing is to be informal and the judge is permitted to consider any evidence "concerning the needs of the juvenile." N.C.G.S. Sec. 7A-640. The trial judge was not restricted to consideration of only those acts for which there had been an adjudication. If the information presented is determined by the trial judge to be reliable, accurate and competently obtained, he may properly consider it. *See In re Vinson*, 298 N.C. 640, 669, 260 S.E. 2d 591, 608 (1979) (trial judge has wide discretion in determining admissibility of unadjudicated and unrelated acts but must first determine that evidence is "reliable and accurate and that it was competently obtained"); *In re Barkley*, 61 N.C. App. 267,

270-71, 300 S.E. 2d 713, 716 (1983) (unadjudicated acts may be considered in dispositional hearing).

The juvenile testified she had run away from the county receiving home and therefore the evidence was reliable, accurate and competent. In any event, the juvenile has objected to the evidence only on the grounds of relevancy and the evidence was certainly relevant in assisting the trial judge to determine the "needs of the juvenile."

IV

On 7 January 1987, the juvenile was placed in secure custody pursuant to an order signed by the court counselor. On the same day, the court counselor filed a motion for review, alleging a violation of the juvenile probation order. The juvenile first argues the court counselor was without the authority to execute the secure custody order. Second, she contends even if the counselor had the authority, there existed no legal grounds for issuance of a secure custody order.

A

[5] Section 7A-573 of our General Statutes authorizes a district court judge to place a juvenile in secure or non-secure custody pursuant to the criteria established in N.C.G.S. Sec. 7A-574. The chief district court judge may delegate this authority "by administrative order" to other persons including court counselors. N.C.G.S. Sec. 7A-573. The order of delegation "shall be filed in the office of the clerk of superior court." *Id.* If the juvenile is alleged to have committed a delinquent or undisciplined act, only "a judge or the chief court counselor or his counseling staff" may issue the custody order. *Id.*

The record does not indicate whether the chief district court judge authorized the court counselor to issue secure custody orders. However, the juvenile has failed to set out in the record on appeal the substance of any omitted findings or conclusions as required by N.C. R. App. P. 10(b)(2) and therefore the issue of the authority of the court counselor to issue the secure custody order is not properly before this court.

B

The juvenile further contends N.C.G.S. Sec. 7A-574 does not authorize secure custody of a juvenile who is alleged only to have violated the terms of her probation. Our Juvenile Code allows secure custody of a juvenile on probation in two instances, both of which are set out in N.C.G.S. Sec. 7A-574. The pertinent subsections provide:

> (b) When a request is made for secure custody, the judge may order secure custody only where he finds there is a reasonable factual basis to believe that the juvenile actually committed the offense as alleged in the petition, and
>
> . . . .
>
> (2) That *the juvenile has willfully failed to appear* on a pending delinquency charge or *on charges of violation of probation* or conditional release, *providing the juvenile was properly notified;*
>
> . . . .
>
> (c) When a juvenile has been adjudicated delinquent, the judge may order secure custody pending the dispositional hearing or pending placement of a delinquent juvenile pursuant to G.S. 7A-649. *The judge may also order secure custody for a juvenile who is alleged to have violated the conditions of his probation* or conditional release *only if the juvenile is alleged to have committed acts that damage property or injure persons.*

N.C.G.S. Secs. 7A-574(b)(2) and 7A-574(c) (emphasis added).

[6] No grounds exist for a secure custody order in the present case under the authority of Section 7A-574(b)(2). That subsection permits secure custody where the juvenile has "willfully failed to appear . . . on charges of violation of probation. . . ." The custody order here was issued prior to any notification to the juvenile of the pending hearing concerning her alleged probation violation and therefore could not serve as a basis for the secure custody order, as she had not "willfully failed to appear."

Nor was there authority under N.C.G.S. Sec. 7A-574(c) to order secure custody for this juvenile where there was no allega-

tion the juvenile committed any "acts that damage property or injure persons" while on probation. The motion for review alleged only that the juvenile had "failed to return to the 'Mills Home,' Thomasville, N.C., where she had been placed by her custodian, the Catawba County Department of Social Services." Section 7A-574(c) does not authorize issuance of a secure custody order for a juvenile who has previously been adjudicated delinquent simply because the juvenile is now alleged to have violated the terms of her probation. Therefore, the juvenile was unlawfully detained from 13 February 1987, the date of the execution of the secure custody order, until 24 February 1987, the date of the judicial adjudication and disposition.

[7] We must further determine if the unlawful detention occurring prior to the adjudication is reversible error. Our Supreme Court has held that the failure to assert a constitutional or statutory right in the trial court is a waiver of that right. *See State v. Gaiten*, 277 N.C. 236, 239, 176 S.E. 2d 778, 781 (1970). Here, the record does not reflect that the issue of the unlawful detention of the juvenile was raised before the trial court. The juvenile also failed to file any habeas corpus action, which is a proper method to challenge an unlawful detention. *See In re Burton*, 257 N.C. 534, 540-41, 126 S.E. 2d 581, 586 (1962). Therefore, the juvenile's failure to raise the issue below is deemed a waiver of any claim she now has to assert her unlawful detention. Furthermore, there has been no showing that the unlawful detention in any way prejudiced the juvenile in the adjudicatory or dispositional hearing. *See State v. Easterling*, 300 N.C. 594, 609, 268 S.E. 2d 800, 809 (1980) (prejudice exists when there is a reasonable possibility a different result would have been reached if no error); *see also State v. Burgess*, 33 N.C. App. 76, 78, 234 S.E. 2d 40, 41 (1977) (failure to take criminal defendant before a magistrate without unnecessary delay did not entitle defendant to new trial without showing of prejudice).

V

[8] The juvenile next contends the trial judge committed error in ordering an "emergency commitment" to the Division of Youth Services. While the Juvenile Code does not use the words "emergency commitment," the effect of the trial court's order was to place the juvenile in custody pending appeal. Section 7A-668 per-

mits the trial judge to enter temporary orders affecting the custody of the juvenile pending disposition of an appeal. The statute states: "For compelling reasons which must be stated in writing, the judge may enter a temporary order affecting the custody or placement of the juvenile as he finds to be in the best interest of the juvenile or the State." Here, the order was in writing but merely stated this was an "emergency commitment" without stating any reasons or findings of fact supporting the order. This was error. Again, however, the juvenile has not shown the error to have prejudiced her in the adjudicatory or dispositional hearings. *See In re Bass*, 77 N.C. App. 110, 117, 334 S.E. 2d 779, 783 (1985).

VI

The juvenile finally argues that certain findings of fact were not supported by the evidence. Prior to any commitment to the Division of Youth Services, the trial judge must first find that

> the alternatives to commitment as contained in G.S. 7A-649 have been attempted unsuccessfully or are inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community.

N.C.G.S. Sec. 7A-652(a). The findings must be supported by some evidence in the record. *In re Vinson*, 298 N.C. 640, 672, 260 S.E. 2d 591, 610 (1979); *In re Khork*, 71 N.C. App. 151, 155, 321 S.E. 2d 487, 490 (1984).

Here, the trial judge made the necessary findings of fact, essentially using the very language employed by the statute. However, our review of the record does not disclose evidence to support the required findings.

A

[9] First, on the finding regarding alternatives to commitment, the record shows that the Department of Social Services recommended a "restrictive atmosphere such as training school" indicating the juvenile would run away from any less restrictive placement. The department's recommendation further stated that "group homes, foster homes and treatment facilities have all been pursued and are not available." The juvenile herself testified that "the more places they put me at, the more I am going to run until

they let me go home." The court counselor's report indicated that no resources were available for the juvenile and also recommended commitment to training school.

The alternatives to a commitment to the Division of Youth Services given in N.C.G.S. Sec. 7A-649 include: a suspended imposition of a more severe disposition, restitution, fine, supervised community service, a supervised day program, a community-based program of academic or vocational education, a professional residential or non-residential treatment program, intermittent confinement in a detention facility, supervised probation, and forfeiture of privileges to operate a motor vehicle.

In determining the appropriate disposition, the court should be guided by the language of N.C.G.S. Sec. 7A-646 which provides in pertinent part:

> If possible, the initial approach should involve working with the juvenile and his family in their home so that the appropriate community resources may be involved in care, supervision and treatment *according to the needs of the juvenile.* Thus, the *judge should arrange for appropriate community-level services* to be provided *to the juvenile and his family* in order to strengthen the home situation.
>
> In choosing among statutorily permissible dispositions for a delinquent juvenile, the judge shall select the least restrictive disposition both in terms of kind and duration, that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile. *A juvenile should not be committed to training school or to any other institution if he can be helped through community-level resources.*

(Emphasis added.)

This statute necessarily requires the judge to first determine the needs of the juvenile and then to determine the appropriate community resources required to meet those needs in order to strengthen the home situation of the juvenile. In selecting among the dispositional alternatives, the trial judge is required to select the least restrictive disposition taking into account the seriousness of the offense, degree of culpability, age, prior record, and

circumstances of the particular case. The judge must also weigh the state's best interest and select a disposition consistent with public safety, *In re Jackson*, 84 N.C. App. 167, 173, 352 S.E. 2d 449, 453 (1987), and within the judge's statutorily granted authority. *See In re Wharton*, 305 N.C. 565, 290 S.E. 2d 688 (1982) (juvenile court exceeded authority by ordering creation of foster home for juveniles); and *In re Brownlee*, 301 N.C. 532, 553, 272 S.E. 2d 861, 874 (1981) (indicating that in appropriate situations, a juvenile disposition may include use of non-governmental resources).

Here, the record is silent as to any evidence that would assist the court in determining the needs of the juvenile such as psychological evaluations, school records, home evaluations, medical examinations, or a history of abuse or neglect. The record is likewise silent as to any community resources that might be appropriate to meet the needs of the juvenile. While the evidence is sufficient to support the court's finding that community-based custodial placements are inappropriate because the child would run away, there is no evidence the court even considered non-custodial alternatives to commitment as outlined in N.C.G.S. Sec. 7A-649. Nor is there evidence in the record the court considered any other "community-level resources" not referred to in Section 7A-649. *See In re Brownlee*, 301 N.C. at 551, 272 S.E. 2d at 872. ("[t]he relationship of family and friends is an important component in the rehabilitative program for a youthful offender"); *In re Hughes*, 50 N.C. App. 258, 262, 273 S.E. 2d 324, 326 (1981) (commitment to training school should be avoided if juvenile could be helped through community-level resources). While the court did find as a fact that the juvenile would not adjust in her own home while "other services are being provided," there is no evidence in the record to support this finding. Accordingly, the finding that alternatives to commitment were either attempted unsuccessfully or were inappropriate was not supported by the evidence and therefore was error.

B

[10] The trial court also found that the juvenile's behavior constituted a threat to persons or property in the community. The record indicates the juvenile had committed the delinquent act of unauthorized use of a motor vehicle and had run away from sever-

al custodial placements outside the home. There is no evidence of any other delinquent activity and no evidence of damage to persons or property. We hold that under the facts here, the unauthorized use of a motor vehicle standing alone without further evidence, was insufficient to support a finding that the juvenile was a threat to persons or property. *See In re Khork*, 71 N.C. App. at 155-56, 321 S.E. 2d at 490 ("Where no evidence of the appropriateness of incarceration is presented in the dispositional hearing, defendant may not be committed based upon the perceived seriousness of the offense alone."). The fact that the juvenile ran away from placements outside her home is not itself evidence of a "threat to persons or property in the community." *See In re Hughes*, 50 N.C. App. at 261, 273 S.E. 2d at 326 (commitment to the Division of Youth Services is not permitted for undisciplined behavior). Accordingly, the finding that the juvenile's behavior constituted a threat to persons or property in the community was not supported by the evidence in the record and was error.

VII

In conclusion, the order of the trial court committing the juvenile to the Division of Youth Services is vacated and the matter is remanded to the trial court for the entry of an appropriate dispositional order consistent with this opinion. On remand, the trial court should also determine the reimbursement amount due the juvenile's attorney for his reasonable costs in transcribing the record. Furthermore, the "emergency commitment" order entered by the trial court is vacated.

Vacated and remanded.

Judges PARKER and COZORT concur.

EVELYN GRACE COLEMAN, ADMINISTRATRIX FOR THE ESTATE OF MONICA AVIS COBB AND MARION ANNETTE COLEMAN v. KATHY LUNCEFORD COOPER, (FORMERLY KATHY LUNCEFORD), WAKE COUNTY, THE CITY OF RALEIGH, AND THE CITY OF RALEIGH POLICE DEPARTMENT

No. 8710SC834

(Filed 15 March 1988)

1. **Municipal Corporations §§ 10 and 12.3— wrongful death action—police department—not person in being**

The trial court did not err by granting summary judgment against plaintiffs in an action against the Raleigh Police Department. Only persons in being may be sued unless a statute provides to the contrary and there is no statute authorizing suit against a police department in North Carolina.

2. **Municipal Corporations § 9.1— witnesses killed—wrongful death action—no duty by police to protect**

The trial court did not err in entering summary judgment for the City of Raleigh in a wrongful death action arising from the deaths of two child witnesses who were also victims of sexual abuse where the undisputed evidence tended to show that, although Officer Phillips knew of the prior acts of violence committed by Melvin Coleman towards the victims, the children had indicated to him that they were not afraid of Coleman; the record is devoid of any evidence which would tend to show that Officer Phillips ever told plaintiff or her intestates that any kind of protection would be afforded them; the evidence also fails to establish a special relationship between the police and plaintiff's intestates; and there was no duty on the part of the police department which would give rise to any liability involving the City of Raleigh.

3. **Counties § 9— abused children—wrongful death action—liability of county and social worker**

The trial court erred by granting summary judgment for defendant social worker and Wake County in an action arising from the wrongful death of abused children where the social worker was fully aware that plaintiff's intestates had suffered physical and sexual abuse at the hands of Melvin Coleman; the social worker was also aware that physical abuse had at times been directed at plaintiff; plaintiff had related to the social worker her concern about the reaction of Melvin Coleman when he found out about the investigation; the social worker had given instructions to school authorities that Melvin Coleman was not to be allowed access to the children; and the record is otherwise silent with regard to what determination if any was made concerning the risk of harm to plaintiff's intestates or whether they should have been provided any type of protective services.

4. **Parent and Child § 3; Death § 11— murder of abused children—wrongful death action—contributory negligence by parent**

In a wrongful death action by a parent arising from the murder of her two abused children after an investigation began into their abuse, the question of the parent's contributory negligence was a matter for the jury where plaintiff

parent had the same information if not more concerning the potential risks to the children as the social worker but took no action other than to ask a neighbor to watch for the car of the man who had abused them when the children were alone, the social worker had asserted that adequate police protection would be provided if needed, and plaintiff asserted that she thought police protection was being provided.

APPEAL by plaintiff from *Farmer (Robert L.), Judge.* Orders entered 27 May 1987 and 5 June 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 3 February 1988.

Plaintiff, administratrix of the estates of her minor daughters, brought this action for damages for the wrongful deaths of plaintiff's intestates resulting from the alleged negligence of defendants. On 27 May 1987, the trial court entered an order granting summary judgment for defendants Kathy L. Cooper (Cooper) and Wake County. On 5 June 1987, the trial court granted summary judgment for defendants City of Raleigh and City of Raleigh Police Department (Police Department). Plaintiff appeals.

Blanchard, Tucker, Twiggs & Abrams, P.A., by Douglas B. Abrams and Anna Neal Currin, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Grady S. Patterson, Jr., and Susan K. Burkhart; Corrine G. Russell and Michael R. Ferrell for defendants-appellees Kathy Lunceford Cooper and Wake County.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and J. Daniel McNatt; and Conely & Stephens, P.A., by Richard B. Conely, for defendants-appellees the City of Raleigh and the City of Raleigh Police Department.

SMITH, Judge.

The undisputed facts as admitted and as appear from affidavits and depositions filed in this cause are as follows: Plaintiff's intestates were her two minor daughters. Defendant Cooper, an employee of the Wake County Department of Social Services (DSS), received information which led her to believe that the two minors might be victims of sexual abuse. Cooper interviewed the children and each related incidents of extensive sexual contact with Melvin Coleman, the natural father of the youngest child and

the stepfather of the eldest child. Melvin Coleman had divorced plaintiff in 1979.

Cooper interviewed plaintiff who acknowledged that the children had told her of sexual abuse by Melvin Coleman. Cooper informed plaintiff that the girls would have to be examined by a physician and interviewed by the police. She also told plaintiff that the children might have to testify. Plaintiff and the children related to Cooper past acts of physical violence directed at them by Melvin Coleman. Plaintiff also expressed her concern about Melvin Coleman's reaction when he found out about the investigation. Cooper assured plaintiff of adequate and complete police protection if it were needed.

Thereafter, the two minor children were examined by a physician. On 5 March 1985, they were interviewed by Officer Rodger Phillips (Phillips) of the Raleigh Police Department. The girls told Phillips details of past physical and sexual abuse by Melvin Coleman. However, each girl stated that she was not afraid of Melvin Coleman.

Phillips subsequently interviewed Melvin Coleman on 6 March 1985. Mr. Coleman refused to make any statement. Phillips noted that Mr. Coleman was calm and well-dressed. His entire criminal record, available to Phillips, consisted of a speeding conviction. On 1 April 1985, Phillips appeared and testified before the Grand Jury of Wake County regarding the sexual abuse. At approximately 5:00 p.m. that afternoon, Phillips contacted the Wake County District Attorney's office and was informed that true bills of indictment had been returned against Melvin Coleman. The following day, 2 April 1985, Phillips asked the district attorney's office to have prepared the orders for arrest for Melvin Coleman. These documents would not normally be received by the Police Department for several more days. The orders of arrest were prepared on that date but Phillips did not pick them up because he was involved in another investigation. Phillips did phone Mr. Michael Dodd, an attorney who had represented Melvin Coleman with regard to the matters under investigation, and told Mr. Dodd of the grand jury's action. Mr. Dodd informed Phillips that he was no longer Melvin Coleman's attorney but that he would call Mr. Coleman and ask him to turn himself in the next day.

On the morning of 3 April 1985, Phillips was involved in another investigation and requested that Officer Keeter pick up the copies of the Bills of Indictment and the orders of arrest at the Wake County Courthouse. Officer Keeter returned those documents to Phillips at the Municipal Building at about 9:30 a.m. that morning. At approximately 11:00 a.m., Phillips learned that shortly after 9:00 a.m. a man later identified as Melvin Coleman was seen running from the mobile home where plaintiff and her intestates resided. It was subsequently discovered that plaintiff's intestates had been murdered and the mobile home in which they resided had been set ablaze.

It is uncontroverted that the Police Department has no policy concerning the protection of witnesses and that protection is not usually provided. It further appears that in most instances in which a defendant is represented by counsel, the Police Department customarily notifies counsel when charges are initiated. The record before this Court indicates that the City and County have liability insurance.

Plaintiff brings forward three assignments of error. By her first assignment of error, she contends the trial court erred by refusing to consider the affidavits of certain witnesses at the summary judgment hearing. By her second and third assignments of error, she contends the trial court erred in granting the summary judgment motions in favor of defendants.

I

Defendants are entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [defendants are] entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). If the pleadings and proof establish that no cause of action exists, summary judgment is proper. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). If the pleadings establish the existence of a cause of action, summary judgment should be granted cautiously in negligence cases in which the jury ordinarily applies a standard of care to the facts of the case. *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979). In reaching its determination that no issues of material fact exist and that a party is entitled to judgment as a matter of law, the trial court must

view the record in the light most favorable to the non-movant, *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970), and draw all reasonable inferences in favor of the non-movant. *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974).

We hold that as to defendants City of Raleigh and Raleigh Police Department summary judgment was properly entered as no cause of action exists. As to defendants Cooper and Wake County, we hold that the granting of summary judgment was error. In view of our decisions, it is not necessary to address plaintiff's first assignment of error.

II

[1] The trial court's order granting summary judgment for the Raleigh Police Department was proper in all respects. Unless a statute provides to the contrary, only persons in being may be sued. *McPherson v. Bank*, 240 N.C. 1, 81 S.E. 2d 386 (1954). In North Carolina there is no statute authorizing suit against a police department. The Police Department is a "component part[] of defendant City . . . and as such lack[s] the capacity to be sued." *Jones v. City of Greensboro*, 51 N.C. App. 571, 593, 277 S.E. 2d 562, 576 (1981).

III

[2] A more difficult question is presented by the lower court's order granting summary judgment for the City of Raleigh. Ordinarily, a municipality providing police services is engaged in a governmental function for which there is no liability. *Croom v. Burgaw*, 259 N.C. 60, 129 S.E. 2d 586 (1963). By purchasing liability insurance, municipalities in this State waive the defense of governmental immunity to the extent of insurance coverage. G.S. 160A-485. A waiver of governmental immunity, however, does not create a cause of action where none previously existed. *Riddoch v. State*, 68 Wash. 329, 123 P. 450 (1912); 57 Am. Jur. 2d *Municipal, School, and State Tort Liability*, Sec. 72.

In tort, it is axiomatic that there is no liability unless the law imposes a duty. *Stanford v. Owens*, 46 N.C. App. 388, 265 S.E. 2d 617, *disc. rev. denied*, 301 N.C. 95 (1980); *Paschall v. N.C. Dept. of Correction*, 88 N.C. App. 520, 364 S.E. 2d 144 (1988). Actionable "[n]egligence is the failure to exercise proper care in the performance of a *legal duty* which [a] defendant owe[s] the plaintiff under

the circumstances surrounding them. *Mattingly v. R.R.*, 253 N.C. 746, 117 S.E. 2d 844. The breach of duty may be by negligent act or a negligent failure to act. *Williams v. Kirkman*, 246 N.C. 510, 98 S.E. 2d 922." *Moore v. Moore*, 268 N.C. 110, 112-13, 150 S.E. 2d 75, 77 (1966) (emphasis added).

A decision with reference to the potential liability of the City of Raleigh first requires that this Court examine the duty, if any, owed by the city, through its police department, to plaintiff's intestates. In furnishing police protection, a municipality ordinarily acts for the benefit of the public at large and not for a specific individual. *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 669 P. 2d 451 (1983); *Evers v. Westerburg*, 38 A.D. 2d 751, 329 N.Y.S. 2d 615, *appeal denied*, 30 N.Y. 2d 486, 286 N.E. 2d 926, 335 N.Y.S. 2d 1025 (1972), *aff'd*, 32 N.Y. 2d 684, 296 N.E. 2d 257, 343 N.Y.S. 2d 361 (1973); *Food Fair v. City of Evansville*, 149 Ind. App. 387, 272 N.E. 2d 871 (1971); *Evett v. City of Inverness*, 224 So. 2d 365 (Fla. Dist. Ct. App. 1969), *cert. dismissed*, 232 So. 2d 18 (1970); *Keane v. City of Chicago*, 98 Ill. App. 2d 460, 240 N.E. 2d 321 (1968). As the duty is to the general public rather than to a specific individual, no liability exists for the failure to furnish police protection. *Warren v. District of Columbia*, 444 A. 2d 1 (D.C. 1981); *Evett v. City of Inverness, supra; Keane v. City of Chicago, supra.* The reason for the rule has been stated thusly:

> The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits. This is quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided.

Riss v. City of New York, 22 N.Y. 2d 579, 581-82, 240 N.E. 2d 860, 860-61, 293 N.Y.S. 2d 897, 898 (1968). *Accord Cuffy v. City of New York*, 69 N.Y. 2d 255, 505 N.E. 2d 937, 513 N.Y.S. 2d 372 (1987).

One exception to the general rule of no liability for failure to provide police protection arises, however, when there is a special

relationship between the injured party and the police. *Swanner v. United States*, 309 F. Supp. 1183 (M.D. Ala. 1970) (United States has a special duty for protection of undercover agents); *Florence v. Goldberg*, 44 N.Y. 2d 189, 375 N.E. 2d 763, 404 N.Y.S. 2d 583 (1978) (special relationship created by regularly furnishing school crossing guards); *Henderson v. City of St. Petersburg*, 247 So. 2d 23 (Fla. Dist. Ct. App.), *cert. denied*, 250 So. 2d 643 (1971) (recognized a special duty but found none to exist where the victim was assured by police that he would be protected); *Gardner v. Village of Chicago Ridge*, 128 Ill. App. 2d 157, 262 N.E. 2d 829 (1970), *cert. denied*, 403 U.S. 919, 29 L.Ed. 2d 696, 91 S.Ct. 2230 (1971) (city held subject to liability where police failed to protect a witness summoned to make an identification, the police knowing the assailant had a violent temper and was capable of physical violence); *Schuster v. City of New York*, 5 N.Y. 2d 75, 154 N.E. 2d 534, 180 N.Y.S. 2d 265 (1958) (a special duty owed where plaintiff's intestate was murdered after supplying police with information leading to the arrest of a dangerous fugitive).

A second exception to the general rule of no liability arises when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered. *Cuffy v. City of New York, supra; Smith v. City of New York*, 122 A.D. 2d 133, 504 N.Y.S. 2d 696, *appeal denied*, 68 N.Y. 2d 611, 502 N.E. 2d 1007, 510 N.Y.S. 2d 1025 (1986); *Bain v. City of Rochester*, 115 A.D. 2d 957, 497 N.Y.S. 2d 785 (1985), *appeal denied*, 67 N.Y. 2d 606, 492 N.E. 2d 1233, 501 N.Y.S. 2d 1025 (1986); *Gallogy v. Village of Mohawk*, 96 A.D. 2d 710, 465 N.Y.S. 2d 376 (1983). We note that in these cases the same result could have been reached by determining that a special relationship did or did not exist between the police and the party injured.

In the case now before the Court, the undisputed evidence tends to show that although Officer Phillips knew of the prior acts of violence committed by Melvin Coleman towards the victims, the children had indicated to him that they were not afraid of their father. Further, the record is devoid of any evidence which would tend to show that Officer Phillips ever told plaintiff or her intestates that any kind of protection would be afforded them. The evidence also fails to establish any special relationship

between the police and plaintiff's intestates. Thus, there is no duty on the part of the Police Department which would give rise to any liability involving the City of Raleigh. The only connection between Officer Phillips and the two young victims was that which arose as a result of the officer's interviews. The evidence clearly shows that plaintiff's intestates were merely potential witnesses who would likely be called by the State at the time of trial. If liability were to be imposed on the City in this instance, law enforcement in this State would be required to protect almost every potential witness to avoid liability.

IV

[3] Wake County and Cooper have alleged sovereign immunity as a defense. Counties, like cities, may waive governmental immunity by purchasing liability insurance. G.S. 153A-435. By purchasing liability insurance, Wake County has waived this defense to the extent of coverage. G.S. 153A-435(a).

Neither appellant nor appellees, Wake County and Cooper, have cited to this Court a case from any jurisdiction which imposes tort liability against a unit of government or a social services employee for failure to protect a minor from harm. The federal courts have acknowledged that, in some instances, failure to carry out the statutory duties imposed upon a social worker or a welfare agency can result in liability under 42 U.S.C. Sec. 1983. *Doe v. New York City Dept. of Social Services*, 649 F. 2d 134 (2d Cir. 1981); *Estate of Bailey by Oare v. County of York*, 768 F. 2d 503 (3d Cir. 1985); *Jensen v. Conrad*, 747 F. 2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052, 84 L.Ed. 2d 818, 105 S.Ct. 1754 (1985).

In *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955), our Supreme Court held that a standard of conduct may be determined by reference to a statute which imposes upon a person a specific duty for the protection of others so that a violation of the statute is negligence *per se*. The Restatement (Second) of Torts, Sec. 286 provides:

> When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted
>
> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an

administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

The General Assembly has enacted a statute establishing the standard of conduct to be exercised by DSS in protecting an abused juvenile, as defined in G.S. 7A-517(1). Both of plaintiff's intestates were abused juveniles within the statutory definition. G.S. 7A-544 provides in part:

> When a report of abuse or neglect is received, the Director of the Department of Social Services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, *and the risk of harm to the juvenile,* in order to determine whether protective services should be provided or the complaint filed as a petition.
>
> . . .
>
> If the investigation reveals abuse or neglect, the Director shall decide whether *immediate removal* of the juvenile or any other juveniles . . . *is necessary* for their protection. If immediate removal does not seem necessary, the Director *shall immediately provide or arrange for protective services.* If the parent or other caretaker refuses to accept the protective services . . ., the Director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.
>
> If *immediate removal seems necessary for the protection of the juvenile or other juveniles* . . ., the Director shall sign a complaint which alleges the applicable facts to invoke the jurisdiction of the court. Where the investigation shows that

> it is warranted, a protective services worker may assume temporary custody of the juvenile for the juvenile's protection pursuant to Article 46 of this Chapter.

(Emphasis added.) Although G.S. 7A-544 has not been previously construed, it appears that one of its specific purposes is the protection of minors from harm. Plaintiff's intestates are within the class intended to be protected by G.S. 7A-544 and the harm resulting from Mr. Coleman's actions is the specific type of harm which the statute was intended to prevent. We hold that a violation of this statute can give rise to an action for negligence.

In the case *sub judice*, Cooper, an employee of DSS, was fully aware that plaintiff's intestates had suffered physical and sexual abuse at the hands of Melvin Coleman. Cooper was also aware that physical abuse had at times been directed at plaintiff. Plaintiff had related to Cooper her concern about the reaction of Melvin Coleman when he found out about the investigation. Cooper had also given instructions to school authorities that Melvin Coleman was not to be allowed access to the children. Other than this, the record is silent with regard to what determination, if any, was made concerning the risk of harm to plaintiff's intestates or whether they should have been provided any type of protective services.

Appellees' contention that Cooper is insulated from liability by G.S. 7A-550 is misplaced. This statute provides, in part, as follows:

> Anyone who makes a report pursuant to this Article, cooperates with the county department of social services in any ensuing inquiry or investigation, testifies in any judicial proceeding resulting from the report, or otherwise participates in the program authorized by this Article, is immune from any civil or criminal liability that might otherwise be incurred or imposed for such action provided that the person was acting in good faith. In any proceeding involving liability, good faith is presumed.

G.S. 7A-550. The report referred to in this statute is clearly an initial report of child abuse, as specified in G.S. 7A-543, which is to be made to the Director of the Department of Social Services. This statute was intended to encourage citizens to report sus-

pected instances of child abuse to the Director of DSS without fear of potential liability if the report was made in good faith. It has no application to employees of DSS in the performance of their official duties.

V

[4] Lastly, appellees Wake County and Cooper contend that the trial court properly granted summary judgment in that plaintiff was contributorily negligent as a matter of law. The appellees assert that contributory negligence is an absolute defense in an action for wrongful death where the negligent parent would be the beneficiary of the recovery. In support of their position, appellees cite *In re Estate of Ives*, 248 N.C. 176, 102 S.E. 2d 807 (1958); *Davenport v. Patrick*, 227 N.C. 686, 44 S.E. 2d 203 (1947); *Reid v. Coach Co.*, 215 N.C. 469, 2 S.E. 2d 578 (1939); and *McDowell v. Estate of Anderson*, 69 N.C. App. 725, 318 S.E. 2d 258 (1984).

At common law, a parent has the duty to protect his child. 59 Am. Jur. 2d *Parent and Child*, Sec. 14 (1987). In the performance of this duty, "[p]arents . . . are bound to provide such reasonable care and protection as an ordinarily prudent person, solicitous for the welfare of a child, would deem necessary." *Id.* at 147. This duty was recognized by our Supreme Court in *State v. Walden*, 306 N.C. 466, 293 S.E. 2d 780 (1982), in establishing criminal liability of a parent as an aider and abettor to child abuse. The General Assembly has also recognized this duty by enacting a criminal statute prohibiting a parent from creating or allowing to be created a substantial risk of physical injury to any child under sixteen years of age. G.S. 14-318.2. A similar standard is used to define an abused juvenile. G.S. 7A-517(1).

We can discern no justifiable reason for failing to apply the same duty in civil cases.

> This is not to say that parents have the legal duty to place themselves in danger of death or great bodily harm . . . . To require such, would require every parent to exhibit courage and heroism which, although commendable in the extreme, cannot realistically be expected or required of all people. But parents do have the duty to take every step reasonably pos-

sible under the circumstances . . . to prevent harm to their children.

State v. Walden, 306 N.C. at 475, 293 S.E. 2d at 786. We hold that failure to perform this duty is negligence.

In the case at bar, plaintiff had the same information, if not more, concerning the potential risk to the children as did Cooper, but she took no action other than to ask a neighbor to watch for Melvin Coleman's car when the children were alone. In light of Cooper's assertion that adequate police protection would be provided if needed and plaintiff's assertion that she thought police protection was being provided, the question of plaintiff's contributory negligence becomes a matter for the jury. It must thus be determined by the jury whether plaintiff provided such reasonable care and protection to her intestates as an ordinary prudent person would deem necessary under the circumstances as they then existed.

As to the

Raleigh Police Department and the City of Raleigh—affirmed.

Kathy L. Cooper and Wake County—reversed.

Chief Judge HEDRICK and Judge BECTON concur.

STATE OF NORTH CAROLINA v. HAROLD HOOVER

No. 867SC1084

(Filed 15 March 1988)

1. Constitutional Law § 51— six years between offense and trial—denial of motion to dismiss proper

Defendant's right to due process was not violated by the denial of his pretrial motion to dismiss on the ground of passage of six years from the date of the offense to the trial, since the State learned of the alleged crimes six years after they occurred, conducted an investigation, and promptly charged defendant with crime against nature and taking indecent liberties with a child; the delay was reasonable; and there was no evidence that the State deliberately or unnecessarily delayed charging defendant to gain any tactical advantage.

2. Criminal Law § 15.1— pretrial publicity—no showing of prejudice

Defendant did not meet his burden of showing that he was prejudiced by pretrial publicity where the charges against defendant arose out of an investigation into an interstate child pornography ring; news accounts were factually correct and did not deny defendant a fair trial; and defendant did not show that he exhausted his peremptory challenges or accepted an objectionable juror.

3. Criminal Law § 25.2— nolo contendere plea—court's finding of factual basis proper

There was no merit to defendant's contention that the trial court erred in finding a factual basis for the *nolo contendere* pleas to the charges of sexual activity by a substitute parent and the first count of crime against nature since the prosecutor stated that defendant had participated in the foster parent program for approximately 2½ years; during that time a 15-year-old was defendant's ward; the prosecutor read a statement by the 15-year-old concerning defendant's acts of sexual abuse toward him; and defendant himself testified concerning his foster parentage.

4. Rape and Allied Offenses § 19— taking indecent liberties with minor—sufficiency of evidence

Evidence was sufficient to sustain convictions for taking indecent liberties with a child and crime against nature where defendant's own testimony established his age, and one victim testified as to acts of fellatio committed upon him by defendant.

5. Criminal Law § 138.14— defendant sentenced pursuant to plea arrangement—findings as to aggravating and mitigating factors not required

The trial judge was not required to make findings of aggravating or mitigating factors where defendant was sentenced pursuant to a plea arrangement.

6. Constitutional Law § 30— no failure by State to disclose favorable evidence

There was no merit to defendant's contention that his convictions of taking indecent liberties and crime against nature against a particular individual were obtained in violation of due process in that the State failed to disclose favorable or exculpatory evidence.

7. Constitutional Law § 51— six years between offense and indictment—no denial of speedy trial

There was no merit to defendant's contention that the passage of six years from the date of the offense to the date that charges were brought against him violated his constitutional right to a speedy trial, since the speedy trial provision does not extend to the time period prior to arrest.

8. Constitutional Law § 34— convictions for crime against nature and sexual activity by substitute parent—no double jeopardy

Defendant was not placed in double jeopardy by convictions for both crime against nature and sexual activity by a substitute parent, since each offense included an element not common to the other, nor was defendant sub-

jected to double jeopardy where he was sentenced both for crime against nature and for taking indecent liberties with a named minor.

9. Constitutional Law § 48— effective assistance of counsel

Evidence was sufficient to support the trial court's conclusion that defendant received effective assistance of counsel.

APPEAL by defendant from *Winberry, Judge*, and *Barefoot, Judge*. Judgments entered 28 February 1985 and Order entered 29 October 1987 in Superior Court, WILSON County. Heard in the Court of Appeals 11 January 1988.

Defendant was charged in proper bills of indictment with 1) sexual activity by a substitute parent in violation of G.S. 14-27.7 (84CRS8450), 2) taking indecent liberties with a child in violation of G.S. 14-202.1 (84CRS8451), 3) crime against nature in violation of G.S. 14-177 (84CRS8452) and 4) a second unrelated count of crime against nature (84CRS8453). The charges of taking indecent liberties with a child and one count of crime against nature (84CRS8453) were consolidated for trial.

Evidence was presented tending to show the following facts: Dayton Allen Bryant testified that he was introduced to defendant by Doral Ray Mason in September 1978. Mason met the 13-year-old Bryant at a fair in Cumberland County. On approximately 15 September 1978, Mason took Bryant to his house where Bryant met defendant. Bryant observed Mason and defendant engaged in fellatio and defendant then forced Bryant to participate. Bryant testified that "[defendant] sucked me and made me suck him." When asked what he referred to, Bryant stated "with your lips suck his penis." Bryant also testified that defendant "laid down on top of [him] and put his penis between [his] legs and went up and down and rolling on the floor with [him]."

Defendant testified that he had never met Bryant. He stated that he was out of town at the time the alleged crimes occurred.

The jury found defendant guilty of taking indecent liberties with a child and crime against nature, for which he was sentenced to six years and ten years respectively. Defendant then pleaded *nolo contendere* to sexual activity by a substitute parent and to the first count of crime against nature. Pursuant to a plea arrangement, defendant was sentenced to ten years and six years

respectively to run concurrently with the sentences in the other cases.

This case was originally docketed in this Court on 17 October 1986 and while the appeal was pending, defendant filed a motion for appropriate relief on the grounds of ineffective assistance of counsel and evidence unavailable at trial. On 10 March 1987, this Court ordered the case remanded to the superior court for an evidentiary hearing to resolve factual issues necessary to a determination of defendant's motion for appropriate relief. On 29 October 1987, Judge Barefoot entered an order in which he made findings and conclusions supporting his denial of defendant's motion for appropriate relief. Judge Barefoot's order was filed in this Court on 17 November 1987 and the case was immediately recalendared for hearing. On 2 December 1987, this Court granted defendant's motion to consolidate the appeals from the judgments and the order. From the judgments and order of the trial court, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David Roy Blackwell, for the State.

Wayne Eads for defendant appellant.

ARNOLD, Judge.

Defendant first contends that the trial court erred in denying his pretrial motion to dismiss on grounds of 1) the passage of six years from the date of the offense to the trial, and 2) extensive, inaccurate and prejudicial pretrial publicity.

[1] "[A] pre-accusation delay violates due process only if the defendant can show that the delay actually prejudiced the conduct of his defense and that it was unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant." *State v. McCoy*, 303 N.C. 1, 7-8, 277 S.E. 2d 515, 522 (1981).

The State learned of the alleged crimes on 10 September 1984 from Dayton Bryant. After an investigation, the State promptly charged defendant with crime against nature and taking indecent liberties with a child. The delay was reasonable and there is no evidence that the State deliberately or unnecessarily delayed charging defendant to gain any tactical advantage.

[2] Defendant argues that he suffered pretrial prejudice as a result of inaccurate news accounts. He asserts that the news accounts erroneously linked him to an interstate child pornography ring. Factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves deny a defendant a fair trial. *See State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984). In order to meet his burden of showing that pretrial publicity precluded him from receiving a fair trial, a defendant must show that jurors had prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to him sat on the jury. *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983).

In the present case, the charges against defendant arose out of an investigation into an interstate child pornography ring. The news accounts were factually correct and did not deny defendant a fair trial. Additionally, defendant has made no showing that he exhausted his peremptory challenges or accepted an objectionable juror. Defendant did not meet his burden in showing that he was prejudiced by pretrial publicity. The trial court did not err in refusing to dismiss the indictments.

[3] Defendant next contends that the trial court erred in finding a factual basis for the *nolo contendere* pleas to the charges of sexual activity by a substitute parent and the first count of crime against nature.

G.S. 15A-1022(c) states:

> The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

The statute requires that "[s]ome substantive material independent of the plea itself appear of record which tends to show that

defendant is, in fact, guilty." *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E. 2d 418, 421-22 (1980). The trial court may consider any information properly brought to its attention in determining whether there is a factual basis for a plea of guilty or no contest. *State v. Dickens*, 299 N.C. 76, 261 S.E. 2d 183 (1980).

In the case *sub judice*, the prosecutor stated that defendant had participated in the foster parent program for approximately 2½ years and that during such time, 15-year-old Everett Eugene Pritchard was defendant's ward. The prosecutor then read the following statement by Pritchard:

> [t]hen about a year ago, Harold and me was [sic] riding around and he started feeling of my leg. Harold had tried to get in the shower with me several times while I was staying with him. On four or five different times, Harold had had oral sex with me. October of '83 was the last time he had oral sex with me.

These statements, as well as defendant's own testimony concerning his foster parentage, constitute a sufficient factual basis for the pleas of *nolo contendere* to sexual activity by a substitute parent and crime against nature.

[4] Defendant next contends that the trial court erred by denying his motions to dismiss at the close of all the evidence because there was insufficient evidence to sustain the convictions for taking indecent liberties with a child and crime against nature. We do not agree.

G.S. 14-202.1 provides in part:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire.

Defendant asserts that there is no proof of his age as of the date of the offense in the record. Defendant is mistaken because defendant testified at trial that he was born in Flint, Michigan in 1928 and that he was 56 years old.

With respect to the conviction for crime against nature, Dayton Bryant's testimony that "[defendant] made me suck him and then he sucked me" is clearly sufficient evidence of the offense. *See State v. Goodson*, 313 N.C. 318, 327 S.E. 2d 868 (1985); *State v. Poe*, 40 N.C. App. 385, 252 S.E. 2d 843, *disc. rev. denied*, 298 N.C. 303, 259 S.E. 2d 304 (1979).

[5] Defendant also contends that the trial court erred in sentencing him for the crimes of sexual activity by a substitute parent and crime against nature. Specifically, defendant argues that the trial court failed to make requisite findings of mitigating and aggravating factors in sentencing him to prison terms in excess of the presumptive terms.

Defendant pleaded *nolo contendere* to the charges involving Everett Eugene Pritchard. He agreed to plead *nolo contendere* as a part of a plea arrangement. The terms and conditions of defendant's pleas were as follows:

> Any active sentences imposed will run concurrently with any active sentences imposed in 84-CRS-8451 and 84-CRS-8453 and will not exceed the active sentence imposed in 84-CRS-8451 and in 84-CRS-8453.

G.S. 15A-1340.4(b) provides in part that "a judge need not make any findings regarding aggravating and mitigating factors if he imposes a prison term pursuant to any plea arrangement as to sentence . . . , regardless of the length of the term. . . ."

Defendant was sentenced pursuant to the plea arrangement and the trial court was not required to make findings of aggravating or mitigating factors. *See State v. Simmons*, 64 N.C. App. 727, 308 S.E. 2d 95 (1983), *disc. rev. denied*, 310 N.C. 310, 312 S.E. 2d 654 (1984). The trial court did not err in sentencing defendant.

[6] Defendant next contends that his convictions of taking indecent liberties and crime against nature involving Dayton Bryant were obtained in violation of due process in that the State failed to disclose favorable or exculpatory evidence pursuant to the provisions of *Brady v. Maryland*, 373 U.S. 83 (1963).

Brady states that "suppression by the prosecution of evidence favorable to an accused upon request violates due proc-

ess where the evidence is material either to guilt or to punishment. . . ." *Id.* at 87.

> [I]t appears the prosecutor is constitutionally required to disclose only *at trial* evidence that is favorable and material to the defense. Due process is concerned that the suppressed evidence might have affected the outcome at trial and not that the suppressed evidence might have aided the defense in preparing for trial.

State v. Hardy, 293 N.C. 105, 127, 235 S.E. 2d 828, 841 (1977).

Defendant contends that the State failed to comply with the *Brady* requirements by withholding 1) pornographic photographs and albums containing the photographs, 2) notebooks seized from one of the witnesses against defendant, 3) statements by Dayton Bryant, 4) statements by Doral Ray Mason and 5) information given by Douglas Lucas to investigating officers which was favorable to defendant.

Defendant argues that the photo albums contained photographs depicting sexual activity with children and bore dates or comments pencilled in beside the pictures. Defendant asserts that he did not appear in the photographs and could have used them to corroborate his testimony that he was not involved in the pornographic activities which led to the charges against him. Defendant also argues that he might have used the dates on the photographs to identify more closely the date of the offenses.

At the time of trial, the State no longer possessed the photographs and Detective Mickey Wilson testified that defendant did not appear in any of the pictures. Even assuming *arguendo* that the albums may have aided defendant in preparing his defense, we hold that they would not have affected the outcome of the trial and would not have been discoverable by means of a *Brady* motion.

Defendant next argues that the State should have given him some notebooks allegedly seized from Doral Ray Mason. Detective Wilson testified about the "notebooks" but it appears from the transcript that he was referring to the photo albums and not to an additional item of evidence.

Defendant also argues that certain statements by Dayton Bryant and Doral Ray Mason should have been presented to the

defense. After a careful review of the record, we hold that defendant made no showing that these statements were favorable to him such that the State was required to disclose them to him absent a request.

Defendant further argues that Douglas Lucas informed the investigating officers that the incident involving Dayton Bryant did not occur and that the State withheld that information. At the hearing concerning defendant's motion for appropriate relief, Detective Wilson testified that Lucas told him that he witnessed defendant having oral sex with Dayton Bryant. Wilson also testified that Lucas was to testify for the State but was not called due to his mental capacity and the fact that he had suffered nervous breakdowns and was on medication. The information that the State obtained from Douglas Lucas prior to trial was neither favorable nor exculpatory to defendant.

[7] Defendant next contends that his convictions of taking indecent liberties and crime against nature involving Dayton Bryant were obtained in violation of the speedy trial provisions of the Sixth Amendment. Defendant asserts that the passage of over six years from the date of the offense to the date that charges were brought against him violated his constitutional rights. This contention is without merit because the speedy trial provision does not extend to the time period prior to arrest. *See United States v. Marion*, 404 U.S. 307 (1971).

[8] Defendant further contends that the trial court erred in sentencing him for both crime against nature and sexual activity by a substitute parent involving Everett Eugene Pritchard. Defendant argues that the convictions for both offenses violated the merger doctrine and subjected him to double jeopardy. Defendant asserts that *"under the unique facts of this case*, the offense of crime against nature is the functional equivalent of a lesser included offense of G.S. 14-27.7." We do not agree.

The determination of whether one offense is a lesser included of another must be based on a strict analysis of the elements of the two offenses. *State v. Wortham*, 318 N.C. 669, 351 S.E. 2d 294 (1987). Facts of a particular case do not determine whether one crime is a lesser included offense of another. *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982).

> [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).

In *State v. Warren*, 309 N.C. 224, 306 S.E. 2d 446 (1983), the defendant was indicted for committing first degree sexual offense (specifically fellatio) in violation of G.S. 14-27.4. G.S. 14-27.4 requires proof of a "sexual act," as does G.S. 14-27.7. In *Warren*, our Supreme Court held that crime against nature was not a lesser included offense of sexual offense and stated:

> [w]hile there may be evidence of penetration in this particular act of fellatio, the evidence was relevant only as proof of the *anatomical nature* of the sexual offense alleged. It is not a determinative factor in deciding whether crime against nature is a lesser included offense of the sexual offense charged.

Id. at 231, 306 S.E. 2d at 451.

Crime against nature is sexual intercourse contrary to the order of nature and includes acts between humans per anum and per os. *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). Proof of penetration of or by the sexual organ is essential to a conviction of crime against nature. *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). Proof of a "sexual act" under G.S. 14-27.7 does not require, but may involve, penetration.

In the case *sub judice*, each offense involving Everett Eugene Pritchard for which defendant was convicted included an element not common to the other. Penetration is not essential to support a conviction of sexual activity by a substitute parent. G.S. 14-27.7 requires that the sexual act be performed by one who has "assumed the position of parent" to the minor victim. This is not a requisite element of crime against nature. Defendant was not placed in double jeopardy by the convictions for both offenses.

Defendant also argues that he was subjected to double jeopardy in that he was convicted of the two offenses as a result of a single act of oral sex. We are not persuaded by defendant's argument. Not only is there evidence of multiple incidents of oral sex, but also, as noted previously, crime against nature and sexual activity by a substitute parent involve distinct elements. Thus, the trial court did not err in sentencing defendant for both offenses.

Defendant further contends that the trial court violated the merger doctrine and subjected him to double jeopardy in sentencing him for both crime against nature and taking indecent liberties with Dayton Bryant. We disagree.

Crime against nature and taking indecent liberties with a child are separate and distinct offenses. *State v. Copeland*, 11 N.C. App. 516, 181 S.E. 2d 722, *cert. denied*, 279 N.C. 512, 183 S.E. 2d 688 (1971). The offenses of crime against nature and taking indecent liberties with children are complimentary but not mutually exclusive. *State v. Elam*, 302 N.C. 157, 273 S.E. 2d 661 (1981). The trial court did not err in sentencing defendant for both offenses.

Defendant also contends that the trial court erred in allowing the State to question Dayton Bryant concerning certain photographs. We have examined the record and find no merit to defendant's argument.

Defendant's remaining assignments of error arise from the trial court's denial of defendant's motion for appropriate relief. In the order denying defendant's motion, Judge Barefoot made the following findings of fact:

1. Petitioner/defendant had retained the services of Roland Braswell on a number of occasions prior to these charges. His services were retained in these cases some four months prior to trial and worked diligently procuring witnesses and evidence until the trial and sentencing was concluded. The court finds that counsel was well aware of all the facts in the cases and pursued all avenues of defense including alibi. Counsel discussed with petitioner all avenues of defense, the results of convictions and the appeal process prior to trial.

2. The newly discovered evidence which was unknown or unavailable to defendant at trial was a man named Douglas Lucas, a resident of Wilson County for forty-nine years working as a tailor. The court finds that this person was a witness for the State and was present during the trial of this matter. Defense counsel did not interview this witness and concluded that he did not need this person to testify for defendant as counsel's investigation revealed that the witness was totally on the side of the State.

3. The next day after guilty verdicts on two charges, counsel discussed negotiated pleas on the final two counts with petitioner. The court finds that counsel for defendant had known defendant for ten to fifteen years and that on the occasion of the discussion of the plea arrangements the petitioner was no different than he had been on other occasions as to his mental alertness, his physical appearance and this general demeanor were the same as always other than the fact that he had been convicted of two serious crimes. He was informed by counsel that upon entry of No Contest pleas that he would loose [sic] his right to appeal the cases.

Judge Barefoot then concluded as a matter of law that:

1. The defendant was represented by competent counsel who afforded him effective, reasonable, and professional representation throughout the proceedings.

2. There is no new evidence available that would allow a new trial or would have caused the jury to reach a different verdict from that pronounced.

3. The pleas entered by the defendant were made freely and voluntarily and understandingly without coersion [sic] and were his informed choices.

4. The petitioner had a fair and impartial trial and none of his constitutional or other legal rights were violated in any respect before, during or after his trial.

When reviewing a trial court's denial of a motion for appropriate relief, an appellate court is to determine whether the findings of fact are supported by the evidence, whether the find-

ings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court. *State v. Stevens*, 305 N.C. 712, 291 S.E. 2d 585 (1982). The trial court's findings of fact are binding if they are supported by evidence even though the evidence is conflicting. *Id.*

[9] Defendant contends that he did not receive effective assistance of counsel.

When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985). In order to meet this burden, a defendant must show that counsel's performance was deficient and prejudiced the defense to the extent that defendant was deprived of a fair trial. *Id.*

After an evidentiary hearing in the present case, Judge Barefoot made findings of fact and concluded that defendant received effective assistance of counsel. The evidence supports the findings of fact, and the findings support the conclusion that defendant received effective representation.

Defendant also contends that his pleas of *nolo contendere* were involuntary, uninformed and incompetent. This contention is without merit as Judge Barefoot's findings of fact and conclusions of law with respect to defendant's pleas are well supported by the evidence in the record.

Defendant finally contends that "the trial court erred and abused its discretion by the entry of an order denying the defendant's request for a new trial in a motion for appropriate relief based in part on newly-discovered evidence." We are not persuaded by defendant's argument. The newly discovered evidence was Douglas Lucas. The trial court's findings and conclusions regarding Douglas Lucas and newly discovered evidence are supported by the evidence in the record. The trial court did not err in denying defendant's request for a new trial.

Defendant had a fair trial, free of prejudicial error.

No error.

Judges WELLS and SMITH concur.

STATE OF NORTH CAROLINA v. JOHN WINFRED BAILEY

No. 8715SC780

(Filed 15 March 1988)

1. **Indictment and Warrant § 13.1— exact location of offense—bill of particulars—denial not prejudicial**

The trial court did not err in denying defendant's motion for a bill of particulars as to the exact location of an alleged offense of taking indecent liberties with a minor where defendant admits that he was aware prior to trial that the offense allegedly occurred on a farm in Chatham County; the victim testified that the offense occurred in a barn and on a certain road on the farm; defendant was given the opportunity to question the victim about the alleged offense prior to trial; and defendant did not suffer any prejudice in the preparation of his defense due to the lack of information as to exactly where on the farm the offense occurred.

2. **Criminal Law § 89.1; Rape and Allied Offenses § 4— expert testimony—why child would cooperate with abusing adult—admissibility**

Expert testimony by a social worker and a pediatrician as to why a child would cooperate with an adult who had been sexually abusing the child did not constitute testimony on a character trait of the child in violation of N.C.G.S. § 8C-1, Rule 405(a) or impermissible expert testimony regarding the credibility of the child; rather, such testimony was specialized knowledge admissible under N.C.G.S. § 8C-1, Rule 702. Furthermore, defendant opened the door to such testimony by cross-examining the child about going to the barn alone with defendant after she testified she was afraid of defendant and did not like to be alone with him.

3. **Criminal Law §§ 50.1, 89.1; Rape and Allied Offenses § 4— expert testimony that child was sexually abused—admissibility**

Testimony by a social worker and a pediatrician stating their opinions that the alleged child victim had been sexually abused was not improper opinion testimony as to the credibility of the victim's testimony and defendant's guilt or innocence but constituted proper expert testimony based on each witness's examination of the victim and expert knowledge concerning abused children in general. N.C.G.S. § 8C-1, Rule 608(a).

4. **Criminal Law § 89.1; Rape § 4— expert testimony that family members knew of sexual abuse—opinion evidence on credibility—harmless error**

While opinion testimony by a social worker and a psychologist that other members of the child victim's family were aware that defendant was sexually abusing the child based on statements made to them by the child may have constituted inadmissible opinion evidence as to the child's credibility, the admission of such opinion testimony was not reversible error in light of other admissible evidence concerning the family's awareness of defendant's sexual abuse of the child.

5. Criminal Law §§ 50.1, 89.1; Rape and Allied Offenses § 4— expert testimony—behavior consistent with sexual abuse—not opinion on credibility

The trial court did not err in permitting a psychologist to testify concerning his observations of anxiety and anger exhibited by an alleged sexual offense victim during his examination of her and to give his expert opinion as to the relationship between the victim's anxiety and anger and the events she described during the examination, since such testimony did not constitute an opinion on the victim's credibility or reliability.

6. Constitutional Law § 30— child sexual abuse victim—Department of Social Services records—in camera inspection—ruling that unnecessary for defense

In this prosecution for a sexual offense and taking indecent liberties with a minor, the trial court did not err in ruling, after an *in camera* inspection of certain Chatham County Department of Social Services records pertaining to the victim, that all records material to defendant's defense were made available to defendant and that the remaining records were not material to his case.

APPEAL by defendant from *Hobgood (Robert H.), Judge.* Judgment entered 16 April 1987 in Superior Court, CHATHAM County. Heard in the Court of Appeals 14 January 1988.

Defendant was charged with first degree sexual offense and with taking indecent liberties with a minor. Defendant pled not guilty to both charges, and the charges were joined for trial. The jury found defendant not guilty of the first degree sexual offense and guilty of taking indecent liberties with a minor. The court sentenced defendant to six years' imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Elizabeth G. McCrodden, Associate Attorney General, for the State.

Public Defender J. Kirk Osborn for defendant-appellant.

PARKER, Judge.

On appeal, defendant raises six questions for review by this Court: (i) whether the trial court erred in denying defendant's motion for a bill of particulars as to the exact location of the alleged offense; (ii) whether the trial court erred in permitting two of the State's expert witnesses to explain why a child would cooperate with a person who had sexually abused her; (iii) whether the trial court erred in permitting two of the State's expert witnesses to give their opinions that the child had been sexually abused; (iv)

whether the trial court erred in permitting two of the State's expert witnesses to give their opinions that the family of the child knew defendant was sexually abusing her; (v) whether the trial court erred in permitting one of the State's expert witnesses to state that the child exhibited behavior consistent with her having been sexually abused; and (vi) whether the trial court erred in ruling, after an *in camera* inspection of certain Chatham County Department of Social Services records, that such records contained no evidence material to the defense of this case. We find no error in the court below.

FACTS

At trial, the State presented evidence tending to show that the prosecuting witness, Angela Donivan, first met defendant when she was five years old. Angela, Angela's mother, and Angela's brothers and sisters lived with defendant on a farm. During the first week of November 1985, when Angela was nine years old, defendant told Angela to come down to the barn to help with some chores. Angela testified that while she was at the barn with defendant, "he put his fingers inside of me and stuff; and he, he messed with me a lot and put his fingers up inside of me." Angela also testified that defendant had done this to her more times than she could count. She also stated that on one occasion defendant "put his fingers inside of [her]" while she rode a pony and he walked along beside her. Angela testified that defendant had exposed himself to her and asked her to touch "his private" although she refused. Angela testified that she told her mother about these incidents, but that this had no effect on defendant's actions.

The State also presented the testimony of Paula Browder, a social worker at the Chatham County Department of Social Services, who interviewed Angela on 8 November 1985 and on several subsequent occasions. After lengthy *voir dire*, the court found Ms. Browder qualified to testify as an expert in the field of social work specializing in child development and family relations. Ms. Browder was permitted to testify as to Angela's statements during the interviews in order to corroborate Angela's testimony. The court also permitted Ms. Browder to state her opinion as to why a child may continue to cooperate with an individual who has abused her sexually. Ms. Browder gave her opinion that Angela

had been sexually abused and that Angela's sisters and her mother knew that defendant was sexually abusing Angela.

Dr. Doug Jackson, a licensed psychologist who interviewed and evaluated Angela on 18 September 1986, testified for the State. After extensive *voir dire*, the court concluded that Dr. Jackson was qualified to testify as an expert in the field of psychology specializing in child abuse. The court permitted Dr. Jackson to relate Angela's statements during his interview with her for the purpose of corroborating Angela's testimony, and also to describe Angela's behavior during his examination that was consistent with her having been sexually abused.

Finally, the State presented the testimony of Dr. Jean Smith, a pediatrician who examined Angela on 12 December 1985. Dr. Smith was qualified by the court as an expert in the field of pediatrics without objection on the part of defendant. Dr. Smith was permitted to testify as to Angela's statements to her in order to corroborate Angela's testimony. She testified that in her opinion, Angela's family members were aware of defendant's actions as to Angela. Dr. Smith was also permitted to explain why a child might continue to cooperate with an individual who has sexually abused the child.

Defendant testified that at the time of trial he was twenty-nine years old and that he married Angela's mother on 16 November 1985, shortly after the alleged incidents with Angela took place. During the first week of November, defendant was employed as a "slider hauler" at Hadley-Peoples; he worked the third shift from eleven at night until seven in the morning; and he did not get home from work until approximately seven-thirty a.m., after Angela had left for school. Defendant went to bed at about noon or one o'clock and woke up for work at about nine or nine-thirty at night. According to defendant, there were no horses or ponies on the farm during the week in question and the barn on the farm had blown down in a windstorm in 1980. Defendant also testified that Angela and her sisters did not want defendant to marry their mother because he attempted to discipline them. Defendant also presented the testimony of Angela's grandmother, defendant's mother, Angela's cousin, and Angela's sister.

I.

[1] Defendant first assigns error to the trial court's denial of his motion for a bill of particulars, requesting, among other facts, "The exact time, date and place" where defendant allegedly committed the indecent liberties offense. In response to this motion, the State filed an answer stating that since the indictment involved a young child it was not possible to be as specific as to time and date as with an adult victim of a crime. The answer also stated that the victim alleged the offenses were ongoing over a period of years and that the date alleged in the indictment, the fourth through the eighth of November 1985, is within a one-week period. The answer is silent as to the location of the offense. The indictment for indecent liberties specifies only that the offense took place in Chatham County.

At trial, defendant argued that the State's response to his motion for a bill of particulars was insufficient in that it failed to narrow down the date of the alleged offense and to specify where the alleged offense took place. The court found that the State made the prosecuting witness Angela available to defendant for interrogation prior to trial. The court denied defendant's motion for further response as to the date of the alleged offense, but ordered the State to provide defendant with information as to the specific farm on which the offense allegedly occurred and with information as to whether the farm was located in Chatham County. Defendant contends in his brief that compliance with this order revealed to defendant "nothing more than what the defense knew already." Defendant argues that the trial court's denial of his motion for a bill of particulars as to the exact location of the alleged offense hampered his ability to prepare his defense. We disagree.

The decision to grant or deny a bill of particulars is generally a matter within the discretion of the trial court and is not reviewable absent a palpable and gross abuse of that discretion. *State v. Easterling*, 300 N.C. 594, 601, 268 S.E. 2d 800, 805 (1980); *State v. McLaughlin*, 286 N.C. 597, 603, 213 S.E. 2d 238, 242 (1975), *death sentence vacated*, 428 U.S. 903, 96 S.Ct. 3206, 49 L.Ed. 2d 1208 (1976). Denial of a defendant's motion for a bill of particulars should be held error only when it is clear "that the lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case." *State v. Easterling*, 300 N.C. at 601, 268 S.E. 2d at 805.

In this case, we find no significant impairment of defendant's defense and, therefore, no abuse of discretion on the part of the trial court. At trial, Angela testified that the offense occurred in a barn on the farm near the house where she and defendant lived and on a "cut off road" near defendant's driveway. Defendant denied that the offense had occurred and presented evidence that during the week of the alleged offense he did not get home from work until after Angela went to school and went to bed well before Angela returned home from school, and that there was no barn or pony on the farm at the time. Defendant admits he was aware prior to trial that the location of the alleged offense was the farm in Chatham County. Defendant also was given the opportunity to question Angela about the alleged offense prior to trial. Based on the record in this case, we find no indication that defendant suffered any prejudice in the preparation of his defense due to a lack of information as to exactly where on the farm the alleged offense occurred. This assignment of error is without merit.

II.

[2] Defendant next objects to the testimony of Ms. Browder and Dr. Smith as to why a child would cooperate with an adult who had been sexually abusing the child. Defendant contends that such testimony violates G.S. 8C-1, Rule 405(a), in that it constitutes expert testimony on a character trait of the child, the trait of " 'cooperation with a sexual abuser.' " Defendant also suggests that the objected-to testimony is impermissible expert testimony regarding the credibility of the witness. These contentions are meritless.

In general, G.S. 8C-1, Rule 702, provides,

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

The trial court, after a lengthy *voir dire*, concluded that Ms. Browder was qualified to testify and to give her opinion as an expert in the field of social work specializing in child development and family relations. When asked for her opinion as to why a

child might continue to cooperate with an individual who the child says has been sexually abusive, Ms. Browder answered:

> It's my opinion that a child may continue to cooperate with someone who they say has sexually abused them for several factors. One being that they may be fearful of the individual and what might happen to them. Another being that when it happens specifically over a long period of time, that it becomes a routine which the child is familiar with. The child is not fearful. The child knows they can survive this. Another being that often perpetrators are not hurtful to children. They do not threaten them with harm, and they are not afraid, and they don't anticipate that it will happen every time that they are with the perpetrator. One other factor that plays in here is when a child has gone to a caregiver parent or someone else and asked for it to stop and it does not stop, the child does not know that anyone else can stop it, does not trust and thus accepts it as the way it should be.

The court found Dr. Smith qualified as an expert in the field of pediatrics. When asked if she had an opinion as to why a child such as Angela would continue to cooperate with an individual after that child has made allegations of improper behavior against that individual, Dr. Smith responded,

> My opinion is that many of these children feel frightened or threatened and sense of abandonment if they cannot get help.

In our view, the testimony of Ms. Browder and Dr. Smith as to a child's continued cooperation with a person the child has accused of sexual abuse was specialized knowledge, helpful to the jury and well within the fields of expertise of the two witnesses.

Moreover, defendant "opened the door" for this evidence by cross-examining Angela about going to the barn alone with defendant after she admitted she was afraid of defendant and did not like to be alone with him. Thus, the testimony of Ms. Browder and Dr. Smith was admissible expert testimony that corroborated the testimony of the State's prosecuting witness. *See State v. Oliver*, 85 N.C. App. 1, 354 S.E. 2d 527, *disc. rev. denied*, 320 N.C. 174, 358 S.E. 2d 64 (1987) (pediatrician's testimony that children don't make up stories about sexual abuse held properly admitted);

State v. Bowman, 84 N.C. App. 238, 352 S.E. 2d 437 (1987) (physician and surgeon specializing in family medicine properly permitted to testify as to why a child might delay reporting an incident of sexual abuse).

III.

[3] Defendant next contends that the trial court erred in permitting Ms. Browder and Dr. Smith to give expert opinion testimony that Angela had been sexually abused. Defendant argues that this testimony is tantamount to the witnesses' assertion that Angela's testimony that she had been abused was believable. We disagree with this contention.

Our appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence. *See State v. Kim*, 318 N.C. 614, 350 S.E. 2d 347 (1986); *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986); *State v. Heath*, 316 N.C. 337, 341 S.E. 2d 565 (1986). *Accord* G.S. 8C-1, Rule 608(a) comment. However, those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness. *See State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985) (Doctor's opinion that four and five year olds had had sexual intercourse held admissible); *State v. Stanley*, 310 N.C. 353, 312 S.E. 2d 482 (1984) (Doctor's opinion as to whether child had been penetrated held admissible); *State v. Starnes*, 308 N.C. 720, 304 S.E. 2d 226 (1983) (Doctor's opinions that child's vaginal area had been penetrated and that her injuries were probably caused by a penis held admissible).

In the instant case, Ms. Browder and Dr. Smith did not give their opinions as to the credibility of the prosecuting witness's in-court testimony nor did they give their opinions as to defendant's guilt or innocence. Each simply gave her expert opinion based on her examination of the child and based on her expert knowledge concerning abused children in general. Defendant's contentions are without merit.

IV.

[4] Defendant next contends that the trial court erred in permitting Ms. Browder and Dr. Smith to testify that, in the opinion of each, other members of Angela's family were aware of the occurrence of sexual abuse involving defendant and Angela. Specifically, Ms. Browder testified that in her opinion, two of Angela's sisters and Angela's mother knew that Angela was being sexually abused. Dr. Smith testified that in her opinion members of Angela's family were aware of the episodes of sexual abuse involving Angela. Each of these opinions was based primarily upon statements made by Angela herself. Defendant contends that this testimony was inadmissible opinion evidence as to Angela's credibility.

Although this evidence, amounting, in effect, to testimony that Ms. Browder and Dr. Smith believed Angela when she told them she had reported the incidents of sexual abuse to her family, may have been erroneously admitted into evidence, its admission was not prejudicial. On direct examination, Angela testified that she had told her mother about defendant's sexual abuse of her when it first occurred. Lee Ann Donivan, Angela's older sister, stated for purposes of corroborating Angela's testimony that Angela reported to her at least once the occurrences that transpired between Angela and defendant. Lee Ann then testified that she told her mother about the occurrences. In light of this admissible and unobjected-to evidence concerning the family's awareness of Angela's allegations against the defendant, we find no reversible error in the testimony of Ms. Browder and Dr. Smith on the subject. These assignments of error are overruled.

V.

[5] Defendant's next assignment of error involves the following testimony of Dr. Jackson as to Angela's anxiousness and anger during his examination of her:

> Q. During the course of your interview with Angie Donovan [sic], would you describe her affect or her behavior?
>
> A. She was anxious at being in the interview. When she would describe these events, she would appear more frightened as though these memories would be frightening her. She also expressed anger toward Mr. Bailey.

Q. Did she express anger? Was that the only anger she expressed?

A. She expressed anger toward her mother citing that on two occasions she had told her mother and her mother had not done anything.

Q. Dr. Jackson, can you, would, can you distinguish between Angela's perhaps being anxious at talking with you and the type of anxious that she, that you just described?

. . . .

A. The anxiousness in talking with me would be the anxiousness of anyone who is talking about something very personal and embarrassing to them, talking with a stranger. That anxiety fades away once the child begins to feel that the examiner is someone who will listen to them and will try to understand what it is they're talking about. The anxiety related to the events as she would talk about a specific thing that had happened, she would then look nervous, frightened kind of anxiety.

. . . .

Q. Okay. Dr. Jackson, listening very carefully to what I'm asking you. What criteria did Angela indicate to you with regard to her behavior, or things that she said that would indicate sexual abuse without talking about, could you just talk about behavior things you observed and saw and heard?

. . . .

A. Her, her anxiety as she described, and again almost a fearful kind of anxiety as she described the incident that had occurred. Her anger seemed to be appropriately placed to specific behaviors of Johnny and her mother.

After a careful review of the above testimony, we find no error. Dr. Jackson is a licensed practicing psychologist whom the court found qualified as an expert in the field of child psychology, specializing in child abuse. Dr. Jackson stated that he examined Angela pursuant to a request by the Department of Social Services for an evaluation of Angela in order to determine if the child had been sexually abused and if the child were in need of

treatment. The testimony at issue here consisted of Dr. Jackson's observations of Angela's behavior during the course of his examination and his professional expert opinion as to the relationship between Angela's anxiousness and anger and the events which she described during the examination. Dr. Jackson said nothing regarding Angela's demeanor during her in-court testimony and gave no opinion as to Angela's credibility or reliability. Dr. Jackson's testimony was properly admitted into evidence by the trial court. *See State v. Kennedy,* 320 N.C. 20, 357 S.E. 2d 359 (1987) (psychologist's testimony as to victim's fear of father, behavior during examination, and symptoms consistent with sexual or physical abuse held admissible).

VI.

[6] As a final matter, defendant asks this Court to review the trial court's decision regarding records of Angela's case kept by the Chatham County Department of Social Services. Pursuant to the United States Supreme Court decision, *Pennsylvania v. Ritchie,* --- U.S. ---, 107 S.Ct. 989, 94 L.Ed. 2d 40 (1987), the State's interest in maintaining the confidentiality of its files and the defendant's right to access to information necessary to the preparation of his defense are properly balanced by an *in camera* review of the records by the trial court and the trial court's obligation to release information material to the fairness of the trial.

After inspection of the Chatham County Department of Social Services' records on Angela's case, we concur with the trial court's determination that all records material to the preparation of defendant's defense in this action were made available to defendant and that the remaining records were not material to his case.

For the reasons stated above, defendant received a fair trial, free from prejudicial error.

No error.

Judges COZORT and GREENE concur.

DEPARTMENT OF TRANSPORTATION v. RICHARD F. CRAINE AND WIFE, MAGDELENE CRAINE

No. 8724SC302

(Filed 15 March 1988)

Highways and Cartways § 5.1— abutter's right of access retained—failure to take into account in determining fair market value of remaining property

Defendants retained their abutter's right of access to a highway despite the relocation of a portion of their driveway on the new State right-of-way, and the trial court therefore erred in excluding evidence by an expert witness that no damages for the driveway were included in his estimation of the value of defendants' land after taking and in refusing to give plaintiff's requested instruction that defendants still had full right of access and this should be taken into account in arriving at the fair market value of the remaining property. N.C.G.S. § 136-89.53.

APPEAL by plaintiff from *Hyatt, J. Marlene, Judge.* Judgment entered 3 October 1986 in Superior Court, MADISON County. Heard in the Court of Appeals 19 October 1987.

This is a condemnation proceeding instituted by plaintiff on 19 November 1984 to acquire a portion of defendants' property for State Highway Project 8.1860106. Defendants owned a tract of land containing 15.94 acres, located on the west side of U.S. 25-70 in Madison County. The property to be appropriated contained 1.28 acres and was the portion of defendants' land abutting on the west side of U.S. 25-70 for a distance of approximately 600 feet. Of the land to be appropriated, 1.19 acres was for a new right-of-way and 0.09 acres was for a temporary construction easement for driveway relocation.

By consent order, all issues were resolved except the issue of damages.

The consent order states in part:

INTEREST OR ESTATE TAKEN:

Fee simple title to right of way for all purposes for which the plaintiff, its successors and assigns, is authorized by law to subject the same, and a temporary construction easement for driveway relocation and reconnection to expire upon the completion of Project 8.1860106, Madison County, at which time

said temporary construction easement will revert to the owners.

That the said property appropriated is described as follows:

Being that area denoted as "New Right of Way" and "Temporary Construction Easement" as shown on the plat filed by the plaintiff in this action . . . , said plat . . . is a correct portrayal of what it purports to show and is a fair and accurate representation of the property affected by the appropriation and property rights appropriated.

The case was heard on the issue of just compensation by Judge Hyatt, sitting with a jury.

Defendant, Richard Craine, testified that prior to the taking, their existing driveway was not on any part of a State right-of-way, with the exception of 0.06 acres that they utilized to gain access to U.S. 25-70 and that after their driveway was relocated, a portion of their driveway existed on the new right-of-way owned by the State. Defendant also testified that they still retained access to U.S. 25-70.

Defendants' value witness, Gerald Young, testified to the effect that defendants' entire property had a fair market value of $65,500 before the taking; that the fair market value of the remaining property after the taking was $18,500, resulting in a damage figure of $47,000. Mr. Young's testimony for valuing the property was based solely on the following criteria: That the driveway to defendants' remaining property is on State property; that the State has a right to fence off defendants' access at any time; that as a result of this right defendants do not have an entrance to their property except from a back way; and that defendants would have to acquire a new right-of-way. Also, on cross-examination by plaintiff, Mr. Young acknowledged that defendants have full legal right of access to the highway subject only to driveway regulations.

Mr. Francis Naeger, the first expert witness for plaintiff, testified to the effect that defendants' entire property had a fair market value of $58,900; that the fair market value of the remaining property after the taking was $49,600, resulting in a damage figure of $9,300. Mr. Naeger took into consideration the following criteria in assessing the value of defendants' property. He re-

searched the property and looked at (1) the sales price of other properties sold in the area; (2) the size of the property; (3) the frontage of the property; (4) the access to the property; (5) the topography of the property; and (6) the utilities. Mr. Naeger also testified that plaintiff specifically rebuilt defendants' driveway so that they could have access to the highway; that the temporary easement for construction on defendants' land was for reconstruction of the driveway; and that when he arrived at a per acre value for the property after the taking, part of the consideration of the per acre value was for change of access due to the relocation of the driveway.

Mr. Charles Torian, plaintiff's other expert witness, testified to the effect that defendants' entire property had a fair market value of $56,100; that the fair market value of the remaining property after the taking was $48,100, resulting in a damage figure of $8,000. Mr. Torian based his appraisal of the property on his inspection of the property and on his comparison of the sales price of other properties sold in the area. Mr. Torian testified that in estimating the after value of defendants' property, he did not include the fact that part of defendants' driveway was on the State right-of-way; nor did he include any decrease in value to the property based on the State's right to use the right-of-way at any time.

The jury found that defendants were entitled to recover $26,500 from plaintiff. From the signing and entry of judgment, plaintiff appealed.

Lacy H. Thornburg, Attorney General, by Alfred N. Salley, Assistant Attorney General, for plaintiff-appellant.

Long, Howell, Parker & Payne, P.A., by Ronald W. Howell, for defendant-appellees.

JOHNSON, Judge.

Plaintiff raises three Assignments of Error in this appeal.

By its first Assignment of Error, plaintiff contends that the trial court erred when it allowed the jury, in arriving at its verdict, to consider evidence that plaintiff had acquired the right to deny defendants access to U.S. 25-70 from their abutting remainder without further compensation. We agree.

Every erroneous ruling in the admission or exclusion of evidence does not *ipso facto* entitle the appealing party to a new trial. He must show that he was prejudiced and that the erroneous ruling probably influenced the jury verdict. *Emerson v. Carras*, 33 N.C. App. 91, 234 S.E. 2d 642 (1977).

At trial, there was a divergence of opinion by plaintiff and defendants based on the testimony of each party's witness' appraisal of defendants' land after the taking. One of plaintiff's expert witnesses, Francis Naeger, testified that his only consideration for damages concerning defendants' driveway was for the fact that it was relocated and slightly narrower. Mr. Naeger did not give any consideration in arriving at an opinion as to the value that the defendants' driveway was on a portion of the State's new right-of-way. When asked to explain why he made no such consideration, plaintiff's expert witness, Naeger, was not permitted to do so. On cross-examination, defendants' counsel was allowed, over objection, to question Mr. Naeger, that he did not consider as a damage factor that defendants' driveway now existed on a portion of the new State right-of-way.

At trial, it was plaintiff's contention that defendants retained their abutter's right of access to U.S. 25-70, despite the relocation of the driveway, and that the only way the State could take their abutter's right of access, requiring further compensation, was if the right-of-way was created for a controlled-access facility. It was the exclusion of this evidence by the trial court, plaintiff contends is erroneous.

On the other hand, no objection was made to defendants' value witness' testimony that his basis for determination in value of defendants' property was because defendants' driveway was now relocated on the new State right-of-way and that the State could deny access at any time. Thus, at trial, it was defendants' contention that since the State acquired in fee simple the right-of-way where a portion of their reconstructed driveway exists, then their direct access to the highway is now permissive and therefore their access is subject to being cut off at any time by the State. As a result, defendants contend they don't abut a State highway but a State right-of-way.

It is generally recognized that the owner of land abutting a highway has a right beyond that which is enjoyed by the general

public; a special right of easement in the public road for access purposes, and this is a property right which cannot be damaged or taken from him without due compensation. *State H'wy Comm'n v. North Carolina Realty Corp.*, 4 N.C. App. 215, 166 S.E. 2d 469 (1969).

By statute, an abutter's right of access can be appropriated by the State but it cannot be taken without just compensation. G.S. 136-89.51 states in part:

> The Department of Transportation is authorized so to design any controlled-access facility and so to regulate, restrict, or prohibit access as best to serve the traffic for which such facility is intended. . . . No person shall have *any right* of ingress and egress to, from or across controlled-access facilities to or from abutting lands, except at such designated points at which access may be permitted, upon such terms and conditions as may be specified from time to time by the Department of Transportation. (Emphasis added.)

G.S. 136-89.52 which deals with acquisition of property and property rights by the State for controlled-access facilities states in part:

> The property rights acquired under the provisions of this Article may be in fee simple or an appropriate easement for right-of-way in perpetuity. . . .
>
> Along new controlled-access highway locations, abutting property owners shall not be entitled to access to such new locations, and no abutter's easement of access to such new locations shall attach to said property.

Furthermore, G.S. 136-89.53 states in part:

> The Department of Transportation may designate and establish controlled-access highways as new and additional facilities or may designate and establish an existing street or highway as included within a controlled-access facility. When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking of or injury to their easement of access. . . .

A controlled-access facility is a "State highway, or section of State highway, especially designed for through traffic, and over, from or to which highway owners or occupants of abutting property, . . . shall have only a controlled right or easement of access." G.S. 136-89.49. It is also the term for a limited access highway where the Department of Transportation (hereinafter DOT) acquires the legal right to cut off entirely the abutting owner's right of direct access to and from the highway on which his property abuts. *Barnes v. North Carolina State H'wy Comm'n*, 257 N.C. 507, 126 S.E. 2d 732 (1962).

When DOT designates property for right-of-way acquisition, the plans submitted for such projects must indicate which right-of-way or other interests in real property is acquired or access is controlled. *See* G.S. 136-19.4. Thus, when it is determined that a highway should be relocated and established as a controlled-access facility, limiting abutter's access thereto, notice of such fact is set forth in detail in plans and petitions for condemnation for the information of landowners and the appraisers in assessing the damages to the property. Also, the symbol C/A is usually placed on the map or plat of proposed construction to indicate controlled access. *See North Carolina State H'wy Comm'n v. Asheville School, Inc.*, 276 N.C. 556, 173 S.E. 2d 909 (1970).

Under the facts of the case *sub judice*, there is no indication that the right-of-way appropriated by DOT was designated as a controlled-access facility, nor was U.S. 25-70 designated as a controlled-access facility. The plat did not contain the C/A symbol or any symbol that indicated the highway or right-of-way was a controlled-access facility. Therefore, we believe the record clearly establishes that U.S. 25-70 is a conventional or non-controlled-access highway, and that the addition of the new right-of-way did not convert it to a controlled-access facility. Nevertheless, the court below deemed that defendants' previous access to the highway no longer existed and that defendants' access only existed at the State's new right-of-way.

The divergence of opinion of the parties concerning what was the true issue appears to us to be based in part on the potential of whether defendants' access to the highway could be cut off at any time due to the fact that their relocated driveway existed on a portion of the new State right-of-way. Thus, plaintiff's and defendants' arguments are premised on a point in time. In other

words, defendants' contention is that their access is permissive only because at any point in time their access, by their driveway, can be cut off, whereas, plaintiff's contention is that, yes, their access can be cut off at any time, but if and only if, the highway is converted to a controlled-access facility. It is at that time that plaintiff states defendants should be further compensated whereas defendants state compensation is due now because they don't know when or where the State will cut off permissive use of their driveway.

The record in the case *sub judice* reveals no evidence that U.S. 25-70 was being converted from a conventional or non-controlled-access highway to a controlled-access facility. There is no indication that after the project's completion, defendants' direct access to the highway was denied. We perceive that there is no statute in force which compensates a landowner, whereby DOT, after acquiring property to extend a right-of-way or a non-controlled-access highway, has permanently cut off whatever abutter's right of access the owner previously had. The consent order is devoid of any language indicating a controlled-access facility or of plaintiff's denying the right of access to defendants. Even in oral argument, plaintiff conceded that the defendants retained a right of access to the highway. When the State interferes with access of a property owner, the question is always whether a reasonable means of ingress and egress remains or is provided. *State H'wy Comm'n v. Yarborough*, 6 N.C. App. 294, 170 S.E. 2d 159 (1969).

DOT, despite having fee simple title in the right-of-way, is placed in check by G.S. 136-89.53. The legislative intent of G.S. 136-89.53 addresses what defendants are afraid of.

It is true, the State has a right to cut defendants' access off at any time. But the State can only restrict their right of access when the highway is a controlled-access facility or is being converted to a controlled-access facility. *Barnes, supra.* It is at that point in time that the legislature has delegated a remedy to the deprived landowner of his abutter's right of access when it is denied and specified on a plat by DOT. A non-controlled-access highway has no need for these types of remedies until the situation arises where it is necessary to effect measures for the safety of the public and in the public interest. G.S. 136-89.51.

The effect of controlled-access facilities is for the public, and when a private citizen's abutter's right of access is denied, he is entitled to just compensation. But where the State acquires a right-of-way abutting an existing non-controlled-access highway, and the landowner's driveway is relocated at another point to a point where their driveway is part of the right-of-way but is still connected to the highway, they still retain their abutter's right of access and have not been denied any rights. The perpetual easement or fee simple in the land acquired by DOT is necessary for construction and the landowner is justly compensated for this taking.

Thus, even where the fee of a conventional highway or right-of-way as in the case *sub judice*, is in the State, it is subject to an easement of access appurtenant to the abutting land. Defendants have access from their property to the highway to which they had access prior to this proceeding. Thus, defendants retained their abutter's right of access to a conventional highway even though part of their driveway exists on the new right-of-way. We believe that the erroneous ruling by the court probably influenced the jury verdict. Therefore, the trial court erred in excluding from the jury's consideration, evidence that defendants retained their right of access to the highway as an abutting landowner and thereby prejudiced plaintiff in the presentation of its case to the jury.

We have considered plaintiff's second Assignment of Error, find it to be meritless and without need for discussion.

Finally, plaintiff, in its third Assignment of Error contends that the trial court erred in failing to tender plaintiff's special jury instruction. We agree.

Plaintiff tendered the following special jury instruction to the court:

> I charge you that the owners of land abutting an existing highway have a special right of easement in the public road for access purposes, and this is a property right which cannot be taken from them without due compensation.
>
> From the evidence in this action, I charge you that the defendants' easement of access has not been interfered with and you will consider the fact that defendant has full right of

access to the highway and that the Department of Transportation has not taken the right to block that access in this action in arriving at the fair market value of the remaining property immediately after the taking under the rules of law I have theretofore given you.

As we have heretofore noted, the problem at issue in the case *sub judice* arose when the trial court did not allow the jury to consider testimony by plaintiff's expert witness, Francis Naeger, that no damages were included in his estimation of the value of defendants' land after the taking because defendants retained their abutter's right of access to the highway despite the relocation of a portion of defendants' driveway on the new State right-of-way. We believe that the special instruction tendered by plaintiff would have removed from the jury's consideration any potential permanent loss of defendants' abutter's right of access alleged by defendants.

When a party aptly tenders a written request for a specific instruction which is correct in itself and supported by the evidence, the failure of the court to give the instruction, in substance at least, is error. *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331 (1954).

We have previously determined that defendants retained their abutter's right of access to the highway despite the fact that defendants' driveway is on a portion of the new State right-of-way. Furthermore, the admission of evidence that in effect indicated that defendants had no access to the highway was incompetent and as a result augmented defendants' recovery. Plaintiff's special instruction was to the effect not to consider evidence that the State could take away defendants' abutter's right of access. Plaintiff's requested special jury instruction was correct, in substance at least, and had the jury been properly instructed we believe that they would have arrived at a different verdict as to the amount of damages. Accordingly, the failure of the trial court to tender plaintiff's special instruction to the jury was error.

Therefore, for all the aforementioned reasons, we are of the opinion that plaintiff is entitled to a

New trial.

Judges WELLS and COZORT concur.

GAIL JOHNSON SMITH v. KEITH EUGENE SMITH

No. 8722DC745

(Filed 15 March 1988)

1. **Divorce and Alimony § 24.9— child support—affirmative findings as to defendant's expenses—no error**

The trial court did not err in a child support case in making findings concerning defendant father's expenses by accepting as reasonable certain of defendant's asserted expenses and rejecting others and finding as reasonable a monthly total in expenses for defendant. The trial judge is not required to make detailed findings of fact upon every item of evidence offered at trial.

2. **Divorce and Alimony § 24.9— child support—expenses not currently affordable for children—allowable**

The trial court did not err in an action for child support by not stating specifically the actual past expenses of the minor children or by including in its findings estimated expenses for certain items that plaintiff mother could not currently afford. Simply because the custodial parent is unable to afford a certain type of expense is no reason to disqualify that item as a reasonable need of the child.

3. **Divorce and Alimony § 24.9— child support—findings of reasonable monthly expenses—supported by evidence**

The trial court's finding in a child support action that the reasonable monthly expenses of plaintiff and the children were in excess of $3,000 per month and that two-thirds of the household expenses were attributable to the children was supported by plaintiff's financial affidavit, which listed individual needs, fixed expenses, and debt payments totaling $2,969.08 per month and approximately $8,000 in household repairs that were necessary at that time or would be necessary in the near future; moreover, it would be a time-consuming if not impossible task for the trial court to determine with any degree of accuracy the portions of expenses such as housing costs, electricity, water, telephone, fuel oil, and automobile expenses attributable to each of the three residents of plaintiff's house.

4. **Divorce and Alimony § 24.9— child support—health insurance findings supported by evidence**

There was sufficient evidence in a child support action to support the court's finding of fact that plaintiff obtained insurance for the minor children because of her fear that defendant would not maintain his health insurance on the minor children where plaintiff testified that defendant had on occasion

refused to sign the insurance forms necessary to release the insurance he maintained for the children and that plaintiff was accumulating a number of medical bills for which she was primarily responsible and she was worried that defendant might change jobs or that the insurance would not cover the expenses.

5. **Divorce and Alimony § 24.9— child support—findings regarding child's medical expenses and educational needs—supported by the evidence**

The evidence in a child support action supported the court's finding that one of the minor children was incurring medical expenses for hospitalization in an amount between $10,000 and $25,000, that at most 80% of those expenses would be covered by insurance, that the child had been diagnosed as having emotional, behavioral and scholastic problems caused by a learning disability, a hearing disorder, and an "auditory processing disorder," and that the child would be returned to the home with an individual education plan requiring computer equipment, a tape recorder, and a tutor.

6. **Divorce and Alimony § 24.9— child support—monthly expenses and estates—evidence sufficient**

The evidence in a child support action was sufficient to support the court's findings regarding defendant's monthly expenses, changes in the parties' estates, and plaintiff's need for a new automobile.

7. **Divorce and Alimony § 24.1— child support—consideration of Chief District Court Judges' Child Support Guidelines—no abuse of discretion**

The trial court did not abuse its discretion in a child support action by considering the Chief District Court Judges' Child Support Guidelines where the trial judge referred to twenty-five percent of defendant's gross income (the guideline amount) in an exchange with defendant's attorney, but plaintiff had prayed for an award of child support in the amount of twenty-five percent of defendant's gross income. Consideration of Child Support Guidelines in making a determination of child support is not error so long as it is clear from the record that the court gave due regard to the factors required to be taken into consideration by statutes and by case law.

APPEAL by defendant from *Fuller (George T.), Judge.* Order entered 23 March 1987 in District Court, IREDELL County. Heard in the Court of Appeals 12 January 1988.

This is an appeal from an order modifying child support. The background is as follows: Plaintiff and defendant were married in 1973, and together had two children, Keith Eugene Smith, Jr., born 24 May 1975, and Keeley Lavinia Smith, born 7 May 1979. The parties separated in 1981, lived together for approximately one year, and then separated finally on 20 June 1983.

On 11 June 1984, the parties entered into a consent judgment with the following relevant provisions: that plaintiff would have

primary custody of the parties' two minor children subject to visitation rights of defendant; that defendant would pay $400.00 per month in child support; that defendant would maintain medical insurance coverage on the two minor children; and that the parties each would pay half of all medical expenses not covered by insurance. The consent judgment also granted plaintiff divorce from bed and board from defendant.

On 14 January 1987, plaintiff filed a motion in the cause for an increase in child support and for other relief. After a hearing, the court entered an order increasing defendant's child support obligation to $1,400.00 per month. Defendant appeals.

Harris, Pressly and Thomas, by Edwin A. Pressly and Genevieve M. Howard, for plaintiff-appellee.

Homesley, Jones, Gaines and Fields, by T. C. Homesley, Jr., and Clifton W. Homesley, for defendant-appellant.

PARKER, Judge.

In this appeal, defendant argues that the trial court erred by making inadequate findings of fact to support its conclusions of law, that the trial court erred by making findings of fact not supported by sufficient evidence, that the trial court erred in placing undue weight upon the District Court Judges' Guidelines, and that the trial judge abused his discretion in ordering defendant to pay $1,400.00 per month in child support. For the reasons that follow, we find that defendant's assignments of error are without merit, and we affirm the order of the trial court.

[1] Defendant first argues that the trial court made inadequate findings of fact. Specifically, defendant argues that the court failed to make any affirmative findings regarding some of his asserted monthly expenses and failed to make any specific findings as to the actual past expenses of the two minor children.

Before ordering a modification of child support, the trial court must determine the present reasonable needs of the children. Such a determination must be based upon specific findings of fact as to actual past expenditures for the minor children, the present reasonable expenses of the minor children, and the parties' relative abilities to pay. *Mullen v. Mullen*, 79 N.C. App. 627, 630, 339 S.E. 2d 838, 840 (1986); *Norton v. Norton*, 76 N.C. App.

213, 216, 332 S.E. 2d 724, 727 (1985). Moreover, findings of fact regarding the parties' incomes, estates, and present reasonable expenses are necessary to determine their relative abilities to pay. *Mullen v. Mullen*, 79 N.C. App. at 630, 339 S.E. 2d at 840; *Norton v. Norton*, 76 N.C. App. at 218, 332 S.E. 2d at 728.

In its order, the court below found as fact:

> That defendant has reasonable monthly expenses of $900.00 for rent, $299.00 for telephone, $69.65 for utilities, $400.85 for automobile payment, $250.00 for food, $104.08 for health insurance, $59.94 for automobile insurance, $100.00 for clothing, $100.00 for entertainment and $40.00 for child medical expenses, totalling $2,323.52 per month.

Defendant contends that the court erred in failing to make affirmative findings as to some of his asserted monthly expenses, such as $500.00 per month for debt repayment to his father, $371.52 per month for meals while travelling as part of his job, $400.00 per month for transportation to visit his children in North Carolina, $115.14 per month for life insurance, $237.44 per month for "hotel marketing expenses," $43.65 per month for cable television, and $166.67 per month for the children's vacation.

Credibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness. *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E. 2d 450 (1971). Moreover, in an action involving a determination of child support, the trial judge is not required to make detailed findings of fact upon every item of evidence offered at trial. The trial judge is required, however, to make material findings of fact that resolve the issues raised. In each case, the findings of fact must be sufficient to allow the appellate courts to determine upon what facts the trial judge predicated his judgment. *Ebron v. Ebron*, 40 N.C. App. 270, 271, 252 S.E. 2d 235, 236 (1979); *Morgan v. Morgan*, 20 N.C. App. 641, 642, 202 S.E. 2d 356, 357 (1974).

In the case before us, the trial court accepted as reasonable a monthly total of $2,323.52 in expenses for defendant. The trial judge must be given broad discretion in making factual determinations, for the trial judge has the opportunity to see the parties in person and to hear the witnesses. *See Pruneau v. Sanders*,

25 N.C. App. 510, 516, 214 S.E. 2d 288, 292, *cert. denied*, 287 N.C. 664, 216 S.E. 2d 911 (1975); *Greer v. Greer*, 5 N.C. App. 160, 163, 167 S.E. 2d 782, 784 (1969). The trial judge accepted as reasonable certain of defendant's asserted expenses and rejected as unreasonable the remainder.

Defendant cites *Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863 (1985), to support his contention. However, in *Plott v. Plott*, the trial judge had summarily drawn a conclusion as to the total monthly reasonable living expenses of the defendant, without "a mathematical worksheet reflecting the amounts that were allowed or disallowed by the judge for reasonable living expenses." 313 N.C. at 70, 326 S.E. 2d at 868. The case before us is clearly distinguishable.

[2] The court below also found as fact that the current reasonable expenses of plaintiff and the children are in excess of $3,000.00 per month and that approximately $1,850.00 of this amount is directly attributable to the minor children. In its finding, the court accepted as "reasonably necessary to maintain the health, welfare and enjoyment of the minor children" two-thirds of the household expenses listed on plaintiff's financial affidavit as well as the total expenses listed on the affidavit that were directly attributable to the children. At trial, when asked how she arrived at the expenses she had listed, plaintiff testified that the figures were based primarily on actual expenditures, although there were some items for her children and for their home that she could not currently afford.

Defendant contends that the court erred in not stating specifically the "actual past expenses" of the minor children. We disagree. The figures listed in plaintiff's financial affidavit and adopted by the court were figures based on actual past expenditures. Moreover, it was not improper for the court to include in its findings estimated expenses for certain items that plaintiff could not currently afford; simply because a custodial parent is unable to afford a certain item or expense is no reason to disqualify that item as a reasonable need of the child. Findings of fact as to actual past expenditures are meant to aid the trial court in determining the reasonable needs of the children, not to hamper the court's ability to assess the children's reasonable needs. Therefore, we find that the court made findings of fact sufficient to support its conclusions of law.

[3] Defendant next argues that certain findings of fact made by the trial judge are not supported by sufficient evidence. We will address each contested finding briefly.

Defendant contends that the trial court's finding number four, that the reasonable monthly expenses of plaintiff and the parties' children are in excess of $3,000.00 per month and that two-thirds of the plaintiff's household expenses were attributable to the children, is based on speculation rather than on evidence in the record. This contention is without merit.

Plaintiff's financial affidavit listed "Individual Needs," "Fixed Expenses," and "Debt Payments" totalling $2,969.08 per month. In addition, plaintiff listed approximately $8,000 in household repairs that were necessary at that time or would be necessary in the near future. This evidence alone is sufficient to support the trial judge's finding that the current reasonable needs of plaintiff and the children total $3,000.00 per month. Moreover, the trial court's allocation of two-thirds of plaintiff's household expenses to the minor children of the parties is not necessarily error. Included in plaintiff's listed household expenses are housing costs, electricity, water, telephone, fuel oil, and automobile expenses. While it is true that plaintiff would have to make expenditures for these items even if the parties' minor children were not residing with her, it would be a time-consuming if not impossible task for the trial court to determine with any degree of accuracy the portions of these expenses attributable to each of the three residents of plaintiff's house. *Compare Evans v. Craddock*, 61 N.C. App. 438, 300 S.E. 2d 908 (1983) (allocation to minor child of one-third total living expenses of custodial parent, her current spouse, and the minor child is impermissible use of a mathematical formula to calculate the child's needs) *with Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E. 2d 99 (1984) (allocation to minor child of one-third total fixed expenses of custodial parent and the minor child not error where figure did not include any new spouse of custodial parent and court found expenses reasonable). We find no error in the trial court's finding of fact number four.

[4] Defendant also contends that there is insufficient evidence to support the court's finding of fact number five, that plaintiff obtained insurance for the minor children because of her fear that defendant would not maintain his health insurance on the minor children. This contention is also without merit.

At trial, plaintiff testified that although defendant was required to carry medical insurance covering the parties' children pursuant to the 1984 consent judgment and although to her knowledge he had thus far complied with that requirement, on occasion, defendant had refused to sign the insurance forms necessary to release the insurance. Plaintiff also testified on cross-examination that she obtained medical insurance because she was accumulating a number of medical bills for which she was primarily responsible, and she was worried that defendant might change jobs or that the insurance would not cover the expenses. This evidence sufficiently supports the court's finding number five.

[5] Defendant further argues that the trial court's finding number six is not supported by sufficient evidence. The trial court's finding number six states the following:

> That the minor child, Keith, is hospitalized now at N. C. Memorial Hospital, and medical expenses will be incurred in connection with his hospitalization in an amount from $10,000.00 to $25,000.00 and that, at the most, 80% of these expenses will be covered by insurance; that from this hospitalization, the minor child will return to the marital home with directives to maximize the child's learning ability, which directives will include a program that will make it necessary to obtain computer equipment, recording equipment, and typewriting equipment for him to use so as to allow him to do his studies through means other than having him write his lessons, and these will be costs in addition to the $156.00 per month needed for a tutor for the minor child.

This finding is supported by ample evidence in the record.

On direct examination, plaintiff testified that the parties' minor son, Keith, was currently at North Carolina Memorial Hospital and that Keith had been diagnosed as having emotional, behavioral, and scholastic problems caused by a learning disability, a hearing disorder, and an "auditory processing disorder." Plaintiff stated that defendant's medical insurance "should pay" eighty percent of the expenses incurred at Memorial Hospital. On cross-examination, plaintiff stated that the estimated bill for Keith's hospitalization was from $10,000.00 to $25,000.00. She also testified that on Keith's release from the hospital, he was to

follow an "Individual Education Plan" that would require computer equipment, including a printer, a tape recorder, and a tutor. Plaintiff stated that she had gotten estimates from professional tutoring services and that tutoring at the lowest available hourly rate would cost $156.00 per month.

This evidence fully supports the trial court's finding of fact number six.

[6] Defendant next contends that the court's findings of fact numbers seven, eight, and nine are not supported by sufficient evidence. In relevant part, the court below found as fact:

> 7. That defendant has reasonable monthly expenses of $900.00 for rent, $299.00 for telephone, $69.65 for utilities, $400.85 for automobile payment, $250.00 for food, $104.08 for health insurance, $59.94 for automobile insurance, $100.00 for clothing, $100.00 for entertainment and $40.00 for child medical expenses, totalling $2,323.52 per month.
>
> . . . .
>
> 8. That since June of 1984, defendant's estate has increased with regard to his partnership interest in Century Classic, Ltd. and his rental home in Charlotte, N. C.
>
> . . . .
>
> 9. That plaintiff's estate had diminished and that her automobile is worn out and needs replacement, and that there has been an equity reduction in the ratio of savings accounts owned and debts owed from June of 1984 to the present time.

As discussed in the earlier portion of this opinion, the court's finding of fact number seven, as to defendant's reasonable monthly expenses, is based directly on defendant's own list of monthly expenditures. Therefore, it is clear that finding number seven was supported by evidence in the record. The trial court's findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support contrary or additional findings of fact. *Vuncannon v. Vuncannon*, 82 N.C. App. 255, 259, 346 S.E. 2d 274, 276 (1986).

Likewise, the court's finding of fact number eight is supported by sufficient evidence in the record. Defendant testified on direct examination that he became a partner in a Charlotte art gallery, Century Classics Limited, in 1985, and that in 1986, his reported income from the partnership was $4,504.71. Defendant also testified that he holds title to some property in Charlotte, which he purchased after he and plaintiff had signed the consent judgment in June of 1984. Defendant also stated that he receives $625.00 per month rental income from the Charlotte property. Defendant testified that his expenses relative to the property, however, are $795.59 per month causing him "a negative cash flow of $170.59 per month." This evidence is sufficient to support the trial court's finding of fact number eight, even though there is evidence to support a different finding as to the rental property.

As to the trial court's finding of fact number nine, plaintiff testified on direct examination that her current automobile, a 1983 Toyota, was giving her "a lot of problems" and "even broke . . . down for a week in the last month." She stated that she felt that she needed to get another car because her car was not dependable, and she was especially concerned when she and the children were on the road at night. Plaintiff testified on redirect examination that in 1984, she had $500.00 in her savings account and that her debts totalled approximately $800.00. Plaintiff stated that at the time of trial, she had $750.00 in her savings account, but that her debts, including a "cash reserve" account that gives an automatic extension to her checking account, amounted to in excess of $3,500.00. Plaintiff also testified that she had had nearly $1,000.00 in an "emergency" savings account, but she was forced to withdraw $700.00 from that account for legal fees and for expenses connected with her son's stay in Chapel Hill. This evidence is sufficient to support the trial court's finding of fact number nine.

[7] Defendant next assigns as error finding of fact number ten which states that the trial court considered the Chief District Court Judges' Child Support Guidelines, providing that a noncustodial parent of two children should pay twenty-five percent of his gross income in child support. Defendant argues that the trial judge placed undue weight upon the guidelines and that this constitutes an abuse of discretion. This contention is entirely without merit.

First, we cannot say that the trial court's consideration of Child Support Guidelines in making a determination of child support is error, so long as it is clear from the record that the court gave due regard to the factors required to be taken into consideration by statutes and by case law. *See, e.g., Mullen v. Mullen, supra; Norton v. Norton, supra.* Furthermore, defendant has not shown that the court has abused its discretion in considering such guidelines.

To support his argument, defendant points to the fact that the amount of support he has been ordered to pay is approximately twenty-two percent of defendant's gross monthly income and that "the court managed to come quite close to the 25% figure." Defendant also points out the following exchange at trial between defendant's attorney and the trial judge:

> MR. HOMESLEY: Judge, did I understand you to say $1,400 a month?
>
> THE COURT: Yes, sir.
>
> MR. HOMESLEY: He [plaintiff's attorney] didn't even ask but for $1,300.
>
> THE COURT: You want to figure out what 25 percent of $77,000 is?

In context, it is clear that the court's reference to twenty-five percent refers not to the Chief District Court Judges' Child Support Guidelines, but to plaintiff's motion in the cause for an increase in child support in which she prayed the court that she be awarded child support "in the amount of 25% of [defendant's] gross income." This assignment of error is overruled.

Defendant's final contention is that the trial judge abused his discretion in ordering defendant to increase his child support payments from $400.00 per month to $1,400.00 per month. We find no abuse of discretion and conclude from a careful review of the record that the trial court's findings of fact are supported by competent evidence in the record, that these findings of fact support the court's conclusions of law, and that the court's conclusions of law support its judgment.

For the reasons stated herein, the order of the trial court is

Affirmed.

Judges COZORT and GREENE concur.

JIMMY L. SHUPING v. JAMES D. BARBER, MICHAEL COATES, AND CITY OF SALISBURY, NORTH CAROLINA

No. 8719SC611

(Filed 15 March 1988)

1. **Libel and Slander § 9— slanderous statements made to plaintiff's fiancee—statements made for protection of interest of recipient—summary judgment improper**

The trial court in an action for slander erred in entering summary judgment for defendant policemen based on conditional or qualified privilege where defendants allegedly made statements that plaintiff had his own car stolen for purposes of defrauding his insurance company and that plaintiff was a drug dealer; the statements were made to plaintiff's fiancee and the fiancee's mother after she and plaintiff had begun dating but before they had married; and there were questions of fact as to whether the publication of the statements was for the protection of the interest of the recipient or a third party.

2. **Municipal Corporations § 12.1— slander by police officers—malice presumed or shown—claim against city barred by governmental immunity**

The trial court properly entered summary judgment for defendant city in an action for slander where defendant police officers allegedly made statements to third parties concerning plaintiff's involvement in defrauding his insurance company and in various drug related transactions; plaintiff presented a sufficient forecast of evidence showing slander per se thereby giving rise to a presumption of malice on the part of defendants; if defendants could successfully establish facts sufficient to show a qualified privilege, plaintiff would be required to show that the publication was made with actual malice in order to recover; any claim by plaintiff against defendant city was therefore barred by governmental immunity because defendant city's liability insurance did not cover claims based on the malicious conduct of its law enforcement employees. However, the individual defendants did not have the benefit of governmental immunity since they were not shielded if their alleged actions were corrupt or malicious, and malice was either presumed or required to be shown for plaintiff to recover.

3. **Libel and Slander § 13; Rules of Civil Procedure § 21— allegation that defendants jointly liable for slander—impropriety—propriety of joinder—summary judgment not required**

There was no merit to defendants' assertion that summary judgment was properly granted in their favor because plaintiff's complaint improperly al-

leged that defendants were jointly liable for slander without any allegation of conspiracy, since defendants could not be held jointly liable, but plaintiff was not precluded from pursuing his claims against both defendants in the same civil action; and even if defendants were improperly joined, summary judgment was inappropriate.

APPEAL by plaintiff from *Helms (William H.), Judge.* Order entered 6 May 1987 in Superior Court, ROWAN County. Heard in the Court of Appeals 3 December 1987.

Plaintiff instituted this action against defendants James D. Barber, Michael Coates, and City of Salisbury, North Carolina, alleging that defendants Barber and Coates made various defamatory statements about plaintiff and that at least some of the statements were made when defendants Barber and Coates were acting under the color of their office as police officers of defendant City of Salisbury. Specifically, the complaint alleged that defendants Barber and Coates stated that plaintiff arranged to have his own car stolen; that plaintiff is a cocaine dealer; that plaintiff would be arrested in the course of an ongoing undercover drug operation; that plaintiff was being watched by police agents; that plaintiff had his phone tapped; that plaintiff had been seen using cocaine; that plaintiff had been set up to make a cocaine sale; and that plaintiff had his residence "staked out" by police. Plaintiff also alleged in his complaint that the foregoing statements were false and were made "maliciously and out of spite and ill will, and for the purpose of injuring plaintiff." Plaintiff sought to recover of defendants "jointly and severally" actual damages in excess of $10,000.00 as well as punitive damages.

Defendants filed a timely answer denying that defendants Barber and Coates made the allegedly defamatory statements and raising as additional defenses that any statements made by defendants about plaintiff were true, that the complaint fails to state a claim for which relief may be granted, that the one-year statute of limitations had run, and that any statements made by defendants about plaintiff were privileged. Defendants moved for summary judgment. When the cause came on for hearing, the court permitted defendants to amend their answer by adding the additional defense of governmental immunity. The trial court thereafter entered an order granting summary judgment in favor of defendants. Plaintiff appeals.

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

Womble, Carlyle, Sandridge and Rice, by Charles F. Vance, Jr., and Gusti W. Frankel, for defendant-appellees.

PARKER, Judge.

On the sole issue raised in this appeal, plaintiff contends that the trial court erred in entering summary judgment for defendants for the reason that the statements allegedly made by the individual defendants were actionable *per se* and defendants' affirmative defenses of privileged communication and governmental immunity are not a bar to plaintiff's claim.

Summary judgment is appropriate when there is no genuine issue as to any material fact and any party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). The evidence must be viewed in the light most favorable to the non-moving party, and questions of credibility are to be resolved by the jury. *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E. 2d 666, 668 (1980); *Wiggins v. City of Monroe*, 73 N.C. App. 44, 47, 326 S.E. 2d 39, 42 (1985). As movants, defendants have the burden of showing that an essential element of plaintiff's claim is nonexistent, of showing that plaintiff cannot produce evidence to support an essential element of his claim, or of showing that plaintiff cannot surmount an affirmative defense which would bar the claim. *Bernick v. Jurden*, 306 N.C. 435, 440-441, 293 S.E. 2d 405, 409 (1982); *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E. 2d 325, 335 (1981).

Slander is the speaking of base or defamatory words that tend to prejudice another in his reputation, office, trade, business, or means of livelihood. *Talbert v. Mauney*, 80 N.C. App. 477, 481, 343 S.E. 2d 5, 8 (1986); *Beane v. Weiman Co., Inc.*, 5 N.C. App. 276, 277, 168 S.E. 2d 236, 237 (1969). Slander may be actionable *per se* or *per quod*; where words are actionable *per se*, the law *prima facie* presumes malice and presumes at least nominal damages without specific proof of injury. *Badame v. Lampke*, 242 N.C. 755, 756, 89 S.E. 2d 466, 467 (1955); *Johnson v. Bollinger*, 86 N.C. App. 1, 9, 356 S.E. 2d 378, 383-384 (1987). Accusations of crime or offenses involving moral turpitude are slander *per se*. *Talbert v. Mauney*, 80 N.C. App. at 481, 343 S.E. 2d at 8. Consequently, statements that plaintiff had his own car stolen for purposes of

defrauding his insurance company and that plaintiff is a drug dealer are actionable *per se*. *See Talbert v. Mauney*, 80 N.C. App. 477, 343 S.E. 2d 5 (statements that plaintiff forged letters of credit and that plaintiff is a drug dealer held slander *per se*). Malice is therefore presumed.

[1] Plaintiff argues that since the allegation that these slanderous *per se* statements were made must be accepted as true for purposes of summary judgment, summary judgment for defendants was improper. The fact, however, that the statements, if made, were slanderous *per se* is not in and of itself sufficient to defeat summary judgment if, as in this case, defendant has asserted privilege. Where the affirmative defense of privilege is alleged, the burden is on the defendant to establish facts sufficient to show that the publication of the alleged defamation was made on a privileged occasion. *Stewart v. Check Corp.*, 279 N.C. 278, 283, 182 S.E. 2d 410, 414 (1971); *Towne v. Cope*, 32 N.C. App. 660, 663, 233 S.E. 2d 624, 626 (1977). Our Supreme Court has stated:

> The defense of qualified or conditional privilege arises in circumstances where (1) a communication is made in good faith, (2) the subject and scope of the communication is one in which the party uttering it has a valid interest to uphold, or in reference to which he has a legal right or duty, and (3) the communication is made to a person or persons having a corresponding interest, right, or duty.

Presnell v. Pell, 298 N.C. 715, 720, 260 S.E. 2d 611, 614 (1979) (emphasis omitted). This duty may be public, personal, or private and of a legal, judicial, political, moral, or social nature. *Ponder v. Cobb and Runnion v. Cobb and Rice v. Cobb*, 257 N.C. 281, 296, 126 S.E. 2d 67, 78 (1962). " 'Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact.' " *Towne v. Cope*, 32 N.C. App. at 664, 233 S.E. 2d at 627 (quoting *Ramsey v. Cheek*, 109 N.C. 270, 274, 13 S.E. 775, 775 (1891)).

Defendants contend that a qualified privilege existed because publication, if any, of the defamatory statements was for the protection of the interest of the recipient or a third party. The

Restatement (Second) of Torts § 595 (1977), defines this privilege in the following manner:

> (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the recipient or a third person, and
>
> (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.
>
> (2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that
>
> (a) the publication is made in response to a request rather than volunteered by the publisher or
>
> (b) a family or other relationship exists between the parties.

In this case, defamatory statements were allegedly made by defendant Barber to plaintiff's fiancee, now wife, Norma Vail Shuping, after she and plaintiff had begun dating, but before they had married. According to Ms. Shuping's deposition, defendant Barber and she had dated one another at one time, and Ms. Shuping felt that defendant Barber's statements concerning plaintiff "started out as something personal against [her]." She did not feel he was trying to protect her in telling her things about her fiance. Ms. Shuping also stated that she had known defendant Coates "since high school," but had never "dated him." Ms. Shuping stated that she talked to defendant Coates to confirm what defendant Barber had said about plaintiff and that defendant Coates also made defamatory remarks about plaintiff. There is a discrepancy between Ms. Shuping's and defendants' testimony as to who initiated these conversations. Finally, Frances M. Vail, Ms. Shuping's mother, stated in her deposition that defendant Barber came to her home and, in the course of conversation, asked Ms. Vail, "[W]hat do you think about this mess that Norma [Ms. Shuping] has gotten herself into?" Ms. Vail stated that defendant Barber went on to make defamatory statements concerning plaintiff.

This evidence, when viewed in the light most favorable to plaintiff, raises questions of fact as to whether the occasions on which the allegedly defamatory statements were made gave rise to a conditional privilege. Accordingly, summary judgment premised on conditional or qualified privilege would not be proper.

[2] Plaintiff further contends that defendants' affirmative defense of governmental immunity is not a basis for summary judgment in defendants' favor. Defendant City of Salisbury argues that although defendant City has waived immunity to the extent of its insurance coverage pursuant to G.S. 160A-485, defendant City's liability insurance excludes coverage of damages caused by the malicious conduct of its law enforcement employees.

Under the common law, a municipality may not be held liable for torts committed by its employees in their performance of a governmental function. *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E. 2d 427, 429 (1970); *Edwards v. Akion*, 52 N.C. App. 688, 691, 279 S.E. 2d 894, 896, 17 A.L.R. 4th 870, 872, *aff'd per curiam*, 304 N.C. 585, 284 S.E. 2d 518 (1981). However, G.S. 160A-485(a) provides in relevant part:

> Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. . . . Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability.

At the time of the acts alleged in plaintiff's complaint, defendant City of Salisbury had in effect a contract of liability insurance that provided, under the heading "Coverage A: Law Enforcement Employees Only," coverage for claims against the insured, the defendants in this case, arising out of any wrongful act by a law enforcement employee acting in his regular course of duty. Under the heading "Exclusions Applicable to Coverage A" is the following language:

> This Policy Does Not Apply To Any Claim As Follows:
>
> D. . . . claims or injury arising out of the willful, intentional or malicious conduct of any Insured.

Through the depositions of several witnesses, plaintiff presented a forecast of evidence tending to show that defendants

Barber and Coates made statements to third parties concerning plaintiff's involvement in defrauding his insurance company and in various drug-related transactions. Plaintiff, therefore, has presented a sufficient forecast of evidence showing slander *per se* thereby giving rise to a presumption of malice on the part of defendants Barber and Coates. If defendants successfully establish facts sufficient to show a qualified privilege, plaintiff would be required to show that the publication was made with actual malice in order to recover. *See Stewart v. Check Corp.*, 279 N.C. at 283, 182 S.E. 2d at 414; *Towne v. Cope*, 32 N.C. App. at 664, 233 S.E. 2d at 627. Hence, any claim by plaintiff against defendant City of Salisbury is barred by governmental immunity because the defendant City's liability insurance does not cover claims based on the malicious conduct of defendant City's law enforcement employees such as defendants Barber and Coates. Therefore, summary judgment was proper as to defendant City of Salisbury.

The individual defendants, James D. Barber and Michael Coates, however, in our view do not have the benefit of governmental immunity under the circumstances of this case. Police officers, such as defendants Barber and Coates, are public officials. *McIlhenney v. Wilmington*, 127 N.C. 146, 150, 37 S.E. 187, 188 (1900). *See also* 57 Am. Jur. 2d *Municipal, School, and State Tort Liability* § 243 (1971). As public officials, they share defendant City of Salisbury's governmental immunity from liability for "mere negligence" in performing governmental duties, but are not shielded from liability if their alleged actions were corrupt or malicious or if they acted outside of and beyond the scope of their duties. *See Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E. 2d 783, 787 (1952); *Wiggins v. City of Monroe*, 73 N.C. App. at 49, 326 S.E. 2d at 43; *Pigott v. City of Wilmington*, 50 N.C. App. 401, 402, 273 S.E. 2d 752, 753-754, *cert. denied*, 303 N.C. 181, 280 S.E. 2d 453 (1981).

As discussed above, the depositions offered in opposition to defendants' motion for summary judgment forecast evidence of slander *per se* on the part of defendants Barber and Coates so malice is presumed on the part of the speakers. If defendants successfully establish the affirmative defense of qualified privilege, plaintiff will be required, in order to recover, to show that the publication was made with actual malice. Because malice is presumed or must be shown in any event, plaintiff's claim against de-

fendants Barber and Coates is not barred by the governmental immunity which shields defendant City of Salisbury from liability.

[3] As a final matter, defendants assert that summary judgment was properly granted in favor of defendants because plaintiff's complaint improperly alleged that defendants were jointly liable for slander without any allegation of conspiracy. While we agree that defendants Barber and Coates may not be found jointly liable on the facts before us, the improper pleading does not justify granting summary judgment for defendants.

In general, slander is an individual tort, and two or more persons each uttering slander against the same individual may not be held jointly liable in the absence of a conspiracy between or among them. *Manley v. News Co.*, 241 N.C. 455, 459-460, 85 S.E. 2d 672, 675 (1955); *Rice v. McAdams*, 149 N.C. 29, 30, 62 S.E. 774, 774 (1908). Plaintiff did not plead conspiracy on the part of defendants Barber and Coates, nor did plaintiff present any forecast of evidence regarding such a conspiracy. Although defendants may not be held jointly liable, plaintiff is not precluded from pursuing his claims against both defendants in the same civil action. G.S. 1A-1, Rule 20(a), provides for permissive joinder of defendants where "there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action." Under G.S. 1A-1, Rule 20(b), the trial judge may enter orders necessary to avoid abuse or prejudice.

Moreover, even if the parties had been improperly joined, G.S. 1A-1, Rule 21, states:

> Neither misjoinder of parties nor misjoinder of parties and claims is ground for dismissal of an action; but on such terms as are just parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action. Any claim against a party may be severed and proceeded with separately.

Summary judgment, like dismissal of the action, is inappropriate in cases of misjoinder of parties and claims.

For the reasons stated above, we hold that the trial court correctly granted summary judgment in favor of defendant City

of Salisbury. The trial court erred, however, in granting summary judgment in favor of defendants Barber and Coates; therefore, we reverse the summary judgment as to the individual defendants and remand the cause to the trial court.

Affirmed in part; reversed in part and remanded.

Judges WELLS and PHILLIPS concur.

FLOSSIE S. CALLAHAN v. H. R. ROGERS

No. 8729SC340

(Filed 15 March 1988)

Physicians, Surgeons, and Allied Professions § 13— malpractice—continued course of treatment exception—action timely

Where defendant doctor operated on plaintiff on 22 January 1981, continued to provide treatment for plaintiff following surgery, discussed with her postoperative pain, performed a fluoroscope examination on 24 June 1981, and discussed results of that examination with her, plaintiff's action for medical malpractice filed on 18 June 1984 was filed within the three-year statute of limitations pursuant to the continued course of treatment exception. N.C.G.S. § 1-15(c).

APPEAL by plaintiff from *Kirby, Robert W., Judge*. Judgment entered 12 January 1987 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 21 October 1987.

This is a civil action for damages for medical malpractice. On 18 June 1984, plaintiff filed a pro se complaint in this action, alleging medical negligence in surgical procedure and post-operative care by defendant doctor. Plaintiff's complaint alleged that on 21 January 1981, defendant Rogers undertook the medical care of plaintiff for pain in her left groin and for other symptoms; that on 22 January 1981 defendant doctor operated on plaintiff's hip and performed a Gilberty II total hip arthroplasty (plastic surgery of a joint); that thereafter plaintiff developed complications in the hip requiring another operation on the hip by another physician; that defendant was negligent in using an improper surgical procedure to repair the subcapital fracture of plaintiff's femoral neck

fracture in her left hip; that defendant failed to take timely medical steps to correct plaintiff's postoperative complications; and that defendant failed to provide care to plaintiff in accordance with standards of health care professionals.

On 16 August 1984, defendant filed a timely answer, denying the material allegations of the complaint and asserting various defenses to plaintiff's claim, including a motion to dismiss plaintiff's action because it was barred by the applicable statute of limitations, G.S. sec. 1-15(c).

Plaintiff's pre-trial deposition established the following: On 21 January 1981, plaintiff fell at work and fractured her left hip. On 22 January 1981, defendant, Dr. H. R. Rogers, an orthopedic surgeon, performed a total hip arthroplasty on plaintiff whereby he inserted a partial hip prosthesis called a Gilberty Bipolar Endoprosthesis. She remained hospitalized for (14) fourteen days. Following the surgical procedure, plaintiff testified that she had continual pain. Dr. Rogers continued to treat her postoperatively and plaintiff continued to discuss with him the constant pain in her hip. Plaintiff continued to see Dr. Rogers until 24 June 1981.

After a referral by her family doctor, on 29 June 1981, plaintiff was seen by another orthopedic surgeon, Dr. Glenn Scott. He scheduled plaintiff for admission to the hospital for further surgical exploration and revision of the total hip arthroplasty. On 22 July 1981, Dr. Scott operated on plaintiff and removed the prosthesis placed in her hip by defendant Dr. Rogers and inserted a completely different prosthesis. On 18 June 1984, plaintiff filed her complaint against defendant Dr. Rogers. On 14 November 1984, Dr. Scott operated on plaintiff for surgical revision of her total hip prosthesis.

On 12 January 1987, the case came on for trial, but prior to jury selection, the parties agreed that the trial court should rule upon defendant's second defense and motion to dismiss made pursuant to G.S. sec. 1-15(c). Subsequently, after review of the pleadings and the pre-trial deposition of plaintiff, the trial court entered an order granting defendant's motion and dismissing the action as being barred by the three-year statute of limitations. Plaintiff appealed.

Swain, Stevenson and Freeman, P.A., by Joel B. Stevenson, for plaintiff-appellant.

Dameron and Burgin, by Charles E. Burgin, for defendant-appellee.

JOHNSON, Judge.

Plaintiff contends that the trial court erred in granting defendant's motion to dismiss her action based on the three-year statute of limitations, where the evidence tended to show that plaintiff filed the action pursuant to the continued course of treatment exception. We agree.

When the trial court granted defendant's motion to dismiss, it also considered plaintiff's pre-trial deposition, in addition to the pleadings. Thus, defendant's motion to dismiss was converted to a motion for summary judgment when matters outside the pleadings were presented to and not excluded by the court. *Roach v. City of Lenoir*, 44 N.C. App. 608, 261 S.E. 2d 299 (1980); *Fowler v. Williamson*, 39 N.C. App. 715, 251 S.E. 2d 889 (1979). "A motion for summary judgment may be granted only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law." *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E. 2d 287, 290 (1978). The rule "allows quick and final disposition of claims where there is no real question as to whether plaintiff should recover, or where the defendant has established a complete defense." *Oakley v. Little*, 49 N.C. App. 650, 652, 272 S.E. 2d 370, 372 (1980).

The statute of limitations operates to vest a defendant with the right to rely on it as a defense, and the court has no discretion when considering whether a claim is time-barred. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E. 2d 870, *cert. denied*, 277 N.C. 110 (1970). The applicable statute of limitations in this action is G.S. sec. 1-15(c) which states in part that:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or

> monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years.

Thus, G.S. 1-15(c) establishes two separate grounds for malpractice: (1) malpractice arising out of the performance of professional services; and (2) the failure to perform professional services. *Schneider v. Brunk*, 72 N.C. App. 560, 324 S.E. 2d 922 (1985). The statute further provides that for both actions and omissions, the cause of action accrues and the statute of limitations begins to run at the time of defendant's *last act* giving rise to the cause of action. *Mathis v. May*, 86 N.C. App. 436, 358 S.E. 2d 94 (1987).

Under the facts in the case *sub judice*, the alleged last act or performance by defendant on plaintiff was the surgical operation that was completed on 22 January 1981 so that plaintiff had until 22 January 1984 to file her action. Plaintiff did not file her complaint until 18 June 1984, and contends that she is not barred by the three year statute of limitations because her case falls within the continued course of treatment exception. *Ballenger, supra.* Plaintiff contends that the evidence establishes that defendant doctor continued to provide treatment for her following surgery by discussing with her, during her postoperative visits with him, the problems plaintiff was experiencing with her hip; by performing a fluoroscope examination on 24 June 1981; and also by discussing with her the results of the fluoroscope examination. According to plaintiff's theory, Dr. Rogers' last act occurred on 24 June 1981, so that plaintiff had until 24 June 1984 in which to file her action. Since she filed her complaint on 18 June 1984, plaintiff argues that she has filed within the statutory period. We agree.

The continued course of treatment doctrine "applies to situations in which the doctor continues a particular course of treatment over a period of time. . . . Where the injurious consequences arise from a continuing course of negligent treat-

ment . . . the statute does not ordinarily begin to run until the injurious treatment is terminated. . . . The malpractice in such cases is regarded as a continuing tort *because of the persistence of the physician or surgeon in continuing and repeating the wrongful treatment.*" *Ballenger*, 38 N.C. App. at 58, 247 S.E. 2d at 293 (emphasis supplied and citation omitted).

In *Stanley v. Brown*, 43 N.C. App. 503, 259 S.E. 2d 408 (1979), plaintiff, following surgery and discharge from the hospital, discovered that something was wrong. On two postoperative visits to the surgeon, plaintiff was advised that the condition was something with which "she must live." Following that last visit, plaintiff saw another physician who informed her that defendant's operation had been performed incorrectly. She underwent an operation within ten months of the first one. She testified that "when Dr. Brown told me I was going to have to live with it, I decided he was not going to be my doctor any more, because he left me in that condition, and I was satisfied that he had done the operation incorrectly, and that he had ruined me. I had already decided in April that I was in bad shape." *Id.* at 503-04, 259 S.E. 2d at 408. Plaintiff also stated the following in her deposition: that she had an operation performed on her on 27 February 1974; that sometime after 9 March 1974, she discovered something was wrong; that on 5 April 1974 and on 12 June 1974, plaintiff had two postoperative visits to the doctor; and that 12 June 1974 was the last time plaintiff saw defendant in a professional capacity. Plaintiff brought an action against the physician on 14 October 1977 for malpractice for the operation performed on 27 February 1974. In his answer defendant pled the statute of limitations as a bar to plaintiff's claim. This court held that the action accrued on the date defendant performed the surgery on the plaintiff, where plaintiff discovered the injury and had corrective surgery within ten months of the alleged negligent operation by defendant. This court noted that "[e]ven if we were to construe the facts liberally and were to find that defendant's last act occurred on 12 June 1974, when plaintiff last visited defendant's office, plaintiff still would not have filed within the statutory period." *Stanley*, 43 N.C. App. at 506-07, 259 S.E. 2d at 410.

In the case *sub judice*, plaintiff never expressly stated in her deposition that she knew the operation had been performed negligently, nor did the subsequent doctor inform her expressly

that the operation had been performed incorrectly. Plaintiff's testimony reveals that plaintiff had been experiencing pain following surgery by defendant and questioned defendant about pain; that on her last postoperative visit to defendant, on 24 June 1981, defendant stated "that [the pain] is part of the game, [and] you'll just have to learn to live with it"; that plaintiff first saw Dr. Scott on 29 June 1981; that Dr. Scott told plaintiff she would not be any better until she had surgery again; that plaintiff had corrective surgery within seven months of the alleged negligent operation by defendant; and that she didn't think about suing defendant until February 1984.

Although plaintiff could not remember the exact number of postoperative visits that had occurred, we believe these facts give rise to the application of the continued course of treatment rule enunciated in *Ballenger, supra.* The treatment provided by defendant was for the same injury and continued after the alleged acts of malpractice. It was not a mere continuity of a general physician-patient relationship. Unlike *Stanley,* plaintiff, in the case *sub judice,* was not informed per se that the operation was performed incorrectly, nor did she make an immediate determination after the operation that she had been operated on negligently. We are mindful of the fact that the record does not reveal whether the postoperative visits were initiated by plaintiff and/or were scheduled office visits. Nevertheless, although defendant informed plaintiff that the pain was something "she must live with," plaintiff continued to seek treatment from defendant because of continued pain in that area for which medical attention was first sought. These visits continued over a period of six months, culminating in plaintiff's last visit on 24 June 1981, in which defendant performed a fluoroscope examination of plaintiff's hip. Thus, defendant's last act occurred on 24 June 1981, plaintiff's last visit to the defendant-doctor. Thus, plaintiff had until 24 June 1984 in which to file an action for malpractice. Since plaintiff filed her claim on 18 June 1984, she filed within the prescribed limitation period and thus her claim is not time-barred.

On the record before this Court, there exists a genuine issue of material fact, and based on the evidence, defendant is not entitled to judgment as a matter of law. Accordingly, the order below allowing defendant's motion for summary judgment was erroneous. Therefore, the judgment below must be and is

Reversed.

Judges WELLS and COZORT concur.

DOUGLAS WAYNE WILLIAMS, AN INCOMPETENT, BY C. D. HEIDGERD, GUARDIAN AD LITEM v. INTERNATIONAL PAPER CO., RICHMOND GRAVURE, INC., CHESTER LITTLE, D/B/A CUSTOM PAVERS AND COATING CO., INC., AND CORPOREX CONSTRUCTORS, INC.

No. 8710SC587

(Filed 15 March 1988)

1. **Appeal and Error § 3— constitutional question—not raised at trial—no appeal**

The Court of Appeals declined to address the issue of whether N.C.G.S. § 97-10.2(j) violates the United States and North Carolina Constitutions because the constitutional challenges were not presented to or passed upon by the trial court.

2. **Master and Servant § 79— common law action settled—distribution of proceeds between employer and employee**

The trial court erroneously decided the issue of employer negligence without a jury in an action in which plaintiff was injured in a construction accident; received workers' compensation; filed this action against the general contractor and other subcontractors; plaintiff and defendants requested a jury trial; two defendants were dismissed; and plaintiff and the remaining two defendants reached a settlement agreement, then applied to the court for a determination of the amount to be paid to plaintiff and to the employer/carrier under N.C.G.S. § 97-10.2(j). Absent a showing that employer/carrier consented to the elimination of the requested jury trial on the issue of employee negligence, it cannot be waived and N.C.G.S. § 97-10.2(e) (1985) clearly preserves the employer/carrier's right to trial by jury, providing that it has been demanded by a party in the pleadings and not waived by all the parties. The Legislature did not contemplate and intend that N.C.G.S. § 97-10.2(j) would deprive the employer/carrier of his right to trial by jury by virtue of the settlement of plaintiff's claim against the third party defendants, an event over which the employer/carrier had no control; moreover, the legislative title to subsection (j) and the language of subsection (j) refer to joint tort-feasors and the parties in this case are not yet joint tort-feasors.

APPEAL by St. Paul Fire & Marine Insurance Company (St. Paul), as the workers' compensation insurance carrier for the plaintiff's employer, Midwestern Commercial Roofers, Inc. (Midwestern), hereinafter referred to as the employer/carrier, from *Farmer, Judge.* Judgment entered 29 December 1986 in

Superior Court, WAKE County. Heard in the Court of Appeals 3 December 1987.

While employed by Midwestern, plaintiff Douglas Wayne Williams was seriously and permanently injured when he fell through the previously damaged roof of a building being constructed in Raleigh. Corporex Constructors, Inc. (Corporex), the general contractor, and Chester Little, d/b/a Custom Pavers and Coating Co. (Little), another subcontractor, were responsible for repairing the damaged roof. Little replaced the damaged panels but Corporex failed to weld them into place because the welding machine was not operating.

Plaintiff's employer, Midwestern, stopped work early on 12 October 1983 to wait for the panels to be replaced and welded. Ted Finneseth, superintendent for Corporex, assured Midwestern's foreman, George Chalke, that the repairs would be completed in time for the crew to begin work the next morning. However, the panels were, in fact, not welded into place.

Midwestern's crew arrived before dawn on 13 October 1983. Chalke ordered the men back to work after he and other crew members examined the panels. The crew placed styrofoam over the roof which obscured the exact location of the unwelded new panels. Later while plaintiff was carrying a hoist across the roof, he stepped on one of the unwelded panels which collapsed causing him to fall thirty feet onto a concrete floor below.

Although previously compensated under the Workers' Compensation Act, plaintiff filed this separate civil suit against Corporex Constructors, Inc., Chester Little d/b/a Custom Pavers and Coating Co., Inc., International Paper Co., and Richmond Gravure, Inc. alleging joint and several liability for negligence. International Paper and Richmond Gravure were later dismissed from the suit. Defendants answered alleging the joint and concurring negligence of Midwestern as a pro tanto bar to the employer/carrier's compensation lien.

When the case was set for trial and called for a pretrial conference, plaintiff and the remaining defendants, Corporex and Little, reached an out-of-court settlement. Defendants then applied for a hearing pursuant to N.C.G.S. § 97-10.2(j) asking the trial court to determine what amount of settlement proceeds should be paid to the employer/carrier.

At the hearing the trial court determined that it was authorized to hear the matter under N.C.G.S. § 97-10.2(j) and to determine the issue of Midwestern's negligence. The employer/carrier objected. If Midwestern was jointly and concurrently negligent in causing plaintiff's injury, then pursuant to N.C.G.S. § 97-10.2, the employer/carrier would not be entitled to enforce its lien and recover from the settlement proceeds for the $520,491.23 paid by it to the employee.

The trial court ordered the parties, including the employer/carrier, to submit briefs and affidavits on all matters affecting distribution of the proceeds. The trial court found Midwestern was jointly and concurrently negligent in causing plaintiff's injury and the employer/carrier recovered nothing. The employer/carrier appeals.

Golding, Crews, Meekins & Gordon, by Rodney Dean and V. Elaine Cohoon, attorneys for appellant.

Johnny S. Gaskins, attorney for plaintiff-appellee.

John E. Aldridge, Jr., attorney for defendant-appellee Chester Little, d/b/a Custom Pavers and Coating Co., Inc.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr., attorney for defendant-appellee Corporex Constructors, Inc.

ORR, Judge.

[1] In its brief appellant asserts that N.C.G.S. § 97-10.2(j) violates numerous provisions of both the United States and North Carolina Constitutions. None of these constitutional challenges, however, were presented to or passed upon by the trial court. "It is a well settled rule of this Court that we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *Powe v. Odell*, 312 N.C. 410, 416, 322 S.E. 2d 762, 765 (1984) (citations omitted). Because appellant did not raise these issues before the trial court, we decline to address them now. *Id.* at 416, 322 S.E. 2d at 766.

[2] We address instead the fundamental issue which is before this Court. Was the trial court correct in deciding the issue of employer negligence under the provisions of N.C.G.S. § 97-10.2(j)?

We conclude that the trial court's interpretation of the law was in error, although parenthetically this Court admits that the statute in question is a morass of confusion and needs to be intelligibly redrafted.

We begin by examining the procedural posture of the case. Plaintiff filed suit against the defendants as third party tort-feasors. Under N.C.G.S. § 97-10.2(e):

> If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury.

In this case the defendants in fact answered and alleged that the employer was jointly and concurrently negligent (although defendants denied their own negligence) in causing the employee's injuries. Defendants also requested a trial by jury as to all issues raised by the pleadings (as had plaintiff previously in his complaint). This answer was served upon the employer as required.

Pursuant to the statute the employer had the right "to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding." N.C.G.S. § 97-10.2(e) (1985). In such a posture the case proceeded through the discovery process up to the point that the case was on the trial calendar and a pretrial conference was held.

At this point the plaintiff and the defendants entered into a settlement. Plaintiff and defendants then applied to the resident superior court judge pursuant to N.C.G.S. § 97-10.2(j) for a determination of the amount to be paid to the plaintiff and the employer/carrier.

Counsel for the employer/carrier contended before the trial court that pursuant to N.C.G.S. § 97-10.2(h) no settlement could be made without the approval of the employee *and* employer and that the employer had not agreed to a settlement. The trial court held that N.C.G.S. § 97-10.2(j) superseded § 97-10.2(h) under the facts of this case.

Prior to 1983 N.C.G.S. § 97-10.2(h) would have in fact controlled but an amendment was passed by the legislature to N.C.G.S. § 97-10.2 by adding subsection (j) which says:

> In the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party when said action is pending on a trial calendar and the pretrial conference with the judge has been held, either party may apply to the resident superior court judge of the county in which the cause of action arose or the presiding judge before whom the cause of action is pending, for determination as to the amount to be paid to each by such third party tort-feasor. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division.

It was argued and agreed to by the trial court that subsection (j) was passed to eliminate a carrier from holding up a settlement agreement and forcing the employer and third party to trial.

Upon the trial court's determination that subsection (j) applied and empowered it to decide the division of the settlement *and* the issue of the employer's negligence, the employer/carrier objected.

It is noted and argued by the appellees that the employer/carrier did not argue the issue of a right to a jury trial nor specifically request one at the hearing. While this point is well taken, the objection entered by counsel for employer/carrier to the trial court's action was sufficient to preserve the issue on appeal. Likewise, the plaintiff and defendants had requested a jury trial on all issues and the employer/carrier had made an appearance in the action pursuant to N.C.G.S. § 97-10.2(e).

Rule 38(d) of the North Carolina Rules of Civil Procedure states, "[a] demand for trial by jury . . . may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action." We, therefore, conclude that absent a showing that employer/carrier consented to the elimination of the requested jury trial on the issue of employer negligence, it cannot be deemed waived. The two original parties to the action had reached a settlement but there still remained the issue of employer negligence to be determined.

We now turn our attention to the basis upon which we conclude that subsection (j) was not the controlling portion of the statute but instead subsection (e) controls.

In subsection (e) the employer/carrier upon being brought into the lawsuit by virtue of the third party's plea of employer negligence was guaranteed the right to have the issue tried by the jury. "Such issue shall be the last of the issues submitted to the jury." N.C.G.S. § 97-10.2(e) (1985). Clearly then, this section of the statute preserves the employer/carrier's right to trial by jury, providing that it has been demanded by a party in the pleadings and not waived by all the parties.

In the case *sub judice*, the plaintiff and third party reached a settlement at the pretrial conference stage. In enacting subsection (j) did the legislature contemplate and intend to deprive the employer/carrier of its right to trial by jury by virtue of the settlement of the plaintiff's claim against the third party defendants —an event over which the employer/carrier had no control? In our opinion, they did not. As a practical matter with the case calendared and ready for trial there is no fundamental reason why the sole remaining issue of employer negligence could not be expeditiously tried before a jury. Therefore, an argument that permitting a jury trial on the issue of employer negligence would result in an unreasonable delay is without merit.

Appellees argue that subsection (j) gives the trial court the authority to hear the matter without a jury. A close examination of the statute gives no positive indication that such an interpretation was intended.

First, the legislative title to the Act enacting subsection (j) states "An act to provide that the applicable Court shall make the

decision of the settlement or judgment costs among *joint tort-feasors* in actions brought under the Workers' Compensation Act when they cannot agree and providing for limitations of its applicability." 1983 N.C. Sess. Laws ch. 645, § 1 (emphasis added). In this case the parties are not yet joint tort-feasors for that question is the precise factual issue to be resolved. In addition the language of subsection (j) states that application can be made to the judge "for determination as to the amount to be paid to each by such third party tort-feasor." N.C.G.S. § 97-10.2(j) (1985). It does not say that the trial court can or shall determine the issue of employer negligence without a jury. In fact, the language of subsection (j) makes no mention of any such authority.

We therefore conclude that the trial court erroneously decided the issue of employer negligence without a jury and that the employer/carrier was entitled to have a jury pass on the issue pursuant to N.C.G.S. § 97-10.2(e).

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

TIMOTHY ABELL AND DON A. REAMS v. THE NASH COUNTY BOARD OF EDUCATION

No. 877SC247

(Filed 15 March 1988)

1. **Schools § 13.2— probationary teachers—arbitrary failure to renew contracts—burden of proof**

Plaintiff probationary teachers had the burden of proving that defendant board of education acted arbitrarily or capriciously in failing to renew their contracts. N.C.G.S. § 115C-44(b).

2. **Schools § 13.2— assistant football coaches—probationary teachers—nonrenewal of contracts because of coaching change**

A board of education's refusal to renew teaching contracts of probationary teachers who also served as assistant football coaches was not arbitrary or capricious because nonrenewal was based on a change of the head football coach. N.C.G.S. § 115C-325(m)(2).

Abell v. Nash County Bd. of Education

APPEAL by plaintiffs from *Strickland (James R.), Judge.* Judgment entered 11 September 1986 in Superior Court, NASH County. Heard in the Court of Appeals 30 September 1987.

Ferguson, Stein, Watt, Wallas & Adkins, by John W. Gresham, for plaintiff-appellants.

Tharrington, Smith & Hargrove, by Richard A. Schwartz, J. David Farren, and C. Allison Brown, and Valentine, Adams, Lamar & Etheridge, by L. Wardlaw Lamar, for defendant-appellee.

GREENE, Judge.

This is a civil action in which plaintiffs seek actual and punitive damages, as well as injunctive relief. They allege defendant Nash County Board of Education's nonrenewal of their teaching contracts was an "arbitrary and capricious" action. At the conclusion of plaintiffs' evidence, the trial court granted defendant's motion for a directed verdict. Plaintiffs appeal to this Court.

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 a question of whether plaintiffs' 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).

Plaintiffs' evidence, viewed in the light most favorable to them, tends to show the following: Plaintiffs were probationary high school teachers who also performed various coaching duties at Northern Nash High School pursuant to year-to-year contracts. Plaintiffs' coaching duties included serving as assistant football coaches. Plaintiff Abell was employed during the 1980-81 and 1981-82 school years. Plaintiff Reams was employed during the

1981-82 school year. Both plaintiffs were certified only in health and physical education but were assigned to teach federally funded remedial math courses. Abell was required by his 1980-81 contract to obtain math certification within three years, although this requirement was not mentioned in his 1981-82 contract. Reams was required to take six semester hours of math courses during 1981-82.

On 28 April 1982, the Nash County Board of Education (hereinafter the "Board") voted not to renew plaintiffs' contracts. About the same time plaintiffs were advised of their nonrenewals, a new football coach was employed by Northern Nash because of alleged improprieties on the part of the former head coach. Plaintiffs were told if they wanted to continue their employment at the high school, they would have to "sell" themselves to the new football coach. The new coach chose instead to employ other assistants. Reams was later offered a position in the Nash County system at a junior high school but declined and accepted a position which included coaching duties with another school system. Abell was later employed as a community recreational director.

The sole issue presented is whether, because of "coaching changes" at the high school, the Board's nonrenewal of the contracts of probationary high school teachers who also served as assistant coaches is arbitrary or capricious.

I

The nonrenewal of the contract of a probationary school teacher in the North Carolina public schools is governed by N.C.G.S. Sec. 115C-325(m)(2) (1987) which provides:

> The board, upon recommendation of the superintendent, may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons.

For plaintiffs to overcome defendant's motion for a directed verdict they are required to offer evidence, beyond mere speculation or conjecture, sufficient for a jury to find every essential ele-

ment of their claim. Upon a failure to do so, the motion for a directed verdict is appropriately entered against them. *Oliver v. Royall*, 36 N.C. App. 239, 242, 243 S.E. 2d 436, 439 (1978). *See also Hong v. George Goodyear Co.*, 63 N.C. App. 741, 742-43, 306 S.E. 2d 157, 159 (1983) (plaintiff's failure to make out *prima facie* case allows judge to rule on issue as a matter of law). An essential element of plaintiffs' claims here is that the nonrenewals of their teaching contracts were for "arbitrary or capricious" reasons. An arbitrary or capricious reason is one "without any rational basis in the record, such that a decision made thereon amounts to an abuse of discretion." *Abell v. Nash Co. Bd. of Education*, 71 N.C. App. 48, 52-53, 321 S.E. 2d 502, 506 (1984), *disc. rev. denied*, 313 N.C. 506, 329 S.E. 2d 389 (1985) (hereinafter "*Abell I*").

[1] Plaintiffs contend the Board has the burden of establishing a rational basis for the nonrenewals and that it failed to meet this burden because it brought forward no evidence of a rational basis for its decision. However, N.C.G.S. Sec. 115C-44(b) provides:

> In all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show the contrary.

This statute clearly places the burden of proof on plaintiffs here to establish that the actions of the Board were arbitrary or capricious. *See also* Winn, *Teacher Nonrenewal in North Carolina*, 14 Wake Forest L. Rev. 739, 762 (1978) (noting that apparent intent of N.C.G.S. Sec. 115C-325(m)(2) is to place the burden of proof on teacher to prove Board's violation of the statute).

Plaintiffs argue that this Court's holding in *Abell I* required the Board to bear the burden of proof to establish a rational reason for its refusal to renew their contracts. However, *Abell I* held only that in order to prevail on a summary judgment motion, "the Board, as movant, bore the burden of establishing a rational reason for its action." *Abell I*, 71 N.C. App. at 54, 321 S.E. 2d at 507. As the record in *Abell I* disclosed conflicts between what plaintiffs were told and what school administrators stated in their affidavits, and because the reasons advanced by the administrators were too "vague and conclusory," the Court held that summary judgment was improperly granted for the Board and reversed the trial court. *Id.* The Court in *Abell I* did require that

the "administrative record, be it the personnel file, board minutes or recommendation memoranda," disclose the basis of the Board's actions in nonrenewing the contracts. *Id.* at 53, 321 S.E. 2d at 506-07. However, that requirement of record keeping does not shift the burden of proof at trial which remains on the party challenging the nonrenewal. The burden of proof includes not only the burden of going forward with the evidence, but also the burden of persuasion. *See* 2 H. Brandis, *Brandis on North Carolina Evidence* Sec. 201 at 133 (1982).

Therefore, in order to establish a *prima facie* case, plaintiffs must produce sufficient evidence to support a finding that the actions of the Nash County Board of Education were "arbitrary or capricious." After a review of the record, we hold the evidence produced by plaintiffs is not sufficient to support a finding that the nonrenewals were "arbitrary or capricious" and instead, establishes a rational basis for the nonrenewals.

Whether the action of the school board in not renewing the contracts of the plaintiffs was "arbitrary or capricious" is a mixed question of law and fact. The jury determines the factual issues involved and the judge applies these findings to determine whether the nonrenewals were arbitrary or capricious as a matter of law.

The discretion of Boards regarding the status of probationary teachers remains very broad, but a nonrenewal decision must have *some* non-arbitrary basis in order to comply with N.C.G.S. Sec. 115C-325(m)(2). *Abell I,* 71 N.C. App. at 52, 321 S.E. 2d at 506. Both plaintiffs contend that the primary reason they were nonrenewed was because of coaching changes at the school. Accepting plaintiffs' argument that a coaching change was the primary reason for their nonrenewals, it is a question of law for the court to determine if this reason was arbitrary or capricious. *Cf. Singleton v. Stewart,* 280 N.C. 460, 469, 186 S.E. 2d 400, 406 (1972) (in reviewing defendant housing commission's decision to purchase property for low-rent public housing, where easement across property was admitted which might have prevented this use, it was for the court to determine whether the commission's purchase was an arbitrary and capricious act).

Subject to State Board of Education rules and regulations, the local board of education is required to make "all rules and

regulations necessary for the conducting of extracurricular activities in the schools under their supervision, including a program of athletics . . . ." N.C.G.S. Sec. 115C-47(4). Given the broad legislative grant of authority over the status of probationary teachers and the legislative grant to local Boards requiring them to promulgate rules and regulations for interscholastic athletics, we hold a Board may properly consider coaching changes as a basis for determining whether to renew a probationary teacher's contract when the teacher also serves as a coach.

The evidence at trial tended to show both plaintiffs were originally hired based on their coaching ability. Both testified they were interviewed first by the former head football coach before they contacted the school administration about the teaching positions. Both plaintiffs had previous experience in coaching, but neither had any experience in teaching math. Neither plaintiff was certified as a math teacher. Both plaintiffs were specifically advised by the new principal that their renewal depended on their ability to "sell" themselves to the new head football coach. The Board's refusal to renew plaintiffs' contracts assured the new head coach of some flexibility in developing his own coaching staff and football program.

[2] Therefore, we hold the Board's action in nonrenewing plaintiffs' contracts based on coaching changes was not arbitrary or capricious. The action was consistent with the Board's duty and responsibility to oversee extracurricular activities, including the personnel involved in coaching interscholastic sports. *See Lee v. Ozark City Bd. of Education*, 517 F. Supp. 686, 689-90 (M.D. Ala. 1981) (Board's nonrenewal of probationary teacher who served as assistant coach in order to give new head coach flexibility in choosing his staff rebutted teacher's claim of discrimination); *Lamar School District No. 39 v. Kinder*, 278 Ark. 1, 642 S.W. 2d 885 (1982) (Board nonrenewal of teaching contracts for reasons related to coaching effectiveness was not arbitrary and capricious).

II

Because we find the action of the Board was not arbitrary or capricious, it is unnecessary to address the additional evidentiary assignments of error raised by the plaintiff-appellants. The order

of the trial court granting the directed verdict was correct and that action is

Affirmed.

Judges PHILLIPS and COZORT concur.

REGINALD V. TROXLER v. CHARTER MANDALA CENTER, INC. AND CHARTER MEDICAL EXECUTIVE CORPORATION

No. 8721SC812

(Filed 15 March 1988)

1. **Libel and Slander § 16; Master and Servant § 33— slander by fellow employee—action against employer—qualified privilege—slander outside scope of employment—respondeat superior inapplicable**

In an action for slander based on statements by one of defendant's employees that plaintiff had sexual relations with a minor female patient, defendant was entitled to summary judgment where plaintiff argued on the one hand that defendant was liable under respondeat superior because the employee was acting within the scope of his employment, in which case the defense of qualified privilege would apply, and plaintiff argued on the other hand that the employee was motivated by malice and resentment, in which case the employee would be outside the scope of his employment and defendant would not be liable under the doctrine of respondeat superior.

2. **Libel and Slander § 10— sexual misconduct by hospital employee—statements made during investigation—qualified privilege**

Statements made by defendant's employees in investigating charges of sexual misconduct were privileged, and there was no merit to plaintiff's contention that the qualified privilege was lost because of the hospital administrator's malice toward plaintiff and excessive publication, since there was no evidence that the administrator spoke to anyone outside of those who had a corresponding interest in the communication and were part of the investigative process.

3. **Trespass § 2— statements by hospital administrator—alleged sexual misconduct by employee—no intentional infliction of emotional distress**

Statements by defendant's administrator concerning plaintiff's alleged sexual misconduct with a minor patient in defendant's hospital did not constitute an intentional infliction of emotional distress where the administrator received information concerning sexual abuse of a minor in defendant's care; the administrator had a duty to the patients and to defendant to investigate these charges and was bound by N.C.G.S. § 7A-543 to report these allegations to protective services; all of the people with whom he spoke were part of the in-

vestigative process; and the administrator's conduct thus cannot be considered outrageous or extreme.

APPEAL by plaintiff from *Wood (William Z.), Judge.* Order entered 15 May 1987 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 February 1988.

On 28 January 1986, plaintiff filed suit against Charter Medical Executive Corporation (Charter Medical) and his employer, Charter Mandala Center, Inc. (Mandala), a wholly owned subsidiary of Charter Medical. The complaint sought recovery for slander and intentional infliction of emotional distress arising out of statements by defendants' employees that plaintiff, while working as a mental health worker, had sexual relations with a minor female patient at Mandala's hospital. On 24 April 1987, defendants filed a motion for summary judgment. The motion was granted on 15 May 1987. Plaintiff appeals.

The record reveals that on or about 18 January 1985, plaintiff's co-worker, Gregory Holthusen (Holthusen), met after work hours with his shift supervisor, Nancy Davis (Davis). Holthusen reported to Davis that several months earlier another co-worker, Thomas Kennedy (Kennedy), had told him that plaintiff and four other workers had engaged in sexual relations with a minor female patient. After receiving counsel from Davis, Holthusen reported the information to the head nurse who in turn reported it to the director of nursing. The director informed the hospital administrator, Alan Erbe (Erbe). Erbe subsequently contacted his immediate supervisor, an employee of Charter Medical in St. Louis, Missouri, who instructed Erbe how to proceed.

An investigation was initiated and those persons allegedly involved were interviewed. Plaintiff was interviewed and denied any sexual misconduct. During the course of the investigation, Erbe notified personnel at Charter Medical in Atlanta. He also contacted the local police and protective services. Charter Medical sent an investigative team to Mandala's hospital.

On 22 January 1985, plaintiff was suspended from his job pending the investigation. In March 1985, Mandala terminated plaintiff's employment.

In a sworn affidavit filed by plaintiff, Kennedy denied ever talking to Holthusen about the alleged sexual misconduct. He fur-

ther stated in his affidavit that Holthusen was bitter towards blacks who were receiving promotions ahead of Holthusen and specifically towards plaintiff who had been promoted. In an affidavit filed by defendant, Holthusen stated that Kennedy had related to him the charges concerning plaintiff and that Holthusen reported the charges out of concern for the welfare of the patients.

In their answer, defendants raise the affirmative defense of qualified privilege. They also assert that Holthusen's alleged slanderous statements cannot be imputed to them because he was outside the scope of his employment when the statements were made to Davis.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Allman Spry Humphreys Leggett & Howington, P.A., by James R. Hubbard and David C. Smith, for defendant-appellees.

SMITH, Judge.

Plaintiff assigns as error the trial court's granting of defendants' motion for summary judgment as to both causes of action. First, he contends that the circumstances under which Holthusen first related to Davis the alleged sexual misconduct did not constitute a "privileged occasion" and the qualified privilege defense is inapplicable. Second, plaintiff contends that the defense of qualified privilege, if it existed, was lost by excessive publication and malice on the part of Holthusen and Erbe. Third, plaintiff contends that the nature and manner in which the statements were published amount to extreme and outrageous conduct on the part of defendants so as to entitle plaintiff to a trial on his cause of action for intentional infliction of emotional distress. We reject plaintiff's arguments and affirm the trial court's order.

A trial court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). In ruling on the motion, the court must consider the evidence in the light most

favorable to the non-movant. *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E. 2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E. 2d 39 (1986). The non-movant must be given all favorable inferences which may reasonably be drawn from the facts proffered. *English v. Realty Corp.*, 41 N.C. App. 1, 254 S.E. 2d 223, *disc. rev. denied*, 297 N.C. 609, 257 S.E. 2d 217 (1979); *Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974). Therefore, any documents presented which support the movant's motion must be strictly scrutinized while the non-movant's papers are regarded with indulgence. *Miller v. Snipes*, 12 N.C. App. 342, 183 S.E. 2d 270, *cert. denied*, 279 N.C. 619, 184 S.E. 2d 883 (1971).

The record contains two affidavits which are in direct conflict with each other. Kennedy's affidavit, furnished by plaintiff, states that Kennedy never talked to Holthusen and that Holthusen was resentful and bitter toward plaintiff. Holthusen's affidavit, furnished by defendant, states that Kennedy told him that plaintiff and others had sexual relations with a minor female patient and that he reported the story to his supervisor after normal working hours.

[1] It is apparent to this Court that plaintiff has attempted to put forth two conflicting arguments. On the one hand, plaintiff has argued that defendants are liable under *respondeat superior* because Holthusen was acting within the scope of his employment. On the other hand, plaintiff has argued that defendant's employee, Holthusen, was motivated by malice and resentment. If we accept Kennedy's statement, Holthusen would be outside the scope of his employment and defendants are not liable under the doctrine of *respondeat superior*. If we accept Holthusen's statement, he would be within the scope of employment and the defense of qualified privilege would apply. Defendant is entitled to summary judgment under either theory.

To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment. *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E. 2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140 (1986). If an employee departs from that purpose to accomplish a purpose of his own, the principal is not liable. *Id.* If we assign every favorable inference to Kennedy's affidavit and thus

accept it as true, then Holthusen's statements to Davis were to further a malicious purpose of his own and are thus outside the scope of his employment.

Even if we accepted Gregory Holthusen's affidavit that he was acting out of concern for patient welfare and found him to be within the scope of his employment, defendant would still be entitled to summary judgment because Holthusen then had a qualified privilege for his allegations regarding plaintiff.

> 'A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest.'

Gibby v. Murphy, 73 N.C. App. 128, 132-133, 325 S.E. 2d 673, 676 (1985), *quoting Stewart v. Check Corp.*, 279 N.C. 278, 285, 182 S.E. 2d 410, 415 (1971). A "privileged occasion" arises " 'when for the public good and in the interests of society one is freed from liability that would otherwise be imposed on him by reason of the publication of defamatory matter.' " *Ponder v. Cobb and Runnion v. Cobb and Rice v. Cobb*, 257 N.C. 281, 295, 126 S.E. 2d 67, 78 (1962), *quoting* 53 C.J.S., Libel and Slander, section 87, pp. 142 and 143.

[2] The health care industry plays a vital and important role in our society. It plays a critical part in helping us to maintain our physical and mental well-being. We as a society, therefore, are interested in the quality and trustworthiness of the care which the medical community provides.

In response to society's concern, defendants, as owners and operators of medical facilities, have an interest in fostering public confidence in their ability to provide safe and expert patient care and treatment. Part of the task of fostering such confidence involves hiring and maintaining a skilled and trustworthy staff and investigating any allegations of patient abuse or mistreatment by members of that staff. Thus, the statements made by the employees (other than Holthusen) of Mandala and Charter Medical in investigating the charges of sexual misconduct were privileged.

Holthusen, an employee of defendant who was directly responsible for patient care, had an ethical if not employment-based duty to report any allegations of abuse. If his affidavit is taken as true, he was protecting the public interest as well as the interests of the patients and defendants. In this context, the allegations reported by Holthusen to his immediate supervisor and to similarly interested personnel were made on a "privileged occasion." If he was within the scope of his employment, he had qualified privilege. Additionally, because Holthusen, according to his affidavit, was acting to further defendants' business, he would be within the scope of his employment and the privilege which freed him of liability would be imputed to defendants. *See generally Morrison v. Kiwanis Club*, 52 N.C. App. 454, 279 S.E. 2d 96, *disc. rev. denied*, 304 N.C. 196, 285 S.E. 2d 100 (1981).

On previous occasions our courts have held that allegations made during the course of investigations are privileged. *See Jones v. Hester*, 260 N.C. 264, 132 S.E. 2d 586 (1963) (corporate president's investigation of employee held to be privileged); *Hartsfield v. Hines*, 200 N.C. 356, 157 S.E. 16 (1931) (defendant's investigation of corporate mismanagement held to be privileged); *Gattis v. Kilgo*, 140 N.C. 106, 52 S.E. 249 (1905) (investigation of charges against college president by board of trustees held to be privileged); *Pressley v. Can Company*, 39 N.C. App. 467, 250 S.E. 2d 676, *disc. rev. denied*, 297 N.C. 177, 254 S.E. 2d 37 (1979) (employment evaluation report by defendant's agent and sent to defendant's manager held to be privileged). The undisputed facts here make clear the privileged nature of the communications made by Erbe, the hospital administrator. The record shows that Erbe only made statements regarding plaintiff to protective services, an agency to which he was legally bound to report (*see* G.S. 7A-543), to the police, to supervisory personnel at Charter Medical and to personnel who were part of the investigation process.

Plaintiff has asserted that defendants' qualified privilege was lost because of Erbe's malice toward plaintiff and excessive publication. We do not agree. Plaintiff has put forth no evidence that Erbe spoke to anyone outside of those who had a corresponding interest in the communication and were part of the investigative process. Nor did he provide any evidence to show malice other than an alleged statement by Erbe to plaintiff that plaintiff was

facing a possible prison term. On its face, such a statement can hardly be said to indicate malice.

[3] Finally, plaintiff contends that statements made by defendants' employees and the alleged manner in which they were communicated constituted an intentional infliction of emotional distress. We disagree. The entire record is devoid of any evidence of outrageous conduct on the part of defendants' employees. To the contrary, the record shows that defendant's administrator received information concerning sexual abuse of a minor in its care. Erbe had a duty to the patients and to defendant to investigate these charges. He was further bound, under G.S. 7A-543, to report these allegations to protective services. All of the people with whom he spoke were part of the investigative process. Given these circumstances, Erbe's conduct cannot be considered outrageous or extreme. Plaintiff relies on *Falwell v. Flynt*, 797 F. 2d 1270, *reh'g denied*, 805 F. 2d 484 (4th Cir. 1986). That opinion was recently reversed, *Falwell v. Flynt*, --- U.S. ---, --- L.Ed. 2d ---, 108 S.Ct. 876 (1988), and does not apply to the facts before this Court. Defendants herein did not publish the allegations of sexual misconduct to the general public intending to expose plaintiff to public ridicule. Defendants here conducted a confidential and necessary investigation to protect patients under their care.

Affirmed.

Chief Judge HEDRICK and Judge BECTON concur.

Clark v. Inn West

CAROL CLARK, PERSONAL REPRESENTATIVE OF THE ESTATE OF WAYNE SCOTT JORDAN, AND ARLIN CLARK AND WIFE, CAROL CLARK, AS INDIVIDUALS v. INN WEST, A NORTH CAROLINA PARTNERSHIP, D/B/A RAMADA INN; RAMADA INN, A DELAWARE CORPORATION; JAMES E. BRANDIS AND WIFE, ANN BRANDIS; DEBRA ARA; WALLACE HYDE; CLIFTON E. SILER AND WIFE, DOROTHY E. SILER; BETTY S. HINTZ AND HUSBAND, WILLIARD A. HINTZ; AND MARY THRASH BOYD AND HUSBAND, ALBERT L. BOYD

No. 8730SC888

(Filed 15 March 1988)

1. **Intoxicating Liquor § 24— sale of alcohol to underage person—wrongful death—contributory negligence as bar to claim**

Decedent's operation of his automobile in an impaired condition constituted contributory negligence which is a defense to a wrongful death claim based on defendant's alleged negligence in selling alcohol to an underage person.

2. **Intoxicating Liquor § 24— dram shop law—sale to underage person—single car accident—contributory negligence not defense—personal representative as aggrieved party**

Under the dram shop law, the underage person's contributory negligence is not a bar to an aggrieved party's action against an ABC permittee, and the personal representative of an underage driver killed in a single car accident after being served alcoholic beverages by a permittee is the aggrieved party who may bring an action for the loss of support or death of the underaged person. N.C.G.S. § 18B-120(1) and (2).

3. **Intoxicating Liquor § 24— dram shop law—sale of alcohol to underage person—death in single car accident—action against ABC permittee**

In an action under the dram shop law to recover for the death of an underage person who was killed in a single car accident after he had purchased four double shots of tequila and four bottles of beer in defendant partnership's motel bar, the trial court erred in dismissing the personal representative's claim against the partnership and the individual partners. However, no claims existed under the dram shop law against the motel franchisor, the employee who served alcohol to deceased, and the owners and lessors of the property on which the motel is located, and claims against these defendants were properly dismissed.

APPEAL by plaintiffs from *Kirby (Robert W.), Judge.* Order entered 16 April 1987 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 10 February 1988.

Plaintiffs Carol Clark, personal representative of the estate of Wayne Scott Jordan (Jordan), Arlin Clark and Carol Clark, individually and as the alleged parents of Jordan, bring this action

for damages under the wrongful death statute, G.S. 28A-18-2, and the "dram shop law," G.S. 18B-120 *et seq.* The complaint was dismissed pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiffs appeal.

Coward, Cabler, Sossomon & Hicks, P.A., by J. K. Coward, Jr., for plaintiffs-appellants.

Roberts Stevens & Cogburn, P.A., by Steven D. Cogburn and Glenn S. Gentry, for defendants-appellees.

SMITH, Judge.

Initially, we note that appellants have failed to comply with Rule 12(a) of the Rules of Appellate Procedure. That rule requires a record on appeal be filed with this court "[w]ithin 15 days after the record . . . has been settled . . . but no later than 150 days after giving notice of appeal." App. R. 12(a). Counsel for the parties stipulated to the record on appeal on 7 July 1987, but plaintiffs failed to file the record with this court until 18 September 1987. The case is, therefore, subject to dismissal for failure to meet the fifteen day requirement. However, as there has been no motion to dismiss and the 150-day requirement was met, we exercise our discretion and hear the appeal "[t]o prevent manifest injustice." App. R. 2.

The complaint alleges that defendant Inn West is a North Carolina partnership operating the Ramada Inn West in Asheville, North Carolina as a franchisee of defendant Ramada Inn, a Delaware corporation. The complaint also alleges that defendants James E. Brandis, Ann Brandis and Wallace Hyde are partners in Inn West. Debra Ara was the employee of Ramada Inn West who served Jordan on the night in question. The remaining defendants, Clifton E. Siler, Dorothy E. Siler, Betty S. Hintz, Williard A. Hintz, Mary Thrash Boyd and Albert L. Boyd, are alleged to be the owners and lessors of the property on which the Ramada Inn West is located.

The complaint further alleges that on 5 December 1985 at approximately 10:00 p.m., Jordan, age 19, purchased four "double shots" of tequila and four bottles of beer at the Ramada Inn West lounge. Jordan was not old enough to legally purchase alcoholic beverages in North Carolina. G.S. 18B-302. On his way home, Jor-

dan was involved in a single-car accident and died the next morning from injuries sustained in the accident.

Defendants answered asserting several defenses, including Jordan's contributory negligence, as a bar to recovery. They also moved for dismissal under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Defendants' motion to dismiss was granted, and plaintiffs appeal. Plaintiffs' sole assignment of error is that the trial court erred in dismissing their claims.

Plaintiffs have sought to allege two causes of action. The first is a wrongful death claim under G.S. 28A-18-2 and G.S. 18B-305. The second is a claim for relief under the "dram shop act," G.S. 18B-120 *et seq.* We conclude that the wrongful death claim was properly dismissed but that the dismissal of the dram shop claim of the personal representative should be reversed as to the Inn West partnership and its individual partners.

[1] Plaintiffs' first claim for relief is under the wrongful death statute, G.S. 28A-18-2. It is alleged that defendants breached a duty to Jordan and to the motoring public by serving alcoholic beverages to an intoxicated person and that this breach proximately caused his death. G.S. 18B-305 prohibits the sale of alcoholic beverages to an intoxicated person. Violation of the statute constitutes negligence *per se. Brower v. Robert Chappell & Assoc., Inc.*, 74 N.C. App. 317, 328 S.E. 2d 45, *disc. rev. denied*, 314 N.C. 537, 335 S.E. 2d 313 (1985); *Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E. 2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E. 2d 734 (1983). However, the complaint also alleges that Jordan was operating his automobile in an impaired condition in violation of G.S. 20-138.1. His violation of that statute also constitutes negligence *per se. Arant v. Ransom*, 4 N.C. App. 89, 165 S.E. 2d 671 (1969). Jordan's contributory negligence is a defense to the wrongful death claim based on defendants' alleged negligence in selling alcohol to an intoxicated person. *See Brower, supra.* This cause of action was properly dismissed.

[2] Plaintiffs' second claim for relief is under G.S. 18B-120 *et seq.* These statutes allow an aggrieved party to recover damages from a local Alcoholic Beverage Control (ABC) Board or a permittee of the North Carolina ABC Commission if an injury is caused by an underage person's negligent operation of a motor vehicle and the

negligent operation of the vehicle is the result of the sale or furnishing of alcoholic beverages to the underage person. The three statutory requirements for recovery are:

> (1) The permittee or his agent or employee or the local board or its agent or employee negligently sold or furnished an alcoholic beverage to an underage person; and
>
> (2) The consumption of the alcoholic beverage that was sold or furnished to an underage person caused or contributed to, in whole or in part, an underage driver's being subject to an impairing substance within the meaning of G.S. 20-138.1 at the time of the injury; and
>
> (3) The injury that resulted was proximately caused by the underage driver's negligent operation of a vehicle while so impaired.

G.S. 18B-121. A claim under this statute must be brought by an aggrieved party, "a person who sustains an injury as a consequence of the actions of the underage person, but . . . not . . . the underage person." G.S. 18B-120(1). If the underage person, Jordan, had lived, he would not be an aggrieved party with a claim for damages under G.S. 18B-120(1). However, G.S. 18B-120(2) further provides that "[n]othing in G.S. 28A-18-2(a) or [G.S. 18B-120(1)] shall be interpreted to preclude recovery under this Article for loss of support or death on account of injury to or death of the underage person." G.S. 18B-120(2). This statute does not create a new cause of action for loss of support or death from injury to the underage person; rather, the plain language of the statute has the effect of eliminating the underage person's contributory negligence as a bar to an aggrieved party's cause of action against the local ABC Board or the permittee. If the three requirements of G.S. 18B-121 are met, an aggrieved party may recover for the loss of support or death of the underage person. In this case, the aggrieved party can recover damages resulting from Jordan's death.

To determine who is the aggrieved party entitled to bring an action for damages under G.S. 18B-121, we must look not only to the definition of "aggrieved party" in G.S. 18B-120(1) but also to the wrongful death statute. "All statutes dealing with the same subject matter are to be construed *in pari materia*—i.e., in such a

way as to give effect, if possible, to all provisions." *State of N.C. ex rel. Utilities Comm. v. Thornburg*, 84 N.C. App. 482, 485, 353 S.E. 2d 413, 415, *disc. rev. denied*, 320 N.C. 517, 358 S.E. 2d 533 (1987). Under the wrongful death statute, the personal representative of the deceased is the proper plaintiff. *Horney v. Pool Co.*, 267 N.C. 521, 148 S.E. 2d 554 (1966). Construing the statutes together, as we must, the personal representative is the aggrieved party. Dismissal of the personal representative's claim under G.S. 18B-120 *et seq.* was error. However, dismissal of the claims of Arlin and Carol Clark as individuals was proper. A parent cannot maintain an action in his individual capacity for the wrongful death of his child. *Killian v. R.R.*, 128 N.C. 261, 38 S.E. 873 (1901).

[3] G.S. 18B-120(2) abolishes the common law defense of contributory negligence insofar as an aggrieved party is concerned and must be strictly construed. *Swift & Co. v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919); *State v. Getward*, 89 N.C. App. 26, 365 S.E. 2d 209 (1988). The statute only allows a claim for relief against the local ABC Board or a permittee. Therefore, no claims exist under the statute against the employee, Debra Ara, the Ramada Inn corporation or the owners and lessors. These claims were properly dismissed. As an additional reason for dismissing all claims against the Ramada Inn corporation, this Court held in *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 357 S.E. 2d 394, *disc. rev. on additional issues denied*, 320 N.C. 631, 360 S.E. 2d 87 (1987), that a franchisor is not responsible for the torts of its franchisee unless a principal-agent relationship is alleged. No such relationship has been alleged.

The complaint does not allege which of the named defendants is the permittee; it refers generally to the defendant permittee. A permit is "any written or printed authorization issued by the [North Carolina ABC Commission] . . . other than a purchase-transportation permit." G.S. 18B-101(2). An ABC permit may be issued to a partnership if each of the partners meets the requirements for a permit. G.S. 18B-900(c)(2). Construing the complaint in the light most favorable to plaintiff, the permittee in this case is the Inn West partnership. A partnership may be sued "under the name by which [it is] commonly known and called, or under which [it is] doing business, . . . without naming any of the individual members composing it." G.S. 1-69.1. This practice,

however, would not subject the partners to individual liability for the payment of any judgment. Only those partners named are individually liable. *Hardy & Newsome, Inc. v. Whedbee*, 244 N.C. 682, 94 S.E. 2d 837 (1956); *Dwiggins v. Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892 (1949). Though the individual partners are not necessary parties, they are proper parties. The dram shop claim against the partnership and the individual partners was improperly dismissed. As to the other defendants, we affirm the trial court's dismissal.

Reversed in part; affirmed in part.

Chief Judge HEDRICK and Judge BECTON concur.

RICHARD G. BELL AND WIFE, EVALYN C. BELL v. WEST AMERICAN INSURANCE COMPANY

No. 8721DC927

(Filed 15 March 1988)

1. **Insurance § 141— property moved from one house to another—property insured against theft—no coverage under relocation provision**

Personal property stolen from plaintiffs' house was not covered under the relocation provision of an insurance policy, since personal property was insured against theft under this provision if it was located in a "newly acquired principal residence," but the house from which property was taken in this case was acquired before issuance of the insurance policy.

2. **Insurance § 141— property moved from one house to another—property insured against loss by theft "anywhere in the world"**

Plaintiffs' personal property was covered under the provision of an insurance policy which insured against loss by theft anywhere in the world, since the property was located in a house owned by plaintiffs into which they were moving but in which they were not living, their principal residence being in another town.

Judge COZORT concurring.

APPEAL by plaintiffs from *Alexander (Abner), Judge*. Judgment entered 13 May 1987 in District Court, FORSYTH County. Heard in the Court of Appeals 1 March 1988.

Prior to 4 September 1984, plaintiffs resided in a house they owned in Winston-Salem, North Carolina. On that date, plaintiffs

moved into a new house in Advance, North Carolina, which became their permanent residence. Immediately prior to the move, plaintiffs obtained from defendant an insurance policy which, in part, insured their personal property against theft and listed the Advance house as the "residence premises."

Plaintiffs never sold the Winston-Salem house and in the summer of 1985 decided to move back to Winston-Salem. Over a period of approximately one month, plaintiffs moved items of personal property to the Winston-Salem house while continuing to reside at their address in Advance.

Before the move was completed, plaintiffs discovered the theft of certain personal property from the Winston-Salem house. Plaintiffs seek to recover under the insurance policy for loss by theft. On 13 May 1987, the trial court granted defendant's motion for summary judgment. Neither plaintiffs nor defendant offered affidavits or depositions and the motion was heard on the pleadings.

Richard G. Bell and Kenneth D. Bell for plaintiffs-appellants.

Petree Stockton & Robinson, by Robert J. Lawing and Jane C. Jackson, for defendant-appellee.

SMITH, Judge.

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The trial court's order granting summary judgment for defendant was thus proper only if there was no issue of material fact and defendant was entitled to judgment as a matter of law.

In construing a policy of insurance, each word and clause must be given effect if that can be done by any reasonable construction. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970); *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967). Whenever an insurance policy defines a specific term, that definition is binding on the parties. *Industrial Center v. Liability Co.*, 271 N.C. 158, 155 S.E. 2d 501 (1967). Words not

defined, however, are to be given their ordinary meaning. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978); *Woods v. Insurance Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978).

After applying these rules of interpretation, any ambiguity in the policy must be resolved against the carrier and in favor of the insured. *Trust Co. v. Insurance Co., supra; Williams v. Insurance Co., supra.* When there is no ambiguity in the policy, the contract must be enforced as written and as a reasonable person in the position of the insured would understand it. *Grant v. Insurance Co., supra.* In the insurance policy in the case at bar, the pertinent provisions are as follows:

> DEFINITIONS
>
> 4. "insured location" means:
>
> a. the residence premises;
>
> b. the part of any other premises, other structures, and grounds, used by you as a residence which is shown in the Declarations or which is acquired by you during the policy period for your use as a residence;
>
> 8. "residence premises" means the one or two family dwelling, other structures, and grounds or that part of any building where you reside which is shown as the "residence premises" in the Declarations.
>
> COVERAGES
>
> We cover personal property away from the residence premises anywhere in the world:
>
> a. owned or used by any insured;
>
> Our liability for personal property away from the residence premises is an additional amount of insurance:
>
> a. not more than 10% of the limit of liability on Coverage C;
>
> b. not less than $1,000.
>
> RELOCATION. If you move personal property covered under Coverage C to a newly acquired principal residence in the Continental United States or the State of Hawaii, Coverage C Limit of Liability applies:

a. at each location in the proportion that the personal property at each location bears to the total value of personal property covered under Coverage C;

b. for 30 days immediately after you begin to move to the new principal residence.

PERILS INSURED AGAINST

This peril does not include loss caused by theft that occurs away from the residence premises of:

a. property while at any other residence owned, rented or occupied by any insured except while the insured is temporarily residing there.

[1] Clearly, the house in Winston-Salem does not qualify as a "residence premises" under the terms of the policy as the "residence premises" is designated as being the Advance address. Therefore, we must determine whether the personal property involved in this matter is covered under the relocation provision of the policy. Personal property is insured against theft under this provision if it is located in a "newly acquired principal residence." The pertinent term in the relocation clause is "newly acquired." Though our courts have not interpreted the phrase "newly acquired" in the context of a residence, it has been defined with reference to automobile insurance. In *Insurance Co. v. Shaffer*, 250 N.C. 45, 108 S.E. 2d 49 (1959), our court discussed with approval cases from other jurisdictions that defined "newly acquired" as meaning acquired after the issuance of the policy. *Brown v. State Farm Mutual Automobile Ins. Co.*, 306 S.W. 2d 836 (Ky. 1957); *Utilities Ins. Co. v. Wilson*, 207 Okla. 574, 251 P. 2d 175 (1952); *Commercial Standard Ins. Co. v. Central Produce Co.*, 42 F. Supp. 31 (M.D. Tenn. 1940), *aff'd*, 122 F. 2d 1021 (6th Cir. 1941). Thus, giving effect to the words "newly acquired," it is apparent that the property in question would not be covered under the relocation clause of the policy because the Winston-Salem house was acquired before the issuance of the insurance policy.

[2] We next address the coverage provision. The policy purports to provide coverage for theft loss away from the residence premises anywhere in the world with certain monetary limitations. Thus, the theft of property is covered unless it is excluded from coverage under the section denoted "Perils Insured Against."

This section excludes from coverage any loss occurring away from the residence premises if the property is located at "any other residence owned, rented or occupied by an insured [unless] the insured is temporarily residing there." As the term "residence" is not defined by the policy, a decision in this case must be made by defining the word "residence" as used in the policy. This term has been generally defined by our courts. "Residence" means a person's actual place of abode whether temporary or permanent. *Baker v. Varser*, 240 N.C. 260, 82 S.E. 2d 90 (1954); *Sheffield v. Walker*, 231 N.C. 556, 58 S.E. 2d 356 (1950); *Owens v. Chaplin*, 228 N.C. 705, 47 S.E. 2d 12, *reh'g denied*, 229 N.C. 797, 48 S.E. 2d 37 (1948).

In order for the Winston-Salem address to be a residence of plaintiffs', they would actually have to live at that location on at least a temporary basis. *Hall v. Board of Elections*, 280 N.C. 600, 187 S.E. 2d 52 (1972), *modified on other grounds, Lloyd v. Babb*, 296 N.C. 416, 251 S.E. 2d 843 (1979). Such is not the case here. Plaintiffs were still residing and living full time at the Advance address. Therefore, plaintiffs' property is covered under the coverage provision of the policy which insures against loss by theft anywhere in the world. This interpretation gives effect and meaning to all of the pertinent provisions of the insurance contract without ambiguity. Further, we note that plaintiffs did not assign as error the trial court's failure to grant summary judgment in their favor.

Reversed and remanded.

Judges EAGLES and COZORT concur.

Judge COZORT concurring.

I concur with the majority opinion, as far as it goes. I believe, however, that the cause should be remanded with instructions to the trial court for entry of judgment for plaintiff on the liability question. Under N.C. Gen. Stat. Sec. 1A-1, Rule 56(c), "[s]ummary judgment, when appropriate, may be rendered against the moving party." I would remand the cause for further proceedings on the amount of damages and the plaintiffs' claims for counsel fees under N.C. Gen. Stat. Sec. 6-21.1.

ROWAN HEALTH PROPERTIES, INC. v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION; TRIAD MEDICAL SERVICES, INC.; SPENCER MERIDIAN LIMITED PARTNERSHIP; MERIDIAN NURSING CENTERS, INC.; AND AUTUMN CORPORATION

No. 8710DHR626

(Filed 15 March 1988)

Hospitals § 2.1— certificate of need—appeal—requirement of contested hearing

An appeal by Rowan Hospital Authority from a decision by the Department of Human Resources that Rowan Health Properties was not entitled to a contested case hearing after the denial of its application for a certificate of need was dismissed because an actual contested case hearing is a jurisdictional prerequisite for a direct appeal to this Court from a final agency decision. Rowan Health Properties' only avenue of relief lay in an appeal to Wake County Superior Court. N.C.G.S. § 131E-188(b).

APPEAL by Rowan Health Properties from Order of the North Carolina Department of Human Resources entered 19 September 1986. Heard in the Court of Appeals 9 December 1987.

Thomas S. Erwin for Rowan Health Properties, plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Sueanna P. Peeler and Richard A. Hinnant, Jr., for North Carolina Department of Human Resources, defendant-appellee.

House, Blanco & Osborn, P.A., by Gene B. Tarr and Marguerite Self, for Triad Medical Services, Inc., intervenor-appellee.

Moore & Van Allen, by Noah H. Huffstetler, III, Julia V. Jones, Dean M. Harris, and Margaret A. Nowell, for Spencer Meridian Limited Partnership and for Meridian Nursing Centers, Inc., intervenor-appellees.

Smith, Helms, Mullis & Moore, by Maureen Demarest Murray and Deborah L. Hayes, for Autumn Corporation, intervenor-appellee.

BECTON, Judge.

This appeal by Rowan Health Properties, Inc. (RHP) arises from a decision of the North Carolina Department of Human Resources (DHR) concerning the issuance of certificates of need

among competing applicants. We conclude that, because RHP is not a "party in a contested case hearing" within the meaning of N.C. Gen. Stat. Sec. 131E-188(b) (1986), the appeal must be dismissed for lack of jurisdiction.

I

The 1984 State Medical Facilities Plan identified a need for 237 additional long term care beds in Rowan County. One of fifteen applicants, RHP applied to DHR on 15 November 1984 for a certificate of need to lease and operate a long term care facility to be developed and built by another certificate of need applicant, Health Care and Retirement Corporation of America (HCR). By letters dated 29 April 1985, the Certificate of Need Section notified all applicants that the applications of appellees, Triad Medical Services, Inc. (Triad), Spencer Meridian Limited Partnership (Spencer Meridian), Meridian Nursing Center, Inc. (Meridian), and Autumn Corporation (Autumn) were conditionally approved and that the remaining applications, including the joint applications of RHP and HCR, were denied.

Thereafter, several of the applicants, including HCR, timely requested a contested case hearing to review the agency's decisions. HCR's request was filed by counsel of record for HCR and RHP. A Notice of Appointment of Hearing Officer, issued 28 June 1985 by Robert J. Fitzgerald, Assistant Director of the Division of Facility Services of DHR, listed the parties that requested a hearing and did not name RHP. On 29 July 1985, Fitzgerald issued an amendment to that notice which stated that RHP was an additional petitioner and that mention of RHP's appeal was omitted from the original notice by oversight. Subsequently, during the period from 14 November 1985 to 18 March 1986, each entity which had requested a hearing formally withdrew from the contested case. HCR's "Notice of Withdrawal of Contested Case Appeal," filed 24 January 1986 by counsel for HCR and RHP, was ambiguously worded but purported to withdraw both HCR and RHP from the contested case.

On 6 February 1986, William L. Rambo, President of RHP, wrote to I. O. Wilkerson, Director of the Division of Facility Services, expressing the "opinion" that RHP's counsel was not authorized to withdraw RHP from the appeals process. On 18 March

1986, RHP gave notice to all parties that it was no longer represented by counsel and would appear for itself until further notice.

Having determined that the contested case was terminated by the withdrawal of all parties requesting a hearing, DHR, on 21 March 1986, issued certificates of need to Triad, Spencer Meridian, Meridian, and Autumn.

On 1 April 1986, RHP filed and served a "Notice of Renunciation of Notice of Withdrawal and Petition for Ruling Requiring Compliance with N.C. Gen. Stat. Sec. 150A-34(a) and (b)," requesting to be heard on the issue of the validity of the purported withdrawal of RHP from the contested case hearing. DHR responded by letter from Fitzgerald dated 7 April 1986, stating that RHP was not entitled to a contested case hearing because RHP had not filed a request for a hearing, that the Amendment to Notice of Appointment of Hearing Officer was issued in error, that the contested case had terminated by virtue of the withdrawal of all requests for a hearing, and that the issuance of the certificates of need constituted a final agency decision not subject to further administrative review.

RHP gave notice of appeal to this Court on 23 April 1986. On 15 August 1986, Triad, Meridian, Spencer Meridian, and Autumn filed a joint motion to dismiss RHP's appeal, pursuant to Rules 18 and 25 of the Rules of Appellate Procedure, on the ground that RHP had failed within the time allowed by the rules to take action regarding the record on appeal. As additional grounds for dismissal, the movants asserted (1) that RHP was not a party and had not exhausted its administrative remedies because it never requested a contested case hearing, (2) that if RHP ever was a party, it was withdrawn by the notice of withdrawal given by counsel for HCR and RHP, and (3) that RHP's application for a certificate of need was no longer viable following the withdrawal of HCR. The Certificate of Need Section of DHR filed a similar motion on the same day. Pursuant to Rule 25, the motion to dismiss was heard by I. O. Wilkerson of DHR, who made findings of fact, ruled in favor of the movants on all issues, and entered an order dismissing RHP's appeal on 19 September 1986.

RHP now seeks to appeal from the dismissal of its initial appeal, contending (1) that RHP was properly named a party to the contested case by DHR, (2) that RHP never withdrew, (3) that

RHP's right to judicial review does not depend upon the existence of a "viable" application for a certificate of need, and (4) that RHP timely pursued the steps necessary to its appeal. RHP requests this Court to remand the matter to DHR "for the resumption of the contested case hearing that was wrongfully terminated."

II

We deem it unnecessary to consider whether DHR's dismissal of RHP's earlier appeal was proper, based upon any of the grounds stated in the 19 September 1986 order, since, under the rule articulated by this Court in *Charlotte-Mecklenburg Hospital Authority v. North Carolina Department of Human Resources*, 83 N.C. App. 122, 349 S.E. 2d 291 (1986), that appeal to this Court, like the current appeal, was premature and was properly dismissed for that reason. In *Charlotte-Mecklenburg Hospital Authority*, we held that, under N.C. Gen. Stat. Sec. 131E-188(b), an actual "contested case hearing" is a jurisdictional prerequisite for a direct appeal to this Court from a final agency decision, and that "parties aggrieved by any other final agency decision are . . . required to appeal to the Wake County Superior Court pursuant to N.C. Gen. Stat. Sec. 131E-191(b) (1985 Cum. Supp.)." *Id.* at 125, 349 S.E. 2d at 293. Although a "contested case" resulted from the filing of the various requests for a contested case hearing, no hearing was ever held due to DHR's conclusion that the withdrawal of all parties had terminated the matter. Thus, regardless of whether RHP ever became a party to the contested case, RHP has clearly not been a party in a contested case *hearing* so as to be entitled to appeal to this Court. Indeed, the central issue RHP would now have us resolve—whether RHP is entitled to a contested case hearing—is similar to that which this Court declined to address in *Charlotte-Mecklenburg Hospital Authority.*

The foregoing analysis leads us to conclude that, following DHR's initial assertion that RHP was not entitled to a hearing, RHP's sole avenue of relief lay in an appeal to Wake County Superior Court for a determination of RHP's right to a contested case hearing, and that DHR thus correctly dismissed RHP's initial attempt to appeal directly to this Court. Furthermore, we likewise lack jurisdiction to entertain the current appeal. The fact that the present appeal comes to us in a slightly different pro-

cedural stance from that in *Charlotte-Mecklenburg Hospital Authority*—i.e., as an appeal from the dismissal of a previous appeal—does not alter the application of the rule that a contested case hearing must precede appeal to this Court.

Appeal dismissed.

Judges EAGLES and COZORT concur.

JUDITH D. BLEE v. FREDERICK J. BLEE

No. 876DC937

(Filed 15 March 1988)

Judgments § 21.1— consent judgment entered in June—consent withdrawn before judgment signed in September—judgment binding

The trial court erred in determining that a judgment signed by another judge was a consent judgment, that one of the parties had withdrawn his consent, and that the judgment was therefore void, since the judgment was promulgated and entered by the other judge on 13 June 1986; the signing thereof on 8 September 1986 merely memorialized said judgment; defendant was silent until three days after the 13 June 1986 hearing when he went to his attorney and declared that he did not consent to the judgment; and defendant's efforts to repudiate were of no effect.

APPEAL by plaintiff from *Tate, Judge.* Order entered 20 May 1987 in District Court, HALIFAX County. Heard in the Court of Appeals 2 March 1988.

This is a civil action for absolute divorce and equitable distribution of marital property. This matter came on for hearing before Judge Long on 13 June 1986, and a judgment regarding the distribution of marital property was entered on that date. The formal judgment was signed by Judge Long on 8 September 1986. On 17 September 1986 defendant filed a motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure to be relieved from the judgment signed on 8 September 1986. Defendant's Rule 60(b) motion came on for hearing before Judge Tate on 13 March 1987 wherein Judge Tate made findings of fact and concluded as a matter of law that "the 'Final Order and Judgment Equitable Distribution' was a Consent Judgment, and one of the parties had

repudiated the agreement and had withdrawn his consent thereto, and such consent was not subsisting at the time this document was signed by Judge Nicholas Long." Judge Tate then granted defendant's Rule 60(b) motion, declared the 8 September 1986 judgment signed by Judge Long to be "void and of no effect," and vacated the judgment. Plaintiff appealed.

Moore, Diedrick, Carlisle & Hester, by J. Edgar Moore, for plaintiff, appellant.

Josey, Josey & Hanuel, by C. Kitchin Josey, for defendant, appellee.

HEDRICK, Chief Judge.

The only question before us on this appeal is whether Judge Tate erred in declaring the judgment signed by Judge Long on 8 September 1986 to be "void and of no effect." On appeal plaintiff contends Judge Tate erred in concluding "the 'Final Order and Judgment Equitable Distribution' was a Consent Judgment, and one of the parties had repudiated the agreement and had withdrawn his consent thereto, and such consent was not subsisting at the time this document was signed by Judge Nicholas Long." We agree with plaintiff and reverse the order appealed from and remand the case to the district court for reinstatement of the judgment entered on 13 June 1986 and memorialized on 8 September 1986 when Judge Long signed the formal judgment.

A consent judgment is a contract of the parties that is entered upon the records with the approval and sanction of a court of competent jurisdiction, and it depends for its validity upon the consent of both parties, without which it is void. *Stanley v. Cox*, 253 N.C. 620, 117 S.E. 2d 826 (1961). "The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment." *Ledford v. Ledford*, 229 N.C. 373, 376, 49 S.E. 2d 794, 796 (1948). A court is without power to sign a judgment, based upon the consent of the parties, after one of the parties repudiates the agreement and withdraws his consent thereto. *Freedle v. Moorefield*, 17 N.C. App. 331, 194 S.E. 2d 156 (1973).

Defendant argues in the present case that Judge Tate was correct in declaring the judgment signed by Judge Long on 8 September 1986 to be void because Judge Long had no jurisdiction to sign the judgment in the face of defendant's unqualified and absolute withdrawal of his consent to the judgment. We recognize the validity of the general proposition cited by defendant. However, these rules and cases are not controlling in the present factual situation.

Plaintiff asserts the judgment signed by Judge Long on 8 September 1986 merely memorialized the judgment promulgated and entered on 13 June 1986. We agree. We quote from the transcript of the 13 June 1986 hearing before Judge Long:

COURT: Gentlemen, are we ready to proceed?

MR. MOSELEY: Yes, sir.

COURT: All right, I believe you have something you wish to say. You may keep your seat.

MR. MOORE: Your Honor, In *Blee vs. Blee*—

COURT: I believe this is case number 281.

MR. MOORE: That's right, 281.

COURT: Just so we'll have the right case number, all right, go ahead.

MR. MOORE: We have a settlement signed by both parties which has been discussed with you in chambers. And the following that is not in writing, we would like to incorporate into the Court Order. And that is that Mr. Blee will occupy the house that he is going to convey to his wife for the next thirty days or until he can find a suitable place to live, earlier if he can.

COURT: All right, is that agreeable Mr. Moseley?

MR. MOSELEY: Yes, sir.

MR. MOORE: All right, in the assets that Mrs. Blee will get there are three debts which are listed as Eddie George, Phil Hux, and Fred Hall, and we would like for Mr. Blee to assist us in testifying if we have to sue to collect them because we know nothing about the debt and what he testifies to in that position.

MR. MOSELEY [sic]: Mr. Moseley, is that agreeable with you?

MR. MOSELEY: Your Honor, I do not object to him being subpoenaed down here to testify—

COURT: As a witness.

MR. MOSELEY: —as a witness.

MR. MOORE: Since the Order, the judgment will be effective today, we would like the keys to the Blee Plumbing and Heathing [sic] building today so we can go ahead and secure it and get it insured. So that should not be any problem.

. . .

COURT: And who is going to draw this order?

MR. MOORE: I will draw the order.

Obviously both parties and their attorneys were present at the hearing on 13 June 1986. Court was in session, and Judge Long was presiding. Both attorneys explained to the court that a settlement had been reached with respect to the distribution of the marital property, and the terms to that agreement had been reduced to writing and signed personally by the parties. The written agreement was specifically made a part of the formal judgment signed by Judge Long on 8 September 1986. The attorney for plaintiff, Mr. Moore, in open court expressly stated "[s]ince the Order, the judgment will be effective today, we would like the keys to the Blee Plumbing and Heathing [sic] building today so we can go ahead and secure it and get it insured. So that should not be any problem." The judge asked defendant's attorney, Mr. Moseley, "That's agreeable?" and Mr. Moseley replied, "Yes, sir." Finally, the judge stated, "All right ma'am, if you want to make a notation on this file that Mr. Moseley is to furnish the divorce judgment and Mr. J. Edgar Moore to furnish us with the other judgment by way of Mr. Moseley."

Rule 58 of the North Carolina Rules of Civil Procedure in pertinent part provides:

> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry

of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

We hold the record before us manifests that a judgment was promulgated and entered by Judge Long on 13 June 1986, and the signing thereof on 8 September 1986 merely memorialized said judgment. It is to be noted that defendant was silent until three days after the 13 June 1986 hearing when he went to his attorney, Mr. Moseley, and declared that he did not consent to the judgment. Defendant then discharged Mr. Moseley as his attorney. On 17 June 1986 defendant personally telephoned Judge Long to tell the judge that he had withdrawn his consent. Thereafter defendant hired new counsel, Mr. Davenport, from out of the district, and Mr. Davenport notified Judge Long that defendant no longer consented to the judgment. There is nothing in the record before us to indicate that Mr. Moseley was ever allowed to withdraw from the case, or that defendant's new counsel, Mr. Davenport, ever officially became counsel of record before the judgment was signed by Judge Long on 8 September 1986.

While we realize the better practice would be for the formal judgment to be prepared and signed immediately after the hearing, such is seldom, if ever, possible or practical, and it is not necessary or required by our rules. It would be a travesty to say that a party to a judgment so solemnly promulgated and entered as the one depicted by this record could repudiate that judgment at any time after the judgment was entered. Defendant's efforts three days later to repudiate the judgment are of no effect whatsoever.

The judgment appealed from is reversed, and the cause is remanded to the District Court of Halifax County for reinstatement of the judgment entered 13 June 1986 and memorialized on 8 September 1986.

Reversed and remanded.

Judges JOHNSON and ORR concur.

CARROLL DEAN EASON AND WIFE, CHONG AE EASON v. ROCKY LEE BARBER AND TERRY LEE BARBER

No. 8727SC727

(Filed 15 March 1988)

1. **Automobiles and Other Vehicles § 79— collision at intersection—contributory negligence**

The trial court did not err in an action arising from a collision at an intersection by denying plaintiffs' motion for judgment notwithstanding the verdict where the jury, having been fully apprised of applicable law, was entitled to construe the evidence of plaintiff's excessive speed as a breach of his duty to keep a proper lookout, drive at a lawful speed, and exercise due care to avoid collision with defendant's car, thereby finding plaintiff contributorily negligent.

2. **Automobiles and Other Vehicles § 79— left turn—collision—verdict not against greater weight of the evidence**

The trial court did not err in an action arising from a collision with an automobile making a left turn in denying plaintiffs' motion for a new trial because the verdict was against the greater weight of the evidence where there was evidence that defendant, giving no indication that he intended to turn left, suddenly swerved out in front of plaintiff approximately 15 feet from plaintiff's motorcycle, but there was testimony relating to plaintiff's excessive speed, failing to keep a proper lookout, and failing to use due care to avoid the collision.

3. **Automobiles and Other Vehicles § 46— opinion of bystanders as to speed—youthful witnesses—testimony admissible**

The trial court did not err in an automobile accident case by admitting the testimony of a seventeen-year-old and an eighteen-year-old witness as to plaintiff's excessive speed where there was no indication that defendants' witnesses lacked either ordinary intelligence or reasonable opportunity to observe the incident. N.C.G.S. § 8C-1, Rule 701.

4. **Automobiles and Other Vehicles § 46— opinion as to speed—intermittent observation—admissible**

The trial court did not err in an automobile accident case by admitting defendant's testimony as to plaintiff's speed where defendant observed plaintiff's approach at a 250 foot distance and again at a 150 foot distance. It is not necessary for a witness to observe the action described continuously, only that the witness had perceived the incident sufficiently to have gained a rational basis on which to formulate an opinion.

APPEAL by plaintiffs from *Hyatt, J. Marlene, Judge.* Judgment entered on the verdict 11 May 1987 in GASTON County Superior Court. Heard in the Court of Appeals 6 January 1988.

This action was instituted to recover damages resulting from the collision of plaintiff Carroll Dean Eason's motorcycle with defendants' car. Plaintiff's wife, Chong Ae, joined in plaintiff's action seeking recovery for loss of consortium. Defendant Terry Lee Barber, owner of the motor vehicle driven by his minor son, defendant Rocky Lee Barber, counterclaimed for damages incurred as a result of the same collision.

The matter came on for trial before a jury 4 May 1987. Over plaintiffs' objections, defendants presented witnesses who testified as to the speed of plaintiffs' motorcycle just before the collision. At the close of all the evidence, plaintiffs moved for a directed verdict on grounds that defendants had failed to prove plaintiff Carroll Dean Eason's contributory negligence as a matter of law. The trial court denied plaintiffs' motion and submitted eight issues to the jury which, over plaintiffs' objection, included an issue of plaintiffs' contributory negligence. The jury returned a verdict finding that the defendant Rocky Lee Barber was negligent but that plaintiff Carroll Dean Eason was also contributorily negligent.

The evidence at trial tended to show that on 11 July 1986 at approximately 11:20 p.m., plaintiff Carroll Eason was driving his motorcycle en route home when he approached the intersection of Catawba Avenue and South Main Street in Mount Holly. Plaintiff Eason testified that he saw defendant Rocky Barber approaching the intersection from the opposite direction and that defendant appeared to be only 15 feet away from plaintiff when he turned left into plaintiff Eason's lane. Witnesses for defendants testified that plaintiff appeared to be travelling between 35-50 m.p.h. in a 20 m.p.h. zone. Martin Owensby, plaintiffs' witness who was driving immediately behind plaintiff, testified that plaintiff was travelling about 15 m.p.h. as he approached the intersection.

From the trial court's denial of plaintiffs' subsequent motions for judgment notwithstanding the verdict and a new trial, plaintiffs appeal.

Harris, Bumgardner & Carpenter, by Reid C. James and Nancy C. Northcott, for plaintiffs-appellants.

Stott, Hollowell, Palmer & Windham, by Douglas P. Arthurs, for defendants-appellees.

WELLS, Judge.

[1] Under their first assignment of error plaintiffs argue that denial of their motion for judgment notwithstanding the verdict constituted reversible error in that plaintiffs were entitled to judgment as a matter of law. Determination of whether to grant a judgment notwithstanding the verdict is made by viewing the evidence, and all reasonable inferences therefrom, in the light most favorable to the non-movant. *DeHart v. R/S Financial Corp.*, 78 N.C. App. 93, 337 S.E. 2d 94 (1985), *cert. denied*, 316 N.C. 376, 342 S.E. 2d 893 (1986). In the present case, plaintiffs claim that under applicable law, the evidence compels a finding in their favor.

Plaintiffs rely on *Petree v. Johnson*, 2 N.C. App. 336, 163 S.E. 2d 87 (1968) in which this Court held that a driver attempting to make a left-hand turn is bound to exercise reasonable care in determining whether the turn can be made safely. Plaintiff's claim that defendant Rocky Barber's failure to realize that Eason's speed coupled with the two vehicles' proximity at the intersection breached his duty of care under *Petree, supra*, thereby rendering defendant liable. While true, the law likewise imposes a correlative duty upon oncoming drivers. It is expected:

> . . . in the absence of notice to the contrary that the oncoming motorist will maintain a proper lookout, drive at a lawful speed, and otherwise exercise due care to avoid collision with the turning vehicle.

Cooley v. Baker, 231 N.C. 533, 58 S.E. 2d 115 (1950).

In the present case, the jury, having been fully apprised of the applicable law, was entitled to construe the evidence of Eason's excessive speed (35-50 m.p.h. in a 20 m.p.h. zone) as a breach of his duty to keep a proper lookout, drive at a lawful speed, and exercise due care to avoid collision with defendant Barber's car, thereby finding plaintiff contributorily negligent. Plaintiffs' first assignment of error is overruled.

[2] By their second assignment of error, plaintiffs argue that the trial court committed reversible error in denying plaintiffs' motion for a new trial because the verdict was against the greater weight of the evidence and because the trial court's instructions to the jury regarding contributory negligence were not supported by the evidence.

Under N.C. Gen. Stat. § 1A-1, Rule 59, a party may obtain a new trial either for errors of law committed during trial or for a verdict not sufficiently supported by the evidence. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977). Where errors of law were committed, such as charging the jury on an issue not supported by the evidence, the trial court is required to grant a new trial. *Jacobs v. Locklear*, 310 N.C. 735, 314 S.E. 2d 544 (1984).

Plaintiffs argue that the verdict went against the greater weight of the evidence because defendant, giving no indication that he intended to turn left, suddenly swerved out in front of plaintiff Eason approximately 15 feet from his motorcycle. Because plaintiff was entitled to assume that the Barber vehicle would wait until plaintiff had passed to make the turn safely, *Brown v. Brown*, 38 N.C. App. 607, 248 S.E. 2d 397 (1978), plaintiff argues that the sole responsibility for the collision rests with defendant. This argument, however, fails to refute or nullify the evidence of plaintiff's own negligence as indicated by the testimony relating to plaintiff's excessive speed, failure to keep a proper lookout, and failure to use due care to avoid the collision. The verdict, therefore, cannot be said to be against the greater weight of the evidence. Plaintiffs' second assignment of error is overruled.

[3] Under their fourth assignment of error, plaintiffs complain that defendants' witnesses who testified as to plaintiff's excessive speed were not competent to do so. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 701 of the Rules of Evidence allows for the admission of lay opinion if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." In North Carolina the general rule for admission of opinion testimony on speed is that ". . . a person of ordinary intelligence and experience is competent to state his opinion as to the speed of a vehicle when he has had a reasonable opportunity to observe the vehicle and judge its speed." *Insurance Co. v. Chantos*, 298 N.C. 246, 258 S.E. 2d 334 (1979).

In the present case, plaintiffs complain that defendants' witnesses were either too inexperienced or lacked the requisite opportunity to observe plaintiff's vehicle to have formulated a "valid" opinion. We believe otherwise.

Plaintiffs complain primarily that each of defendants' three witnesses lacked the necessary driving experience to formulate a reliable opinion on vehicular speed. Plaintiffs point out that one of the witnesses, Michael Lamberth, who was a passenger in defendant's car at the time of the collision and had testified that plaintiff appeared to be travelling 35 m.p.h., was only 17 years old and had had only nine months of driving experience at the time. Additionally, plaintiffs complain that James Hart, II, a witness who had observed plaintiff's approach from a parking lot adjacent to the intersection and who testified that plaintiff appeared to be travelling 40-50 m.p.h., was only 18 years old and had been driving for only 14 months.

The foregoing accounts of the witnesses' youth and driving experience fail to persuade us of any incompetency in their testimony. Under *Insurance Co. v. Chantos, supra* and Rule 701, it is sufficient only that the witness be a person of ordinary intelligence and have had an opportunity to observe the incident. There is no indication in the present record that defendants' witnesses lacked either ordinary intelligence or a reasonable opportunity to observe the incident. We therefore find that witnesses Lamberth and Hart were competent to testify on the speed of plaintiff's motorcycle as it approached the intersection.

[4] Finally, plaintiffs contend that defendant Barber's observation of plaintiff's approach, once at a 250 foot distance and again at a 150 foot distance, lacked the continuity required to provide Barber with a reliable perception of the plaintiff's speed. We disagree. It is not necessary for a witness to observe the action described *continuously, Cockrell v. Transport Co.*, 295 N.C. 444, 245 S.E. 2d 497 (1978); *Loomis v. Torrence*, 259 N.C. 381, 130 S.E. 2d 540 (1963); only that the witness have perceived the incident sufficiently to have gained a rational basis on which to formulate an opinion. We believe that defendant Barber had ample opportunity to observe plaintiff's vehicle approach the intersection such that his testimony on plaintiff's speed was competent and admissible. Plaintiffs' fourth assignment of error is overruled.

No error.

Judges ARNOLD and SMITH concur.

NATIONWIDE MUTUAL INSURANCE COMPANY v. AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

No. 8718SC210

(Filed 15 March 1988)

1. **Subrogation § 2— plaintiff's payments made in good faith that plaintiff was liable—plaintiff not a volunteer—plaintiff entitled to subrogation**

Plaintiff's payments to an injured employee were made in good faith under the erroneous impression that plaintiff's liability policy covered the employee's injuries arising from a truck accident; therefore, plaintiff was not a volunteer and was entitled to recover by equitable subrogation those monies it had paid to the employee which defendant, as the workers' compensation provider, was ultimately determined to be liable for by the Industrial Commission.

2. **Subrogation § 1— accrual of right of action for subrogation—action timely**

Plaintiff was not entitled to institute its subrogation action against defendant until the Industrial Commission's final determination of liability on 31 January 1985, and plaintiff's complaint filed on 10 May 1985 was therefore filed within the period of the applicable statute of limitations.

APPEAL by defendant from *Cornelius (C. Preston), Judge.* Judgment entered 28 October 1986 in Superior Court, GUILFORD County. Heard in Court of Appeals 25 September 1987.

Tuggle Duggins Meschan & Elrod, P.A., by J. Reed Johnston, Jr., for plaintiff-appellee.

Smith Helms Mulliss & Moore, by J. Donald Cowan Jr., for defendant-appellant.

GREENE, Judge.

This appeal arises from a civil action in which plaintiff sought to recover from defendant monies allegedly paid to an insured on defendant's behalf. The stipulated facts show plaintiff issued an automobile liability insurance policy covering a truck owned by James Clark. The policy excluded coverage for "any obligation for which the insured . . . may be held liable under any worker's compensation law." Defendant meanwhile provided workers' compensation coverage to Clark. On 9 July 1981 (when both policies were in effect), an employee of Clark named Southard was injured as a passenger in the insured truck when the truck overturned while being driven by another employee. The employees were re-

turning from Virginia where they had been doing work for which Clark furnished the truck for transportation to and from the job site. After Southard submitted his insurance claim to plaintiff, plaintiff took statements from the injured employee and his fellow-employees. Within less than a month of the injury, plaintiff began making payments to Southard. By 30 August 1982, plaintiff had paid either directly to Southard or for his benefit a total of $21,922.06 for lost wages and medical and rehabilitation expenses; however, in early September 1982, plaintiff determined that its liability policy in fact did not cover any of Southard's claims since they appeared to be covered by workers' compensation.

Southard had also filed a workers' compensation claim against defendant in November 1981. On 30 December 1981, defendant denied coverage. Three years later, the Industrial Commission concluded that Southard's injuries resulted from an accident arising out of and in the course of Southard's employment with Clark. The Commission ordered defendant to pay Southard for his injuries but credited defendant with $14,208.60 which represented lost wages plaintiff previously paid to Southard.

Plaintiff then sued defendant to recover all monies it had allegedly paid Southard on defendant's behalf. The parties stipulated among other things that, under applicable workers' compensation statutes, defendant would have had to pay Southard over $7,000 in medical and rehabilitation expenses had plaintiff not done so. The parties waived jury trial and the trial court awarded plaintiff $21,922.06. Defendant appeals.

Defendant raises two issues: I) whether plaintiff was a mere "volunteer" and thus not entitled to recover those monies allegedly paid Southard on defendant's behalf; and II) whether all or part of plaintiff's claim was in any event barred by the statute of limitations.

I

[1] Subrogation is not generally decreed in favor of a "volunteer" who, without any moral or other duty, pays the debt or discharges the obligation of another; thus, one making payment to another is ordinarily a volunteer without subrogation rights if he had no right or interest of his own to protect and acts without

any obligation. *See* 73 Am. Jur. 2d *Subrogation* Secs. 23-24 (1974). However, a party making payments in good faith "under a moral obligation, or in ignorance of the real state of facts, or under an erroneous impression of one's legal duty" is not a mere volunteer. *State ex rel. Boney v. Central Mutual Ins. Co. of Chicago*, 213 N.C. 563, 567, 197 S.E. 122, 126 (1938); *see also Jamestown Mutual Ins. Co. v. Nationwide Mutual Ins. Co.*, 277 N.C. 216, 221-22, 176 S.E. 2d 751, 755 (1970) (applying *Boney*).

In this case, all the evidence indicates plaintiff's payments to Southard were made in good faith under the erroneous impression that plaintiff's liability policy covered Southard's injuries arising from the truck accident. We note that defendant denied any coverage of Southard's losses for three and one-half years until its liability was finally determined by the Industrial Commission. Liberal application of the doctrine of subrogation is especially encouraged under such circumstances: the doctrine allows swift treatment of a claimant's injuries without unjustly enriching another carrier who in fact was liable for payment.

Under these circumstances, plaintiff was certainly not an intermeddling volunteer. Accordingly, as plaintiff has paid what has now been either adjudicated or stipulated to be defendant's obligation, plaintiff is entitled to recover those monies by equitable subrogation, which is "the mode which equity adopts to compel ultimate payment of a debt by one who in justice, equity and good conscience ought to pay." *Boney*, 213 N.C. at 568, 197 S.E. at 126.

II

[2] Defendant contends in the alternative that, even if plaintiff had a subrogation claim against defendant, the claim is entirely or partially barred by the relevant statute of limitations. However, our statutes of limitations do not generally begin to run against a civil claim until the claim first accrues. N.C.G.S. Sec. 1-15(a) (1983). Assuming no legal disability exists, a claim does not accrue until the injured party is at liberty to sue or is entitled to institute an action. *Jamestown*, 277 N.C. at 222, 176 S.E. 2d at 756; *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 183, 230 S.E. 2d 405, 408 (1976).

An essential element of plaintiff's claim against defendant is defendant's liability for Southard's injuries. That issue, which

could only be decided by the Industrial Commission, was not finally determined until 31 January 1985, the date of the Full Commission's final opinion. *See Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 604, 70 S.E. 2d 706, 708 (1952) (stating Commission's exclusive jurisdiction). While the Industrial Commission had exclusive jurisdiction of Southard's workers' compensation claim, it noted it had no jurisdiction to determine whether any payments by plaintiff would have been deemed those of a mere volunteer. *Cf. Jamestown*, 277 N.C. at 222, 176 S.E. 2d at 756 (where party's obligation could be determined by court of general jurisdiction, subrogation action arising from alleged payment of that obligation would accrue after first payment). As plaintiff was not here entitled to institute its subrogation action against defendant until the Commission's final determination on 31 January 1985, its subrogation action against defendant accrued on that date. As plaintiff's complaint was filed on 10 May 1985, it was therefore filed within any relevant statute of limitations.

III

Accordingly, the trial court committed no error in determining that plaintiff was entitled to recover from defendant the sum of $21,922.06.

Affirmed.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. JAMES EUGENE DEESE

No. 8710SC654

(Filed 15 March 1988)

Searches and Seizures § 11— drug raid in motel rooms—warrantless search of nearby car—probable cause

Officers had a reasonable suspicion of criminal activity which justified their warrantless search of defendant's burgundy Cadillac where the Cadillac was parked near two motel rooms in which the officers had just conducted a drug raid and discovered cocaine, drug paraphernalia, a shotgun and an empty pistol case; a suspect told the officers that she and another individual rode from Charlotte with the cocaine supplier in a burgundy Cadillac; the occupants

of the Cadillac had been hugging and kissing and acting oblivious to armed officers who were running around the car shouting commands and orders; the driver of the Cadillac had a Charlotte address on his driver's license; and a handgun was seen protruding from under the front seat of the Cadillac.

APPEAL by defendant from *Barnette, Judge.* Judgment entered 27 April 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 10 December 1987.

Defendant was convicted of possession with intent to sell and deliver cocaine and sentenced to a term of five years imprisonment. At a voir dire hearing regarding defendant's motion to suppress certain evidence, the trial court made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendant James Eugene Deese was the owner and operator of the 1979 burgundy Cadillac, N.C. license number HJP-659, searched by Raleigh Police Officers on April 5, 1985.

2. W. L. Baker, a Raleigh Police Officer of 14 years and a Detective in the Vice and Narcotics Division for 5 years, having previously purchased cocaine from a Mel Oldiges, arranged to purchase $14,000.00 worth of cocaine from Oldiges at the Comfort Inn in North Raleigh on April 5, 1985. Baker was told by Oldiges to go to Room 127, that his supplier would be there but unseen to take the money and that his supplier and the cocaine would be coming from Charlotte. Checking with the motel, Baker learned that the same person had rented both Room 125 and Room 127.

3. The above information (paragraph #2) was conveyed to Captain Lassiter, Lt. Brown, other Vice and Narcotics Detectives and members of the Selective Enforcement Unit, all of the Raleigh Police Department, including Detective Boykin and Officer Joyner.

4. Detective Baker went to Room 127 as directed by Oldiges, showing an envelope purported to contain $14,000.00 to pay for the cocaine. Oldiges showed Baker the 8 ounces of cocaine and Baker told Oldiges the envelope was a "dummy" package and that he would get the money out of the car. As

he opened the door to the parking lot, Baker gave the prearranged signal and SEU members and drug detectives carrying shotguns and rifles stormed rooms 125 and 127.

5. Mel Oldiges and the 8 ounces of cocaine were found in Room 127. Found in Room 125 were Thomas and Janet Karchon, a Mossberg .12 guage [sic] shotgun with case, a cocaine sifter and grinder, some plastic baggies, a wad of paper, an empty pistol case with weapon unaccounted for, and the key to Room 127. Not found were a pistol to match the case and a key to Room 125. Janet Karchon told police "we rode up from Charlotte with them in a burgundy Cadillac."

6. Captain Lassiter, after being informed of what had been found, what had not been found, and what Janet Karchon had said, approached a burgundy Cadillac parked two spaces down from Room 127, in front of Room 123. This car had been parked in front of Room 123 since before the "take down" of the "buy bust" in Rooms 125 and 127. The occupants, James Eugene Deese, driver's seat, and Emilie Wolanda Kennedy, right front passenger seat, appeared to be "making out" or hugging and kissing and acted oblivious to the rifle and shotgun carrying SEU members and drug detectives who were running around their car, shouting commands to each other and ordering people to put their hands in the air. Captain Lassiter, aware of all of the above, asked to see Deese's drivers' [sic] license, saw that it had a Charlotte address, gave it back to him, and returned briefly to Room 125.

7. Captain Lassiter again approached the burgundy Cadillac, directing SEU member, R. G. Joyner, to go around to the passenger side. As Joyner came around the front of the car, looking through the windshield, he could see a handgun under the front seat and announced "We've got a gun in the vehicle." Captain Lassiter asked Deese and Kennedy to step out of and to the back of the vehicle, which they did.

8. Officer Joyner went into the Cadillac to retrieve the handgun. While there he also saw another handgun concealed under the front seat and another handgun concealed in a gun case located on the console. He also secured these. While in the car he also observed a key to Room 125 on the floor on the driver's side in front of the front seat.

9. Both defendant Deese and defendant Kennedy were arrested, handcuffed, and transported to the Investigative Division of the Raleigh Police Department so that the evidence could be inventoried and secured, the booking slips could be filled out, and the warrants could be filled out. Defendant Deese was read his Miranda rights and stated that he did not wish to make a statement to police. After about one and a half to two hours the evidence was inventoried and secured, the paperwork was completed and all five defendants arrested were taken before the Wake County Magistrate. The defendants had been advised at the police station that they were being charged with conspiracy to traffic cocaine and that other charges would probably be brought.

10. After securing the weapons and arrest of the defendants the 1979 Cadillac was taken to the Raleigh Police Department where it was searched, its contents were inventoried, and items were seized from the passenger area of the vehicle.

11. Before the date set for probable cause hearing these cases were submitted to the Wake County Grand Jury. The Grand Jury continued the cases to a later session, but the Superior Court assumed and retained jurisdiction.

Based on the foregoing findings of fact, this Court makes the following

CONCLUSIONS OF LAW

1. Defendant Deese has standing to object to the search of his 1979 Cadillac as he had a legitimate expectation of privacy in said vehicle.

2. Defendant Kennedy had no legitimate expectation of privacy in Deese's 1979 Cadillac and has no standing to contest the search.

3. At the time that Captain Lassiter first approached the 1979 Burgundy Cadillac containing these defendants, he had sufficient articulable facts to form a reasonable suspicion of criminal activity involving the defendants and the 1979 Cadillac.

4. Before defendants were asked to step out of the vehicle and Officer Joyner entered the vehicle, probable cause existed to believe that evidence relating to cocaine trafficking and conspiracy to traffick in cocaine would be found in the 1979 burgundy Cadillac.

5. Before defendants were asked to step out of the vehicle and Officer Joyner entered the vehicle, probable cause existed to believe that both defendants Deese and Kennedy had been involved in committing the felonies of cocaine trafficking and conspiracy to traffick in cocaine.

6. The search of the passenger area of the vehicle was also valid as being incident to arrest of the defendants.

7. There were no substantial violations of N.C.G.S. 15A in any arrest, processing or pretrial procedures involving these defendants.

Wherefore, it is hereby Ordered that both defendants' written and oral Motions to Suppress evidence seized in the search of the 1979 burgundy Cadillac be and are Denied and any such evidence shall be admissible at any trial of these defendants if otherwise admissible and relevant under the Rules of Evidence.

From the judgment of the trial court, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Allen Jernigan, for the State.

Blanchard, Tucker, Twiggs and Abrams, by George E. Kelly, III, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred in denying his motion to suppress evidence which was seized in the search of his 1979 burgundy Cadillac. We disagree.

When reviewing the denial of a defendant's motion to suppress evidence, the trial court's findings of fact are conclusive and binding if supported by competent evidence in the record. *State v. Giles*, 83 N.C. App. 487, 350 S.E. 2d 868 (1986), *disc. rev. denied*, 319 N.C. 460, 356 S.E. 2d 8 (1987). There is ample evidence in the

record before this Court to support the trial court's findings of fact in the case *sub judice.*

These findings of fact establish that as Officer Joyner and Captain Lassiter approached the burgundy Cadillac for the second time after the motel rooms were stormed, they had the following knowledge: 1) Eight ounces of cocaine had been found in Room 127; 2) a shotgun, a cocaine sifter and grinder, some plastic baggies, an empty pistol case and a key to Room 127 were found in Room 125; 3) a suspect told police that she and another individual rode from Charlotte with the supplier in a burgundy Cadillac; 4) the occupants of the vehicle had been "making out" or hugging and kissing in the burgundy Cadillac during the "take down" while armed police officers ran around the car shouting commands and orders; 5) the driver of the car had a Charlotte address on his driver's license and 6) a handgun was seen protruding from under the front seat of the car.

It has been held that when a weapon is the immediate object of a search, the safety of police officers justify allowing warrantless searches based only upon a reasonable suspicion of criminal activity. *State v. Alston*, 82 N.C. App. 372, 346 S.E. 2d 184, *disc. rev. allowed*, 318 N.C. 696, 350 S.E. 2d 858 (1986). The information possessed by the officers as they approached the car, at the very least, allowed the officers a reasonable suspicion of criminal activity. Defendant's contention is without merit.

Defendant further contends that the evidence should be excluded because it was obtained as a result of substantial violations of G.S. 15A. We disagree.

Evidence, if obtained as a consequence of a police officer's conduct in violation of G.S. 15A, must be suppressed. *State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978). Defendant presents several alleged violations of G.S. 15A. However, even assuming *arguendo* that there were substantial violations, defendant's contention is still without merit. All of the supposed violations occurred after the evidence in question already had been lawfully obtained. The trial court correctly denied defendant's motion to suppress.

No error.

Judges JOHNSON and ORR concur.

KIM JOHN SCHROCK v. MARSHA LEE SCHROCK

No. 8712DC809

(Filed 15 March 1988)

1. **Divorce and Alimony § 26.1— Michigan child custody award—no jurisdiction over child—award not entitled to full faith and credit**

The trial court properly declined to give full faith and credit to a Michigan custody award, though the Michigan petition was filed before the North Carolina action was commenced, since Michigan was not the home state of the child, and it appeared that North Carolina would have jurisdiction pursuant to the Parental Kidnapping Prevention Act.

2. **Divorce and Alimony § 25.4— child custody awarded to father—no abuse of discretion**

The trial court did not abuse its discretion in awarding child custody to plaintiff father where both of the parties were judged to be fit parents, and the trial court determined that it was best for the child to remain in North Carolina with his father where the father had established an effective child care plan for his son in an environment to which the child was accustomed and in which he had spent most of his life.

APPEAL by defendant, Marsha Lee Schrock, from *Keever, Judge*. Judgment entered 20 March 1987 in District Court, CUMBERLAND County. Heard in the Court of Appeals 2 February 1988.

Plaintiff and defendant were married on 19 August 1978. Shortly thereafter, the couple moved to North Carolina where plaintiff was stationed in the army at Fort Bragg. On 20 January 1981, the parties had their only child of the marriage, Brian Lee Schrock. The parties separated in June of 1985 due to marital difficulties. Subsequent to the separation, defendant took Brian to Michigan where she had lived before her marriage. She then filed an action in Michigan for divorce which was dismissed for failure to meet the necessary residency requirement.

Approximately four months after defendant had taken the child to Michigan, plaintiff went to Michigan in order to return

Brian to North Carolina. Defendant filed a second action for divorce and custody in Michigan on 13 December 1985. Five days later, plaintiff filed a child custody action in North Carolina. On 1 October 1986, a final judgment was entered in Michigan awarding legal custody of the child to the mother. The North Carolina court declined to give full faith and credit to the Michigan custody award and granted custody to plaintiff. From the judgment of the trial court, defendant appeals.

Reid, Lewis & Deese, by Renny W. Deese, for plaintiff appellee.

A. Maxwell Ruppe for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court erred by not giving full faith and credit to the Michigan court's jurisdictional findings and the court's custody award. We disagree.

The issue of a state court's jurisdiction over child custody matters is governed by the Uniform Child Custody Jurisdiction Act (hereinafter U.C.C.J.A.) and the Parental Kidnapping Prevention Act (hereinafter P.K.P.A.). G.S. 50A; 28 U.S.C. Sec. 1738A. The P.K.P.A. states

> A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State *where such court of that other State is exercising jurisdiction consistently with the provisions of this section* to make a custody determination.

28 U.S.C. Sec. 1738A(g). (Emphasis added.) The U.C.C.J.A. states

> If at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state *exercising jurisdiction substantially in conformity with this Chapter*, a court of this State shall not exercise its jurisdiction under this Chapter, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

G.S. 50A-6(a). (Emphasis added.) Since the Michigan petition was filed before the North Carolina action was commenced, the issue

is whether Michigan was exercising jurisdiction consistent with the P.K.P.A. and the U.C.C.J.A. If Michigan was exercising jurisdiction substantially in conformity with the acts, then North Carolina should have refrained from exercising jurisdiction over the custody dispute.

The P.K.P.A. states that a child custody determination is made consistent with its provisions if:

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

28 U.S.C. Sec. 1738A(c).

Condition (A) is not met because at no time has Michigan been the "home State" of the child. "Home State" is defined as "the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months. . . . Periods of temporary absence of any such persons are counted as part of the six-month or other period." 28 U.S.C. Sec. 1738A(b)(4). Brian has only spent approximately four months of his life in Michigan and the definition of "home State" requires a period of six consecutive months.

Condition (B) is not met because at the time of the Michigan proceeding, it did appear that North Carolina would have jurisdiction under subparagraph (A). Excluding the four months spent in Michigan, Brian had lived his entire life in North Carolina. Although Brian was not actually in North Carolina for the entire six-month period preceding the filing of the Michigan action, the "home State" definition states that "(p)eriods of temporary absence . . . are counted as part of the six-month or other period." Since North Carolina was Brian's "home State" Michigan could not gain jurisdiction under subsection (B).

Appellant does not argue and it is clear that Michigan could not establish jurisdiction of the present custody determination under conditions (C) or (D). Therefore, defendant's contention that the trial court erred by not giving full faith and credit to the Michigan court's custody award is incorrect.

Defendant also contends that "the trial court's order does not contain sufficient findings of fact to permit meaningful appellate review by this Court." Defendant bases her contention upon exceptions numbered 3 and 4. These exceptions, however, make no mention of the order not containing sufficient findings of fact. An exception not set out in the record on appeal or in the verbatim transcript of the proceedings may not be the basis of an assignment of error on appeal. N.C. App. R., Rule 10. Defendant may not raise these exceptions.

[2] Appellant's final contention is that the trial court abused its discretion in awarding custody to plaintiff. After careful review, we hold that the trial court did not abuse its discretion. Both of the parties were judged to be fit parents. The trial court determined, however, that it was best for Brian to remain with his father in North Carolina where the father had established an effective child care plan for his son in an environment that Brian was accustomed to and in which he had spent most of his life. There was no abuse of discretion by the trial court.

No error.

Judges PHILLIPS and COZORT concur.

J. D. PATE AND WIFE, MARY ELIZABETH PATE v. GEORGE R. THOMAS, SHERYL THOMAS, MARCUS BLANTON AND WIFE, ANNA BELLE BLANTON

No. 8724DC689

(Filed 15 March 1988)

Deeds § 24.2— covenant that property free of encumbrances—grantee's knowledge of encumbrance no defense

A covenantee's knowledge of an encumbrance on real property is no defense to an action against the covenantor for breaching his covenant in the deed that the property conveyed was free of encumbrances.

APPEAL by defendants from *Lacey, Judge*. Judgment entered 28 January 1987 in District Court, MITCHELL County. Heard in the Court of Appeals 5 January 1988.

Following discovery, the denial of defendants' motion for summary judgment, and a jury trial, plaintiffs obtained judgment against defendants in the amount of $7,823.00 for breaching their covenant in a warranty deed that a house and lot sold them was free of encumbrances. In pertinent part the evidence of the parties showed without contradiction that: On 12 April 1983 defendants contracted in writing to sell plaintiffs a certain house and lot free of all encumbrances; on 19 April 1983 the purchase was closed by defendants executing and delivering a warranty deed

which covenanted, without qualification, that the property was "free and clear of all liens and encumbrances"; at that time a deed of trust defendants gave Northwestern Bank in November, 1981 for construction money when building the house was still recorded against the property and the balance owed on it was nearly $30,000; at the closing of the house and lot purchase plaintiffs secured the balance of the purchase price by executing and delivering to defendants a deed of trust on the property that stated that it was subordinate to a prior deed of trust executed by defendants in favor of Northwestern Bank; in August, 1984 plaintiffs moved off the property and stopped paying on their deed of trust, and their interest in the property, on which they had paid $7,823.00, was later foreclosed on by defendants; plaintiffs never were called on to pay on the prior deed of trust, which defendants eventually paid off and it was cancelled of record in April, 1985, a year before this suit was brought. The only conflict in the evidence pertinent to this appeal is that plaintiffs testified that they did not notice the statement in their deed of trust about the prior deed of trust and did not learn about it until August, 1984 immediately before they moved off the property and stopped paying on it when they had the title searched; and that defendant George Thomas testified he told plaintiffs about the prior encumbrance before plaintiffs contracted to buy the property and received the deed.

Lloyd Hise, Jr. for plaintiff appellees.

Hal G. Harrison for defendant appellants.

PHILLIPS, Judge.

The foregoing facts clearly establish that defendants breached their unqualified, unambiguous covenant that the property sold plaintiffs was free of encumbrances when they delivered the deed to plaintiffs while Northwestern Bank's unpaid deed of trust was still recorded against the property, *Cover v. McAden*, 183 N.C. 641, 112 S.E. 817 (1922), and the only question suggested by the facts is whether plaintiffs' suit is barred because they may have known about the encumbrance before receiving the deed. Before determining that question, however, the remarkable number of errors that defendants made in processing this relatively simple appeal must be noted.

(1) They did not state in the brief the questions they would have us determine as Rule 28(b)(2) of our rules of appellate procedure requires. (2) Instead of narrating the testimony of the witnesses in the first person without comment as is customary, the "narration" is largely a summary that is peppered with many unnecessary comments, such as "Mr. Pate also testified" and "Mr. Thomas stated." (3) The record does not show that the court's instructions to the jury, which defendants argue were erroneous, were excepted to as Rule 10(b)(2) of our Rules of Appellate Procedure requires. While the record does show that appellants made some objections in the pre-jury instruction conference, it does not show what was objected to or the grounds therefor because the transcript of the pre-jury instruction conference is not included in the record on appeal. Presenting us with a proper record on appeal was defendants' responsibility and since the one presented does not show that the instructions now complained of were properly objected to the arguments were not considered. (4) In undertaking to raise essentially one question of law, whether there was an issue for the jury because of plaintiffs' apparent knowledge that the property was encumbered, instead of formulating one assignment of error that directly raised that question, defendants made *three* indirect and round about assignments of error—one to the denial of their motion for summary judgment, another to the denial of their motion for a directed verdict at the close of plaintiffs' evidence, and still another to the denial of their motion for judgment notwithstanding the verdict—and supported these assignments in the brief with *three* separate but essentially identical arguments to the effect that there was no jury issue because plaintiffs admittedly signed the deed of trust stating that it was subordinate to a prior deed of trust. Even if each of the three rulings referred to was reviewable, and none is for the reasons stated below, one assignment of error and argument would have sufficed because the three rulings involved essentially the same question of law. Pointless repetition is not required by our rules of appellate procedure and serves no purpose. As Rules 10(c) and 28(b), N.C. Rules of Appellate Procedure, clearly indicate one assignment of error is enough to raise one question of law even when it questions the correctness of many rulings by the trial court; and nothing is more superfluous in the entire field of litigation than repetition in argument. (5) But despite their multiplicity none of defendants' assignments of error properly raised the

question they thrice argued. For the correctness of the court's denial of their motion for summary judgment became moot when the case was tried on the merits to verdict, *Martin-Kahill Ford Lincoln Mercury, Inc. v. Skidmore*, 62 N.C. App. 736, 303 S.E. 2d 392 (1983); their exception to the denial of their motion for a directed verdict at the close of plaintiffs' evidence was waived by presenting evidence, *Overman v. Gibson Products Company of Thomasville, Inc.*, 30 N.C. App. 516, 227 S.E. 2d 159 (1976); and not having moved for a directed verdict at the end of all the evidence their motion for judgment notwithstanding the verdict has no basis, *Gibbs v. Duke*, 32 N.C. App. 439, 232 S.E. 2d 484, *disc. rev. denied*, 292 N.C. 640, 235 S.E. 2d 61 (1977).

Nevertheless, we have considered and overrule defendants' argument that plaintiffs' suit for breaching their covenant against encumbrances is barred because plaintiffs' signed deed of trust indicates that they had knowledge of the encumbrance when the deed was received. For the law is that a covenantee's knowledge of an encumbrance on real property is no defense to an action against the covenantor for breaching his covenant in the deed that the property conveyed was free of encumbrances. *Philbin Investments, Inc. v. Orb Enterprises, Ltd.*, 35 N.C. App. 622, 242 S.E. 2d 176, *disc. rev. denied*, 295 N.C. 90, 244 S.E. 2d 260 (1978).

No error.

Judges JOHNSON and ORR concur in the result.

MARGARET H. ANDREWS v. AUGUST RICHARD PETERS, III

No. 873SC758

(Filed 15 March 1988)

1. Judgments § 2; Rules of Civil Procedure § 59— order for new trial on damages issue—remand for findings—authority of trial judge

Where an order allowing plaintiff's Rule 59 motion for a new trial on the issue of damages was remanded by the Court of Appeals for findings of fact to provide a basis for meaningful appellate review, the judge who entered the original order had authority to enter a superseding order making detailed findings of fact although he was not a resident judge of the judicial district, a

special superior court judge residing in the district, or the judge regularly presiding over the courts of the district at the time the superseding order was entered.

2. **Rules of Civil Procedure § 59; Trial § 52.1— inadequate verdict—new trial on damages issue**

Evidence and findings relating to the extent of injuries suffered by plaintiff as a result of an intentional tort by a fellow employee, medical costs for treatment of those injuries, and plaintiff's lost wages supported the trial court's conclusions that damages of $7,500 awarded to plaintiff by the jury for those injuries were inadequate and appeared to have been awarded under the influence of passion and prejudice.

APPEAL by defendant from *Allsbrook, Richard B., Judge.* Order entered 11 May 1987 out of county and term. Heard in the Court of Appeals 13 January 1988.

This case is before our Court for a third time. On its initial appeal we reversed the trial court's granting of defendant's N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) motion and remanded for trial. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E. 2d 748, *disc. rev. denied*, 305 N.C. 395, 290 S.E. 2d 364 (1982). On 10 October 1983 the case came on for trial at the conclusion of which the jury returned a verdict finding defendant liable for battery and awarding plaintiff personal injury damages in the amount of $7,500. Subsequently, plaintiff timely moved for a new trial on damages pursuant to G.S. § 1A-1, Rule 59, and the defendant moved under G.S. § 1A-1, Rule 52(a)(2) that the court make detailed findings of fact and conclusions of law in ruling on plaintiff's Rule 59 motion. On 21 December 1983 the trial court granted plaintiff's motion for a new trial on damages but declined to specify the reasons for so ruling. Thereupon defendant brought motions under G.S. § 1A-1, Rules 52(b) and 60(b)(6) by which he requested, *inter alia*, that the trial court fully set forth the basis of its 21 December order awarding a new trial on the issue of damages. On 29 December the trial court denied the motions, and defendant appealed. This Court vacated the trial court's 21 and 29 December orders and remanded for findings of fact, pursuant to defendant's Rule 52(a)(2) motion, to provide a basis of meaningful appellate review of the 21 December order, and our Supreme Court affirmed. *Andrews v. Peters*, 75 N.C. App. 252, 330 S.E. 2d 638, *aff'd*, 318 N.C. 133, 347 S.E. 2d 409 (1986). On 11 May 1987 the trial court entered an order superseding that of 21 December 1983, making detailed find-

ings of fact and conclusions of law, and ordering once again a new trial on the issue of damages. Defendant appeals.

Barker, Dunn & Mills, by James C. Mills, for plaintiff-appellee.

Lee E. Knott, Jr. for defendant-appellant.

WELLS, Judge.

This appeal raises two questions: (1) Did the trial judge have jurisdiction to enter his 11 May 1987 superseding order, and (2) Should the trial court's 11 May order for a new trial on the issue of damages be reversed? For the reasons set forth below we answer these two questions, respectively, yes and no, and affirm the trial court's 11 May order.

The background facts need not long detain us. Briefly, the plaintiff, Margaret H. Andrews, was injured on 27 September 1979 when defendant, a co-employee at Burroughs Wellcome Corporation, walked up behind her and tapped the back of her right knee with the front of his right knee. Unexpectedly, the plaintiff fell to the floor and dislocated her right kneecap. From 28 September 1979 until 8 September 1980 plaintiff was under the care of Dr. Randolph Williams, an orthopedic surgeon. On 16 March 1981 plaintiff went to see Dr. Harold Vandersea, another orthopedic surgeon, for a second opinion. Dr. Vandersea operated on plaintiff's right knee on 19 March 1981, on her back on 14 May of the same year, and again on plaintiff's knee on 24 February 1983 —this time removing her kneecap. In plaintiff's amended complaint, filed 13 October 1983, she prayed for $500,000 in compensatory and punitive damages.

[1] By his first assignment of error defendant contends that Judge Allsbrook had no authority to enter his 11 May 1987 order because the latter was neither a resident judge of the Third Judicial District, nor a special superior court judge residing in the district, nor the judge regularly presiding over the courts of the district in May of 1987. Hence, argues defendant, Judge Allsbrook had no jurisdiction to hear or pass on plaintiff's Rule 59 motion. We disagree. In his 11 May 1987 Order, Judge Allsbrook followed our mandate on remand. Judge Allsbrook's mandate from this Court was simply to make additional findings of fact on his 21

December 1983 decision on plaintiff's Rule 59 motion. No other judge could have made the necessary determinations, and it is idle to contend that N.C. Gen. Stat. § 7A-47 and § 7A-47.1 debar Judge Allsbrook from complying with this Court's mandate until such time as he might be reassigned to the Third District.

[2] By his second and third assignments defendant contends that the trial court's order for a new trial on damages should be vacated because (1) the trial court manifestly abused its discretion in setting aside the jury's damage award and because (2) the Record does not support the court's finding and conclusion that the jury verdict was inadequate and apparently given under the influence of passion and prejudice. We disagree.

In his 11 May 1987 Order, Judge Allsbrook made extensive findings of fact relating to the extent of plaintiff's injuries, the cost of medical treatment of those injuries, and plaintiff's wages lost as a result of those injuries. It was upon these findings that Judge Allsbrook concluded that the jury's verdict as to damages was inadequate. In so doing, Judge Allsbrook necessarily dealt with evidence which was, to some extent, conflicting. Our examination of the Record shows that there was support in the evidence for these findings. While we agree with defendant that at trial conflicts in the evidence are for the jury to resolve, we nevertheless recognize that the scope of appellate review of a trial court Rule 59 order for a new trial is strictly limited. In *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982), our Supreme Court, after articulating the particular aspects of the role of the trial judge in ruling on such motion, held that ". . . [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." *Id.* Based on our review of the Record before us, we perceive no substantial miscarriage of justice in Judge Allsbrook's findings and conclusions that the damages awarded to plaintiff by the jury were inadequate.

Our review of Judge Allsbrook's findings and conclusions that the jury's verdict as to damages appeared to have been awarded under the influence of passion and prejudice leads us to the same result as to this aspect of his Order under review here.

Defendant further complains that if the trial court considered the verdict inadequate it should have stated what damage award would be sufficient in the interest of judicial economy. However, in North Carolina the trial court is without authority to modify a jury's damage award by increasing the amount, except, under circumstances, to add interest. *Bethea v. Kenly*, 261 N.C. 730, 136 S.E. 2d 38 (1964), *accord, Circuits Co. v. Communications, Inc.*, 26 N.C. App. 536, 216 S.E. 2d 919 (1975).

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

Affirmed.

Judges ARNOLD and SMITH concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; AND MCI TELECOMMUNICATIONS CORPORATION v. THE PUBLIC STAFF; SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY; CENTRAL TELEPHONE COMPANY; ALLTEL CAROLINA, INC.; GENERAL TELEPHONE COMPANY OF THE SOUTHEAST; CAROLINA TELEPHONE COMPANY; TELECOMMUNICATIONS SYSTEMS, INC.; CAROLINA UTILITY CUSTOMERS ASSOCIATION; NORTH CAROLINA LONG DISTANCE ASSOCIATION; AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.; AND U.S. SPRINT COMMUNICATIONS COMPANY

Nos. 8710UC701
8710UC802

(Filed 15 March 1988)

Telecommunications § 1.1— issuance of certificate of authority postponed—investment in facilities by phone company—no deprivation of vested property right

The Utilities Commission did not unconstitutionally deprive MCI of a vested property right by postponing the issuance of certificates authorizing MCI to provide certain long distance services in North Carolina, since the Commission's order merely indicated that it was the policy of the Commission to allow the service in question once all the issues and problems were resolved; pursuant to N.C.G.S. § 62-110(b) the Commission could not issue a certificate of authority without making the requisite findings; and MCI assumed the risk that the findings would not be made by the anticipated date when it spent $34 million to develop its network to provide the services in question.

APPEALS by MCI Telecommunications Corporation (MCI) from orders of the North Carolina Utilities Commission entered

23 December 1986 and 1 April 1987. Heard in the Court of Appeals 29 February 1988.

These are appeals from decisions of the North Carolina Utilities Commission postponing the issuance of certificates authorizing MCI to provide certain long distance services in North Carolina. These decisions stem from the federal court-ordered breakup of the American Telephone and Telegraph Company. For a detailed summary of the breakup and its effect on the North Carolina telecommunications market, *see State ex rel. Utilities Comm. v. Southern Bell*, 88 N.C. App. 153, 363 S.E. 2d 73 (1987).

In this case, the only segment of the breakup at issue is the competition of carriers other than AT&T in the long distance market. These other common carriers (OCCs), including MCI, were first allowed by the Federal Communications Commission to complete interstate calls. The North Carolina Utilities Commission has also authorized MCI and other OCCs to complete long distance calls within the state between Local Access and Transport Areas (LATAs). LATAs are "calling zones" normally located around large cities. North Carolina has five LATAs encompassing most of the state, situated around Raleigh, Wilmington, Greensboro, Charlotte and Asheville.

Within the LATAs, local calls and short intraLATA long distance calls have been completed by local exchange companies (LECs) such as Southern Bell Telephone and Telegraph Company. By an order of 22 February 1985, the Utilities Commission found that intraLATA long distance competition would be in the public interest, "subject to the resolution of certain important issues. . . ." The Commission then stated that intraLATA resale competition would be permitted no later than 1 January 1986. Resellers are companies which merely resell the services of a LEC without using their own facilities.

The Commission additionally stated: "Competition by intraLATA facilities-based carriers will be allowed after a transition period of approximately two years on January 1, 1987." This would have allowed OCCs such as MCI to complete intraLATA calls using their own facilities. The transitional period was necessary for the Commission to review how billing would be handled and how much compensation OCCs should pay LECs,

which had always subsidized local service with toll revenues from long distance calling.

After the order of 22 February, various additional hearings were held. On 30 September 1985 the Commission ordered MCI to pay LECs 4.72 cents per conversation minute for unauthorized intraLATA calls. On 19 December 1985 the Commission specifically permitted *resale* intraLATA competition to begin on 1 January 1986, which carried out the first part of the intraLATA competition plan.

By order of 4 February 1986 the Commission scheduled hearings to consider (1) the appropriate level and structure of access charges, (2) the existing toll pooling and settlement procedures and toll deaveraging, and (3) intraLATA competition by facilities-based carriers. These hearings were conducted beginning on 8 July 1986. At the hearings, the Public Staff argued that local exchange service was threatened to such an extent that permission to compete in the intraLATA market by facilities-based OCCs should be denied.

The Commission then decided, because the issues concerning among other things billing and compensation had not been resolved, the date for facilities-based intraLATA competition should be postponed. On 23 December 1986, the Commission entered an order to that effect. It did allow companies such as MCI to resell services and it continued the compensation plan for unauthorized intraLATA calls.

Between 22 February 1985 and 23 December 1986 MCI spent over $34 million in development of a network in North Carolina. Although the facilities would have been used for intraLATA service, MCI can use them for interLATA and interstate service.

MCI appealed the Commission's order and also petitioned the Commission to reconsider the order. That petition was later denied and MCI also appealed from that denial.

Adams, McCullough & Beard, by Charles C. Meeker and Gary S. Maines, for MCI Telecommunications Corporation, appellant.

Hunton & Williams, by Edward S. Finley, Jr., and Frank A. Schiller; and J. Billie Ray, Jr., and Edward L. Rankin, III, for Southern Bell Telephone and Telegraph Company, appellee.

Public Staff Executive Director Robert P. Gruber, by Chief Counsel Antoinette R. Wike, for North Carolina Utilities Commission, appellee.

HEDRICK, Chief Judge.

At oral argument, counsel for MCI stated that the only question raised by these appeals is whether the Commission violated MCI's vested right to provide intraLATA service via its own facilities. Appellant argues the order entered on 22 February 1985 gave it a vested property right of which it was unconstitutionally deprived by the Commission's failure to allow facilities-based intraLATA competition on 1 January 1987. The Public Staff and Southern Bell, appellees, on the other hand, argue the order of the Commission from which these appeals were taken failed to vest in MCI any property right whatsoever. They argue that before MCI could have the right to provide intraLATA service via its own facilities the Commission must issue a certificate of authority to MCI, and that the Commission could not issue this certificate without making the requisite findings of fact pursuant to G.S. 62-110(b), which states:

> (b) The Commission shall be authorized to issue a certificate to any person applying to the Commission to offer long distance 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.

We hold the order of the Commission in question merely indicated it was the policy of the Commission to allow intraLATA service once all the issues and problems were resolved. While the language in the order of the Commission is less than clear, the statutes are very clear that the Commission could not issue a certificate of authority without making the requisite findings, and MCI assumed the risk that the findings would not be made by 1 January 1987.

Affirmed.

Judges JOHNSON and ORR concur.

PAMLICO PROPERTIES IV v. SEG ANSTALT COMPANY, LUX CORPORATION, AGRI WORLD FARM MANAGEMENT, ULI BENNEWITZ AND THE RICH COMPANY

No. 872SC501

(Filed 15 March 1988)

1. **Appeal and Error § 27— appeal from summary judgment—broadside assignment of error—affirmed**

A summary judgment for defendant The Rich Company was affirmed where plaintiff made only a broadside assignment of error and the facts found by the court clearly supported the decision that the claim was barred by the three-year statute of limitations.

2. **Limitation of Actions § 8— undisclosed partner—not applicable**

In an action for negligence in permitting a fire to spread to plaintiff's land, summary judgment for defendant The Rich Company, based on the statute of limitations, was not improperly granted where the fire spread on 5 April 1981; the action was filed on 21 September 1983 against multiple defendants including Agri World, an N.C. partnership, and Uli Bennewitz, a general partner; plaintiff purportedly did not know that The Rich Company was a partner until Bennewitz's deposition on 14 November 1984; and plaintiff immediately moved for and was granted permission to add The Rich Company as a defendant. That plaintiff may not have known before then that The Rich Company was a partner does not prove that it was an undisclosed partner within the contemplation of the law. Moreover, even if The Rich Company was an undisclosed partner, N.C.G.S. § 1-28 provides only that the statutes of limitations apply from the time the partnership became known, and the partnership status of Agri World obviously became known to plaintiff before the original complaint was filed.

3. **Rules of Civil Procedure §§ 56.2, 56.3— summary judgment—supporting material—burden of proof**

Summary judgment was not improperly granted against defendant The Rich Company based on the statute of limitations where plaintiff argued that the action was not barred because the statute did not begin running until the partnership was dissolved in fraud of creditors, but based its allegation only on information and belief, and defendant presented affidavits and other documents showing that all of its known creditors were paid upon dissolution. Moreover, when the statute of limitations is pleaded, the claimant has the burden of showing that the action is not barred.

4. Rules of Civil Procedure § 56— summary judgment motion—other motions—*order of hearing*

The trial court did not err by hearing a summary judgment motion before ruling on plaintiff's motions for a continuance and to compel discovery where plaintiff's counsel was present at the hearing and prepared to go forward, and the motion to compel discovery was not filed until the very day the summary judgment motion was heard.

APPEAL by plaintiff from *Llewellyn, Judge.* Order entered 27 February 1987 in Superior Court, HYDE County. Heard in the Court of Appeals 18 November 1987.

Lee E. Knott, Jr. for plaintiff appellant.

Trimpi, Thompson & Nash, by John G. Trimpi, for defendant appellees.

PHILLIPS, Judge.

Plaintiff's action is for damages allegedly caused by the several defendants negligently permitting a fire to spread onto its land on 5 April 1981. The action was filed on 21 September 1983, but defendant The Rich Company was not joined as a party or notified of the claim until 9 January 1985 when an amended complaint was filed. Eventually the claim was dismissed by an order of summary judgment on the explicit ground that it was barred by the three-year statute of limitations. In appealing from that order plaintiff paid little heed either to our rules of appellate procedure, the terms of the laws relied upon, or the state of the record. The pertinent facts are that: Adjoining plaintiff's property was a tract of forest land owned by defendant Seg Anstalt Company that was being cleared of its trees; defendant Agri World, a North Carolina partnership, supervised the contractors doing the clearing, during the course of which trees pushed into windrows were set afire and it spread to plaintiff's property; Agri World's general partners were the defendants Uli Bennewitz and The Rich Company; while plaintiff's original complaint alleged that Agri World was a North Carolina partnership and Uli Bennewitz was a general partner, it did not refer to The Rich Company or any other partner; defendant Agri World was dissolved by agreement of the partners in the spring of 1982; on 14 November 1984 while being deposed by plaintiff Uli Bennewitz testified that he and The Rich Company were general partners in Agri World, and

immediately thereafter plaintiff moved for and was granted permission to join The Rich Company as a party defendant.

[1] Plaintiff assigned as error only "[t]he granting of the motion for summary judgment of the defendant, The Rich Company." This is a broadside assignment, since it does not state any specific basis for the alleged error as Rule 10, N.C. Rules of Appellate Procedure requires, and the only questions it raises are whether the facts found by the court support the judgment and whether any error of law appears on the face of the record. *Columbus County v. Thompson*, 249 N.C. 607, 611, 107 S.E. 2d 302, 305-306 (1959). Though the court is not required to find facts in ruling on a motion for summary judgment, the facts found in this instance —that the cause of action against The Rich Company arose on 5 April 1981 when the fire spread to plaintiff's land and that it was not served with notice of the claim against it until 9 January 1985 —clearly support the decision that the claim is barred by the three-year statute of limitations and no error of law appears on the face of the record. Thus, the order appealed from is affirmed.

[2, 3] Citing only that same assignment of error based only on an exception to the signing of the order plaintiff argues in the brief with no foundation at all that the order was erroneous on several specific grounds, one being that the statute of limitations did not run against The Rich Company in the usual way because it was an "undisclosed" partner of Agri World until 14 November 1984 when plaintiff purportedly learned that it was a partner. But the record does not show that. All it shows is that on the 14th of November, 1984, in response to an appropriate question, Bennewitz told plaintiff that the Agri World general partners were him and The Rich Company. The record does not show that plaintiff had asked the question earlier of anybody; or that The Rich Company's status as a partner was concealed from anyone interested in learning who comprised the partnership. That plaintiff may not have known before then that The Rich Company was a partner does not prove that it was an "undisclosed" partner within contemplation of law. Nevertheless, moving on from that unestablished premise, plaintiff argues that under G.S. 1-28 the statute of limitations did not begin to run against the claim until it learned that The Rich Company was an undisclosed partner. But even if The Rich Company had been an "undisclosed" partner, G.S. 1-28 would not have had that effect, because it provides

only that "[t]he statutes of limitations apply to a civil action brought against an undisclosed partner only from the time the partnership became known to the plaintiff," and the partnership status of Agri World obviously became known to plaintiff before the original complaint so alleging was filed. Plaintiff also argues that its action against The Rich Company is not barred by the statute of limitations because the statute did not start running against the partnership until 1982 when Agri World was dissolved in fraud of its creditors by not retaining enough assets to pay its debts. Even if the legal theory advanced was sound its only support in the record is plaintiff's own allegation in the amended complaint based on information and belief, while The Rich Company presented affidavits and other documents showing that all the partnership's known creditors were paid upon dissolution. From both these arguments it is also evident that plaintiff is under the mistaken impression that The Rich Company was obliged to show the absence of all conditions that might have extended the statute of limitations, whereas, our law is that when the applicable statute is pleaded the claimant has the burden of showing that the action is not barred. *Willetts v. Willetts*, 254 N.C. 136, 118 S.E. 2d 548 (1961).

[4] And still citing just its one broadside assignment of error and exception, plaintiff finally argued that the court erred in hearing the summary judgment motion before ruling on its motions for a continuance and to compel discovery; yet the order itself recites that plaintiff's counsel was present at the hearing and prepared to go forward, and the record shows that the motion to compel discovery was not filed until the very day the summary judgment motion was heard.

Affirmed.

Judges BECTON and GREENE concur.

SOUTHWOOD ASSOCIATION, LTD. v. REGINALD S. WALLACE

No. 8726DC313

(Filed 15 March 1988)

Appeal and Error § 9— injunction to prohibit renting of condo—condo sold—issues moot

Where plaintiff sought an injunction to prohibit defendant from renting his condominium, issues raised in the action were rendered moot when defendant sold his condominium.

APPEAL by defendant from *Brown (L. Stanley), Judge.* Judgment entered 5 November 1986 in District Court, MECKLENBURG County. Heard in the Court of Appeals 20 October 1987.

Waggoner, Hamrick, Hasty, Monteith, Kratt, Cobb & McDonnell, by James D. Monteith and Richard L. Huffman, for plaintiff-appellee.

William G. Robinson for defendant-appellant.

GREENE, Judge.

This is a civil action in which plaintiff seeks an injunction to prohibit defendant from renting his condominium. On 12 November 1986, the trial judge issued a permanent injunction granting plaintiff's motion. Defendant appeals the granting of the injunction.

The record shows the defendant purchased a condominium in Southwood Condominiums on 12 February 1981. He resided there until the Fall of 1983 at which time he began leasing the condominium to tenants. On 14 June 1983, the bylaws of the plaintiff association were amended to prohibit owners from renting the condominiums. The defendant rented his condominium both before and after the bylaws became effective.

Following the granting of the injunction, defendant sold his condominium on 19 December 1986. On 21 April 1987, plaintiff filed a motion pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure contending the appeal should be dismissed as moot since defendant had sold his condominium. Defendant filed a reply with supporting documents admitting he had sold his condominium but showing that he retained an option to purchase

for thirty days beginning 1 October 1987. As well, defendant retained a promissory note due on or about 31 October 1987 which was secured by a deed of trust on the condominium.

We do not address the issues raised by the defendant-appellant, as we agree with the plaintiff-appellee that the case is moot. On the issue of mootness, our Supreme Court has stated:

> That a court will not decide a "moot" case is recognized in virtually every American jurisdiction . . . . In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint.
>
> . . . .
>
> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.
>
> . . . .
>
> Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before the court or administrative body become moot at anytime during the course of the proceedings, the usual response should be to dismiss the action.

In re Peoples, 296 N.C. 109, 147-48, 250 S.E. 2d 890, 912 (1978) (citations omitted), *cert. denied*, 442 U.S. 929, 61 L.Ed. 2d 297 (1979).

The issues raised by this case were rendered moot when the defendant sold his condominium. *See City of Wilmington v. Camera's Eye, Inc.*, 43 N.C. App. 558, 561, 259 S.E. 2d 589, 591 (1979) (court order that defendant's business violated zoning laws rendered moot when, pending appeal, defendant moved business from the premises). The plaintiff only sought an injunction restraining defendant from "renting the condominium unit owned by him in the Southwood Condominiums." The defendant no longer owns the condominium and therefore the questions originally

in controversy between the parties are no longer at issue. The possibility that defendant would again own the property in the future either by exercising his option to repurchase or by the purchaser's default is not a sufficient real or immediate interest evidencing an existing controversy. *See State ex rel. Utilities Commission v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 286, 288, 221 S.E. 2d 322, 324 (1976) (court does not sit to determine abstract questions of law or to determine which party should rightly have prevailed in the lower court); *cf. Hoing v. Doe*, --- U.S. ---, 98 L.Ed. 2d 686, 703 (1988) (Supreme Court noted that a case is not moot where there is reasonable likelihood that respondents would again suffer deprivation of certain rights).

Therefore, the appeal is dismissed and the judgment of the trial court is vacated. *See Utilities Commission*, 289 N.C. at 290, 221 S.E. 2d at 324-25 (noting that while usual disposition is to simply dismiss appeal that becomes moot, better practice here was to vacate Court of Appeals decision); *Peoples*, 296 N.C. at 148, 250 S.E. 2d at 912 (if issues before court become moot at any time during course of proceedings, usual response should be to dismiss the action); *see also* Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U.Pa.L. Rev. 772, 794 (1955); *cf. Deakins v. Monaghan*, --- U.S. ---, 98 L.Ed. 2d 529, 539 (1988) (in federal practice, when a claim is rendered moot while awaiting review by the Supreme Court, the judgment below should be vacated with directions to dismiss the complaint). The vacation will allow relitigation of the issues between the parties should the controversy arise again in the future. In concluding the case before us is moot, we do not in any way express an opinion as to the correctness of the decision below.

Appeal dismissed; judgment vacated.

Judges BECTON and PHILLIPS concur.

ROBERT J. KNAPP v. DICKERSON GROUP OF MONROE, N. C., INC. AND IRON PEDDLERS, INC.

No. 8720SC644

(Filed 15 March 1988)

Fraud § 12— insufficient evidence of element of damage

Plaintiff's evidence on motion for summary judgment was insufficient to establish the damage element of fraud where it showed that plaintiff purchased at an auction a tractor that soon ceased to operate; the tractor was listed as being in "fair" condition, which was the next to last condition and meant that it had seen considerable service and might require an overhaul soon; plaintiff was aware of the condition of the tractor when he purchased it; and plaintiff had an opportunity to make pertinent inquiries about the tractor but failed to do so.

APPEAL by plaintiff from *Mills, Judge.* Judgment entered 16 February 1987 in Superior Court, UNION County. Heard in the Court of Appeals 10 December 1987.

On 28 March 1985, plaintiff attended an auction in Monroe, North Carolina where construction equipment belonging to both defendants and others was sold. A brochure was distributed by the auctioneer, Yoder & Frey Auctioneers, Inc., which stated:

> The equipment may be inspected at any time. Most of the equipment will be running prior to sale and will be demonstrated upon request. Should you have any questions whatsoever during the sale, please feel free to ask any one of the clerks or Auctioneers.
>
> * * * *
>
> All descriptions of equipment in this catalog are believed to be correct and have been conscientiously set forth by the owner. However, neither the owner nor the auctioneers are responsible for any errors in description or conditions. The equipment is available to the public for inspection and the foregoing is merely a helpful guide, and is in no way a warranty or guarantee, actual or implied.
>
> * * * *
>
> EVERYTHING SOLD "AS IS"—"WHERE IS"!!

The brochure also stated that the equipment would be labeled as being in one of five conditions: excellent, very good, good, fair and poor.

Plaintiff purchased a "Caterpillar Crawler Tractor" which was listed as being in "fair" condition. A piece of equipment listed as being in "fair" condition was described by the brochure in the following words: "[h]as had considerable service and may require overhaul soon."

After the plaintiff purchased the tractor, it soon thereafter ceased to function. Plaintiff then learned that Iron Peddlers, Inc. had been the prior owner and not the Dickerson Group of Monroe, N.C., Inc., as plaintiff, due to the advertising of the sale, had previously thought. In response, plaintiff filed a complaint alleging that he had been damaged by the unfair and deceptive trade practices of defendants.

Both defendants filed motions for summary judgment. Plaintiff then served interrogatories on defendants by mail and filed a response to the motions for summary judgment, objecting to a hearing on the summary judgment motions until his outstanding discovery was completed. Iron Peddlers, Inc. responded to plaintiff's interrogatories while Dickerson Group of Monroe, N.C., Inc. did not.

The trial court granted both defendants' motions for summary judgment. From this judgment, plaintiff appeals.

Charles D. Humphries for plaintiff appellant.

Smith, Helms, Mulliss & Moore, by Rolly L. Chambers, for defendant appellee, Dickerson Group of Monroe, N.C., Inc.

Thomas, Harrington & Biedler, by Larry E. Harrington, for defendant appellee, Iron Peddlers, Inc.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in granting both defendants' motions for summary judgment. We disagree.

In order to make out a case of actionable fraud a plaintiff 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. Insurance Co., 300 N.C. 247, 253, 266 S.E. 2d 610, 615 (1980).

Summary judgment is properly granted to a defendant when the record before the court shows that plaintiff fails to establish an essential element of his claim. *Id.* at 260, 266 S.E. 2d at 619. Even assuming *arguendo* that plaintiff presented sufficient evidence to establish the first five elements of fraud, summary judgment would still be proper because plaintiff in no way established that he suffered any damage.

In the present case, the facts show that the tractor purchased by plaintiff was labeled as being in "fair" condition, meaning that it had seen considerable service and might require an overhaul soon. Plaintiff was well aware of the condition of the tractor when he purchased it. Out of five possible condition ratings, the tractor was classified at the second to the last level. If plaintiff had further questions about the piece of equipment, he should have brought them forth at the time of sale. When a buyer has the opportunity to make pertinent inquiries but fails to do so, through no inducement by the seller, then no action in fraud will lie. *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 303 S.E. 2d 565, *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983). Since plaintiff failed to establish any damage, the trial court was correct to grant both defendants' motions for summary judgment.

Affirmed.

Judges JOHNSON and ORR concur.

THOMAS E. VASS v. BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN; GEOFFREY ELTING, DIRECTOR; AND EDS FEDERAL CORPORATION

No. 8710DC715

(Filed 15 March 1988)

Administrative Law § 2— surgery covered under State Medical Plan—dispute covered by Administrative Procedure Act

In accordance with N.C.G.S. Ch. 150B plaintiff's dispute with defendant as to whether plaintiff's eye surgery should be covered under the State Employees' Comprehensive Major Medical Plan should be brought under the Administrative Procedure Act, and plaintiff's appeal was therefore not properly before the Court of Appeals.

APPEAL by plaintiff from *Payne, Judge*. Judgment entered 30 April 1987 in District Court, WAKE County. Heard in the Court of Appeals 6 January 1988.

In 1984, plaintiff was an employee of the State of North Carolina and was insured through the State's self-insurance Major Medical Plan, which was administered by EDS Federal Corporation (hereinafter EDS) and overseen by the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan (hereinafter Board). Plaintiff's vision in his right eye had been steadily deteriorating and upon consultation with Dr. Frederic B. Kremer, an ophthalmologist, plaintiff underwent a procedure called radial keratotomy to correct the deteriorating condition in his right eye. Radial keratotomy involves laser incisions on the front surface of the patient's cornea.

Dr. Kremer successfully performed the surgery and plaintiff incurred medical expenses of $1,725.00. Plaintiff filed a medical claim with EDS to recover his costs but the claim was denied. Plaintiff then appealed to the Board which also denied his claim on four bases: 1) pursuant to N.C.G.S. § 135-40.6(6)h which states that "No benefits will be payable for surgical procedures specifically listed by the American Medical Association or the North Carolina Medical Association as having no medical value," 2) pursuant to N.C.G.S. § 135-40(b) which states that "The Plan benefits will be provided under contracts between the State and the Claims Processor selected by the State . . . and shall be administered by the respective Claims Processor of the State which will

determine benefits and other questions arising thereunder, 3) the recommendation of the Plan Administrator's Medical Director, 4) the Board's belief that the procedure is basically a substitute for eyeglasses which are not covered under the Plan.

Plaintiff attempted to convince the Board to reconsider its decision and received a letter from Medical Director Sarah T. Morrow which stated that plaintiff had exhausted all of his appeal processes with the Board and that "[t]here is no further appeal other than through litigation." Plaintiff, thereafter, instituted this action for breach of contract against the Board, Geoffrey Elting, the Plan Director, and EDS. Defendants Board and Elting filed a joint answer and motion to dismiss. The motion was granted as to Elting but was denied as to the Board. Defendant EDS filed a separate motion to dismiss which was granted. Both plaintiff and the remaining defendant, the Board, filed motions for summary judgment. Both motions were heard on 13 March 1987 with the trial court granting defendant's motion and denying plaintiff's motion for summary judgment. From this judgment, plaintiff appeals.

Paul Baldasare, Jr. for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Angeline M. Maletto, for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in denying his motion for summary judgment and in granting the Board's motion because "a proper interpretation of the State's statutory insurance plan clearly requires the State Board to pay for coverage of radial keratotomy surgery."

First, we must address the issue of whether plaintiff's appeal is properly before this Court. G.S. 150B establishes a uniform system of adjudicatory procedures for state agencies. "Agency" is defined as "any agency, institution, board . . . or officer of the State government." G.S. 150B-2(1).

> Notwithstanding any other provision of law, if the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to

determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

G.S. 150B-22. The Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan, established in G.S. 135-39, is an administrative agency. In accordance with G.S. 150B, plaintiff's dispute with the Board should be brought under the Administrative Procedure Act. This case is remanded to the trial court to be dismissed for lack of subject matter jurisdiction.

Remanded for dismissal.

Judges WELLS and SMITH concur.

RICHARD S. MYERS AND MARY HOFFMAN MYERS v. LIBERTY LINCOLN-MERCURY, INC.

No. 8721DC692

(Filed 15 March 1988)

1. **Unfair Competition § 1— unfair trade practice—misrepresentation of model year of car**

The trial court's findings that defendant sold plaintiffs a 1982 model car which defendant misrepresented as being a 1983 model and that the car was worth $1,400 less than a 1983 model supported the court's conclusion that the misrepresentation violated N.C.G.S. § 75-1.1.

2. **Unfair Competition § 1— unfair trade practice—misrepresentation of model year of car—mistake no defense**

Defendant's contention that a misrepresentation of the model year of a car sold to plaintiffs was not intentional or fraudulent but was just a "mistake" by its employees was not a defense to plaintiffs' action for an unfair trade practice under N.C.G.S. § 75-1 *et seq.*

3. **Unfair Competition § 1— unfair trade practice—misrepresentation of model year of car—revised contract**

Plaintiffs' unfair trade practice action based on defendant's misrepresentation that a 1982 model car sold to plaintiffs was a 1983 model was not required to be dismissed as a matter of law because a "revised contract" that plaintiffs admittedly signed a few days after the car was bought states that it is a 1982 model where there was evidence that defendant's agent obtained plaintiffs' signatures on the revised contract by telling them that new papers had to be signed because the monthly payments called for in the original contract had been miscalculated and could not be keyed into the computer, and that plain-

tiffs did not read the new contract and did not learn until later that the car was not a 1983 model.

4. **Witnesses § 7— writings used to refresh memory—examination of whole file by opposing counsel—absence of in camera examination—harmless error**

Although the trial court violated Rule of Evidence 612 in permitting plaintiffs' counsel to examine defendant's entire file when cross-examining a witness who had referred to documents in the file without making an *in camera* examination of papers in the file claimed by defendants to be privileged, such error was not prejudicial where nothing in the record suggests that the examination of the file produced anything harmful to defendant or changed the outcome of the case.

APPEAL by defendant from *Hayes, Judge.* Judgment entered 10 March 1987 in District Court, FORSYTH County. Heard in the Court of Appeals 5 January 1988.

Leonard, Tanis & Cleland, by Robert K. Leonard and Warren C. Hodges, for plaintiff appellees.

A. Carl Penney for defendant appellant.

PHILLIPS, Judge.

[1] Plaintiffs sued defendant under Chapter 75 of the North Carolina General Statutes for selling them a 1982 model Oldsmobile Firenza automobile that it represented was a 1983 model, and following a trial before Judge Roland H. Hayes without a jury judgment was obtained in the amount of $4,200. The judgment was based upon findings that the 1982 model car plaintiffs bought from defendant was misrepresented as being a 1983 model and was worth $1,400 less than a 1983 model and conclusions of law that defendant's misrepresentation violated G.S. 75-1, *et seq.* and the damages should be trebled. The judge's findings of fact, not being excepted to by defendant, are binding upon us, *In re Sterling*, 63 N.C. App. 562, 305 S.E. 2d 769 (1983), and clearly support the conclusion of law that the misrepresentation violated G.S. 75-1.1.

[2, 3] In seeking to overturn the judgment defendant contends that the record established two defenses to the suit and that other prejudicial errors were made. First, it asserts that the misrepresentation as to the model of the car was not a violation of the Act because it was not intentionally or fraudulently made, but was just a "mistake" by its employees. This contention has no

legal basis, since to prevail in a Chapter 75 case, a purchaser of misrepresented merchandise does not have to prove fraud, bad faith or intentional deception as at common law; it is enough that the goods bought were misrepresented, *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981), assuming, of course, that the other requisites of the action are proved, about which no question is raised by this appeal. Next, it contends that the action should have been dismissed as a matter of law because a "revised contract" that plaintiffs admittedly signed a few days after the car was bought states that it was a 1982 model. This contention ignores, *inter alia*, the evidence plaintiffs presented on this point, the prerogative a fact finder has under our jurisprudence to determine the credibility of conflicting evidence, and the court's uncontested findings of fact to the effect that the so-called "revised contract" was a sham. Plaintiffs' evidence with respect to this contention, in substance, was that: About a week after the sale was completed and plaintiffs drove the Firenza away, defendant's agent obtained their signatures to the paper dubbed a "revised contract" not by candidly telling them a mistake had been made as to the model of the car, but by claiming that new papers had to be signed because the monthly payments called for by the original contract had been miscalculated and could not be keyed into the computer; and that plaintiffs did not read the so-called new contract and did not learn until later that the car was not a 1983 model. These are the established facts on this question because the court's unchallenged findings are based thereon; and they certainly do not establish that defendant is entitled as a matter of law to the dismissal of plaintiffs' case.

Defendant's next contention, that the court erred in finding damages based on plaintiffs' book value testimony, is supported not by an exception to any finding of fact by the court, but by three exceptions to the admissibility of opinion testimony by plaintiff Richard Myers that the fair market value of the 1982 Firenza was $1,400 less than that of a 1983 Firenza. Thus, the assignment has no proper basis and we overrule it; in doing so we also note that, without objection or exception by defendant, opinions to substantially the same effect were testified to by several other qualified witnesses. *Thompson v. James*, 80 N.C. App. 535, 342 S.E. 2d 577 (1986).

[4] Finally, defendant argues that the trial judge erred in permitting plaintiffs' counsel over its objection to examine defendant's entire file pertaining to the car and case when cross-examining an employee of defendant's who had referred to some documents in the file during direct examination. Since Rule 612, N.C. Rules of Evidence requires the judge to make an *in camera* examination of papers claimed to be privileged before permitting an adversary to examine them and the judge made no such examination, error was committed. But nothing in the record suggests, much less shows, that the examination of the file produced anything harmful to the defendant or changed the outcome of the case.

Affirmed.

Judges JOHNSON and ORR concur.

BART L. CLEARY AND WIFE, CINDY CLEARY v. GORDON F. LEDEN AND WIFE, BARBARA S. LEDEN AND T. S. ROYSTER, JR.

No. 879SC659

(Filed 15 March 1988)

Partition § 9— distribution of proceeds—consideration of parties' debts—distribution proper

The trial court properly and equitably distributed partition sale proceeds where its method of distribution—adding the parties' debts to the bid price, subtracting expenses, dividing the proceeds into the proportions owned by the parties, and subtracting the parties' debts—took into account the variation between the percentage of ownership and the percentage of total indebtedness of the parties, and the actual net distribution correctly reflected both parties' net share of equity in the property.

APPEAL by petitioners from *Herring, Judge.* Judgment entered 2 May 1987 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 4 January 1988.

On 18 July 1986, petitioners Bart and Cindy Cleary filed a Petition for Sale for Partition to sell an office building in Oxford, North Carolina. Petitioners owned a two-thirds undivided interest in the building for which they owed $60,167.12 on a purchase

money deed of trust. Petitioners owned their two-thirds interest as tenants in common with respondents Gordon and Barbara Leden. Respondents owned a one-third undivided interest in the building and owed $14,871.11 on their interest. T. S. Royster, Jr. was joined in the proceeding as trustee under the separate deeds of trust of the individual parties.

On 12 August 1986, the Clerk of Superior Court of Granville County appointed John H. Pike and James E. Cross, Jr. as commissioners to sell the building at auction to the highest bidder after advertising the sale as provided by law. The commissioners published a Notice of Sale which provided that the sale was subject to all liens and encumbrances of record. The building was first auctioned on 12 September 1986 and commissioner Cross announced that the sale was subject to existing liens and encumbrances. Petitioners bid $80,000.00 but their bid was upset by respondent Gordon Leden and an Order of Resale was issued.

On 3 October 1986, Gordon Leden was the last and highest bidder for the property, bidding the sum of $138,000.00. On 20 October 1986, the Clerk of Superior Court signed an Order of Confirmation approving and confirming the sale. On 5 December 1986, the Clerk of Superior Court entered an Order which adjusted each of the parties' indebtedness in order to determine the net distribution of the sale proceeds. Under the Order, petitioners' net distribution was $76,674.23 and respondents' net distribution was $53,549.57. Petitioners owned a two-thirds (66.67%) interest in the building but held 80.18% of the total debt. Thus, their percentage of indebtedness exceeded their proportionate share in the building. The adjustment took into account the fact that petitioners' share of debt was 13.51% more than their proportionate share of ownership in the building.

Petitioners appealed the Order and the case was heard before Judge Herring on 13 April 1987. On 2 May 1987, the trial court entered judgment which confirmed and ratified the Clerk's 5 December Order. From the judgment of the trial court, petitioners appeal.

John H. Pike for petitioner appellants.

Royster, Royster & Cross, by James E. Cross, Jr., for respondent appellees.

ARNOLD, Judge.

Petitioners make three assignments of error, all of which essentially contend that the trial court erred in making adjustments reflecting the respective parties' indebtedness in order to determine the net distribution of sale proceeds. We are not persuaded by petitioners' arguments.

Proceedings for partition are equitable in nature. *Roberts v. Barlowe*, 260 N.C. 239, 132 S.E. 2d 483 (1963). A sale for partition may be ordered and the rights of the parties adjusted from the proceeds of the sale. *Id.*

The method used by the trial court to determine the net distribution of sale proceeds was as follows:

Bid Price	$138,000.00
Sold Subject to following Debts:	
Ledens	14,871.11
Clearys	60,167.12
Gross Sale Price	213,038.23
Less Expenses	7,776.20
Gross for Distribution	205,262.03
1/3 Gross to Ledens	68,420.68
Less Ledens' Debt	14,871.11
Net Distribution	53,549.57
2/3 Gross to Clearys	136,841.35
Less Clearys' Debt	60,167.12
Net Distribution	76,674.23

Petitioners urge that the following method be used to determine the net distribution of sale proceeds because the sale was a "subject to" sale:

Bid Price	$138,000.00
Less Expenses	7,776.20
Gross for Distribution	130,223.80
1/3 Gross to Ledens—Net Distribution	43,407.93
2/3 Gross to Clearys—Net Distribution	86,815.87

We first note that a "subject to" sale means that the purchaser takes the property along with the existing liens and encum-

brances against it. *See Jordan v. Faulkner*, 168 N.C. 466, 84 S.E. 2d 764 (1915). This fact, however, is irrelevant to the distribution of sale proceeds between the sellers in the present case.

Under petitioners' method, they would receive $10,141.64 more than they received under the trial court's method. Petitioners' proposed method fails to take into account the disparity of debt percentage between the parties. It also provides petitioners with a windfall at the expense of respondents.

The method used by the trial court took into account the variation between the percentage of ownership and the percentage of total indebtedness of the parties. The actual net distribution correctly reflects both parties' share of equity in the property. The trial court properly and equitably distributed the sale proceeds.

The judgment of the trial court is

Affirmed.

Judges WELLS and SMITH concur.

ANTHONY R. PASQUINELLI AND BRUNO A. PASQUINELLI v. THOMAS H. WILSON, DR. EUGENE MIHALYKA, FREDERICK M. MYERS, DAVID J. HEINSMA, VICTOR W. KURILKO, AND LUNDQUIST-HEINSMA CORPORATION, A CORPORATION

No. 8726SC555

(Filed 15 March 1988)

Process § 14.2— North Carolina corporation—nonresident directors—in personam jurisdiction

The exercise of personal jurisdiction over defendants did not violate due process where the complaint alleged that defendants as directors of a North Carolina corporation were liable for the illegal sale of securities in Illinois, and defendants' only contacts with North Carolina were that they were directors of the corporation and participated in the management of the corporation's affairs by attending two or three directors' meetings in Charlotte and by taking part in two other directors' meetings over the telephone. Not only does N.C.G.S. § 1-75.4(8) explicitly grant personal jurisdiction over persons who are officers or directors of domestic corporations in cases arising out of the conduct of the corporation, N.C.G.S. § 55-33(a) subjects all officers and directors of North Carolina corporations, resident and nonresident alike, to the personal

jurisdiction of our courts in cases involving either their services or the acts of their corporations during their period of service.

APPEAL by defendants Dr. Eugene Mihalyka and Frederick M. Myers from *Snepp, Judge*. Order entered 30 December 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 1 December 1987.

Haywood, Menser and Yurko, by James A. Warren, Jr., for plaintiff appellees.

DeArmon and Burris, by Frank L. Bryant, for defendant appellant Dr. Eugene Mihalyka.

Essex, Richards & Morris, by Channing O. Richards, for defendant appellant Frederick M. Myers.

PHILLIPS, Judge.

Defendants Mihalyka, a resident of Virginia, and Myers, a resident of Massachusetts, appeal from an order denying their motions to dismiss for lack of personal jurisdiction. The case against them stated in the complaint is that Berkshire Enterprises, Ltd., a North Carolina corporation that sold securities to plaintiffs in Illinois without complying with Illinois law, refused to return their purchase money and that defendants as directors of the corporation at the time of the sale are liable therefor. Appellants' only contacts with this state before the action was brought, according to their affidavits in support of their motions, were that they were directors of Berkshire during the period of the alleged sales and participated in the management of Berkshire's affairs by attending two or three directors' meetings in this state at the company offices in Charlotte and by taking part in two other directors' meetings conducted over the telephone.

The lawful exercise of *in personam* jurisdiction over a nonresident requires two things—statutory authority and that the exercise of that power not violate constitutional due process. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). That there is statutory authority for the exercise of personal jurisdiction over these defendants is clear and defendants do not contend otherwise. Not only does our long-arm statute, G.S. 1-75.4(8), explicitly grant personal jurisdiction over persons

who were officers or directors of domestic corporations in cases arising out of the *conduct* of the corporation while they were directors or officers, but our Business Corporation Act, by appropriate provisions enacted in 1955, subjects all officers and directors of North Carolina corporations, resident and nonresident alike, to the personal jurisdiction of our courts in cases involving either their services or the acts of their corporations during the period of service. The statute affecting nonresident directors, G.S. 55-33(a), provides as follows:

> (a) Every nonresident of this State who shall become a director of a domestic corporation shall by becoming such director be subjected to the jurisdiction of the courts of this State in all actions or proceedings brought therein by, or on behalf of, or against said corporation in which said director is a necessary or proper party, or in any action or proceeding by shareholders or creditors against said director for violation of his duty as director. Every nonresident who is a director of a domestic corporation when this Chapter becomes effective shall be likewise so subject to the jurisdiction of the courts of this State unless he shall within 60 days of the effective date of this Chapter resign his office and file in the office of the Secretary of State a notice of such resignation.

This statute if anything is more pertinent to the case at hand than the long-arm statute.

What the appellants contend is that the exercise of personal jurisdiction over them in this case would violate the Due Process Clause of the United States Constitution because their contacts with this state have been so few. Though defendants' contacts with this state have been few, their nature and possible effect upon the public were such that exercising personal jurisdiction over them will not violate the notions of fair play that the Due Process Clause embodies, *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958), and the contention is overruled. As the General Assembly recognized in enacting the Business Corporation Act, North Carolina has a legitimate interest in protecting members of the public who deal with corporations created by our laws; and since corporations act through people it was both efficacious and reasonable that the General Assembly chose to implement that policy by subjecting those persons who

control and govern domestic corporations to the jurisdiction of our courts in proper cases. The State's policy in this regard was announced to the public, and before appellants voluntarily became directors of the North Carolina corporation involved they knew or should have known that by accepting those positions and the protection given them by our laws that they could be required to account for their stewardship in the courts of this state. Under the circumstances, therefore, enforcing the jurisdiction that defendants' own voluntary acts vested in our courts will not be unfair to them; and for that matter trying the case against them here will better serve the ends of justice than would the duplicitous and wasteful course of requiring plaintiffs to sue each defendant appellant in his own state. *Byham v. The National CIBO House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965); *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *disc. rev. denied and appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181, 182, 183 (1979).

Affirmed.

Judges WELLS and PARKER concur.

OTIS L. DAYE v. WILBERT O. ROBERTS AND ROBBIE E. ROBERTS

No. 8714SC842

(Filed 15 March 1988)

Contracts § 6.1— improvements to house exceeding $30,000—unlicensed general contractor—no recovery

Plaintiff was not entitled to recover for improvements made to defendants' home where the amount contracted for exceeded $30,000, and plaintiff was not a licensed contractor as required by N.C.G.S. § 87-1. Furthermore, the defense of illegality bars plaintiff's recovery on a promissory note given by defendants for the improvements. N.C.G.S. §§ 25-3-307(2) and 87-13.

APPEAL by plaintiff from *Brannon, Judge*. Judgment entered 27 April 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 3 February 1988.

In October 1985, defendants contacted plaintiff and requested him to make repairs to their home which had been damaged by

fire. Plaintiff agreed to perform the work for the amount of $32,900.00, and defendants gave him a promissory note "for work to be done to restore [their] home." Under the terms of the note, defendants agreed to: (1) pay plaintiff $10,966.66 upon "the completion of 1/3 of construction for labor and supplies to be agreed by both parties," (2) pay plaintiff $10,966.66 upon "the completion of 2/3 of the work," and (3) pay plaintiff $10,966.66 "at the completion of the work and release given by [defendants]."

In his complaint, plaintiff stated that he completed the repairs to defendants' home on approximately 17 February 1986 and had been paid $20,000.00 by defendants. Plaintiff also stated that during the course of the work, he and defendants agreed to a modification of their agreement whereby he was to perform additional work and receive an additional $1,100.00. Defendants, however, failed to make any further payment, and plaintiff filed a lien against defendants' property. Plaintiff then instituted this action to enforce the lien in order to recover $14,000.00 owed to him by defendants.

Defendants filed an answer and later filed an amended answer and counterclaim. Defendants then moved for summary judgment on plaintiff's claims and Judge Brannon granted their motion. From the judgment of the trial court, plaintiff appeals.

Moore & Van Allen, by David E. Fox and Alesia Rae Alphin, for plaintiff appellant.

Randall, Yaeger, Jervis & Stout, by Robert B. Jervis, for defendant appellees.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in granting defendants' motion for summary judgment. We do not agree.

G.S. 87-1 states in pertinent part that:

> [a]ny person or firm or corporation who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities,

> grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more, shall be deemed to be a "general contractor" engaged in the business of general contracting in the State of North Carolina.

The term "improvement" in G.S. 87-1 connotes the performance of construction work and presupposes the prior existence of some structure to be improved. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970).

Plaintiff was contracted to restore defendants' home for an amount exceeding $30,000.00. The promissory note given by defendants to plaintiff specifically stated that a certain sum was to be paid upon completion of 1/3 of the *construction*. There is no doubt that plaintiff's work on defendants' home constituted an "improvement" under G.S. 87-1. Thus, plaintiff was a "general contractor" as defined by the statute and was required to be licensed by the North Carolina Licensing Board for General Contractors.

In North Carolina, an unlicensed general contractor may not recover on a contract or in *quantum meruit*. *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 336 S.E. 2d 108 (1985), *disc. rev. denied*, 316 N.C. 379, 342 S.E. 2d 897 (1986). Since plaintiff was an unlicensed general contractor, he is not entitled to a recovery from defendants.

Plaintiff also argues that he should be allowed to enforce the promissory note made by defendants based on G.S. 25-3-307(2). G.S. 25-3-307(2) states:

> When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

In the case *sub judice*, defendants have established a defense to plaintiff's recovery on the note. G.S. 87-13 provides that:

> Any person, firm, or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in G.S. 87-1, without having first complied with the provisions hereof, or who shall attempt to practice general contracting in the State, . . .

shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars ($500.00) or imprisonment of three months, or both . . . in the discretion of the court.

Since plaintiff was not licensed and performed general contracting, his actions were illegal. Accordingly, the defense of illegality bars plaintiff's recovery on the note.

Affirmed.

Judges EAGLES and COZORT concur.

JANET B. CAMP v. GARY D. CAMP AND LISA CAMP

No. 8727SC756

(Filed 15 March 1988)

1. **Parent and Child § 2— automobile accident—suit by mother against child—summary judgment properly granted**

The trial court properly granted summary judgment for defendant Lisa Camp in an action by a mother against her daughter and husband arising from an automobile accident. A parent's right to sue his or her minor child has been abolished.

2. **Automobiles and Other Vehicles § 108.1— automobile accident—family purpose doctrine—summary judgment inappropriate**

The trial court erred by granting summary judgment for defendant husband in an action by a wife against her husband and daughter arising from an automobile accident where the automobile was registered in plaintiff's name but defendant husband testified that he actually purchased the car and the insurance, paid the taxes, and was responsible for the maintenance of the vehicle. There was a question as to who had control of the automobile within the meaning of the family purpose doctrine.

APPEAL by plaintiff from *Hyatt, Judge*. Judgment entered 12 May 1987 in Superior Court, GASTON County. Heard in the Court of Appeals 13 January 1988.

On 29 April 1984, plaintiff was persuaded by her husband, defendant Gary D. Camp, to take an automobile ride with their teenage daughter Lisa, who had obtained her learners permit approximately six months earlier. Plaintiff, who had not yet ridden

with her daughter, was to sit in the back seat while her husband was to ride in the front seat and direct the daughter's driving. While plaintiff was getting into the back seat, her husband instructed Lisa to turn the ignition switch to the start position so that the level of fuel in the car could be checked. Unfortunately, Lisa turned the switch too far and the automobile jerked backwards, partially knocking plaintiff under the car. Lisa then panicked and started the car, backing over plaintiff's legs.

Plaintiff brought an action against her daughter seeking damages for personal injuries sustained in the accident. Later, plaintiff amended her complaint to include her husband as a defendant, based upon the family purpose doctrine as well as his own negligence.

Both defendants filed a motion for summary judgment which was granted on 12 May 1987. From this judgment, plaintiff appeals.

Harris, Bumgardner & Carpenter, by Reid C. James, for plaintiff appellant.

Stott, Hollowell, Palmer & Windham, by Nancy E. Foltz, for defendant appellees.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in granting defendants' motion for summary judgment "because there are genuine issues of material fact involved in this case and the defendants were not entitled to judgment as a matter of law."

[1] Concerning the defendant daughter, we note that *Allen v. Allen*, 76 N.C. App. 504, 333 S.E. 2d 530, *disc. rev. denied*, 315 N.C. 182, 337 S.E. 2d 855 (1985), abolished a parent's right to sue his or her minor child. Therefore, the trial court was correct to grant summary judgment in favor of defendant Lisa Camp.

[2] In reviewing the granting of summary judgment in favor of plaintiff's husband, Gary D. Camp, the family purpose doctrine must be examined. The family purpose doctrine imposes liability upon the owner or person with ultimate control over a vehicle for the negligent operation of that vehicle by a member of his or her household. *Williams v. Trust Co.*, 292 N.C. 416, 233 S.E. 2d 589 (1977).

> In order to recover under the doctrine, a plaintiff must show that (1) the operator was a member of the family or household of the owner or person with control and was living in such person's home; (2) that the vehicle was owned, provided and maintained for the general use, pleasure and convenience of the family; and (3) that the vehicle was being so used with the express or implied consent of the owner or person in control at the time of the accident.

Byrne v. Bordeaux, 85 N.C. App. 262, 264, 265, 354 S.E. 2d 277, 279 (1987).

The family purpose doctrine can be extended to and exercised only by one member of the family. *Smith v. Simpson*, 260 N.C. 601, 133 S.E. 2d 474 (1963). In determining which member of the family should be held liable under the doctrine, the issue is one of control and use. *Id.* The question to be asked is who controls the automobile. *Id.*

While the term control may seem nebulous in some circumstances, there are certain factors that are used in determining what party has control of the vehicle. Ownership, while not conclusive, is an element to be considered. *Id.* The use of the automobile, *i.e.* the purpose for which the car was purchased, is also a factor. However, the most important question to be asked is who maintains or provides the automobile for the use by the family. *Id.* That person is the party in "control" of the vehicle. *Id.* Maintenance includes such acts as buying the fuel and oil for the car, paying for repairs and listing and paying taxes on the car.

In the present case, the automobile was registered in plaintiff's name but plaintiff's husband testified that he actually purchased the car and the insurance, paid the taxes and was responsible for the "maintenance" of the vehicle. There is most definitely a question as to who had "control" of the automobile. The trial court was incorrect in granting defendant Gary Camp's motion for summary judgment.

Affirmed in part, reversed in part and remanded.

Judges WELLS and SMITH concur.

STATE OF NORTH CAROLINA v. HUBERT CLINTON PENLAND

No. 8717SC822

(Filed 15 March 1988)

Criminal Law § 141— habitual felon—separate punishment not permitted

The trial court erred in sentencing defendant in a separate judgment and commitment as an habitual felon; rather, the habitual felon status could only be used to enhance the punishment for the underlying substantive felony. N.C.G.S. § 14-7.6.

ON writ of certiorari to review the 7 January 1986 judgments of *Rousseau, Judge.* Judgments entered in Superior Court, STOKES County. Heard in the Court of Appeals 2 February 1988.

Defendant was charged in a proper bill of indictment with assault with a deadly weapon upon a law enforcement officer in violation of G.S. 14-34.2. Defendant was also charged in a separate bill of indictment as an habitual felon in violation of G.S. 14-7.1. On 7 January 1986, defendant pled guilty to the charges pursuant to a plea arrangement.

The court sentenced defendant to a term of eighteen years for the offense of being an habitual felon, and in a separate judgment and commitment sentenced him to a two-year concurrent sentence upon his conviction of assault with a deadly weapon upon a law enforcement officer. From the judgments entered, defendant gave timely notice of appeal.

On 22 January 1986, the Stokes County Clerk of Court's office informed defendant that his cases could not be appealed to the Court of Appeals. Defendant filed a petition for writ of certiorari in this Court on 15 May 1986. On 28 May 1986, defendant's petition was allowed in order to review the sentence imposed on the habitual felon conviction.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas D. Zweigart, for the State.

V. L. DeHart, Jr. for defendant appellant.

ARNOLD, Judge.

In his sole assignment of error, defendant contends the trial court erred in considering the habitual felon charge as a separate

crime and in sentencing him separately as an habitual felon. We agree.

The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. *State v. Allen*, 292 N.C. 431, 233 S.E. 2d 585 (1977). Being an habitual felon is not a crime but is a status. *Id.* The status itself, standing alone, will not support a criminal sentence. *Id.* A court may not treat the violation of the Habitual Felon Act as a substantive offense. *State v. Thomas*, 82 N.C. App. 682, 347 S.E. 2d 494 (1986). Upon a conviction as an habitual felon, the court must sentence the defendant for the underlying felony as a Class C felon. G.S. 14-7.6; *State v. Aldridge*, 67 N.C. App. 655, 314 S.E. 2d 139 (1984).

In the present case, the trial court erred in sentencing defendant in a separate judgment and commitment as an habitual felon. Defendant is entitled to a new sentencing hearing in which the convictions for assault with a deadly weapon upon a law enforcement officer and being an habitual felon shall be treated as a single Class C felony.

The judgment finding defendant guilty of being an habitual felon is vacated. The judgment finding defendant guilty of assault with a deadly weapon upon a law enforcement officer is remanded for resentencing in accordance with this opinion.

Vacated and remanded for resentencing.

Judges PHILLIPS and COZORT concur.

RUTH S. MOORE AND ROBERT MOORE, JR. v. RICHARD LEE MOORE AND CAROL WOOD MOORE

No. 8721DC658

(Filed 15 March 1988)

Infants § 6.7— visitation by grandparents—no custody action—dismissal of complaint proper

The trial court did not err by, in effect, entering judgment on the pleadings for defendants in an action in which plaintiff grandparents sought an

order confirming defendants' custody of the children and permitting plaintiffs to resume visiting them on a regular basis. While N.C.G.S. § 50-13.2(b1) authorizes the court to provide for visitation rights of grandparents when custody of minor children is being litigated, it does not authorize the court to enter such an order when custody of the children is not an issue; it is fundamental that parents who have lawful custody of the minor children have the prerogative of determining with whom their children shall associate.

APPEAL by plaintiffs from *Alexander, Judge.* Order entered 13 March 1987 in District Court, FORSYTH County. Heard in the Court of Appeals 10 December 1987.

Victor M. Lefkowitz for plaintiff appellants.

Cofer, Mitchell and Tisdale, by Eddie C. Mitchell and Maureen T. Orbock, for defendant appellees.

PHILLIPS, Judge.

Plaintiffs sued to obtain an order permitting them to visit defendants' minor children on a regular basis and the court dismissed the action pursuant to defendants' motion. Though the order is phrased as one of summary judgment under Rule 56, N.C. Rules of Civil Procedure, since it is based only upon an examination of the complaint, we treat it as a judgment on the pleadings pursuant to Rule 12(b)(6), N.C. Rules of Civil Procedure. *Town of Bladenboro v. McKeithan*, 44 N.C. App. 459, 261 S.E. 2d 260, *appeal dismissed*, 300 N.C. 202, 282 S.E. 2d 228 (1980). In substance the complaint alleges the following: Defendants, married for ten years, are living together with their three children and are fit and proper persons to have their custody; defendants' custody of their children has never been challenged and is not challenged by plaintiffs who are the paternal grandparents of the children; in September 1986 because of differences about a business matter defendants stopped plaintiffs from visiting the children; before then plaintiffs visited the children often and the children often visited them; the children greatly benefited from the visits and their best interests would be served by the court entering an order confirming defendants' custody of the children and permitting plaintiffs to resume visiting them on a regular basis.

The allegations do not state a claim for which our law authorizes relief, Rule 12(b)(6), N.C. Rules of Civil Procedure, and the order dismissing the complaint is affirmed. It is fundamental that

parents who have lawful custody of their minor children have the prerogative of determining with whom their children shall associate, and in a similar case a grandmother's action to enforce her claimed visitation rights was dismissed. *Acker v. Barnes*, 33 N.C. App. 750, 236 S.E. 2d 715, *cert. denied*, 293 N.C. 360, 238 S.E. 2d 149 (1977). The only possible authority for plaintiffs' claim is that since *Acker* was decided the General Assembly amended the statutes governing the custody of children to provide that "[a]n order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate." G.S. 50-13.2(b1). While this provision authorizes the court to provide for the visitation rights of grandparents when the custody of minor children is being litigated, it does not authorize the court to enter such an order when the custody of the children is not even in issue. That the children would benefit from the visits, as we must assume that they would, *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976), is not enough by itself to make the action enforceable. For our courts have no blanket commission from the law to control children for their benefit, but can only exercise dominion over them as the law authorizes, and the trial judge had no authority to exercise dominion over defendants' children in this instance.

Affirmed.

Judges WELLS and PARKER concur.

STATE OF NORTH CAROLINA v. COY HAVEN KIRKPATRICK

No. 8715SC864

(Filed 15 March 1988)

Criminal Law § 138.13— resentencing—imposition of more severe sentence proper

Where the trial court is required by statute to impose a particular sentence on resentencing, N.C.G.S. § 15A-1335 does not apply to prevent the imposition of a more severe sentence.

APPEAL by defendant from *Battle, Judge*. Judgment entered 27 April 1987 in ALAMANCE County Superior Court. Heard in the Court of Appeals 2 February 1988.

At the 29 April 1986 session of the Superior Court of Alamance County, defendant was convicted of one count of felonious possession of stolen property (85CRS17405) and one count of habitual felon (86CRS1826). Defendant was sentenced in case number 85CRS17405 to a term of three years and in 86CRS1826 to a term of fifteen years, said sentence to begin at the expiration of the sentence in 85CRS17405.

On appeal, this Court, in an unpublished opinion reported at 85 N.C. App. 172, 354 S.E. 2d 774 (1987) found no error in the trial, but following *State v. Thomas*, 82 N.C. App. 682, 347 S.E. 2d 494 (1986), held that defendant was improperly given a separate sentence in 86CRS1826 (habitual felon), and remanded for resentencing in 85CRS17405 (felonious possession of stolen property).

On remand, the trial court sentenced defendant in 85CRS17405 to a term of fifteen years. Defendant appeals from that sentence.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lemuel W. Hinton, for the State.

Patterson, Parker & White, by C. Craig White, for defendant-appellant.

WELLS, Judge.

Under his sole assignment of error, defendant contends that the trial court erred in increasing defendant's sentence on resentencing from three years to fifteen years, relying on N.C. Gen. Stat. § 15A-1335 (1983), which is as follows:

> *Resentencing after appellate review.* Where a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence . . . .

We disagree.

While G.S. § 15A-1335 has been interpreted to prohibit the trial court from imposing a more severe sentence because of reweighing factors in aggravation or because of finding new factors in aggravation, *see State v. Williams*, 74 N.C. App. 728, 329 S.E.

2d 709 (1985), where the trial court is required by statute to impose a particular sentence (on resentencing) G.S. § 15A-1335 does not apply to prevent the imposition of a more severe sentence. N.C. Gen. Stat. § 14-7.6 (1986) provides, in pertinent part, as follows:

> *Sentencing of habitual felons.* When an habitual felon . . . shall commit any felony under the laws of the State of North Carolina, he must, upon conviction . . . be sentenced as a Class C felon . . . .

See also State v. Aldridge, 67 N.C. App. 655, 314 S.E. 2d 139 (1984). Pursuant to the provisions of G.S. § 15A-1340.4(f)(1) (1983), the presumptive sentence for a Class C felon is fifteen years.

For the reasons stated, we hold that the trial court properly resentenced defendant to a term of fifteen years, and that the judgment of the trial court must be and is

Affirmed.

Judges EAGLES and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 MARCH 1988

ALISYNCRO, INC. v. McCARTHY No. 8726SC695	Mecklenburg (86CVS4737)	Affirmed in part, reversed in part and remanded
BROWN v. ALLENTON REALTY No. 8714SC863	Durham (86CVS2388)	Affirmed
BROWN v. FRYE No. 8710IC770	Ind. Comm. (535733)	Affirmed
DAVIS v. ALLENSON No. 873DC589	Craven (86CVD441)	No Error
ELECTRICAL SOUTH v. MOORE No. 8718SC777	Guilford (86CVS7893)	Appeal Dismissed
EVANS v. WILLIAMS No. 8723SC932	Alleghany (86CVS144)	No Error
HARLOW v. GRANT & HASTINGS No. 8719SC704	Cabarrus (86CVS1129)	Affirmed
IN RE EDWARDS No. 8715DC799	Orange (87J1)	Affirmed
IN RE PILKINGTON No. 8730DC531	Haywood (86CVD29) (86CVD30) (86CVD31)	Affirmed
IN RE WILL OF SIMPSON No. 875SC568	Pender (86CVS155)	Affirmed
MALONE & BROWN v. PRATT & CO. No. 8714SC1010	Durham (87CVS1355)	Affirmed
POWELL v. CAROLINA MOTOR CLUB No. 877SC867	Nash (87CVS240)	Reversed and Remanded
ROCHELLE v. ROCHELLE No. 8714DC942	Durham (81CVD0244) (83CVD1541)	Affirmed
SPAULDING & PERKINS, LTD. v. JONES No. 8710SC672	Wake (86CVS3790)	Affirmed
STATE v. BRANCH No. 878SC900	Lenoir (86CRS3288)	No Error

STATE v. BREWER No. 8718SC784	Guilford (86CRS25709)	Judgment is Arrested
STATE v. DARDEN No. 872SC945	Beaufort (85CRS6536)	No Error
STATE v. FARROW No. 872SC947	Hyde (87CRS66)	No Error
STATE v. HILL No. 8729SC718	Rutherford (86CRS2608)	No Error
STATE v. HUFF No. 8726SC879	Mecklenburg (85CRS81374)	No Error
STATE v. JONES No. 8712SC730	Cumberland (86CRS47719) (86CRS47648) (86CRS47646)	No Error
STATE v. McVAY No. 8726SC960	Mecklenburg (87CRS2145)	No Error
STATE v. NESMITH No. 8710SC750	Wake (86CRS21972) (86CRS21973) (86CRS21974) (86CRS21975) (86CRS21976)	No Error
STATE v. TAYLOR No. 877SC938	Nash (86CRS16598) (86CRS16985)	No Error
STOUT v. NCNB No. 8718SC726	Guilford (85CVS6114)	Affirmed

CLAUDE E. DEANS AND WIFE, MURVEREE F. DEANS v. BEN J. LAYTON

No. 877SC923

(Filed 5 April 1988)

1. **Husband and Wife § 3— tenants by the entirety—only one named as vendor—signing tenant acting as agent for non-signing tenant**

A paper writing memorializing a contract for the purchase and sale of land which names as vendor only one of the two tenants by the entirety is enforceable against the vendee where there is uncontradicted evidence that the cotenant signing the contract was acting as agent for the non-signing cotenant.

2. **Cancellation and Rescission of Instruments § 4; Vendor and Purchaser § 6—purchase of land which would not "perk"—risk assumed by purchaser**

In an action for breach of contract for the purchase of land, defendant assumed the risk of mistake as to what percentage of the land would "perk," and he was precluded as a matter of law from seeking rescission of the contract on the ground of mutual mistake, where both plaintiff and defendant were experienced in matters involving the purchase and sale of land; each had been involved previously in residential land development; defendant inspected the property with plaintiff, saw that it was very wet, and observed the presence of "bull grass," which usually indicates drainage problems; plaintiff did not state to defendant that he had had the property inspected by an engineer and that every lot would "perk"; and defendant was not prevented from conducting a survey of the property himself or from having the water levels checked, but he failed to do so.

3. **Fraud § 12; Vendor and Purchaser § 6— drainage of land—no material misrepresentation**

Defendant failed to present a forecast of evidence sufficient to raise any question of fact as to misrepresentation or fraud on the part of plaintiffs in the sale of land where the two parties to the contract were experienced businessmen dealing at arm's length; plaintiff did not make any false representation concerning the drainage of the property in question; and no one prevented defendant from having the property surveyed or from having someone check the water levels of the soil prior to his execution of the contract.

4. **Vendor and Purchaser § 1— contract to convey land supported by reciprocal consideration**

A contract was formed by plaintiffs and defendant and it was supported by reciprocal consideration where plaintiffs promised to sell the property in question to defendant for $180,000, and defendant agreed to pay to plaintiffs the purchase price on or before a certain date.

5. **Rules of Civil Procedure § 18— plaintiff's motion to join wife properly allowed**

The trial court did not err in granting plaintiff's motion to join his wife as an additional party and in ordering that she be allowed to adopt plaintiff's complaint as amended, since neither the amendment nor the joinder brought

out any new matters, altered the theory of the case, or in any way surprised defendant.

6. **Interest § 2— contract to convey land—interest properly awarded from time of agreed-on closing to actual closing**

In an action for breach of contract for the purchase of property, the trial court did not err in ordering defendant to pay plaintiffs interest from the agreed-on date for closing the sale to the date of the actual closing. N.C.G.S. § 24-5(a).

7. **Vendor and Purchaser § 5— specific performance—showing of inadequacy of legal remedy not required**

Where land is the subject matter of the parties' agreement, the vendor, like the purchaser, may seek specific performance without showing the inadequacy of a legal remedy.

APPEAL by defendant from *Brown (Frank R.), Judge.* Judgment entered 28 May 1987 in Superior Court, NASH County. (By consent of the parties, the motion was heard and judgment entered out of session and out of the county.) Heard in the Court of Appeals 1 March 1988.

On 30 October 1985, plaintiff Claude E. Deans commenced this action seeking damages in the amount of $180,000.00 plus interest for breach of a contract for the purchase and sale of land or, alternatively, for specific performance of the contract. Defendant filed an answer containing a motion to dismiss plaintiff's complaint pursuant to G.S. 1A-1, Rule 12(b)(6), and raising, among other defenses, the affirmative defenses of mutual mistake, misrepresentation, and lack of consideration. Defendant also asserted counterclaims for costs incurred, punitive damages, and treble damages for unfair and deceptive trade practices. The mutual mistake and misrepresentation defenses and counterclaims were based on alleged statements by plaintiff Claude Deans that the property contained 104 lots when in fact, on account of drainage conditions, a substantial portion of the 100.8 acres was unsuitable for subdivision into residential lots. Plaintiff Claude E. Deans filed a timely reply to defendant's answer and counterclaims.

On 14 July 1986, plaintiff Claude E. Deans filed a motion for leave to amend his complaint to allege that he and his wife, Murveree F. Deans, together owned the property that is the subject of the contract in this controversy and that in the negotiations leading up to execution of the contract, in the execution of the contract, and in the institution of this action he was acting on his

own behalf and as agent on behalf of Murveree F. Deans. On 19 August 1986, plaintiff Claude E. Deans filed a motion to join Murveree F. Deans as an additional party plaintiff in the action. The trial court denied defendant's motion to dismiss plaintiff's complaint, allowed plaintiff Claude E. Deans' amendment to the complaint, and ordered that Murveree F. Deans be joined as plaintiff and that she be allowed to adopt the complaint of the plaintiff as amended.

Thereafter, plaintiffs Claude E. Deans and Murveree F. Deans moved for summary judgment pursuant to G.S. 1A-1, Rule 56. After a hearing and after consideration of the pleadings, affidavits, exhibits, and depositions, the trial court granted summary judgment in favor of plaintiffs, ordering specific performance of the contract entered into by the parties for the purchase and sale of land and awarding to plaintiffs interest at the judgment rate from 15 May 1985 to the date of closing. To this judgment and to the order denying his motion to dismiss plaintiffs' complaint pursuant to G.S. 1A-1, Rule 12(b)(6), defendant appeals.

Poyner and Spruill, by Charles T. Lane, Ernie K. Murray, and Susan K. Nichols, for plaintiff-appellees.

Thomas W. King for defendant-appellant.

PARKER, Judge.

On appeal defendant raises five assignments of error for consideration by this Court: (i) the trial court's denial of defendant's motion to dismiss and entry of summary judgment for plaintiffs where the contract was signed only by Claude E. Deans and the land was owned by plaintiffs as tenants by the entirety; (ii) the trial court's granting of plaintiffs' motion for summary judgment where defendant's affirmative defenses of mutual mistake, misrepresentation, and lack of consideration raised genuine issues of material fact; (iii) the trial court's granting of plaintiffs' motion for summary judgment where plaintiff Murveree F. Deans never served defendant with a complaint but only proceeded upon a theory of adoption of the amended complaint of Claude E. Deans; (iv) the trial court's order requiring defendant to pay to plaintiffs interest at the judgment rate from 15 May 1985 until the date of closing where the contract contained no term regarding interest; and (v) the trial court's order granting specific performance where

plaintiffs had an adequate remedy at law. We shall address these five issues seriatim.

I.

[1] The first issue raised by this appeal is whether a paper writing memorializing a contract for the purchase and sale of land that names as vendor only one of the two tenants by the entirety is enforceable against the vendee. We hold that where, as in this case, there is uncontradicted evidence that the cotenant signing the contract was acting as agent for the non-signing cotenant, the contract is binding and enforceable against the vendee.

The case of *Reichler v. Tillman*, 21 N.C. App. 38, 203 S.E. 2d 68 (1974), addresses the issue of the binding effect of a contract for the purchase and sale of land where only one of the two tenants by the entirety was named in and signed the contract. In *Reichler*, plaintiff-vendees sued defendants husband and wife for specific performance of a contract for the purchase and sale of land held by defendants as tenants by the entirety. The contract did not mention defendant-wife, and defendant-wife never signed the contract. *Id.* at 39, 203 S.E. 2d at 69. Defendant-wife pled the statute of frauds and moved the court for summary judgment in her favor. *Id.* at 39-40, 203 S.E. 2d at 69-70. This Court reversed the trial court's order granting partial summary judgment in favor of defendant-wife. *Id.* Treating the trial court's ruling as a judgment on the pleadings because the record on appeal contained only the pleadings, this Court held that the trial court erred in ordering entry of judgment for defendant-wife where plaintiffs could show that defendant-husband was authorized by his wife to act as her agent in contracting to sell the land belonging to both as tenants by the entirety. *Id.* at 40-41, 203 S.E. 2d at 70-71.

In the instant case, both plaintiffs submitted affidavits stating that plaintiff Murveree F. Deans expressly authorized plaintiff Claude E. Deans to act as her agent in all matters regarding the sale of the tract of land that is the subject of the contract in controversy; that plaintiff Claude E. Deans executed the contract both on his own behalf and as agent for plaintiff Murveree F. Deans; and that upon being informed of the execution of the contract, plaintiff Murveree F. Deans expressly consented to and ratified the execution of the contract by plaintiff Claude E.

Deans as her agent. Defendant has presented no forecast of evidence that might controvert the statements in plaintiffs' affidavits.

Although defendant assigns as error both the denial of his motion to dismiss plaintiffs' complaint pursuant to G.S. 1A-1, Rule 12(b)(6), and the allowance of plaintiffs' motion for summary judgment pursuant to G.S. 1A-1, Rule 56, these questions may be treated as one since where matters outside the pleadings are before the court, a motion to dismiss may be treated as a motion for summary judgment. G.S. 1A-1, Rule 12(b). A motion for summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). A defendant may prevail on a motion for summary judgment by proving that an essential element of plaintiff's claim is nonexistent, that plaintiff cannot produce evidence to support an essential element of his claim, or that plaintiff cannot surmount an affirmative defense which would bar the claim. *Bernick v. Jurden*, 306 N.C. 435, 440-441, 293 S.E. 2d 405, 409 (1982). When the plaintiff moves for summary judgment, plaintiff must establish that the facts as to each essential element of his claim are in his favor and that there is no genuine issue of material fact with respect to any essential element. *Development Corp. v. James*, 300 N.C. 631, 637, 268 S.E. 2d 205, 209 (1980); *Federal Land Bank v. Lieben*, 86 N.C. App. 342, 345, 357 S.E. 2d 700, 702-703 (1987). Once movant has met his burden, the "adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." G.S. 1A-1, Rule 56.

In the case before us, defendant has failed to rebut plaintiffs' evidence to support the agency relationship alleged in plaintiffs' amended complaint and has failed to show the existence of any material issue of fact as to agency. Defendant's first assignment of error is overruled.

II.

Defendant's second assignment of error on this appeal is that the trial court erred in granting plaintiffs summary judgment because defendant's affirmative defenses of mutual mistake, misrep-

resentation, and lack of consideration raised genuine issues of material fact. We shall address each of these affirmative defenses separately.

A.

[2] Regarding the defense of mutual mistake, our Supreme Court has stated the following:

> "The formation of a binding contract may be affected by a mistake. Thus, a contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. Furthermore, a defense may be asserted when there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus *ad idem*. Generally speaking, however, in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, the *sine qua non*, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties."

MacKay v. McIntosh, 270 N.C. 69, 73, 153 S.E. 2d 800, 804 (1967) (quoting 17 Am. Jur. 2d, *Contracts* § 143 (1964)). However, a party who assumes the risk of mistake regarding certain facts may not seek to rescind a contract merely because the facts were not as he had hoped. *Financial Services v. Capitol Funds*, 288 N.C. 122, 139, 217 S.E. 2d 551, 562, 77 A.L.R. 3d 1036, 1053 (1975); *Howell v. Waters*, 82 N.C. App. 481, 488, 347 S.E. 2d 65, 70 (1986), *disc. rev. denied*, 318 N.C. 694, 351 S.E. 2d 747 (1987).

A party assumes the risk of mistake where:

(a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract is made that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Howell v. Waters, 82 N.C. App. at 488, 347 S.E. 2d at 70 (quoting Restatement (Second) Contracts § 154 (1979)).

In this case, the discovery materials and affidavits presented to the trial court showed that both defendant and plaintiff Claude E. Deans were experienced in matters involving the purchase and sale of land and that each had been involved previously in residential land development. In his deposition, defendant stated that he inspected the property with plaintiff Claude E. Deans in December of 1984. He described this meeting as follows:

> [W]e were checking out, talking about the land. It was raining, and it was very wet, and I know I remember asking him about some old bull grass there. First I asked him if that had been tested or if that would pass the perk test. And he had told me on this one—now this is not exact words, but this is what was brought up, or said, or meant to be, or my understanding of it. He said that it had been approved, that there was a map that had been drawn off with 104 lots and that's what he was selling me on the hundred and something acres. It's supposed to have been so many acres, 108 I believe, 104.

When asked to describe the land, defendant stated,

> I believe it had grown cotton on top of the hill on the left. And on the right side it was weed, and grass, and bull grass in there. And I particularly asked Mr. Deans about that, because I was wondering why that hadn't been tended with the other tended. And if you go there today, I think you'll find the stalks and all still there from that time. He assured me—and we went on up on top of a hill now—that he has three mobile homes sitting up there. And then in front of those mobile homes is just as pretty a land that you can ask for, and we drove up that far. And the land on the left and some of it on the right where the hill kind of slopes over a little bit was good, no problem about perking. But the one there as we first drove on, there was a doubt. And I asked him and he told me it was—that it would perk. And I said well, what about all the land all the way back. And it was so wet that we couldn't go any farther than those mobile homes.

> Now the mobile homes is [sic] only, oh, I dare say a third of the way down. Well, the path there to the mobile homes is only about a third of the depth of the farm. And that's where we had to turn around.
>
> . . . .
>
> We—it was so wet, Mr. Deans didn't want to get out, and neither did I want to get out there and wade through the mud and the water and the rain. Okay, the land did not have debris on it. And from the looks at it from where these mobile homes was [sic], it looked like it was well drained and everything else all the way down just as to observe it.
>
> . . . .
>
> When we—when we first drove on that land, and I think if you'll go out there today and look at it, on the right side of the road, there's bull grass or that's what we call it. Normally it's when you see bull grass, you know it's a problem of dampness and wet. And most of the time it won't perk.

When asked if plaintiff Claude E. Deans ever stated to defendant that he had had the land "perked," defendant replied, "No, he never told me he had it perked, but he assured me it would." Defendant stated, "I'm not saying that Mr. Deans knew the condition of all the back. I don't know whether he ever had anyone down there or not." Later in his deposition, defendant stated, "I'm not saying that Mr. Deans knew that the soil, all of it was that bad." When asked if plaintiff Claude E. Deans ever told defendant that he had had the property inspected by an engineer and that every lot would "perk," defendant answered, "He told me he had 104 lots there, and they were already drawn off, and told me where the map was." Defendant stated that he went to the office of Mr. Bill McIntyre, a civil engineer, to get a copy of the 104-lot plat of the property. In his deposition, defendant described his visit to Mr. McIntyre's office as follows:

> Mr. McIntyre wasn't in there. I talked with Van. He wasn't too familiar with the land, but he told me that land was basically mighty wet out there, and that I'd better check it good. They do all of my surveying and handling the developments.

Defendant conceded that no one prevented him from conducting a survey of the property himself or from having someone check the water levels. Defendant also acknowledged that nearly every piece of land that he had ever bought had certain areas that would not "perk" and that a purchaser cannot know what lots will "perk" until the land is examined, surveyed, and staked off.

After looking at the property on 20 December 1984, plaintiff Claude E. Deans and defendant discussed the price of the land. According to defendant, plaintiff Claude E. Deans wanted $2,000.00 per acre, but defendant refused to pay that price. On 31 December 1984, plaintiff Claude E. Deans and defendant met at defendant's office and reached an agreement for the purchase and sale of the property for a price of $180,000.00. Defendant then drew up a written contract to that effect and both defendant and plaintiff Claude E. Deans signed the contract.

Defendant did not arrange for an inspection of the property by a surveyor/engineer until June of 1985. The surveyor/engineer estimated that approximately 32.4 acres of the property would be unsuitable for septic tanks and well systems because of wet or poorly drained soil with a high water table. Accordingly, the number of suitable lots on the property was between sixty-five and seventy-six. This information was corroborated by a representative of the county health department who based his evaluation on his general experience with poor drainage and wet soil in the area as well as the presence of "saw grass" (or bull grass) on the property.

Defendant was experienced in real estate transactions and residential land development and was dealing at arm's length in entering into this agreement. Therefore, from the record before us, we must conclude that defendant assumed the risk of mistake as to what percentage of the land would "perk," and he is precluded as a matter of law from seeking rescission of the contract.

B.

[3] In order to make out a claim for fraud or misrepresentation, the party asserting it must show (i) false representation or concealment of a material fact, (ii) reasonably calculated to deceive, (iii) made with intent to deceive, (iv) which does in fact deceive, (v)

resulting in damage to the injured party. *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (1974); *Shreve v. Combs*, 54 N.C. App. 18, 21, 282 S.E. 2d 568, 571 (1981).

Defendant has, first of all, failed to forecast any evidence that plaintiff Claude E. Deans made any representation concerning the property that was "false," "reasonably calculated to deceive," or "made with intent to deceive." In his deposition, defendant stated, "I'm not saying that Mr. Deans knew the condition of all the back [of the property]. I don't know whether he ever had anyone down there or not." Defendant also stated, "I'm not saying Mr. Deans knew that the soil, all of it was that bad. I'm not sure that he ever done [sic] it, but he told me that 104 lots was what was there and was what I could count on and he told me that absolute." Defendant also testified, "He [Mr. Deans] told me he had 104 lots there, and they were already drawn off, and told me where the map was." From the record, there is no dispute that such a map showing 104 lots existed. For the representation to be calculated to deceive, the person making the representation must have known the representation was false when it was made or have made the representation recklessly without knowledge of its truth and as a positive assertion. *See Johnson v. Insurance Co.*, 300 N.C. 247, 253, 266 S.E. 2d 610, 615 (1980).

Furthermore, defendant acknowledged he was warned to check the property because the land was "mighty wet." Our Supreme Court has stated the following regarding alleged misrepresentation in real property transactions:

> A purchaser of property seeking redress on account of loss sustained by reliance upon a false representation of a material fact made by the seller may not be heard to complain if the parties were on equal terms and he had knowledge of the facts or means of information readily available and failed to make use of his knowledge or information, unless prevented by the seller. But the rule is also well established that one to whom a definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon. The right to rely on representations is inseparably connected with the correlative problem of a duty of a representee to

> use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest.

Fox v. Southern Appliances, 264 N.C. 267, 271-272, 141 S.E. 2d 522, 526 (1965). This Court has held that where parties deal at arm's length, where the purchaser has ample opportunity to inspect the land or have the land inspected by experts prior to the sale, and where the seller has not induced the purchaser to forego inquiry or investigation of the land, no action for fraud will lie. *Williams v. Jennette*, 77 N.C. App. 283, 335 S.E. 2d 191 (1985) (summary judgment for defendants held proper where plaintiffs failed to allege they were fraudulently induced to forbear inquiries concerning the suitability of land for residential use); *Goff v. Realty and Insurance Co.*, 21 N.C. App. 25, 203 S.E. 2d 65, *cert. denied*, 285 N.C. 373, 205 S.E. 2d 97 (1974) (directed verdict for defendants was proper where plaintiffs had full opportunity to view topography of lot and to inquire as to septic tank problems in the area). *See also Harding v. Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599 (1940) (nonsuit for defendant was improperly denied where there was no evidence that plaintiff was fraudulently induced to forbear inquiries as to defects in the water, heating, plumbing, and roof of hotel).

As stated earlier, the two parties to the contract in the case before us were experienced businessmen dealing at arm's length. Defendant admitted in his deposition that no one prevented him from having the property surveyed or from having someone check the water levels of the soil prior to his execution of the contract. Therefore, under applicable principles of law, defendant has failed to present a forecast of evidence sufficient to raise any question of fact as to misrepresentation or fraud on the part of plaintiffs.

C.

[4] In order for a contract to be enforceable in this State it must be supported by consideration. *Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E. 2d 342, 345 (1972). Consideration has been defined as some benefit or advantage to the promisor or some loss or detriment to the promisee. *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 147, 139 S.E. 2d 362, 368 (1964). Mutual promises may constitute reciprocal consideration to support a contract.

See Penley v. Penley, 314 N.C. 1, 16, 332 S.E. 2d 51, 60 (1985); *Allied Personnel v. Alford*, 25 N.C. App. 27, 30, 212 S.E. 2d 46, 48 (1975).

Plaintiffs promised to sell the property to defendant for $180,000.00. In exchange, defendant agreed to pay to plaintiffs the purchase price of $180,000.00 on or before 31 March 1985. A contract was thereby formed and was supported by reciprocal consideration. As discussed earlier, there is uncontroverted evidence that plaintiff Claude E. Deans was acting both for himself and as agent for plaintiff Murveree F. Deans when he signed the contract. Therefore, defendant's contention that the promises of plaintiffs and defendant are not mutual is without merit.

III.

[5] The third issue raised by defendant in this appeal is whether the court below erred in granting plaintiffs' motion for summary judgment where plaintiff Murveree F. Deans became a party to the action only after the trial court granted plaintiff Claude E. Deans' motion to join her as an additional party and ordered that she be allowed to adopt the complaint of plaintiff Claude E. Deans as amended. Defendant contends that plaintiff Murveree F. Deans is not properly a party in this action because she did not file a separate complaint, she was not named in the caption to the amended complaint, she has not made a demand for relief, and she was never named in an issued summons. This contention is without merit.

Under our Rules of Civil Procedure, amendments to pleadings should be liberally allowed. Discretion in allowing amendments to the pleadings is vested in the trial judge, and his ruling will not be disturbed absent a showing of prejudice to the opposing party. *Goodrich v. Rice*, 75 N.C. App. 530, 533, 331 S.E. 2d 195, 197 (1985). Similarly, whether proper parties will be ordered joined rests within the sound discretion of the trial judge. *Long v. City of Charlotte*, 306 N.C. 187, 212, 293 S.E. 2d 101, 117 (1982). *See also* G.S. 1A-1, Rule 20(a).

Defendant has failed to show that the trial judge abused his discretion in ordering plaintiff Murveree F. Deans joined as an additional party plaintiff and allowing her to adopt the amended complaint of plaintiff Claude E. Deans. Neither the amendment of

the complaint nor the addition of plaintiff Murveree F. Deans to the action brought out any new matters, altered the theory of the case, or in any way surprised defendant. Defendant has shown no prejudice resulting from the amendment or the joinder. *See Goodrich v. Rice, supra* (defendant showed no abuse of discretion or prejudice resulting from amendment adding additional plaintiff); *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E. 2d 231 (1952) (under prior law, court had discretion to bring in as additional plaintiff insurance company that had interest in subject of action and in relief demanded).

IV.

[6] Defendant next argues that the trial court erred in ordering defendant to pay plaintiffs interest from 15 May 1985, the agreed-on date for closing the sale, to the date of the actual closing because the contract did not provide for payment of interest. This argument is without merit.

General Statute 24-5(a) (1985) (amended 1987) states the following:

> Contracts.—In an action for breach of contract, except an action on a penal bond, the amount awarded on the contract bears interest from the date of breach. The fact finder in an action for breach of contract shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied. Interest on an award in a contract action shall be at the contract rate, if the parties have so provided in the contract; otherwise, it shall be at the legal rate.

In general, interest is the compensation allowed by law or fixed by the parties for the use, forbearance, or detention of money. *Ripple v. Mortgage Corp.*, 193 N.C. 422, 424, 137 S.E. 156, 157 (1927); *Parker v. Lippard*, 87 N.C. App. 43, 49, 359 S.E. 2d 492, 496, *modified and aff'd*, 87 N.C. App. 487, 361 S.E. 2d 395 (1987).

The contract executed by the parties contained a performance date of 31 March 1985. This date was later changed by mutual consent of the parties to 15 May 1985. On 15 May 1985, plaintiffs were ready, willing, and able to comply with the contract and to deliver to defendant a deed to the property that was the subject of the purchase contract; by the terms of the contract,

plaintiffs were to receive, in exchange, the sum of $180,000.00. However, because of defendant's failure to perform, plaintiffs were denied the use of the $180,000.00 from 15 May 1985. The contract for the purchase and sale of the property did not provide for the payment of any interest by defendant because the parties contemplated defendant's performance and not defendant's breach of the contract. Therefore, the trial court properly ordered defendant to pay plaintiffs interest on the purchase price at the judgment rate from 15 May 1985 to the date of closing.

V.

[7] As a final matter, defendant contends that the trial court erred in affording plaintiffs, the vendors of the property, the remedy of specific performance by defendant, the purchaser of the property, where plaintiffs had an adequate remedy at law for money damages. We disagree with this contention.

The law in North Carolina has long recognized that a vendor has the same right as the purchaser to enforce an executory contract for the purchase and sale of real property by specific performance. *See, e.g., Springs v. Sanders*, 62 N.C. (Phil. Eq.) 67 (1866); *Bryson v. Peak*, 43 N.C. (8 Ire. Eq.) 310 (1852). Where land is the subject matter of the parties' agreement, the vendor, like the purchaser, may seek specific performance without showing the inadequacy of a legal remedy. *Springs v. Sanders, supra. See also* 71 Am. Jur. 2d *Specific Performance* §§ 112, 115 (1973). Early cases base this remedy upon the principle of mutuality, "that since the *purchaser* could obtain specific performance (land being unique and no substitute being satisfactory), then the *vendor* ought to be able to enforce his side of the bargain through an identical or similar remedy." D. Dobbs, Remedies § 12.13 (1973) (citing *Springs v. Sanders, supra*). However, modern authorities recognize other valid reasons for affording the vendor in a land sale contract the remedy of specific performance, such as the difficulty of locating a willing buyer with acceptable credit, especially where the value of the property is declining. *See* Dobbs, *supra.* Therefore, the court below did not err in granting specific performance in favor of plaintiffs as vendors in the contract for the purchase and sale of land.

For the reasons stated above, the trial court's entry of summary judgment in favor of plaintiffs ordering specific performance of the land sale contract executed by the parties is

Affirmed.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. RODNEY WILLIAM ROWLAND

No. 8726SC744

(Filed 5 April 1988)

1. **Assault and Battery § 5.3; Robbery § 5.2— attempted armed robbery—assault with a deadly weapon not lesser-included offense**

The trial court did not err in a prosecution for attempted armed robbery by refusing defendant's requested instruction on assault with a deadly weapon because the offense of assault with a deadly weapon is not a lesser-included offense of attempted armed robbery. Fear is an essential element of assault with a deadly weapon but is not an inherent, essential element of attempted armed robbery.

2. **Robbery § 5.4— attempted armed robbery—instruction on attempted common law robbery refused—no error**

The trial court did not err in a prosecution for attempted armed robbery with a pocketknife by not instructing the jury on attempted common law robbery where the detailed description of the knife and the uncontradicted evidence of its use compels a finding that it was a dangerous weapon.

3. **Criminal Law § 85.3— attempted armed robbery—cross-examination regarding drug addiction—prejudicial error**

The trial court erred in a prosecution for attempted armed robbery by allowing the prosecution to cross-examine defendant regarding his addiction to cocaine. The evidence was improper under N.C.G.S. § 8C-1, Rule 608(b) because extrinsic evidence of drug addiction, standing alone, is not probative of defendant's character for truthfulness or untruthfulness; the evidence is not admissible under N.C.G.S. § 8C-1, Rule 404(b) because it was not relevant and because it did not show that defendant had a drug addiction in proximity to the date of the crime; and there was prejudice because the case turned on a question of credibility. N.C.G.S. § 15A-1443(a).

APPEAL by defendant from *Gray, Judge*. Judgment entered 12 March 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 January 1988.

Defendant was tried and convicted upon a bill of indictment charging him with the offense of attempted robbery with a dangerous weapon. From the imposition of a sentence of fourteen years imprisonment defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David R. Minges, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Marc D. Towler, for defendant appellant.

JOHNSON, Judge.

The State presented evidence which tended to show the following: Between 9:30 and 10:00 p.m., Friday, 25 April 1986, David DeStefani was driving his vehicle in the one hundred block of Church Street of downtown Charlotte. As he proceeded through the intersection of Church and Trade Streets, defendant, who was walking across the street, hit his backpack against the rear quarter panel of DeStefani's car. DeStefani pulled his car over, got out, walked toward defendant, and asked defendant if there was a problem. Defendant responded that there was a problem and asked DeStefani for either his wallet or his money. DeStefani became scared and stepped back. Defendant then pulled a pocketknife five to five and one-half inches long with a two and one-half to three inch blade. Defendant held the knife in his right hand with the knife open and the blade up, moved toward DeStefani and said, "Give me your wallet." Defendant reached around DeStefani with his left hand for DeStefani's wallet. DeStefani grabbed defendant's left arm and a struggle ensued. During the struggle two of DeStefani's friends drove up, stopped and asked if everything was all right. Defendant responded, "No, I'm going to kill him." DeStefani's friends then drove further down the street and stopped. Defendant then told DeStefani, "You better give me your money or I'm going to cut you anyway." Defendant closed the knife and put it in his pocket. As the struggle continued, DeStefani managed to remove the knife from defendant's pocket, opened it and told defendant to stand back. Defendant responded by reaching for his backpack and saying that he had a gun in it and he was going to shoot DeStefani. As defendant opened the backpack, DeStefani closed the knife, threw it away and started for his car. Defendant struck him twice about the face and again

threatened to shoot him. DeStefani managed to get into his car and drive down the street to where his friends had pulled over. He told them defendant did not get his wallet or cut him. DeStefani did not report the incident to the police because he was all right, defendant did not get his money and he "figured" the police would not catch defendant because defendant "took off."

On Sunday afternoon, 27 April 1986, DeStefani was in downtown Charlotte at the Springfest when he noticed defendant standing on a corner. DeStefani approached two officers and told them that defendant had tried to rob him on Friday night. The officers approached defendant and confronted him with DeStefani's accusations. Defendant denied any knowledge of the incident and said that he was working Friday night.

Defendant testified in his own behalf to the following: That on the night in question, he was at the intersection of Church and Trade Streets in downtown Charlotte, waiting to cross the street, and when the signal indicated "walk," he began crossing the street at which time the car driven by DeStefani almost hit him. He hit the back of the car with his hand, and the car pulled over to the side suddenly. DeStefani "jumped out" of the car like he wanted to fight and said, "What's your problem?" He became scared and pulled out his pocketknife as DeStefani approached him because DeStefani was twice his size. DeStefani grabbed his arm and spun him around. As they struggled, he closed the knife and put it in his pocket and told DeStefani to "stop, forget it." DeStefani reached into defendant's pocket, grabbed the knife, opened it and threw it into the street. DeStefani shoved him and he slapped DeStefani. During the struggle defendant told DeStefani he was going to kill him only because he was mad and DeStefani almost hit him as he was crossing the street. In addition, defendant stated that he had no intention of actually killing him. Defendant denied having a gun, or asking or reaching for DeStefani's money or wallet, or saying anything about robbing or shooting him. Defendant's description of the knife is as follows: "the blade on it was probably two and one half or three inches long, opened probably five and one half inches long, and a real skinny blade, maybe a half an inch thick. It was like a whittling knife like you whittle, you know, with wood, like a carving knife, . . ."

[1] By his first Assignment of Error, defendant contends the trial court erred in failing to give defendant's requested instruction on assault with a deadly weapon. Defendant preserved his right to assign as error this omission by properly objecting at trial. Rule 10(b)(2), N.C. Rules of App. P.

The State contends that assault with a deadly weapon is not a lesser included offense of attempted armed robbery; therefore, the State argues, the trial court was not required to instruct on the offense of assault with a deadly weapon even if there was evidence from which the lesser crime could be found.

It is clear from the evidence of this case that there was evidence from which the lesser crime could be found. Although the State presented evidence which tended to show that defendant, armed with a pocketknife, threatened to cut and kill DeStefani if DeStefani did not give him his wallet and money, and that the attack and robbery were thwarted by DeStefani's grabbing defendant's hand, defendant testified that he drew the knife on DeStefani and threatened to kill him, but never requested or demanded DeStefani's wallet or money. From defendant's testimony, the lesser crime of assault with a deadly weapon could be found.

If the offense of assault with a deadly weapon is a lesser included offense of attempted armed robbery, then the trial court was required to give defendant's requested instruction. For it is a well established rule in this jurisdiction that:

> [w]hen there is conflicting evidence of the essential elements of the greater crime and evidence of a lesser included offense, the trial judge must instruct on the lesser included offense. . . .

State v. Odom, 307 N.C. 655, 659, 300 S.E. 2d 375, 378 (1983) (*quoting State v. Brown*, 300 N.C. 41, 50, 265 S.E. 2d 191, 197 (1980)). *See also State v. Bell*, 284 N.C. 416, 200 S.E. 2d 601 (1973).

In *State v. Weaver*, 306 N.C. 629, 635, 295 S.E. 2d 375, 378-79 (1982), our Supreme Court held that:

> [T]he facts of a particular case should [not] determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine wheth-

er one offense is a lesser included offense of another crime. (Citation omitted.) In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

The essential elements of attempted armed robbery, as set forth in G.S. sec. 14-87(a), are:

(1) the unlawful attempted taking of personal property from another;

(2) the possession, use or threatened use of a firearm or other dangerous weapon, implement or means; and

(3) danger or threat to the life of the victim.

See also, State v. Torbit, 77 N.C. App. 816, 336 S.E. 2d 122 (1985).

Attempted armed robbery occurs when the defendant, with the requisite intent to rob, does some overt act calculated toward unlawfully depriving another of his personal property by endangering or threatening his life with a dangerous weapon. *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981); *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971). The overt act done towards unlawfully depriving another of his personal property must be beyond mere preparation, but falling short of completion. *State v. Powell*, 277 N.C. 672, 178 S.E. 2d 417 (1971).

The essential elements of an assault with a deadly weapon are:

(1) The assault of a person;

(2) With the use of a deadly weapon.

G.S. sec. 14-33.

The word assault has been defined as an overt act or attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or violence must be sufficient to put a person of reasonable firmness in fear of immediate physical injury. *State v. Roberts*, 270 N.C. 655, 155 S.E. 2d 303 (1967).

While we are cognizant of cases of this Court which have held that assault with a deadly weapon is a lesser included offense of attempted armed robbery, *see, State v. Sanders*, 29 N.C. App. 662, 225 S.E. 2d 620 (1976); *State v. Blackmon*, 28 N.C. App. 255, 220 S.E. 2d 850 (1976); *State v. Harris*, 27 N.C. App. 520, 219 S.E. 2d 538 (1975), these cases were decided before our Supreme Court adopted the *definitional* test in *Weaver, supra*, as the formula to be used in determining whether one offense is a lesser included offense of another crime.

Applying the *definitional* test set forth in *Weaver*, we are of the opinion that the offense of assault with a deadly weapon is not a lesser included offense of attempted armed robbery. The only inherent, essential element common to both offenses, attempted armed robbery and assault with a deadly weapon, is the element of the use of a dangerous weapon. Fear, a reasonable apprehension on the part of the victim of immediate bodily harm or injury, is an essential element of the offense of assault with a deadly weapon but is not an inherent, essential element of attempted armed robbery. In other words, to prove the crime of attempted armed robbery, the State does not necessarily have to prove that an assault occurred. On the other hand, to prove an assault with a deadly weapon the State must show as an essential element that an *assault* occurred. Fear is an essential element of assault with a deadly weapon which is not completely covered by the greater crime of attempted armed robbery. Therefore, under the *definitional* test of *Weaver*, assault with a deadly weapon is not a lesser included crime of attempted armed robbery. The trial court was correct in not giving defendant's requested instruction.

[2] Next, defendant contends the court erred in its denial of defendant's request for an instruction on the lesser included offense of attempted common law robbery.

The court is required to give an instruction as to an included crime of lesser degree than charged, when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed, and the presence of such evidence is the determinative factor. However, there is no requirement to submit the lesser included offense to the jury when there is no evidence to sustain a verdict of defendant's guilt of such lesser offense. *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971),

cert. denied, 409 U.S. 948, 93 S.Ct. 293, 34 L.Ed. 2d 218 (1972); *State v. Allen*, 47 N.C. App. 482, 267 S.E. 2d 514 (1980); *State v. Black*, 21 N.C. App. 640, 205 S.E. 2d 154, *aff'd*, 286 N.C. 191, 209 S.E. 2d 458 (1974). Attempted common law robbery is a lesser included offense of attempted armed robbery.

As we have previously stated, the essential elements of attempted armed robbery are the attempted taking of personal property from another by force or intimidation, occasioned by the use or threatened use of a weapon; *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971); while the essential elements of attempted common law robbery are the attempted taking of personal property of another by violence or intimidation. G.S. sec. 14-87(a); *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966). All of the essential elements of attempted common law robbery are covered by the greater crime of attempted armed robbery.

Defendant argues that the evidence did not compel a finding that the pocketknife was a dangerous weapon *per se*, and that since the court did not so find it to be a dangerous weapon as a matter of law, and submitted the question to the jury as to whether it was a dangerous weapon, the court should have instructed the jury on the lesser included offense of attempted common law robbery. We disagree.

Defendant relies primarily upon this Court's holding in *State v. Jackson*, 85 N.C. App. 531, 355 S.E. 2d 224 (1987). In *Jackson*, defendant was charged with robbery with a dangerous weapon and was convicted of attempted armed robbery. The evidence showed that defendant pulled a hammer on a police officer, held it in a threatening manner, and said, "You'd better give me $15, man." The hammer was identified and admitted into evidence. The court did not find the hammer to be a dangerous weapon as a matter of law, but submitted it to the jury as a question of fact. The court did not instruct the jury on the lesser included offense of common law robbery. This Court held that the trial court erred in not instructing on the lesser included offense since the court did not find the hammer to be a dangerous weapon as a matter of law; and "[t]he evidence in the present case did not compel a finding that the hammer was a dangerous weapon." *Id.* at 532, 355 S.E. 2d at 225. We find *Jackson* distinguishable from the case *sub*

judice. In the instant case we believe the evidence compelled a finding that the knife was a dangerous weapon as a matter of law.

The pocketknife was described in detail by evidence presented by both the State and defendant. The State's evidence showed the pocketknife to be approximately five to five and one half inches long with a two and one half to three inch blade. Defendant described it as approximately five and one half inches long opened, with the blade approximately two and one half to three inches long and one half inch thick. Although defendant denied demanding or requesting any of the victim's personal property, all of the evidence shows that defendant threatened to cut and kill the victim. The State's evidence also shows that defendant held the knife in his right hand with the blade open and up, and reached around the victim with his left hand.

We find similarities between this case and *State v. Fletcher*, 264 N.C. 482, 141 S.E. 2d 873 (1965) (per curiam). In *Fletcher*, defendant was indicted for armed robbery. The State's evidence showed that defendant approached the victim, pulled a knife, opened a blade two to three inches long and said, "I want to see your pocketbook." While holding the knife in his right hand, defendant reached around the victim with his left hand for the victim's wallet. Defendant offered no evidence. Defendant was convicted of armed robbery. In finding no error, the Court held that the evidence did not entitle defendant to an instruction on the lesser included offense of common law robbery; that the evidence "restricted the jury to two verdicts: guilty of robbery with a dangerous weapon, i.e., a knife, or not guilty." *Id.* at 485, 141 S.E. 2d at 875.

In the case *sub judice*, as in *Fletcher*, the knife was described in detail and there is only one version as to how the knife was used. The evidence is uncontradicted that defendant held the knife with the blade opened and threatened to cut and kill DeStefani with it. Where the weapon is described in detail or is introduced into evidence and the manner of its use is of such character as to admit but one conclusion, the question of whether it is a dangerous weapon is a question of law. *See, State v. Torain*, 316 N.C. 111, 340 S.E. 2d 465, *cert. denied*, 107 S.Ct. 133, 93 L.Ed. 2d 77 (1986); *State v. Wiggins*, 78 N.C. App. 405, 337 S.E.

2d 198 (1985); *State v. Parker*, 7 N.C. App. 191, 171 S.E. 2d 665 (1970).

The detailed description of the knife in the instant case and the uncontradicted evidence of its use compels a finding that it was a dangerous weapon. The trial court could properly have found it to be a dangerous weapon as a matter of law. Nonetheless, having failed to do so, the error was harmless, because by leaving the question to the jury as a question of fact, the court placed a higher burden upon the State. This was in fact advantageous to defendant. *Torain, supra.* Based upon the evidence in the instant case, defendant was not entitled to have the court instruct the jury on attempted common law robbery. Defendant was either guilty of attempting to rob DeStefani of his wallet and money by the threatened use of a knife five and one-half to nine inches long and a blade one and one-half to three inches long, or not guilty.

[3] By his third and final Assignment of Error, defendant contends the trial court erred in allowing the State, over defendant's objection, to cross-examine defendant regarding his addiction to cocaine.

During cross-examination of the defendant at trial, the following exchange took place:

Q. Mr. Rowland, you've got a serious addiction to cocaine, don't you?

MR. CONRAD: OBJECTION, Your Honor, that's improper and that's irrelevant.

COURT: Approach the bench.

(Conference at the bench)

COURT: Objection is OVERRULED.

Q. Isn't that true, Mr. Rowland?

A. No, it's not.

Q. You do not have a drug problem?

A. No, I don't.

Q. You have not been in drug treatment, at least two drug treatment centers in the last eight months?

A. No.

Q. You have not been in McCloud Center here in Charlotte for drug treatment?

A. Yes, I have.

Q. And you have been in a drug treatment center the early part, I believe it was 19—late part of last year in Atlanta in a drug treatment center?

A. I wasn't in a drug treatment center, no.

Q. But you were treated for drug treatment—drug addiction?

A. I was here in Charlotte.

Q. And down in Atlanta?

A. No, I wasn't in Atlanta.

Thus, the trial court allowed the State to cross-examine defendant about prior "extrinsic conduct evidence" which refers to evidence of a specific prior or subsequent act, not charged in the indictment which may or may not be criminal. *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986).

As in *Morgan*, defendant here argues that the questions were improper under G.S. sec. 8C-1, Rule 608(b) (evidence of specific instances of conduct for the purpose of proving credibility of witness or lack thereof). The State argues that the evidence was properly admitted pursuant to Rule 608(b) as well as Rule 404(b) (evidence of specific instances of a party's conduct for the purpose of proving motive, opportunity, etc.).

Rule 608(b) provides:

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

to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

G.S. sec. 8C-1, Rule 608(b).

In that "the only purpose for which . . . evidence [under Rule 608(b)] is sought to be admitted is to impeach or to bolster the credibility of a witness, the only character trait relevant to the issue of credibility is veracity or the lack of it." *Morgan at 634, 340 S.E. 2d at 90. The Morgan* Court also stated that "evidence routinely disapproved as irrelevant to the question of a witness' general veracity (credibility) includes specific instances of conduct relating to 'sexual relationships or proclivities, the bearing of illigitimate [sic] children, *the use of drugs* or alcohol, . . . or violence against other persons.' " (Emphasis added.) *Id.* at 635, 340 S.E. 2d at 90.

We, therefore, conclude that the cross-examination complained of in the instant case concerning defendant's drug addiction was improper under Rule 608(b) because extrinsic evidence of drug addiction, standing alone, is not probative of defendant's character for truthfulness or untruthfulness.

The State also contends the evidence was admissible under Rule 404(b) to show motive for the attempted armed robbery and to test defendant's recollection and ability to perceive the underlying events of the crime (evidence of specific instances of conduct for the purpose of proving character of the accused to show motive, opportunity, etc.). Rule 404(b) provides:

(b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

G.S. sec. 8C-1, Rule 404(b).

Before extrinsic conduct evidence is admissible pursuant to Rule 404(b), the trial court is required to *first*, determine whether conduct is being offered pursuant to Rule 404(b); *second*, the trial court is required to make a determination of the evidence's relevancy. "If the trial judge makes the initial determination that the evidence is of the type and offered for the proper purpose under Rule 404(b), the record should so reflect." *Morgan*, 315 N.C. at 637, 340 S.E. 2d at 91. The trial judge in the instant case made no such determination.

Rule 401 defines relevant evidence as:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

G.S. sec. 8C-1, Rule 401.

We perceive no relevancy for the admission of the complained of evidence regarding defendant's drug addiction. Furthermore, this evidence does not show that defendant had a drug addiction in proximity to the date of the crime. It was error for the trial court to allow this evidence in over defendant's objection.

DeStefani contends that defendant pulled the knife on him and threatened to cut and kill him if he did not give defendant his wallet and money. Defendant testified that he pulled the knife on DeStefani and threatened to cut and kill him *only* because he was mad, as DeStefani almost ran over him as he was crossing the street, and that DeStefani jumped out the car as if he wanted to fight; not because he attempted to rob DeStefani. The State's case would stand or fall on this evidence. It became a question of credibility for the jury as to what evidence to believe. We cannot say that there is no "reasonable possibility that, had this error in question not been committed," the jury would have reached a different verdict. G.S. sec. 15A-1443(a). It is at least reasonably possible that the jury considered this evidence of defendant's drug addiction in the manner that the State argued that it should be viewed, and rejected defendant's contention that he, although having admitted pulling the knife and threatening to cut and kill

DeStefani, did not attempt to rob DeStefani. The error was, therefore, prejudicial.

We, therefore, award defendant a

New trial.

Judges PHILLIPS and ORR concur.

STATE OF NORTH CAROLINA v. JUDY ANN LAWS NORMAN

No. 8729SC676

(Filed 5 April 1988)

Homicide § 28.1 — self-defense — sleeping victim — battered spouse syndrome

Defendant was entitled to an instruction on perfect self-defense in a prosecution for the murder of her husband by shooting him while he was sleeping where there was evidence tending to show that defendant suffered from abused spouse syndrome; defendant had been subjected by decedent to beatings, other physical abuse, verbal abuse and threats on her life throughout the day of the killing up to the time when decedent went to sleep; defendant believed it necessary to kill the victim to save herself from death or serious bodily harm; and defendant felt helpless to extricate herself from abuse by defendant. Based on this evidence, the jury could find that decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent, that defendant merely took advantage of her first opportunity to protect herself, and that defendant's act was not without the provocation required for perfect self-defense.

APPEAL by defendant from *Gardner (John), Judge*. Judgment entered 5 March 1987 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 10 December 1987.

Defendant, indicted for first degree murder in the shooting death of her husband, was found guilty of voluntary manslaughter by the jury and sentenced to six years' imprisonment. Defendant appeals from the judgment.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jeffrey P. Gray, for the State.

Robert W. Wolf and Robert L. Harris for defendant-appellant.

PARKER, Judge.

At trial the judge instructed on first degree murder, second degree murder, and voluntary manslaughter. The primary issue presented on this appeal is whether the trial court erred in failing to instruct on self-defense. We answer in the affirmative and grant a new trial.

FACTS

At trial the State presented the testimony of a deputy sheriff of the Rutherford County Sheriff's Department who testified that on 12 June 1985, at approximately 7:30 p.m., he was dispatched to the Norman residence. There, in one of the bedrooms, he found decedent, John Thomas "J.T." Norman (herein decedent or Norman) dead, lying on his left side on a bed. The State presented an autopsy report, stipulated to by both parties, concluding that Norman had died from two gunshot wounds to the head. The deputy sheriff also testified that later that evening, after being advised of her rights, defendant told the officer that decedent, her husband, had been beating her all day, that she went to her mother's house nearby and got a .25 automatic pistol, that she returned to her house and loaded the gun, and that she shot her husband. The officer noted at the time that there were burns and bruises on defendant's body.

Defendant's evidence, presented through several different witnesses, disclosed a long history of verbal and physical abuse leveled by decedent against defendant. Defendant and Norman had been married twenty-five years at the time of Norman's death. Norman was an alcoholic. He had begun to drink and to beat defendant five years after they were married. The couple had five children, four of whom are still living. When defendant was pregnant with her youngest child, Norman beat her and kicked her down a flight of steps, causing the baby to be born prematurely the next day.

Norman, himself, had worked one day a few months prior to his death; but aside from that one day, witnesses could not remember his ever working. Over the years and up to the time of his death, Norman forced defendant to prostitute herself every day in order to support him. If she begged him not to make her go, he slapped her. Norman required defendant to make a mini-

mum of one hundred dollars per day; if she failed to make this minimum, he would beat her.

Norman commonly called defendant "Dogs," "Bitches," and "Whores," and referred to her as a dog. Norman beat defendant "most every day," especially when he was drunk and when other people were around, to "show off." He would beat defendant with whatever was handy—his fist, a fly swatter, a baseball bat, his shoe, or a bottle; he put out cigarettes on defendant's skin; he threw food and drink in her face and refused to let her eat for days at a time; and he threw glasses, ashtrays, and beer bottles at her and once smashed a glass in her face. Defendant exhibited to the jury scars on her face from these incidents. Norman would often make defendant bark like a dog, and if she refused, he would beat her. He often forced defendant to sleep on the concrete floor of their home and on several occasions forced her to eat dog or cat food out of the dog or cat bowl.

Norman often stated both to defendant and to others that he would kill defendant. He also threatened to cut her heart out.

Witnesses for the defense also testified to the events in the thirty-six hours prior to Norman's death. On or about the morning of 10 June 1985, Norman forced defendant to go to a truck stop or rest stop on Interstate 85 in order to prostitute to make some money. Defendant's daughter and defendant's daughter's boyfriend accompanied defendant. Some time later that day, Norman went to the truck stop, apparently drunk, and began hitting defendant in the face with his fist and slamming the car door into her. He also threw hot coffee on defendant. On the way home, Norman's car was stopped by police, and he was arrested for driving under the influence.

When Norman was released from jail the next morning, on 11 June 1985, he was extremely angry and beat defendant. Defendant's mother said defendant acted nervous and scared. Defendant testified that during the entire day, when she was near him, her husband slapped her, and when she was away from him, he threw glasses, ashtrays, and beer bottles at her. Norman asked defendant to make him a sandwich; when defendant brought it to him, he threw it on the floor and told her to make him another. Defendant made him a second sandwich and brought it to him; Norman again threw it on the floor, telling her to put something on

her hands because he did not want her to touch the bread. Defendant made a third sandwich using a paper towel to handle the bread. Norman took the third sandwich and smeared it in defendant's face.

On the evening of 11 June 1985, at about 8:00 or 8:30 p.m., a domestic quarrel was reported at the Norman residence. The officer responding to the call testified that defendant was bruised and crying and that she stated her husband had been beating her all day and she could not take it any longer. The officer advised defendant to take out a warrant on her husband, but defendant responded that if she did so, he would kill her. A short time later, the officer was again dispatched to the Norman residence. There he learned that defendant had taken an overdose of "nerve pills," and that Norman was interfering with emergency personnel who were trying to treat defendant. Norman was drunk and was making statements such as, " 'If you want to die, you deserve to die. I'll give you more pills,' " and " 'Let the bitch die . . . . She ain't nothing but a dog. She don't deserve to live.' " Norman also threatened to kill defendant, defendant's mother, and defendant's grandmother. The law enforcement officer reached for his flashlight or blackjack and chased Norman into the house. Defendant was taken to Rutherford Hospital.

The therapist on call at the hospital that night stated that defendant was angry and depressed and that she felt her situation was hopeless. On the advice of the therapist, defendant did not return home that night, but spent the night at her grandmother's house.

The next day, 12 June 1985, the day of Norman's death, Norman was angrier and more violent with defendant than usual. According to witnesses, Norman beat defendant all day long. Sometime during the day, Lemuel Splawn, Norman's best friend, called Norman and asked Norman to drive with him to Spartanburg, where Splawn worked, to pick up Splawn's paycheck. Norman arrived at Splawn's house some time later. Defendant was driving. During the ride to Spartanburg, Norman slapped defendant for following a truck too closely and poured a beer on her head. Norman kicked defendant in the side of the head while she was driving and told her he would " 'cut her breast off and shove it up her rear end.' "

Later that day, one of the Normans' daughters, Loretta, reported to defendant's mother that her father was beating her mother again. Defendant's mother called the sheriff's department, but no help arrived at that time. Witnesses stated that back at the Norman residence, Norman threatened to cut defendant's throat, threatened to kill her, and threatened to cut off her breast. Norman also smashed a doughnut on defendant's face and put out a cigarette on her chest.

In the late afternoon, Norman wanted to take a nap. He lay down on the larger of the two beds in the bedroom. Defendant started to lie down on the smaller bed, but Norman said, " 'No bitch . . . Dogs don't sleep on beds, they sleep in [sic] the floor.' " Soon after, one of the Normans' daughters, Phyllis, came into the room and asked if defendant could look after her baby. Norman assented. When the baby began to cry, defendant took the child to her mother's house, fearful that the baby would disturb Norman. At her mother's house, defendant found a gun. She took it back to her home and shot Norman.

Defendant testified that things at home were so bad she could no longer stand it. She explained that she could not leave Norman because he would kill her. She stated that she had left him before on several occasions and that each time he found her, took her home, and beat her. She said that she was afraid to take out a warrant on her husband because he had said that if she ever had him locked up, he would kill her when he got out. She stated she did not have him committed because he told her he would see the authorities coming for him and before they got to him he would cut defendant's throat. Defendant also testified that when he threatened to kill her, she believed he would kill her if he had the chance.

The defense presented the testimony of two expert witnesses in the field of forensic psychology, Dr. William Tyson and Dr. Robert Rollins. Based on an examination of defendant and an investigation of the matter, Dr. Tyson concluded that defendant "fits and exceeds the profile, of an abused or battered spouse." Dr. Tyson explained that in defendant's case the situation had progressed beyond mere " 'Wife battering or family violence' " and had become "torture, degradation and reduction to an animal level of existence, where all behavior was marked purely by sur-

vival . . . ." Dr. Tyson stated that defendant could not leave her husband because she had gotten to the point where she had no belief whatsoever in herself and believed in the total invulnerability of her husband. He stated, "Mrs. Norman didn't leave because she believed, fully believed that escape was totally impossible. . . . She fully believed that [Norman] was invulnerable to the law and to all social agencies that were available; that nobody could withstand his power. As a result, there was no such thing as escape." Dr. Tyson stated that the incidences of Norman forcing defendant to perform prostitution and to eat pet food from pet dishes were parts of the dehumanization process. Dr. Tyson analogized the process to practices in prisoner-of-war camps in the Second World War and the Korean War.

When asked if it appeared to defendant reasonably necessary to kill her husband, Dr. Tyson responded, "I think Judy Norman felt that she had no choice, both in the protection of herself and her family, but to engage, exhibit deadly force against Mr. Norman, and that in so doing, she was sacrificing herself, both for herself and for her family."

Dr. Rollins was defendant's attending physician at Dorothea Dix Hospital where she was sent for a psychiatric evaluation after her arrest. Based on an examination of defendant, laboratory studies, psychological tests, interviews, and background investigation, Dr. Rollins testified that defendant suffered from "abused spouse syndrome." Dr. Rollins defined the syndrome in the following way:

> The "abused spouse syndrome" refers to situations where one spouse has achieved almost complete control and submission of the other by both psychological and physical domination. It's, to start with, it's usually seen in the females who do not have a strong sense of their own adequacy who do not have a lot of personal or occupational resources; it's usually associated with physical abuse over a long period of time, and the particular characteristics that interest us are that the abused spouse comes to believe that the other person is in complete control; that they themselves are worthless and they cannot get away; that there's no rescue from the other person.

When asked, in his opinion, whether it appeared reasonably necessary that defendant take the life of J. T. Norman, Dr. Rollins responded, "In my opinion, that course of action did appear necessary to Mrs. Norman." However, Dr. Rollins stated that he found no evidence of any psychotic disorder and that defendant was capable of proceeding to trial.

LEGAL ANALYSIS

In North Carolina a defendant is entitled to an instruction on perfect self-defense as justification for homicide where, viewed in the light most favorable to the defendant, there is evidence tending to show that at the time of the killing:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Gappins, 320 N.C. 64, 70-71, 357 S.E. 2d 654, 659 (1987).

Under this standard, the reasonableness of defendant's belief in the necessity to kill decedent and non-aggression on defendant's part are two essential elements of the defense. The State, relying on *State v. Mize*, 316 N.C. 48, 340 S.E. 2d 439 (1986); *State v. Wallace*, 309 N.C. 141, 305 S.E. 2d 548 (1983); and *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982), argues that defendant was not entitled to an instruction on self-defense. The State contends that since decedent was asleep at the time of the shooting, defendant's belief in the necessity to kill decedent was, as a matter of law, unreasonable. The State further contends that even as-

suming *arguendo* that the evidence satisfied the requirement that defendant's belief be reasonable, defendant, being the aggressor, cannot satisfy the third requirement of perfect self-defense or the requirement of imperfect self-defense that the act be committed without murderous intent.

We agree with the State that defendant was not entitled to an instruction on imperfect self-defense. Imperfect self-defense has been defined as follows:

> "[I]f defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter."

State v. Wilson, 304 N.C. 689, 695, 285 S.E. 2d 804, 808 (1982) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E. 2d 570, 573 (1981)) (emphasis in original). As noted in *State v. Mize*, "Murderous intent means the intent to kill or inflict serious bodily harm." *Mize*, 316 N.C. at 52, 340 S.E. 2d at 442. As in *Mize*, if defendant did not intend to kill decedent, then the first requirement of self-defense, that defendant believed it necessary to kill the victim, would not be met. *Id.* at 54, 340 S.E. 2d at 443.

The question then arising on the facts in this case is whether the victim's passiveness at the moment the unlawful act occurred precludes defendant from asserting perfect self-defense.

Applying the criteria of perfect self-defense to the facts of this case, we hold that the evidence was sufficient to submit an issue of perfect self-defense to the jury. An examination of the elements of perfect self-defense reveals that both subjective and objective standards are to be applied in making the crucial determinations. The first requirement that it appear to defendant and that defendant believe it necessary to kill the deceased in order to save herself from death or great bodily harm calls for a subjec-

tive evaluation. This evaluation inquires as to what the defendant herself perceived at the time of the shooting. The trial was replete with testimony of forced prostitution, beatings, and threats on defendant's life. The defendant testified that she believed the decedent would kill her, and the evidence showed that on the occasions when she had made an effort to get away from Norman, he had come after her and beat her. Indeed, within twenty-four hours prior to the shooting, defendant had attempted to escape by taking her own life and throughout the day on 12 June 1985 had been subjected to beatings and other physical abuse, verbal abuse, and threats on her life up to the time when decedent went to sleep. Both experts testified that in their opinion, defendant believed killing the victim was necessary to avoid being killed. This evidence would permit a finding by a jury that defendant believed it necessary to kill the victim to save herself from death or serious bodily harm.

Unlike the first requirement, the second element of self-defense—that defendant's belief be reasonable in that the circumstances as they appeared to defendant would be sufficient to create such a belief in the mind of a person of ordinary firmness—is measured by the objective standard of the person of ordinary firmness under the same circumstances. Again, the record is replete with sufficient evidence to permit but not compel a juror, representing the person of ordinary firmness, to infer that defendant's belief was reasonable under the circumstances in which she found herself. Both expert witnesses testified that defendant exhibited severe symptoms of battered spouse syndrome, a condition that develops from repeated cycles of violence by the victim against the defendant. Through this repeated, sometimes constant, abuse, the battered spouse acquires what the psychologists denote as a state of "learned helplessness," defendant's state of mind as described by Drs. Tyson and Rollins. *See* Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 Hastings L.J. 895 (1981); Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 Am. U.L. Rev. 11 (1986). In the instant case, decedent's excessive anger, his constant beating and battering of defendant on 12 June 1985, her fear that the beatings would resume, as well as previous efforts by defendant to extricate herself from this abuse are circumstances to be considered in judging the reasonableness of defendant's belief that she would be seriously injured or killed at

the time the criminal act was committed. The evidence discloses that defendant felt helpless to extricate herself from this intolerable, dehumanizing, brutal existence. Just the night before the shooting, defendant had told the sheriff's deputy that she was afraid to swear out a warrant against her husband because he had threatened to kill her when he was released if she did. The inability of a defendant to withdraw from the hostile situation and the vulnerability of a defendant to the victim are factors considered by our Supreme Court in determining the reasonableness of a defendant's belief in the necessity to kill the victim. *See, e.g.*, cases compiled by Justice Exum in *State v. Mize*, 316 N.C. at 53, 340 S.E. 2d at 442.

To satisfy the third requirement, defendant must not have aggressively and willingly entered into the fight without legal excuse or provocation. By definition, aggression in the context of self-defense is tied to provocation. The existence of battered spouse syndrome, in our view, distinguishes this case from the usual situation involving a single confrontation or affray. The provocation necessary to determine whether defendant was the aggressor must be considered in light of the totality of the circumstances. Psychologists and sociologists report that battered spouse syndrome usually has three phases—the tension-building phase, the violent phase, and the quiet or loving phase. *See* L. Walker, *The Battered Woman Syndrome*, at 95-104 (1984). During the violent phase, the time when the traditional concept of self-defense would mandate that defendant protect herself, *i.e.*, at the moment the abusing spouse attacks, the battered spouse is least able to counter because she is immobilized by fear, if not actually physically restrained. *See State v. Kelly*, 97 N.J. 178, 220, 478 A. 2d 364, 385 n. 23 (1984).

Mindful that the law should never casually permit an otherwise unlawful killing of another human being to be justified or excused, this Court is of the opinion that with the battered spouse there can be, under certain circumstances, an unlawful killing of a passive victim that does not preclude the defense of perfect self-defense. Given the characteristics of battered spouse syndrome, we do not believe that a battered person must wait until a deadly attack occurs or that the victim must in all cases be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for the battered person to act in self-defense. Such a standard, in our view, would ignore the realities of the condition. This position is in accord with other jurisdictions

that have addressed the issue. *See, e.g., State v. Gallegos*, 104 N.M. 247, 719 P. 2d 1268 (N.M. Ct. App. 1986); *State v. Leidholm*, 334 N.W. 2d 811 (N.D. 1983); *State v. Allery*, 101 Wash. 2d 591, 682 P. 2d 312 (1984).

In the instant case, decedent, angrier than usual, had beaten defendant almost continuously during the afternoon and had threatened to maim and kill defendant. Hence, although decedent was asleep at the time defendant shot him, defendant's unlawful act was closely related in time to an assault and threat of death by decedent against defendant. Defendant testified that she took the baby to her mother's house because she was afraid that the child's crying would wake decedent and the beatings would resume. Based on this evidence, a jury, in our view, could find that decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent, that defendant merely took advantage of her first opportunity to protect herself, and that defendant's act was not without the provocation required for perfect self-defense.

Finally, the expert testimony considered with the other evidence would permit reasonable minds to infer that defendant did not use more force than reasonably appeared necessary to her under the circumstances to protect herself from death or great bodily harm.

Based on the foregoing analysis, we are of the opinion that, in addition to the instruction on voluntary manslaughter, defendant was entitled to an instruction on perfect self-defense. Weighing the evidence against the four criteria for self-defense, the jury is to regard evidence of battered spouse syndrome merely as some evidence to be considered along with all other evidence in making its determination whether there is a reasonable doubt as to the unlawfulness of defendant's conduct. *See State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977).

Defendant's remaining assignment of error that the trial court erred in denying defendant's motion to dismiss based on uncontradicted exculpatory statements introduced by the State is without merit and is overruled.

New trial.

Judges WELLS and PHILLIPS concur.

FEDERAL LAND BANK OF COLUMBIA, PLAINTIFF v. SAMUEL LIEBEN, GOODSON FARMS, INC., J. MICHAEL GOODSON, AND ESTATE OF GREYLIN R. GOODSON AND SAMUEL LIEBEN, DEFENDANT, CROSS CLAIM PLAINTIFF, AND THIRD PARTY PLAINTIFF; AND GOODSON FARMS, INC., J. MICHAEL GOODSON, AND ESTATE OF GREYLIN R. GOODSON, DEFENDANTS & CROSS CLAIM DEFENDANTS v. EDWARD F. MOORE, THIRD PARTY DEFENDANT

No. 874SC606

(Filed 5 April 1988)

1. **Guaranty § 2— guarantor's notice to holder to proceed against principal—guarantor protected by N.C.G.S. § 26-7(a)**

Where defendant signed a guaranty agreement whereby he agreed not only to be liable for the entire balance of a note when it became due and payable upon a default but also "to make payment of [any delinquent] full installment, including delinquent interest" thirty days after he had been given written notice of the default, defendant was protected by N.C.G.S. § 26-7(a) which provides that a guarantor may give written notice to a holder of the obligation to proceed against the principal or its securities and collateral, since defendant's written promise to pay each individual installment upon default created an obligation covered by the statute; the note installment payment became due and payable on 1 January 1982; plaintiff notified defendant of the payment's delinquency on 19 January 1982; and defendant informed plaintiff on 25 January 1982 that he was exercising his rights under the statute.

2. **Guaranty § 2— no waiver of right to invoke N.C.G.S. § 26-7(a)**

The trial court properly found that language in defendant's guaranty contract did not expressly waive defendant's right to invoke N.C.G.S. § 26-7(a) but instead served only to identify the guaranty as a guaranty of payment.

3. **Guaranty § 2— balance of note at different times—admissibility of evidence—damage to guarantor by holder's refusal to proceed against principal**

In an action to recover on a guaranty contract the trial court did not err in admitting evidence of the note's balance at different periods of time, since the evidence specifically addressed the question of whether defendant was prejudiced by plaintiff's refusal to comply with N.C.G.S. § 26-7(a).

4. **Guaranty § 2— guarantor's indemnification by third person—no evidence that guarantor waived N.C.G.S. § 26-7**

In an action to recover on a guaranty contract, defendant's indemnification by a third person for the remaining potential liability existing under the guaranty contract had no tendency to show any act which might induce plaintiff to believe defendant had waived N.C.G.S. § 26-7, and the trial court therefore properly excluded as irrelevant a settlement agreement including the indemnification provision.

5. Guaranty § 2— holder's failure to comply with N.C.G.S. § 26-7—guarantor not required to mitigate damages

Defendant as guarantor of a note was not required to mitigate the damages he suffered because of plaintiff's failure to comply with N.C.G.S. § 26-7.

APPEAL by plaintiff from *Pope, Judge.* Judgment entered 20 November 1986 in Superior Court, SAMPSON County. Heard in the Court of Appeals 8 December 1987.

Wells, Blossom & Burrows, by Richard L. Burrows, attorney for plaintiff-appellant.

Petree Stockton & Robinson, by Daniel R. Taylor, Jr. and Clifford Britt, attorneys for defendant-appellee Samuel Lieben.

ORR, Judge.

Plaintiff Federal Land Bank of Columbia, instituted suit on 20 August 1985 against defendant Lieben to recover upon a contract of guaranty signed by Lieben on behalf of Goodson Farms, Inc., J. Michael Goodson and Greylin R. Goodson.

At trial, the judge sitting without a jury, found plaintiff's actions had released Lieben from all liability as guarantor under the note. The judge dismissed plaintiff's action on the guaranty contract with prejudice.

From the judgment, plaintiff appeals.

I.

The determinative issue on appeal is whether defendant Lieben was protected by N.C.G.S. § 26-7(a) which provides in pertinent part:

> After any note, bill, bond, or other obligation becomes due and payable, any surety, indorser, or guarantor thereof may give written notice to the holder or owner of the obligation requiring him to use all reasonable diligence to recover against the principal and to proceed to realize upon any securities which he holds for the obligation.

The following undisputed facts are relevant to this issue. The note Lieben guaranteed required Goodson Farms, Inc. to make an annual payment of interest and principal on 1 January 1982.

When Goodson Farms failed to make this payment, plaintiff notified Lieben, as guarantor, that the payment was "seriously delinquent," and "[i]f suitable arrangements [had] not been made by January 30, 1982, [the note would] be mailed to Columbia with recommendation for foreclosure." Lieben replied to plaintiff's notice on 25 January 1982, by informing it that he, as guarantor, was exercising his right, pursuant to N.C.G.S. § 26-7, to demand that plaintiff proceed against all securities and collateral held on the note and to recover against the principal debtor, Goodson Farms.

On 26 January 1982, plaintiff mailed two additional letters to Lieben. The first letter acknowledged plaintiff's receipt of Lieben's letter invoking N.C.G.S. § 26-7. The second letter stated that the unpaid note had been placed in delinquent status.

Despite Lieben's request for action, plaintiff did not proceed as required by N.C.G.S. § 26-7 against either Goodson Farms, or its securities and collateral, within thirty days after receiving Lieben's notice. Thereafter, on 23 February 1982, an outside investor, Edward Moore, made the 1 January 1982 note payment for Goodson Farms.

Plaintiff next contacted Lieben on 1 May 1985, to notify him that Goodson Farms was again delinquent in its note payment. After Lieben refused to pay on Goodson Farms' behalf, plaintiff brought suit against him as guarantor, on 20 August 1985, for the remainder of the unpaid note balance in the amount of $1,494,121.01 plus interest.

The trial court found that plaintiff's failure to comply with N.C.G.S. § 26-7(a) released Lieben to the extent he was prejudiced by plaintiff's delay. The trial court further found Lieben was prejudiced for the entire amount of the guaranty and, therefore, was released from all liability as guarantor under the note under N.C.G.S. § 26-9.

II.

[1] On appeal, plaintiff first contends the trial court's findings of fact and conclusion of law, holding Lieben properly invoked N.C.G.S. § 26-7(a), were not supported by the evidence.

The trial court's findings of fact in a non-jury trial have the force and effect of a verdict by a jury and are conclusive on ap-

peal if there is evidence to support them. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *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). Judgments supported by such findings will be affirmed on appeal. *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974); *Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 201 S.E. 2d 503, *cert. denied*, 285 N.C. 85, 203 S.E. 2d 57 (1974).

Plaintiff argues that N.C.G.S. § 26-7(a) may only be invoked when a note has matured and is fully due and payable. It contends that because the evidence did not show the note had matured in full, at the time Lieben gave notice, the trial court's findings and conclusion were erroneous.

We disagree and we find plaintiff has incorrectly interpreted the scope of N.C.G.S. § 26-7(a).

N.C.G.S. § 26-7(a) permits a guarantor to notify a creditor to take action "[a]fter any note, bill, bond, *or other obligation* becomes due and payable . . . ." (Emphasis added.) An obligation is defined as "any certain written promise to pay money . . . ." Black's Law Dictionary 969 (rev. 5th ed. 1979).

In the parties' guaranty agreement, Lieben promised not only to be liable for the entire balance of the note when it became due and payable upon a default, but also "to make payment of [any delinquent] full installment, including delinquent interest" thirty days after he had been given written notice of the default. Thus, Lieben's written promise to pay each individual installment upon default created an obligation covered by N.C.G.S. § 26-7(a).

N.C.G.S. § 26-9 gives further guidance on the question of notice, stating that "[a]ny such notice to the holder or owner of the obligation as is authorized by G.S. 26-7 may be given *at or subsequent to* the time such obligation is due . . . ." N.C.G.S. § 26-9(b) (1986) (emphasis added).

The trial court's findings show that the note installment payment became due and payable on 1 January 1982, that plaintiff notified Lieben of the payment's delinquency on 19 January 1982, and that Lieben informed plaintiff on 25 January 1982 he was exercising his rights under N.C.G.S. §§ 26-7 through 26-9. These findings are supported by competent evidence in the record.

Therefore, we conclude the trial court's findings and conclusion, holding Lieben properly invoked N.C.G.S. § 26-7(a), were based on sufficient evidence. We overrule this assignment of error.

III.

[2] The trial court also found that language in Lieben's guaranty contract did not expressly waive Lieben's right to invoke N.C.G.S. § 26-7(a). Plaintiff contends this conclusion was erroneous.

When determining if a right has been waived, the Supreme Court of North Carolina said:

> '. . . Waiver . . . presupposes that the person to be bound is fully cognizant of his rights, and that being so he neglects to enforce them . . . . Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be designed, or one party must have so acted as to induce the other to believe that he intended to waive, when he will be forbidden to assert to the contrary.'

Realty Co. v. Spiegel, Inc., 246 N.C. 458, 466, 98 S.E. 2d 871, 877 (1957), *quoting, Manufacturing Co. v. Building Co.*, 177 N.C. 104, 107, 97 S.E. 718, 720 (1919).

Two rules of contract construction guide our review of this provision. The first rule requires any ambiguity in a written contract to be construed against the party who drafted the instrument. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E. 2d 190 (1975); *Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E. 2d 473 (1974). The second rule states the liability of a guarantor must not be enlarged beyond the strict terms of the contract. *O'Grady v. Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978); *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946).

The statement in the guaranty relied on by plaintiff says:

> The Federal Land Bank of Columbia can require payment immediately upon the expiration of 30 days after default and shall not be required to first institute suit or exhaust its remedies against Goodson Farms, Inc., or J. Michael Goodson, or Greylin R. Goodson, or to first enforce its rights against any collateral which has been pledged to secure such indebtedness.

The trial court found this language served only to identify the guaranty as a guaranty of payment and was not intended to waive N.C.G.S. § 26-7.

There are two types of guaranties: a guaranty of payment and a guaranty of collection. The type of guaranty given is determined by the language of the guaranty contract. *See Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E. 2d 117 (1980); *Thompson v. Soles*, 299 N.C. 484, 263 S.E. 2d 599 (1980). The language in the above provision is commonly used to describe a guaranty of payment. *See* 9 Am. Jur. Legal Forms 2d *Guaranty* §§ 132:269 and 132:271 (1985).

Accordingly we find the trial court's narrow interpretation of the language in Lieben's favor comports with the rules of construction and the case law discussed above. We overrule this assignment of error.

IV.

[3] Plaintiff next contends the trial court improperly admitted evidence of the note's balance at different periods of time.

On appeal plaintiff cites numerous reasons as to why this evidence was prejudicial. At trial plaintiff argued only that the evidence was irrelevant because it was derived from hypothetical questions, based on assumptions contrary to the truth.

"A specific objection, if overruled, will be effective only to the extent of the grounds specified. It makes no difference that there was another ground which would have been valid, unless there is no purpose at all for which the evidence would have been admissible." 1 Brandis on North Carolina Evidence § 27 (1982); *State v. Jones*, 293 N.C. 413, 238 S.E. 2d 482 (1977); *Santora, McKay & Ranieri v. Franklin*, 79 N.C. App. 585, 339 S.E. 2d 799 (1986); *State v. Sellars*, 52 N.C. App. 380, 278 S.E. 2d 907, *appeal dismissed and disc. rev. denied*, 304 N.C. 200, 285 S.E. 2d 108 (1981).

N.C.G.S. § 8C-1, Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The evidence challenged by plaintiff consisted of liquidation figures derived by Dorothy Barefoot, an employee of plaintiff, who was familiar with the Goodson Farms' loan books and records. Ms. Barefoot, at Lieben's request, determined what the balance due on the Goodson Farms' loan would be for the dates 1 January 1982 and 1 January 1983, if the 1 January 1982 installment payment had never been made.

As the record discloses, Lieben submitted these figures to show that the value of the collateral securing the loan exceeded the balance of the loan due on the date Lieben invoked N.C.G.S. § 26-7; and that the value of the collateral continued to exceed the balance due on the note until at least 1 January 1983.

This evidence specifically addressed the question of whether Lieben was prejudiced by plaintiff's refusal to comply with N.C.G.S. § 26-7(a). Furthermore, this evidence is essential in determining the degree of prejudice suffered by Lieben.

We find the evidence tended to make the existence of a fact of consequence to the determination more probable or less probable. Accordingly, we conclude the evidence was relevant and properly admitted at trial, and we overrule this assignment of error.

V.

Plaintiff's third assignment of error contends the trial court improperly excluded evidence of conduct by Lieben showing an implied waiver of the N.C.G.S. § 26-7 provisions.

Exclusion of evidence is not prejudicial when appellant fails to show that the excluded evidence was material. *Hege v. Sellers*, 241 N.C. 240, 84 S.E. 2d 892 (1954); *Jackson v. Parks*, 220 N.C. 680, 18 S.E. 2d 138 (1942); *Hammond v. Williams*, 215 N.C. 657, 3 S.E. 2d 437 (1939).

Furthermore, to be material the evidence must be relevant and have a "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." N.C.G.S. § 8C-1, Rule 401 (1986).

The law regarding an implied waiver is stated as follows:

'A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A man may do that . . . by conduct which naturally and justly leads the other party to believe that he dispenses with it. There can be no waiver unless so intended by one party, and so understood by the other, or one party has so acted as to mislead the other.' And further, 'the intent to waive may appear as a legal result of conduct. . . . [T]he intention to abandon a right, is generally a matter of inference to be deducted with more or less certainty from the external and visible acts of the party and all the accompanying circumstances of the transaction, regardless of whether there was an actual or expressed intent to waive, or even if there was an actual but undisclosed intention to the contrary. The decisions declaring intent to be the essence of waiver recognize that the intent may be inferred from a party's conduct.'

Manufacturing Co. v. Lefkowitz, 204 N.C. 449, 453-54, 168 S.E. 517, 519 (1933), *quoting in part*, Herman on Estoppel; *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962); *Altman v. Munns*, 82 N.C. App. 102, 345 S.E. 2d 419 (1986); *Kinnard v. Mecklenburg Fair*, 46 N.C. App. 725, 266 S.E. 2d 14, *aff'd per curiam*, 301 N.C. 522, 271 S.E. 2d 909 (1980).

In the present case, to be relevant on the issue of implied waiver, plaintiff's evidence must show that Lieben acted in a manner which induced plaintiff to believe Lieben intended to waive the provisions of N.C.G.S. § 26-7. *Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 98 S.E. 2d 871; *Altman v. Munns*, 82 N.C. App. 102, 345 S.E. 2d 419.

[4] A. Three types of evidence offered by plaintiff on this issue were rejected by the trial court. First, plaintiff attempted to introduce a settlement agreement entered into by Lieben, Goodson Farms, and a third party, Edward Moore.

Lieben, in addition to serving as guarantor on Goodson Farms' note with plaintiff, owned stock and stock options in Goodson Farms, had loaned substantial sums of money to the farm, and held deeds of trust to farm property as security for his loans. In 1984, Lieben brought suit against Goodson Farms to recover payment due for his loans. The parties settled the suit, and in the agreement arising out of the settlement Edward Moore, a third

party investor who was not involved in the lawsuit, agreed to "indemnify and hold harmless Lieben from any and all amounts which may hereafter be paid pursuant to the guarantees of the aforementioned loans to [Goodson] Farms from [plaintiff] the Federal Land Bank of Columbia . . . ."

The settlement agreement, plaintiff argues, tended to show that Lieben had waived the protections of N.C.G.S. § 26-7, and knew and accepted the fact that he was still fully obligated to plaintiff as guarantor for the loan.

N.C.G.S. § 26-9 governs the effect of failure to comply with N.C.G.S. § 26-7 and states:

> (a) If the holder or owner of the obligation refuses or fails, within 30 days from the service or receipt of such notice, to take appropriate action pursuant thereto, the following persons shall be discharged on any such note, bond, bill or other obligation to the extent that they are prejudiced thereby:
>
> (1) The . . . guarantor giving such notice . . . .

Under this statute, plaintiff's refusal to move against either Goodson Farms or the farm's collateral to collect the balance of the note due in 1982 released Lieben, as guarantor, only to the extent he was prejudiced. If the solvency of Goodson Farms and the value of its collateral in 1985 were equivalent to the same values existing in 1982, when Lieben gave plaintiff the N.C.G.S. § 26-7 notice, Lieben would not have been prejudiced by plaintiff's failure to act and would have continued to be liable for the entire amount of the note he originally guaranteed.

For this reason, we conclude Lieben's indemnification by Edward Moore, for the remaining potential liability existing under the guaranty contract, had no tendency to show any act, which might induce plaintiff to believe Lieben had waived N.C.G.S. § 26-7. Thus, the settlement agreement was properly excluded at trial as irrelevant.

[5] B. The next evidence plaintiff contends was improperly excluded consisted of: (1) a 16 November 1981 proxy giving Lieben voting power of Goodson Farms' stock; (2) two notices calling for a Goodson Farms shareholder's meeting on 16 November and 3

December 1981; (3) a 7 December 1981 Goodson Farms' shareholder resolution authorizing a sale of farm land for cash to pay in full plaintiff's note and to release Lieben as guarantor; and (4) 30 January 1981 meeting notes belonging to Lieben, in which he concluded that Goodson Farms had a zero liquidation value.

Plaintiff contends these documents show Lieben's ability to liquidate Goodson Farms without relying on plaintiff to take this action pursuant to N.C.G.S. § 26-7. Consequently, plaintiff argues, Lieben had a duty to institute foreclosure independent of plaintiff to mitigate the damages he suffered because of plaintiff's refusal to comply with N.C.G.S. § 26-7.

Plaintiff's argument is based on an erroneous assumption. The duty to mitigate arises only in tort actions and breach of contract actions. *Miller v. Miller*, 273 N.C. 228, 160 S.E. 2d 65 (1968); *Johnson v. R. R.*, 184 N.C. 101, 113 S.E. 606 (1922); *Radford v. Norris*, 63 N.C. App. 501, 305 S.E. 2d 64 (1983). Here, Lieben's rights and remedies are statutorily mandated by N.C.G.S. §§ 26-7 through 26-9. These statutes do not require Lieben, as guarantor, to mitigate the damages he suffered because of plaintiff's failure to comply with N.C.G.S. § 26-7. Therefore, this Court declines to expand the scope of the duty to mitigate in the present case.

Since plaintiff presented no other reason for the admission of this evidence at trial, we conclude the trial court properly excluded the evidence as irrelevant.

C. The third piece of evidence rejected by the trial court was a report on Edward Moore's financial status received by Lieben on 8 March 1983 prior to his signing of the settlement agreement with Moore.

Plaintiff contends this report shows Lieben's intent to obtain repayment for personal loans he made to Goodson Farms and to be indemnified for his liability as guarantor on Goodson Farms' note.

Assuming *arguendo* plaintiff's argument is true, the evidence has no tendency to show any act of Lieben's which would induce plaintiff to believe Lieben had waived N.C.G.S. § 26-7. For this reason, we conclude this evidence was also properly excluded as irrelevant by the trial court.

We overruled this assignment of error.

VI.

For the reasons discussed above, we find the trial court properly concluded that Lieben was protected by N.C.G.S. § 26-7 and that plaintiff's failure to proceed under the statute released Lieben to the extent he had been prejudiced.

We further find the trial court's conclusion that Lieben had been prejudiced for the entire amount of his guaranty and, thus, was released from any liability to plaintiff, based on competent evidence.

Accordingly, we hold the trial court properly dismissed plaintiff's action to recover under the guaranty contract with prejudice.

VII.

After review, we find plaintiff's remaining assignments of error to be without merit and decline to discuss them.

We conclude plaintiff received a fair trial free from prejudice and we find no error in the decision of the trial court.

Affirmed.

Judges ARNOLD and JOHNSON concur.

ETTA COUCH v. NORTH CAROLINA EMPLOYMENT SECURITY COMMISSION, AND KID'S WORLD

No. 8715SC869

(Filed 5 April 1988)

1. Master and Servant § 108— unemployment compensation—reduction of work hours—voluntary quit

Claimant voluntarily left her employment as a cook where she quit because the employer reduced her hours and it became economically unfeasible for her to continue working in that job.

2. Master and Servant § 108— unemployment compensation—substantial reduction of work hours—good cause attributable to employer

An employer's substantial reduction of an employee's working hours may constitute good cause attributable to the employer for leaving the employment for the purpose of determining whether the employee is entitled to unemployment compensation benefits. However, what constitutes a substantial reduction in a claimant's working hours is a factual determination best left for the trier of fact, and this case is remanded for further proceedings to determine whether the reduction of claimant's working hours as a cook from five to three hours per day, in light of the attendant facts and circumstances, was a substantial reduction sufficient to qualify as good cause attributable to the employer.

Judge GREENE dissenting.

APPEAL by claimant from *Hobgood (Robert), Judge.* Judgment entered 25 June 1987 in Superior Court, ORANGE County. Heard in the Court of Appeals 4 February 1988.

Kid's World (employer) employed Etta Couch (claimant) as a cook at its day care facility for approximately five months prior to her leaving her position. Claimant testified that she worked five hours per day five days a week. Sometime in December 1986 employer reduced claimant's hours to three hours per day. Her hourly wage did not change. Claimant determined that she could no longer afford to work only three hours per day for approximately $4.50 per hour and quit her position. Her final work day was 29 December 1986. Claimant filed this claim for unemployment compensation benefits on 18 January 1987.

On 2 February 1987 an Employment Security Commission (ESC) adjudicator denied claimant's application for unemployment compensation benefits. Claimant appealed and the case was heard by an appeals referee. On 9 March 1987 the referee found that claimant voluntarily quit her position without good cause attributable to her employer and disqualified claimant from receiving any benefits. Claimant appealed to ESC. ESC affirmed and adopted the referee's decision stating that a "reduction of hours does not give good cause for voluntarily leaving a job." On 25 June 1987 the trial court affirmed the Commission's decision denying claimant's application. Claimant appeals.

North State Legal Services, Inc., by John L. Saxon for claimant-appellant.

No brief filed for Kid's World, appellee.

T. S. Whitaker, Chief Counsel, and Thelma M. Hill, Staff Attorney, for the Employment Security Commission of North Carolina, appellee.

EAGLES, Judge.

The sole issue for our review is whether claimant has left her employment as a cook with Kid's World voluntarily without good cause attributable to her employer. Specifically, we must decide two questions: whether claimant left her job voluntarily and whether a reduction in her work hours constitutes "good cause attributable to the employer."

Initially we note that where, as here, appellant fails to except to the findings of fact, our review is limited to whether ESC and the court below correctly interpreted the law and correctly applied the law to the facts found. *Bunn v. N.C. State University*, 70 N.C. App. 699, 321 S.E. 2d 32 (1984), *disc. rev. denied*, 313 N.C. 173, 326 S.E. 2d 31 (1985). Here the referee found that:

> 1. Claimant last worked for Kids [sic] World on December 29, 1986. From January 18, 1987 until January 24, 1987, claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator, Helen DeBerry, issued a determination which disqualified the claimant for unemployment benefits. The claimant filed a NIC claim effective January 18, 1987. The claimant's weekly benefit amount is $87.00. The claimant's maximum benefit amount is $1,479.00.
>
> 2. The claimant appealed the Adjudicator's determination and an evidentiary hearing was scheduled for March 3, 1987 before Jo Ann Weaver, Appeals Referee. The following individuals were present at the hearing: the claimant. The employer requested a continuance for business reasons. The continuance was denied.
>
> 3. Claimant left this job because her hours were cut and she did not feel that her pay justified the commute.

4. When claimant left the job, continuing work was available for claimant there.

5. The claimant originally worked five hours a day, five days a week.

6. The claimant's hours were cut to three hours a day for five days a week in December of 1986.

7. The claimant was paid an hourly rate.

8. The claimant lived approximately eight miles from her place of employment.

These facts are binding on appeal when, as here, there is competent evidence to support the findings. *In re Cantrell*, 44 N.C. App. 718, 263 S.E. 2d 1 (1980). The referee's conclusions of law, as well as the conclusions of ESC, are fully reviewable. *See id.*

The trial court held "that the Employment Security Commission properly applied the law to [the] facts and the decision rendered was in accordance with the Employment Security Law." More specifically, ESC had concluded as a matter of law that a "reduction of hours does not give good cause for voluntarily leaving a job."

In its determination ESC relied upon G.S. 96-14(1) which, in pertinent part, states:

> An individual shall be disqualified for benefits:
>
> (1) For the duration of his unemployment . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work *voluntarily without good cause attributable to the employer.* [Emphasis added.]

Our Supreme Court has construed this provision to mean that a claimant is disqualified from receiving unemployment compensation only if he voluntarily left his position and the leaving was without good cause attributable to the employer. *In re Poteat v. Employment Security Comm.*, 319 N.C. 201, 353 S.E. 2d 219 (1987).

[1] We first address whether claimant's quit was voluntary. Neither the referee's decision nor ESC's decision spoke to this issue. Claimant argues that she was forced to quit because her

employer reduced her hours and it became economically unfeasible for her to continue working there. We hold that claimant's quit was voluntary.

In *In re Poteat* the Supreme Court in discussing voluntary termination, quoted *Eason v. Gould*, 66 N.C. App. 260, 311 S.E. 2d 372 (1984), *aff'd per curiam by equally divided court*, 312 N.C. 618, 324 S.E. 2d 223 (1985), "an employee has not left his job voluntarily when events beyond the employee's control or the wishes of the employer cause the termination." *In re Poteat*, at 205, 353 S.E. 2d at 222. The court indicated that a review of voluntariness must focus on the "external factors motivating the employee's quit." *Id.*

Here claimant was not asked to resign nor was she told that she would be discharged within a few weeks. This Court has previously ruled that in those factual circumstances an employee's quit would not be considered voluntary. *Eason, supra; In re Werner*, 44 N.C. App. 723, 263 S.E. 2d 4 (1980). Instead, this employer made a conscious unilateral business decision which directly affected claimant and changed the working conditions under which she was initially employed. The employer's decision to reduce claimant's working hours, however, did not terminate her employment. In fact, the referee found that when claimant left her position, there was continuing work available at Kid's World. Furthermore, the record does not indicate that the employer's actions were an attempt to induce claimant to quit. Claimant's decision to leave her employment was not made under compulsion or coercion, but rather was a knowing, conscious response to the employer-imposed reduction in her working hours. Accordingly, we hold that claimant voluntarily quit her employment.

[2] G.S. 96-14(1) disqualifies this claimant for benefits only if it can be shown that she voluntarily quit *and* that the quit was without good cause attributable to the employer. *In re Poteat*, 319 N.C. at 203, 353 S.E. 2d at 221. Our Supreme Court has defined "good cause" as "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E. 2d 357, 359 (1982). Additionally, "attributable to the employer" has been defined as "produced, caused, created or

as a result of actions by the employer." *In re Vinson*, 42 N.C. App. 28, 31, 255 S.E. 2d 644, 646 (1979). The facts here show that the employer created these circumstances by his decision to reduce claimant's working hours. The question, then, is whether a reduction in hours under these facts and circumstances would be deemed by reasonable men and women to be good cause to voluntarily quit. Our research discloses no North Carolina decision on this issue.

The majority rule among those states which have addressed this specific issue is that a substantial reduction in pay or hours worked may be good cause attributable to the employer so that the claimant is not disqualified as a matter of law from receiving unemployment benefits. In *Bunny's Waffle Shop v. California Employment Com'n.*, 24 Cal. 2d 735, 151 P. 2d 224 (1944), San Francisco area restaurant owners unilaterally reduced the wages of their respective employees in a union dispute. Some employees quit their jobs because of this unilateral reduction in their wages. The employers brought the case before the California Supreme Court and described it as involving "workers who left their jobs because their employers substantially reduced wages and imposed less favorable conditions of work." *Id.* at 739, 151 P. 2d at 226. After addressing the specific union issues, the court addressed whether the employee-claimants left work voluntarily without good cause. Justice Traynor noted that "[a] substantial reduction in earnings is generally regarded as good cause for leaving employment." *Id.* at 743, 151 P. 2d at 228.

A Louisiana court also concluded that substantial reductions in pay could be regarded as good cause for leaving employment. *Robertson v. Brown*, 139 So. 2d 226 (La. App. 1962). That court concluded that any other result would allow an employer to prevent any employee from receiving unemployment benefits by simply reducing the employee's wages or hours rather than discharging them outright. The court reasoned that while a substantial pay or work reduction would compel the normal, reasonable employee to leave his job, it would at the same time make him ineligible for any unemployment benefits.

A number of other foreign jurisdictions follow this general rule. *Tombigbee Lightweight Aggreg. Corp. v. Roberts*, 351 So. 2d 1388 (Ala. Civ. App. 1977) (reduction in earnings from minimum

of $165 per week to maximum of $130 per week was good cause for leaving employment); *Kyle v. Beco Corp.*, 109 Id. 267, 707 P. 2d 378 (1985) (wage cut from $7.50 per hour to $3.35 per hour could be good cause for leaving employment); *Keystone Consol. Ind. v. Illinois Dept. of Labor*, 37 Ill. App. 3d 704, 346 N.E. 2d 399 (1976) (reductions in wages of 30% to 47% can be good cause); *International Spike, Inc. v. Ky. Unemployment Ins.*, 609 S.W. 2d 374 (Ky. App. 1980) (salary reductions of 21% and 32% resulting from transfer within the plant produced circumstances compelling quit); *Boucher v. Maine Employment Sec. Com'n.*, 464 A. 2d 171 (Me. 1983) (unilateral 66.5% reduction in pay after recall from layoff was good cause); *Scott v. Photo Center, Inc.*, 306 Minn. 535, 235 N.W. 2d 616 (1975) (per curiam) (25% pay cut gave claimant good cause to quit employment); *Tate v. Mississippi Employment Sec. Com'n.*, 407 So. 2d 109 (Miss. 1981) (claimant whose work hours were reduced approximately 50% to below what it would cost claimant for child care had good cause to voluntarily leave); *Armco Steel Corp. v. Labor & Indus. Rel. Com'n.*, 553 S.W. 2d 506 (Mo. App. 1977) (demotion and resulting pay reduction of 44% gave claimant good cause to leave); *Johns-Manville Prod. Corp. v. Board of Review, Etc.*, 122 N.J. Super. 366, 300 A. 2d 572 (1973) (per curiam) (wage reduction from $4.27 an hour to $3.35 an hour was good cause); *Edwards v. Commonwealth, Unemp. Comp. Bd. of Rev.*, 35 Pa. Commw. 647, 387 A. 2d 510 (1978) (50% reduction in wages); *LaRose v. Department of Employment Sec.*, 139 Vt. 513, 431 A. 2d 1240 (1981) (wage cut of 40% gave claimant just cause attributable to his employer to leave employment); *Brewster v. Rutledge*, 342 S.E. 2d 232 (W. Va. 1986) (per curiam) (claimant whose pay rate decreased from $3.35 an hour to $2.25 an hour with an increase in job responsibilities did not quit without good cause).

ESC argues that enactment of G.S. 96-12(c) authorizing payment of partial benefits to persons partially unemployed as defined in G.S. 96-8(10)b.2 requires that this claimant be disqualified from receiving any unemployment benefits. ESC argues that to hold otherwise would reduce the partial benefits provisions in G.S. 96-12(c) and G.S. 96-8(10)b.2 to "mere surplusage." We disagree.

Affirming the ESC on this record would leave employees whose employers had reduced their employees' wages or hours by

up to 40% without unemployment benefits. This logic totally discounts the fact that to continue on a job under reduced hours or wages, might not be economically feasible for the affected employee. *See Robertson, supra.* We do not believe this was the General Assembly's intent.

The General Assembly has stated the policy of this State is that the compulsory reserves required under the Employment Security Law "be used for the benefit of persons unemployed through no fault of their own." G.S. 96-2. In order to carry out the intent of the act its provisions should be liberally construed in favor of applicants. *Eason, supra.* By contrast, our courts have said that "sections of the act imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication." *In re Watson,* 273 N.C. 629, 639, 161 S.E. 2d 1, 10 (1968). Here, because this claimant's hours were not reduced to the extent that she would have "worked less than three customary scheduled full-time days" per week, she would not have been eligible for partial unemployment compensation. G.S. 96-8(10)b.2. Consequently, the question here is whether the employer's unilateral reduction in this claimant's working hours constitutes good cause to quit her employment for purposes of the Employment Security Law. We hold that a unilateral, substantial reduction in one's working hours by his employer may permit a finding of good cause attributable to the employer. Accordingly, the claimant here is not disqualified as a matter of law from receiving unemployment compensation benefits.

However, what constitutes a substantial reduction in claimant's working hours is a factual determination best left for the trier of fact. In making its determination the fact-finder should consider the individual circumstances peculiar to each claimant. The amount of the reduction in wages or hours is but one factor in the fact-finder's decision making process. Here the facts found by the appeals referee, affirmed and adopted by the ESC, are not sufficient to conclude that this claimant's reduction in hours was not substantial. Accordingly, we vacate the order of the Employment Security Commission and remand the case for further proceedings to determine whether the reduction in working hours in this case, in light of all attending facts and circumstances, was a "substantial reduction" sufficient to qualify as "good cause attributable to the employer." *See* Annotation, *Unemployment Com-*

pensation: Eligibility as Affected by Claimant's Refusal to Work at Reduced Compensation, 95 A.L.R. 3d 449 (1979).

Vacated and remanded.

Judge WELLS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The issue presented is whether the claimant is eligible for unemployment benefits when she quits her job because her employer reduces her work hours. The majority holds the determinative issue is simply whether the reduction of claimant's working hours was so "substantial" as to constitute good cause for quitting attributable to her employer. I disagree. Under our case law, the dispositive question is instead whether claimant's refusal of her employer's offer of work at reduced hours is a refusal of "suitable work" under N.C.G.S. Sec. 96-14(3) (1985).

Just as an unemployed claimant is disqualified for unemployment benefits if he or she "refuses" suitable work, a claimant is likewise disqualified from unemployment benefits if he or she "quits" employment when suitable work is offered. *See* Sec. 96-14(3) (unemployed claimant disqualified if he fails without good cause to accept suitable work when offered); *Bunn v. North Carolina State Univ.*, 70 N.C. App. 699, 703, 321 S.E. 2d 32, 35, *disc. rev. denied*, 313 N.C. 173, 326 S.E. 2d 31 (1985) (inconsistent to allow unemployed claimant benefits where refuses unsuitable work but deny benefits to claimant who refuses to continue unsuitable work); *see also Poteat v. Employment Sec. Comm'n*, 319 N.C. 201, 205 n. 1, 353 S.E. 2d 219, 221 n. 1 (1987) (applying *Bunn* analysis but reaching different result where suitable work was available during week claimant received discharge notice; Court noted its distinguishing *Bunn* was neither approval nor disapproval of *Bunn* "result"). Irrespective of whether the claimant is employed at the time suitable work is offered, allowing benefits to a claimant who quits his job rather than accept suitable work from the same employer contravenes the purpose of the Employment Security Act. *See In re Watson*, 273 N.C. 629, 633, 161 S.E. 2d 1, 6 (1968) (Act must be construed to provide benefits to those

who are available for work at suitable employment). Under functionally identical circumstances, our Supreme Court has specifically held that the question of "good cause" under Section 96-14(1) must be determined in light of the suitability of other work under Section 96-14(3). In *In re Troutman*, 264 N.C. 289, 141 S.E. 2d 613 (1965), claimant refused an offer of other employment by the same employer who terminated him. The Court reasoned that whether the claimant had left work voluntarily without good cause under subsection (1) turned on the question whether he had been offered other suitable work under subsection (3). *Id.* at 292, 141 S.E. 2d at 617; *see also Poteat*, 319 N.C. at 204-05, 353 S.E. 2d at 221 (determining whether claimant disqualified under subsection (1) based on availability of suitable work under subsection (3)). The *Troutman* Court concluded that the other work offered was not suitable.

There is no dispositive distinction between the facts of this case and the facts in *Troutman*, *Poteat* and *Bunn* which would require our crafting a completely different rationale for this case. Rather than leave the Commission to make its determination based simply on some ill-defined concept of mere reduction of hours, Section 96-14(3) instead provides a specific array of factors to guide the Commission in determining whether there is "good cause" for quitting where arguably suitable work has been offered:

> In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.
>
> Notwithstanding any other provisions of this Chapter, *no work shall be deemed suitable* and benefits shall not be denied under this Chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: . . . *If the remuneration, hours, or other conditions or the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality* . . . [Emphasis added.]

As "suitable work" cannot be determined with reference to a fixed formula, it must necessarily be determined on a case-by-case basis. However, where the wages or hours of the offered employment are "substantially less favorable to the individual than those prevailing for similar work in the locality," the work is clearly not suitable under Section 96-14(3). In that case, we could not conclude that a claimant had quit employment "voluntarily without good cause attributable to the employer" under Section 96-14(1).

The average claimant cannot be expected to provide evidence regarding hours and wages prevailing for similar work in the locality. Thus, the employer is here required to prove this claimant refused "suitable work." *See Intercraft Ind. Corp. v. Morrison,* 305 N.C. 373, 376, 289 S.E. 2d 357, 360 (1982) (burden on employer to show circumstances which disqualify claimant from unemployment benefits). The record discloses no evidence whether the hours or remuneration offered by this employer were substantially less favorable to claimant than those prevailing for similar work in the locality. Once construed properly in light of subsection (3), the record thus fails to show adequate grounds for disqualifying claimant under these facts from benefits under Section 96-14(1).

Therefore, I would vacate the judgment of the Superior Court and the order of the Commission disqualifying claimant from benefits. On remand, I note the Commission would still be required to determine if claimant is otherwise eligible for unemployment benefits.

BRENDA D. BENFIELD v. GERALD BENFIELD

No. 8725DC290

(Filed 5 April 1988)

1. Appeal and Error § 16— appeal entries—subsequent discovery sanctions—trial court not divested of jurisdiction

The trial court in a divorce and equitable distribution action was not divested of jurisdiction to impose sanctions for failing to answer discovery questions where defendant had given notice of appeal after an earlier order requiring defendant to answer the questions and pay plaintiff's attorney fees; the trial judge signed appeal entries but later vacated those appeal entries in a

written order in which he found the appeal to be interlocutory; and another district court judge found defendant in contempt for failing to comply with the earlier discovery order, ordered defendant's pleadings stricken, and ordered that defendant not be allowed to support his contentions regarding equitable distribution or defend plaintiff's allegations. The order compelling discovery and granting attorney fees was interlocutory and not properly appealable, and the attempted appeal was a nullity.

2. **Rules of Civil Procedure § 37— discovery order—no abuse of discretion**

The trial court did not abuse its discretion in an action for divorce and equitable distribution by ordering defendant to give more complete answers to discovery questions where there was no showing that defendant was ordered to provide information he could not produce; defendant gave the same answers even though the judge had previously found those evasive; the ownership of an insurance agency, the subject of the questions, was well within the scope of discovery; there was no contention by defendant that the material was privileged; and defendant did not seek a protective order against discovery of the material. N.C.G.S. § 1A-1, Rule 37(a)(3). N.C.G.S. § 1A-1, Rule 26(b)(1).

3. **Rules of Civil Procedure § 37; Attorneys at Law § 7.5— motion to compel discovery—movant's attorney fees as sanction—insufficient findings**

In an action for divorce and equitable distribution, the court was required by N.C.G.S. § 1A-1, Rule 37(a)(4) to order defendant to pay plaintiff's attorney's fees for the attorney's efforts in the filing and hearing of a motion to compel discovery where the answers of the deponent were evasive, there was no evidence that the attorney fees would be unjustified, and no evidence of other circumstances that would make an award unjust; however, the order contained no findings of fact to support any conclusion that the fees were reasonable and was vacated and remanded.

4. **Rules of Civil Procedure § 37— sanctions for failure to comply with discovery—no abuse of discretion**

The trial court did not abuse its discretion in a divorce and equitable distribution action by striking defendant's pleadings and prohibiting him from supporting his contentions in regard to the issue of equitable distribution where defendant willfully disregarded the order of the court to provide further answers, was given a second opportunity, and again disregarded the court's order. Given the fact that defendant was allowed a second opportunity to answer but disregarded the court's order, there was no injustice in entering sanctions relating to the subject matter of the questions. N.C.G.S. § 1A-1, Rule 37(b)(2).

APPEAL by defendant Gerald Benfield from *Greene, Jr. (Daniel), Judge.* Orders entered 15 August 1986 and 19 November 1986 in District Court, CALDWELL County. Heard in the Court of Appeals 1 October 1987.

Michael P. Baumberger for plaintiff-appellee.

Wilson and Palmer, P.A., by William C. Palmer, for defendant-appellant.

GREENE, Judge.

This is an action for divorce and equitable distribution. The Court found the defendant-husband in "indirect criminal contempt" for failure to comply with certain discovery requests. Defendant appeals.

Pursuant to a valid notice, plaintiff scheduled a deposition of defendant for 25 February 1986. On that day, plaintiff contended defendant "failed or refused to answer, or gave evasive or incomplete answers to numerous questions . . . ." On 21 July 1986, pursuant to plaintiff's motion to compel discovery and for sanctions, Judge Oliver Noble, Jr. ordered defendant to answer certain questions asked during the deposition and further ordered defendant to pay $200 to plaintiff's lawyer for attorney's fees in bringing the motion. On or about 28 July 1986, defendant tendered supplemental answers. On 29 July 1986, plaintiff filed a motion requesting sanctions contending the defendant had "willfully, and without just cause, failed and refused once more" to answer some of the same questions.

On 15 August 1986, Judge Samuel Tate again ordered defendant to answer the questions and ordered defendant to pay $250 in attorney's fees to plaintiff's lawyer. Defendant then gave notice of appeal. On 15 August 1986, Judge Tate signed appeal entries allowing defendant sixty days to prepare and serve a proposed record on appeal. On 20 August 1986, Judge Tate vacated these appeal entries in a written order in which he found the appeal to be interlocutory. On or about 11 September 1986, plaintiff moved the district court to require defendant "to appear and show cause why he should not be held in contempt" for failing to answer the questions and pay the attorney's fees assessed in the previous order. On 9 October 1986, defendant tendered his proposed record on appeal to plaintiff. Plaintiff objected in writing to defendant's record on appeal because the appeal entries had been vacated. On 14 November 1986, defendant requested a hearing before the trial judge for the purpose of settling the record on appeal. On 20 November 1986, Judge Daniel Greene, Jr. found defendant in con-

tempt for failing to comply with the earlier order. Judge Greene's order stated in part:

> 2. That the defendant shall not be allowed to support his contentions with regard to the issue of equitable distribution of marital property nor to defend against the plaintiff's allegations as to equitable distribution of marital property in this action. This provision shall not prevent the defendant from appearing or offering evidence with regard to the issue of Divorce but shall only apply to the issue of equitable distribution.
>
> 3. That the pleadings of the defendant regarding his contentions as to equitable distribution are hereby stricken.

Defendant appeals from this contempt order and the imposition of sanctions.

The issues presented are: I) whether the first notice of appeal divested the trial court of jurisdiction to subsequently order sanctions against defendant; and II) (A) whether the trial court erred on 15 August 1986 in ordering defendant to answer the tendered questions in the deposition, (B) whether the trial court erred on 15 August 1986 in ordering defendant to pay plaintiff's attorney's fees, and (C) whether the trial court erred on 20 November 1986 in entering sanctions against defendant.

I

[1] Defendant argues his first notice of appeal on 15 August 1986 divested the trial court of jurisdiction to enter further orders regarding his failure to answer questions asked at the deposition.

As a general rule, an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial right which would be lost if the ruling is not reviewed before final judgment. *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E. 2d 806, 807, *disc. rev. denied*, 318 N.C. 505, 349 S.E. 2d 859 (1986). However, our Courts have held where a party is adjudged to be in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions, the order is immediately appealable since it affects a substantial right un-

der N.C.G.S. Secs. 1-277 (1986) and 7A-27(d)(1) (1983). *See Willis v. Duke Power Co.*, 291 N.C. 19, 30, 229 S.E. 2d 191, 198 (1976) (when civil litigant adjudged in contempt for failure to comply with discovery order, the order is immediately appealable); *Adair v. Adair*, 62 N.C. App. 493, 495, 303 S.E. 2d 190, 192, *disc. rev. denied*, 309 N.C. 319, 307 S.E. 2d 162 (1983) (striking defendant's answer for noncompliance with discovery requests affected a substantial right and was immediately appealable); *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554-55, 353 S.E. 2d 425, 426 (1987) (order compelling discovery not appealable unless it is enforced by sanctions pursuant to Rule 37(b) which affect a substantial right).

The order from which defendant first appealed contained no enforcement sanctions. It only ordered defendant to answer the questions by a certain date. The portion of the order requiring defendant to pay the attorney's fees of plaintiff is authorized by N.C.G.S. Sec. 1A-1, Rule 37(a)(4). This order granting attorney's fees is interlocutory, as it does not finally determine the action nor affect a substantial right which might "be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *J. & B. Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E. 2d 812, 815 (1988); *cf. Bell v. Moore*, 31 N.C. App. 386, 388, 229 S.E. 2d 235, 237 (1976) (order staying collection of costs for depositions was interlocutory where final judgment on costs would be entered at termination of the second suit or upon expiration of the statute of limitations).

As the order from which defendant first appealed was not properly appealable, the "attempted appeal was a nullity, notwithstanding [that] the Judge signed the appeal entries . . . ." *Cox v. Cox*, 246 N.C. 528, 532, 98 S.E. 2d 879, 883 (1957). The trial court's signing of the appeal entries did not grant defendant a right to appeal. *Veazey v. City of Durham*, 231 N.C. 357, 365, 57 S.E. 2d 377, 384, *reh'g denied*, 232 N.C. 744, 59 S.E. 2d 429 (1950). The trial judge "has nothing to do with the granting of an appeal"; he is simply authorized to perform ministerial acts such as "setting the amount of the appeal bond and settling the case on appeal," or executing other duties necessary to perfect an appeal allowed by law. *Id.* at 365, 57 S.E. 2d at 384. *See also Harrell v. Harrell*, 253 N.C. 758, 761, 117 S.E. 2d 728, 730 (1961) ("A Superior Court Judge can neither allow nor refuse an appeal."). Accordingly, the

first appeal of 15 August 1986, did not divest the trial court of jurisdiction to subsequently enter sanctions against defendant. *See Veazey*, 231 N.C. at 364, 57 S.E. 2d at 382-83 (a litigant cannot deprive the superior court of jurisdiction to try and determine a case on its merits by taking an appeal from a nonappealable interlocutory order).

II

[2] The second appeal of 20 November 1986 is appealable as it seeks relief from an order holding defendant in contempt of court for his failure to comply with a discovery order. *Willis*, 291 N.C. at 30, 229 S.E. 2d at 198. This appeal tests the validity "both of the original discovery order and the contempt order . . . ." As a general rule, orders concerning discovery matters will not be overturned absent a showing of abuse of discretion by the trial court. *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E. 2d 479, 480, *disc. rev. denied*, 293 N.C. 589, 239 S.E. 2d 264 (1977).

A

In the 21 July 1986 order compelling discovery, the trial judge ordered defendant to answer certain questions posed to him during his oral deposition. The court found the defendant "failed or refused to answer, or gave evasive or incomplete answers to various questions" and that there was no justification for this action. Among the answers the court found evasive included those relating to the ownership of an insurance agency which defendant had started during the course of the marriage. Defendant admitted he was a stockholder and president of the insurance agency, which was incorporated soon after the date of separation. Prior to the time of incorporation, the business had operated as a sole proprietorship.

The questions at issue included:

Q. Where are your stock certificates?

A. I don't know.

Q. Do you know how many shares of stock you own?

A. No, sir, I don't.

Q. Do you know where your corporate books are?

A. No, I don't.

Q. Are there any corporate books?

A. I would assume.

Following the 21 July 1986 order, defendant filed "Supplemental Answers to Deposition" in which he stated his answers to the above questions were the "SAME AS PREVIOUSLY ANSWERED." On 15 August 1986, the trial court again found these answers "evasive in nature" and again specifically ordered defendant to answer the questions.

Rule 37(a)(3) of the Rules of Civil Procedure specifically provides that an evasive or incomplete answer is to be treated as a failure to answer. Defendant argues that he did answer the questions to the best of his knowledge and nothing more is required. Our courts have held that if a party is unable to answer discovery requests because of circumstances beyond its control, it cannot be compelled to answer. *Laing v. Liberty Loan Co.*, 46 N.C. App. 67, 71, 264 S.E. 2d 381, 384, *disc. rev. denied*, 300 N.C. 557, 270 S.E. 2d 109 (1980). A "good faith effort at compliance" with the court order is required of the deponent. *Id.* at 71, 264 S.E. 2d at 384. Here, there was no showing defendant was ordered to provide information he could not produce. Rather than demonstrating a good faith effort at compliance, defendant gave the same answers even though the judge had previously found these evasive. The ownership of the insurance agency, which was unincorporated prior to the parties' separation, was relevant and material to the equitable distribution action and well within the scope of discovery under Rule 26(b)(1). *See Willoughby v. Wilkins*, 65 N.C. App. 626, 642, 310 S.E. 2d 90, 100 (1983) (discovery should facilitate disclosure, prior to trial, of unprivileged, relevant and material information), *disc. rev. denied*, 310 N.C. 631, 315 S.E. 2d 697 (1984). The answers may have been necessary to determine the extent of property which might be classified as marital. There is no contention by defendant that the material was privileged nor did he seek a protective order against discovery of the material pursuant to Rule 26(c). Furthermore, there was no showing that defendant was punished for failure to do something he could not do. *See Laing*, 46 N.C. App. at 71, 264 S.E. 2d at 384.

Given that one of the basic purposes of discovery is to facilitate disclosure of material and relevant information to a lawsuit so as to permit the narrowing of issues and facts for trial, we hold

there was no abuse of discretion by the trial court in finding the answers evasive and incomplete. *See Carpenter v. Cooke*, 58 N.C. App. 381, 384-85, 293 S.E. 2d 630, 632, *cert. denied*, 306 N.C. 740, 295 S.E. 2d 758 (1982). The trial court was within its discretion in ordering the defendant to give more complete answers to the questions. At no time did defendant attempt to justify his non-compliance with the court's orders to provide more complete answers.

B

[3] Defendant also contends the trial court erred in the 15 August 1986 order by awarding $250 to plaintiff's attorney "for his efforts in the filing and hearing" of the motion to compel discovery.

Where a motion compelling discovery is allowed under Rule 37(a)(2), the court shall award the movant "reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." N.C.G.S. Sec. 1A-1, Rule 37(a)(4). The trial court found the answers of the deponent evasive in nature and there was no evidence that attorney's fees would be unjustified. Furthermore, there was no evidence of "other circumstances" that would make an award of expenses unjust. Therefore, an award of attorney's fees to the movant was mandatory. *Kent v. Humphries*, 50 N.C. App. 580, 590, 275 S.E. 2d 176, 183 (in absence of justification, court "required by the mandatory language of Rule 37(a)(4) to order defendant to pay plaintiff's attorney's fees"), *modified and aff'd*, 303 N.C. 675, 281 S.E. 2d 43 (1981).

However, as Rule 37(a)(4) requires the award of expenses to be reasonable, the record must contain findings of fact to support the award of any expenses, including attorney's fees. *See Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E. 2d 120, 125 (1987). The findings should be consistent with the purpose of the subsection which is not to punish the noncomplying party, but to reimburse the successful movant for his expenses. *See* 4A J. Moore, J. Lucas & D. Epstein, *Moore's Federal Practice* Par. 37.02 [10-1] at 37-47 (2d ed. 1987). The trial court simply awarded attorney's fees in the amount of $250. The order contained no findings of fact to support any conclusion that the fees were reasonable. Therefore,

the award of attorney's fees is vacated and remanded for findings to support the award.

C

[4] Defendant finally argues the sanctions order filed 20 November 1986 was too severe in that it struck defendant's pleadings and prohibited him from supporting his contentions in regard to the issue of equitable distribution. Defendant contends the sanctions amounted to an abuse of discretion.

"[I]f the court acted properly in compelling defendant to answer, upon his failure to do so the court had authority to impose sanctions." *Stone v. Martin*, 56 N.C. App. 473, 475, 289 S.E. 2d 898, 900, *disc. rev. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982). Though somewhat severe, both the striking of pleadings or parts of pleadings and prohibiting a disobedient party from supporting certain claims are sanctions specifically authorized by Rule 37 (b)(2). Defendant willfully disregarded the order of the trial court to provide further answers. Defendant was given a second opportunity and again disregarded the court's order. Over eight months passed between the date of the deposition and the order of contempt. In the interim, defendant was twice ordered to provide further answers to the questions posed during the deposition. Rule 37(b)(2) gives the trial judge the power to make orders for sanctions "as are just." Given the fact that defendant was allowed a second opportunity to answer but disregarded the court's order, we clearly see no injustice in entering sanctions related to the subject matter of the questions. Therefore, the trial court's order of sanctions did not constitute an abuse of discretion. *Martin v. Solon Automated Servs., Inc.*, 84 N.C. App. 197, 201, 352 S.E. 2d 278, 281 (1987) (trial court given broad discretion in regard to sanctions), *disc. rev. denied*, 319 N.C. 674, 356 S.E. 2d 789.

III

Accordingly, the orders of the trial court dated 15 August 1986 and 20 November 1986 are affirmed, except as to the award of attorney's fees in the 15 August 1986 order which is vacated and remanded for findings supporting the award amount.

Affirmed in part and remanded.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. KENNETH RAY HYLEMAN

No. 8727SC543

(Filed 5 April 1988)

1. **Criminal Law § 84— invalid warrant—admission of seized evidence—good faith exception to exclusionary rule**

Although an affidavit submitted to obtain a search warrant did not contain sufficient information to establish probable cause for issuance of the warrant, the trial court properly denied defendant's motion to suppress evidence seized in a search under the warrant because of the good faith exception to the exclusionary rule.

2. **Searches and Seizures § 39— warrant for residence—search of garage**

Even though a garage was a separate building and a place of business, the garage could be searched as part of defendant's residence.

3. **Searches and Seizures § 39— execution of warrant—delay of inventory**

A delay of three and one-half days between execution of a warrant and return of the inventory of the items seized was not unreasonable or prejudicial. N.C.G.S. § 15A-257.

4. **Searches and Seizures § 29— search warrant—showing time of issuance**

Omission of the time of issuance of a search warrant above the signature of the magistrate was not prejudicial where the time of issuance was noted elsewhere on the face of the warrant. N.C.G.S. § 15A-241(1).

5. **Criminal Law § 90.1— State's impeachment of own witness—prior inconsistent statement**

The trial court did not err in permitting the State to use a prior inconsistent statement to impeach its own witness where there was no showing that the prior statement was used under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which was not otherwise admissible. N.C.G.S. § 8C-1, Rule 607.

6. **Narcotics § 4— trafficking in cocaine—sufficient evidence**

The evidence was sufficient to support defendant's conviction of trafficking in cocaine by selling more than 28 grams thereof. N.C.G.S. § 90-95(h)(3).

Judge BECTON dissenting.

APPEAL by defendant from *Ferrell, Judge*. Judgments entered 27 February 1987 in Superior Court, GASTON County. Heard in the Court of Appeals 7 December 1987.

This is a criminal action wherein defendant was charged in proper bills of indictment with trafficking in cocaine under G.S. 90-95(h)(3) and with possession of drug paraphernalia under G.S. 90-113.22.

The State's evidence tends to show the following: Detective William Durst of the Gaston County Police Department set up a meeting to buy cocaine from Gene Orendorff. At the meeting Durst purchased cocaine using cash. The serial numbers of the cash had previously been recorded by making photocopies of the bills.

Orendorff and another man, Jeff Manning, were to later deliver the cocaine. They were observed driving to a trailer park where they picked up a third man, Kenny Wood. Later, Detective Durst met with the three men to receive the cocaine. The men were then arrested. Both Orendorff and Wood made statements to the police. Wood told police that defendant had sold the cocaine to him and that he had given defendant the money earlier received from Durst.

Upon a search of defendant's residence, police found a set of triple-beam scales, a notebook, a 12-gauge shotgun, rolling papers, marijuana and cocaine cutting agents. Also found were bills with serial numbers matching those photocopied earlier by Detective Durst.

Before defendant's trial began, he moved to suppress the evidence. The motion was denied. The jury returned two verdicts of guilty and from sentences of 10 years for trafficking of cocaine and 12 months for possession of drug paraphernalia, defendant appealed.

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

Gray and Hodnett, P.A., by James C. Gray, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant's first contention is that the trial court committed reversible error in denying his motion to suppress evidence seized by police. Defendant argues the search warrant was not issued with probable cause as required under the "totality of the circumstances" test of *Illinois v. Gates*, 462 U.S. 321, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983). He bases this on his contention that the affidavit submitted to secure the search warrant does not have sufficient information to establish probable cause. The State

all but concedes the affidavit is insufficient, but argues the court did not err in denying the motion to suppress due to the "good faith exception" to the exclusionary rule.

The "good faith exception" is enunciated and elaborated on in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1982). Our State recognized this "good faith exception" in *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789 (1986). We hold the trial court did not err in denying defendant's motion to suppress the evidence because of the good faith exception.

[2] Defendant further contends "the officers did not have a right to search [defendant's] garage, a licensed business in a premises separate from the residence home of the Defendant." Even though the garage was a separate building and a place of business, it could be searched as part of defendant's residence. *State v. Trapper*, 48 N.C. App. 481, 269 S.E. 2d 680 (1980).

[3] Defendant next argues a delay of three and one-half days between execution and return of the inventory of items seized was an undue delay in violation of G.S. 15A-257. The statute does not state a particular time for return of the inventory, and we hold that in this case the delay was not undue or unreasonable, and we can conceive of no prejudice.

Under G.S. 15A-242, defendant argues that several items were improperly seized. The statute allows for seizure of contraband or evidence of an offense. Pursuant to a lawful search warrant, officers have a right to seize any articles thought to be connected to the drug business of defendant. All items in this case were properly seized.

[4] Defendant also argues the search warrant fails to meet the requirements of G.S. 15A-246(1) in that the time of issuance is not found above the signature of the magistrate. Such an omission could be significant, but in this case there is no prejudice since the time of issuance was noted elsewhere on the face of the warrant.

[5] Defendant next argues the trial court erred by allowing impeachment of Wood, the State's witness. Wood was asked about his prior inconsistent statement to Detective Durst. Following Wood's denial of the statement, Durst testified as to what Wood told him. Defendant asserts that although G.S. 8C-1, Rule 607

allows the State to impeach its own witnesses by use of a prior inconsistent statement, the State "may not use such a statement under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible." *United States v. Miller*, 664 F. 2d 94, 97 (1981).

In this case, two witnesses had already testified as to Wood's involvement. Wood's actions were important to the State's case, and his testimony was needed. There is no showing that the prior inconsistent statement was used for any purpose other than impeachment. The State acted in good faith, and there was no error in allowing impeachment.

Finally, defendant argues the trial court erred in its motions to dismiss, to set aside the verdicts and for a new trial. In ruling on a motion to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Lowery*, 309 N.C. 763, 766, 309 S.E. 2d 232, 235-36 (1983). If there is substantial evidence of these determinations, denial of the motion is proper. *Id.*

In considering whether this evidence is sufficient, the evidence is considered in the light most favorable to the State. *State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983).

[6] For a defendant to be convicted of trafficking in cocaine, he must be someone "who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative or preparation thereof. . . ." G.S. 90-95(h)(3). In this case, the jury found defendant guilty of selling more than 28 grams of cocaine. There is ample evidence that defendant sold more than 28 grams of cocaine. For this reason, the motion to dismiss was properly denied.

Likewise, we find the motions to set aside the verdicts and for a new trial were properly denied since there was sufficient evidence for the verdicts. These arguments have no merit.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judge GREENE concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

I dissent. The "bare-bones" conclusory affidavit for the search warrant does not aver that any controlled substances are, or ever were, at defendant's residence or even mention that the confidential informants were reliable. Further, the allegations in the affidavit, in my view, are so lacking in indicia of probable cause as to render official belief in its existence unreasonable, thus making the *Leon* "good faith exception" inappropriate. Moreover, the record suggests that the State's use of Wood's prior inconsistent statement was a subterfuge to get before the jury evidence not otherwise admissible.

I

The State did not concede that the affidavit was insufficient to establish probable cause. Indeed, arguing that Detective Durst had "within his personal knowledge sufficient facts to constitute probable cause but [was] unable to place all of the information in an application for a search warrant out of fear for the safety of an informant," State's brief, page 8, the State, nevertheless, asks this Court to uphold the search warrant as issued. I, for one, am unwilling to do so.

If it were permissible, an affiant could always embellish his story with "twenty-twenty" hindsight by saying, "I knew more than I told the magistrate." Consequently, our Courts and Legislature opted for a rule of law requiring the "information" to be contained in the affidavit or be "either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official." N.C. Gen. Stat. Sec. 15A-245 (1983); *State v. Heath*, 73 N.C. App. 391, 326 S.E. 2d 640 (1985).

This rule of law was not followed in this case, but it is particularly applicable since the State's argument—that details "would have disclosed that Kenny Wood was a source of information"—is refuted by the record. Once defendant Hyleman was ar-

rested as the source of the two ounces of cocaine that were delivered to Detective Durst, Kenny Wood was necessarily exposed as the informant since defendant, according to the State, would not deal with anyone other than Kenny Wood. Moreover, Detective Durst's affidavit specifically names Kenny Wood as the person to whom Durst gave marked money for the two ounces of cocaine.

II

Detective Durst testified at the suppression hearing that he was the only witness to appear before the magistrate and that his entire testimony was contained in the written affidavit. That affidavit is so lacking in information that no detached and neutral magistrate could reasonably conclude that contraband was in the place or on the person to be searched. As defendant points out in his brief, the defendant and his residence are not even mentioned in the affidavit, and a magistrate could have just as easily issued a search warrant for any residence in Gaston County. Even *Leon*, which established the "good faith exception" to the exclusionary rule, precludes use of the "good faith exception" when "the magistrate abandon[s] his detached and neutral role, [or] the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." 468 U.S. at 926, 82 L.Ed. 2d at 701. *Accord State v. Roark*, 83 N.C. App. 425, 350 S.E. 2d 153 (1986); *State v. Newcomb*, 84 N.C. App. 92, 351 S.E. 2d 565 (1987). In short, the majority has erroneously failed to apply the following language from *Leon* to the facts of this case:

> Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." . . . Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. (Citations omitted.)

468 U.S. at 923, 82 L.Ed. 2d at 699.

III

The transcript suggests that the District Attorney called the witness Wood solely for the purpose of impeaching him with an alleged prior inconsistent oral statement made to Detective Durst. Even the State concedes, on page 16 of its brief, that "[t]here is some indication in the record that the State knew before he was called that Wood was going to recant his previous assertions."

I do not quarrel with Rule 607 of the North Carolina Rules of Evidence which generally permits any party to attack the credibility of any witness. I am concerned with what may be a growing trend of using prior inconsistent statements as a subterfuge to get before the jury hearsay evidence not otherwise admissible. *See State v. Bell*, 87 N.C. App. 626, 362 S.E. 2d 288 (1 December 1987) in which this Court expressly disapproved the ruse whereby a party calls an unfriendly witness solely to justify the subsequent call of a second witness to testify about a prior inconsistent statement. *See also United States v. Webster*, 734 F. 2d 1191 (7th Cir. 1984) (court denied use of prior inconsistent statement to impeach witness when the sole purpose for calling a witness was to impeach his testimony by applying Rule 607 of the Federal Rules of Evidence). It is not enough to say, as the majority says, that "Wood's actions were important to the State's case, and his testimony was needed." *Ante*, page 427. Sometimes needed witnesses are not available. Sometimes the State cannot prove its case without inadmissible evidence. Courts should not change the rules because the testimony is needed.

Further, it is not germane to say, as does the majority, *ante*, page 427, that two witnesses had already testified as to Wood's involvement. First, these two witnesses were not with Wood at the relevant time and did not know where Wood got the cocaine. Equally important, although Detective Durst's affidavit avers that Wood and the two witnesses were kept under surveillance by law enforcement officials from 7:15 p.m. until 10:50 p.m. during which time the drugs were purchased on the night in question, Detective Durst admitted at the motion to suppress hearing that, from 8:15 p.m. until 10:25 p.m. during the time that the drugs were purchased, neither he nor other law enforcement officials had any idea of the whereabouts of Wood and the other two witnesses or

their car. More importantly, Wood himself acknowledged his involvement. He denied, however, having told anyone that he had purchased cocaine from defendant Hyleman, and he testified that he bought the cocaine from Billy Faulkner. Wood further testified that he purchased an automobile from defendant Hyleman on the night in question using $250 of the $1600 marked money, and that transaction was witnessed by a notary public who testified for defendant Hyleman.

IV

Based on the above, I believe the trial court erred in denying defendant Hyleman's motion to suppress evidence and by allowing the State to use "a statement under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible." *United States v. Miller*, 664 F. 2d 94, 97 (5th Cir. 1981), *cert denied*, 459 U.S. 854, 74 L.Ed. 2d 106 (1982).

STATE OF NORTH CAROLINA v. FELTON BREWER

No. 8716SC655

(Filed 5 April 1988)

1. **Assault and Battery § 15.7— defendant as aggressor—instruction on self-defense not required**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, defendant was not entitled to an instruction on self-defense where all of the evidence clearly showed that defendant was at fault in bringing on both encounters with the victim, and, though defendant did abandon the initial encounter and leave the scene, he later returned to the scene and attacked the victim with a knife.

2. **Criminal Law § 138.28— aggravating sentencing factor of prior convictions—sufficiency of evidence**

The trial court's finding of the aggravating sentencing factor of prior convictions was sufficiently supported by the evidence where the prosecutor recited defendant's two prior convictions; in response defense counsel immediately stated that defendant had had no convictions for almost ten years; and such response was tantamount to an admission or a stipulated fact that defendant had the convictions so represented by the State.

3. Criminal Law § 99.3— no expression of opinion by court on evidence

There was no merit to defendant's contention that the trial court expressed an opinion that a fact had been proved and stated a fact not in evidence by instructing that there was evidence which tended to show that defendant cut the victim's throat with a knife over some beer.

4. Criminal Law § 113.1— instructions—summary of evidence adequate

There was no merit to defendant's contention that the trial court failed to summarize exculpatory evidence defendant elicited through cross-examination where there was no exculpatory evidence which went to any of the crucial issues of the case.

APPEAL by defendant from *Herring, Judge.* Judgment entered 19 February 1987 in Superior Court, ROBESON County. Heard in the Court of Appeals 12 January 1988.

Defendant was tried upon separate bills of indictment, proper in form, charging him with robbery with a dangerous weapon (86CRS20849); assault on John "Sonny" Jones with a deadly weapon with intent to kill inflicting serious injury (86CRS20850); and assault on James Floyd with a deadly weapon with intent to kill inflicting serious injury (86CRS20851). The cases were consolidated for trial. Defendant was convicted of common law robbery, for which he was sentenced to a term of ten years; assault on John "Sonny" Jones with a deadly weapon inflicting serious injury, for which he was sentenced to a term of three years; and assault on James Floyd with a deadly weapon with intent to kill inflicting serious injury, for which he was sentenced to a term of ten years. The sentences were ordered to run consecutively. From the imposition of these sentences, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State.

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

JOHNSON, Judge.

The State presented evidence which tended to show that on 14 September 1986, at about 5:30 p.m., defendant and John "Sonny" Jones went to James Floyd's home to purchase beer. Floyd sold beer to the public out of his home. Defendant and Jones were frequent customers of Floyd. Defendant and Jones entered the back door into the kitchen and asked Floyd for a beer. Floyd had

a red igloo cooler of beer sitting beside the kitchen sink. After giving defendant and Jones one beer each, Floyd sat at the kitchen table and talked with them. Shortly thereafter, defendant stood up and requested a six-pack of beer but stated that he didn't have money to pay for it. Floyd stated that a six-pack cost six dollars. Floyd stood from the table and turned to the sink to get some water. As he turned to the sink, he was standing with his back to defendant and Jones. Defendant was six or seven feet to the rear of Floyd. Defendant grabbed Floyd's hair, pulled his head back, and cut his throat. Floyd ran from the house and was taken to the hospital by ambulance. Floyd's cooler of beer was taken from his house. At about 6:15 p.m. on the same day, Officer Benjamin Morris saw defendant and Jones carrying a red cooler down the street in Floyd's neighborhood.

Retha Williams, Jones' girlfriend, testified for the State that shortly after 6:00 p.m. on the date in question, while she was visiting her daughter, defendant stopped by and was carrying a red cooler of beer. Defendant sat the cooler on the kitchen floor and said that he "cut a [man's] throat and took the beer." Williams kicked the cooler of beer out the kitchen door into the yard. Defendant went into the yard to retrieve the cooler and beer. When defendant left to retrieve the cooler and beer, Williams locked the kitchen door. Defendant kicked the door open, entered and slapped Williams. Williams left the house and went into the front yard. Defendant followed her there and again slapped her as well as her daughter who was also standing in the front yard. At that moment, Jones appeared and told defendant to leave the women alone. Williams snatched a pistol from Jones' belt and shot twice in the air. Defendant pulled a knife and advanced toward Jones. Jones took the pistol from Williams, backed away, fired three times in the ground and asked defendant several times not to come on him with the knife. As defendant continued to advance, Jones shot him in the stomach. Defendant turned, walked away from Jones, walked around the corner to the side of Hunt's house, through the back yard, and went to a nearby relative's house. Jones walked around the corner to the side of Hunt's house. Defendant left his relative's house, returned to the side of Hunt's house where Jones was and began fighting and cutting Jones with the knife. Defendant had to be physically pulled off Jones.

Defendant did not testify or present any witnesses in his behalf.

[1] By his first Assignment of Error defendant contends the court erred in failing to instruct the jury on self-defense in the assault on John Jones (86CRS20850).

> The right to act in self-defense rests upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time. *However, the right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.*

State v. Marsh, 293 N.C. 353, 354, 237 S.E. 2d 745, 747 (1977) (citations omitted) (emphasis added).

> [W]hen the State or defendant produces evidence that defendant acted in self-defense, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 [1974]; *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 [1973]. Conversely, if the evidence is insufficient to evoke the doctrine of self-defense, the trial judge is not required to give instructions on that defense even when specifically requested. *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 [1969]; *State v. McLawhorn*, 270 N.C. 622, 155 S.E. 2d 198 [1967].

State v. Davis, 289 N.C. 500, 509, 223 S.E. 2d 296, 301-02 (1976).

In resolving the question as to whether an instruction on self-defense should be given, the court must interpret the facts in the light most favorable to the defendant. *State v. Blackmon*, 38 N.C. App. 620, 248 S.E. 2d 456 (1978), *cert. denied*, 296 N.C. 412, 251 S.E. 2d 471 (1979).

In the case *sub judice*, all of the evidence clearly shows that defendant was at fault in bringing on both encounters with Jones and that he, the defendant, was the aggressor in each encounter. Defendant pulled a knife on Jones and advanced on Jones in a threatening manner when all Jones had done was to ask defendant to leave Williams and her daughter alone. Defendant did in fact abandon this initial encounter and left the scene. However, defendant later returned to the scene and attacked Jones with the knife. It was this second encounter which led to the indictment and conviction of assault. Although defendant quit the initial encounter with Jones, it was defendant who voluntarily, aggressively, and willingly renewed the combat. Therefore, as the aggressor, defendant was not entitled to an instruction on self-defense. This assignment of error is without merit.

[2] Next, defendant contends that he is entitled to a new sentencing hearing in the common law robbery and assault convictions involving James Floyd because the aggravating factor the trial court found to enhance the sentences is not supported by competent evidence. We disagree.

In the common law robbery conviction the presumptive sentence is three years; in the assault with a deadly weapon with intent to kill inflicting serious injury conviction, the presumptive sentence is six years. In both cases the trial court found the aggravating sentencing factor that "[t]he defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement." Defendant was then sentenced to a term of ten years in each case, a total of eleven years in excess of the presumptive terms.

The State bears the burden of persuasion on aggravating factors if it seeks a term greater than the presumptive. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). The trial judge's finding of an aggravating sentencing factor must be supported by a preponderance of the evidence introduced at the sentencing hearing. G.S. sec. 15A-1340.4(a)(b); *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

At the sentencing hearing, the prosecutor stated that in 1974 defendant was convicted of larceny and received a four year sentence as a committed youthful offender; that in 1977 defendant was convicted of felonious assault for which he received a ten

year sentence as a regular youthful offender. In response to the prosecutor's remarks, defense counsel stated:

> MR. PRICE: Your Honor, Mr. Brewer last worked in April or May of 1986 for a contractor in roofing work. He has a G.E.D. and is 28-years-old. He has been living with his father and step-mother. I would emphasis [sic], Your Honor, that his record indicates no convictions for almost 10 years. We would ask for leniency.

G.S. sec. 15A-1340.4(e) provides in pertinent part that prior convictions "may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." These methods of proof, however, are permissive rather than mandatory. *See, e.g., State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983) (prior convictions proven by defendant's own statements under oath); *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983) (prior convictions proven by a law enforcement officer's testimony as to his personal knowledge of the convictions).

Considering the State's remarks about defendant's record of convictions and defense counsel's immediate response that he would like to emphasize to the court that defendant's record "indicates no convictions for almost 10 years," we find and so hold that defense counsel was referring to the record of convictions the State had just referenced. From the full context of the remarks we find that no reasonable inferences to the contrary can be drawn. Defense counsel's response is tantamount to an admission or a stipulated fact that defendant has the convictions so represented by the State. Therefore, the credibility of the evidence of defendant's prior convictions is manifest as a matter of law by defense counsel's admission of the truth of the basic facts. *Compare, State v. Albert, Dearen and Mills*, 312 N.C. 567, 324 S.E. 2d 233 (1985) (where the Court held that with regard to the establishment of a mitigating factor, the State established, as a matter of law, the defendant's case, when in response to defense counsel's statement that his client (Mills) had no prior record, the prosecutor responded that "only Mr. Dearen" has a prior record). This assignment of error is overruled.

By his third Assignment of Error, defendant contends that he is entitled to a new trial in the assault conviction involving James Floyd because in its jury instructions, the trial court improperly

expressed an opinion that a fact had been proved, only summarized evidence favorable to the State, and stated facts not in evidence.

[3] Based upon the following excerpts from the jury instructions regarding the assault charge upon James Floyd, defendant contends that the trial court expressed an opinion that a fact had been proved and that the opinion also constituted facts not in evidence.

> *First*, that the defendant, Brewer, assaulted James Thomas Floyd by intentionally cutting him with a knife.
>
> There is evidence which tends to show that he cut his throat with a knife over some beer.

Defendant argues that when Floyd was cut he was standing with his back to defendant and James and that Floyd testified that he did not know what cut him.

G.S. sec. 15A-1232 provides that:

> [i]n instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. He must not express an opinion whether a fact has been proved.

We find no merit in either contention. The court stated that there is evidence which "tends to show" that defendant cut Thomas with a knife in a dispute over some beer. This does not amount to an improper expression of opinion by the court that a fact had been proved nor does it state facts not in evidence. Besides, there was clearly ample evidence introduced at trial from which the jury could reasonably infer that defendant cut Thomas' throat with a knife in a dispute over some beer. According to Williams' testimony defendant told her that he had cut a man's throat and taken the beer. There is no question defendant had a knife on his person. Shortly after Thomas was cut, defendant assaulted Jones with a knife.

[4] Next, defendant argues that the court failed to summarize exculpatory evidence defendant elicited through cross-examination.

> [T]he trial court is not required to fully recapitulate all the evidence, but when it does, the trial court must sum-

> marize the evidence in the case that is favorable to defendant even though defendant presents no evidence. . . . Evidence favorable to defendant elicited on cross examination that tends to exculpate defendant is substantive evidence. A trial court cannot adequately explain the application of the law to the evidence in such a case without mentioning the exculpatory evidence elicited by defendant on cross examination.

State v. Carter, 74 N.C. App. 437, 440, 328 S.E. 2d 607, 609 (1985) (citations omitted).

We have carefully examined the evidence in this case and do not find any exculpatory evidence which goes to any of the crucial issues of the case. This argument is also without merit. We find no defect in the trial court's jury instruction.

In the trial of defendant's cases we find

No error.

Judges PHILLIPS and ORR concur.

SOUTHEASTERN ADHESIVES COMPANY v. FUNDER AMERICA, INC.

No. 8725SC919

(Filed 5 April 1988)

1. Uniform Commercial Code § 12— sale of urea resins—implied warranty of merchantability—allegations sufficient to raise claim

Defendant's counterclaim was sufficient to state a claim for breach of implied warranty of merchantability where the parties stipulated that they were merchants; defendant alleged that it purchased urea resins from plaintiff but no payments were made because the resins contained latent defects attributable to plaintiff's manufacture which rendered the goods unusable; the defective resin proximately caused defendant injury; and defendant gave notice of the defect to plaintiff.

2. Uniform Commercial Code § 12— sale of urea resins—claim of breach of implied warranty of merchantability—no disclaimer by words on bill of lading

Plaintiff could not defeat defendant's claim of breach of implied warranty of merchantability by arguing that it had disclaimed all warranties by virtue of a disclaimer printed on the back of each bill of lading, since the parties had done business in the same manner for more than ten years; their custom was that defendant would place a telephone order, within days plaintiff would ship

the resin, defendant would send a written purchase order confirming the oral order, and plaintiff would bill defendant by invoice; the parties therefore contracted for the shipment and delivery of resins when defendant telephoned his order to plaintiff, and the disclaimer of warranties was a proposal for additional terms to the contract; the written purchase orders did not expressly limit acceptance to their terms; and the disclaimers were ineffective because they materially altered the contracts. N.C.G.S. § 25-2-207(2).

3. **Uniform Commercial Code § 14— specifications for manufacturer of resin given by purchaser—no implied warranty of fitness for particular purpose**

In an action to recover the costs of urea resins which plaintiff sold to defendant but which defendant alleged were defective, no implied warranty of fitness for a particular purpose arose because defendant provided plaintiff with the specifications to manufacture the resins. N.C.G.S. § 25-2-315.

4. **Uniform Commercial Code § 12— sale of urea resins—examination by purchaser's chemist—latent defects alleged—breach of implied warranty of merchantability**

In an action to recover the costs of urea resins which plaintiff sold to defendant but which defendant alleged were defective, there was no merit to plaintiff's argument that defendant's chemist's examination and inspection of the resin before acceptance precluded defendant from recovering on its counterclaim for breach of implied warranty of merchantability as a matter of law, since defendant specifically alleged that the defects present in the resin were latent defects, and this raised the issue of whether the chemist should have discovered the defects. N.C.G.S. § 25-2-316.

APPEAL by defendant from *Sherrill (W. Terry), Judge.* Order entered 27 May 1987 in Superior Court, CALDWELL County. Heard in the Court of Appeals 11 February 1988.

Plaintiff seeks to collect $6,783.00 plus interest as payment for its delivery of four separate shipments of urea resin to defendant. Defendant uses the resin in its melamine fabrication process. In its answer defendant admitted delivery of the resin and further admitted its refusal to pay upon plaintiff's demand. Defendant counterclaimed stating that payment was withheld because the resin shipped contained latent defects and, therefore, plaintiff had breached its implied warranty of merchantability and its implied warranty of fitness for a particular purpose.

On 27 May 1987 plaintiff orally moved for summary judgment on defendant's counterclaim. After hearing certain stipulations agreed to by the parties, the court granted plaintiff's motion as to the counterclaim. Because defendant's refusal to pay was based exclusively upon plaintiff's breach of the implied warranties, the

court then granted summary judgment in favor of plaintiff on plaintiff's complaint. Defendant appeals.

Bell, Davis & Pitt, by Joseph T. Carruthers and J. Dennis Bailey; Petree Stockton & Robinson, by Leon E. Porter, Jr., for plaintiff-appellee.

Martin & Van Hoy, by Henry P. Van Hoy, II, and G. Wilson Martin, Jr., for defendant-appellant.

EAGLES, Judge.

Defendant appeals the trial court's grants of summary judgment against defendant's counterclaim and in favor of plaintiff's complaint. While we find that there are genuine issues of material fact presented by defendant's allegations of breach of the implied warranty of merchantability, we conclude that summary judgment on defendant's claim of breach of the implied warranty of fitness for a particular purpose was proper. Accordingly, we reverse in part, affirm in part and remand for trial.

The questions presented on appeal of a summary judgment motion are whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Ellis v. Williams*, 319 N.C. 413, 355 S.E. 2d 479 (1987). In making this determination "[a]ll inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." [Citation omitted.] *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E. 2d 325, 335 (1981). A summary judgment motion does not require the court to rule upon questions of fact, but requires only that the court determine whether a genuine issue of material fact exists. *Id.* Summary judgment will be sustained if the movant demonstrates either the nonexistence of an essential element of the claims made or a valid defense to the claims presented as a matter of law. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

[1] Defendant may recover on its counterclaim for breach of the implied warranty of merchantability if it establishes that:

> (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchant-

ability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

Reid v. Eckerds Drugs, 40 N.C. App. 476, 480, 253 S.E. 2d 344, 347, *disc. rev. denied*, 297 N.C. 612, 257 S.E. 2d 219 (1979). Defendant's counterclaim alleges each of these elements. First, the parties stipulated that they were merchants. The gravamen of defendant's counterclaim is that no payments were made because the resins contained latent defects attributable to plaintiff's manufacture which rendered the goods unusable. Defendant further alleges that the defective resin proximately caused defendant injury and that it gave notice of the defect to plaintiff.

[2] The only proof presented at the summary judgment hearing by plaintiff was the parties' stipulation. Plaintiff did not argue the nonexistence of any of the essential elements necessary to show breach of either of the implied warranties. Instead, it argued that it had valid defenses against defendant's breach of warranties counterclaim as a matter of law. In particular, plaintiff argued that it had disclaimed all implied warranties.

The facts here, considered in the light most favorable to the defendant, show the following: The parties stipulated that they are merchants, that they had "done business with each other since 1974," and that their business together involved defendant's purchases of a urea resin from plaintiff. Defendant demanded certain specifications and requirements in plaintiff's manufacturing of the resin.

On each of the four occasions in question defendant first made an oral purchase order by telephone. The record does not show that any disclaimers of warranty were made at these times. Within a short time plaintiff shipped the resin to defendant accompanied by a bill of lading. Before defendant accepted each shipment its chemist conducted tests on the resin to determine whether it met defendant's specifications. Defendant rejected the first shipment in question here and returned it to plaintiff for filtering. After filtering, the shipment was sent back to defendant the next day. This time defendant accepted the resin. Defendant accepted each of the three remaining shipments after the chemist indicated that the resin met defendant's requirements.

Defendant's agents signed the bills of lading acknowledging receipt of the resin and retained a copy for defendant's files. The

back of each of the bills of lading contained disclaimers of the warranty of merchantability and the warranty of fitness for a particular purpose. Soon thereafter plaintiff received a written purchase order from defendant which confirmed the oral order and plaintiff then billed defendant by invoice.

Plaintiff first contends that it has a valid defense as a matter of law to defendant's counterclaim in that it disclaimed all implied warranties. Plaintiff argues that no contract between the parties was formed until defendant's agent signed the bill of lading containing an additional contract term, the disclaimer provision. Plaintiff contends its acceptance of defendant's offer was, pursuant to G.S. 25-2-207(1), "conditional on [defendant's] assent to the additional or different terms." Therefore, plaintiff argues, defendant agreed to the additional term making the disclaimer a part of the contract between the parties. We disagree and hold that plaintiff's attempted disclaimer of warranties was not a part of the contract.

G.S. 25-2-204(1) provides that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." The parties stipulated that they had been conducting their business with one another since 1974. Furthermore, each of the shipments here followed the same pattern or course of dealing: defendant would place a telephonic order, within days plaintiff would ship the resin, defendant would send a written purchase order confirming the oral order, and finally, plaintiff would bill defendant by invoice.

This course of dealing between the parties indicates that they intended to contract and that a contract was formed when defendant called and ordered the resin shipped. Apparently the parties had conducted their business in this fashion for the more than ten years they had dealt with one another. Accordingly, we hold that the parties contracted for the shipment and delivery of urea resins when defendant telephoned his order to plaintiff.

We view the disclaimer of warranties as a proposal for additional terms to the contract. *See Hosiery Mills v. Burlington Industries*, 285 N.C. 344, 204 S.E. 2d 834 (1974). G.S. 25-2-207(2) addresses this issue and provides that

> [t]he additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Defendant argues that its written purchase orders expressly limited acceptance to their terms. We disagree. On four different occasions the parties orally contracted for the shipment and delivery of urea resins. Each of the purchase orders later sent by defendant were merely confirmations of the earlier agreed upon oral contracts. This record does not reflect any statement made by defendant at the times of contracting which expressly limited plaintiff's ability to accept any of the offers.

Defendant argues alternatively that the disclaimers are ineffective because they "materially alter" the contracts. We agree. The "Official Comment" following G.S. 25-2-207 states:

> Examples of typical clauses which would normally "materially alter" the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches.

A term which so drastically affects the remedies available to the buyer upon seller's breach must be considered a material alteration when not explicitly negotiated by the parties. *See Hosiery Mills*, 285 N.C. at 357 (addition of an arbitration clause to an oral contract constitutes a material alteration). Therefore, plaintiff's attempt to add a disclaimer of warranties to the parties' contracts was ineffective.

[3] Plaintiff next argues that it has a defense to both warranty claims as a matter of law in that it produced the resin to defendant's specifications and, therefore, no implied warranties arise. Quoting G.S. 25-2-315 this Court in *Construction Co. v. Hajoca*

Corp., 28 N.C. App. 684, 688-689, 222 S.E. 2d 709, 712 (1976), stated that "[t]here is no warranty of fitness for a particular purpose unless 'the buyer is relying on the seller's skill or judgment to furnish suitable goods.'" When the buyer provides the specifications for goods to be purchased, there is no reliance on the seller's skill. *See* G.S. 25-2-315 Official Comment 2; *Blockhead, Inc. v. Plastic Forming Company, Inc.*, 402 F. Supp. 1017 (D. Conn. 1975). Here, since plaintiff properly manufactured the urea resin to defendant's specifications, no implied warranty of fitness for a particular purpose arises.

On the other hand, the implied warranty of merchantability requires no reliance by the buyer upon the seller's skill. G.S. 25-2-314(1) provides that "[u]nless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Plaintiff must be considered a merchant with respect to the resin since it stipulated that it is a merchant and it has been conducting this particular business since 1974. Though we hold no implied warranty of fitness for a particular purpose arises here because defendant provided plaintiff with the specifications to manufacture the resin, the implied warranty of merchantability exists in any sales contract where the seller is a "merchant with respect to [the] goods" sold. *Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E. 2d 161 (1972).

[4] Plaintiff further contends that defendant's chemist's examination and inspection of the resin before acceptance precludes defendant from recovering on its counterclaim as a matter of law. We disagree.

Plaintiff correctly argues that G.S. 25-2-316 allows words or conduct to disclaim implied warranties. Additionally, "when the buyer before entering into the contract has examined the goods . . . as fully as he desired . . . there is no implied warranty *with regard to defects which an examination ought in the circumstances to have revealed to him.*" G.S. 25-2-316(3)(b). Defendant's counterclaim specifically alleges that the defects present in the resin were *latent* defects. This raises the issue of whether the chemist should have discovered the defects. The parties' stipulations indicate the tests conducted were simply "to insure that the resin met all the specifications and requirements as given to the plaintiff."

Professional buyers "will be held to have assumed the risk as to all defects which a professional in the field ought to observe." G.S. 25-2-316 Official Comment 8. The record does not indicate whether the chemist's tests could have or should have discovered the latent defects. We hold that this raises a genuine issue of material fact and does not demonstrate a defense to defendant's counterclaim as a matter of law.

In summary, we hold that summary judgment in favor of plaintiff on defendant's counterclaim of breach of warranty of fitness for a particular purpose was proper and that portion of the trial court's order is affirmed. However, defendant's counterclaim for breach of warranty of merchantability raises genuine issues of material fact and that portion of the trial court's order is reversed. Because of our ruling here we reverse the trial court's order granting summary judgment to plaintiff on plaintiff's original claim. The case is remanded for further proceedings consistent with this opinion.

Affirmed in part; reversed and remanded.

Judges WELLS and GREENE concur.

JAMES M. TRUESDALE v. JUANITA TRUESDALE

No. 8712DC249

(Filed 5 April 1988)

1. **Divorce and Alimony § 19.1— notice of appeal—court's power to modify alimony award terminated**

Plaintiff's notice of appeal terminated the trial court's power to modify the alimony provisions of its judgment pronounced in open court.

2. **Divorce and Alimony § 30— equitable distribution of marital property—post-separation appreciation of marital home**

The trial court properly placed a valuation on the parties' marital home on the date of separation, but the court erred in failing to treat the post-separation appreciation of the home as a distributional factor under N.C.G.S. § 50-20(c)(11a) or (12).

Judge PHILLIPS concurring only in the result.

Truesdale v. Truesdale

APPEAL by plaintiff from *Keever (A. Elizabeth), Judge.* Judgment entered 30 December 1986 in District Court, CUMBERLAND County. Heard in the Court of Appeals 30 September 1987.

Harris, Sweeney & Mitchell, by Ronnie M. Mitchell, for plaintiff-appellant.

No brief filed for defendant-appellee.

GREENE, Judge.

The parties married in 1960, separated on 14 July 1982, and divorced in September 1983. On 23 October 1986, the trial court rendered a judgment which increased defendant's alimony from $200 to $300 and which divided the parties' marital assets in a ratio of 70 percent to defendant and 30 percent to plaintiff. The parties had stipulated that they purchased the marital home in July 1979 for $37,000, and that the home had a value of $49,000 on the date of separation and a value of $56,000 in February 1986. The trial court distributed the parties' marital property based on the home's net value of $12,661.93 on the date of separation. Seven days after the court rendered this judgment, plaintiff filed written notice of appeal. Three days later the court signed appeal entries fixing the times for serving the proposed record and alternative record on appeal. The trial court's written judgment, which recited it was entered *nunc pro tunc* on 23 October 1986, was signed on 30 December 1986 and contained substantially the same provisions as the judgment rendered 23 October 1986 except that defendant's alimony was increased to $375 a month.

These facts present the following issues: (I) whether the trial court retained jurisdiction after plaintiff's written notice of appeal to increase defendant's alimony in its subsequently written judgment; and (II) whether the trial court properly considered the post-separation appreciation of the parties' marital home in making its unequal distribution of the parties' marital property.

I

[1] Plaintiff asserts his 31 October 1986 notice of appeal terminated the trial court's power to modify the judgment pronounced in open court on 23 October 1986. As rendered, the court increased plaintiff's alimony obligation to $300; however, the sub-

sequently written judgment increased his alimony obligation to $375. As the court's 23 October 1986 judgment determined all matters pertaining to alimony and equitable distribution, the judgment was appealable under N.C.G.S. Sec. 1-277 (1983).

A perfected appeal stays all further proceedings in the trial court concerning any matter embraced by the notice of appeal. N.C.G.S. Sec. 1-294 (1983). Plaintiff's 31 October 1986 notice of appeal gave ample notice to defendant of those disputed matters encompassed by the court's subsequently written judgment. *See Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E. 2d 864, 867 (1979) (notice of appeal sufficient if puts opposing party on notice of issues raised). Therefore, as perfection of plaintiff's appeal "related back" to the time of trial, any orders regarding the matters appealed from which were entered after the notice were void for lack of jurisdiction. *See Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 580, 273 S.E. 2d 247, 258 (1981).

It is true the stay under Section 1-294 does not prevent the trial court from approving the form of its judgment and making those findings and conclusions necessary to prepare and file its judgment under N.C.G.S. Sec. 1A-1, Rule 58 (1983). *Hightower v. Hightower*, 85 N.C. App. 333, 336-37, 354 S.E. 2d 743, 745 (1987). However, Rule 58 does not authorize the trial court to prepare and file findings and conclusions which contradict those rendered prior to the notice of appeal. Thus, the trial court here had no authority to prepare and file an order increasing the amount of defendant's alimony over that amount ordered in open court prior to plaintiff's notice of appeal. Accordingly, that portion of the court's written judgment increasing defendant's alimony to $375 is modified to reflect the lesser amount of $300 ordered by the court on 23 October 1986. As the record reveals findings of fact which sufficiently support the court's conclusion that changed circumstances justified its original increase of alimony, we reject plaintiff's other challenges to the alimony award.

II

[2] The trial court's distribution of the parties' marital property was based in part on the court's classification of the marital home as marital property having a net value on the date of separation of $12,661.93. Plaintiff argues the trial court should also have classified the marital home's post-separation appreciation as

marital property subject to equitable distribution under Section 50-20(c).

The post-separation appreciation of marital property is itself neither marital nor separate property. Such appreciation must instead be treated as a distributional factor under Section 50-20(c)(11a) or (12) since: (1) Section 50-20(b)(1) restricts the definition of marital property to property "acquired . . . before the date of separation"; (2) Section 50-21(b) mandates the valuation of marital property on the date of separation; and (3) Section 50-20(b)(2) limits the scope of separate property to property acquired before marriage or "by bequest, devise, descent or gift during the course of the marriage." *See* N.C.G.S. Sec. 50-20(b)(1) (1987) ("marital property" means property acquired during marriage and before separation); N.C.G.S. Sec. 50-21(b) (1987) (marital property valued on date of separation); N.C.G.S. Sec. 50-20(b)(2) ("separate property" means property acquired before marriage or acquired by bequest, devise, descent, or gift during the marriage); N.C.G.S. Sec. 50-20(b)(11a) (1987) (in determining if property should be equally distributed, court shall consider acts of either party to increase or decrease marital property's value after separation and before distribution); N.C.G.S. Sec. 50-20(c)(12) (1987) (court shall also consider any other just and proper factor); *see also Becker v. Becker*, 88 N.C. App. 606, 364 S.E. 2d 175 (1988) (treating post-separation "rental value" of marital home as distributional factor); *Johnson v. Johnson*, 78 N.C. App. 787, 790, 338 S.E. 2d 567, 569 (1986) (holding trial court could consider under Section 50-20(c)(12) that wife's separate property depreciated as result of use to enrich marital estate). As one commentator has concluded:

> Identification of the date of mere physical separation with the date for cessation of marital property acquisition is . . . a unique, and potentially troublesome solution to a problem faced in all equitable distribution states. It may create difficulties . . . with property whose value may substantially appreciate or depreciate during the year-long separation period required for divorce in North Carolina. Under Section 50-20(c)(11a), courts may consider as a distributional factor '[a]cts of either party to increase or decrease the value of marital property after separation and before distribution.' . . . Marked increases or decreases in the value of property not caused by either party's acts between the date of separa-

> tion and the date of the equitable distribution action could . . . be considered under [Section] 50-20(c)(12) as an 'any other' distributional factor . . .

S. Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. Rev. 195, 204 n. 51 (1987) (quoting text and note) (citations omitted).

Since the trial court valued the marital home on the date of separation as required under Section 21(b), we need not apply the "harmless error" rationale applied by two other courts where the marital property had been valued on the date of distribution. *Cf. Dewey v. Dewey*, 77 N.C. App. 787, 791, 336 S.E. 2d 451, 453-54, *disc. rev. denied*, 316 N.C. 376, 344 S.E. 2d 1 (1986) (error harmless where court equally distributed "net value" based on valuation at distribution since 50% of post-separation appreciation would be each spouse's separate property); *Swindell v. Lewis*, 82 N.C. App. 423, 425, 346 S.E. 2d 237, 239 (1986) (error harmless where court's equal distribution of marital property included 50% of post-separation "passive" appreciation of marital assets since it was separate property). However, we question the apparent approval in *Dewey* and *Swindell* of distributing such appreciation as "separate" property since (1) only marital property is distributed under Section 50-20(c) and (2) post-separation appreciation arising before divorce will not usually meet the definition of separate property under Section 50-20(b)(2) as it is not normally acquired by bequest, devise, descent or gift. Furthermore, we reject the implicit notion in *Dewey* and *Swindell* that it is harmless error to distribute such appreciation so long as it is distributed in the same ratio deemed equitable under Section 50-20(c): the trial court cannot determine in the first place what an equitable distribution ratio would be without first considering evidence of this appreciation as a distributional factor under Section 50-20(c)(11a) or (12).

As there has been no exchange, contribution or conversion of marital funds or assets, we likewise decline to extend to these facts the source-of-funds analysis employed in *Peak v. Peak*, 82 N.C. App. 700, 704-05, 348 S.E. 2d 353, 356-57 (1986) (where marital funds converted to other assets after separation, court held marital estate "entitled" to return on those funds proportionate to appreciation of property acquired); *cf. Wade v. Wade*,

72 N.C. App. 372, 378-80, 325 S.E. 2d 260, 268-69, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985) (property classified as "dual" property since marital funds used to improve house and lot acquired before marriage); *Sharp*, 65 N.C.L. Rev. at 219-20 (summarizing examples where source-of-funds analysis previously used). Applying either the *Dewey/Swindell* or *Peak* approaches to these facts is inconsistent with the legislative intent expressed in both the restrictive definitions of marital and separate property under Section 50-20(b) and in the requirement of Section 50-21(b) that marital property be valued on the date of separation. Our approach permits the trial court to distribute the marital property in any ratio deemed equitable through the award of adjustive credits reflecting the court's consideration of post-separation appreciation as a distributional factor. Unlike the *Dewey/Swindell* approach, our approach also permits the trial court to award a return on marital investments or assets without contravening either the definition of marital property or the required statutory date of valuation.

However, while we uphold the trial court's valuation of the marital home on the date of separation, the record on appeal demonstrates the trial judge here did not properly consider the post-separation appreciation as a distributional factor under Section 50-20(c)(11a) or (12). The trial court's order shows that, while it properly determined the net value of the marital home on the date of separation, it made no finding concerning the home's subsequent appreciation since it specifically stated that it only considered those factors set forth in Section 50-20(c)(1), (5), (7) and (8). The trial judge must consider those distributional factors raised by the evidence. *See White v. White*, 312 N.C. 770, 776-77, 324 S.E. 2d 829, 832-33 (1985). As the record clearly reveals evidence which would require the court's consideration of post-separation appreciation under Section 50-20(c)(11a) and (12), we must vacate the court's order insofar as it distributed the parties' marital property. In passing, we note the record only reflects appreciation of the marital home as of February 1986 although the court ordered distribution in October 1986; on remand, the court should hear additional evidence concerning the subsequent appreciation of the marital home. Plaintiff's remaining assignments of error merely restate challenges to the trial court's equitable

distribution order which we reject as moot or meritless in light of our earlier discussion.

Modified in part, vacated in part and remanded for further proceedings consistent with this opinion.

Judge COZORT concurs.

Judge PHILLIPS concurs in the result.

Judge PHILLIPS concurring only in the result.

As to the difference between the alimony order as orally *entered* and as signed the point, it seems to me, is simply that the only differences Rule 58, N.C. Rules of Civil Procedure, authorizes are in *form*, whereas, the amount a party is required to pay is a matter of substance, and cannot be increased after appeal is taken. And as to the equitable distribution of the marital assets the lesson to be derived from this case, I believe, is merely that when essentially the only marital asset greatly increases in value between the separation and distribution the "equalizing" payment required of the one receiving the asset cannot be equitably based just on the former, deflated value, but account must be taken of the increase and why it occurred.

ARCHIE MELTON McLEMORE v. MELINDA KAY McDOWALL McLEMORE

No. 8728DC707

(Filed 5 April 1988)

1. Divorce and Alimony § 24.1— child support—defendant's payment of financial obligation for education of adult child—properly considered

The trial court in an action for support for a minor child could give "due regard" under N.C.G.S. § 50-13.4(c) to defendant's paying a financial obligation to Wachovia Bank which plaintiff would himself have otherwise had to pay where the court found that both parties owed approximately $9,500 on a line of credit used to support the parties' adult daughter while she was in college.

2. Divorce and Alimony § 24.9— child support—parties' estates—findings as to child's needs—insufficient

In an action for child support, the trial court's findings were insufficient under N.C.G.S. § 50-13.4(c) to support its awarding of no support. Although

the court found that the parties made approximately the same amount of money, the court nowhere determined the minor child's past or present living expenses and could not have properly computed plaintiff's disposable income as the custodial parent.

3. Divorce and Alimony § 27— child support—attorney fees—findings as to child's needs and plaintiff's income—insufficient

The trial court's conclusion in a child custody and support action that plaintiff had sufficient assets to pay his own attorney's fees, based on findings that plaintiff had an annual gross income of $30,000, a three-bedroom condo, and an automobile, was remanded where the court failed to determine plaintiff's disposable income after the child's reasonable needs were met. N.C.G.S. § 50-13.6 (1987).

APPEAL by plaintiff from *Harrell (Robert L.), Judge.* Judgment entered 12 February 1987 in District Court, BUNCOMBE County. Heard in the Court of Appeals 5 January 1988.

Riddle, Kelly & Cagle, P.A., by E. Glenn Kelly, for plaintiff-appellant.

Brock & Drye, P.A., by Floyd D. Brock, for defendant-appellee.

GREENE, Judge.

This appeal arises from an action in which plaintiff sought custody of his 16-year-old son, child support and attorney's fees. Defendant did not contest the award of the son's custody to plaintiff. The evidence before the court tended to show that the parties had two children when they separated in July 1986. The parties' adult daughter was a college senior at Davidson College while their minor son lived with plaintiff. Both parties introduced affidavits which stated their living expenses as well as respective gross incomes. Plaintiff's 1986 gross income was $30,000 and defendant's gross income that year was $34,000. In denying plaintiff's claim for child support and attorney's fees, the court made *inter alia* the following pertinent findings of fact and conclusions of law:

Findings of Fact

16. The defendant has recognized her obligation to send the oldest child, Melissa McLemore, to college and has taken the necessary steps to insure her continued enrollment at David-

son and has provided support in excess of $10,000.00 over the past four years. Presently, the plaintiff and defendant owe to Wachovia Bank approximately $9,500.00 on a line of credit, which sum was used to support the oldest daughter of the parties and the plaintiff has indicated his unwillingness to repay this debt and the defendant acknowledged that she will pay it. The defendant is now paying the sum of $400.00 per month on the bank line credit.

21. Both plaintiff and defendant have similar estates in that each makes approximately the same amount of money, each has a three-bedroom condominium, each owns an automobile and each has taken on the responsibility at the present time of supporting one child of the marriage.

22. The plaintiff testified that he has monthly expenses for the minor son in the amount of $1492.50, which the Court finds to be unreasonable. The plaintiff has monthly living expenses for himself, which includes his house payment, utilities, food and miscellaneous credit card payments, totaling $1179.25.

23. The defendant has living expenses as contained on the exhibit marked D-1, reference to which is hereby made.

25. That both plaintiff and defendant are primarily liable for the support of the minor child, but considering the income, estates and accustomed standard of living, having due regard to the circumstances of the parties and the minor child as required by G.S. 50-13.3(b) and (c), the Court, in its discretion, will not require the defendant to contribute to the support of the minor child at this time.

26. That the plaintiff's attorney, E. Glenn Kelly, has rendered valuable legal services in the representation of the plaintiff in this hearing; however, the plaintiff has sufficient assets with which to pay reasonable attorney fees and the defendant should not be required to pay the attorney for the services rendered to the plaintiff.

Conclusions of Law

5. That the Court will order no support to be paid by the defendant to the plaintiff at this time, but will order each party to maintain hospitalization insurance on the minor child.

6. That the plaintiff is not entitled to an order for reasonable attorney fees.

N.C.G.S. Sec. 50-13.4 (1987) states in pertinent part:

> (b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child, and any other person, agency, organization or institution standing *in loco parentis* shall be secondarily liable for such support . . .
>
> (c) Payments ordered for the support of a minor child shall be in such amount 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 contribution of each party, and other facts of the particular case. Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except: (1) if the child is otherwise emancipated, payments shall terminate at that time; (2) if the child is still in primary or secondary school when he reaches age 18, the court in its discretion may order support payments to continue until he graduates, otherwise ceases to attend school on a regular basis, or reaches age 20, whichever comes first.

Plaintiff appeals from the court's denial of child support and attorney's fees. Plaintiff specifically claims there was insufficient evidence to support Finding No. 21 insofar as it determined that the parties "make approximately the same amount of money." Plaintiff likewise asserts insufficient evidence supports Finding No. 26 that plaintiff had sufficient assets to pay his own attorney's fees. Plaintiff finally claims the court's findings do not support its Conclusion Nos. 5 and 6 and that Finding No. 25 constitutes an abuse of discretion.

The issues presented are: I) where the trial court (A) apparently considered defendant's paying a joint bank loan for college expenses of the parties' adult child and (B) failed to determine the reasonable needs of the parties' minor child, whether the court's findings sufficiently supported its conclusion that no child support should be awarded under N.C.G.S. Sec. 50-13.4(c)

(1987); and II) whether the trial court's findings supported its denial of plaintiff's attorney's fees.

I

In a child support action, the trial court must first determine who is primarily liable for the minor child's support under N.C.G.S. Sec. 50-13.4(b) (1987). The court then determines the actual amount of support necessary to meet the minor child's reasonable needs pursuant to Section 50-13.4(c). We first note that Finding No. 25 reveals the trial court apparently merged these two determinations into one "finding." Finding No. 25 in fact states two conclusions: (1) that both parents are primarily liable for their minor child's support under Section 50-13.4(b) but (2) after considering the "incomes, estates and accustomed standard of living . . . of the parties and minor child," the court decided in its discretion to award no child support under Section 50-13.4(c).

A

The record reveals that plaintiff did not specifically except to Finding No. 16 concerning his joint obligation on a college bank line of credit nor to the court's determination of defendant's living expenses in Finding No. 23. We therefore do not review the sufficiency of the evidence supporting those findings. N.C.R. App. P. 10(a).

[1] We specifically reject plaintiff's argument that the court could not consider defendant's paying plaintiff's share of their joint obligation to Wachovia Bank. The court found that *both* parties owed approximately $9,500 on a line of credit used to support the parties' adult daughter while she was in college. While a parent certainly has no statutory obligation to support an adult child, the parent may enter an enforceable agreement to provide such support. *Compare* Sec. 50-13.4(c) (child support payments terminate when child is eighteen unless child is earlier emancipated or still in secondary school when becomes eighteen) *with Bridges v. Bridges*, 85 N.C. App. 524, 528, 355 S.E. 2d 230, 232 (1987) (in absence of enforceable contract, no statutory obligation to support adult children). In determining the proper amount of child support, the trial court could give "due regard" under Section 50-13.4(c) to defendant's paying a financial obligation to Wachovia Bank which plaintiff would himself have otherwise been required to pay.

B

[2] However, plaintiff also argues the court's findings were insufficient to support its awarding no support under Section 50-13.4(c) since the court failed to determine what were the "reasonable needs of the [minor] child for health, education, and maintenance . . ." We agree. Once the court had determined that *both* parties were primarily obligated to support their minor child under Section 50-13.4(b), we fail to see how the court could decide no support was necessary to meet the reasonable needs of the minor child under Section 50-13.4(c) without determining what those reasonable needs were and whether they were being met by those primarily liable for the child's support. We recognize that Section 50-13.4(c) provides for "due regard" of the parties' earnings, standard of living and other factors in determining the amount of child support. However, it is not possible to determine what regard to these factors is "due" without weighing them against the minor child's reasonable needs for support. *See Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E. 2d 466, 469 (1978) (if past expenditures below subsistence, "due regard" must be shown for meeting reasonable needs of child). As our Supreme Court stated in *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980):

> Under G.S. 50-13.4(c) . . . , an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child and parents.

(Emphasis in original.) *See also Boyd v. Boyd*, 81 N.C. App. 71, 78, 343 S.E. 2d 581, 586 (1986) (findings required in order that appellate court may determine whether trial court gave due consideration to factors); *Atwell v. Atwell*, 74 N.C. App. 231, 236, 328 S.E. 2d 47, 50-51 (1985) (to determine reasonable needs, court must make findings of fact on past expenditures on child and present reasonable expenses).

We note the court found the parties made "approximately the same amount of money." As the court nowhere determined the minor child's past or present living expenses, the court could not have properly computed plaintiff's disposable income as the custodial parent. This failure would also require remand for further findings since plaintiff's disposable income is a conclusion of law which may significantly affect the determination of the parties' proportionate shares of their minor child's support. *See Plott v. Plott*, 313 N.C. 63, 76-77, 326 S.E. 2d 863, 872 (1985).

Thus, as the court nowhere determined the past expenditures on the child nor his reasonable needs nor whether those needs were being met, we cannot conclude the court properly weighed the child's reasonable needs for support against those other factors set forth in Section 50-13.4(c). *Cf. Coble*, 300 N.C. at 713, 268 S.E. 2d at 189 (fact that plaintiff's net monthly income exceeded reasonable needs of the child suggested plaintiff could sufficiently provide for child on his own). Consequently, we must vacate the court's order denying plaintiff child support under Section 50-13.4(c) since the court failed to properly determine the reasonable needs of the minor child.

II

[3] Plaintiff also contends the court erred in denying his request for attorney's fees. N.C.G.S. Sec. 50-13.6 (1987) allows counsel fees in support actions where the party shows, among other things, that he has insufficient means to defray the expense of the suit. The trial court concluded plaintiff had sufficient assets to pay his own attorney's fees based on its findings that plaintiff had an annual gross income of $30,000, a three-bedroom condominium and an automobile. These findings are arguably sufficient to support the court's denial of plaintiff's attorney's fees; however, given the court's failure to determine plaintiff's disposable income after the child's reasonable needs are met, we also remand on this point so that the court may consider the sufficiency of plaintiff's assets in light of our earlier discussion.

We have reviewed plaintiff's remaining assignments of error and find them meritless.

Vacated and remanded.

Judges PARKER and COZORT concur.

JULIA ANN CRAIG v. ROBERT LEE KELLEY

No. 8726DC447

(Filed 5 April 1988)

1. **Divorce and Alimony § 25— award of child custody to mother—sufficiency of evidence**

Evidence was sufficient to support the trial court's award of custody to plaintiff where it tended to show that plaintiff mother had had custody of the child since birth; plaintiff could provide the child with a proper living situation, love, and care; defendant had not visited the child in a substantial length of time; and defendant did not request visitation privileges or custody.

2. **Divorce and Alimony § 24— child support—custody requirement for bringing action met by mother**

Pursuant to N.C.G.S. § 50-13.4(a), plaintiff met the custody requirement for bringing an action for child support since the statute provides that any person bringing a proceeding for custody may institute an action for support of such child; in her proceeding for modification of the support order, plaintiff also requested a formal adjudication of custody; plaintiff had been vested with custody since the birth of the child; and the statute did not specify that it required a judicial determination of custody before its provisions could be utilized by a person bringing a support action.

3. **Divorce and Alimony § 24.5— modification of support order—substantial change of circumstances**

Evidence was sufficient to support the trial court's finding that there had been a substantial change of circumstances warranting an increase in child support where the court found that the child had turned five and had started school, and the court made specific findings as to the cost of his needs for food, shelter, clothing, and medical expenses, among other things. N.C.G.S. § 50-13.7(a).

4. **Divorce and Alimony § 27— child custody and support—award of attorney's fees proper**

In an action for child custody and support, the trial court did not err in ordering defendant to pay $400.00 in attorney's fees where the court made specific findings based on adequate evidence that plaintiff's income was insufficient to cover her expenses and pay litigation costs, and the court made findings as to the time plaintiff's counsel had spent pursuing the matter, his level of skill, and prevailing legal rates.

APPEAL by defendant from *Bissel, Judge.* Judgment entered 27 January 1987 in District Court, MECKLENBURG County. Heard in the Court of Appeals 16 November 1987.

This is an appeal from an order granting affirmative relief on a motion in the cause seeking an increase in child support.

Shelley Blum for plaintiff-appellee.

Tucker, Hicks, Moon, Hodge and Cranford, P.A., by Michael F. Schultze, for defendant-appellant.

JOHNSON, Judge.

On 29 October 1984 the State of North Carolina commenced an action for child support against defendant on behalf of plaintiff for support of the minor child, Jonathan Robert Kelley, born on 15 September 1981. Defendant had acknowledged paternity on 25 September 1984 and an order of paternity was entered on 2 October 1984.

On 8 January 1985, plaintiff's motion for support came on for hearing and the court ultimately ordered defendant to pay child support in the amount of $140.00 biweekly.

On 29 October 1986, plaintiff filed a motion, which is the subject of the present appeal, seeking an increase in child support. In it she alleged a substantial change of circumstances evidenced by an increase in defendant's income and an increase in the needs of the minor child who had since reached five years of age. Plaintiff also requested that a formal adjudication of custody be entered in her favor. On the same day plaintiff also filed a motion for child support garnishment alleging that defendant was $370.00 in arrears and requesting that $510.00 per month be garnished from his earnings to insure payment of child support.

The matters noted above came on for hearing on 5 January 1987 and a final order was entered on 27 January 1987. The court concluded that there had been a substantial change in the needs of the child since the previous order concerning child support had been entered.

Utilizing the calculations contained in plaintiff's and defendant's financial affidavits, as well as the Mecklenburg County child support guidelines, the court increased defendant's child support

obligation from $140.00 biweekly to $220.00 biweekly. The court further determined that plaintiff, with whom the minor child had lived since birth, was a fit and proper person to have the care, custody and control of the minor child. Defendant was determined to be $160.00 in arrears on his support obligation and was ordered to pay same, but plaintiff's request to have defendant's wages garnished was denied. Finally, the court ordered defendant to pay $400.00 in attorney's fees to plaintiff's attorney. From this order defendant appeals.

Defendant presents twenty-three questions for our review which can basically be grouped into three categories: a challenge to the court's order as it concerned child custody; a challenge to the court's order as it concerned child support; and a challenge to the court's order as it concerned an award of attorney's fees to the plaintiff's attorney.

CHILD CUSTODY

We note at the outset that we find defendant's questions challenging the court's subject matter jurisdiction over the child custody matter wholly groundless and therefore decline to review them.

[1] Defendant next contends that the court erred in awarding custody to the plaintiff on the grounds of insufficiency of the evidence. He argues that there was insufficient evidence as a matter of law to support the court's finding of fact that it is in the best interests of the minor child that he continue to live with the plaintiff, and that she is a fit and proper person to have the care, custody and control of the minor child, as well as the conclusion of law stating the same.

It is well-settled that a court's findings of fact in proceedings to modify child custody orders are conclusive on appeal where they are supported by competent evidence. *Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E. 2d 429 (1980). A trial judge is vested with wide discretion in determining child custody and the decision will not be disturbed absent a clear abuse of that discretion. *Vuncannon v. Vuncannon*, 82 N.C. App. 255, 346 S.E. 2d 274 (1986).

Reviewing the facts of the case *sub judice*, and bearing these principles in mind, we find that we agree with plaintiff that there

was plenary evidence upon which the court could base its award. The evidence considered at the hearing showed the following: that plaintiff mother has had de facto custody of the child since birth; that plaintiff works for the City of Charlotte; that plaintiff stated in her motion for a formal adjudication of custody that "[i]t is in the best interests of Jonathan that he continue to live with his mother, . . . and she can provide him with a proper living situation love and care"; and that defendant has not in fact visited the child in a substantial length of time, nor has he requested visitation privileges or custody.

The court eventually found as a fact that "[i]t is in the best interests of Jonathan that he continue to live with his mother, plaintiff herein, with whom he has lived since birth, and she can provide him with a proper living situation, love, and care." The court also ultimately concluded that "[p]laintiff is a fit and proper person to have the custody of a minor child and it is in the best interests of the child to be in her custody."

In light of the fact that defendant has not requested custody, or even visitation privileges for that matter, we are somewhat perplexed by his challenge to the court's order awarding custody to the plaintiff. At any rate, however, we hold that the court's findings and conclusions of law were supported by competent evidence and there was no abuse of discretion by the trial judge.

CHILD SUPPORT

Thirteen of defendant's Assignments of Error concern the issue of child support.

[2] Defendant first contends that the trial court erred in awarding child support to the plaintiff on the grounds that she did not have custody of the minor child and G.S. 50-13.4(a) requires any person instituting an action for support of the minor child to be vested with custody of such minor child. This argument fails for two basic reasons. First, G.S. 50-13.4(a) provides that any person having custody of a minor child, "or bringing an action or proceeding for the custody of such child, . . . may institute an action for the support of such child. . . ." In her proceeding for modification of the support order, plaintiff also requested a formal adjudication of custody. The request was granted and we have affirmed that ruling on appeal. Second, plaintiff had been vested

with de facto custody since the birth of the minor child. G.S. 50-13.4(a) does not specify that it requires a judicial determination of custody before its provision can be utilized by a person or agency bringing an action for support. Thus, plaintiff met the custody requirement.

Next, defendant contends that the trial court committed error in finding that he was $160.00 in arrears at the time of the hearing because such a finding was contrary to the evidence. We agree. Plaintiff has conceded in her brief that counsel had made a $100.00 error in addition and the order should be corrected to reflect the true amount of the arrearage. Therefore, the order should be corrected to reflect that at the time of the hearing defendant was $60.00 in arrears and not $160.00 as noted.

[3] By his next Assignment of Error defendant argues that the court erred in finding that there had been a substantial change of circumstances warranting an increase in child support. We do not agree. G.S. 50-13.7(a) provides in part that:

> An order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of G.S. 50-13.10.

The court is required to make findings of specific facts pertaining to what actual past expenditures have been in order to determine the amount of support necessary to meet the reasonable needs of the child for health, education, and maintenance. *Steele v. Steele*, 36 N.C. App. 601, 244 S.E. 2d 466 (1978). In addition, in order to modify a support order, there must be findings of fact, based upon competent evidence, that there has been a substantial change of circumstances affecting the needs of the child. *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E. 2d 522 (1975).

From the evidence offered at the hearing through testimony, a review of the record and financial affidavits of both plaintiff and defendant, the court made the following pertinent findings of fact:

> There has been a substantial change in the needs of the child in that his needs have increased since the entry of the last order. In particular, he is now five and has started school. Jonathan's expenses and share of expenses have in-

creased for shelter from $197.00 to $248.00 per month; in his clothing from $15.50 to $30.00, for Duke Power from $37 to $41; $6.50 for kerosene, for food from $30 to $62.50; for dental costs to $10.00; and for automobile expenses from $121 to $178, as determined by comparing plaintiff's earlier and later affidavits, and utilizing her testimony in court. Although his mother's total costs have increased by $55.00 per month, and her income has increased by $45.00 per month, the costs for the child have substantially increased while her income increase must be divided among plaintiff, her other 12 year old child, and Jonathan. Plaintiff is not married and earns $1,505.25. The needs of the child are $536.36 per month, as stated in the plaintiff's affidavit of financial standing & this amount is reasonable. (MRB)

In addition the court found that:

> [d]efendant's income is as stated in his affidavit: $1,052.38 per bi-weekly pay period, or $2,280.16 per month. Defendant's expenses are such that he has, and has had at all times pertinent hereto, the ability to pay child support from his earnings at the Post Office, without regard to any earnings he may have from his business. The Court is unable to determine how much, if any, he earns from the construction business. His expenses as stated on his affidavit are $1,870.16 per month, and these are inflated, as stated above.

We hold that there was competent evidence in the record to support these findings of fact and find no reasons to disturb the order increasing defendant's biweekly child support obligation from $140.00 to $220.00.

We have carefully reviewed defendant's remaining arguments on the issue of child support modification and find them all meritless.

ATTORNEY'S FEES

[4] Defendant alleges that the trial court erred in ordering him to pay $400.00 in attorney's fees on the ground that there was insufficient evidence to support the award, findings of fact or conclusions of law. Again, we do not agree.

G.S. 50-13.6 permits the court, when hearing an action for child support, including modification of an existing order, to order

payment of a reasonable attorney's fee "to an interested party acting in good faith who has insufficient means to defray the expenses of the suit." When proceeding under this provision, the court must find as fact that the request has been made in good faith, that the movant has insufficient means to defray the expenses of the suit, and that the party ordered to pay support had refused to pay adequate support under the circumstances existing at the time the action was instituted. *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E. 2d 581 (1986).

When reviewing an order concerning the award of attorney's fees as it concerns the amount awarded, we are required to affirm it in the absence of an abuse of discretion by the trial judge. *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E. 2d 47 (1985). With these principles in mind, we shall proceed.

Evidence was introduced at the hearing to the effect that plaintiff's attorney contacted defendant in the form of a letter to request support payments. The request was not honored. In its findings of fact the court noted, after reviewing the financial affidavits, that "plaintiff's income [was] insufficient to cover her expenses, those of her children, and pay the expenses of litigating this matter." The court also made specific findings of fact concerning the time plaintiff's counsel had spent pursuing the matter, 5½ hours, his level of skill and expertise, fifteen years of practice, and the prevailing rates for this type of case, $100.00 per hour for out of court work and $110.00 per hour for in court work, before ordering defendant to pay $400.00 in counsel fees which represents a portion of the total fees in this matter.

We, therefore, hold that these findings of fact were supported by competent evidence and the trial judge did not abuse his discretion in awarding attorney's fees to plaintiff.

It is for the foregoing reasons that we affirm the trial court's order in all respects, except to remand the action so that the true amount of the child support arrearage, $60.00 as opposed to $160.00 as incorrectly reported, can be reflected.

Affirmed and remanded.

Judge COZORT concurs.

Judge WELLS concurs in the result.

STATE OF NORTH CAROLINA v. GLENN CARROLL BLANKENSHIP

No. 8725SC905

(Filed 5 April 1988)

1. **Criminal Law § 105.1— motion for dismissal—renewal at close of evidence—failure to assign as error or argue in brief**

By his introduction of evidence, defendant waived his motion for dismissal at the close of the State's evidence; even though defendant renewed his motion to dismiss at the close of all the evidence, he did not properly raise this issue on appeal where he did not assign as error the court's denial of that motion or argue this issue in his brief.

2. **Criminal Law § 86.2— impeachment of defendant—conviction more than ten years old**

The State's use of a prior conviction more than ten years old to impeach defendant's testimony was not prohibited by N.C.G.S. § 8C-1, Rule 609(b) where the prior conviction was not used to impeach defendant's character in general but was offered to directly impeach defendant based on an assertion made by him during direct examination.

3. **Bills of Discovery § 6— prior conviction—continuing failure to disclose in discovery—use to impeach defendant**

The State's failure to comply with its continuing duty under N.C.G.S. § 15A-907 to disclose defendant's 1972 conviction for credit card theft pursuant to his request for discovery of his criminal record did not require the trial court to forbid the State to use such conviction to impeach defendant where the conviction was actually known by defendant and the State's nondisclosure could not have hampered defendant's preparation of his defense, and where defendant's testimony opened the door for the State's inquiry about that conviction and negated any allegation of surprise.

APPEAL by defendant from *Gaines, Judge.* Judgment entered 26 March 1987 in Superior Court, CATAWBA County. Heard in the Court of Appeals 9 February 1988.

Defendant was tried 24 March 1987 upon proper bills of indictment charging defendant with two separate counts of sale and

delivery of a controlled substance and one count of possession with intent to sell and deliver a controlled substance. As part of his pre-trial discovery requests, defendant requested a copy of his criminal record. In response the State tendered a copy of his criminal record indicating the copy was "as is now available to the State." The copy tendered omitted that defendant had been convicted of credit card theft in 1972. Though the State subsequently found out about the 1972 conviction, it was never disclosed to the defendant. At trial after the State presented its evidence, defendant testified and detailed his criminal record for the jury without mentioning the 1972 conviction. On cross-examination the State asked defendant about the still undisclosed 1972 conviction. Defendant objected and the trial court overruled. The defendant answered admitting the 1972 prior conviction. The jury found defendant guilty and defendant appeals.

Attorney General Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State.

C. Gary Triggs for defendant-appellant.

EAGLES, Judge.

Defendant first contends that the trial court erred in failing to dismiss the case at the close of the State's evidence. Next, defendant argues that the trial court violated North Carolina Rule of Evidence 609(b) in allowing the jury to hear, on cross-examination, impeachment evidence of a prior conviction which was more than ten years old. We disagree and find that the defendant received a fair trial free of prejudicial error.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss at the close of the State's evidence. By his introduction of evidence, defendant waived his motion for dismissal at the conclusion of the State's evidence. G.S. 15-173; *State v. Powell*, 74 N.C. App. 584, 328 S.E. 2d 613 (1985). Defendant renewed his motion to dismiss at the close of all the evidence but he did not assign as error the court's denial of that motion nor did he argue this issue in his brief. Defendant did not properly raise the issue and we may not consider it on appeal. *State v. Wortham*, 80 N.C. App. 54, 341 S.E. 2d 76 (1986), *rev'd in part on other ground*, 318 N.C. 669, 351 S.E. 2d 294 (1987). This assignment of error is without merit.

[2] Defendant's next assignment of error concerns the State's use of a prior conviction, more than ten years old, to impeach defendant's testimony. Defendant argues that the State committed prejudicial error when it did not comply with Rule 609(b) of the North Carolina Rules of Evidence. Specifically, defendant argues that there was error because the State did not give defendant advance notice of its intent to use the 1972 credit card theft conviction. On this record, we disagree.

Rule 609(b) of the North Carolina Rules of Evidence states:

> Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction . . . unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

The commentary to Rule 609 states that "[s]ubdivision (b) is identical" to Federal Rule 609(b). Because we have found no North Carolina cases determining this specific issue, we look to the federal cases.

Rule 609 allows defendant's prior convictions to be offered into evidence when the defendant takes the stand and thereby places his credibility at issue. *State v. Fisher*, 318 N.C. 512, 350 S.E. 2d 334 (1986). The rationale is that people who commit certain crimes may not be credible witnesses. *United States v. Johnson*, 542 F. 2d 230 (5th Cir. 1976). Rule 609(b) tempers this broad rule by disallowing the admission of convictions more than ten years old except under "exceptional circumstances." *United States v. Sims*, 588 F. 2d 1145, 1148 (6th Cir. 1978).

In 1974 Congress amended Federal Rule 609(b). The amended rule represented a compromise. Both the House and Senate drafts, however, demonstrated serious concerns as to the probative value of prior convictions more than ten years old. H.R. Rep. No. 93-650, 93rd Cong., 1st Sess., *reprinted in* 1974 U.S. Code

Cong. & Admin. News 7051; *U.S. v. Sims, supra.* The compromise created a rebuttable presumption that prior convictions more than ten years old were more prejudicial to defendant's defense than probative of defendant's general character for credibility and, therefore, should not be admitted into evidence. *Id.*

On the other hand, in those rare instances where the use of the older prior convictions was not more prejudicial than probative, the trial court must make appropriate findings of fact. G.S. 8C-1, Rule 609(b); *State v. Hensley,* 77 N.C. App. 192, 334 S.E. 2d 783 (1985), *disc. rev. denied,* 315 N.C. 393, 338 S.E. 2d 882 (1986). Furthermore, this Court in *State v. Ragland,* 80 N.C. App. 496, 342 S.E. 2d 532 (1986), recognized that the North Carolina rule did not forbid the admission of a prior conviction more than ten years old as a matter of law. Rather, as in the federal rule, the court must weigh the probative value of the conviction against its possible prejudicial effect. *Id.*

Here the State's question to defendant about his 1972 conviction did not seek to impeach his character in general. The State offered the prior conviction evidence to directly impeach defendant based on an assertion made by him during direct examination. Defense counsel first questioned defendant about four minor convictions appearing on his record: two traffic violations; fishing without a valid identification; and possession of an undersized striped bass. Defendant's counsel then asked:

Q: You have had no arrests except for the arrest that you're being tried for since 1980, have you?

A: That's right.

Q: This is the entire record that you have?

A: Yes, sir.

From defendant's testimony the jury might infer that defendant had no previous violations of the law. The net effect would be to make his testimony more credible than that of the State's primary witness who was testifying pursuant to a plea arrangement. Defendant's testimony, however, was demonstrably false.

In *U.S. v. Johnson, supra,* a jury convicted the defendant for violating a federal statute by pointing a pistol at FBI agents. The defendant had been attempting to evade the agents and prevent

their stopping him. More than 10 years earlier this defendant had been convicted of a felony and was thereby prohibited by federal statute from possessing a firearm. The defendant, in trying to explain his actions, testified on direct examination:

> Q: I want [you] to tell the Jury why it would be bad for them [FBI agents] to catch you, sir.
>
> A: Because it's not exactly legal to have a weapon in my possession.
>
> Q: Why you, sir?
>
> A: Anyone, really. I'm not authorized to carry a weapon. I'm not a law enforcement agent. I'm not military personnel.
>
> Q: Is there any other reason, Mr. Johnson?
>
> A: Not that I can think of right now, no.
>
> Q: You are not aware of any other reason that would prevent you, Leonard Johnson, from carrying a gun as opposed to Mr. McPherson or anyone else?
>
> A: I maintain my answer, no.

Id. at 234.

On cross-examination the government then elicited information concerning defendant's 1958 felony conviction to impeach his direct testimony about there being no other reason preventing him from possessing a firearm. The government did not give defendant advance notice of its intended use of the 1958 conviction nor did the trial court weigh the possible prejudicial impact of the conviction as against its probative value. The Fifth Circuit Court of Appeals affirmed the trial court and ruled that

> [w]e do not believe Rule 609 was meant to cover this particular species of impeachment use of a prior conviction. Rule 609 was crafted to apply in those cases where the conviction is offered only on the theory that people who do certain bad things are not to be trusted to tell the truth. Here the evidence had a different, surer value in that it directly contradicted the position taken by the witness.

Id. at 234-235. Applying the *Johnson* rationale here, we find no error in the admission of defendant's 1972 conviction.

Moreover, our Supreme Court has held that "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, *even though such latter evidence would be incompetent or irrelevant had it been offered initially.*" [Emphasis added.] *State v. Albert*, 303 N.C. 173, 177, 277 S.E. 2d 439, 441 (1981). *Accord State v. Watts*, 77 N.C. App. 124, 334 S.E. 2d 400 (1985), *disc. rev. denied*, 315 N.C. 396, 338 S.E. 2d 886 (1986). Defendant's testimony raises an inference favorable to his case concerning his "*entire* record." On cross-examination the State, therefore, may inquire into defendant's record and rebut his statement that defendant had not been convicted of anything other than the crimes mentioned in defendant's testimony. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984).

[3] Defendant also claims that the State failed to comply with its continuing duty to disclose discovery requests pursuant to G.S. 15A-907. Defendant argues that as a result the State should not be permitted the right to impeach defendant with his undivulged 1972 conviction for credit card theft. Our inquiry here is whether "prejudice to the defendant result[s] from either surprise on a material issue or where the non-disclosure hampers the preparation and presentation of the defendant's case." [Citation omitted.] *State v. Ginn*, 59 N.C. App. 363, 373, 296 S.E. 2d 825, 832, *disc. rev. denied and appeal dismissed*, 307 N.C. 271, 299 S.E. 2d 217 (1982).

Here the State failed to disclose a 1972 conviction for credit card theft. This fact was actually known by defendant and the State's non-disclosure could not have hampered defendant's preparation or presentation of his defense. Additionally, defendant's testimony opened the door for the State's inquiry about that conviction thereby negating any allegation of surprise. Though we do not condone the State's failure to comply with its continuing duty to disclose, we find that this violation does not rise to the level necessary to forbid the State's use of the evidence.

No error.

Judges WELLS and GREENE concur.

OAK ISLAND SOUTHWIND REALTY, INC. v. RALPH EDWARD PRUITT AND WIFE, BETTY B. PRUITT

No. 8713DC579

(Filed 5 April 1988)

1. **Brokers and Factors § 6.6— exclusive listing contract—purchaser procured by homeowner—right to commission—evidence of oral contract inadmissible**

In an action to recover on an exclusive listing contract between the parties for the sale of defendants' real estate, the trial court properly entered summary judgment for plaintiff against defendant husband where defendant contended that the parties entered into an oral contract before the written contract was signed whereby defendants were not required to pay plaintiff a commission upon a sale of the property which was solely generated by the efforts of defendants, but evidence of the oral contract would not be admissible at trial because it was parol evidence tending to contradict the provisions of the written contract; the written contract was the only competent evidence on plaintiff's motion for summary judgment; and the written contract was without ambiguity.

2. **Rules of Civil Procedure § 56.1— summary judgment—failure to serve notice**

Summary judgment for plaintiff against defendant wife was improper where plaintiff did not serve notice of his summary judgment motion at least ten days before hearing as required by N.C.G.S. § 1A-1, Rule 56(a).

APPEAL by defendants from *Hooks, Judge*. Order entered 10 March 1987 in District Court, BRUNSWICK County. Heard in the Court of Appeals 28 March 1988.

This is a civil action wherein plaintiff seeks to recover at least $11,000.00 from defendants pursuant to an exclusive listing contract between the parties for the sale of defendants' real estate. The record shows that on 7 December 1985 plaintiff and defendants entered into a written contract which provided that plaintiff should have the exclusive right and privilege for a period of six months to attempt to find a purchaser of certain property owned by defendants. Within the six month period the property was sold by defendants to a third party not procured by plaintiff. Defendants refused to pay the commission of 10% of the gross purchase price to plaintiff, contending that pursuant to an oral agreement made before the written contract was signed defendants were not required to pay plaintiff a commission upon a sale of the property that was solely generated by the efforts of defendants.

Plaintiff moved for summary judgment. The trial judge granted plaintiff's motion on 10 March 1987 and ordered defendants to pay $11,000.00 together with the costs of the action. Defendant Ralph Edward Pruitt gave notice of appeal in open court. Defendant Betty B. Pruitt did not appear at the hearing on the motion for summary judgment or perfect her appeal to this Court, but her petition for writ of certiorari was allowed by this Court on 4 December 1987.

Prevatte, Prevatte & Peterson, by James R. Prevatte, Jr., and Kenneth R. Campbell, for plaintiff, appellee.

Frink, Foy, Gainey & Yount, P.A., by A. H. Gainey, Jr., for defendant, appellant Ralph Edward Pruitt.

Whitesides, Robinson and Blue and Wilson, by Henry M. Whitesides, for defendant, appellant Betty B. Pruitt.

HEDRICK, Chief Judge.

[1] We first consider the appeal of defendant Ralph Pruitt. He contends the trial court erred in entering summary judgment for plaintiff, arguing that the record discloses a genuine issue of material fact as to the existence of an oral contract.

The North Carolina Supreme Court has held that:

> [S]ummary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate.

Kidd v. Early, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976). Where the movant is the party with the burden of proof he must still succeed on the basis of his own materials in order to be entitled to summary judgment. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

Defendant Ralph Pruitt argues that although the parol evidence rule prohibits the admission of evidence of prior or contemporaneous agreements or negotiations to contradict the terms of a

writing when such writing is the final and complete expression of an agreement, evidence is admissible to show that the writing was not intended as a final expression of the parties. Defendant Ralph Pruitt contends the question of whether the oral contract between defendants and plaintiff was superseded by the written contract is a question that must be answered by examining the conduct and language of the parties and is a genuine issue of material fact which must be decided by a jury.

The parol evidence rule is a substantive rule of law and is stated as follows: "Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing." 2 Brandis, North Carolina Evidence (Second Rev. 1982), Sec. 251, p. 267. *See also Realty, Inc. v. Coffey*, 41 N.C. App. 112, 115, 254 S.E. 2d 184, 186 (1979). When a final writing is executed or "integrated" all prior or contemporaneous negotiations or agreements, whether written or oral, are said to be "merged" into the writing. The writing then becomes the exclusive source of the parties' rights and obligations with respect to the particular transaction. 2 Brandis, North Carolina Evidence (Second Rev. 1982), Sec. 251, pp. 267-68.

The facts of *Realty, Inc. v. Coffey*, 41 N.C. App. 112, 254 S.E. 2d 184 (1979) are similar to the facts in the present case. There plaintiff, a realty company, filed an action to recover a commission from the sale of certain real estate owned by defendants pursuant to a written exclusive listing contract. Defendants had allowed a second broker to sell the property and refused to pay plaintiff a commission. Defendants attempted to contradict the written listing contract with evidence that plaintiff and defendants had allegedly reached an agreement before the written contract was signed, to the effect that defendants could use a second broker and would not be liable to plaintiff if the second broker was the first to find a buyer.

The Court held that since the factual situation presented parol evidence which directly contradicted the provisions of the written instrument and none of the exceptions to the rule applied, the trial court properly excluded the parol evidence. The Court further stated that "the parol evidence rule evolved to lend stability to written contracts and prevent their upheaval in situations precisely like this." *Id.* at 116, 254 S.E. 2d at 186.

In the present case, defendant Ralph Pruitt in his affidavit, states that there was an oral agreement between plaintiff and defendants entered into at the time of the signing of that written contract, that defendants would not have to pay a commission if defendants sold the property themselves. Plaintiff's agent, Elizabeth Rose, on the other hand, in her affidavit states that in her capacity as an officer of Oak Island Southwind Realty, Inc. she entered into an exclusive right to sell contract with defendants wherein plaintiff agreed to market certain properties of defendants with the understanding that the company would be compensated for its efforts as provided in the written contract. Thus, it is true that there is a genuine issue as to whether there was an oral agreement to the effect that if defendants sold the property plaintiff would get no commission. Even assuming that there is such a genuine issue, evidence of the oral agreement would not be admissible at trial. As in *Realty, Inc. v. Coffey*, 41 N.C. App. 112, 254 S.E. 2d 184 (1979) the evidence of the oral agreement is parol evidence tending to contradict the provisions of the written contract. Here, the written contract was the only competent evidence on plaintiff's motion for summary judgment. The executed written contract expressly states that Oak Island Southwind Realty, Inc. is "hereby granted the exclusive right, for a period of 6 months, to and including June 7, 1986, to sell the said property. . . ." Therefore, plaintiff's evidence in support of its motion for summary judgment is prima facie on its face, without any ambiguity. Summary judgment for plaintiff against defendant Ralph Pruitt was proper and will be affirmed.

[2] Next, we consider whether summary judgment for plaintiff against defendant Betty Pruitt was proper. This defendant filed no answer. The answer filed by Ralph Pruitt did not purport to be an answer for Betty Pruitt. Plaintiff did not seek a default judgment against defendant Betty Pruitt but undertook instead to seek summary judgment against her under Rule 56 of the North Carolina Rules of Civil Procedure.

Rule 56(a) provides:

> For Claimant. A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion

> for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

Rule 56(c) states that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." The notice required by Rule 56 is procedural notice as distinguished from constitutional notice required by the law of the land and due process of law. *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E. 2d 904 (1978). Thus we hold that under the circumstances of this case it was incumbent upon plaintiff to serve notice to defendant Betty Pruitt pursuant to Rule 4 of the North Carolina Rules of Civil Procedure. Betty Pruitt was and is a resident of North Carolina. Therefore she could have been served with notice of plaintiff's motion for summary judgment pursuant to Rule 4(j)(1). Plaintiff apparently did undertake to have defendant Betty Pruitt served pursuant to Rule 4(j)(1) which states that the manner of service of process upon a natural person shall be as follows:

> a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

The record does not disclose that notice was sent to Betty Pruitt's dwelling house or usual place of abode and left with a person of suitable age and discretion. There is nothing in the record to indicate that notice was addressed and mailed to Betty Pruitt and delivered to the addressee. There is also nothing in the record to show that notice was served on Betty Pruitt by delivering a copy to an agent authorized by appointment or by law. The receipt for certified mail included in the record states

that notice was sent to Ms. Betty B. Pruitt in care of McBess Industries. The record does not disclose that McBess Industries was an agent of defendant Betty Pruitt. Furthermore, the record does not show that this receipt was signed by defendant Betty Pruitt or McBess Industries. Thus, we hold that defendant Betty Pruitt did not have proper notice of plaintiff's motion for summary judgment, and the judgment against her must be vacated. With respect to the propriety of attempting to obtain summary judgment against a party who has not filed an answer without first obtaining a default judgment under Rule 55 of the North Carolina Rules of Civil Procedure see *Real Estate Trust v. Debnam*, 299 N.C. 510, 263 S.E. 2d 595 (1980).

The judgment for plaintiff against defendant Ralph Pruitt is affirmed; judgment against defendant Betty Pruitt is vacated, and the cause is remanded for further proceedings.

Affirmed in part and vacated and remanded in part.

Judges PHILLIPS and EAGLES concur.

APPALACHIAN POSTER ADVERTISING CO., INC., PETITIONER v. JAMES E. HARRINGTON, AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. 8710SC988

(Filed 5 April 1988)

1. **Rules of Civil Procedure § 52— appeal from revocation of sign permit—findings insufficient**

In an action in which DOT revoked petitioner's sign permit following repairs to the sign by petitioner, the trial court erred by failing to make proper findings of fact where the court's findings amounted only to a recitation of the evidence. The findings of fact required by N.C.G.S. § 1A-1, Rule 52(a)(1) must be more than evidentiary facts, they must be specific ultimate facts. Ultimate facts are the final resulting facts reached by the process of logical reasoning from evidentiary facts.

2. **Rules of Civil Procedure § 52.1— revocation of sign permit—conclusions of law not supported by findings of fact**

In a *de novo* superior court review of a DOT decision to revoke petitioner's sign permit, the trial court's conclusions that DOT's decision did

not violate constitutional provisions, was in accordance with statutory rules and regulations, and was not affected by other errors of law were not supported by the findings where those findings revealed only that DOT was authorized to regulate outdoor advertising, that petitioner had been issued a permit, and that respondent's actions were not affected by other errors of law. A bare conclusion unaccompanied by the supporting grounds for that conclusion does not comply with N.C.G.S. § 1A-1, Rule 52(a)(1).

3. Administrative Law § 8— de novo review of Department of Transportation decision—scope of review—findings

Although N.C.G.S. § 136-134.1 limits the scope of the findings of fact and conclusions of law which can be made, it does not limit the requirements for properly setting forth findings and conclusions, and a trial court's determination that a DOT decision to revoke a sign permit was constitutional, in accordance with statutes and regulations, and unaffected by other errors of law was not based on proper findings of fact and was remanded.

APPEAL by petitioner from *Hight (Henry W., Jr.), Judge.* Judgment entered 2 July 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 3 March 1988.

Petitioner, a North Carolina corporation engaged in the construction and maintenance of outdoor advertising signs, petitioned the trial court pursuant to G.S. 136-134.1 for a *de novo* review of the Department of Transportation's (DOT) revocation of a sign permit issued by DOT to petitioner for a sign located on Interstate 40 (I-40) in McDowell County. On 14 July 1987, the trial court entered an order upholding DOT's decision. Petitioner appeals.

The record reveals that on 13 June 1973 DOT issued petitioner a permit for an outdoor advertising sign situated along I-40 in McDowell County. On 8 October 1985, the district engineer for DOT notified petitioner by letter that petitioner's permit was being revoked and that petitioner must remove the sign. The district engineer set forth as grounds for the revocation petitioner's alleged replacement or rebuilding of the sign in contravention of rules and regulations governing outdoor advertising. In response, petitioner, through its president, forwarded a letter to respondent dated 7 November 1985 requesting a review of the matter. Petitioner explained that in conformity with its customary practice, petitioner's employees had removed the face of the sign in order to facilitate changes needed for a new advertising client. While making these changes, a decision was made to replace and

remove the worn signposts and relocate the sign further away from I-40 a distance of three to five feet. Petitioner stated that the decision to move the sign was prompted by vandalism problems. Petitioner also stated that the alterations did not increase the total allowed area of the sign or increase the value of the sign over the "50% repair rule" limit under DOT's regulation 9A N.C.A.C. 2E.0210(13). Respondent affirmed the district engineer's decision.

Bailey & Dixon, by Kenneth Wooten and Patricia Kerner, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas H. Davis, Jr., for respondent-appellee.

SMITH, Judge.

[1] By its fourth and fifth assignments of error, petitioner contends that the trial court erred in failing to make findings of fact and conclusions of law necessary to decide the issues raised. Specifically, it alleges that the findings of fact set forth by the trial court amount only to a recitation of the evidence. We agree.

G.S. 136-134.1 provides in pertinent part:

> Any person who is aggrieved by a final decision of the Secretary of Transportation after exhausting all administrative remedies made available to him . . . is entitled to judicial review of such decision . . . .
>
> The review . . . shall be conducted by the [Superior] court without a jury and shall hear the matter de novo pursuant to the rules of evidence as applied in the General Court of Justice.

Therefore, pursuant to G.S. 136-134.1, petitioner is entitled to a non-jury *de novo* review of the DOT decision by the Superior Court. " 'The word "*de novo*" means fresh or anew; for a second time . . . . [A] *de novo* trial . . . is a trial had as if no action whatever had been instituted.' " *In re Hayes*, 261 N.C. 616, 622, 135 S.E. 2d 645, 649 (1964), *quoting In re Farlin*, 350 Ill. App. 328, 112 N.E. 2d 736 (1953). A *de novo* review vests the superior court " 'with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed original-

ly in that court.' " *Id.* at 622, 135 S.E. 2d at 649, *quoting Lone Star Gas Co. v. State*, 137 Tex. 279, 153 S.W. 2d 681 (1941), *motion denied, Ex Parte State of Texas*, 315 U.S. 8, 86 L.Ed. 579, 62 S.Ct. 418 (1942); *Warren v. City of Asheville*, 74 N.C. App. 402, 405-406, 328 S.E. 2d 859, 862, *disc. rev. denied*, 314 N.C. 336, 333 S.E. 2d 496 (1985). This means that the court must hear the merits of plaintiff's case without any presumption in favor of DOT's decision. *Hayes, supra.*

Additionally, G.S. 1A-1, Rule 52(a)(1) requires a trial judge sitting without a jury, as in the case at bar, to "find the facts specifically and state separately [his] conclusions of law . . . and direct the entry of the appropriate judgment." The findings of fact required under G.S. 1A-1, Rule 52(a)(1) must be more than evidentiary facts; they must be specific ultimate facts sufficient enough for an appellate court to determine if the judgment is supported by the evidence. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977). "[E]videntiary facts are those subsidiary facts required to prove the ultimate facts." *Woodward v. Mordecai*, 234 N.C. 463, 470, 67 S.E. 2d 639, 644 (1951). Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts. *Id.* The findings of fact made by the court in this case are not the "ultimate facts" required by G.S. 1A-1, Rule 52(a)(1). For the greater part, they are only recitations of the evidence. They merely set forth, sometimes verbatim, the contents of letters exchanged between petitioner and respondent. Clearly, they do not reflect the "processes of logical reasoning" required by G.S. 1A-1, Rule 52(a)(1).

[2] Further, the trial court's conclusions of law are not supported by the findings of fact. G.S. 1A-1, Rule 52(a)(1) requires that conclusions of law be based on the facts found. Petitioner, in its petition, alleged that DOT's decision denied it due process under the United States and North Carolina constitutions. Yet, the court's findings are devoid of facts which would support the court's conclusion of law that DOT's decision was not in violation of constitutional provisions. Neither are there findings of fact which would support the court's other conclusions that the administrative decision was in accordance with statutory rules and regulations and that respondent's actions were not affected by other errors of law. All that the findings reveal is that DOT was authorized to regulate outdoor advertising, that petitioner had

been issued a permit and that respondent revoked petitioner's permit by reason of the rebuilding of petitioner's non-conforming sign.

"A 'conclusion of law' is the court's statement of the law which is determinative of the matter at issue [and] . . . must be based on the facts found by the court." *Montgomery*, 32 N.C. App. at 157, 231 S.E. 2d at 28-29. A bare conclusion unaccompanied by the supporting grounds for that conclusion does not comply with G.S. 1A-1, Rule 52(a)(1). *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975). In its conclusions of law, the trial court must conclude on the basis of the ultimate facts found whether there is any violation of a specific constitutional, statutory or regulatory provision. The trial court should then appropriately make a determination as to whether the respondent's decision should be affirmed, modified or reversed and enter judgment accordingly. Such findings of fact and conclusions of law are necessary so that this Court may review the trial court's decision and test the correctness of its judgment. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982).

[3] Respondent correctly contends that although a review of a final agency decision is *de novo*, the trial court is still limited by G.S. 136-134.1 in the scope of its review. G.S. 136-134.1 states in pertinent part:

> The court, after hearing the matter may affirm, reverse or modify the decision if the decision is:
>
> (1) In violation of constitutional provisions; or
>
> (2) Not made in accordance with this Article or rules or regulations promulgated by the Department of Transportation; or
>
> (3) Affected by other error of law.

However, this does not circumvent the requirements of G.S. 1A-1, Rule 52(a)(1). G.S. 136-134.1 limits the scope of the findings of fact and conclusions of law which can be made; it does not limit the requirements for properly setting forth such findings and conclusions. The trial court's determination that DOT's decision is constitutional, is in accordance with statutes and regulations, or is affected by errors of law must be based on proper findings of

fact. In this case, such findings were not made. For the foregoing reasons, we remand this case to the trial court for such findings of fact and conclusions of law as may be appropriate and consistent with this opinion. In light of our holding, we find it unnecessary to address petitioner's remaining assignments of error.

Remanded.

Judges EAGLES and COZORT concur.

GLENN JOHNSON, PERSONAL REPRESENTATIVE FOR BETTIE W. JOHNSON, (DECEASED) v. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 8718SC920

(Filed 5 April 1988)

1. **Social Security and Public Welfare § 1— Medicaid benefits—eligibility—first moment of the first day of the month rule improperly applied**

Respondent erred in applying the "first moment of the first day of the month" rule to deny Medicaid benefits to petitioner for the last two weeks of February 1985 during which her financial resources were within the allowable limits for Medicaid eligibility, since a less restrictive rule, under which resource eligibility existed as of the day the applicable resource limits were met, became effective on 1 March 1985; respondent's own administrative regulations required that the more liberal rule be applied to all applications taken after 1 March 1985 and to all pending applications or redeterminations completed on or after 1 March 1985; and petitioner filed her application on 8 March 1985.

2. **Social Security and Public Welfare § 1— Medicaid benefits—eligibility improperly determined**

There was no merit to respondent's contention that, because petitioner would not have been eligible for Medicaid assistance under the regulations effective in February 1985 had she applied then, she was prohibited by 42 U.S.C. § 1396a(a)(34) from receiving any award for that period of time, since there was nothing in the statute which suggested a legislative intent to affirmatively prohibit the retroactive application of broader eligibility requirements adopted by a state agency.

APPEAL by Respondent, North Carolina Department of Human Resources, from *William H. Freeman, Judge*. Judgment

entered 29 May 1987 in Superior Court, GUILFORD County.[1] Heard in the Court of Appeals 1 March 1988.

Turner, Enochs, Sparrow, Boone & Falk, P.A., by Wendell H. Ott, Thomas E. Cone, and S. Mark Payne, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Henry T. Rosser, for respondent-appellant.

BECTON, Judge.

The central issue in this case is whether Respondent, North Carolina Department of Human Resources (DHR), properly applied the North Carolina Medicaid program's "first moment of the first day of the month" rule to deny medical assistance (Medicaid) benefits to Petitioner, Bettie W. Johnson, for an approximately two-week period during which her financial resources were within the allowable limits for Medicaid eligibility.

On 8 March 1985, Petitioner, through her personal representative, Glenn Johnson, applied to the Guilford County Department of Social Services (DSS) for Medicaid benefits beginning 13 February 1985. DSS determined that she was eligible for benefits from 1 March 1985 but denied benefits prior to that date. Pursuant to N.C. Gen. Stat. Sec. 108A-79(g) (Cum. Supp. 1987), Petitioner sought administrative review of that decision by DHR. Following a hearing at which the evidence showed that Petitioner met the applicable resource limits for eligibility as of 13 February 1985, DHR's administrative hearing officer affirmed the decision of DSS. Petitioner then appealed the final agency decision to Guilford County Superior Court. After reviewing the administrative record and considering arguments of counsel, the trial judge concluded that DHR's denial of benefits for the period from 13 February 1985 through 28 February 1985 was affected by error of law. From judgment entered 29 May 1987, reversing the decision of DHR and ordering the matter remanded to DSS for a final determination of Medicaid eligibility consistent with the judgment, DHR appeals. We affirm.

1. By stipulation of the parties, this judgment was entered out of term, out of session, out of court, and out of the district.

I

It is not disputed that the Petitioner's assets were reduced to the applicable Medicaid eligibility reserve limits as of 13 February 1985. Eligibility was denied by DHR for the period from 13 February through 28 February 1985 because DHR applied the "first moment of the first day of the month" rule for determining the value of Petitioner's assets. Under that rule, which was established by provisions of the North Carolina Administrative Code and DHR's Medicaid Eligibility Manual, and which was effective prior to 1 March 1985, a Medicaid applicant's resources ("reserves") are valued, for purposes of determining eligibility for benefits, as of the first moment of the first day of the month for which application is made. If the applicant's reserve exceeds the allowable eligibility limit at that time, the applicant is ineligible for the entire month. *See* 10 N.C. Administrative Code 50B.0311 (c)(1) (1984). Although those provisions were amended, effective 1 March 1985, to allow eligibility to begin on the very day that an applicant's countable resources are reduced to allowable limits, *see* 10 N.C. Administrative Code 50B.0311(3)(a) (1985), DHR concluded that the amendment did not apply retroactively to allow an award of benefits to Petitioner for that portion of February 1985 during which her resources were within allowable limits.

In reversing DHR's decision, the Superior Court judge concluded: (1) that processing Petitioner's 8 March 1985 application by use of N.C. Administrative Code regulations and Medicaid Eligibility Manual materials which were no longer in effect on that date constituted error, and (2) that application of the "first moment of the first day of the month" rule was also error because that rule was in conflict with federal law and with federal and state regulations mandating that only assets "available" to an applicant be considered in evaluating Medicaid eligibility. DHR assigns error to both of those conclusions.

II

[1] The standard of review in this action is provided by the review provisions of the Administrative Procedure Act, N.C. Gen. Stat. Sec. 150A-51 (1983). *Lackey v. North Carolina Department of Human Resources*, 306 N.C. 231, 293 S.E. 2d 171 (1982). Section 150A-51 allows a reviewing court to reverse an agency decision

> if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (4) affected by . . . error of law . . . .

We hold that DHR failed to properly follow its own administrative regulations in effect at the time of Petitioner's application and that its decision to deny benefits prior to 1 March 1985 was thus affected by error of law.

Although the less restrictive rule—under which resource eligibility exists as of the day the applicable resource limit is met—became effective 1 March 1985, DHR contends that the more restrictive "first moment of the first day" rule controlled as of the time of Petitioner's 8 March 1985 application because benefits were sought for a period of time when the more restrictive rule was still in effect, and because the State's Medicaid regulations make no provision for retroactive application of the more liberal rule. We disagree.

Pursuant to DHR's amendment of its regulation concerning reserve requirements set forth in N.C. Administrative Code 50B .0311, the Medicaid Eligibility Manual was also revised to reflect the more liberal rule for eligibility. *See* Medicaid Eligibility Manual Change No. 16-85 and Medicaid Eligibility Manual Sec. MA-3330 IV A.2 (Rev. 03-01-85). The instructions for implementing the change, transmitted by Change Notice 16-85, state: "Apply these changes effective March 1, 1985 to all applications taken on or after March 1, 1985 and to all pending applications or redeterminations completed on or after March 1, 1985."

In our view, the plain and unambiguous wording of this instruction required DHR to apply the more liberal eligibility standard to this case which clearly involves an "application taken on or after March 1, 1985." Moreover, the requirement that the new rule be applied to pending applications or to redeterminations completed on or after that date would, in many instances, be rendered meaningless if retroactive application of the rule were denied.

[2] We also reject DHR's contention that the allowance of benefits to Petitioner for any part of February 1985 would result in a

violation of 42 U.S.C. Sec. 1396a(a)(34) which requires a state Medicaid plan to provide payment for care and services received by an applicant up to three months prior to the month of application

> . . . if such individual was (or upon application would have been) eligible for such assistance at the time such care and services were furnished.

Id. DHR argues that because Petitioner would not have been eligible for assistance under the regulations effective in February 1985 had she applied then, this provision proscribes any award for that period of time. However, DHR has not cited, nor have we discovered, any authority in support of this interpretation of the statute. We find nothing in the plain language of the statute which suggests a legislative intent to affirmatively prohibit the retroactive application of broader *eligibility* requirements adopted by a state agency. Rather, the purpose of the provision apparently is to ensure that *assistance* will be made available retroactively for a specific period of time to those who otherwise meet applicable eligibility requirements. *See Liegl v. Webb*, 802 F. 2d 623, 625 (2d Cir. 1986); *Cohen v. Quern*, 608 F. Supp. 1324, 1330 (N.D. Ill., E.D. 1984).

III

In summary, we hold that, by applying the "first moment of the first day of the month" rule to Petitioner's application for Medicaid benefits, DHR erroneously violated its own administrative regulations in effect at the time of application. Accordingly, we affirm the ruling of the trial court that Petitioner is entitled to benefits for the period from 13 February through 28 February 1985. In light of this holding, we deem it unnecessary to consider DHR's arguments concerning whether application of the "first day" rule was also error because the rule conflicted with other state or federal law.

Affirmed.

Judges ARNOLD and PARKER concur.

MENDENHALL-MOORE REALTORS v. CAROL SEDORIS

No. 8718DC638

(Filed 5 April 1988)

1. **Landlord and Tenant § 8— leased dwelling—hot water heater—duty to repair**

N.C.G.S. § 42-42 does not *per se* require that a dwelling have a serviceable hot water heater for it to be fit for habitation. However, where defendant's leased apartment includes a hot water heater, the statute requires the landlord to maintain the heater in good working order and to repair it upon receiving notice that it is defective.

2. **Landlord and Tenant § 8— leased dwelling—defective hot water heater—recovery of rent paid**

Under N.C.G.S. § 42-42, a tenant is entitled to decline taking possession of leased premises where a landlord fails to provide and maintain any services agreed upon at the time the lease was executed, and defendant tenant was therefore not obligated to pay rent while she was not in possession of the premises because of a defective hot water heater and may recover rent paid for that period. Additionally, defendant may recover the difference between the fair market rental value of the premises in their defective condition and the rent actually paid for any period in which defendant occupied the premises while defective.

3. **Landlord and Tenant § 8— defective hot water heater—acceptance of premises not waiver**

Defendant tenant's acceptance of the premises while the hot water heater had not been repaired did not waive defendant's rights to recover for the defect. N.C.G.S. § 42-42(b).

APPEAL by defendant from *Vaden, William A., Judge.* Order entered out of session 8 May 1987 in GUILFORD County District Court. Heard in the Court of Appeals 11 January 1988.

This appeal arises out of plaintiff's action for summary ejectment filed 11 September 1985 to recover rent owed for the period 1 September to 20 September 1985 and to regain possession of the demised premises at 1022 Manley Street in High Point. From the magistrate's Order dated 20 September 1985, defendant appealed to the district court filing a counterclaim for two months' rent paid, during which time defendant did not have possession of the premises. The counterclaim was filed against both Mendenhall-Moore (plaintiff) and Myrtle Kearns, the owner of the demised property. By Order dated 15 September 1986, the district court dismissed the case in its entirety as against Myrtle Kearns,

then deceased, and her estate, and allowed defendant 30 days in which to file supplemental pleadings against plaintiff Mendenhall-Moore.

Defendant's amended answer and counterclaim filed 23 September 1986 alleged among other claims and defenses that plaintiff had failed to provide an operable hot water heater in the rental property from 14 June 1983 (the first day of the parties' lease agreement) to 15 August 1983. Although defendant refused to take possession until 15 August 1983 because of the lack of hot water, she continued to pay rent in the amount of $200.00 per month for the two months she was not in possession.

The action was heard by the trial court, sitting without a jury. After hearing the evidence, the trial court made findings of fact, entered conclusions of law, allowed plaintiff's recovery of rent for the period 1 September 1985 to 20 September 1985, but denied defendant's counterclaim for the rent she paid plaintiff for the two months she alleged she was not in possession. Included among the trial court's findings of fact portion of its Order were the following pertinent paragraphs:

> 3. That the Plaintiff and the Defendant entered into a rental agreement dated June 14, 1983, and this agreement was for the premises located at 1022 Manley Street, High Point, North Carolina. The rent was to be $200.00 a month.
>
> 4. That as of June 14, 1983, the Defendant was to move to the premises at 1022 Manley Street and at that time the hot water heater located therein was not in operation.
>
> 5. That the Plaintiff signed a contract on July 21, 1983, with a contractor to have a new hot water heater installed, and it was installed. That defendant did not move into the premises until around August 15, 1983. Defendant testified that she didn't move in until then because the hot water heater was not operable, but this reasoning was not conveyed to Mendenhall-Moore. Defendant paid the $200.00 a month rent during this period from June 14th to August 15, 1983, while she chose not to live on the premises.
>
> 6. The Court finds that it is not a prerequisite that a dwelling have a serviceable hot water heater for it to be a fit and suitable habitation pursuant to North Carolina General

Statute Chapter 42 and shortly after the water heater was installed the Defendant did accept the premises and took possession of the same from the Plaintiff.

The judgment also contained the following pertinent conclusions of law:

(2) The premises were not unfit for human habitation pursuant to North Carolina General Statute Chapter 42; and

. . .

(4) That Defendant is not entitled to any damages from Mendenhall-Moore Realtors.

No brief filed by plaintiff.

Central Carolina Legal Services, Inc., by Stanley B. Sprague and Robert S. Payne, for defendant-appellant.

WELLS, Judge.

The manner in which this appeal has been presented complicates its resolution by us. In her brief, defendant has not challenged the trial court's findings of fact, but addresses only its conclusions of law. We note, however, that the trial court's findings of fact include a conclusion of law to the effect that "[It] is not a prerequisite that a dwelling have a serviceable hot water heater for it to be a fit and suitable habitation pursuant to North Carolina General Statute Chapter 42 . . . ."

In her brief, defendant presents her first question as follows:

The landlord breached its duties under G.S. § 42-42 by not supplying any hot water to the tenant during the first two months of her tenancy.

This question is based on defendant's exception to the trial court's "finding" in paragraph 6 of its Order which we have determined to be a conclusion of law. Thus, the first issue we must determine is whether the trial court erred in reaching its conclusion stated in paragraph 6 of the findings of fact and subsequently concluding that defendant was not entitled to any damages from plaintiff.

G.S. § 42-42 provides:

§ 42-42. *Landlord to provide fit premises.*

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code;

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in safe condition; and

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.

(b) The landlord is not released of his obligations, under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, ...

[1] We hold that the statute does not *per se* require the furnishing of hot water in residential premises. It is clear, however, under the trial court's findings, that defendant's leased apartment included a hot water heater, and that the heater was not operating at the inception of her lease. We also hold that the statute does require that a landlord shall "(4) Maintain in good . . . working order and promptly repair all . . . plumbing . . . facilities and appliances supplied . . . by him . . . ."

G.S. §§ 42-42(a)(2) and (4), as interpreted by this Court in *Miller v. C. W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 355 S.E. 2d 189 (1987) means that when a landlord has either expressly or implicitly agreed to provide a service to or an appliance in demised property, the same must be supplied or repaired in time

for the tenant to take possession. In other words, G.S. § 42-42 entitles a tenant to the value of the bargain contained in the lease which includes full and adequate operation of services promised by the landlord. The trial court's conclusion stated in paragraph 6 of its findings was therefore in error.

We point out, however, that for liability to attach, the landlord must have had notice of the defect. G.S. § 42-42(a)(4). The trial court's finding of fact No. 5, while indicating that plaintiff had the heater repaired sometime on or after 21 July 1983 and thus had notice at that time, does not make clear when plaintiff was first apprised of the defect nor when, in fact, the defect was repaired. Finding No. 5 suggests that defendant believed the heater was inoperable until 15 August and so refused to take possession until that time, but it does not make clear whether the heater was actually inoperable then. On remand, the trial court is instructed to make clear findings regarding the time plaintiff first became aware of the defect, the existence, if any, of other periods of inoperability, and the date the heater was repaired. Defendant's recovery should then be limited to a valuation computed for the period during which plaintiff had notice of the defect extending through to the time in which the heater was rendered operable.

[2] Under our interpretation of G.S. § 42-42, a tenant is entitled to decline taking possession of leased premises where a landlord fails to provide and maintain any services agreed upon at the time the lease was contracted. Defendant was therefore not obligated to pay rent while she was not in possession of the defective premises because of the defective hot water heater, and may recover the rent paid for that period. Additionally, the tenant may recover the difference between the fair market rental value of the premises in their defective condition and the value of the rent actually paid for any period in which defendant occupied the premises while defective. On remand, the trial court is required to determine whether the water heater was inoperable at any time during defendant's occupancy and, if so, award damages as discussed above for the duration of the defective condition.

[3] In her second argument, defendant contends that the trial court's suggestion in finding No. 6 that she had waived any rights to recover for the defect by taking possession of the premises

with the knowledge of the heater's defect and repairs, constituted an incorrect statement of the law under G.S. § 42-42. We agree.

Although neither the trial court's finding nor the defendant's argument on this point are entirely clear, defendant's contention prompts us to reiterate the pertinent law. G.S. § 42-42(b) provides that a tenant's acceptance of defective conditions does not waive the landlord's obligation to provide the services agreed upon by the parties. *See also Miller, supra.* We hold that defendant's subsequent acceptance of the premises while the hot water heater had not been repaired does not waive defendant's rights to recover for the defect.

Because the parties agreed and stipulated that defendant owed plaintiff the sum of $126.67 unpaid rent for the period 1 September 1983 to 20 September 1983, we do not disturb that part of the trial court's order allowing plaintiff to recover that amount from defendant.

Affirmed in part, reversed in part and remanded.

Judges ARNOLD and SMITH concur.

STATE OF NORTH CAROLINA v. GARY DEAN HALL

No. 8727SC244

(Filed 5 April 1988)

1. **Assault and Battery § 15.7— defendant as aggressor—instruction on self-defense not required**

In a prosecution for assault with a deadly weapon inflicting serious injury defendant was not entitled to an instruction on self-defense where defendant refused the request of his wife to get back into his van and admitted returning to the van to secure his shotgun; defendant then approached the victim with the gun; this evidence indicated that defendant was not without fault in bringing on the affray; and there was no evidence that defendant at any time withdrew from the fight and gave notice to the victim of the same.

2. **Assault and Battery § 15.7— no belief that wife was in danger—instruction on defense of family not required**

In a prosecution for assault with a deadly weapon inflicting serious injury the trial court did not err in failing to instruct on defense of family where

there was no evidence that defendant reasonably believed his wife was in peril of death or serious bodily harm at the time he shot the victim.

3. Assault and Battery § 15.2— assault with deadly weapon inflicting serious injury—requested instruction not supported by evidence

In a prosecution for assault with a deadly weapon inflicting serious injury where there was no evidence of self-defense or defense of family, the trial court did not err in refusing to add the words "and without justification or excuse" to the jury instructions.

APPEAL by defendant from *Downs (James), Judge.* Judgment entered 22 October 1986 in Superior Court, GASTON County. Heard in the Court of Appeals 23 September 1987.

Attorney General Lacy H. Thornburg, by Randy Meares, Associate Attorney General, for the State.

Kellum Morris for defendant-appellant.

GREENE, Judge.

This is a criminal case in which defendant was indicted for assault with a deadly weapon inflicting serious injury on Andrew Franklin Ivey. Defendant entered a plea of not guilty. At trial, the jury found defendant guilty and the judge sentenced him to eighteen months in prison. Defendant appeals.

Defendant contends he was entitled to instructions on defense of family members and self-defense, or in the alternative, a modified instruction as to the principal crime. The trial court refused to submit these instructions to the jury.

In determining whether the jury should have been instructed as defendant requests, the facts are to be interpreted in the light most favorable to the defendant. *State v. Watkins*, 283 N.C. 504, 509, 196 S.E. 2d 750, 754 (1973). The evidence, interpreted in the light most favorable to the defendant, shows he went to his estranged wife's (hereinafter "Nancy" or "wife") mobile home after reading a note she left him at his residence. The note requested the defendant to bring her a gun so she could protect herself and her children from Andrew Ivey (hereinafter "victim"). Defendant then placed a single-barrel shotgun in his truck and drove to Nancy's mobile home. When defendant arrived, he got out of his van and was met by Nancy, who came running out of the mobile home. She told defendant the victim had a knife and that the vic-

tim was going to hurt him. Nancy also told defendant to get back into his van. Instead, defendant walked back to his van, reached in, and pulled out the shotgun. The victim, who had been standing on the porch, walked towards the corner of the mobile home and defendant approached the victim with the shotgun. The two men were about ten to twelve feet apart. Over a period of about five minutes, defendant and the victim argued. Defendant asked the victim to leave the premises several times. The evidence indicated the victim had an open knife in one of his pockets and at one point told defendant to put down the gun and he would put away his knife. However, defendant never saw a knife in the possession of the victim. Defendant testified that the victim then turned as if to leave but abruptly turned back towards defendant and took two or three steps in his direction. It appeared to defendant that the victim was reaching for something as he moved towards him and so he fired the shotgun. The shot hit the victim and caused severe damage to his right arm.

The issues presented are: I) whether the evidence required an instruction on self-defense, II) whether the evidence required an instruction on defense of family or, in the alternative, III) whether the instructions were in error because they failed to instruct the jury that the State had to prove defendant assaulted victim "without justification or excuse."

I

[1] Where there is sufficient evidence, considered in the light most favorable to the defendant, that the defendant acted in self-defense, a court should charge the jury on self-defense. *Watkins*, 283 N.C. at 509, 196 S.E. 2d at 754. Self-defense in repelling a felonious assault (*see State v. Hunter*, 315 N.C. 371, 373, 338 S.E. 2d 99, 101-02 (1986)), is a complete defense if it is established that at the time of the assault: (1) it appeared to defendant and he believed it necessary to use deadly force in order to save himself from death or great bodily harm; (2) defendant's belief was reasonable in that the circumstances at the time of the action were sufficient to create this belief in a person of ordinary firmness; (3) defendant did not use more force than was necessary or reasonably appeared necessary to him in protecting himself from death or great bodily harm; (4) defendant was not the aggressor in

bringing on the affray, that is, he was without fault and did not aggressively and willfully enter into the fight without legal provocation or excuse. *State v. Bush*, 307 N.C. 152, 158, 297 S.E. 2d 563, 568 (1982), *habeas corpus granted on other grounds*, *Bush v. Stephenson*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd*, 826 F. 2d 1059 (4th Cir. 1987); *State v. Marsh*, 293 N.C. 353, 354, 237 S.E. 2d 745, 747 (1977).

In the present case, defendant refused the request of his wife to get back into his van and admitted returning to the van to secure the shotgun. He then approached the victim with the gun. This evidence indicates defendant was not without fault in bringing on the affray and "voluntarily and aggressively took himself into a situation in which he well knew that he or the other man would probably use deadly force." *State v. Brooks*, 37 N.C. App. 206, 208-09, 245 S.E. 2d 564, 565 (1978). There was no evidence defendant at any time withdrew from the fight and gave notice to the victim of the same. *See Marsh*, 293 N.C. at 354, 237 S.E. 2d at 747 (self-defense instruction proper where evidence shows defendant abandoned fight, withdrew, and gave notice to his adversary that he has done so). As defendant entered into the affray voluntarily and without lawful excuse or provocation, he is considered the aggressor and was therefore not entitled to a charge on self-defense. *Watkins*, 238 N.C. at 511, 196 S.E. 2d at 755.

II

[2] Defendant next argues the trial court committed error in not instructing the jury on defense of family. A family member has the right to come to the defense of a fellow family member when that member is faced with an assault. *State v. Moses*, 17 N.C. App. 115, 116, 193 S.E. 2d 288, 289 (1972). The law allows this interference to prevent injury. *Id.* However, unless there is evidence defendant had a well-grounded belief that an assault was about to be committed by another on the family member, he is not entitled to an instruction on defense of that person. *See State v. Fields*, 268 N.C. 456, 458, 150 S.E. 2d 852, 854 (1966) (per curiam). Moreover, the "assistant's act may not be in excess of that which the law would allow the assisted party." *Moses*, 17 N.C. App. at 116, 193 S.E. 2d at 289.

Here, there is no evidence in the record defendant reasonably believed his wife was in peril of death or serious bodily harm

at the time he shot the victim. The wife's statements to defendant once he reached the mobile home showed her concern for her husband's safety but did not indicate she felt she was about to be assaulted. While the victim may have earlier assaulted defendant's wife, at the time of defendant's assault on the victim, the wife was removed from any likely harm from the victim. Accordingly, the trial court committed no error in failing to instruct on defense of family.

III

[3] Defendant contends that the trial court committed error in instructing the jury as follows:

> The defendant has been charged, and you will determine whether or not he is guilty or innocent of, assault with a deadly weapon inflicting serious injury. For you to find him guilty of that offense the State must prove the following things beyond a reasonable doubt: one, that the defendant assaulted Andrew Ivey by shooting him in the arm; second, at the time the defendant used a deadly weapon. A deadly weapon is one which is likely to cause death or serious bodily injury and; third, that the defendant inflicted serious injury upon Andrew Ivey.

Defendant contends a proper instruction would have been as follows:

> The defendant has been charged, and you will determine whether or not he is guilty or innocent of, assault with a deadly weapon inflicting serious injury. For you to find him guilty of that offense the State must prove the following things beyond a reasonable doubt: one, that the defendant assaulted Andrew Ivey by shooting him in the arm *and without justification or excuse*; second, at the time the defendant used a deadly weapon. A deadly weapon is one which is likely to cause death or serious bodily injury and; third, that the defendant inflicted serious injury upon Andrew Ivey.

The only evidence in the record which defendant argues supports any justification or excuse is the evidence relating to defense of self and defense of family. As we have held defendant did not offer sufficient evidence on defense of self or defense of fami-

ly, the court committed no error in refusing to add the words "and without justification or excuse" to the jury instructions.

Finally, we find no error in the trial court's refusal to set aside the jury verdict. The evidence was sufficient to convince a rational trier of fact to find each element of the crime beyond a reasonable doubt. *See State v. Revelle*, 301 N.C. 153, 160, 270 S.E. 2d 476, 480 (1980).

No error.

Judges PHILLIPS and COZORT concur.

C. E. COCHRAN AND WIFE, HAZEL A. COCHRAN, AND DAVID S. WHITE AND WIFE, JEAN C. WHITE v. JOSEPH WILLIAM KELLER, III

No. 8729DC873

(Filed 5 April 1988)

1. **Easements § 7.1— appurtenant easement—defendant's directed verdict motions—properly denied**

In an action involving an alleged easement across defendant's property, the trial court properly denied defendant's motion for a directed verdict where plaintiffs presented at trial substantial evidence, extrinsic to the 1963 instrument, of the intent of that instrument to convey an easement to serve plaintiff's property; and such evidence was more than sufficient to withstand defendant's N.C.G.S. § 1A-1, Rule 50 motions.

2. **Adverse Possession § 25.2— easement—counterclaim for adverse possession—directed verdict for plaintiff proper**

In an action in which plaintiffs alleged ownership of a right of way across defendant's property and defendant alleged adverse possession, the trial court did not err by allowing plaintiffs' motion for a directed verdict on the issue of adverse possession where defendant failed to present at trial any credible evidence of hostile possession, plaintiffs introduced evidence that defendant's predecessor in title had made rent payments for permission to park trailers on the disputed easement, and plaintiffs brought into evidence deeds in defendant's chain of title giving explicit notice of the disputed 40-foot wide easement to plaintiffs' land.

APPEAL by defendant from *Hix, Thomas N., Judge*. Judgment entered 6 May 1987 in TRANSYLVANIA County District Court. Heard in the Court of Appeals 4 February 1988.

Plaintiffs filed this action alleging ownership of a right-of-way across defendant's property and seeking damages for defendant's alleged trespass upon this right-of-way. Defendant answered denying plaintiffs' ownership of any right-of-way across his land and affirmatively alleging adverse possession and abandonment. On 11 February 1986 the case came on for a jury trial at the conclusion of which the trial court granted plaintiffs' Motion for a Directed Verdict on the issues of existence, ownership, and location of the easement and adverse possession. On appeal, this Court found there to be a latent ambiguity in the language creating the easement, reversed the directed verdict on the issue of ownership, and remanded for a trial on the factual question of whether the disputed easement was created to benefit plaintiffs' property. *Cochran v. Keller*, 84 N.C. App. 205, 352 S.E. 2d 458 (1987). The case was retried to a jury on 4 May 1987. At the end of all the evidence the trial court again directed a verdict against defendant on the question of adverse possession but submitted the issues of ownership and abandonment to the jury. From a judgment entered on a jury verdict favorable to plaintiffs on both issues, defendant appeals.

Ramsey, Hill, Smart, Ramsey & Pratt, P.A., by Michael K. Pratt, for plaintiffs-appellees.

Prince, Youngblood & Massagee, by Sharon B. Ellis, for defendant-appellant.

WELLS, Judge.

On this his second appeal to our Court defendant brings forward six assignments of error. For reasons stated below we overrule all assignments and find no prejudicial error in the trial.

The facts were set forth in ample detail on our first review of this case, *id.*, and therefore we need only summarize them here. Briefly, plaintiffs are the owners in fee simple of a tract of land designated as Parcel No. 15 on the tax map of Transylvania County. Defendants are the owners of a tract of land adjacent to plaintiffs' tract and identified as Parcel No. 7 on the same tax map. James C. Boozer, not a party to this lawsuit, owns a third tract of land north of, and contiguous to, the tracts owned by the parties, and identified as Parcel No. 14 on said tax map. On 22 February 1963 defendant's predecessor in title conveyed to Carl McCrary,

who at the time owned both Parcels Nos. 14 and 15, two tracts of land. Tract I described a "right of way 40 feet in width for the purpose of ingress and egress to property purchased by the Grantee from the Breese heirs . . . and adjoining the lands of the Grantors." Tract II described a "right of way 22 feet in width for the purpose of ingress and egress to the property of the Grantee." The parties stipulated that only Parcel No. 14 was purchased by Carl McCrary from the Breese heirs. McCrary purchased Parcel No. 15, now owned by plaintiffs, from other owners. Plaintiffs asserted in their Complaint that they own the 40-foot right-of-way leading from Caldwell Street, a public road, to their property, Parcel No. 15. Defendant answered that the 1963 deed to McCrary created an easement appurtenant not to plaintiffs' property, but rather to Parcel No. 14. The deed's language "property purchased . . . from the Breese heirs" would seem to identify Parcel No. 14 as the intended dominant tenement of the easement appurtenant. On the other hand, the same 1963 deed's metes and bounds description does not describe a right-of-way attached or contiguous to Parcel No. 14. Instead, it identifies a 40-foot wide tract extending directly from Caldwell Street, across defendant's property to Parcel No. 15, *i.e.* to *plaintiffs'* land.

As indicated above, on this case's first appeal we held that the language of the 1963 deed is ambiguous and remanded for a new trial to resolve the factual question of whether the disputed easement was created with the intent to serve plaintiffs' land or some other parcel. We stated: "The question of intent is one for the jury and in order to ascertain that intent it is necessary to look at the subject matter involved, the situation of the parties at the time of the conveyance and the purpose sought to be accomplished." *Id.* Pursuant to our mandate, the trial court submitted to the jury at the conclusion of the evidence the following issue: "Does the 40-foot right of way running across the Defendant's property (parcel 7) serve the Plaintiffs' property (parcel 15)?" The jury answered *yes.*

[1] On this appeal defendant first contends that plaintiffs offered no evidence tending to show that the parties who originally created the disputed easement intended that it benefit plaintiffs' land and that therefore his Motions for a Directed Verdict and Judgment Notwithstanding the Verdict should have been granted. We disagree. First, plaintiffs presented the evidence that defendant's

land lies between plaintiffs' property and Caldwell Street, a public road, and that Tract I conveyed by defendant's predecessor in title led directly to plaintiffs' Parcel No. 15. Second, plaintiff offered into evidence the fact that, on the same day on which defendant's predecessor in title conveyed Tracts I and II to Carl McCrary, the latter, in turn, relinquished to defendant's predecessor in title all right, title, and interest in a previously created 24-foot wide right-of-way extending across the northern margin of Parcel No. 7 to Caldwell Street. Defendant's predecessor in title built a motel in the extinguished 24-foot easement. Without the northern right-of-way, there would be no access to Caldwell Street from Parcel No. 15 except via the newly created Tract I. Third, plaintiff introduced the testimony of Dorothy McIntosh and Martha McGuire tending to prove that during the years 1971-1973 defendant's predecessor in title had paid rent for permission to obstruct the 40-foot wide Tract I. Since during these years Martha McGuire owned Parcel No. 15, but not Parcel No. 14, the rent payments were ratifying evidence of the intent of the 1963 deed that Tract I serve Parcel No. 15. Thus, plaintiffs presented at trial substantial evidence, extrinsic to the 1963 instrument, of the intent of that instrument to convey an easement to serve Parcel No. 15; and such evidence was more than sufficient to withstand defendant's N.C. Gen. Stat. § 1A-1, Rule 50 motions. On a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of all reasonable inferences. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). If there is more than a scintilla of evidence to support the plaintiff's claim, the motion for a directed verdict should be denied. *Rice v. Wood*, 82 N.C. App. 318, 346 S.E. 2d 205, *disc. rev. denied*, 318 N.C. 417, 349 S.E. 2d 599 (1986). The test for granting a motion for judgment notwithstanding the verdict is the same as for granting a directed verdict. *Snider v. Dickens*, 293 N.C. 356, 237 S.E. 2d 832 (1977).

[2] Defendant further contends that the trial court erred in allowing plaintiffs' Motion for a Directed Verdict on the issue of adverse possession. We disagree. At trial defendant failed to present any credible evidence of hostile possession. On the other hand, plaintiffs introduced evidence, first, that defendant's predecessor in title made, during the years 1971-1973, rent

payments for permission to park trailers on the disputed easement. Second, plaintiffs brought into evidence deeds in defendant's chain of title giving explicit notice of the disputed 40-foot wide easement to plaintiffs' land. In sum, all the credible evidence supported plaintiffs' contention that defendant's use and possession of the right-of-way in controversy was not hostile, and hence there was no question for the jury. A motion for a directed verdict may be granted if the evidence is insufficient to support a verdict for the nonmovant as a matter of law. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979). Such was the case here.

We have carefully reviewed defendant's remaining assignments of error and find no prejudicial error.

No error.

Judges EAGLES and GREENE concur.

DORA SHERROD v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, NORTH CAROLINA DIVISION OF SOCIAL SERVICES

No. 877SC652

(Filed 5 April 1988

Social Security and Public Welfare § 1— Medicaid eligibility—medical evidence of severe impairment—denial of request improper

Respondent's denial of petitioner's request for Medicaid disability assistance on the basis that she did not suffer from a severe impairment which would limit her ability to do work was contrary to the medical conclusion reached by the examining physician of respondent's choice, and was unsupported by any other medical evidence.

APPEAL by appellant from *Brown (Frank R.), Judge*. Judgment entered 26 February 1987 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 10 December 1987.

Appellant was fifty-two years old when she first applied for Medicaid disability assistance on 3 July 1984. She is the mother of five children and has an eleventh grade education. From 1971 to 1974 she worked as a "cord setter" for Black & Decker. She has not been gainfully employed since 1974. Appellant claims her dis-

ability is the result of numerous medical problems including hypertension, diabetes, gout, bad nerves, blurred vision, poor circulation and problems with her back, leg and shoulder.

As a result of these medical problems, appellant says she is unable to sweep, mop, scrub, or even sit for prolonged periods without suffering severe pain and muscle spasms in her back and leg. In addition she claims to be unable to lift more than five pounds without strain and that her pain affects her ability to bend, stoop, push, pull and use foot controls. Mrs. Sherrod's initial request for Medicaid was denied by the Edgecombe County Department of Social Services on 18 September 1984. Pursuant to her request, a hearing was held before a state hearing officer on 4 December 1984. The hearing officer issued a tentative decision upholding the denial, which became the final decision of the Division of Social Services.

Appellant filed a petition for judicial review on 24 May 1985. On 27 January 1986 a consent order was entered and the matter was remanded for further administrative proceedings. Another state hearing was held on 19 March 1986. The hearing officer issued a tentative decision on 13 May 1986 again denying appellant's application for Medicaid. The tentative decision became the final determination of appellee on 10 July 1986.

Appellant then filed an action for judicial review in the Edgecombe County Superior Court on 8 August 1986. The superior court affirmed. Mrs. Sherrod appeals.

Eastern Carolina Legal Services, Inc., by Patricia A. Bailey, attorney for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Associate Attorney General Joe L. Webster, for the State.

ORR, Judge.

Appellee concludes as a matter of law that "the appellant does not have a severe impairment and, therefore, cannot be found disabled as defined in 20 C.F.R. 404 and 20 C.F.R. 416." The term "severe impairment" refers to an impairment which significantly limits physical or mental abilities to do basic work activities. *See generally* 20 C.F.R. §§ 416.920 and 416.1002 (1987). "Basic work activities" is defined as follows:

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, co-workers and usual work situations; and

(6) Dealing with changes in a routine work setting.

20 C.F.R. § 416.921(b) (1987).

The medical assessment performed by Dr. Omatta Sirisena, to whom appellee sent appellant for evaluation, contains specific conclusions based upon his examination and evaluation of her condition. These conclusions show an impairment for lifting/carrying; an impairment for standing/walking; an impairment affecting pushing/pulling and seeing; and environmental restrictions around heights and machinery caused by impairments.

Dr. Sirisena's narrative history of appellant states the following:

IMPRESSIONS: 1. Degenerative arthritis of lumbosacral spine.
2. Diabetes mellitus.
3. Hypertension.
4. Status post-Bell's palsy.

COMMENTS: The patient had lower back pain, possibly associated with degenerative arthritis of lumbosacral spine and at first the left leg problem appears to be associated with a nerve root involvement but neurological examination did not reveal objective evidence of radiculopathy. The Bell's palsy has cleared up without residuals. Her blood pressure is fairly well controlled with medications.

She can manage benefits on her own behalf.

Based upon these findings by Dr. Sirisena it is clear that the listed impairments significantly limited appellant's "physical . . . ability to do basic work activities." If so, and the doctor's report so concludes, then it follows that the appellant would suffer from a severe impairment. In addition, there is no evidence of record submitted by an examining physician that contradicts Dr. Sirisena's conclusions. Appellee, in its order denying appellant benefits, voluminously sets forth an "Evaluation of the Evidence." We focus our attention, however, on the Findings of Fact to see if they support the conclusion reached by appellee.

The critical findings state in part, "[t]he evidence and testimony of the appellant do not support a finding of limitation of appellant's ability to perform basic work activities as defined in 20 C.F.R. 416.921." This finding is contrary to the medical conclusion reached by Dr. Sirisena and as previously noted there are no medical reports by examining physicians contrary to those conclusions found by Dr. Sirisena.

Finding of Fact No. 4 states:

> The appellant's arthritis is not severe and would not limit her ability to stand, walk, sit, lift, carry, reach, push, pull, or handle. Appellant's testimony regarding pain she has in her back, neck, legs, shoulders, and extremities is not fully credible in light of the very minimal findings in the evidence.

Again, this finding is not based on the medical evidence of examining physicians. Therefore, the conclusion of law upon which appellee determined that appellant does not have a severe impairment is inadequately based upon findings of fact supported by substantial evidence in the record.

In this case appellant has submitted to a comprehensive physical examination by a physician—not of her choice—but of appellee's choice. The physician's conclusions showed a severe impairment based upon the criteria set forth by appellee. For appellee to conclude contrary to the examining physician's determination will take at least some credible medical evidence supporting such contrary findings of fact that in turn support a conclusion of no severe impairment. We find no such support in this case and, therefore, reverse the decision and remand for entry of judgment not inconsistent with this opinion.

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

DONALD J. NESS AND WIFE, CAROL E. NESS v. JACKIE JONES AND TOWN & COUNTRY REAL ESTATE OF JACKSONVILLE, INC.

No. 874SC854

(Filed 5 April 1988)

Brokers and Factors § 4.1— negligence of real estate broker—12(b)(6) dismissal improper

The trial court erred by granting defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action in which plaintiffs alleged that defendants were negligent in advising plaintiffs that plaintiff wife was entitled to V.A. home financing apart from her husband's V.A. entitlement.

APPEAL by plaintiffs from *Small, Judge.* Order entered 11 June 1987 in Superior Court, ONSLOW County. Heard in the Court of Appeals 9 February 1988.

Robert T. Hargett for plaintiff appellants.

Womble Carlyle Sandridge & Rice by Robert H. Sasser, III, and Ellen M. Gregg for defendant appellees.

COZORT, Judge.

The issue before us in this case is whether plaintiffs' complaint fails to state a claim upon which relief can be granted. Plaintiffs sued defendants alleging that defendants were negligent in advising plaintiffs that the plaintiff-wife was entitled to V.A. home financing separate and apart from her husband's V.A. entitlement. The trial court granted defendants' Rule 12(b)(6) motion to dismiss. We reverse and remand the case for further proceedings.

The complaint alleged the following:

Plaintiffs contracted with defendant Jones, an agent with defendant Town & Country Real Estate, to list and sell their home. Plaintiff-husband had used his Veterans Administration (V.A.) en-

titlement to purchase the home listed with defendants for sale. Plaintiffs told defendant Jones that it was important to keep plaintiff-husband's V.A. entitlement for the purchase of a new residence. Defendant Jones told plaintiffs that the wife was eligible for a V.A. loan entitlement by virtue of her military service.

After being advised by Jones that the wife was eligible for V.A. financing, plaintiffs agreed to sell their home to a couple who assumed plaintiffs' V.A. loan, thereby using up plaintiff-husband's V.A. entitlement. Plaintiffs entered into a contract to buy another home and applied for V.A. financing using plaintiff-wife's V.A. entitlement. Plaintiffs were informed by the lending institution that plaintiff-wife was not eligible for V.A. financing. Plaintiffs canceled their contract to purchase the new residence and moved out of that home because they were unable to qualify for financing.

Plaintiffs claim defendants were negligent in misinforming plaintiffs of eligibility requirements for V.A. financing. Plaintiffs contend defendants had an affirmative duty not to make willful or negligent misrepresentations or omissions of material facts. As real estate agents in the Jacksonville area, defendants should have been familiar with the eligibility rules for V.A. loans because most of the real estate transactions in the Jacksonville area involved V.A. financing.

When reviewing a motion to dismiss, a court considers that allegations made in plaintiffs' complaint are taken as true. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E. 2d 240, 241 (1981). A Rule 12(b)(6) motion should be granted only where " '*it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*' " *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E. 2d 161, 166 (1970) (emphasis in original).

Plaintiffs contend in their brief that the complaint has sufficiently alleged a duty, a breach of that duty, and substantial damages to plaintiff proximately caused by that breach. Plaintiffs further contend there is no insurmountable bar raised in the complaint which would prevent recovery.

In their brief, defendants respond that the plaintiffs' complaint fails to establish that plaintiffs justifiably relied upon any false information allegedly provided by the defendants. While ad-

mitting that the question of justifiable reliance is generally a factual issue for the jury, defendants contend that the trial court may properly hold that a plaintiff's reliance is unreasonable as a matter of law. In support of this argument defendants rely principally upon *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957), and *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 303 S.E. 2d 565, *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983). We find defendants' reliance misplaced, their argument unpersuasive, and the trial court's order of dismissal error.

In *Calloway*, the Supreme Court affirmed a *directed verdict* for the defendant at the close of plaintiffs' evidence in an action grounded on *fraud*. The Court's specific holding was that there were insufficient averments of facts in the complaint from which an intent to deceive could be legitimately implied. *Calloway*, 246 N.C. at 134, 97 S.E. 2d at 885. The Court then went on to state that plaintiffs knew of the water shortage in the area and were not reasonable in relying on defendant's representations without making further inquiry. *Id.* at 135, 97 S.E. 2d at 886.

In *Libby Hill*, this Court affirmed the trial court's granting of *directed verdict at the close of plaintiff's evidence*. On the negligent misrepresentation claim, the Court said:

> Even if Yarbrough's statements were representations, plaintiff has failed to show reasonable reliance. A purchaser who is on equal footing with the vendor and has equal means of knowing the truth is contributorily negligent if he relies on a vendor's statements . . . . We find that, being on equal footing with defendants, plaintiff had no right to rely on defendants' statements and was negligent in doing so.

Libby Hill Seafood Restaurants, Inc. v. Owens, 62 N.C. App. at 699-700, 303 S.E. 2d at 569.

This case is easily distinguishable from *Calloway* and *Libby Hill*. First, in both of those cases, the test was whether the evidence presented by plaintiff was sufficient to withstand a motion for directed verdict. In the case below, the court is testing the sufficiency of plaintiffs' *claim* on a Rule 12(b)(6) motion; there is no evidence for the court to review. Second, in both *Calloway* and *Libby Hill*, the court relied on plaintiff's knowledge of the problem and plaintiff's insufficient inquiries to sustain a holding of un-

justifiable reliance as a matter of law. In the matter below, the amount of plaintiffs' knowledge and the sufficiency of plaintiffs' inquiries are factual matters not yet of record.

We hold that plaintiffs have stated a sufficient claim for relief and that the trial court erred in dismissing it.

Reversed and remanded.

Judges ARNOLD and PHILLIPS concur.

EDGAR JOINES AND WIFE, ELIZABETH JOINES v. JOHN R. HERMAN AND WIFE, MILDRED HERMAN

No. 8724DC997

(Filed 5 April 1988)

1. **Easements § 11— termination of easement by necessity**

The trial court did not err in concluding that an easement across defendants' land, though an easement by necessity when plaintiffs first purchased from defendants in 1965, was no longer necessary and that the easement terminated in 1971 when plaintiffs obtained a deeded easement to their tract from another adjacent landowner; furthermore, the easement across defendants' land was not necessary to reach the far end of plaintiffs' 10 7/8-acre tract and a 37-acre tract beyond where there was an eight-foot wide farm road across the 10 7/8-acre tract onto the 37-acre tract, and the road had already been used by farm tractors, pickup trucks, and trucks pulling trailers.

2. **Easements § 7.1— use of land permissive—no easement by prescription**

The trial court did not err in finding that plaintiffs' use of defendants' land did not constitute an easement by prescription, since the evidence clearly showed that plaintiffs' use of defendants' land from 1960 until 1983 was always with defendants' permission, and a mere permissive use cannot ripen into an easement by prescription.

3. **Attorneys at Law § 7— action to establish easement—award of attorney's fees improper**

No statutory basis exists for awarding attorney's fees in an action to establish an easement, and the trial court therefore erred in awarding attorney's fees to defendants.

APPEAL by plaintiffs from *Lacey, Judge*. Judgment entered 17 April 1987 in District Court, WATAUGA County. Heard in the Court of Appeals 8 March 1988.

Deal & Smith, by James M. Deal, Jr., for plaintiff appellants.

Clement, Miller & Whittle, by Paul E. Miller, Jr., for defendant appellees.

COZORT, Judge.

Plaintiffs filed this action to establish an easement across defendants' land. From the trial court's judgment concluding that no easement existed, plaintiffs appeal. We affirm.

On 6 August 1960, plaintiffs purchased a 37-acre tract of land in Watauga County. This tract was surrounded by land owned by defendants, and its only means of access was by an old farm road across defendants' land from U.S. Highway No. 421. After purchasing the property, plaintiffs requested defendants' permission to use this road to reach a farmhouse located on the 37-acre tract. Defendants gave them oral permission to use the road and thereafter also gave them permission to gravel and pave a portion of the road, to keep the gates located across the road open, and to increase the intensity of their use of the road. On 7 July 1983, defendants revoked, in writing, their oral permission for plaintiffs to use their road.

In January 1965, plaintiffs purchased from defendants a 10-7/8-acre tract of land adjacent to the 37-acre tract they already owned. This tract did not join a public road, but it could be reached via the same road used to reach the 37-acre tract. In 1970, plaintiffs built an A-frame house on the 10-7/8-acre tract and in 1971 acquired from Ralph Greene and his wife a deeded easement from the 10-7/8-acre tract to Lynhill Drive, a state road. An 8-foot wide farm road also existed across the 10-7/8-acre tract from the A-frame house to the farmhouse on the 37-acre tract. This farm road has been used by tractors, pickup trucks and trucks with trailers.

On 31 October 1985, plaintiffs instituted the action upon which this appeal is based. Plaintiffs requested an easement over defendants' land in order to regain access to the 10-7/8-acre tract from U.S. Highway No. 421. The trial court found that no easement existed across defendants' land and charged plaintiffs with the costs of the action, including defendants' attorney's fees. From this judgment, plaintiffs appeal.

[1] Plaintiffs first argue that the trial court erred in concluding that the easement obtained across the 10-7/8-acre tract was no longer necessary and that it terminated in 1971. We disagree.

> "A way of necessity arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers. It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway."

Pritchard v. Scott, 254 N.C. 277, 282, 118 S.E. 2d 890, 894 (1961), *quoting* 17A Am. Jur. *Easements* § 58. " 'A way of necessity is a temporary right in the sense that it continues only so long as the necessity exists . . . and ceases to exist upon the termination of the necessity which gave rise to it.' " *Id.* at 282-83, 118 S.E. 2d at 895, *quoting* 17A Am. Jur. *Easements* § 100.

Although an easement by necessity existed over the 10-7/8-acre tract when plaintiffs purchased it from defendants in 1965, the necessity ended in 1971 when plaintiffs obtained a deeded easement to the 10-7/8-acre tract from the Greenes. The trial court correctly held that the easement was no longer necessary for the use and enjoyment of plaintiffs' land.

Plaintiffs argue that the use of defendants' land is still necessary even though they acquired an additional means of access to the 10-7/8-acre tract. Plaintiffs acquired a deeded easement to the eastern edge of the 10-7/8-acre tract where their A-frame house is located. To reach the other end of the 10-7/8 acres which joins the 37-acre tract would require crossing a "razorback ridge" running down the middle of the property. Plaintiffs argue that building a road across this ridge would not be reasonable and that the easement across defendants' land is still necessary to reach the remainder of their 10-7/8-acre tract. We do not agree. The evidence shows, and the trial court found, that an 8-foot-wide farm road already exists across the 10-7/8-acre tract from the A-frame house to the farmhouse on the 37-acre tract and that it can be cut and filled at a reasonable cost. The evidence further showed that this

road had already been used by farm tractors, pickup trucks, and trucks pulling trailers.

The trial court found that plaintiffs had a reasonable means of access to the entire 10-7/8-acre tract, and we hold that it correctly found that the easement by necessity over defendants' land terminated in 1971.

[2] Plaintiffs next argue that the trial court erred in finding that plaintiffs' use of defendants' land did not constitute an easement by prescription. We disagree.

> In order to prevail in an action to establish an easement by prescription, a plaintiff must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of easement claimed throughout the twenty-year period.

Potts v. Burnette, 301 N.C. 663, 666, 273 S.E. 2d 285, 287-88 (1981).

In the case *sub judice*, the evidence clearly shows that plaintiffs' use of defendants' land from 1960 until 1983 was always with defendants' permission. "A mere permissive use of a way over another's land, no matter how long continued, cannot ripen into an easement by prescription." *Nicholas v. Furniture Co.*, 248 N.C. 462, 471, 103 S.E. 2d 837, 844 (1958). Therefore, we hold the trial court correctly found that no easement by prescription existed.

[3] Finally, plaintiffs argue that the trial court erred in awarding attorney's fees to defendants. We agree.

In North Carolina, it is well established that attorney's fees are taxable as costs only when expressly authorized by statute. *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E. 2d 179 (1972). No statutory basis exists for awarding attorney's fees in an action to establish an easement. Therefore, the portion of the trial court's order awarding attorney's fees is vacated.

Affirmed in part; vacated in part.

Judges EAGLES and SMITH concur.

STATE OF NORTH CAROLINA v. GILBERT M. ROTH

No. 8726SC1017

(Filed 5 April 1988)

1. False Pretense § 3.2— improper instruction on "representation"

In a prosecution for attempting to obtain property by false pretense by boarding an airplane using another person's flight coupon after it had expired, the trial court's characterization of the other person's name on the coupon as a "representation" in the jury instructions may have misled the jury and was prejudicial error since the question before the jury was whether the tendering of the coupon bearing another person's name and a revalidation sticker was a representation that the coupon was valid.

2. Criminal Law § 34.6— other crimes—competency to show intent

In a prosecution for attempting to obtain property by false pretense by boarding an airplane using another person's flight coupon after it had expired, an FBI agent's testimony concerning flight coupons, boarding passes and revalidation stickers discovered in a search of defendant's home and schemes defendant engaged in involving the airline industry was admissible to show defendant's intent to deceive. N.C.G.S. § 8C-1, Rule 404(b).

APPEAL by defendant from *Owens, Judge.* Judgment entered 10 June 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 March 1988.

Defendant was charged in a proper bill of indictment with attempting to obtain property by false pretense in violation of G.S. 14-100.

Evidence presented at trial tended to show the following facts. On 26 April 1986, defendant went to the Douglas Municipal Airport in Charlotte, North Carolina and awaited the call for the boarding of Delta Airlines flight 267 to Atlanta. When the flight was called for boarding, defendant proceeded to the gate, presented a flight coupon (ticket) to the attendant and boarded the airplane.

Robert Crider, a Delta employee, recognized defendant and noticed that the flight coupon defendant had used was not in defendant's name. The coupon was in the name of Ms. K. McKenna and had been issued on 6 April 1984 by Eastern Airlines. It bore a Delta revalidation sticker for the Delta flight 267. The boarding pass attached to the coupon was also in the name of Ms. K. McKenna. Crider contacted James Yates, another Delta employee,

who then contacted an airport security officer. Yates and the officer boarded the airplane, located defendant and asked him to step out of the airplane. Defendant asserted at that point that the McKenna ticket wasn't his ticket and that there had been a mistake. Despite defendant's claims, he then purchased a ticket and was permitted to fly to Atlanta.

Both Crider and Yates testified that revalidation stickers could not extend the life of a flight coupon beyond one year and that the McKenna coupon had no value. They also testified that it was against corporate policy to transfer flight coupons except under special circumstances. Yates further testified that no one in authority with Delta had given defendant permission to use the coupon he used. On cross-examination, however, Yates stated that there had been instances when Delta employees violated corporate policy and revalidated flight coupons to extend their life beyond one year and transferred flight coupons from one passenger to another.

Defendant presented evidence that people often fly under a name other than that which appears on the flight coupon and that flight coupons are in fact revalidated to extend their life beyond one year.

Stanley Borgia, an F.B.I. agent, testified that he executed a search of defendant's home on 12 December 1984 and seized over 100 flight coupons and boarding passes, none of which were in defendant's name, approximately 6,600 revalidation stickers, some of which were counterfeit, and documents indicating that defendant had opened over 400 "frequent flyer" accounts under fictitious names. The agent further testified about an interview he had with defendant in which defendant explained the "frequent flyer scheme" and another "scheme" in which defendant removed high priced coupons from a coupon book and replaced them with less expensive coupons before seeking a refund for the original coupon book.

The jury found defendant guilty of attempting to obtain property by false pretenses, and defendant was sentenced to a three-year term of imprisonment. From the judgment of the trial court, defendant appeals.

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

Michael S. Scofield for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in charging the jury. We agree.

The court charged the jury as follows:

> Members of the jury, the defendant has been accused of attempting to obtain property by false pretenses. In order for you to find the defendant guilty of attempting to obtain property by false pretenses, the State must prove four things beyond a reasonable doubt:
>
> First, that on or about the 28th day of April of 1986 the defendant presented one Eastern Airlines, Inc. flight coupon, number 100772641430360, issued on April the 6th, 1984, with the name of the passenger listed as Ms. K. McKenna, to a representative of Delta Airlines, Inc., and by making that representation—strike that, Madam Reporter—and by making that presentation the defendant made the representation that he was the person named on the flight coupon and that the coupon had not expired.
>
> Second, that this representation was false.
>
> Third, that the representation was calculated and intended to deceive.
>
> And, fourth, that the defendant thereby attempted to obtain passage aboard Delta Airlines flight 267 from Delta Airlines, Inc.
>
> So I charge you, members of the jury, that if you find from the evidence beyond a reasonable doubt that on or about the 28th day of April, 1986, that the defendant, Gilbert Roth, did present to a representative of Delta Airlines, Inc. one Eastern Airlines, Inc. flight coupon number 100772641430360, issued on April the 6th, 1984, with the name of the passenger listed as Ms. K. McKenna, *and that this representation was false* in that the defendant is not Ms.

K. McKenna, and that said flight coupon had expired one year from the date of its issuance, and that this representation was calculated and intended to deceive, and that Gilbert M. Roth thereby attempted to obtain passage aboard Delta Airlines flight 267 from Delta Airlines, Inc., it would be your duty to return a verdict of guilty of attempting to obtain property by false pretenses. However, if you do not so find, or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty. [Emphasis added.]

When a court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. *State v. Harris*, 289 N.C. 275, 221 S.E. 2d 343 (1976).

Although the first part of the charge concerning the elements of the crime was correct, the trial court then mistakenly characterized the McKenna name on the coupon as a "representation." This characterization may have misled the jury in that the question before them was whether the tendering of the coupon bearing the McKenna name and the revalidation sticker was a representation that the coupon was valid. The charge was incorrect and defendant is entitled to a new trial.

[2] Defendant also contends that the trial court erred in admitting the F.B.I. agent's testimony concerning a search of defendant's home and "schemes" defendant engaged in involving the airline industry.

G.S. 8C-1, Rule 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 hold that the agent's testimony was properly admitted to show defendant's intent to deceive. The testimony also indicated that defendant was very familiar with the purchase and use of flight coupons and constituted evidence of the absence of any mistake on defendant's part in tendering the flight coupon. The

trial court did not err in admitting the agent's testimony under Rule 404(b).

New trial.

Judges BECTON and PARKER concur.

DENNIS P. TURLINGTON v. ROSA D. McLEOD, GRACE MATTHEWS, FRED McLEOD, LOUISE McLEOD, JOHN SEYMOUR, KAREN SEYMOUR, RONNIE LEE, JUNE ELLEN LEE, MAYLON AVERY, FLOSSIE AVERY, MIKE JOHNSON, KATHY JOHNSON, HARRY MATTHEWS, DEBBIE MATTHEWS, MACKIE WHITE, BETTY BYRD WHITE, CRAIG MATTHEWS AND DENISE CURRIN MATTHEWS

No. 8711SC175

(Filed 5 April 1988)

1. **Highways and Cartways § 12.1— cartway—evidence of lack of access—sufficient**

Petitioner's evidence in a cartway proceeding was sufficient to show lack of access where petitioner's evidence tended to show that petitioner now had no permission from any adjoining landowner to go over his or her land to get to a public road; that the various permissions given to him earlier were all withdrawn; and that one respondent had even barricaded with barbed wire a way petitioner formerly used. N.C.G.S. § 136-69.

2. **Highways and Cartways § 12.1— cartway proceeding—purpose for which land used—not sufficient**

Petitioner's evidence in a cartway proceeding was not sufficient to establish that he was using his land for a purpose which would qualify him for a cartway where the only possible qualifying use was sawing trees into firewood and selling it. Trees suitable only for firewood are not "standing timber" within the meaning of N.C.G.S. § 136-69.

APPEAL by respondent Rosa D. McLeod from *Stephens, Judge.* Judgment entered 17 October 1986 in Superior Court, HARNETT County. Heard in the Court of Appeals 23 September 1987.

Stewart and Hayes, by Gerald W. Hayes, Jr. and Vernon K. Stewart, for petitioner appellee.

Bryan, Jones, Johnson & Snow, by James M. Johnson, for respondent appellant.

PHILLIPS, Judge.

Petitioner, who owns a 21-acre tract of Harnett County land that is surrounded by lands belonging to the various respondents, brought this special proceeding to obtain a cartway from his land to a public road. An earlier proceeding for the same purpose, tried to the judge and affirmed by this Court, *Turlington v. McLeod*, 79 N.C. App. 299, 339 S.E. 2d 44, *disc. rev. denied*, 316 N.C. 557, 344 S.E. 2d 18 (1986), ended in an adjudication that plaintiff was not then entitled to a cartway under the provisions of G.S. 136-69 because (1) he was not using or preparing to use the land to accomplish any purpose stated in the statute, and (2) he had permission from some adjoining owners to cross their land and thus did not need a cartway. In the trial of this proceeding, however, the jury found that petitioner is entitled to a private way over the lands of one or more of the respondents and judgment was entered on the verdict.

[1] Rosa D. McLeod, the only respondent to perfect an appeal, first contends that contrary to the verdict petitioner is not entitled to a cartway under the provisions of G.S. 136-69 because the evidence does not show, as that statute requires, that petitioner's land is without adequate access to a public road. This contention has no merit and we overrule it. Contrary to appellant's argument, most of which is devoted to times covered by the earlier proceeding, petitioner's evidence at this trial clearly supports the allegation that his land is *now* without adequate access to a public road. When viewed in its most favorable light for the petitioner his evidence tends to show that petitioner now has no permission from any adjoining landowner to go over his or her land to get to a public road; that the various permissions given to him earlier were all withdrawn; and that one respondent had even barricaded with barbed wire a way that he formerly used.

[2] But respondent's other contention, that the evidence presented at trial was insufficient to establish that petitioner is using his land for a purpose that entitles him to a cartway, is well taken. The evidence on this point is without significant conflict, and tends to show that the only use petitioner is making of his land that could possibly qualify him to obtain a statutory cartway is sawing trees up into firewood and selling it. This raises a question of law that apparently has not been ruled upon by our Courts

heretofore. For an owner of landlocked land, who has no adequate access to a public road, is qualified to petition for a cartway under G.S. 136-69 only if he is engaged or is preparing to engage—

> in the cultivation of any land or the cutting and removing of *any* standing timber, or the working of any quarries, mines, or minerals, or the operating of any industrial or manufacturing plants, or public or private cemetery, . . . (Emphasis supplied).

The statute says nothing about cutting trees up into firewood and sifted down, petitioner's evidence is to the following effect: Though there are some standing trees on the 21-acre tract of land, all the marketable timber was removed from the land some years earlier; the trees now there—oak and hickory trees, some of "pretty good size"—are suitable only for firewood; and petitioner cuts the trees, saws them up, and sells firewood "as people need it." No evidence was presented that he has used the trees, or intends to use them, for any purpose other than firewood, and petitioner does not argue otherwise.

Construing the statute strictly, as we must, since it infringes upon the common law rights of adjoining property owners, *Candler v. Sluder*, 259 N.C. 62, 130 S.E. 2d 1 (1963), we are of the opinion that trees suitable only for firewood are not "standing timber" within the meaning of the statute, and the judgment in petitioner's favor is vacated. The following comment from 54 C.J.S. *Logs and Logging* Sec. 1(b) at 672 (1948) is pertinent:

> The word "timber" has an enlarged or restricted sense, according to the connection in which it is employed. It has been held that "timber" may refer to standing trees suitable for the manufacture of lumber to be used for building and allied purposes, but it has also been held that timber is distinguishable from trees in that the former term applies only to the wood, or the particular form which the tree assumes when no longer growing or standing in the ground. The term "timber" has also been applied to the stems or trunks of trees cut and shaped for use in the erection of buildings or other structures and not manufactured into lumber within the ordinary meaning of the word "lumber," or to that sort of wood which is proper for buildings, or for tools, utensils, furniture, carriages, fences, ships, and the like.

Black's Law Dictionary 1653 (rev. 4th ed. 1968) defines the word timber as:

> Wood felled for building or other such like use. In a legal sense it generally means (in England) oak, ash, and elm, but in some parts of England, and generally in America, it is used in a wider sense, which is recognized by the law.
>
> The term "timber," as used in commerce, refers generally only to large sticks of wood, squared or capable of being squared for building houses or vessels; and certain trees only having been formerly used for such purposes, namely, the oak, the ash, and the elm, they alone were recognized as timber trees. But the numerous uses to which wood has come to be applied, and the general employment of all kinds of trees for some valuable purpose, has wrought a change in the general acceptation of terms in connection therewith, and we find that Webster defines "timber" to be "that sort of wood which is proper for buildings or for tools, utensils, furniture, carriages, fences, ships, and the like." This would include all sorts of wood from which any useful articles may be made, or which may be used to advantage in any class of manufacture or construction. (Citations omitted.)

And in *People v. Bolling*, 140 Mich. App. 606, 612-13, 364 N.W. 2d 759, 763 (1985), the Michigan Court of Appeals said "[i]n a contract for the purchase of timber, the purchaser acquires no title to trees not suitable for any purpose but for firewood."

Our holding therefore is that the "cutting and removing of any standing timber" as used in G.S. 136-69 means cutting and removing standing trees that are suitable for constructing buildings or other objects out of; it does not mean cutting and removing trees that are suitable only for firewood.

Vacated.

Judges COZORT and GREENE concur.

ELSIE PORTER v. MID-STATE OIL COMPANY

No. 8713DC1026

(Filed 5 April 1988)

Negligence §§ 30.1, 31— injury while pumping gas—no knowledge of defect in pump hose—res ipsa loquitur inapplicable

The trial court properly directed verdict for defendant in plaintiff's action to recover for personal injuries allegedly sustained by her when she was putting gas in her car at defendant's self-service gas station, since plaintiff's evidence tended to show the existence of an unsafe condition in the form of a hole or other defect in the pump hose, but there was no evidence tending to show that defendant knew or should have known of the alleged defect in the hose; furthermore, the doctrine of *res ipsa loquitur* did not apply where the pump, which was being operated by plaintiff at the time of her injury, was not under the exclusive control of defendant at that time.

APPEAL by plaintiff from *Hooks (D. Jack, Jr.), Judge.* Order entered 4 June 1987 in District Court, BRUNSWICK County. Heard in the Court of Appeals 9 March 1988.

Plaintiff brought this action seeking to recover for personal injuries she suffered when she was putting gas in her car at defendant's self-service gas station. Plaintiff alleged that her injuries resulted when the hose portion of defendant's gas pump ruptured and squirted gasoline on her body, causing chemical burns. The trial court granted defendant's motion for a directed verdict at the close of plaintiff's evidence. Plaintiff appeals.

O. K. Pridgen, II, for plaintiff-appellant.

Marshall, Williams, Gorham and Brawley, by William Robert Cherry, Jr., for defendant-appellee.

PARKER, Judge.

Plaintiff contends that the trial court erred in granting defendant's motion for a directed verdict. She argues that her evidence was sufficient to go to the jury on the issue of defendant's negligence. We disagree and affirm the trial court's order.

In considering defendant's motion for a directed verdict, the court must view the evidence in the light most favorable to the plaintiff and give the plaintiff the benefit of every reasonable inference that can be drawn from the evidence. *Husketh v. Conven-*

ient Systems, 295 N.C. 459, 461, 245 S.E. 2d 507, 508-09 (1978). The motion can be granted only if the evidence is insufficient as a matter of law to support a verdict for the plaintiff. *Id.*

Plaintiff in this case testified that she pulled her car into defendant's station and picked up a pump nozzle in order to put gas in her car. While she was holding the nozzle, but before she pressed the trigger mechanism, she felt something cold on her body. When she looked to see what it was, she saw gas "going everywhere." She then dropped the nozzle and ran away. Plaintiff further testified that the gas came out of a hole in the hose about four feet below the nozzle, but she did not know how large the hole was.

Plaintiff presented one other witness who observed the incident. An attendant at another station across the street saw plaintiff at the pump. The attendant testified that she saw gas spraying as high as the top of the pump for fifteen to thirty seconds, but she could not see where the gas was coming from. She also testified that the gas continued to spray after plaintiff dropped the nozzle.

Because plaintiff was on defendant's premises as a customer, she was an invitee. *Little v. Oil Corp.*, 249 N.C. 773, 776, 107 S.E. 2d 729, 730 (1959). Therefore, defendant owed plaintiff a duty to maintain the premises in a reasonably safe condition and to warn of hidden dangers or unsafe conditions which were known or discoverable through reasonable inspection. *Id.*

Viewed in the light most favorable to plaintiff, her evidence shows the existence of an unsafe condition in the form of a hole or other defect in the pump hose. The mere existence of an unsafe condition on the premises is not, however, sufficient to establish actionable negligence on the part of defendant. Plaintiff must show that defendant either knew of the unsafe condition or should have discovered it through reasonable inspection. *Revis v. Orr*, 234 N.C. 158, 66 S.E. 2d 652, 28 A.L.R. 2d 609 (1951); *see also Graves v. Order of Elks*, 268 N.C. 356, 150 S.E. 2d 522 (1966).

In the present case, plaintiff has not presented any evidence tending to show that defendant knew or should have known of the alleged defect in the hose. Plaintiff herself testified that she did not notice anything wrong with the hose when she picked up

the nozzle. Although she testified that there was a hole in the hose, she could not describe the hole with any particularity. She presented no evidence to show the actual condition of the hose.

Under these circumstances, there is no rational basis for a jury to determine whether or for how long the hole existed before plaintiff used the pump, whether the hose ruptured because it was worn or defective, whether the hose was accidentally or intentionally damaged by another customer, whether or when the hose was inspected, or whether the defect would have been discoverable if defendant had inspected the hose. Where, as here, a finding of actionable negligence depends upon speculation, the question will not be submitted to the jury. *See Colclough v. A. & P. Tea Co.*, 2 N.C. App. 504, 163 S.E. 2d 418 (1968).

Plaintiff argues, however, that the doctrine of *res ipsa loquitur* applies in this case. If plaintiff's evidence warrants the application of the doctrine, then it is sufficient to carry the case to the jury. *Young v. Anchor Co.*, 239 N.C. 288, 291, 79 S.E. 2d 785, 788 (1954). The doctrine permits the jury to infer negligence from the mere occurrence of the accident. *Id.* at 290, 79 S.E. 2d at 787.

The doctrine of *res ipsa loquitur* will not apply when more than one inference can be drawn as to whose negligence caused the injury or when the instrumentality causing the injury is not under the exclusive management or control of the defendant. *Kekelis v. Machine Works*, 273 N.C. 439, 443, 160 S.E. 2d 320, 323 (1968). In the present case, plaintiff was operating the pump at the time of her injury. Thus, the instrumentality causing the injury was not under the exclusive control of the defendant at that time.

We recognize that, as a practical matter, defendant had exclusive control of the pump for purposes of maintenance and inspection, and there may be cases where the doctrine of *res ipsa loquitur* will apply despite the fact that a rigid application of the "exclusive control" test would preclude its application. *See Kekelis v. Machine Works, supra.* The doctrine will apply in such cases, however, only if the plaintiff offers additional evidence which negates possible causes of the injury other than defendant's negligence. As stated in *Kekelis v. Machine Works*, 273 N.C. at 444, 160 S.E. 2d at 323:

The rule of *res ipsa loquitur* never applies when the facts of the occurrence, although indicating negligence on the part of some person, do not point to the defendant as the *only* probable tortfeasor. In such a case, unless *additional evidence*, which eliminates negligence on the part of all others who have had control of the instrument causing the plaintiff's injury, is introduced, the court must nonsuit the case.

Since the actual cause of the alleged defect in defendant's hose is not addressed by plaintiff's evidence, it remains a matter of sheer speculation. Defendant's station is open to the public and the customers pump their own gas; there are, therefore, several possible causes of the defect other than defendant's negligence. Plaintiff has failed to offer evidence to negate these possibilities. Thus, the doctrine of *res ipsa loquitur* does not apply in this case.

Affirmed.

Judges ARNOLD and BECTON concur.

MR. CARL MATTHEWS v. JOHNSON PUBLISHING CO., INC.

No. 8721SC590

(Filed 5 April 1988)

Libel and Slander § 14; Negligence § 22; Trespass § 2— sit-in movement—failure to include defendant's contributions in magazine—complaint insufficient to state claim

Plaintiff's complaint alleging that defendant publishing company intentionally and negligently failed to include anything about plaintiff's contributions to the sit-in movement of the 1960s in any issues of Ebony magazine published since February 1960 or in its November 1985 Fortieth Anniversary Issue was properly dismissed for failure to state a claim for relief since (1) any claims based on defendant's acts which occurred as early as 1960 are time barred, and (2) plaintiff's allegations relating to the Fortieth Anniversary Issue were insufficient to state claims for intentional infliction of emotional distress, product liability, libel or conspiracy.

APPEAL by plaintiff from *Seay, Thomas W., Judge*. Judgment entered 10 June 1986. Heard in the Court of Appeals 3 December 1987.

Dr. G. Ray Motsinger, for plaintiff-appellant.

West, Wood, James & Banks, by Phillip S. Banks, III, and Johnson, Toal & Batiste, by I. S. Leevy Johnson, for defendant-appellee.

JOHNSON, Judge.

Plaintiff commenced this civil action on 10 February 1986 alleging that defendant corporation intentionally and negligently failed to include plaintiff and his contributions to the sit-in movement of the 1960's in any of the issues of its publication, Ebony Magazine, published since February 1960, nor in its November 1985 Fortieth Anniversary Issue. The complaint further alleged that defendant was a member of a conspiracy which included the National Association for the Advancement of Colored People (NAACP), and the mayors and Board of Aldermen of Winston-Salem, North Carolina, serving between 25 May 1960 and February 1986, which conspired "to suppress [p]laintiff's contributions and successes and to otherwise prevent him from receiving due recognition" for the successes of the sit-in movement of the 1960's. Plaintiff further alleged that defendant's "negligent and conspiratorial conduct" caused him severe emotional distress, humiliation, depression and physical harm, as well as a loss of earnings and other compensations.

In response to the complaint, defendant filed a motion to dismiss on 18 April 1986, pursuant to G.S. 1A-1, Rule 12(b)(6), contending that plaintiff had failed to state a claim upon which relief could be granted. The matter came on for hearing on 2 June 1986 and defendant's motion to dismiss was allowed. From the order dismissing this action with prejudice plaintiff appeals.

By this appeal plaintiff has asked this Court to consider whether the trial court erred in dismissing the complaint pursuant to G.S. 1A-1, Rule 12(b)(6).

It is a familiar rule of law that when considering a 12(b)(6) motion to dismiss, the court must treat the allegations of the complaint as true, and determine whether they are sufficient to establish a claim under some recognized legal theory. *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 355 S.E. 2d 838 (1987). The complaint must provide sufficient notice of the circumstances under

which the claim arises and make allegations which adequately satisfy the substantive elements of a valid claim. *Fox v. Wilson*, 85 N.C. App. 292, 354 S.E. 2d 737 (1987).

Applying these principles to the case *sub judice*, we are faced with no other possible alternative except to affirm the trial court's order dismissing the action.

We note at the outset that plaintiff is attempting to recover for acts of defendant which occurred as early as 1960. It is clear to us that any claims plaintiff has brought forward for libel, intentional infliction of emotional distress, conspiracy, or product liability based upon these actions are time-barred. *See* G.S. 1-46-56. The remainder of the discussion, however, is limited to plaintiff's claims which arose from having been omitted from the February 1985 Fortieth Anniversary Issue of defendant's magazine.

Plaintiff bases his entire claim upon the assertion that defendant failed to publish anything about his contribution to the sit-in movement in its publication, Ebony Magazine. He particularly objects to not having been included in the November 1985, Fortieth Anniversary Issue. He alleges that this action, or rather inaction, rose to the level of establishing an actionable claim grounded in negligence, and proceeds under the theories of intentional infliction of emotional distress, product liability, and also alludes to libel. His remaining theory of the case is that defendant was engaged in a conspiracy intended to deprive him of public recognition. Plaintiff has failed to present any facts which would allow him to proceed further under those or any other recognized legal theory.

In order to establish a cause of action for intentional infliction of emotional distress, plaintiff must allege that defendant committed: (1) an extreme or outrageous act, (2) which was intended to cause and resulted in, (3) severe emotional disturbance in another person. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981). We have before us no such act.

It is also quite clear to us that defendant's publication, Ebony Magazine, does not constitute the type of product contemplated by G.S. 99B, otherwise known as the North Carolina Product Liability Act. G.S. 99B-1(3) specifically provides that a " '[p]roduct

liability action' includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design formulation, . . . or labeling of any product." Although novel, plaintiff's theory is untenable.

The libel theory, which was never clearly specified as such, similarly fails due to the absence of any writing or picture published by the defendant which referred to the plaintiff in any manner whatsoever. The establishment of any claim for libel must necessarily begin with a "publication by writing, printing, signs or pictures . . ." *Renwick v. The News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 317, 312 S.E. 2d 405, 409 (1984); *see also* 53 C.J.S. *Libel and Slander; Injurious Falsehood* secs. 1-9 (1987). It is undisputed that defendant published no words or pictures relating to the plaintiff. In fact, the absence of any reference is precisely what the plaintiff has emphasized.

Lastly, plaintiff failed to allege any specific facts which when considered could establish a cause of action for conspiracy. We agree with defendant that at most plaintiff merely showed that the alleged members of the conspiracy "engaged in *unconscious and unknowing parallel conduct* [in] not participating in activity to cause [plaintiff] to receive some form of public recognition." We simply have no facts before us which would even suggest common purpose or concerted activity. Therefore, the trial court's order is

Affirmed.

Judges ARNOLD and ORR concur.

STATE OF NORTH CAROLINA v. STEVEN McCRIMMON

No. 8715SC839

(Filed 5 April 1988)

Rape § 4.3— prior sexual behavior of prosecutrix—evidence inadmissible

There was no merit to defendant's contention in a rape case that because a witness testified that the victim was a "nice person" and a detective stated that the witness had voiced a similar opinion during a recorded statement

given to police, certain portions of that recorded statement concerning the victim's prior sexual history should have been admitted into evidence, since the statement in question did not fit into any of the four categories of admissible evidence of prior sexual behavior described in Rule 412(b) of the N.C. Rules of Evidence.

APPEAL by defendant from *Hobgood, Judge*. Judgment entered 17 November 1986 in Superior Court, ORANGE County. Heard in the Court of Appeals 9 February 1988.

At approximately two p.m. on 7 May 1986, Patricia Murray went to Rigsbee's Store in Carrboro, North Carolina and shared two bottles of wine with a few other people, including defendant. While there, she had a disagreement with another woman and a physical fight occurred between the two.

At six p.m., Murray asked defendant, Richard Jones and Henry McCloud for a ride to her house and they agreed. Before leaving, defendant went into Rigsbee's Store and purchased a fifth of Wild Irish Rose wine. Instead of going directly to Patricia Murray's house, Jones drove his car past the street where Ms. Murray lived and into a wooded area across from a school.

After the wine had been consumed by all of the parties in the car, Jones and McCrimmon had sexual intercourse with Patricia Murray. There was conflicting evidence at trial as to exactly what happened at that point. Murray testified that defendant crawled on top of her in the back seat of the car and despite her efforts to stop him, he hit her repeatedly in the face and had intercourse with her. Murray stated that defendant then told Jones that it was his turn and Jones got into the back seat, hit her and had intercourse with her. McCloud testified that the sexual encounters took place on the ground beside the car and that defendant held Murray's arms while Jones had intercourse with her first and that defendant had intercourse with Murray second.

Murray was then taken home and McCloud claimed that when they arrived, defendant got out of the car and was hugged and kissed on the side of the face by Murray. Murray then went into her apartment and told her roommate that defendant had beaten and raped her. She then called the police.

Murray was taken to the hospital and thoroughly examined. Murray had a cut on her thumb, a broken blood vessel in one eye,

swollen lips, cuts on the inside of her upper lip and an abrasion on her back and on her stomach. There were no signs of redness, bruising or lacerations in the genital area.

At trial, defendant was found guilty of second degree rape. On the verdict form, the jury wrote "leniency" and told the judge that they were trying to ask him to be lenient when sentencing defendant. From the judgment of the trial court sentencing defendant to three years in prison, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James Peeler Smith, for the State.

Glover and Petersen, by James R. Glover, for defendant appellant.

ARNOLD, Judge.

Defendant contends that he was "deprived of his right to confrontation and to a fair trial by the exclusion of evidence offered to impeach and rebut the evidence offered by the State as to the alleged victim's general good character." The thrust of defendant's contention is that because Henry McCloud stated at trial that he thought the victim was a "nice person" and detective Arthur Summey stated that McCloud had voiced a similar opinion during a recorded statement given to the police on 14 May 1986, certain portions of that recorded statement concerning the victim's prior sexual history should have been admitted into evidence. We disagree.

Rule 412(b) of the North Carolina Rules of Evidence states "[n]otwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution" unless the behavior falls within certain exceptions listed in the rule. Defendant, in his brief, recognizes that the portion of McCloud's statement in question "does not fit neatly into any of the four categories of admissible evidence of prior sexual behavior described in Rule 412(b)." However, defendant argues that these exceptions are not exclusive and cites the following: "the statute was not intended to act as a barricade against evidence which is used to prove issues common to all trials." *State v. Younger*, 306 N.C. 692, 697, 295 S.E. 2d 453, 456 (1982). Defendant's reliance on the *Younger* case and on *State v. Johnson*, 66 N.C. App. 444, 311

S.E. 2d 50, *disc. rev. denied*, 310 N.C. 747, 315 S.E. 2d 707 (1984), is misplaced.

The *Younger* case allowed the defendant to impeach the credibility of the prosecutrix by cross-examining her about a prior inconsistent statement. At trial she testified that she had sex on the night of the alleged rape with the defendant's roommate but she told the examining physician only hours after the alleged rape that she had last had sex with her boyfriend one month earlier. *State v. Younger*, 306 N.C. 692, 295 S.E. 2d 453 (1982). The *Johnson* case allowed the defendant "to introduce statements concerning the prosecuting witness' prior rape, which statements were allegedly made by the prosecuting witness both to defendant and to the examining physician, and statements concerning the fact that at the preliminary hearing she denied making any such statements." *State v. Johnson* at 445, 311 S.E. 2d at 51, *disc. rev. denied*, 310 N.C. 747, 315 S.E. 2d 707 (1984).

Neither the *Younger* case nor the *Johnson* case is applicable here. The present case does not concern such inconsistent statements by the prosecutrix about her sexual activity.

Defendant also argues that Rule 106 of the North Carolina Rules of Evidence allows him to introduce McCloud's statement into evidence. Rule 106 states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

We first note that the State never introduced a part of McCloud's statement into evidence at trial. Second, we reemphasize the language of Rule 412(b) which states that "*[n]otwithstanding any other provision of law*, the sexual behavior of the complainant is irrelevant" unless it falls within the four exceptions listed within the rule. (Emphasis added.) The statement that defendant attempted to introduce in the case *sub judice* is the precise type of evidence that Rule 412 was intended to exclude.

No error.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. GRAY ALEXANDER EDWARDS, JR.

No. 8714SC935

(Filed 5 April 1988)

Constitutional Law § 28— inconsistent State's testimony—no knowledge of falsity by prosecutor—no deprivation of due process

Defendant was not denied due process in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into an occupied vehicle where the defendant alleged that the prosecution failed to correct perjured testimony. Inconsistencies and conflicting testimony in the State's evidence were brought out by the prosecutor, and there was no indication in the record of any knowledge of falsity by the prosecutor.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 30 April 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 March 1988.

This is a criminal action wherein defendant was charged in proper bills of indictment with two counts of assault with a deadly weapon with intent to kill inflicting serious injury in violation of G.S. 14-32(a) and with two counts of discharging a firearm into an occupied vehicle in violation of G.S. 14-34.1.

At trial, evidence was presented which tends to show that on 21 August 1986 Keith and Leslie Karlsson were returning to their home in Raleigh on Interstate 85 when a beige Cutlass began pursuing them. The car followed them onto Highway 70 flashing its lights, blowing its horn and running red lights in order to continue the pursuit. The Karlssons then heard a gunshot; Keith Karlsson had been shot in the back and Leslie Karlsson had been shot in the hand.

The Karlssons saw the pursuing car pass them, and Mr. Karlsson pulled their car to the side of the road. A few minutes later two men in a pickup truck stopped to help the Karlssons, saying they had seen everything including the car's license plate number and the two men in the car.

Mrs. Karlsson and the two men, Stone Ferris and William Allen Smith, testified that defendant was the passenger who had been holding a gun in the Cutlass. Immediately after the incident, the Karlssons had been unable to describe the occupants of the car. Ferris and Smith had been shown photographs from which

they had chosen the photograph of defendant as that of the passenger in the car.

The jury found defendant guilty on two counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of discharging a firearm into an occupied vehicle. From a judgment imposing prison terms of 20 years for each count of assault with a deadly weapon and 10 years for discharging a firearm into an occupied vehicle, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Victor H. E. Morgan, Jr., for the State.

Arthur Vann for defendant, appellant.

HEDRICK, Chief Judge.

Defendant's only argument on appeal is that he "was denied due process by the prosecutor's failure to correct false or perjurious testimony of the State's witnesses." Defendant contends there were two incidents of perjured testimony in the trial and that the prosecutor had a duty to correct this testimony.

Leslie Karlsson testified that she got a full facial view of the passenger in the car and believed defendant to be the passenger. Defendant argues this was contrary to her statements after the shooting that she could not describe the passenger. He also argues the testimony was inherently incredible.

Defendant further argues Smith and Ferris testified falsely that they picked defendant's photograph out of three photographs and that they picked the photographs out two months after the incident. The State offered the testimony of Detective Buchanan to the effect that both Smith and Ferris had been shown only one photograph at a time and that this was done only a week after the incident.

Defendant made no specific objection, motion to strike or motion for a mistrial with respect to any of the testimony in question. Although his brief raises an issue of an impermissibly suggestive identification procedure relating to the photographs shown to Ferris and Smith, there was no motion to suppress identification testimony prior to trial as required by G.S. 15A-975. Therefore, the only question before us is whether defendant was

denied due process because the prosecutor did not correct his witnesses' testimony. We hold under the circumstances of this case defendant was not denied constitutional due process.

Defendant in his brief relies on a number of cases which hold that prosecutors do have certain duties concerning perjured testimony. In *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed. 2d 9 (1957), the United States Supreme Court held that a prosecutor should correct substantive testimony which he knows to be false. In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959), the Court broadened its ruling by holding that perjury relating to the credibility of a witness should be corrected if the prosecutor knew of its falsity. Finally, the Court, in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972), held that if other attorneys in the prosecutor's office knew of the falsity of testimony it did not matter that the prosecutor did not personally know of the falsity. In each of these cases, testimony at trial was later discovered to be false and the prosecutor knew or should have known this. No conflicting testimony was presented at the trials.

In the present case, there are inconsistencies due to Leslie Karlsson's testimony. These inconsistencies were revealed at trial by the prosecutor himself when he questioned a police detective who testified about the Karlssons' previous inability to describe the passenger of the car. Inconsistencies and contradictions in the State's evidence are a matter for the jury to consider and resolve. *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334, *cert. denied*, 377 U.S. 978, 84 S.Ct. 1884, 12 L.Ed. 2d 747 (1964), *overruled on other grounds, News and Observer v. State*, 312 N.C. 276, 322 S.E. 2d 133 (1984). Further, the record does not show that the prosecutor knew Leslie Karlsson was lying, if in fact she was.

As for the testimony of Smith and Ferris, it was again the prosecutor himself who made the inconsistencies evident by questioning the police detective. There is no indication in the record that the prosecutor knew the testimony to be false. The inconsistencies are again for the jury to consider and resolve, and there is no prohibition against a prosecutor placing inconsistencies before a jury. Unlike the cases relied on by defendant, the jury in this case was given an opportunity to hear conflicting testimony concerning certain details. Since there is no indication in the record

of any knowledge of falsity or reason to know on the part of the prosecutor, defendant's argument fails.

We hold defendant had a fair trial free from prejudicial error.

No error.

Judges PHILLIPS and EAGLES concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. D. K. BRIDGES, SR./SURETY, AND CHARLES HENRY HAMILTON, DEFENDANTS

STATE OF NORTH CAROLINA, PLAINTIFF v. D. K. BRIDGES, SR./SURETY, AND ROBERT MASON KIMBEL, DEFENDANTS

STATE OF NORTH CAROLINA, PLAINTIFF v. D. K. BRIDGES, SR./SURETY, AND STANLEY W. ACREY, DEFENDANTS

STATE OF NORTH CAROLINA, PLAINTIFF v. D. K. BRIDGES, SR./SURETY, AND BOBBY JEAN ENGLISH, DEFENDANTS

STATE OF NORTH CAROLINA, PLAINTIFF v. W. K. MOSER, III/SURETY, AND TIMOTHY PAUL KAVANAUGH, DEFENDANTS

STATE OF NORTH CAROLINA, PLAINTIFF v. W. K. MOSER, III/SURETY, AND ROBERT LEE WOOD, DEFENDANTS

STATE OF NORTH CAROLINA, PLAINTIFF v. W. K. MOSER, III/SURETY, AND CHARLES CORY COLLIER, DEFENDANTS

No. 875DC1027

(Filed 5 April 1988)

Arrest and Bail § 11.4— defendants as bail bond runners—defendants not liable as sureties on appearance bonds

The trial court erred in holding defendants liable as sureties on several appearance bonds where defendants executed the bonds, in compliance with all of the relevant statutes and regulations, as bail bond runners on behalf of a named bail bondsman, and the fact that the defendants signed only their own names on the bonds as sureties did not make them individually liable for the

bonds, since defendants denoted their agency by affixing the bail bondsman's license certificates to the bonds, and, when the bonds in question were signed, it was common for runners to sign only their own names when executing bonds on behalf of bondsmen. N.C.G.S. § 85C-1(9).

APPEAL by defendants, D. K. Bridges, Sr. and W. K. Moser, III, from *Charles E. Rice, Judge.* Order entered 10 August 1987 in District Court, NEW HANOVER County. Heard in the Court of Appeals 9 March 1988.

Hogue, Hill, Jones, Nash & Lynch by William L. Hill, II and New Hanover County District Attorney, Jerry L. Spivey for the State and for New Hanover County Board of Education, plaintiff-appellees.

Zimmer and Zimmer by Jeffrey L. Zimmer and John L. Coble for defendant-appellants.

BECTON, Judge.

Defendants D. K. Bridges, Sr. and W. K. Moser, III were ordered to forfeit several appearance bonds they executed in similar fashion in New Hanover County at various times between January 1986 and June 1987. Defendants filed motions for "remission of judgment" in District Court, maintaining that they signed the bonds on behalf of James C. Rideoutt, Jr. pursuant to a special power of attorney which he executed in their favor. The motions were denied. Defendants appeal. We reverse.

N.C. Gen. Stat. Sec. 85C-1(9) defines a bail bond runner as follows:

> Runner shall mean a person employed by a bail bondsman for the purpose of assisting the bail bondsman in presenting the defendant in court when required, or to assist in apprehension and surrender of defendant to the court, or keeping defendant under necessary surveillance, *or to execute bonds on behalf of the licensed bondsman when the power of attorney has been duly recorded.* (Emphasis added.)

A "surety bondsman" is defined in subsection 85C-1(11) as

> . . . any person who is approved by and licensed by the Commissioner as an insurance agent pursuant to the provisions of Chapter 58 of the General Statutes of North Carolina and ap-

> pointed by an insurer by power of attorney to execute or countersign bail bonds for the insurer in connection with judicial proceedings and receives or is promised money or other things of value therefor.

During the time period in which the subject bonds were executed, defendants were licensed as bail bond runners only. Indeed, Chapter 85C specifically delineates the respective responsibilities of bail bondsmen and bail bond runners, and it provides that bail bondsmen alone are liable as sureties on bonds. Defendants were authorized to execute bonds by power of attorney for James C. Rideoutt, Jr. who was a licensed bail bondsman at the time. The powers of attorney were filed with the Commissioner of Insurance and the Clerk of Superior Court in New Hanover County as required by statute. Moreover, in compliance with North Carolina Insurance Regulations Section 13.0505, the certification seals of the bail bondsman, James C. Rideoutt, Jr., were affixed to each bond. Thus, defendants executed these bonds, in compliance with all of the relevant statutes and regulations, as bail bond runners on behalf of bail bondsman James C. Rideoutt, Jr.

The State, citing case authority concerning agency liability, argues that because defendants signed only their own names on the bonds as sureties, they are individually liable for the bonds. We disagree. We believe that defendants denoted their agency by affixing Rideoutt's license certificates to the bonds. Equally important, when the bonds in question were signed, it was common for runners to sign only their own names when executing bonds on behalf of bondsmen. Later, runners were informed by notice from the Clerk of Court that they must annotate the name of the bondsman for whom they executed the bond. We hold that under the foregoing circumstances it was clear that defendants executed the bonds on behalf of James C. Rideoutt, Jr., bail bondsman.

The denial of a motion for remission of forfeiture is a matter of judicial discretion in the trial judges and cannot be reviewed except for some error in a matter of law or legal inference. *State v. Hawkins*, 14 N.C. App. 129, 187 S.E. 2d 417 (1972). The trial judge committed legal error in holding defendants liable as sureties on the bonds. The judgment is therefore

Reversed.

Judges ARNOLD and PARKER concur.

PROVIDENT FINANCE COMPANY v. JAMES AND VERA LOCKLEAR

No. 8716DC391

(Filed 5 April 1988)

Courts § 14.2; Rules of Civil Procedure § 58— magistrate's small claim judgment— time of entry—belated notice of appeal

N.C.G.S. § 7A-224 does not control the manner of "entry" of a magistrate's judgment under N.C.G.S. § 1A-1, Rule 58 but merely requires that a magistrate's judgment in a small claim action be rendered in writing in order to be deemed a judgment of the district court entitled to recording and indexing as any other district court judgment. Therefore, a judgment was entered by the magistrate when he announced his judgment in open court and noted it in his minutes, not when he filed his written judgment four days later, and plaintiff's written notice of appeal filed more than ten days after the judgment was announced in open court was not timely. N.C.G.S. § 7A-228(a).

APPEAL by plaintiff from *Behan (Adelaide G.), Judge.* Judgment entered 12 December 1986 in District Court, SCOTLAND County. Heard in the Court of Appeals 27 October 1987.

Etheridge, Moser and Garner, P.A., by Terry R. Garner, for plaintiff-appellant.

Lumbee River Legal Services, Inc., by Janet H. Roach, for defendant-appellees.

GREENE, Judge.

The sole issue presented on appeal is whether plaintiff gave timely written notice of appeal to the district court from a magistrate's judgment in a small claims action. The magistrate announced his judgment in open court on 22 August 1986 and noted it in his minutes. He prepared his written judgment later the same day but did not file it until 26 August 1986. Plaintiff filed its written notice of appeal fourteen days after 22 August 1986. The District Court dismissed the appeal for trial *de novo* since plain-

tiff's notice was filed too late under N.C.G.S. Sec. 7A-228(a) (1986) which states in part:

> After final disposition before the magistrate, the sole remedy for an aggrieved party is appeal for trial *de novo* before a district court judge or a jury. Notice of appeal may be given orally in open court upon announcement or after entry of judgment. If not announced in open court, written notice of appeal must be filed in the office of the clerk of superior court within 10 days after entry of judgment.

Although plaintiff's written notice of appeal was filed fourteen days after the magistrate announced his judgment in open court, plaintiff nevertheless contends that notice was timely. Plaintiff first notes that N.C.G.S. Sec. 7A-224 (1986) states:

> Judgment in a small claim action is rendered in writing and signed by the magistrate. The judgment so rendered is a judgment of the district court, and is recorded and indexed as are judgments of the district and superior court generally. Entry is made as soon as practicable after rendition.

Plaintiff construes Section 7A-224 to mean that a magistrate can never "render" a small claims judgment until he reduces it to writing. As the magistrate here did not prepare his written judgment in open court, plaintiff contends that the judgment was therefore not "rendered" in open court. Under Rule 58, judgments rendered out of court are not deemed "entered" until the clerk mails copies of the written and filed judgment to all parties. N.C.G.S. Sec. 1A-1, Rule 58 (1987) (where judgment not rendered in open court, entry of judgment deemed complete when judgment filed and clerk mails notice to all parties). As the evidence is clear that the clerk has never mailed any copies of the magistrate's judgment to the parties, plaintiff concludes that the magistrate's judgment has never been properly entered and therefore its notice of appeal cannot be untimely under Section 7A-228.

While plaintiff's argument is logical, its premise is false: Section 7A-224 does not control the manner of "rendering" magistrate's judgments under Rule 58; Section 7A-224 merely requires the magistrate's judgment be rendered in writing in order to be deemed a judgment of the district court entitled to recording and indexing as any other district court judgment. *See* Sec. 7A-224

(judgment "so rendered" is judgment of district court). The statement that "entry is made as soon as practicable after rendition" merely refers to the entry of that judgment in the records and indexes of the general courts. *See Black's Law Dictionary* 478 (5th ed. 1979) ("entry" generally synonymous with "recording"). Thus, Section 7A-224 simply sets forth the requirements for filing a magistrate's judgment as a judgment of the district court.

Conversely, Rule 58 specifically controls the determination of the magistrate's "entry" of the small claims court judgment in the court minutes for purposes of appeal under Section 7A-228. Under Rule 58, the magistrate here "rendered" his judgment in open court since the evidence is clear that he announced the judgment in open court. *See Black's Law Dictionary* 1165 (5th ed. 1979) ("render judgment" means to "pronounce, state, declare or announce" judgment and is not synonymous with "entering, docketing or recording"). As the magistrate's judgment both dismissed plaintiff's action and awarded defendants a sum certain on their counterclaim, entry of the magistrate's judgment is deemed to occur at the time of rendition since Rule 58 provides that "the clerk . . . *shall* make a notation in his minutes of such . . . decision and such notation *shall* constitute entry of judgment . . . ." (emphasis added). Entry of the magistrate's judgment for purposes of Rule 58 was not less automatic simply because the magistrate himself (rather than a clerk) noted the judgment in the court minutes: Under Rule 17 of the General Rules of Practice of the Superior and District Courts, entries on court records may be made by the clerk, the deputy clerk, any person specifically directed by the presiding judge, or the judge himself. *See* N.C.G.S. Sec. 7A-34 (1986) (adopting such rules of court supplementing rules of civil procedure). Given the court's authority to note its own judgment in court records, we note the result under Rule 58 would be the same even if the judgment rendered in open court were not for a sum certain. *Cf.* Sec. 1A-1, Rule 58 (in "other cases where judgment is rendered in open court," clerk notes judgment in minutes "as the judge may direct . . .").

Accordingly, the record clearly reveals that the magistrate both rendered his judgment and entered it in his minutes on 22 August 1986. As entry under Rule 58 therefore occurred on 22 August 1986, the district court properly dismissed plaintiff's appeal since its written notice was not filed until 5 September 1986.

In passing, we note that Section 7A-228(a) provides for motions under Rule 60(b)(1) to set aside the magistrate's judgment; however, the district court's dismissal of this appeal must be

Affirmed.

Judges BECTON and PHILLIPS concur.

JOYCE H. OUTLAW, PLAINTIFF v. JARVIS C. OUTLAW, DEFENDANT

No. 871DC939

(Filed 5 April 1988)

Divorce and Alimony § 24.8— modification of child support—no showing of changed circumstances

Defendant failed to show a substantial change of circumstances which would warrant modification of a child support order.

APPEAL by defendant from *Beaman, Judge*. Order entered 27 April 1987 in District Court, DARE County. Heard in the Court of Appeals 2 March 1988.

This appeal arises as a result of the trial court's ruling on a motion in the cause to modify child support payments and alimony payments provided for pursuant to a Consent Judgment.

Aldridge, Seawell and Khoury, by Christopher L. Seawell and Joe G. Adams, Jr., for plaintiff-appellee.

Aycock, Spence and Graham, by W. Mark Spence, for defendant-appellant.

JOHNSON, Judge.

By Consent Judgment entered 8 October 1986, custody of the two minor children born to the parties was placed with the plaintiff and defendant was ordered to pay the sum of $200 per month as permanent alimony, to pay the sum of $850 per month as child support, to maintain medical insurance for the benefit of the minor children, to pay eighty percent (80%) of all medical ex-

penses of the minor children not covered by medical insurance, and to pay all reasonable dental expenses of the minor children.

On 2 April 1987, pursuant to Chapter 50 of the North Carolina General Statutes, defendant filed a motion in the cause seeking a change in custody and a reduction of child support and alimony payments. Defendant alleged in his motion that since the entry of the 8 October 1986 judgment, there had been a substantial change in circumstances warranting the requested modifications. Plaintiff filed a response denying that there had been any substantial change in circumstances.

At the hearing of defendant's motion, defendant withdrew his request seeking to modify the Consent Judgment with regard to child custody. Following a hearing on defendant's motion on 27 April 1987, Judge Beaman, after making findings of fact and conclusions of law, held that there was no showing of a substantial change of circumstances warranting a modification of the 8 October 1986 Consent Judgment. The court then denied defendant's motion. From the denial of his motion, defendant appeals.

We note at the outset that this appeal is subject to dismissal. Rule 12 of the N.C. Rules of App. P. provides that the record on appeal shall be filed no later than 150 days after giving notice of appeal. Rule 27(c)(2) provides that the 150 day limit may be extended on motion, but only by the appropriate appellate court.

Defendant gave notice of appeal from the 27 April 1987 order on 28 April 1987. The record on appeal was filed 7 October 1987, more than 150 days from the date defendant gave notice of appeal. The 150 day limit was never extended by this Court. Nevertheless, we have, in our discretion, decided to consider defendant's appeal.

Defendant brings forward five Assignments of Error upon which he bases his two arguments. First, defendant contends that the trial court erred in failing to make specific findings of fact as to all of the circumstances of the parties. Defendant argues that the findings the trial court failed to make would have supported a modification of the 8 October 1986 Consent Judgment. Secondly, defendant contends the trial court's findings of fact do not support its conclusions of law.

The party moving for the modification has the burden of showing that a material change in the circumstances has occurred. *See, e.g., Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E. 2d 116 (1979); *Shore v. Shore*, 15 N.C. App. 629, 190 S.E. 2d 666 (1972). While the trial court must make findings of fact to support its order, these findings are conclusive on appeal if supported by any competent evidence and a judgment or order supported by such findings will be affirmed. *See, e.g., Paschall v. Paschall*, 21 N.C. App. 120, 203 S.E. 2d 337 (1974).

In the present case the Order denying defendant's motion for modification contains the following findings:

> 2. By consent judgment entered October 8, 1986, the Plaintiff (sic) [Defendant] agreed to pay the sum of $200.00 per month as permanent alimony through the office of the Clerk of Superior Court of Dare County, as will appear in said order, $850.00 per month as child support for the two minor children born between the marriage between the parties, as will appear by said order of court, and certain other additional medical and dental expenses, as will appear in the record proper.
>
> 3. That the Defendant's gross wages in October, 1986 were approximately $2,000.00 per month, as evidenced by his prior affidavit of financial standing and testimony of the Defendant at a prior hearing in this matter; that the Defendant's current gross income at this time is $2,274.00 per month, as evidenced by his recently filed affidavit of financial standing and his testimony at this hearing; that the Defendant's income is somewhat more than it was in October, 1986.
>
> 4. That the monthly expenses of the Defendant in October, 1986 were $2,511.00, as evidenced by his testimony at prior hearings and his affidavit of financial standing; that the Defendant's monthly expenses at this time are $2,161.00, as evidenced by his current affidavit of financial standing and testimony at this hearing; that the Defendant's monthly expenses now are somewhat less than they were at the time of the entry of the prior order in October, 1986.
>
> 5. That the Defendant has purchased, since the date of entry of the last order, a new tractor in connection with his business for the sum of $7,000.00 cash.

6. The gross income for the Defendant for the year 1986 was $29,307.00 and said income for this year is similar to that of the Defendant for the year 1986.

7. The Court finds that the Defendant is working approximately 50 to 55 hours per week, which is the same amount of work now that he was working at the time of the entry of the consent order in October, 1986; that the Defendant is regularly working for several general contractors and has no anticipation of work falling off in the near future.

We have carefully reviewed the record in this case and find that the evidence fully supports these findings. Furthermore, we have determined from our review of the record that the evidence which defendant argues the trial court failed to make findings upon is not sufficient evidence of a material change of circumstances. This evidence shows that according to plaintiff's affidavit she has no income; that although defendant has personal knowledge that plaintiff has done some part-time work since the date of the Consent Judgment, defendant does not know if plaintiff is currently employed; that since October of 1986, plaintiff has received some temporary financial assistance from a Carl Winkler to help her with some of her expenses. Clearly this evidence fails to support a finding of a material change of circumstances and we find no error in the court's failing to make findings therefrom.

The findings of fact found by the trial court are supported by the evidence and are clearly more than ample to support the court's conclusion that defendant has failed to show a substantial change of circumstances that would warrant a modification of the 8 October 1986 Consent Judgment.

The Order denying defendant's motion for modification is

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

BAUCOM'S NURSERY COMPANY, A CORPORATION v. MECKLENBURG COUNTY, NORTH CAROLINA, CARLA E. DuPUY, CHAIRMAN AND MEMBER OF THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY, NORTH CAROLINA, AND T. RODNEY AUTREY, JOHN G. BLACKMON, GEORGE HIGGINS, PETER KEBER, BARBARA LOCKWOOD AND ROBERT L. WALTON, MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY, NORTH CAROLINA

No. 8726SC1046

(Filed 5 April 1988)

1. **Counties § 5.4— amendment to zoning ordinance—statute of limitations—summary judgment for defendants proper**

The trial court properly granted summary judgment for defendants in an action seeking to have an amendment to a county zoning ordinance declared invalid where the amended ordinance was adopted on 6 December 1982 and plaintiff filed this action on 18 May 1987. N.C.G.S. § 153A-348, the statute of limitations for actions involving the validity of a county zoning ordinance, requires actions to be brought within nine months of the adoption of the ordinance or amendment.

2. **Counties § 9— amendment to zoning ordinance—action for damages—governmental immunity**

The trial court properly granted summary judgment for defendants in an action for damages occurring as the result of the enactment and enforcement of an amendment to a county zoning ordinance where plaintiff failed to allege or present any evidence that the county has liability insurance. N.C.G.S. § 153A-435.

3. **Counties § 9— amendment of zoning ordinance—punitive damages—government immunity**

Summary judgment was properly granted for defendant on plaintiff's claim for punitive damages for the attempted destruction of plaintiff's business through enactment of a zoning amendment because there is no statute in North Carolina which specifically authorizes the recovery of punitive damages from a county.

APPEAL by plaintiff from *Snepp (Frank W.), Judge.* Judgment entered 13 August 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 10 March 1988.

Plaintiff brings this action against Mecklenburg County and the Board of County Commissioners seeking to have a 6 December 1982 amendment to the county zoning ordinance declared invalid. Plaintiff further seeks actual damages allegedly resulting from the enforcement of the amended zoning ordinance and also seeks to recover punitive damages for the willful and malicious

conduct of defendants in attempting to destroy its operations by enactment of the amendment.

Defendants in their answer assert the affirmative defenses of the statute of limitation and sovereign immunity. From the lower court's granting of summary judgment for defendants, plaintiff appeals.

Boyle, Alexander, Hord and Smith, by B. Irvin Boyle, for plaintiff-appellant.

Ruff, Bond, Cobb, Wade & McNair, by James O. Cobb, for defendants-appellees.

SMITH, Judge.

Plaintiff previously instituted an action against defendant County and its commissioners involving an interpretation of this same zoning ordinance as it was written before the 6 December 1982 amendment. *See Baucom's Nursery Co. v. Mecklenburg Co.*, 62 N.C. App. 396, 303 S.E. 2d 236 (1983). Before this Court filed its opinion in the prior case, the ordinance, which was then the subject of litigation, was amended. This amended ordinance is the subject of the present controversy.

Plaintiff assigns as error (1) the trial court's conclusion that there is no genuine issue of material fact, and (2) the trial court's conclusion that the defendants are entitled to summary judgment as a matter of law. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). Summary judgment is an appropriate means of raising the defense of a statute of limitation if the statute is properly before the court. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E. 2d 350 (1985); *Marshburn v. Associated Indemnity Corp.*, 84 N.C. App. 365, 353 S.E. 2d 123, *disc. rev. denied*, 319 N.C. 673, 356 S.E. 2d 779, *reconsideration dismissed*, 320 N.C. 170, 358 S.E. 2d 53 (1987). A defendant may also properly utilize summary judgment when a plaintiff has failed to allege a claim for relief. *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E. 2d 355 (1985); *Colonial Building Co. v. Justice*, 83 N.C. App. 643, 351 S.E. 2d 140 (1986), *disc. rev. denied*, 319 N.C. 402, 354 S.E. 2d 711 (1987).

[1] The undisputed facts in this cause conclusively show that the amended ordinance was adopted on 6 December 1982. Plaintiff filed this action in the Superior Court of Mecklenburg County on 18 May 1987. G.S. 153A-348, the statute of limitation for actions involving the invalidity of a county zoning ordinance, provides "[a] cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Part or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within nine months as provided in G.S. 1-54.1." This statute has not been previously applied by this Court; however, G.S. 160A-364.1 which is almost identical to G.S. 153A-348 except that it applies to municipalities, has been utilized by this Court to bar attacks on municipal zoning ordinances. *In re Appeal of CAMA Permit*, 82 N.C. App. 32, 345 S.E. 2d 699 (1986); *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). We hold that G.S. 153A-348 is an absolute bar to plaintiff's attack on the validity of the amended zoning ordinance. The period of time between the enactment of the amended zoning ordinance and the institution of this action was approximately four and one-half years. We note that the validity of G.S. 153A-348 is not at issue and therefore we do not address this question.

[2] We next address plaintiff's alleged causes of action for actual and punitive damages occurring as a result of the enactment and enforcement of the amended zoning ordinance. In this regard, the county, as a governmental agency, exercises the police power of the State and is thus exempt from liability under the common law rule of governmental immunity. *Orange County v. Heath*, 14 N.C. App. 44, 187 S.E. 2d 345 (1972); *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 178 S.E. 2d 18 (1970), *cert. denied*, 277 N.C. 727, 178 S.E. 2d 831 (1971). The individual county commissioners are likewise engaged in the performance of a governmental function in either enacting or enforcing the amended zoning ordinance. Thus, they also are protected from liability by the doctrine of governmental immunity. *Robinson v. Nash County*, 43 N.C. App. 33, 257 S.E. 2d 679 (1979). However, a county in this State may waive governmental immunity by purchasing liability insurance. G.S. 153A-435; *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E. 2d 2 (1988). Plaintiff, in the case at bar, fails to allege or present any

evidence that Mecklenburg County has liability insurance. Thus, summary judgment was appropriate.

[3] Further, with regard to the claim for punitive damages, it has been held that such damages may not be recovered from a governmental agency unless expressly provided for by statute. *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982). There is no statute in this State which specifically authorizes the recovery of punitive damages from a county. For the reasons herein stated, the trial court is affirmed.

Affirmed.

Judges EAGLES and COZORT concur.

GEORGE A. McFADYEN, II AND WIFE, CAREY O. McFADYEN v. JODY OLIVE AND OLIVE FARMS, INC.

No. 8711SC828

(Filed 5 April 1988)

1. **Easements § 5.3— easement by implication—path as sole means of access—necessity for easement—extinguishment of easement—jury question**

The trial court erred in entering summary judgment for plaintiffs on defendants' counterclaim for an easement by implication where genuine issues of fact existed as to whether a pathway across plaintiffs' land had been used as the sole access to a house on defendants' property, whether the claimed easement was necessary to the use and enjoyment of defendants' land, and whether the easement was extinguished by plaintiffs' adverse use of the property for a twenty-year period.

2. **Easements § 7.1— customs affecting land—no exclusion by hearsay rule**

Reputation as to customs affecting land is not excluded by the hearsay rule, and testimony about customs affecting lands is not limited to the lifetime of the witness.

APPEAL by defendants from *Allen (J. B., Jr.), Judge.* Judgment entered 8 June 1987 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 9 February 1988.

Plaintiff George A. McFadyen owns a 92-acre farm near Smithfield, North Carolina. McFadyen purchased the farm in 1971

from his father, who had purchased it in 1959. Defendant Olive Farms, Inc. owns a 41-acre tract adjoining McFadyen's property. In the 1960's or 1970's, defendant's tract was planted with pines. In order to plant the trees, defendants gained access to the property by going across lands owned by Wilton Pace. At that time, another means of access to the 41-acre tract was available to defendants through a 36-acre tract which was owned by Richard Olive, Jody Olive's father. Richard Olive later sold the 36-acre tract.

In addition to the timber, there was a house on the 42-acre Olive tract but it had not been occupied since the mid-1950's. McFadyen testified at his deposition that since 1966, no path through the McFadyen farm to the Olive tract existed.

In the spring of 1986, Jody Olive told McFadyen that he wanted to cross McFadyen's land in order to cut timber on the Olive tract. McFadyen requested that Olive notify him when he was going through and required that Olive "fix the road" when he finished. This was not satisfactory to Olive, and McFadyen had the sheriff's office serve Olive with a letter advising him that any entry other than by an agreed upon temporary route would be unauthorized.

On 13 October 1986, Jody Olive crossed McFadyen's land with trucks, trailers and logging equipment. McFadyen filed this action against Jody Olive alleging trespass and damage to his soybean crop.

Jody Olive moved to have Olive Farms, Inc. added as a party since the corporation owned the 42-acre tract which Jody Olive was attempting to reach when he crossed McFadyen's property. Olive Farms, Inc. filed a motion to intervene and attached a proposed counterclaim in which it set up claims of easement by implication and easement by prescription. On 10 March 1987, a consent order was entered transferring the matter to superior court, adding Olive Farms, Inc. as a party and allowing it to intervene. The order also added Carey O. McFadyen as an additional party plaintiff. Plaintiffs moved to dismiss the counterclaim and filed a reply to the counterclaim denying the existence of an easement. Plaintiffs thereafter moved for summary judgment on defendants' counterclaim, and the trial court granted their motion. From the judgment of the trial court, defendants appeal.

W. Richard Moore for plaintiff appellees.

Narron, O'Hale, Whittington and Woodruff, by James W. Narron; and Wilkins and Wellons, by Charles P. Wilkins, for defendant appellants.

ARNOLD, Judge.

[1] Defendants' sole contention is that the trial court erred in granting plaintiffs' motion for summary judgment. Defendants argue that there is a genuine issue of material fact as to the existence of an easement implied from prior use across the McFadyen property. We agree.

> An easement implied from prior use 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 Hous. Auth., 70 N.C. App. 95, 98, 318 S.E. 2d 861, 863 (1984).

In the case *sub judice*, defendants have presented sufficient evidence of the above three requirements to raise an issue of fact regarding the existence of an easement implied from prior use. First, defendants have shown that there was common ownership of the Olive and McFadyen tracts. Both tracts were owned at one time by M. C. Smith and the transfer separating ownership occurred in 1906.

Second, defendants have presented enough evidence to raise an issue of fact concerning the existence and use of the alleged pathway at the time of the 1906 transfer. In their affidavits before the court, Luther Puckett and Bertha Green stated that the reputation of the house on the Olive tract is that it had been there prior to 1900 and that no other pathway other than the one crossing McFadyen's property provided access to the house.

[2] Reputation as to customs affecting land is not excluded by the hearsay rule. G.S. 8C-1, Rule 803(20); *Broyhill v. Coppage*, 79

N.C. App. 221, 339 S.E. 2d 32 (1986). Testimony about customs affecting lands is not limited to the lifetime of the witness. *Id.* The affidavits of Luther Puckett and Bertha Green contain competent evidence sufficient to raise a question of fact whether a pathway on the McFadyen tract was used in 1906 for the benefit of the Olive tract and whether that use was apparent, continuous and permanent.

Defendants have also presented proof of the third requirement in that they have shown the claimed easement is necessary to the use and enjoyment of their land since they have no other access to a public road. Accordingly, a genuine issue of material fact exists with respect to the existence of the easement.

Even if a trier of fact finds that an easement implied from prior use existed at one time, it also must determine whether the easement was extinguished by adverse possession. An easement may be extinguished by adverse use by the owner of the servient property for the twenty-year prescriptive period. *Skvarla v. Park*, 62 N.C. App. 482, 303 S.E. 2d 354 (1983).

In his deposition, George McFadyen testified that there had been no pathway across his property to the Olive tract since 1966. However, the affidavits of Luther Puckett, Richard Olive, Bertha Green and Jimmy Barbour conflict with McFadyen's testimony. Thus, an additional issue of fact remains regarding the termination of the alleged easement.

The trial court erred in granting plaintiffs' motion for summary judgment on defendants' counterclaim since genuine issues of material fact exist.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

PAUL B. WILLIAMS, INC. v. SOUTHEASTERN REGIONAL MENTAL HEALTH CENTER

No. 8712SC910

(Filed 5 April 1988)

Landlord and Tenant § 5— lease of copiers—failure to repair—substantial breach by lessor

The evidence and findings were sufficient to support the trial court's conclusion that plaintiff materially breached the terms of lease agreements for copiers by failing reasonably to repair and maintain the copiers and thereby lost its right to enforce the agreements against defendant.

APPEAL by plaintiff from *D. B. Herring, Jr., Judge.* Judgment entered 24 July 1987 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 1 March 1988.

Nance, Collier, Herndon, Guthrie & Jenkins, by Joel S. Jenkins, Jr., for plaintiff-appellant.

Lee and Lee, by J. Stanley Carmical, for defendant-appellee.

BECTON, Judge.

Plaintiff, Paul B. Williams, Inc. (PBW), brought this action against defendant, Southeastern Regional Mental Health Center (Southeastern), to recover damages for breach of eleven equipment rental agreements. The Complaint alleged, in pertinent part, that the parties had entered into contracts whereby Southeastern leased eleven Savin copy machines from PBW, that Southeastern had cancelled all of the lease agreements prior to the expiration of each lease term without proper notice, and that, pursuant to the terms of the contracts, PBW was entitled to recover from Southeastern an early termination penalty calculated as the remaining monthly rental charges due under the current term of each lease. In its Answer, Southeastern denied that its cancellation notice was not timely and alleged, by way of defense, that PBW had breached the contracts by failing to maintain the leased copiers in operating condition and by failing to respond in a timely fashion to requests for service.

By stipulation of the parties, the matter was tried without a jury. Following the presentation of evidence by both parties, the trial court made findings, concluded as a matter of law that both

parties had materially breached the terms of the lease agreements, and entered judgment in favor of Southeastern. PBW appeals. We affirm.

Although the trial court found a breach of contract by both parties, the sole issue on appeal is whether the trial court correctly ruled that PBW materially breached the lease agreements and thereby lost its right to enforce the contracts against Southeastern. PBW challenges, as unsupported by the evidence, findings by the trial judge (1) that the meter readings on some of the copiers at the time of installation "appear to be very high"; (2) that during the terms of the lease agreements, the quality of the copies produced by the leased machines was less than reasonable copy quality or the quality desired by Southeastern; (3) that many of the copiers were out of service on frequent occasions, and that at least fifty-one service calls were made by PBW during the contract periods; (4) that frequent complaints regarding copy quality, problems, and service delays were relayed by Southeastern to PBW; and (5) that despite Southeastern's repeated complaints, PBW failed to reasonably repair and maintain the copiers as required by the terms and conditions of the lease agreements.

Although the question of the sufficiency of the evidence to support the findings may be raised on appeal, the appellate courts are bound by the trial judge's findings of fact if there is some evidence to support them, even though the evidence might sustain findings to the contrary. *In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984); *Lyerly v. Malpass*, 82 N.C. App. 224, 346 S.E. 2d 254 (1986), *cert. denied*, 318 N.C. 695, 351 S.E. 2d 748 (1987). Moreover, when findings that are supported by competent evidence are sufficient to support a judgment, that judgment will not be disturbed on appeal even though another finding, which is unnecessary to the conclusion, is erroneous or unsupported by the evidence. *See Wachovia Bank and Trust Co. v. Bounous*, 53 N.C. App. 700, 281 S.E. 2d 712 (1981); *Dawson Industries, Inc. v. Godley Construction Co.*, 29 N.C. App. 270, 224 S.E. 2d 266 (1976).

At trial, Elizabeth Odom, purchasing agent for Southeastern, testified, in pertinent part, that she had many complaints with the service by PBW and with the quality of the copies from the leased copiers, that there was a problem with servicemen coming out on a day's notice, and that some of the machines would be

serviced more than twice in the same week. Employees at various branch offices of Southeastern had complained to her about the copy quality and service, and she had passed those complaints to PBW. Odom further testified that she had on one occasion voiced to Dewey Bordeaux, branch manager for PBW's Fayetteville office, a threat to cancel the contract because of the problems, and that dissatisfaction led her to solicit bids for new equipment and eventually to award a new contract to another dealer.

Furthermore, under the express terms of the eleven written contracts, copies of which were offered in evidence by PBW, PBW agreed to make, during regular business hours, all necessary repairs to the equipment. Dewey Bordeaux, who testified on behalf of PBW, conceded, on cross-examination, that failure by PBW to repair or service the machines within a reasonable time would work a hardship upon and disrupt the business of Southeastern and would constitute a breach of the lease contracts.

In our view, the foregoing and other competent evidence in the record is sufficient to support the last four findings of fact challenged by PBW, despite the existence of other evidence in the record which might sustain findings to the contrary. Furthermore, we deem it unnecessary to address PBW's challenge to the finding of fact concerning the meter readings on the copiers at the time of their installation since, assuming *arguendo* that finding is unsupported by the evidence, the other properly supported findings of the trial court are sufficient, in our view, to support a conclusion that PBW materially breached the terms of the lease agreements by failing to reasonably repair and maintain the copiers.

The general rule governing bilateral contracts provides that if either party to the contract is materially in default with respect to performance of his obligations under the contract, the other party should be excused from the obligation to perform further. *See Coleman v. Shirlen*, 53 N.C. App. 573, 577-78, 281 S.E. 2d 431, 434 (1981); 6 S. Williston, *A Treatise on the Law of Contracts* Secs. 813, 814 (3rd ed. 1967). Accordingly, the judgment in favor of Southeastern is

Affirmed.

Judges ARNOLD and PARKER concur.

PILOT LIFE INSURANCE COMPANY v. ELMA S. FARMER, SR., MARY PARKER FARMER, ELMA S. FARMER, JR., T. W. PRUITT, UNION NATIONAL BANK AND WALTER L. HINSON, TRUSTEE IN THE BANKRUPTCY MATTER OF ELMA SPEIGHT FARMER, MARY ALICE FARMER, A/K/A MARY ALICE PARKER FARMER, D/B/A SPEIGHT OIL COMPANY, D/B/A SPEIGHT OIL COMPANY, L.A., D/B/A ELMA FARMER FARM AND LIVESTOCK

No. 8718SC943

(Filed 5 April 1988)

Insurance § 9— life insurance policy assigned as collateral for debt—debt discharged—finding unsupported by evidence

Where plaintiff issued a policy insuring the life of defendant husband, and defendant wife, as owner of the policy, assigned it as collateral for a debt, the trial court erred in finding that the debt for which the policy was assigned as collateral was discharged in bankruptcy court, and that the assignment was voidable at the option of the owner of the policy, since there was no evidence to support such a finding; however, evidence was sufficient to support the trial court's conclusion that assignment of the policy was valid.

APPEAL by defendant Pruitt from *Battle, Judge*. Judgment entered 6 April 1987 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 March 1988.

This is a declaratory judgment proceeding instituted by plaintiff against Elma S. Farmer, Sr., Mary Parker Farmer, Elma S. Farmer, Jr., T. W. Pruitt, Union National Bank, and Walter L. Hinson, trustee in the Farmers' bankruptcy matter. Each defendant filed an answer and prayed that the court enter its judgment declaring rights under an insurance policy issued by plaintiff on the life of Elma S. Farmer, Sr.

The record before us, including the complaint, answers and findings of fact made by the trial court, establishes the following uncontroverted facts:

On 10 November 1980, plaintiff issued the policy insuring the life of Elma S. Farmer, Sr., in the amount of $1,000,000. On 7 January 1983, Mary Parker Farmer, as owner of the policy, assigned it to T. W. Pruitt and Union National Bank as collateral for a debt. On 26 November 1985, the assignees of the policy submitted to plaintiff a request to borrow against the cash value of the policy in order to pay the premiums since Mary Parker Farmer refused to make the payments. On 3 December 1985, the Farmers

notified plaintiff that they no longer wanted the policy renewed and that they did not want assignees to pay the premiums or borrow against the policy in order to keep it in force.

The complaint in this proceeding was filed on 11 December 1985 and at that time defendants Elma S. Farmer, Sr., and Mary Parker Farmer were involved in a bankruptcy proceeding under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of North Carolina. When this cause came on for hearing before Judge Battle, he found as a fact that "[t]he debt for which the policy served as collateral was discharged in the United States Bankruptcy Court, Eastern District of North Carolina, on November 26, 1986." He also found that the assignee had the sole right to "loans or advances on the policy . . . without notice to, or assent by" the owner.

Based on its findings of fact, the trial court concluded that the assignment to T. W. Pruitt and Union National Bank was valid. It further concluded that "[i]n November 1985, and November 1986, the assignees *properly* exercised their rights to continue the policy in force and to borrow against the cash value of the policy to pay the premiums." (Emphasis added.)

Additionally, the court concluded:

> Upon discharge in bankruptcy of the debt for which the assignment was collateral, the assignment became voidable at the option of the owner of the policy. It is obvious from the testimony of Mary Parker Farmer that she desires this assignment to be canceled, or declared void. Therefore, it is the conclusion of this Court that the assignment should be voided, and all rights, privileges and options under the assignment shall revert to Mary Parker Farmer as of this date.

From the judgment declaring the assignment was voided and the policy canceled, defendant Pruitt appealed.

No counsel for plaintiff Pilot Life Insurance Company.

Edmundson & Burnette, by R. Gene Edmundson and J. Thomas Burnette, for defendant, appellant T. W. Pruitt.

No counsel for defendant Union National Bank.

No counsel for defendant Walter L. Hinson.

Hornthal, Riley, Ellis & Maland, by Donald C. Prentiss, for defendants, appellees Elma S. Farmer, Sr., and Mary Parker Farmer.

HEDRICK, Chief Judge.

No question has been raised with respect to that part of Judge Battle's judgment concluding that defendant Pruitt "properly" exercised his option to continue the policy in force and borrow against its cash value to pay the premiums in 1985 and 1986. Indeed, defendant Pruitt could not appeal from that portion since he was not an aggrieved party. *Coburn v. Timber Corporation*, 260 N.C. 173, 132 S.E. 2d 340 (1963).

The only question argued on appeal by defendant Pruitt is whether the trial court erred in declaring that the assignment was voided and the policy canceled. At the hearing on the declaratory judgment proceeding only Mrs. Farmer, owner of the insurance policy in question, was sworn as a witness. She testified concerning the debt that "[w]e have been discharged." The trial court found as a fact that the debt in question was discharged. At the hearing, defendant Pruitt's counsel argued that the only question before the court was "whether or not the assignment was valid." He contended defendant Pruitt was not prepared to litigate any question except validity of the assignment. Plaintiff made no motion to amend the complaint nor did any of defendants. Defendant Pruitt vigorously contended that the question of whether the debtors were discharged was not before the trial court.

Defendant Pruitt on appeal now argues the discharge of the Farmers in the bankruptcy proceeding did not discharge the debt, that the assignment of the policy was valid, and that the trial court had no authority to declare that "[u]pon discharge in bankruptcy of the debt . . . the assignment became voidable at the option of the owner of the policy." We agree. There is no evidence in the record to support the finding made by the trial court that the "debt for which the policy served as collateral was discharged. . . ." The only evidence is that Mrs. Farmer testified she and her husband had been discharged from the debt. This does not support the conclusion that the assignment was voidable. The

question of whether the debt was discharged has not been litigated and was not raised in the pleadings. That portion of the judgment indicating the assignment of the policy was voidable at the option of the Farmers must be vacated. That portion of the judgment declaring the assignment valid will be affirmed.

Affirmed in part; vacated in part.

Judges JOHNSON and ORR concur.

HAROLD MORRIS, GRACE MORRIS HELMS, AND NINA H. BROWDER, REPRESENTATIVE OF THE ESTATE OF CATHERINE MORRIS HELMS, PLAINTIFFS v. PLYLER PAPER STOCK COMPANY, INC., DEFENDANT

No. 8726SC911

(Filed 5 April 1988)

Landlord and Tenant § 13.2— lease—option to renew—12(b)(6) motion improperly granted

Defendant's motion to dismiss for failure to state a claim was improperly granted in a declaratory judgment action seeking a declaration of rights under a lease where defendants had leased property from the estate of Harvey Morris for five years with an option to renew the lease for an additional five years; plaintiffs alleged in their complaint that Harold Morris had had no authority under his father's will to grant the options to renew and to purchase; defendant had acted to exercise its options and had threatened legal actions if plaintiffs refused to grant them; and plaintiffs were attempting to sell the property on the open market and the existence of the options hindered their attempts to do so.

APPEAL by plaintiffs from *Snepp, Judge*. Order entered 24 August 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 February 1988.

Kennedy, Covington, Lobdell & Hickman by Wayne Huckel and Alton D. Bain for plaintiff appellants.

No brief filed for defendant.

COZORT, Judge.

Plaintiffs filed this declaratory judgment action seeking a declaration of their rights under a lease with defendant. From the

trial court's order granting defendant's motion to dismiss, plaintiffs appeal. We reverse.

Harvey Morris died on 15 August 1982. In his will he devised a thirteen-acre tract of land in fee simple to his wife and three children. His will directed that:

> [N]one of said developed real estate be sold for a period of five years from the date of my death. . . . I direct that during said five-year period my son, Harold Morris, shall manage said property, make necessary repairs, rent the same, collect the rents, pay all insurance premiums, taxes and other expenses out of the rents, and then divide the net amount in four equal shares and pay the same to the persons hereinabove named at least once every year. . . . At the expiration of the five-year period, I suggest the property not be sold at that time unless it can be sold at a great advantage.

On 27 August 1982, Harold Morris, as agent for the estate of Harvey Morris, leased a portion of the subject property to defendant. The lease provided that it would last for five years, beginning 1 September 1982, and that at the end of that time, defendant would have the option to renew the lease for an additional five years. The lease also provided that defendant had the option to purchase the leased property during the original or renewal lease terms.

On 12 January 1987, defendant gave written notice of its intention to exercise both its option to renew and its option to purchase. On 9 March 1987, plaintiffs, the children of Harvey Morris, filed a complaint for declaratory judgment alleging that the lease options are void and that they hinder plaintiffs' efforts to sell the property on the open market. Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) on the grounds that plaintiffs failed to state a claim upon which relief could be granted. From the trial court's order which granted this motion, plaintiffs appeal.

Plaintiffs contend that the trial court erred in granting defendant's Rule 12(b)(6) motion, because the allegations of its complaint were sufficient to state a claim for declaratory judgment. We agree.

The test on a motion to dismiss under Rule 12(b)(6) is whether the pleading is legally sufficient to state a cause of action.

Drilling Co. v. Nello L. Teer Co., 38 N.C. App. 472, 478, 248 S.E. 2d 444, 448 (1978). In ruling on the motion, the allegations of the complaint are treated as true, *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E. 2d 378, 381 (1987), and on that basis the trial court must determine as a matter of law whether the allegations state a claim for which relief may be granted. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). The " 'issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims.' " *Johnson v. Bollinger*, 86 N.C. App. at 4, 356 S.E. 2d at 381.

A motion to dismiss for failure to state a claim is seldom appropriate "in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail." *Consumers Power v. Power Co.*, 285 N.C. 434, 439, 206 S.E. 2d 178, 182 (1974). The motion is allowed only when "there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy." *Id.* A claim for declaratory relief is sufficient if the complaint alleges the existence of a real controversy arising out of the parties' opposing contentions and respective legal rights under a deed, will or contract in writing. *Id.* at 449, 206 S.E. 2d at 188.

In the case *sub judice*, plaintiffs have clearly alleged that a genuine controversy exists with respect to the lease agreement. In their complaint, they stated that Harold Morris had no authority under his father's will to grant the options to renew and to purchase, and therefore these options are void. They further stated that defendant had acted to exercise its options and had threatened legal action if plaintiffs refuse to grant them. Finally, plaintiffs alleged that they were attempting to sell the property on the open market and that the existence of the options hindered their attempts to do so.

We hold that plaintiffs' complaint alleged sufficient facts to establish the existence of a genuine controversy and to survive defendant's motion to dismiss under Rule 12(b)(6). Therefore, we reverse the order of the trial court granting defendant's motion.

Reversed and remanded.

Judges ARNOLD and PHILLIPS concur.

VELMA T. SLATER AND HUSBAND, JOHN H. SLATER, AND GLADYS T. MILLER AND HUSBAND, TROY M. MILLER, PETITIONERS v. OLA T. LINEBERRY AND HUSBAND, CHARLIE LINEBERRY, RESPONDENTS

No. 8723SC924

(Filed 5 April 1988)

Wills § 32— property devised in fee simple to children—grant of authority to sell property at auction precatory

The trial court properly concluded that a will devised to testator's children a remainder interest in real property in fee simple absolute, and the clause which followed such devise, and which purported to grant the authority to sell the devised real property at a public auction, was precatory in nature and did not limit or defeat the devise in fee simple absolute.

APPEAL by respondents from *Rousseau, Julius A., Judge.* Order entered 14 July 1987 in YADKIN County Superior Court. Heard in the Court of Appeals 11 February 1988.

On 25 March 1986 petitioners filed an action to partition in kind real property inherited from the parents of the female parties herein. Respondents timely filed a response, denying that the lands should be partitioned, relying upon the Will of Curney Preston Taylor, and praying that the court appoint administrators to sell the lands pursuant to the Will of Curney Preston Taylor. On 3 December 1986 the Clerk of Superior Court of Yadkin County ordered the matter transferred to superior court for the purpose of construing the Will. On 30 June 1987 the cause came on for a hearing in superior court; and the trial judge, having reviewed the record and heard arguments, made findings of fact and conclusions of law and ordered the matter remanded to the Clerk of Superior Court of Yadkin County for proceedings to accomplish the partition in kind sought by petitioners. Respondents appealed.

Shore, Hudspeth and Harding, by N. Lawrence Hudspeth, III, for petitioner-appellees.

Lee Zachary for respondents-appellants.

WELLS, Judge.

The question presented is whether certain language in Item Four of the Will of Curney Preston Taylor, deceased, should be

construed as precatory or mandatory. Item Four of the Will provides as follows:

> ITEM FOUR: I will, devise and bequeath to my three children, to wit: Ola Mae Taylor Lineberry, Gladys Taylor Miller, and Velma Taylor Slater, subject to the life estate of my said wife, all of the lands that I may own at the time of my death, absolutely and in fee simple, and it is my will that my executor sell at public auction for cash the said lands after the death of my said wife, and divide the proceeds among my three children, or in the event that any of them should predecease me, then I want her share to go to her children.

The trial court concluded as a matter of law that Item Four devises to the testator's children a remainder interest in real property in fee simple absolute and that the clause which follows, and which purports to grant the authority to sell the devised real property at a public auction, "is precatory in nature and does not limit or defeat the devise in fee simple absolute as aforesaid." We agree.

On appeal, respondents contend, in their first and main assignment, that we should "conjoin the clauses" of Item Four and read them as an indivisible unit with the purpose of determining the testator's "whole intention." That whole intention, respondents contend, is that the takers under the Will should have the proceeds from the sale of the real property, without being made subject to further life estates, liens, trusts, or other charges. This argument cannot prevail.

To be sure, respondents are correct in pointing out that the intent of the testator is the polar star that must guide courts in the interpretation of all wills. *Wing v. Trust Co.*, 301 N.C. 456, 272 S.E. 2d 90 (1980). Moreover, in construing a will every word and clause must, if possible, be given effect and apparent conflicts reconciled. *Joyner v. Duncan*, 299 N.C. 565, 264 S.E. 2d 76 (1980). However, when undertaking to reconcile apparently conflicting provisions, greater regard must be given to the dominant purpose of the testator than to the use of any particular words. *See Mansour v. Rabil*, 277 N.C. 364, 177 S.E. 2d 849 (1970); *Trust Co. v. Wolfe*, 245 N.C. 535, 96 S.E. 2d 690 (1957). In the case before us the testator's dominant purpose, as expressed in the first clause

of Item Four of his Will, is to devise all his real property in fee simple absolute. The words "will, devise, and bequeath . . . absolutely and in fee simple" admit of no other import. We recognize that the coordinate clause following, introduced by the words "and it is my will," would seem to restrict the immediately preceding unconditional devise. But this subsequent limiting language cannot be reconciled with the testator's general, dominant purpose, which is to devise the property in fee simple. The limiting clause must yield to the general, prevailing purpose. It follows that we must hold that the limiting language of the second clause of Item Four merely expresses the testator's precatory, nonbinding desire as to how he wishes his children to dispose of their remainder interest. Accordingly, respondents' first assignment is overruled.

Since petitioners and respondents own the devised real property as tenants in common, respondents' remaining assignments, which stand or fall with the first one, must also fail.

The Order of the trial court is

Affirmed.

Judges EAGLES and GREENE concur.

HUGH HAROLD SHEPHERD v. CONSOLIDATED JUDICIAL RETIREMENT SYSTEM

No. 8710SC999

(Filed 5 April 1988)

1. **Administrative Law § 8— superior court order affirming agency decision— findings and conclusions unnecessary**

The superior court was not required to make findings of fact and conclusions of law in its judgment affirming a final agency decision by the director of the Retirement System Division of the Department of State Treasurer. N.C.G.S. § 150B-51.

2. **Retirement Systems § 5— Judicial Retirement System—restored service credits with State Employees' Retirement System**

The Department of the State Treasurer did not err in ruling that petitioner was not entitled to have restored service credits with the Teachers' and

State Employees' Retirement System counted in determining his retirement benefit under the Consolidated Judicial Retirement System. N.C.G.S. § 135-58(b).

APPEAL by petitioner from *Bailey, Judge.* Order entered 1 May 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 9 March 1988.

This is an appeal from an order of the superior court affirming the final agency decision of E. T. Barnes, director of the Retirement Systems Division of the Department of the State Treasurer. On 2 July 1986 petitioner filed a request with Director E. T. Barnes for a declaratory ruling "in regards to establishing his rights to unreduced retirement benefits in the Consolidated Judicial Retirement System. . . ." On 15 August 1986, Director E. T. Barnes entered his ruling declaring that "[p]etitioner's request to have the sixteen years and one month of restored service credits with the Teachers' and State Employees' Retirement System counted towards the twenty-four years for an unreduced benefit from the Consolidated Judicial Retirement System is hereby denied." In the declaratory ruling Director E. T. Barnes discussed in detail the several statutes referred to in petitioner's request for a declaratory ruling and pertaining to all of the questions raised in the request. Director Barnes, in his ruling, also applied these statutes, G.S. 135-28.1 and G.S. 135-58, to petitioner's factual situation.

Thereafter, petitioner filed for judicial review in the superior court pursuant to G.S. 150B-43 (formerly G.S. 150A-43). On 1 May 1987 Judge Bailey entered a judgment concluding that the declaratory ruling was not erroneous as a matter of law and should be affirmed. Petitioner appealed.

David Yates Bingham for petitioner, appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Norma S. Harrell, for respondent, appellee.

HEDRICK, Chief Judge.

[1] On appeal to this Court petitioner contends the superior court erred by not making findings of fact and conclusions of law in its judgment of 1 May 1987.

G.S. 150B-17 states that a "declaratory ruling is subject to judicial review in the same manner as an order in a contested case." Under G.S. 150A-51 the reviewing court was required to set out written reasons only when reversing or modifying an agency decision. The Administrative Procedure Act, formerly Chapter 150A of the North Carolina General Statutes, was recodified as Chapter 150B effective 1 January 1986. G.S. 150B-51 of the recodified Act does not even require that the reviewing court set out its reasons for reversal or modification.

This Court has held that when a superior court judge sits as an appellate court to review an administrative agency decision the judge is not required to make findings of fact and enter a judgment thereon in the same manner as the court would be when acting in its role as trial court. *Markham v. Swails*, 29 N.C. App. 205, 223 S.E. 2d 920, *disc. rev. denied*, 290 N.C. 309, 225 S.E. 2d 829, *cert. denied*, 290 N.C. 551, 226 S.E. 2d 510, *cert. denied*, 429 U.S. 940, 97 S.Ct. 356, 50 L.Ed. 2d 310 (1976). If the superior court judge does make findings of fact and conclusions of law, these will not be considered in our appellate review. *Area Mental Health Authority v. Speed*, 69 N.C. App. 247, 317 S.E. 2d 22, *disc. rev. denied*, 312 N.C. 81, 321 S.E. 2d 893 (1984).

Judge Bailey's judgment of 1 May 1987 recited that the court had reviewed the record and matters on file and had considered the oral arguments and relevant statutory provisions. Based on these considerations Judge Bailey concluded that the declaratory ruling of Director E. T. Barnes was not erroneous as a matter of law and should be affirmed.

We hold this judgment meets all the requirements of G.S. 150B-51 and is clearly sufficient as a matter of law. *See In re House of Raeford Farms v. Brooks*, 63 N.C. App. 106, 304 S.E. 2d 619 (1983), *disc. rev. denied*, 310 N.C. 153, 311 S.E. 2d 291 (1984). Petitioner's argument is without merit.

[2] Petitioner also contends the trial court "committed reversible error in that it ignored the specific language of N.C.G.S. Sec. 135-58(b) relating to determining creditable service as of the time of Petitioner/Appellant's retirement" and that the trial court "committed reversible error in that the Court failed and refused to find the language of N.C.G.S. Sec. 135-58(b) sufficiently ambigu-

ous as to require the Court to interpret it in light of expressed legislative intent."

We have examined Judge Bailey's judgment and Director Barnes' declaratory ruling in this light and find these contentions to be without merit. Manifestly, Director Barnes and Judge Bailey did not ignore the "specific language of N.C.G.S. Sec. 135-58(b) relating to determining creditable service as of the time of Petitioner/Appellant's retirement" as contended by petitioner. It is clear that Director Barnes considered the statute cited by petitioner and correctly applied it to petitioner's factual situation. We also do not find G.S. 135-58(b) in any way ambiguous to petitioner's situation, and we find no necessity to construe the legislature's intent with respect to this statute. The judgment dated 1 May 1987 affirming the declaratory ruling of the director of the Division of Retirement Services of the Department of State Treasurer is affirmed.

Affirmed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. AMANDA ANN CASH

No. 8716SC990

(Filed 5 April 1988)

1. **Narcotics § 1.3— transporting and possessing marijuana—election not required**

The trial court did not err in denying defendant's motion to compel the State to elect between the charges of transporting and possessing marijuana.

2. **Searches and Seizures § 9— stopping car for traffic violation—no pretext for warrantless search**

There was no merit to defendant's contention that an officer's stop of her car was a pretext to conduct a warrantless search where defendant made a left turn from a right-turn lane, looked back at the policeman several times, and exceeded 80 m.p.h., and defendant admitted in her brief that a stop such as this one for a traffic violation was permissible. Therefore, a search of the trunk of the car with defendant's consent was lawful.

State v. Cash

APPEAL by defendant from *Williams, Judge.* Judgment entered 27 May 1987 in Superior Court, ROBESON County. Heard in the Court of Appeals 9 March 1988.

This is a criminal action wherein defendant was charged in proper bills of indictment with trafficking in marijuana by transporting and by possessing in violation of G.S. 90-95(h). Defendant moved before trial that the State be required to elect to proceed either on the possessing charge or the trafficking charge. Defendant further moved to suppress evidence obtained at the time of her arrest. The court denied the motion to force an election by the State, and then held a hearing on the motion to suppress. Following the hearing, the court made findings of fact, as summarized:

On 8 November 1986, defendant was at the drive-thru window of a fast food restaurant in Lumberton when Officer Herbert Battle, an Alcohol Law Enforcement agent, pulled up behind her in an unmarked car. The restaurant clerk alerted defendant that a police officer was behind her, and she turned and looked. She then got into the right turn lane to exit the parking lot and put on a right turn signal. The officer, who was at the restaurant to get a game sticker, asked the clerk about defendant.

Defendant made a left turn, and Officer Battle followed because defendant looked back at him and because of her left turn from the right-turn lane. Defendant entered I-95, and the officer soon followed behind. After observing defendant's speed at over 80 miles per hour, the officer activated his blue light and pulled her over.

The officer smelled an odor of marijuana coming from the rear of the car as he approached it. He asked defendant for a driver's license and registration, and she gave him only an expired Maryland license. After requesting and obtaining permission from defendant to search the car, the officer searched the trunk of the car and found the evidence in question.

The court further found that the officer had authority to enforce traffic laws and having a reasonable suspicion that defendant had violated traffic laws, he violated none of her constitutional rights by stopping her. The court also found there was probable cause to search the trunk of the car because of the mari-

juana odor and that the officer obtained consent for the search. The court concluded that no constitutional rights were violated, and the motion was denied. Defendant pled guilty, the judgment was consolidated, and defendant was sentenced to seven years in prison. Defendant then appealed the denial of her motions.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Marvin D. Miller and Beaver, Holt & Richardson, P.A., by H. Gerald Beaver, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns error to the court's denial of her motion to compel the State to elect between the charges of transporting and possessing marijuana. It is well-settled that each may be punished as a separate and distinct offense, and such is not violative of any constitutional protections. *State v. Diaz*, 317 N.C. 545, 346 S.E. 2d 488 (1986); *State v. Perry*, 316 N.C. 87, 340 S.E. 2d 450 (1986); *State v. Russell*, 84 N.C. App. 383, 352 S.E. 2d 922, *disc. rev. denied*, 319 N.C. 677, 356 S.E. 2d 784 (1987). This assignment of error has no merit.

[2] Defendant next contends her constitutional rights were violated and that it was error for the court to deny her motion to suppress evidence seized from the trunk of her car. Defendant argues the officer's stop of the car was a pretext to conduct a search. In defendant's brief it is admitted that a stop such as this for a traffic violation is permissible. Defendant only argues the impermissible purpose of this stop was to search the car. The trial court found the officer had reasonable suspicion enough to stop the car for a traffic violation and that defendant "voluntarily, knowingly and intelligently consented" to the search of the trunk. Upon review of the evidence in the record, we hold there is evidence to support this finding. Evidence seized during a warrantless search is admissible if the defendant freely and voluntarily, without coercion, duress or fraud, consented to the search. *State v. Williams*, 314 N.C. 337, 333 S.E. 2d 708 (1985). For these reasons, we hold this argument is without merit.

Finally, defendant contends the officer could not properly search inside the plastic garbage bags found in the trunk of the

car. Where police officers have probable cause to believe contraband is concealed somewhere within a legitimately stopped automobile, they may conduct a search of the automobile that is as thorough as a magistrate could have authorized in a warrant. *State v. Ford*, 70 N.C. App. 244, 318 S.E. 2d 914 (1984); *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed. 2d 572 (1982). Because there was probable cause, a magistrate could have authorized a search of the garbage bags. The officer's action was within the scope of a permissible search, and defendant's motion was properly denied.

The judgment appealed from is

Affirmed.

Judges JOHNSON and ORR concur.

JANIS LYNNETTE VAUGHAN v. GEORGE ALLEN MOORE

No. 8714SC982

(Filed 5 April 1988)

1. **Appeal and Error § 6— partial summary judgment—right of immediate appeal**

In an action to recover damages resulting from an automobile accident, partial summary judgment for defendant on the issue of liability for medical expenses plaintiff incurred before she reached the age of majority was immediately appealable since plaintiff has a substantial right to have all of her damage claims arising out of the accident tried before the same trier of fact.

2. **Infants § 3; Parent and Child § 5.1— medical expenses during minority—waiver by parent—expired statute of limitations—no right of child to recover**

Although plaintiff obtained a waiver and assignment of her mother's claim for medical expenses incurred by plaintiff during her minority as a result of an automobile accident allegedly caused by defendant's negligence, she was not entitled to recover those medical expenses from defendant after reaching majority where she obtained the waiver and assignment more than four years after the cause of action arose and the mother's claim would essentially be extended beyond its three-year statute of limitations if effect were given to the waiver and assignment. N.C.G.S. § 1-17(a) (1983).

APPEAL by plaintiff from *James H. Pou Bailey, Judge*. Order entered 21 September 1987 in Superior Court, DURHAM County. Heard in the Court of Appeals 8 March 1988.

Pulley, Watson, King & Hofler, P.A., by W. Paul Pulley, Jr. and Tracy K. Lischer, for plaintiff-appellant.

Bryant, Patterson, Covington & Idol, P.A., by Lee A. Patterson, II, for defendant-appellee.

BECTON, Judge.

Plaintiff, Janis Lynnette Vaughan, brought this personal injury action against defendant, George Allen Moore, to recover damages resulting from an automobile accident allegedly caused by defendant's negligence. The trial judge granted defendant's motion for partial summary judgment on the issue of defendant's liability to plaintiff for medical expenses she incurred before she reached the age of majority. We affirm.

I

Plaintiff alleges that she was injured when the automobile driven by defendant, and in which she was a passenger, careened off the highway and struck a utility pole in July 1983. Plaintiff was 15 years old at the time. Plaintiff alleged that the accident was caused by defendant's negligence. She sought relief in the amount of $264,790.95, of which $14,790.95 was for medical expenses. She also sought future medical expenses in the amount between $8,500.00 and $11,000.00. She brought the action in March 1986. On 10 September 1987, defendant moved for summary judgment on plaintiff's claim for all medical expenses incurred before her eighteenth birthday. On 21 September 1987 plaintiff obtained a waiver and assignment of claim from her mother, who was her only living parent at the time of the accident.

II

[1] Before we address the issue raised by plaintiff's appeal, we must first consider whether the appeal is interlocutory and premature.

If partial summary judgment is final as to the matters adjudicated therein, or if it affects a substantial right, it is immediately appealable. *Beck v. American Bankers Life Assurance Co. of Florida*, 36 N.C. App. 218, 243 S.E. 2d 414 (1978). In *Olive v. Great American Ins. Co.*, 76 N.C. App. 180, 333 S.E. 2d 41, *disc. rev. denied*, 314 N.C. 668, 336 S.E. 2d 400 (1985), this Court held that a

substantial right was affected, when the trial judge granted partial summary judgment regarding plaintiff's second and third claims concerning tortious breach of contract and punitive damages, although plaintiff's first claim for breach of contract remained live, stating that plaintiffs have a substantial right to have all of their factually related claims tried before the same judge and jury. Similarly, plaintiff in the instant case has a substantial right to have all of her damages claims arising out of the accident tried before the same trier of fact.

[2] We now turn to plaintiff's assignment of error. Plaintiff contends that the trial judge erred by granting defendant's motion for partial summary judgment on the ground that plaintiff, even after reaching majority, may not recover medical expenses incurred during minority.

In North Carolina, an injury to a minor creates two causes of action: (1) the parents may recover for the child's lost earnings and medical expenses during minority, and (2) the minor may recover for pain and suffering and impairment of future earning capacity. *Ellington v. Bradford*, 242 N.C. 159, 160, 86 S.E. 2d 925, 926 (1955). However, in *Ellington*, the parent's right was deemed waived in an action by the parent to recover as "next friend" on behalf of the minor. The minor was allowed to recover the full amount to which both he and the parent were entitled. Plaintiff argues that, in light of *Ellington* and N.C. Gen. Stat. Sec. 1-17(a) (1983) which permits a minor to bring an action within three years of the removal of their disability, she should be permitted to recover the full amount including her mother's claim for the lost wages and medical expenses during minority, because her mother expressly waived her right to recover. Although we agree with plaintiff that case precedent is favorable, particularly in other jurisdictions, and that public policy, which favors payment of health care providers and disfavors subjecting defendants to the risk of double liability, is also served by permitting recovery by the minor when majority is reached and the parent's claim is waived, we cannot subscribe to such a rule in the instant case. Plaintiff obtained the waiver and assignment from her mother on 21 September 1987, more than four years after the cause of action arose. Thus, in order to give effect to the waiver, we would essentially extend the parent's claim beyond its three-year statute of limitations. We decline to do so. Judgment is therefore

Affirmed.

Judges ARNOLD and PARKER concur.

HAROLD R. HOKE, M.D. v. ALFRED CHARLES YOUNG, INDIVIDUALLY AND AS AGENT OF PAW CREEK CHURCH OF GOD; PAW CREEK CHURCH OF GOD, INDIVIDUALLY AND SEVERALLY, AND INSURANCE COMPANY OF NORTH AMERICA, INDIVIDUALLY AND SEVERALLY

No. 8726SC690

(Filed 5 April 1988)

Unfair Competition § 1— defendant's attorney's actions not coercion or duress—no claim for unfair or deceptive trade practices alleged

Plaintiff's allegations that an insurance company's attorney improperly relied on hearsay statements gathered by the company's accident investigator concerning plaintiff's intoxication at the time of an accident and that the attorney did not sufficiently investigate the defense before raising it in the answer were insufficient to show coercion or duress, and the complaint was therefore insufficient to allege a claim for unfair or deceptive trade practices.

APPEAL by plaintiff from *Allen (C. Walter), Judge.* Judgment entered 11 February 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 January 1988.

Elam, Seaford & McGinnis, by William H. Elam, attorney for plaintiff-appellant.

Wade and Carmichael, by R. C. Carmichael, Jr., attorney for defendant-appellee Insurance Company of North America.

ORR, Judge.

On 6 September 1979 plaintiff Harold Hoke's car collided with a bus owned by Paw Creek Church of God and driven by its employee Alfred Charles Young. The church carried liability insurance for the bus and its driver with defendant Insurance Company of North America (INA).

On 7 September 1982 plaintiff sued the church and Young to recover for physical injuries and property damage suffered in the 6 September 1979 accident.

INA, in defense of the church and Young, filed an answer to plaintiff's complaint, alleging that plaintiff was intoxicated at the time of the accident, and therefore, barred from recovery by his own contributory negligence.

Plaintiff dismissed the 7 September 1982 suit without prejudice, later refiling the action on 28 August 1985, in order to add INA as a defendant.

In plaintiff's second action, he alleged INA had committed an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1 by alleging in the answer to the 7 September 1982 complaint that plaintiff was intoxicated at the time of the accident.

INA filed a motion to dismiss plaintiff's charge pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), which the trial court granted.

From the judgment dismissing plaintiff's claim, he appeals.

"A motion to dismiss under G.S. 1A-1, R. Civ. P. 12(b)(6) generally tests the legal sufficiency of the complaint: Has the pleader given notice of such facts as will, if true, support a claim for relief under some legal theory?" *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 681, 340 S.E. 2d 755, 758, *cert. denied*, 317 N.C. 333, 346 S.E. 2d 137 (1986); *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

If plaintiff's facts are sufficient to state a claim under any legal theory, a claim based upon an incorrect theory of law may not be dismissed under this statute, *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979); *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E. 2d 562 (1981), unless the face of the complaint shows an insurmountable bar to recovery. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161; *Piatt v. Doughnut Corp.*, 28 N.C. App. 139, 220 S.E. 2d 173 (1975), *disc. rev. denied*, 289 N.C. 299, 222 S.E. 2d 698 (1976).

The trial court concluded in the present case that plaintiff's facts failed to state a recognized claim for relief.

On appeal plaintiff argues the statements in INA's answer were made to coerce him into an unfair settlement of his insurance claim.

N.C.G.S. § 75-1.1(a) governs this issue and holds in pertinent part: "[U]nfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

In North Carolina "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *Johnson v. Insurance Co.*, 300 N.C. 247, 264, 266 S.E. 2d 610, 622 (1980); *Dull v. Mut. of Omaha Ins. Co.*, 85 N.C. App. 310, 354 S.E. 2d 752, *disc. rev. denied*, 320 N.C. 512, 358 S.E. 2d 518 (1987). "Therefore, coercive tactics are within the definition of unfair practices." *Wilder v. Squires*, 68 N.C. App. 310, 315, 315 S.E. 2d 63, 66, *disc. rev. denied*, 311 N.C. 769, 321 S.E. 2d 158 (1984). However, whether an alleged commercial act or practice is unfair or deceptive in violation of N.C.G.S. § 75-1.1 is a question of law for the trial court. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975); *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E. 2d 838 (1987).

Coercion or duress occurs when a party intentionally uses a wrongful act or threat to compel a victim to act against his will. *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971); *Wilder v. Squires*, 68 N.C. App. 310, 315 S.E. 2d 63.

The facts in plaintiff's complaint alleged only that INA's attorney improperly relied on hearsay statements gathered by INA's accident investigator, and, as a result of his negligent reliance, the INA attorney did not sufficiently investigate the defense before raising it in the answer.

After review, we conclude these facts were insufficient, as a matter of law, to state a claim entitling plaintiff to proceed under N.C.G.S. § 75-1.1.

The trial court's dismissal of plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) is affirmed.

Affirmed.

Judges JOHNSON and PHILLIPS concur.

JAMES ROBERT ROBINSON AND WIFE, PRINCESS PEARL ROBINSON v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND LEE CONSTRUCTION COMPANY

No. 8713SC908

(Filed 5 April 1988)

Eminent Domain § 2— damage to property from pile driving—compensable "taking"

Plaintiffs' complaint was sufficient to state a claim in inverse condemnation where they alleged that defendant construction company, under contract with DOT, engaged in pile driving operations which damaged their property, and they further alleged that the damage to their property amounted to a "taking" for which they were entitled to compensation. N.C.G.S. § 136-11.

APPEAL by plaintiffs from *Stephens, Judge.* Order entered 29 June 1987 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 11 February 1988.

In the spring of 1985, Lee Construction Company, under contract with the North Carolina Department of Transportation, began construction of a bridge across the Intracoastal Waterway to connect Holden Beach with the mainland via Highway 130. Under the terms of the construction contract, the bridge was to be supported by concrete pile foundations. Lee Construction Company drove the piles 20 to 25 feet into the ground creating vibrations in the surrounding ground. Plaintiffs' property, located on the east side of Highway 130 and adjacent to the bridge construction, suffered damage.

In their complaint, plaintiffs stated that the vibrations damaged an oyster house on their property to such an extent that it was condemned. Specifically, the walls and the concrete slab floor cracked and the foundation settled. Additionally, two concrete septic tanks for residential structures on their property collapsed. When plaintiffs informed the on-site superintendent of the damage which was occurring, Lee Construction Company attempted to make repairs but continued the pile driving operations.

Plaintiffs filed this action against the Department of Transportation and Lee Construction Company alleging that they were entitled to recover damages from the Department of Transportation for inverse condemnation under G.S. 136-111 or, in the alter-

native, that they were entitled to recover damages from Lee Construction Company for trespass.

The Department denied plaintiffs' allegations of damages resulting from the bridge construction and moved to dismiss the action pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure. Judge Stephens granted the Department's motion and dismissed the complaint as against the Department of Transportation on the grounds that the complaint failed to state a claim for relief and that the court lacked subject matter and personal jurisdiction. From the order of the trial court, plaintiffs appeal.

Powell and Gore, by William A. Powell, for plaintiff appellants.

Attorney General Lacy H. Thornburg, by Assistant Attorneys General Evelyn M. Coman and David R. Minges, for defendant appellee Department of Transportation.

ARNOLD, Judge.

Plaintiffs contend that the trial court erred in dismissing their complaint against the Department of Transportation. We agree.

Inverse condemnation is governed by G.S. 136-111 which states in pertinent part:

> Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation and no complaint or declaration of taking has been filed by said Department of Transportation may . . . file a complaint in the superior court. . . .

In *Ledford v. Highway Comm.*, 279 N.C. 188, 190-91, 181 S.E. 2d 466, 468 (1971), our Supreme Court stated:

> "Taking" under the power of eminent domain may be defined generally as entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.

Although plaintiffs' property damage caused by the bridge construction does not fit squarely within the above definition of a "taking," North Carolina courts have consistently held that such damage does, in fact, constitute a "taking." *Falls Sales Co. v. Board of Trans.*, 292 N.C. 437, 233 S.E. 2d 569 (1977); *Cody v. Department of Trans.*, 45 N.C. App. 471, 263 S.E. 2d 334, *disc. rev. denied*, 300 N.C. 372, 267 S.E. 2d 674 (1980). Damage to land which inevitably or necessarily flows from a public construction project results in an appropriation of land for public use. *See City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E. 2d 794 (1986). The remedy for such property damage is an action against the Department of Transportation on the theory of condemnation. *Falls Sales Co.*, 292 N.C. at 437, 233 S.E. 2d at 569; *Cody*, 45 N.C. App. at 471, 263 S.E. 2d at 334.

Plaintiffs alleged in their complaint that Lee Construction Company, under contract with the Department of Transportation, engaged in pile driving operations which damaged their property. Plaintiffs further alleged that the damage to their property amounted to a "taking" for which they were entitled to compensation. Plaintiffs' allegations clearly state a claim in inverse condemnation against the Department of Transportation pursuant to G.S. 136-111. The trial court had subject matter jurisdiction in the case and erred in dismissing the complaint.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

J. W. ROBINSON AND WIFE, LILLIAN ROBINSON v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND LEE CONSTRUCTION COMPANY

No. 8713SC909

(Filed 5 April 1988)

APPEAL by plaintiffs from *Stephens, Judge*. Order entered 29 June 1987 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 11 February 1988.

In the spring of 1985, Lee Construction Company, under contract with the North Carolina Department of Transportation, began construction of a bridge across the Intracoastal Waterway to connect Holden Beach with the mainland via Highway 130. Under the terms of the construction contract, the bridge was to be supported by concrete pile foundations. Lee Construction Company drove the piles 20 to 25 feet into the ground creating vibrations in the surrounding ground. Plaintiffs' property, located on the west side of Highway 130 and adjacent to the bridge construction, suffered damage.

In their complaint, plaintiffs stated that the vibrations caused damage to a residential structure on their property. Specifically, a porch, floor coverings and sheetrock cracked, supporting piers settled, pictures fell from walls, a chandelier fell from the ceiling and floors became unlevel and unsteady. Plaintiffs informed the on-site superintendent of the damage which was occurring but Lee Construction Company continued the pile driving operations.

Plaintiffs filed this action against the Department of Transportation and Lee Construction Company alleging that they were entitled to recover damages from the Department of Transportation for inverse condemnation under G.S. 136-111 or, in the alternative, that they were entitled to recover damages from Lee Construction Company for trespass.

The Department denied plaintiffs' allegations of damages resulting from the bridge construction and moved to dismiss the action pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure. Judge Stephens granted the Department's motion and dismissed the complaint as against the Department of Transportation on the grounds that the complaint failed to state a claim for relief and that the court lacked subject matter and personal jurisdiction. From the order of the trial court, plaintiffs appeal.

Powell and Gore, by William A. Powell, for plaintiff appellants.

Attorney General Lacy H. Thornburg, by Assistant Attorneys General Evelyn M. Coman and David R. Minges, for defendant appellee Department of Transportation.

ARNOLD, Judge.

For the reasons set forth in *Robinson v. N.C. Dept. of Transportation*, 89 N.C. App. 572, 366 S.E. 2d 492 (1988), we reverse the order of the superior court.

Reversed and remanded.

Judges PHILLIPS and COZORT concur.

IN THE MATTER OF THE WILL OF LILLIE C. JOLLY

No. 8717SC845

(Filed 5 April 1988)

Wills § 11— lost or destroyed will—photostat copy—accepted as will

The evidence was sufficient to establish, as the jury found, that a paper writing offered for probate was the last will and testament of the propounder's aunt, that the testatrix never changed her mind about leaving her property to the propounder at her death, and that she neither destroyed her will nor intended to revoke it where the testatrix executed her last will and testament in 1977 in the office of an attorney, leaving all of her property to the propounder in fee simple; she took the original will with her when she left the lawyer's office and that was the last time it was seen; she told several relatives in the years that followed that she had willed all of her property to the propounder and implied that she had done so because he had agreed to help her as needed; the propounder was the testatrix's primary caretaker, making appointments for her, driving her to the doctor, dentist and hospital, managing her finances and paying her bills, often doing her grocery shopping, and frequently telephoning and visiting; the propounder arranged for another nephew of the testatrix, who was also respondent's son, to stay with the testatrix at night after the testatrix returned home from a hospitalization in 1979; testatrix never compensated propounder for his services nor expressed any disappointment with him, but stated on several occasions that she was pleased with him, the last statement being a week before her final hospitalization; the testatrix gave propounder a stack of personal papers the Thanksgiving or Christmas before she died; the photostat copy of the will offered into evidence was found among those papers after her death; the only other place the testatrix kept important papers was in a footlocker at the end of her bed; the final time the testatrix became ill, the respondent, a sister of the testatrix, was there and called the propounder to come to the house and take her to the hospital; and a search of the testatrix's home and footlocker after her death uncovered no sign of the original will.

In the Matter of The Will of Jolly

APPEAL by respondent Pauline C. Norman from *John, Judge.* Judgment entered 11 June 1987 in Superior Court, SURRY County. Heard in the Court of Appeals 3 February 1988.

R. Lewis Alexander for petitioner appellee Ricky T. Cockerham.

W. David White for respondent appellant Pauline C. Norman.

PHILLIPS, Judge.

Respondent's appeal is from a judgment based upon a jury verdict that the paper writing offered for probate by the propounder, Ricky C. Cockerham, was the last will and testament of his aunt, Lillie C. Jolly. According to all the evidence, the offered paper writing was a photostat of a paper writing, either lost or destroyed, that was properly drafted, executed, and witnessed several years before the testatrix's death and respondent does not contend otherwise. What she does contend is that the evidence presented at trial was not sufficient to establish that the testatrix did not revoke her will. It is well established that when a will last seen in the testator's possession cannot be found at death a rebuttable presumption arises that the will was revoked, *In re Will of Hedgepeth*, 150 N.C. 245, 63 S.E. 1025 (1909); and in order to revoke a will by destroying it the destructive act must be done with the intent to revoke the will. *In re Will of Wall*, 223 N.C. 591, 27 S.E. 2d 728 (1943). Thus, the sole question for determination is whether the propounder presented any competent evidence either that the testatrix did not destroy the will or did not intend to revoke it. In our opinion such evidence was presented.

The propounder's evidence tended to show that: Lillie C. Jolly executed her last will and testament on 20 July 1977 in the office of Jonesville attorney James J. Randleman. The will left all of her property to the propounder in fee simple. She took the executed, witnessed original will with her when she left the lawyer's office and that was the last time it was seen. During the years that followed she told several different relatives, friends and business associates that she had willed all of her property to the propounder and implied that she did so because he had agreed to help her as needed. During those years the propounder was the testatrix's primary caretaker; he made appointments for her and drove her to the doctor, dentist and hospital; he managed

her finances and paid her bills; he often did her grocery shopping and frequently telephoned and visited. After the testatrix was hospitalized in 1979 and returned home he arranged for Linville Norman, another nephew of the testatrix and respondent's son, to stay with her at night, for which Norman was paid $100 per week. Mrs. Jolly never compensated propounder for his services nor expressed any disappointment with him, but on several occasions stated that she was pleased with him, the last time being but a week before her final hospitalization. Around Thanksgiving or Christmas before she died the testatrix gave propounder a stack of personal papers, and the photostat copy of the will offered into evidence was found among them after her death. The only other place the testatrix kept important papers was in a footlocker at the end of her bed. The final time the testatrix became ill the respondent, a sister of the testatrix, was there and called the propounder to come to the house and take her to the hospital. A search of the testatrix's home and footlocker after her death uncovered no sign of the original will. Respondent presented no evidence.

This evidence is sufficient to establish, as the jury found, that the testatrix never changed her mind about leaving her property to the propounder at her death, and that she neither destroyed the will nor intended to revoke it.

No error.

Judges ARNOLD and COZORT concur.

CAROLINA POWER & LIGHT COMPANY, PETITIONER v. LAWRENCE G. CROWDER AND WIFE, THERESA CROWDER, RESPONDENTS

No. 8728SC899

(Filed 5 April 1988)

Eminent Domain § 11— condemnation—appeal from Commissioners' Report—no exceptions

The trial court properly dismissed respondents' appeal from a final judgment in a condemnation action where respondents failed to make any exceptions to the Commissioners' Report and failed to file exceptions to the Clerk's final judgment. N.C.G.S. § 40A-28.

APPEAL by respondents from *Lewis (Robert D.), Judge.* Order entered 21 April 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 11 February 1988.

On 1 October 1986, petitioner filed a Petition for Condemnation of Right of Way under Chapter 40A of the General Statutes. The Clerk of Superior Court of Buncombe County entered an order appointing Commissioners to determine the value of respondents' property subject to condemnation. The Commissioners filed their report on 20 January 1987 in which they estimated and assessed the compensation due respondents to be $25,300.00.

On 12 February 1987, the Clerk entered a final judgment approving the condemnation and compensation. Respondents filed a notice of appeal from this decision on 20 February 1987. Petitioner then filed a motion to dismiss the appeal which was granted by Judge Lewis on 21 April 1987. From the order of the trial judge, respondents appeal.

Carolina Power & Light Company, by Associate General Counsel Andrew McDaniel; and Van Winkle, Buck, Wall, Starnes & Davis, by Russell P. Brannon, for petitioner appellee.

Alley, Hyler, Killian, Kersten, Davis & Smathers, by George B. Hyler, Jr., for respondent appellants.

ARNOLD, Judge.

Respondents contend that the trial court erred in dismissing their appeal. We do not agree.

G.S. 40A-28 states in pertinent part:

(a) Upon the filing of the report, the clerk shall forthwith mail copies to the parties. Within 20 days after the filing of the report any party to the proceedings may file exceptions thereto. The clerk, after notice to the parties, shall hear any exceptions so filed and may thereafter direct a new appraisal, modify or confirm the report, or make such other orders as the clerk may deem right and proper.

(b) If no exceptions are filed to the report, and if the clerk's final judgment rendered upon the petition and proceedings shall be in favor of the condemnor, . . . all

owners who have been made parties to the proceedings shall be divested of the property. . . .

(c) Any party to the proceedings may file exceptions to the clerk's final determination on any exceptions to the report and may appeal to the judge of superior court having jurisdiction. Notice of appeal shall be filed within 10 days of the clerk's final determination. . . .

The filing of exceptions to the Commissioners' Report is a prerequisite to the filing of an appeal. *City of Raleigh v. Martin*, 59 N.C. App. 627, 297 S.E. 2d 916 (1982).

In the present case, respondents failed to make any exceptions to the Commissioners' Report. They also failed to file exceptions to the clerk's final judgment. Therefore, respondents' appeal was properly dismissed.

Respondents' sole exception is to the trial court's order dismissing the appeal. An exception to the signing of the order presents nothing for review except whether or not the court's conclusions of law are supported by the findings of fact. *See Cratch v. Taylor*, 256 N.C. 462, 124 S.E. 2d 124 (1962). The trial court's order dismissing respondents' appeal is well supported by the finding that respondents failed to file exceptions to the Commissioners' Report. The order of the trial court is

Affirmed.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. HUBERT EARL SPRUILL

No. 872SC904

(Filed 5 April 1988)

1. Criminal Law § 26.5; Larceny § 1— theft of car keys and car—two separate offenses

Defendant could be convicted of separate offenses of larceny of car keys and larceny of a car where the evidence showed that defendant broke into a car dealer's office and took a number of car keys and then drove a car away from the dealer's lot.

2. Criminal Law § 141.1 — habitual felon — date of prior offense — no fatal variance

There was no fatal variance between indictment and proof on an habitual felon charge where the indictment alleged a prison escape on 28 October 1977 as one of defendant's three prior felonies and defendant stipulated prior to trial that this offense actually occurred on 7 October 1977.

APPEAL by defendant from *Fountain, George M., Judge.* Judgments entered 1 May 1987 in MARTIN County Superior Court. Heard in the Court of Appeals 9 February 1988.

Defendant was indicted for, tried on, and convicted of one charge of felonious breaking and entering, two charges of felonious larceny, and the offense of being a habitual felon. From active sentences entered on the jury's verdicts, defendant has appealed.

At trial, the State's evidence showed that on 1 July 1986, defendant forcefully broke into the office of J & M Motors in Williamston and removed from the building a number of car keys. He then took a 1986 Pontiac automobile belonging to J & M and drove it to a rural area in Pitt County, where he was apprehended. The car was valued at approximately $17,500.00.

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

James R. Batchelor, Jr. for defendant-appellant.

WELLS, Judge.

Under his first assignment of error, defendant suggests that the trial court erred in denying his Motion to Dismiss for lack of a speedy trial. Defendant was indicted on 28 July 1986 and his trial began on 27 April 1987. Defendant concedes, however, that sufficient continuances were granted to him to deny him relief under the North Carolina Speedy Trial Act (N.C. Gen. Stat. § 15A-701, *et seq.*). Defendant does not contend that his constitutional rights to a speedy trial were violated. This assignment is overruled.

[1] Defendant next contends that the trial court erred in failing to dismiss or arrest judgment in one of the larceny cases, contending that the larceny of the car keys and the larceny of the car were "substantially" the same offense. We disagree. The evidence was that defendant broke into J & M's building and took a number of car keys, property of value, and then selected a car to

drive away from J & M's lot. This shows two separate acts of larceny, separated in time and space, involving separate property. We cannot accept defendant's argument that under these facts there was but a single transaction showing only one act of larceny. For cases where on similar facts our Supreme Court rejected similar arguments, *see State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984) and *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). This assignment is overruled.

[2] Defendant next contends that the trial court erred in sentencing him as a habitual felon because there was a variance in the indictment and proof at trial as to one of the three prior offenses forming the basis for this charge. The indictment alleged as one of defendant's three prior felonies that he escaped from prison on 28 October 1977. Prior to trial defendant stipulated that this offense actually occurred on 7 October 1977. This was not a fatal variance. Time was not of the essence as to this offense, and defendant's stipulation establishes that he was not surprised by the variance. This assignment is overruled.

No error.

Judges EAGLES and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 APRIL 1988

CAPPS v. CAPPS No. 8710DC926	Wake (84CVD3998)	Affirmed in part; remanded in part
GRAIN DEALERS MUTUAL v. LAMBERT No. 8727DC1055	Gaston (86CVD907)	No Error
HEATHERLY v. ESTATE OF CLARK No. 8730SC998	Haywood (85CVS535)	Affirmed
INTERNATIONAL HARVESTER v. MITCHELL No. 8726SC961	Mecklenburg (77CVS9834)	Affirmed
JAMES v. JAMES No. 8715DC912	Orange (86CVD57)	Affirmed in part; dismissed in part
KENNEDY v. WALL No. 8718SC253	Guilford (86CVS4735)	Appeal Dismissed
ROSE v. BULLUCK No. 876SC925	Halifax (86CVS558)	Affirmed
STATE v. LOUIS No. 874SC1071	Sampson (86CRS5482) (86CRS5485) (86CRS5486)	Vacated & Remanded
STATE v. NORMAN No. 8712SC597	Cumberland (86CRS35055)	No Error
STUTTS v. RENEGAR No. 8715SC277	Orange (85CVS501)	Affirmed
THELEN v. THELEN No. 8726DC794	Mecklenburg (79CVD1297U) (81CVD1053)	Affirmed
WATTS v. WATTS No. 8728DC930	Buncombe (84CVD175)	Reversed & Remanded

STATE OF NORTH CAROLINA v. JAMES WILLIAM JONES

No. 8715SC674

(Filed 19 April 1988)

1. **Constitutional Law § 66— competency of child victim—exclusion of defendant from courtroom during voir dire testimony**

In a prosecution for taking indecent liberties with a four-year-old child, the trial court's exclusion of defendant from the courtroom during testimony by the victim in a *voir dire* hearing to determine the victim's competency to testify at trial did not violate defendant's right to confrontation under the Sixth Amendment to the U.S. Constitution or his rights under the open courts provision of Art. I, § 18 of the N.C. Constitution where a child psychologist testified that the victim exhibited an intense fear of defendant and could suffer emotional harm if forced to testify in his presence; the trial judge secluded defendant in the judge's chambers with a closed circuit television when the victim testified; defendant's attorney was present in the courtroom throughout the victim's testimony; defendant and his attorney were permitted to confer after the victim's direct testimony and before completion of cross-examination of her; defendant's attorney had an unrestricted oportunity to cross-examine the victim; and the trial court concluded that the victim was incompetent to testify at trial.

2. **Criminal Law § 73— hearsay testimony—when admissible**

The unavailability of the child victim due to incompetency and the evidentiary importance of the victim's statements meet the necessity requirement of the two-part test for the admission of hearsay evidence. The second part of the test, which requires a showing that the hearsay statement is inherently trustworthy, is met when the evidence falls within a statutory hearsay exception.

3. **Criminal Law § 73.5— sexual assault—statements by child victim to mother—medical diagnosis exception to hearsay rule**

Testimony that the four-year-old victim told her mother that defendant had sexually assaulted her was admissible under the medical diagnosis exception to the hearsay rule provided by N.C.G.S. § 8C-1, Rule 803(4) where the victim's statements to her mother resulted in immediate medical care for the victim.

4. **Criminal Law § 73.5— child's statements to social worker—medical diagnosis exception to hearsay rule**

Testimony by a social worker who was a member of the Duke Child Protection Team describing a child victim's identification of defendant as the person who committed indecent liberties upon her was admissible under the medical diagnosis exception to the hearsay rule, notwithstanding the child was examined and evaluated by the Team three months after the molestation upon the recommendation of the district attorney, where the witness's interview of the victim sought to elicit information about the molestation for the purpose of aiding a physical examination and diagnosis of the victim's condition, and the victim received psychological treatment after the Team diagnosed her as sexually abused.

5. Criminal Law § 34.8— evidence of another crime—competency to show common plan

In a prosecution of defendant for taking indecent liberties by rubbing the child victim's vagina with his finger, a social worker's testimony that the victim stated that defendant had also put "his peter in her mouth" was admissible under N.C.G.S. § 8C-1, Rule 404(b) to establish a common plan or scheme by defendant to sexually abuse the victim. Furthermore, the trial court was not required to exclude this testimony under Rule 403 on the ground that its probative value was substantially outweighed by the danger of unfair prejudice.

6. Criminal Law § 73.4— child's statements to parents—admissibility as excited utterances

Statements made by a child victim to her parents within ten hours after leaving defendant's custody that defendant "pulled my pants down and touched my pee patch again" and that he had done so before were admissible as excited utterances under N.C.G.S. § 8C-1, Rule 803(2).

7. Criminal Law § 51.1— expert in child abuse—sufficient showing

The trial court did not err in permitting a physician's assistant to testify as an expert in child abuse where the witness testified that she has taught as an assistant professor in the Duke University Pediatrics Department; she has published numerous articles in medical journals and has edited a pediatric textbook on the topic of diagnosis and evaluation of sexually abused children; and she has served as an expert witness in the area of sexual abuse of children at several dozen trials.

8. Witnesses § 1.2— informing jury that child witness incompetent

The trial court in an indecent liberties case did not err in informing the jury that the four-year-old victim had been found incompetent to testify as a witness at the trial.

9. Rape and Allied Offenses § 19— indecent liberties with child—sufficient evidence

The evidence was sufficient to permit the jury to infer that defendant took indecent liberties with the child victim for the purpose of gratifying his sexual desire where it tended to show that defendant moved the victim to an isolated room where he pulled down her underwear and rubbed her vagina with his finger.

10. Constitutional Law § 66— State's use of hearsay—no violation of right to confrontation

Defendant's right to confrontation under the Sixth Amendment to the U.S. Constitution and Art. I, § 25 of the N.C. Constitution was not violated by the State's use of hearsay evidence where the declarant was unavailable to testify and the evidence was admissible under established exceptions to the hearsay rule.

APPEAL by defendant from *Battle, Judge.* Judgment entered 11 February 1987 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 12 January 1988.

Defendant was indicted and convicted of taking indecent liberties with a four-year-old child, in violation of N.C.G.S. § 14-202.1. From a judgment sentencing defendant to a five year active term, he appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Debra K. Gilchrist, for the State.

Daniel H. Monroe, for defendant-appellant.

ORR, Judge.

I.

[1] Defendant contends the trial court erred in excluding him from the voir dire hearing during the victim's testimony to determine her competency to testify.

Prior to examining the victim, the judge heard the testimony of the victim's psychologist, Dr. Betty Gordon. Dr. Gordon, a clinical child psychologist specializing in sexual abuse, testified that the victim exhibited an intense fear of the defendant and that she could suffer emotional harm if forced to testify in his presence.

Based upon Dr. Gordon's testimony, the judge secluded defendant in the judge's chambers with a closed circuit television, when the victim was examined.

The television allowed defendant to see and hear the victim's testimony. In addition, defendant and his attorney were authorized to confer after the victim's direct examination and prior to culmination of the victim's cross-examination. Defendant's attorney was present in the courtroom throughout the victim's testimony and had an unrestricted opportunity to cross-examine her.

After the voir dire hearing, the trial court concluded the victim was incompetent to testify at trial, and declared her to be an unavailable witness.

A. Defendant argues his exclusion from the courtroom violated his Sixth Amendment right to confrontation under the United

States Constitution, and his rights under Article I, §§ 18, 19 or 23 of the North Carolina Constitution.

The legality of excluding a defendant from the courtroom during a competency hearing is an issue of first impression in North Carolina. However, this issue was recently addressed by the U.S. Supreme Court in *Kentucky v. Stincer*, 482 U.S. ---, 96 L.Ed. 2d 631 (1987).

In *Stincer* the defendant was excluded from a hearing determining the competency of a young girl and a young boy the defendant was charged with sexually abusing. The *Stincer* court did not provide the defendant with either a closed circuit television or the opportunity to confer with his attorney while excluded. The trial court in *Stincer* found the children competent to testify; therefore, the defendant had an opportunity to effectively cross-examine the children at trial. This opportunity to cross-examine, the U.S. Supreme Court held, prevented defendant's Sixth Amendment right to confrontation from being violated by his exclusion from the courtroom during voir dire.

The U.S. Supreme Court discussed the purpose and protections of the Sixth Amendment Confrontation clause in *Stincer*, saying:

> The Court has emphasized that 'a primary interest secured by [the Sixth Amendment Confrontation Clause] is the right of cross-examination.' *Douglas v. Alabama*, 380 US 415, 418, 13 L Ed 2d 934, 85 S Ct 1074 (1965). The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process. Cross-examination is 'the principal means by which the believability of a witness and the truth of his testimony are tested.' *Davis v. Alaska*, 415 US 308, 316, 39 L Ed 2d 347, 94 S Ct 1105 (1974).

Stincer, 482 U.S. at ---, 96 L.Ed. 2d at 641.

> Of course, the Confrontation Clause guarantees only '*an opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' *Delaware v. Fensterer*, 474 US, at 20, 88 L Ed 2d 15, 106 S Ct 292 (emphasis in original). This limitation is consistent with the concept that the right

to confrontation is a functional one for the purpose of promoting reliability in a criminal trial.

Id. at ---, 96 L.Ed. 2d at 643.

Based on the decision in *Stincer*, we conclude the determinative question in the present case is whether defendant's exclusion from the courtroom interfered with his opportunity for effective cross-examination.

The record shows that after direct examination of the victim ended, defendant's attorney cross-examined her. When the attorney had completed his own cross-examination, he left the room briefly, conferred with defendant and then returned to ask the victim several more questions before ending all cross-examination.

Defendant heard the complete testimony of the victim during her direct examination and her initial cross-examination. After the initial cross-examination, defendant was able to confer with his attorney and bring to his attorney's attention any discrepancies in the victim's testimony or any crucial unaddressed issues requiring further cross-examination. Thus, defendant, although absent from the courtroom, was able to hear all testimony, interact freely with his attorney, and through his attorney confront the victim, thereby accomplishing effective cross-examination.

We conclude the procedures enacted by the trial court under the facts of this case did not violate defendant's Sixth Amendment right to confrontation.

B. We also conclude the exclusion of defendant did not violate Article I, §§ 18, 19 or 23 of the North Carolina Constitution.

Specifically, we address Article I, § 18, which states in pertinent part, "All court shall be open . . . ." Prior case law in North Carolina holds a defendant has a constitutional right to be present at all stages of a court proceeding so that he may hear the evidence and have an opportunity to refute it. *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962); *Raper v. Berrier*, 246 N.C. 193, 97 S.E. 2d 782 (1957).

We find the trial court's use of a closed circuit television and its act of providing defendant and his attorney adequate opportunity to communicate during the victim's testimony, were sufficient to permit defendant to hear the evidence and to refute it.

Therefore, defendant's rights under the North Carolina Constitution were also fully protected.

II.

Defendant next contends the hearsay evidence rule prohibited Deborah Matthews, Randell Matthews, and Nancy Berson from testifying as to statements made by the victim.

At trial the victim's mother, Deborah Matthews, and father, Randell Matthews, testified that on 19 July 1986 at approximately 8:00 p.m. the victim told the mother in the presence of the father that "Poppy pulled my pants down and touched my pee patch again." The parents further testified that the victim, when asked what she meant by again, responded that Poppy had touched her another time, "And he wiggled his finger around in my pee patch and hurt me." The victim's mother also testified that the victim described her vaginal area as her "pee patch."

In addition, Nancy Berson, a social worker and Coordinator and Child Evaluator for the Duke Child Protection Team, testified she had interviewed the victim on 16 and 17 October 1986 at the Duke Medical Center Pediatric Clinic. During the interview, the victim told Ms. Berson that she had been sleeping with Nanny, her grandmother, when Poppy, her step-grandfather, "snuck up and got [her]" and took her to another room, where he hurt her pee patch with his hand. Ms. Berson also testified that the victim "pulled down her bottom lip just like this to demonstrate the gums, and she said, 'Poppy hurt me here,' and I said, 'Well, how did he hurt you?' and she said he put his peter in her mouth. While saying this, before I could say anything else, she said to me, 'It made me sick, it made me heave.' "

To introduce hearsay evidence in a criminal trial, the prosecution must meet two requirements: (1) it must show the necessity for using hearsay testimony, and (2) it must establish the inherent trustworthiness of the original declaration. *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d 597 (1980); *State v. Smith*, 312 N.C. 361, 323 S.E. 2d 316 (1984); *State v. Gregory*, 78 N.C. App. 565, 338 S.E. 2d 110 (1985), *appeal dismissed and disc. rev. denied*, 316 N.C. 382, 342 S.E. 2d 901 (1986).

[2] In the present case, the trial court, after holding a N.C.G.S. § 8C-1, Rule 601(b) competency hearing, found the victim incompe-

tent to testify at trial. Since the State's case against defendant consisted mainly of the victim's statements, "[t]he unavailability of the victim due to incompetency and the evidentiary importance of the victim's statements adequately demonstrate[d] the necessity" requirement of the two-part hearsay test. *State v. Gregory*, 78 N.C. App. at 568, 338 S.E. 2d at 112-13.

The second part of the test, a showing that the hearsay statement is inherently trustworthy, is established when the evidence falls within a statutory hearsay exception. N.C.G.S. § 8C-1, Rule 802 (1986); *accord, Ohio v. Roberts*, 448 U.S. at 66, 65 L.Ed. 2d at 608.

Therefore, to determine the admissibility of the State's evidence, we must examine the facts underlying each of the victim's statements, testified to by the witnesses, to see if they fall within an exception to the hearsay evidence rule.

A. Testimony of mother, Deborah Matthews.

[3] The State contends Mrs. Matthews' testimony was admissible under Rule 803(4), the statutory exception for statements made for purposes of medical diagnosis or treatment. N.C.G.S. § 8C-1, Rule 803(4) (1986); *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985); *State v. Gregory*, 78 N.C. App. 565, 338 S.E. 2d 110.

Rule 803(4) permits admission of:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

In *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833, the Supreme Court found Rule 803(4) permitted admission of hearsay on facts similar to those in the present case. In *Smith*, two young girls, ages four and five, told their grandmother that a family friend had sexually assaulted them. In response to the children's statements, the grandmother immediately obtained medical care for the children. The Supreme Court said that although the children did not specifically request medical care, they had sought help for their conditions from their caretaker, and their statements resulted in immediate medical treatment and diagno-

sis. Therefore, the Supreme Court held the children's conversation with the grandmother, identifying the type of sexual assault they had suffered and their attacker, was properly admitted as substantive evidence pursuant to the Rule 803(4) hearsay exception.

Here, the four-year-old victim told her mother, Mrs. Matthews, that defendant had sexually assaulted her. The mother responded to the victim's statements by immediately calling a doctor and then taking the victim to the hospital. Consequently, the victim's conversation with her mother caused her to receive immediate medical treatment.

We find no significant difference between the facts in *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 and the present facts. We conclude the trial court properly admitted the mother's testimony at trial, pursuant to Rule 803(4).

B. Testimony of Nancy Berson.

[4] (1) The State argues Ms. Berson's testimony describing the victim's identification of defendant as her attacker was also admissible under Rule 803(4) as statements made for purposes of medical diagnosis and treatment.

Statements made to a medical worker, if pertinent to diagnosis or treatment, are admissible under Rule 803(4). *State v. Aguallo*, 318 N.C. 590, 350 S.E. 2d 76 (1986); *State v. Oliver*, 85 N.C. App. 1, 354 S.E. 2d 527, *disc. rev. denied*, 320 N.C. 174, 358 S.E. 2d 64 (1987).

Defendant argues the victim's statements to Ms. Berson do not fall under Rule 803(4) because Ms. Berson's actions were not for the purpose of treatment or diagnosis, but were instead for the purpose of gathering evidence for the State.

In determining the purpose of a medical examination our Courts have considered the following factors: (1) whether the examination was requested by persons involved in the prosecution of the case; (2) the proximity of the examination to the victim's initial diagnosis; (3) whether the victim received a diagnosis or treatment as a result of the examination; and (4) the proximity of the examination to the trial date. *State v. Stafford*, 317 N.C. 568, 346 S.E. 2d 463 (1986); *State v. Oliver*, 85 N.C. App. 1, 354 S.E. 2d 527.

The victim's mother took her for evaluation by the Duke Child Protection Team (Team) on the recommendation of the prosecuting attorney, Mr. White, and the child's psychologist, Dr. Betty Gordon.

The recommendation of the prosecuting attorney, while suspect, does not automatically render Ms. Berson's testimony inadmissible. As social worker Donna Somers testified, because defendant was not a primary caretaker of the child, social services could not become involved in the case. Consequently, when the child began to exhibit physical and behavioral problems, the mother asked Mr. White for advice instead of turning to a social worker. Mr. White referred the victim's mother to Dr. Betty Gordon, a child psychologist specializing in the evaluation and treatment of sexually abused children. He also referred the mother to the Team for a disclosure interview and medical exam, to determine if there was medical evidence of sexual abuse.

The victim's mother took the child to Dr. Gordon for treatment on 13 October 1986, at which time Dr. Gordon also recommended the child be evaluated by the Team.

The victim was examined and evaluated by the Team on 16 and 17 October 1986, approximately three months after her molestation. Prior to the Team's examination, the victim had been treated several times by Dr. Carol Kline, M.D., and once by Dr. Betty Gordon, a psychologist.

Dr. Kline testified, however, that when she examined the child she was not looking for signs of sexual abuse. Consequently, the victim's examination by the Team was the first time she was physically evaluated for the purpose of medically diagnosing sexual abuse. In addition, Dr. Gordon did not conduct a disclosure interview with the victim as part of her treatment upon learning the Team would be evaluating the victim.

Ms. Berson explained at trial that a Team evaluation for sexual abuse of a child consisted of two parts: a disclosure interview and a physical examination. Ms. Berson testified that a disclosure interview sought to elicit information about the molestation for the purpose of aiding the medical examination and diagnosis of the victim's condition.

After evaluating the victim's disclosure interview and medical examination, the Team diagnosed the victim as having been sexually abused.

Finally, the record shows the disclosure interview and diagnosis by the Team occurred approximately four months before trial, and that after the Team diagnosed the victim as sexually abused, she received psychological treatment for her condition from Dr. Gordon.

Based upon the evidence discussed above, this Court finds the victim's statements to Ms. Berson were made for the purpose of medical diagnosis. We conclude the trial court properly admitted Ms. Berson's testimony under the Rule 803(4) exception to hearsay.

[5] (2) Defendant also challenges Ms. Berson's testimony that the victim said defendant had put "his peter in her mouth."

Defendant argues this evidence was inadmissible for two reasons. First, he asserts the testimony was prohibited by N.C.G.S. § 8C-1, Rule 404(b), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

North Carolina courts have been "very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule [stated in N.C.G.S. § 8C-1, Rule 404(b)]." *State v. Williams*, 303 N.C. 507, 513, 279 S.E. 2d 592, 596 (1981); *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986).

In four cases involving sexual abuse of children, the Supreme Court and the Court of Appeals have permitted testimony of other sex acts, similar in nature and circumstances, for the purpose of showing a common plan or scheme on the part of the defendant to commit the crime charged. *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (evidence of defendant's sexual abuse of daughter permitted at defendant's trial for sexual abuse of two sons); *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983) (evidence of defend-

ant's act of fellatio with son permitted at defendant's trial for sodomy with son); *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (evidence of defendant's fondling of girl's breasts permitted at defendant's trial for first-degree sexual offense with two other girls); *State v. Goforth*, 59 N.C. App. 504, 297 S.E. 2d 128 (1982), *disc. rev. allowed for limited purpose on other grounds*, 307 N.C. 699, 307 S.E. 2d 162 (1983) (evidence of defendant's sexual abuse of two older step-daughters permitted at defendant's trial for attempted first-degree rape of third step-daughter).

In the present case, as in *DeLeonardo*, *Effler*, *Williams* and *Goforth*, the challenged evidence tends to establish a common plan or scheme on the part of defendant to sexually abuse the victim, his step-granddaughter. Thus, the evidence relating to defendant's other sexual activity with the victim was properly admitted under Rule 404(b).

Defendant finally contends this testimony, if admissible under Rule 404(b), should have been excluded pursuant to N.C.G.S. § 8C-1, Rule 403, because its probative value was substantially outweighed by the danger of unfair prejudice.

Whether or not to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, "and his ruling may be reversed for an abuse of discretion only upon a showing that it 'was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986), *quoting State v. Thompson*, 314 N.C. 618, 626, 336 S.E. 2d 78, 82 (1985).

The record discloses no evidence of an abuse of discretion by the trial court. Therefore, we overrule this assignment of error.

C. Testimony of father, Randell Matthews.

[6] Defendant further contends the father's testimony concerning the victim's statements violated the hearsay evidence rule. The State argues this testimony was admissible under the excited utterance hearsay exception, N.C.G.S. § 8C-1, Rule 803(2) as: "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

"In order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication. McCormick on Evidence § 297." *State v. Smith*, 315 N.C. 76, 86, 337 S.E. 2d 833, 841 (1985).

The Supreme Court addressed the admissibility of statements made by young children, and testified to in court by the adult to whom they were made, as Rule 803(2) excited utterance exceptions to the hearsay rule in *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833.

The Court in *Smith* found "that the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than in adults." *State v. Smith*, 315 N.C. at 87, 337 S.E. 2d at 841 (citations omitted).

> 'This ascertainment of prolonged stress is born of three observations. First, a child is apt to repress the incident. Second, it is often unlikely that a child will report this kind of incident to anyone but the mother. Third, the characteristics of young children work to produce declarations "free of conscious fabrication" for a longer period after the incident than with adults.' *Padilla*, 110 Wis. 2d at 419, 329 N.W. 2d at 266 (citations omitted).

Id. at 87-88, 337 S.E. 2d at 841.

Here, the victim entered the bedroom where her parents were watching television, walked over to her mother, and said, "Mama, Poppy pulled my pants down and touched my pee patch again." The victim made this statement within ten hours after leaving defendant's custody. She reported the incident specifically to her mother, and she made the statement without hesitation and without prompting by her parents.

These facts are sufficient to show that the victim's statements were a spontaneous reaction to a startling experience, as defined in *Smith*. We conclude the trial court properly admitted the father's testimony as to the victim's statements under the hearsay exception for excited utterances, Rule 803(2).

III.

[7] Defendant further argues the trial court erred in qualifying State's witness Marcia Herman-Giddens, a physician's assistant, as an expert in the area of child sexual abuse.

"Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge. . . . A finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it. . . ." *State v. King*, 287 N.C. 645, 658, 215 S.E. 2d 540, 548-49 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1209 (1976); *State v. Zuniga*, 320 N.C. 233, 357 S.E. 2d 898, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 384 (1987).

At trial, Ms. Herman-Giddens testified that she specialized in the area of child abuse and that she had taught for eight years, as an assistant professor, in the Duke University Pediatrics Department. She further said she had published numerous articles in medical journals and had edited one pediatric textbook on the topic of diagnosis and evaluation of sexually abused children. She also testified that she had served as an expert witness in the area of sexual abuse of children at several dozen prior trials.

Ms. Herman-Giddens' testimony that the victim had been sexually abused was, therefore, based upon her training and experience in the area of sexual abuse of children. Since there is evidence to support the trial court's conclusion that Ms. Herman-Giddens is an expert in child sexual abuse, we find no abuse of discretion in the admission of her testimony.

IV.

Defendant challenges two actions taken by the trial court during his administration of the trial.

> The presiding judge is given large discretionary power as to the conduct of a trial. Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion.

State v. Rhodes, 290 N.C. 16, 23, 224 S.E. 2d 631, 635 (1976); *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985).

[8] Defendant first contends the trial court erred in notifying the jury that the victim had been found an incompetent witness and would not testify at trial.

After reviewing the record we find defendant's evidence did not show the trial court's statement to the jury lacked a rational basis. Thus, defendant failed to establish an abuse of discretion. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430; *State v. Thompson*, 314 N.C. 618, 336 S.E. 2d 78.

Next, defendant argues the trial court erred in permitting the district attorney to present the victim to the jury, when the victim would not be testifying.

We reject defendant's second argument because he failed to preserve in the record any evidence showing that the victim was, in fact, presented to the jury at trial.

Accordingly, we find that defendant's evidence in support of both arguments was insufficient to show that the trial court's actions constituted either an abuse of discretion or prejudicial error. We overrule these assignments of error.

V.

[9] Defendant argues the State's evidence was insufficient to establish he acted "for the purpose of arousing or gratifying sexual desire," pursuant to N.C.G.S. § 14-202.1, when he assaulted the victim. Therefore, he asserts the trial court improperly denied his motions to dismiss.

Upon a motion to dismiss, "all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977); *State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987).

We have addressed this specific question in two prior cases, *State v. Slone*, 76 N.C. App. 628, 334 S.E. 2d 78 (1985) and *State v.*

Campbell, 51 N.C. App. 418, 276 S.E. 2d 726 (1981). In each of these cases we noted that "[a] defendant's purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference." *State v. Campbell*, 51 N.C. App. at 421, 276 S.E. 2d at 729.

Here the evidence tends to show that defendant moved the victim to an isolated room, where he pulled her underwear down and rubbed her vagina with his finger. We conclude this evidence was sufficient to permit the jury to infer defendant took indecent liberties with the victim for the purpose of arousing or gratifying his sexual desire. We overrule this assignment of error.

VI.

[10] Finally, defendant contends the State's use of hearsay evidence violated his right to confrontation under the Sixth Amendment of the United States Constitution and Article I, § 25 of the North Carolina Constitution.

We find this argument to be without merit. The U.S. Supreme Court in *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d 597 held that the admission of hearsay evidence at trial did not violate the confrontation clause, when the declarant was unavailable to testify and his statement bore adequate "indicia of reliability." The U.S. Supreme Court further said that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* at 66, 65 L.Ed. 2d at 608.

As previously discussed, the hearsay evidence presented by the State was admissible under established exceptions to the hearsay evidence rule. Accordingly, we overrule this assignment of error.

For the reasons given above, we conclude defendant received a fair trial free from prejudicial error.

No error.

Judges JOHNSON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. JOHNNY H. WATKINS

No. 8728SC719

(Filed 19 April 1988)

1. **Rape and Allied Offenses § 4.3— victim's prior sexual conduct—questions properly limited**

The trial court in a rape case properly limited questions with regard to the victim's prior sexual conduct. N.C.G.S. § 8C-1, Rule 412(b).

2. **Rape and Allied Offenses § 4— defense counsel's questioning of victim limited—no expression of opinion by court on victim's credibility**

The trial judge did not express an opinion as to the rape victim's credibility when he limited defense counsel's questioning of the victim as to what she drank immediately before the rape, since the victim testified on direct examination as to what she drank, and defense counsel cross-examined her on the subject twice before the trial judge prevented him from going over it again.

3. **Rape and Allied Offenses § 6.1— conflicting evidence as to use of knife—lesser offenses properly submitted**

In a prosecution of defendant for first degree rape and first degree sexual offense where there was conflicting evidence as to whether defendant used a knife, the trial court properly submitted the lesser included charges of second degree rape and second degree sexual offense to the jury.

4. **Rape and Allied Offenses § 6— instructions on pocketknife as deadly weapon—instructions proper**

The trial court properly instructed the jury with respect to defendant's use of a pocketknife and whether the knife was a deadly weapon; moreover, acquittal of defendant of first degree rape made any error with regard to such instructions not prejudicial.

5. **Criminal Law § 122.1— jury's request to have rape victim's testimony read—instructions proper**

The trial judge did not err in granting the jury's request to have certain portions of a rape victim's testimony read to them, since the judge then instructed the jury that they "must consider and deliberate on all of the evidence and remember what the rest of the evidence was concerning that conversation." N.C.G.S. § 15A-1233(a).

6. **Criminal Law § 138.34— intoxication as mitigating factor—insufficiency of evidence**

The trial court in a rape case was not required to consider defendant's intoxication as a mitigating factor where there was evidence that defendant was capable of driving his truck for considerable distances both before and after the alleged assault; there was no evidence that defendant's intoxication prevented him from being cognizant of his actions; and defendant therefore failed to prove that his intoxication reduced his culpability.

7. **Criminal Law § 138.41— good character as mitigating factor—insufficiency of evidence**

The trial court in a rape case did not err in failing to find as a mitigating factor that defendant was a person of good character, since the only evidence of defendant's good character consisted of statements by his employment supervisor of three months and his employer of two years that his character was good.

8. **Constitutional Law § 48— defense counsel's admission of crime denied by defendant—no ineffective assistance of counsel**

A statement to the jury during closing argument by defendant's attorney in a rape and sexual offense case that "I think there was anal intercourse" did not amount to ineffective assistance of counsel where defendant had entered a plea of not guilty to all charges, including the charge of first degree sexual offense, to wit: anal intercourse; the victim testified that defendant twice had anal intercourse with her against her will; the physician who examined the victim on the night of the assault testified that the victim told him she had been forced to have anal intercourse and that his examination of her substantiated that story; defendant never denied that he engaged in anal intercourse with the victim; though defendant never specifically admitted or acknowledged having had anal intercourse with the victim, his defense generally was that whatever happened was with the victim's consent; and defense counsel's statement, viewed in the light of all the evidence, thus failed to rise to the level of prejudice requiring a new trial.

APPEAL by defendant from *Lewis (Robert D.), Judge.* Judgment entered 27 February 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 12 January 1988.

Attorney General Lacy H. Thornburg by Assistant Attorney General John F. Maddrey for the State.

Albert L. Williams, II, for defendant appellant.

COZORT, Judge.

Defendant was convicted of one count of second-degree rape and two counts of second-degree sexual offense. From a judgment sentencing him to terms of twenty years, twelve years and twelve years, to run consecutively, defendant appeals. We find no error in defendant's trial.

Defendant was charged with first-degree rape and two counts of first-degree sexual offense, one alleging anal intercourse and one alleging fellatio. Defendant pled not guilty to all of the charges.

At trial, the State's evidence tended to show the following:

On 27 September 1986, Cassandra Lynn Myers met defendant for the first time at a bar in Asheville. They left the bar with some of her friends at around 8:00 p.m. and drove up into the mountains where they parked their cars, drank beer and smoked marijuana. Ms. Myers testified that she drank nothing before meeting the defendant and that while on the mountain she drank one beer and had three to five hits of marijuana. When they left the mountain, Ms. Myers was riding with defendant in his truck when he realized he had lost his cooler. He asked Ms. Myers if she would go back with him to look for it, and she agreed as long as it would take no more than thirty minutes. On the way back up the mountain, defendant stopped the truck, talked to Ms. Myers for a few minutes, and then began telling her that he wanted to make love to her. Ms. Myers told defendant she did not want to make love. Defendant forced himself on Ms. Myers, who, although she tried, was unable to fight off defendant's advances. Defendant proceeded to tie her hands in front of her with a rope and gagged her mouth with his shirt. He was unable to undress her because her hands were tied. He took a pocketknife and cut down the front of her shirt and cut her bra straps. He then forced her to have vaginal and anal intercourse, about twice each, and forced her to perform fellatio.

Afterwards defendant apologized to Ms. Myers and drove her to a convenience store so that she could call a friend to take her home. Ms. Myers testified that after she got out of defendant's car and he drove off, she noticed a police car stopped nearby. She said she walked up to one of the officers and said, "Please help me. I've just been raped."

Sergeant Randy Riddle of the Buncombe County Sheriff's Department testified that Ms. Myers approached his car on the night of 27 September 1986 and told him that she had been raped. He stated that Ms. Myers was crying and that her tank top had been cut or torn open.

Dr. George Houlditch testified that he was the emergency room physician on duty in the early morning hours of 28 September 1986 when Ms. Myers was brought to the hospital. He testified that he examined Ms. Myers and that she had several fresh tears and some bruising around the anal area, but that her pelvic

examination showed nothing remarkable. He also testified that his examination substantiated her story that she had been forced to have anal intercourse.

When defendant took the stand, he testified that Ms. Myers never resisted him or said anything negative to him during the incident. He also stated that he did not have a rope or knife in the truck on the night of the incident. He stated that when he heard the police were looking for him, he voluntarily turned himself in on 29 September 1986.

The jury found defendant guilty of one count of second-degree rape and two counts of second-degree sexual offense. The court sentenced defendant to terms of twenty years, twelve years and twelve years, to run consecutively. From that judgment, defendant appeals and contends that the trial court erred: (1) by limiting questioning during an *in camera* hearing; (2) by limiting the cross-examination of Ms. Myers; (3) by submitting the lesser-included offense of second-degree rape and second-degree sexual offense to the jury; (4) by instructing the jury as to the use of a pocketknife during the crimes; (5) by reading requested testimony from the trial transcript to the jury; (6) by declining to find his voluntary intoxication as a mitigating factor; (7) by declining to find his cooperation with the police as a mitigating factor; (8) and by declining to find that defendant was a person of good character as a mitigating factor. The defendant also filed a "Conditional Motion for Appropriate Relief," alleging that defendant's trial counsel, who was not the same as defendant's counsel on appeal, had rendered to defendant ineffective assistance of counsel.

We first address the issues brought forward by the defendant in his appeal of right pursuant to N.C. Gen. Stat. § 15A-1442.

[1] Defendant first argues that the trial court erred in limiting certain questioning during an *in camera* hearing during Ms. Myers's cross-examination by the defendant. We disagree.

During the *in camera* hearing, defense counsel attempted to question Ms. Myers as to her prior sexual conduct. The trial judge sustained an objection to this line of questioning and held that no evidence of prior sexual conduct could be introduced at trial because it fell outside the scope of N.C. Gen. Stat. § 8C-1, Rule 412(b).

Rule 412(b) provides:

> Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complainant and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

In the case at bar, defense counsel attempted to question Ms. Myers about an alleged violent incident with her boyfriend, which Ms. Myers testified was unrelated to any sexual activity. These questions were not relevant or admissible under Rule 412(b), and we hold that the trial court properly limited this line of questioning.

[2] Defendant next argues that the trial court erred in limiting defense counsel's cross-examination of Ms. Myers concerning her drinking on the night she was assaulted. We find no error.

On cross-examination, defense counsel repeatedly questioned Ms. Myers about what she drank while on the mountain. After several similar questions, the trial judge said, "Well, I believe we've been over that, Mr. Shackelford. She said she stopped drinking when they got up there. Ask your next question." Defendant contends that this statement unduly prejudiced him in that it amounted to an expression of opinion by the judge as to Ms. Myers's credibility.

In exercising control over the conduct of the trial, the trial judge, in his discretion, may object to repetitive questions because he has an obligation to avoid useless repetition of the evidence. *State v. Paige*, 316 N.C. 630, 650, 343 S.E. 2d 848, 860 (1986). In this case, Ms. Myers testified on direct examination as to what she drank on the mountain, and defense counsel cross-examined her on the subject twice before the trial judge prevented him from going over it again. We hold that the trial judge properly exercised his discretion in limiting defense counsel's questioning on this issue.

[3] Next, defendant argues that there was insufficient evidence to submit the lesser-included charges of second-degree rape and second-degree sexual offenses to the jury. We find no merit to defendant's argument.

> "The trial court is required to submit lesser included degrees of the crime charged in the indictment when and only when there is evidence of guilt of the lesser degrees." [Citations omitted.]
>
> . . . Where there is conflicting evidence as to an essential element of the crime charged, the court should instruct the jury with regard to any lesser included offense *supported by any version of the evidence.*

State v. Jones, 304 N.C. 323, 330-31, 283 S.E. 2d 483, 487-88 (1981).

In this case, there was conflicting evidence on the defendant's use of a knife, proof of which was necessary for a verdict of first-degree rape. Ms. Myers testified that defendant employed a knife during the act of rape. Defendant testified that there was no knife in his truck when the incident occurred and no knife was ever located by investigating officers. Since there was conflicting evidence on this issue, we hold that the trial court properly included the lesser-included offense in its charge to the jury.

[4] Defendant's next argument is that the trial court erred in its charge to the jury on first-degree rape and the use of a pocketknife. We disagree.

Defendant asserts that the trial court presumptively charged that a pocketknife was a deadly weapon in its charge on first-degree rape. In its charge to the jury the trial court stated:

> [T]he State must prove that the defendant employed a dangerous or deadly weapon. A pocket knife may be a dangerous or deadly weapon, for a dangerous or deadly weapon is a weapon which is likely to cause death or serious bodily injury. In determining whether this pocket knife is a deadly weapon on this occasion, you should consider the size and nature of the pocket knife, the manner in which it was used, and the size and strength of Mr. Watkins as compared to Miss Myers.

We hold that these jury instructions were proper and did not constitute a "presumptive" charge that a pocketknife was a deadly weapon. In any event, the acquittal of defendant of first-degree rape makes any such error in the instructions not prejudicial to the defendant.

[5] Next, defendant argues that the trial court erred in reading certain requested portions of Ms. Myers's testimony to the jury. We find no merit to this argument.

N.C. Gen. Stat. § 15A-1233(a) provides in part:

> If the jury after retiring for deliberation requests a review of certain testimony . . . [t]he judge in his discretion . . . may direct that requested parts of the testimony be read to the jury . . . . In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

After the jury in this case began deliberations, it submitted a question to the judge regarding Ms. Myers's testimony about a conversation between defendant and her friends. The trial judge located the relevant portion of her testimony and had the court reporter read it to the jury. Defendant contends that by reading only Ms. Myers's testimony, the trial judge gave undue weight to her testimony and prejudiced his right to a fair trial. We do not agree. Immediately after the court reporter read Ms. Myers's testimony, the trial judge instructed the jury that they "must consider and deliberate on all of the evidence and remember what the rest of the evidence was concerning that conversation." Based on these instructions, we hold that the trial judge properly exercised his discretion in having the requested testimony read to the jury and that defendant's argument has no merit.

[6] Defendant next argues that the trial court erred in failing to consider his intoxication as a mitigating factor. We disagree.

When a defendant argues that his intoxication compels a finding of a mitigating factor, he must not only prove his intoxication, but also prove that the intoxication reduced his culpability for the offense. *State v. Torres*, 77 N.C. App. 345, 351, 335 S.E. 2d 34, 38 (1985). In this case, defendant failed to prove that his intoxication reduced his culpability. Although there was evidence of his voluntary intoxication, there was also evidence that defendant was capable of driving his truck for considerable distances, both before and after the alleged assault. There is also no evidence that defendant's intoxication prevented him from being cognizant of his actions. Therefore, the trial court was not required to consider defendant's intoxication as a mitigating factor.

Defendant also argues that the trial court erred in not finding as a non-statutory mitigating factor that he cooperated with the police by turning himself in for questioning. We find this argument meritless.

N.C. Gen. Stat. § 15A-1340.4 provides that a sentencing judge may consider any non-statutory factor in aggravation or mitigation of an offense if it is "proved by the preponderance of the evidence, and [it is] reasonably related to the purposes of sentencing . . . ." The consideration of a non-statutory factor is in the discretion of the sentencing judge and "failure to find such a non-statutory mitigating factor will not be disturbed on appeal absent a showing of abuse of discretion." *State v. Spears*, 314 N.C. 319, 322-23, 333 S.E. 2d 242, 244 (1985). We hold that defendant has failed to show any abuse of discretion in the trial court's failure to consider this factor.

[7] Defendant next argues that the trial court erred in not finding as a mitigating factor that defendant was a person of good character. We find no error.

A defendant has the burden of proving factors in mitigation "by a preponderance of the evidence, and the trial court has the discretion to assess the credibility of defendant's evidence and either accept or reject it." *State v. McGuire*, 78 N.C. App. 285, 294, 337 S.E. 2d 620, 626 (1985).

The only evidence below of defendant's good character was statements by his employment supervisor of three months and his employer of two years. His supervisor stated that, as far as he knew, defendant had good character. His employer simply stated that defendant's character and reputation were good. We hold that the trial judge did not abuse his discretion in failing to find defendant's good character as a factor in mitigation.

[8] We now turn to the defendant's allegation that he is entitled to a new trial because he was denied effective assistance of counsel at trial. This argument is before us in a somewhat unusual fashion. The defendant included in the record on appeal an assignment of error which reads:

> 5. When the defendant's attorney argued to the jury, without the Defendant's consent, that the Defendant did engage in anal intercourse with the prosecuting witness, the Defendant's attorney admitted an element of the charge and the separate uncharged offense of crime against nature, thus denying Defendant's constitutional right to effective assistance of counsel as well as his constitutional right to enter a plea of not guilty as that admission contradicted the Defendant's not guilty plea and the evidence presented at trial of the Defendant's denial of anal intercourse.

Shortly after the defendant filed his brief, in which he made an argument in support of Assignment of Error No. 5, the defendant filed in this Court a document entitled "Conditional Motion for Appropriate Relief." In that document, the defendant again contended that he was denied effective assistance of counsel at trial. He repeated the allegation made in Assignment of Error No. 5 in the Record and also alleged that his trial attorney (1) "did not receive adequate discovery," (2) did not properly prepare defendant for cross-examination, (3) did not thoroughly research the evidence law regarding the introduction of the prosecuting witness's prior sexual history, and (4) did not have recorded closing arguments of counsel. The defendant offered no argument and filed no documents in support of the new allegations made in the Conditional Motion for Appropriate Relief. Instead, he asks that the Motion be sent back to the trial court for an evidentiary hearing on the merits.

N.C. Gen. Stat. § 15A-1418(a) states that a motion for appropriate relief based upon grounds set out in N.C. Gen. Stat. § 15A-1415 may be made in the appellate division when a case is in that division for review. Among the grounds for appropriate relief listed in § 15A-1415(b) is: "(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." Defendant's claim of ineffective assistance of counsel would appear to be a claim under subsection (3). N.C. Gen. Stat. § 15A-1418(b) provides:

> When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

Upon review of the Record and transcript, we find that the materials before us are sufficient to make a determination on the issue of whether the statement to the jury by defendant's counsel ("I think there was anal intercourse") constituted ineffective assistance of counsel. We now proceed to that contention.

When a defendant contends that he has been denied effective assistance of counsel, he must show that his counsel's conduct fell below an objective standard of reasonableness. To this end, the defendant must satisfy the following two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.* (Emphasis added.)

State v. Braswell, 312 N.C. 553, 562, 324 S.E. 2d 241, 248 (1985), *quoting Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 693 (1984).

Defendant entered a plea of not guilty to all charges, including the charge of second-degree sex offense, to wit: anal intercourse. During his closing argument to the jury, defendant's attorney stated, "I think there was anal intercourse." Defendant contends that this unauthorized admission by his attorney undermined his credibility to the extent that defendant was denied a fair trial. Viewed in the light of all the other evidence, we hold that defense counsel's statement failed to rise to the level of prejudice requiring a new trial.

Ms. Myers testified that defendant twice committed anal intercourse against her will. Her testimony was corroborated by that of Dr. Houlditch, the physician who examined Ms. Myers on the night of the assault. He testified that Ms. Myers had several fresh lacerations and some bruising in the anal area. He also testified that Ms. Myers told him she had been forced to have anal intercourse and that his examination of her substantiated that story. In his testimony, the defendant never denied that he engaged in anal intercourse with Ms. Myers. Although he never specifically admitted or acknowledged having had anal intercourse with Ms. Myers, his defense generally was that whatever happened between defendant and Ms. Myers was with Ms. Myers's consent. Given this evidence, we find that defense counsel's statement was insufficient to have adversely affected the outcome of defendant's trial.

The defendant has offered no materials and no argument on the other allegations of ineffective assistance of counsel contained in his Motion for Appropriate Relief. There is nothing before this Court upon which we can determine whether the defendant is entitled to a new trial based on those allegations. The case must be remanded to the trial court, in accordance with N.C. Gen. Stat. § 15A-1418(b). The trial court must then determine, in accordance with N.C. Gen. Stat. § 15A-1420, whether the defendant is entitled to a hearing on the four allegations of ineffective assistance of counsel not now reviewable in this Court.

In summary, the result of the appeal is: (1) as to defendant's appeal as of right, we find no error; (2) as to defendant's Motion for Appropriate Relief alleging ineffective assistance of counsel based on counsel's statement to the jury, we deny defendant's motion for a new trial; (3) as to the remaining allegations in defend-

ant's Motion for Appropriate Relief, the case is remanded to the trial court for further proceedings.

No error in trial; motion denied in part and remanded in part.

Judges PARKER and GREENE concur.

JOHN MICHAEL ALDERMAN AND GLORIA R. ALDERMAN; RUPERT L. BYNUM, JR. AND JOYCE M. BYNUM; GEORGE BOWIE AND ANNE BOWIE; F. C. BURGNER; ELSIE C. GOFF; WILLIAM C. FISCHER AND SANDRA FISCHER; ROBERT P. BLAIR; JAMES E. PRUCHNIAK; JOSEPH K. WARD AND CHARLOTTE WARD; GEORGE CLARK THOMPSON AND CAROL S. THOMPSON v. CHATHAM COUNTY AND THE BOARD OF COUNTY COMMISSIONERS OF CHATHAM COUNTY, INCLUDING EARL D. THOMPSON, HENRY DUNLAP, JR., GUS MURCHISON, JR., C. W. LUTTERLOH; CARL THOMPSON AND CALVIN ROBERSON AND WIFE, MARY C. ROBERSON

No. 8715SC401

(Filed 19 April 1988)

1. **Counties § 5.1; Municipal Corporations § 30.9— property rezoned from residential agricultural to mobile home district—improper spot zoning**

The trial court did not err in concluding that the rezoning of defendants' property from residential agricultural to mobile home district was illegal spot zoning since the rezoned area was only 14.2 acres and was uniformly surrounded by property zoned residential agricultural, and the county failed to show a reasonable basis for rezoning the 14.2-acre tract in that there was no indication of any change in conditions in the immediate area of the property, there was no indication that the tract was unsuitable for residential use for which it was previously zoned, and the classification and development of nearby land was not consistent with mobile home district.

2. **Counties § 5.1; Municipal Corporations § 30.9— property rezoned from residential agricultural to mobile home district—illegal contract zoning**

The trial court did not err in concluding that the rezoning of defendants' land from residential agricultural to mobile home district constituted illegal contract zoning where the county had denied defendants' five previous rezoning requests; defendants changed their request from 24 to 14 lots; the reason they gave was to have the lots in line with the Land Development Plan, which addressed density of land use; the land was rezoned in consideration of an assurance that the 14.2-acre tract would be developed in accordance with a restricted plan; and the rezoning was accomplished as a direct consequence of

the condition agreed to by the applicant rather than as a valid exercise of the county's legislative discretion.

APPEAL by defendants from *Lee, Thomas H., Judge.* Judgment entered 17 November 1986 in Superior Court, CHATHAM County. Heard in the Court of Appeals 28 October 1987.

This is a civil action by plaintiffs for a declaratory judgment invalidating an amendment to a zoning ordinance adopted by the Chatham County Board of Commissioners.

Epting & Hackney, by Robert Epting, for plaintiff-appellees.

Gunn & Messick, by Paul S. Messick, Jr. and Robert L. Gunn; Faison, Brown, Fletcher & Brough, by Michael Brough, for defendant-appellants.

JOHNSON, Judge.

Plaintiffs' complaint alleged that defendant Chatham County and its Board of County Commissioners had acted unlawfully in rezoning Calvin and Mary C. Roberson's 14.2 acre tract from Residential Agricultural 40-30 (RA 40-30) to Mobile Home District (MH District) for 14 lots and sought the court's declaratory judgment that defendant commissioners' 17 March 1986 action in that regard was illegal, invalid, and void, on grounds, *inter alia*, that the action of the County Commissioners constituted spot zoning and contract zoning.

The trial court's findings of fact established the following: The Robersons are owners of 14.2 acres of land located south of State Road 1700 and west of Mount Gilead Baptist Church Road. The 14.2 acre tract is adjacent to the south side of Parker's Creek which flows into the Parker's Creek impoundment on Jordan Lake, where the Parker's Creek campground and recreation areas are located. Some of the plaintiffs are owners of single family homes located on lots which are contiguous with and adjoin the southern boundary of the Robersons' 14.2 acre property, and the remaining plaintiffs are owners of single family residences located on lots in the same nearby vicinity and generally south and west of the 14.2 acre tract.

Plaintiffs' lands and the Robersons' 14.2 acre tract are a small part of a much larger area of land totalling 500 acres which

was originally zoned Residential Agricultural 20 (RA-20) when the county first adopted its zoning ordinance in 1968.

Prior to defendants' 30 January 1986 rezoning request for the 14.2 acre tract, defendant Calvin Roberson had sought to have their land (including the 14.2 acre tract) rezoned from low density residential use to mobile home park use on six different occasions. On 23 July 1973, defendant Calvin Roberson requested that the county rezone 40 acres then zoned RA-20 (including the 14.2 acre tract at issue) for a trailer park. On 1 October 1973, this request was denied by unanimous vote of the defendant Chatham County Commissioners.

On 17 October 1974, defendant Calvin Roberson sought to have 20 acres (adjacent to the 14.2 acre tract at issue) rezoned to mobile home use for a trailer park of 40 mobile homes. The County Planning Board opposed the rezoning on grounds that such use could jeopardize the planned Parker's Creek impoundment and recreation area at the Jordan Reservoir. However, on 9 June 1975, the County Commissioners, by a 3-2 vote, voted to rezone 16 of the 20 acres for a mobile home park at a density of not more than two trailers per acre.

On 13 September 1983, the Chatham County Planning Board considered the Robersons' request to expand their trailer park from the 16 acres rezoned on 9 June 1975, into the adjacent portion of their property south of Parker's Creek, which included the 14.2 acre tract at issue. Neither the Planning Board nor the County Commissioners took further action on this request because they failed to present any survey or other evidence to support their claim that the land was located in an unzoned township. On 29 September 1983, defendant Calvin Roberson requested that their 20 acres located west of Mount Gilead Church Road (including the 14.2 acres at issue) be rezoned from RA 40-30 to Mobile Home District.

On 11 October 1983, before the Planning Board, defendant Calvin Roberson stated that the purpose of the request was to spread out the existing thirty-two trailer lots and add 18 more on larger lots, which on its south side bordered the plaintiffs' lots and homes. In addition, he stated that he had State approval for a package treatment plant to serve the trailer park.

On 8 November 1983, the Planning Board considered the request again. Plans submitted at the meeting showed that the parcel for which rezoning was requested contained 16 acres. It was learned that no approval for a package treatment plant to serve the proposed trailer park had been given by the State. After the County Planner advised the Board that the rezoning request (for 24 units on 16 acres) did not conform to the density recommended in the Land Development Plan, the Board voted 5-3 to deny the request.

On 9 January 1984, the Chatham County Commissioners again considered the rezoning request. At that meeting, defendant Commissioner Carl Thompson made the motion to deny the rezoning request, and "strongly recommended" that the Robersons submit a plan that would provide an adequate buffer between their property and the adjoining property owners. Two commissioners voted to approve the rezoning request and two voted to deny the request. Defendant Chairman Earl Thompson broke the tie and voted against the rezoning request, stating that his concern was a larger buffer zone and the potential density in the proposed trailer park.

On 9 April 1985, the Planning Board considered their request that a 16.2 acre tract (including the 14.2 acre tract at issue) be rezoned from RA 40-30 to MH District for 24 mobile homes. The Planning Board tabled this request pending State action on the Robersons' permit application for a package sewage treatment plant. On 14 January 1986, before the Planning Board, defendant Calvin Roberson asked that the rezoning request not be taken off the table.

On 30 January 1986, the Robersons submitted the rezoning request at issue, asking that the 14.2 acres (adjacent on its south side to plaintiffs' lands, which was the tract that was part of the property considered in the five previous rezoning requests) be rezoned from RA 40-30 to MH District for 14 mobile home lots. On 11 February 1986, the Planning Board considered the request. At that meeting, defendant Calvin Roberson stated that they had changed their request from 24 lots to 14 lots because they felt that the 14 lots would be more in line with the Land Development Plan. He also stated that they were trying to get a package treatment plant approved by the State to serve the property, in-

cluding the 32 units already approved on the 16 acres which he and his wife owned.

Plaintiff John Alderman stated that he had purchased his lot (adjacent to the 14.2 acre tract's south boundary) from the Robersons. Plaintiff Alderman stated that at the time he purchased his lot, Calvin Roberson had verbally promised him that no mobile homes would be placed behind Alderman's lot. The Planning Board voted to recommend that the 14.2 acres be rezoned from RA 40-30 to MH District for 14 lots.

On 13 March 1986, the Chatham County Commissioners held a public hearing to hear public comment on the Robersons' request. Defendant Calvin Roberson stated that they sought to have the 14.2 acres rezoned so that they could expand their existing trailer park. He stated that the Planning Board had approved their request and that they had met all requirements such as buffer zones, low density, and sewage systems.

Many persons spoke in opposition to the requested rezoning change. Plaintiff Alderman reiterated his position that he would not have purchased his lot but for the Robersons' assurance that they would not build on the 14.2 acres unless they decided to build for their children. Other persons had opposition to trailer parks being built but not individual mobile homes. These parties stated that they were against an increase in density allowed in MH District; that the expansion of the trailer park was unwarranted because the Robersons had not utilized the land rezoned in 1975; that their attempts to have the land rezoned had been denied during the last ten years; that there existed no change of circumstances in condition to warrant the rezoning; that there were a number of lots off Mount Gilead Church Road zoned for mobile homes; that there already existed in the community another trailer park in addition to the Robersons'; and that any additional trailer parks would affect the single family character of the area.

On 17 March 1986, the rezoning request was granted by the defendant County Commissioners. The minutes of the meeting simply indicate that "Commissioner Dunlap moved, seconded by Commissioner Murchison and passed unanimously to approve the request . . . that 14.2 acres on the south side of SR 1700 (Mt.

Gilead Church Road) be zoned from Residential Agricultural to Mobile Home District for fourteen lots."

On 22 April 1986, plaintiffs filed their complaint against the respective defendants. On 23 June 1986, defendants filed their answers. On 14 October 1986, the case was tried by the trial judge, sitting without a jury. After reviewing the evidence and stipulations of the parties, and after making findings of fact and conclusions of law, the trial court declared that the rezoning by the Board of Commissioners was invalid and enjoined the Robersons from developing a mobile home park unless validly rezoned by the Board of Commissioners. From the judgment of the trial court, defendants appealed.

Defendants bring forth three Assignments of Error for this Court's review. For the following reasons, we affirm the judgment of the trial court.

[1] By their first Assignment of Error, defendants contend that the trial court erred in concluding that the rezoning of the Robersons' property was illegal spot zoning. We disagree.

G.S. sec. 153A-344 expressly gives counties the power to amend their zoning ordinances. As a legislative function, the county's act of amending its zoning ordinance is entitled to a presumption of validity. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979). The legislative act of enacting or amending a zoning ordinance is invalid if it is unreasonable, arbitrary, or an unequal exercise of legislative power. *Id.*

"Spot zoning" is defined as:

> [a] zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, . . .

Blades v. City of Raleigh, 280 N.C. 531, 549, 187 S.E. 2d 35, 45 (1972).

Zoning generally must be accomplished in accordance with a comprehensive plan in order to promote the general welfare and

serve the purposes of the enabling statute. G.S. sec. 153A-341; *Godfrey v. Union County Bd. of Commissioners*, 61 N.C. App. 100, 300 S.E. 2d 273 (1983). Because it zones a small area differently than a much larger area surrounding it, spot zoning, by definition, conflicts with the whole purpose of planned zoning. 2 Rathkopf, The Law of Zoning and Planning sec. 28.02 (1987). Therefore, unless there is a "clear showing of a reasonable basis," spot zoning is beyond the authority of the county or municipality. *Blades* at 549, 187 S.E. 2d at 45.

First, defendants argue that a relatively small area is required for spot zoning per *Blades, supra,* and that the 14.2 acres involved is part of a larger tract of approximately 41 acres *owned by the Robersons.* (Emphasis supplied.) Furthermore, defendants argue that since the 14.2 acres rezoned adjoins the Robersons' existing 16 acre tract zoned MH District, then the rezoning was merely an extension of the existing MH District. Defendants' argument is misplaced.

It is undisputed that at the time the application came before the Board, the Robersons' 14.2 acre tract was part of a much larger area of over 500 acres which was zoned RA 40-30 for low density single family residential and agricultural use. Trailer parks were not a permitted use in the RA 40-30 zone, although individual trailers could be used as single family residences within the RA 40-30 zone. If mobile homes were to be used for single family residences, subdivision requirements had to be met, which included surveying and platting the individual lots upon which trailers would be placed, and paving the subdivision roads. The rezoning of the property by the Commission to MH District permitted the Robersons to utilize the property without having to meet the subdivision requirements. Thus, the rezoning singled out a "relatively small parcel owned by a single person . . . so as to relieve the small tract from restrictions to which the rest of the area is subjected." *Blades, supra.*

This was the basis for the trial court's finding of fact No. 24 which states:

> The development standards applicable to Mobile Home Districts under the Chatham County Zoning Ordinance are different from and less stringent than the development standards applicable to the development of subdivisions under RA

40-30 zoning; in particular, individual lots do not have to be surveyed for development in a Mobile Home District, while such surveys are required for lots subdivided in a RA 40-30 subdivision; and, in an RA 40-30 subdivision with as many as four lots, roads would have to be paved, while in a Mobile Home District with less than 15 lots, the roads do not have to be paved. Thus, the March 17, 1986 Rezoning of Defendant Roberson's 14.2 acre tract from RA 40-30 to MH District for 14 mobile home lots relieved that tract from restrictions to which the remaining RA 40-30 area, including the Plaintiffs' said properties, were and remain subjected.

Thus, the rezoning amendment here clearly constitutes spot zoning. The rezoned area was only 14.2 acres and was uniformly surrounded by property zoned RA 40-30. The remaining question then is whether there was a reasonable basis for the county's action in spot zoning the 14.2 acre land.

An examination of the record reveals that the county has failed to show a reasonable basis for rezoning the 14.2 acre tract from RA 40-30 to MH District. Among the factors to be considered when determining whether there is a reasonable basis for spot zoning are: (1) change in conditions, (2) particular characteristics of the area being rezoned, and (3) the classification and development of nearby land. *Chrismon v. Guilford County*, 85 N.C. App. 211, 354 S.E. 2d 309 (1987).

In their brief, defendants give no analysis as to whether there was a reasonable basis to justify the rezoning. Nevertheless, there is no indication of any change in conditions in the immediate area of the property which would justify the rezoning. The record reveals no increase in mobile home use within the 500 acre tract with the exception of the 16 acre tract adjacent to plaintiffs' land. At the time defendants were not using all of the 32 spaces allowed in their existing trailer park.

In reference to the particular characteristics of the area being rezoned, G.S. sec. 153A-341 states that, among other things, zoning regulations should be made with reasonable consideration to "the character of the district and its peculiar suitability for particular uses." An examination of the record reveals that there is no indication that the 14.2 acre lot was unsuitable for residential use for which it was previously zoned. In fact, the evidence

established that: the recommended tract was in an area designated, rural and low density; that the individual trailers could be used as single family residences within the RA 40-30 zone; and that trailer parks were not a permitted use in the RA 40-30 zone.

Finally, in determining whether a rezoning was invalid as spot zoning, our courts have also considered the classification and development of nearby land. In the case *sub judice*, the majority of the land surrounding the rezoned 14.2 acres was uniformly zoned RA 40-30, and consisted of 500 acres. The classification and development of nearby land is not consistent with MH District considering the fact that mobile homes may be used as single family residences within the RA 40-30 zone. Furthermore, in 1986, the county turned down an application to rezone property to MH District within two miles of the 14.2 acre tract.

[2] In its second Assignment of Error, defendants contend that the trial court erred in concluding that the rezoning constituted illegal contract zoning. We disagree.

> A county's legislative body has authority to rezone when reasonably necessary to do so in the interests of the public health, safety, morals or general welfare. Ordinarily[,] the only limitation upon this authority is that it may not be exercised arbitrarily or capriciously. However[,] to avoid contract zoning, all the areas in each class must be subject to the same restrictions. If the rezoning is done in consideration of an assurance that a particular tract or parcel will be developed in accordance with a restricted plan this is contract zoning and is illegal.

Willis v. Union County, 77 N.C. App. 407, 409, 335 S.E. 2d 76, 77 (1985).

The record establishes that on 9 April 1985, the Planning Board considered the request that 16.29 acres (which included the 14.2 acres at issue) be rezoned from RA 40-30 to MH District for 24 lots for mobile homes. Subsequently, on 30 January 1986, the Robersons submitted the rezoning request at issue, requesting that 14.2 acres of their remaining land be rezoned from RA 40-30 to MH District for 14 mobile home lots.

On 11 February 1986, before the Planning Board, when asked why they changed their request from 24 lots to 14 lots, Calvin

Roberson stated that he felt the 14 lots would be more in line with the Land Development Plan. The Land Development Plan does not specifically address mobile home parks but instead addresses density of land use. Subsequently, on 17 March 1986, after having denied their five previous rezoning requests, the rezoning request was approved by defendant Board of County Commissioners. The record reflects that at that meeting there was no discussion on the rezoning request.

We believe that the record reveals that the only justification for allowing the rezoning of the property was only if the number of lots was reduced to coincide with the density requirements of the county. There was no determination that the Board based its rezoning on the basis that the site was suitable for all uses permitted under MH District zoning.

The land was rezoned in consideration of an assurance that the 14.2 acre tract would be developed in accordance with a restricted plan. The rezoning here was accomplished as a direct consequence of the conditions agreed to by the applicant rather than as a valid exercise of the county's legislative discretion. As a result, such action by defendant Commissioners constituted contract zoning.

We have reviewed defendants' final Assignment of Error, and find it meritless and without need for discussion.

For the reasons herein assigned, the judgment of the trial court is

Affirmed.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. BILLY JOE PEARSON

No. 8718SC811

(Filed 19 April 1988)

1. **Homicide § 21.2; Robbery § 4.3— armed robbery—second degree murder—sufficiency of evidence**

Evidence was sufficient to support defendant's convictions of armed robbery and second degree murder where it tended to show that prior to the incident, defendant purchased a .45 caliber gun and ammunition consistent with that used to kill the victim; the day before the murder, defendant obtained instruction in the use of a .45 handgun; someone other than the victim was bleeding at the scene; on the night of the murder, defendant suffered a serious gunshot wound for which he delayed seeking treatment and for which he gave three false and contradictory explanations; the following day he sought assistance in disposing of a bag containing money in denominations consistent with that missing from the victim's pool hall, including a large quantity of rolled change; bloodstains on the victim's clothing matched the relatively rare blood type of defendant; defendant's wound was saturated with gunpowder while there was no gunpowder on the victim's wound or clothing; and the angle of the fatal bullet suggested it was fired from close range.

2. **Criminal Law § 55.1— defendant's blood type—evidence admissible as proof of identity**

In a prosecution for murder and robbery evidence of defendant's blood type was properly admitted and could be used, along with other circumstances, as some proof of identity.

3. **Constitutional Law § 40— collection of hair, fingernail and blood samples without attorney present—right to counsel not violated**

There was no merit to defendant's contention that his right to counsel was violated by the collection of blood, hair and fingerprint samples without an attorney present, since defendant was present and represented by counsel at a prior hearing regarding the issuance of the nontestimonial identification order, and defendant failed to demonstrate how his rights would have been further protected by the actual presence of counsel during the taking of the evidence sample.

4. **Criminal Law § 84; Searches and Seizures § 4— withdrawal of blood sample without warrant—violation of defendant's rights—good faith exception to exclusionary rule**

Although the withdrawal of a blood sample without a warrant from a defendant in custody violated defendant's Fourth Amendment right to be free from unreasonable searches and seizures, the trial court could properly admit the blood sample into evidence under the good faith exception to the exclusionary rule where an officer applied in good faith to a district court judge who conducted a hearing and issued a nontestimonial identification order; *State v. Welch*, 316 N.C. 578 (1986), had not been decided at that time; and the

officer thus took every reasonable step, based on the existing law, to comport with Fourth Amendment requirements.

APPEAL by defendant from *William H. Helms, Judge.* Judgments entered 29 October 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 1 February 1988.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Doris J. Holton, for the State.

Mary K. Nicholson for defendant-appellant.

BECTON, Judge.

Defendant, Billy Joe Pearson, was convicted by a jury of robbery with a dangerous weapon and second degree murder. The court imposed a sentence of imprisonment for thirty-five years for the second degree murder conviction and the presumptive sentence of fourteen years for robbery with a firearm.

On appeal to this Court, defendant brings forward sixty assignments of error, forty-five relating to the admission of various real and testimonial evidence, three relating to discovery matters, one relating to the joinder of the two offenses for trial, four relating to arguments by the district attorney to the jury, four relating to the jury instructions, two relating to the denial of defendant's motions to dismiss and to set aside the verdict for insufficiency of the evidence, and one relating to the trial judge's findings of aggravating and mitigating factors at the sentencing phase of the proceedings. Of these assignments of error, the only issues which merit discussion are (1) the sufficiency of the evidence to support the convictions, and (2) the propriety of the admission of certain evidence obtained by way of a "nontestimonial identification order" issued pursuant to N.C. Gen. Stat. Sec. 15A-271 to -282 (1983). Having carefully considered all of the arguments presented, we conclude that defendant's trial and sentencing were free of error.

I

We first consider the contention of defendant that there was insufficient evidence to support his convictions of armed robbery and second degree murder.

A

At trial, the evidence presented by the State tended to show the following:

The body of Lawrence Elsasser was discovered by a city employee about 7:00 a.m. on 26 March 1985 beside a dumpster located behind Elsasser's place of business, the On-Cue Pool Hall, in Greensboro. According to expert witnesses, Elsasser died at approximately 2:00 a.m. from a gunshot wound caused by either hand-loaded or commercially reloaded .45 caliber ammunition fired from either a Llama or Star pistol, or from an Eagle Arms rifle or carbine. The angle of the bullet, which entered the collarbone, travelled down through the lungs, and lodged in the spine, showed that the fatal shot was fired from above and to the left of the body. The victim was paralyzed instantly and died within three or four minutes. An absence of powder burns or residue on the victim's body or clothing indicated either that the shot was fired from a distance or from within several inches to two feet with some object between the gun barrel and the body acting as a shield to absorb the residue. The victim's shirt and jacket were soaked with blood but contained no bullet holes.

The victim's keys were discovered a few feet from the pool hall's double front doors, which were unlocked and partially ajar. There were unidentified blood smears on the door frame, door handle, and push bar. The victim apparently was shot about fifteen feet from the front door where there was a large pool of blood and, in the same vicinity, a spent .45 caliber shell casing and some miscellaneous items which evidently were from the victim's pockets. Drag marks led around the corner of the building to a second pool of blood. The victim's wallet lay nearby; it contained no cash and its other contents appeared undisturbed. The drag marks continued from that point to where the body lay. The victim's pockets were turned inside out. Some coins and a pocketknife were discovered near the body.

Robert Green, co-owner of the On-Cue, testified that the interior of the building appeared as it normally did when the business had been closed for the night. A .38 special handgun kept on the premises was missing, as well as approximately $2,200.00 to

$2,300.00 in currency and in rolled quarters, dimes, and nickels from video machines.

Elsasser took over the evening shift at the On-Cue at 7:00 p.m. on 25 March. His girlfriend, Julie Elmore, took him to work and his jeans had no blood on them at that time. The poolroom ordinarily closed at 1:00 a.m. or, if customers were present, at 1:30 a.m. Elsasser called his girlfriend about 12:30 a.m. and told her he was cleaning up and would be home soon. Eric Greeson, a frequent patron, was at the On-Cue with a friend until around 1:45 a.m. When they left, Elsasser was closing up and no one else was there.

Joyce Allen, manager of a convenience store near the poolroom, was at work when, between 2:15 and 2:30 a.m. on 26 March she heard a loud banging sound.

Defendant, who lived near the On-Cue and was a frequent patron of the establishment, was seen at the L. Richardson Hospital emergency room at approximately 11:00 a.m. on 26 March 1985 for treatment of a serious gunshot wound to his left hand. The bullet entered at an angle through the palm and exited through the back of the third finger, causing the third joint to be completely "blown out" and require surgical replacement. The wound, which was not more than 24 hours old, was still bleeding, was saturated with gunpowder and, according to expert medical testimony, should have been very painful. Defendant told the doctor the injury occurred while he was cleaning a gun around 7:00 the previous evening, but he gave no explanation for having waited to seek treatment.

That afternoon, defendant told investigating officers at the hospital that he was wounded at approximately 7:30 p.m. on 25 March when his friend T. C. Stroke was showing him how to jam Stroke's .38 caliber handgun at the South Gate Inn where Stroke was staying. He also stated that he and Stroke had been in the On-Cue for a few minutes earlier that evening. However, Stroke testified that he saw defendant at the South Gate Inn about 2:30 on the afternoon of 25 March. Defendant showed him a .45 caliber pistol and told him he did not know how to operate it very well. Stroke instructed him in its operation and defendant left. The gun was not fired in Stroke's presence, nor did Stroke see defendant any more that day or night.

Anthony Ray Upchurch, a customer at the On-Cue from 7:00 p.m. to 1:30 a.m. the night of the murder, saw defendant there shooting pool between 8:00 and 9:00 p.m., and defendant's hand was not injured at that time. On 29 March 1985, the day defendant was taken into custody, he stated to police that he was shot during a scuffle with an assailant at about 11:00 p.m. on 25 March outside the South Gate Inn where he had gone to see a friend.

The State presented additional evidence that sometime prior to the murder, defendant traveled to Alabama and there, accompanied by his housemate, Terry Bracken, purchased a .45 caliber Llama pistol and commercially reloaded ammunition from a pawnshop. Sometime after they returned and before the murder, defendant's other housemate, Lloyd Parker, saw defendant show what he thought was a .45 to some friends and heard defendant say the gun was his. Defendant denied to the investigating officers having ever owned a handgun.

Neither of his roommates saw defendant at home the night of the murder. Kesha Nash, Bracken's girlfriend, heard the voice of defendant at Bracken's bedroom door around midnight but she never saw him. Defendant called Stephanie Donnell that night about midnight and talked until approximately 1:30 a.m. Ms. Donnell encountered defendant the following morning about 8:00. She noticed his injured hand, encouraged him to go to the hospital because he complained of pain, and, when he finally agreed, drove him there around 11:00 a.m. Defendant told Ms. Donnell he was injured while some guy was showing him a trick with a gun.

On 26 March, defendant called his housemate, Bracken, from the hospital and asked him to "get rid" of a brown bag and a pool stick in a black case located in defendant's closet and also to bring some things he needed to the hospital. At the hospital, defendant asked Bracken if he got rid of the bag, but defendant did not want to talk further because there "might be bugs in the room." After leaving the hospital Bracken felt inside the brown duffel bag and discovered rolls of coins contained in a smaller bag and also some currency in rubber bands. Bracken left the bag and pool stick at the home of a friend, Robin Baines, with instructions not to touch it. Ms. Baines estimated that there was about $120.00 in coins and $1,200.00 in currency in the bags. She and Bracken spent the money over a period of time.

Bracken visited defendant in jail following his arrest and asked him what really happened. Defendant responded, "I had to do what I had to do," but declined to talk further for fear of being overheard.

The pools of blood at the crime scene and most of the blood on the victim's clothing matched that of the victim. Four stains on the victim's jeans, three of which were located near the pockets, were identified as being of a blood type inconsistent with that of the victim but which matched the blood type of defendant, a blood type possessed by only .5% of the black population and .8% of the white population. Hair fragments found on the victim's shirt and shoes were identified as having originated from a black person. Defendant is black and the victim was white.

Defendant offered no evidence.

B

[1] In considering a motion to dismiss for insufficiency of the evidence, the court must determine whether there is substantial evidence of each element of the offense charged and that the defendant is the perpetrator. *E.g., State v. Rasor*, 319 N.C. 577, 356 S.E. 2d 328 (1987). The evidence must be considered in the light most favorable to the State; all contradictions and discrepancies must be resolved in the State's favor; and the State must be given the benefit of every reasonable inference to be drawn from the evidence. *E.g., State v. Blake*, 319 N.C. 599, 356 S.E. 2d 352 (1987). This test of the sufficiency of the evidence is the same whether the evidence is direct, circumstantial, or both. *E.g., State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Moreover, the evidence favorable to the State must be considered as a whole to judge its sufficiency, especially when the evidence is circumstantial, since one piece of such evidence will rarely point to a defendant's guilt. *Id.*

Second degree murder is the unlawful killing of another human being with malice but without premeditation and deliberation. *E.g., State v. Brown*, 300 N.C. 731, 268 S.E. 2d 201 (1980). Armed robbery is the taking of personal property from the person or presence of another, by the use or threatened use of a dangerous weapon, whereby the victim's life is endangered or threatened. N.C. Gen. Stat. Sec. 14-87(a) (1986); *Rasor*. Defendant

maintains his murder conviction cannot be upheld because there is no proof the gun purchased in Alabama was the murder weapon and because there is no direct evidence linking him to the crime. He further argues that there is inadequate evidence that a robbery occurred or, if it did, that defendant was the perpetrator or even that the perpetrator of the murder was also the robber. We disagree.

The evidence, viewed in the light most favorable to the State, showed that prior to the incident, defendant purchased a .45 caliber gun and ammunition consistent with that used to kill the victim; that the day before the murder, defendant obtained instruction in the use of a .45 handgun; that someone other than the victim was bleeding at the scene; that, on the night of the murder, defendant suffered a serious gunshot wound for which he delayed seeking treatment and for which he gave three false and contradictory explanations; that the following day, he sought assistance in disposing of a bag containing money in denominations consistent with that missing from the pool hall, including a large quantity of rolled change; and that bloodstains on the victim's clothing matched the relatively rare blood type of defendant. Moreover, defendant's wound was saturated with gunpowder while there was no gunpowder on the victim's wound or clothing, and the angle of the fatal bullet suggested it was fired from close range.

Taken as a whole, this and other evidence presented by the State supports a reasonable inference that defendant was the perpetrator of the crime, that the gun purchased in Alabama was the murder weapon, and that defendant's own wound was self-inflicted when he shot the victim. Further, when considered along with physical evidence at the scene, such as the victim's empty pockets, this evidence is also sufficient to allow the jury to reasonably find that the murder was committed by defendant in furtherance of a robbery of the victim and his place of business. Accordingly, we hold that the evidence supports both of defendant's convictions and that the trial court properly denied defendant's motions to dismiss and to set aside the verdict.

II

We next address defendant's contention that certain evidence, obtained pursuant to a nontestimonial identification order,

was erroneously admitted at trial. Defendant was first arrested on 29 March 1985 on a misdemeanor charge of giving a false report to the police regarding the origin of his gunshot wound. On that date and while defendant was in custody, the State sought and obtained issuance of a nontestimonial identification order permitting the collection of blood, hair, and fingerprint samples. The samples were obtained that day, the seventy-two hour notice requirement set forth in N.C. Gen. Stat. Sec. 15A-274 having been waived based on evidence that defendant had stated an intention to go to California immediately and that his bags were packed.

Defendant timely moved to suppress the evidence, contending that (1) the "minimum positive probative value" of evidence of defendant's blood type was outweighed by its prejudicial impact; (2) the evidence was collected in violation of statutory requirements governing nontestimonial identification orders, specifically the provisions requiring a seventy-two hour notice and a return within ninety days, N.C. Gen. Stat. Secs. 15A-274 and -280; and (3) the blood sample was withdrawn without a warrant or probable cause, resulting in an unlawful search and seizure, and was also taken without counsel present in violation of his constitutional right to counsel. Following a *voir dire*, the motion was denied and defendant now presents the same arguments on appeal. Our discussion is confined to the propriety of the admission of evidence of defendant's blood type, since the hair samples and fingerprints were not determined to match any found at the scene and their acquisition thus did not prejudice defendant.

A

[2] We summarily reject the first argument that the evidence of defendant's blood type was so irrelevant as to be inadmissible. Although such evidence standing alone is inadequate to positively identify a particular individual as the source of a bloodstain or as the perpetrator of a crime, *see, e.g., State v. Bell*, 65 N.C. App. 234, 309 S.E. 2d 465 (1983), *affirmed*, 311 N.C. 299, 316 S.E. 2d 72 (1984) (*per curiam*), it is nevertheless generally of sufficient probative value to be properly admitted and may be used, along with other circumstances, as some proof of identity. *See, e.g., State v. Fulton*, 299 N.C. 491, 263 S.E. 2d 608 (1980); *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977).

B

[3] We also summarily reject the contention that defendant's right to counsel was violated by the collection of the evidence sample without an attorney present. Assuming *arguendo* that a suspect is constitutionally entitled to the presence of counsel during such proceedings, we nevertheless find no prejudicial treatment of defendant in this case. The record shows that defendant was present and represented by counsel at a prior hearing regarding the issuance of the nontestimonial identification order, and defendant has failed to demonstrate how his rights would have been further protected by the actual presence of counsel during the taking of the evidence sample.

C

[4] The remaining issues relating to the blood evidence are controlled by our Supreme Court's decision in *State v. Welch*, 316 N.C. 578, 342 S.E. 2d 789 (1986). Like the *Welch* Court, we deem it unnecessary to address the arguments raised concerning possible technical violations of the statutes governing the issuance of nontestimonial identification orders since defendant was not entitled to the protections of such an order while in custody. *See id.* at 585, 342 S.E. 2d at 792-93. *See also State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. Puckett*, 46 N.C. App. 719, 266 S.E. 2d 48, *appeal dismissed*, 300 N.C. 561, 270 S.E. 2d 115 (1980).

In *Welch*, the Court held, citing *Schmerber v. California*, 384 U.S. 757, 16 L.Ed. 2d 908 (1966), that "[t]he withdrawal of a blood sample from a person is a search subject to fourth amendment protection" and that, consequently, "a search warrant must be procured before a suspect may be required to submit to such a procedure unless probable cause and exigent circumstances exist that would justify a warrantless search." *Welch* at 585, 342 S.E. 2d at 793. The Court concluded that the defendant's rights had been violated in that case by the withdrawal of a blood sample without a warrant or justification for a warrantless search, but nevertheless upheld the admission of the evidence obtained pursuant to a nontestimonial identification order, by applying the "good faith" exception to the exclusionary rule established by the Supreme Court in *United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677 (1984). *See also State v. Fisher*, 321 N.C. 19, 361 S.E. 2d 551 (1987).

Applying the same analysis utilized in *Welch* to the present case, we conclude that the trial court was not required to exclude the sample of defendant's blood. As in *Welch*, the withdrawal of a blood sample without a warrant in this case resulted in a violation of defendant's fourth amendment right to be free of unreasonable searches and seizures. However, the competent evidence presented on *voir dire* showed that the police officer responsible applied in good faith to a district court judge who conducted a hearing and issued a nontestimonial identification order based on evidence of facts establishing (1) probable cause to believe that an offense punishable by imprisonment for more than one year had been committed, (2) reasonable grounds to suspect defendant had committed the offense, and (3) the results would materially aid in determining whether defendant committed the offense. *See* N.C. Gen. Stat. Sec. 15A-273; *Welch* at 589, 342 S.E. 2d at 795. At that time, *Welch* had not been decided, and the officer thus took every reasonable step, based on the existing law, to comport with fourth amendment requirements. We therefore hold, based on the *Leon* "good faith" exception to the exclusionary rule, that the evidence resulting from the taking of a sample of defendant's blood was properly admitted.

III

We have carefully reviewed each of defendant's remaining assignments of error and have found them to be without merit. Defendant received a fair trial free of reversible error.

No error.

Chief Judge HEDRICK and Judge SMITH concur.

STATE OF NORTH CAROLINA v. EDWARD EARL LLOYD AND ARCHIE GRAY MAY, JR.

No. 873SC442

(Filed 19 April 1988)

1. **Criminal Law § 138.16— aggravating factor of inducing another to participate in murder—sufficiency of evidence**

Evidence supported the sentencing judge's finding in aggravation that the 26-year-old defendant induced the 16-year-old defendant to participate in the murder with which they were both charged where such evidence tended to show that the adult, after threatening to shoot the victim and getting a gun, told the minor to shoot the victim; and the shooting by the minor did not occur until after the encouragement from the adult. N.C.G.S. § 15A-1340.4(a)(1)(a).

2. **Criminal Law § 138.29— aggravating factor of premeditation and deliberation —sufficiency of evidence**

Evidence was sufficient to support the sentencing judge's finding of premeditation and deliberation as an aggravating factor for second degree murder to which defendants pled guilty where it tended to show that one defendant threatened to shoot the victim on one other occasion and on the day of the killing again threatened the victim a few minutes prior to the actual shooting; there was no evidence of any provocation on the part of the victim and yet, after seeing the victim, defendant told a friend to go get the gun and procured it himself when the friend refused; the minor defendant aimed the rifle and then killed the victim with one shot to the head after the friend asked him not to shoot; the minor defendant then reloaded the rifle and again aimed at the victim but did not fire the rifle; after the shooting both defendants walked over to the victim where the minor grabbed deceased's head and shook it; and defendants walked away and shook hands.

3. **Criminal Law § 138.29— aggravating factor of premeditation and deliberation—evidence of intoxication insufficient to negate**

Evidence of intoxication of the defendants was not sufficient to negate the finding of premeditation and deliberation as an aggravating factor for second degree murder where there was evidence that both consumed alcohol and smoked marijuana prior to the killing, but there was no evidence to support a conclusion that either defendant was so intoxicated that he did not know what he was doing.

4. **Criminal Law § 138.15— same evidence not used to support two aggravating factors**

There was no merit to defendant's contention that the sentencing judge considered the same item of evidence to prove the aggravating factors of inducing another to participate in the crime and premeditation and deliberation in violation of N.C.G.S. § 15A-1340.3(a)(1).

5. Criminal Law § 138.35— limited mental capacity as mitigating factor—finding not required

The sentencing judge was not required to find defendant's limited mental capacity as a mitigating factor where defendant's evidence established that he had well below average intelligence which would impair his ability to handle stressful situations, but evidence of defendant's low intelligence, limited social skills, and limited judgment did not clearly establish that these traits significantly reduced his culpability for the offense under the circumstances present at the time of the shooting. N.C.G.S. § 15A-1340.4(a)(2)(e).

6. Criminal Law § 138.34— intoxication as mitigating factor—finding not required

Even if one defendant was suffering from a mental or physical condition brought about by alcoholic beverages and marijuana, there was no evidence that his culpability for the offense was significantly reduced, and the sentencing judge therefore did not err in failing to find intoxication as a mitigating factor. N.C.G.S. § 15A-1340.4(a)(2)(d).

APPEAL by defendants from *Brown (Frank R.), Judge.* Judgments entered 15 December 1986 in Superior Court, PITT County. Heard in the Court of Appeals 30 September 1987.

Attorney General Lacy H. Thornburg, by Associate Attorney General Donald W. Laton, for the State.

John M. Savage for defendant-appellant Lloyd.

Public Defender Robert L. Shoffner, Jr., for defendant-appellant May.

GREENE, Judge.

This is a criminal case in which defendants were charged with first-degree murder. Defendants pled guilty to second-degree murder and were given active prison sentences of fifty years each. Defendants appeal the imposition of these sentences.

Evidence offered during the sentencing hearing tended to show that defendant Archie Gray May, Jr. (hereinafter "May"), and Eugene Sides (hereinafter "Sides"), both age 16, went to spend the night at the mobile home of May's uncle, defendant Edward Earl Lloyd (hereinafter "Lloyd"), age 26. The mobile home was located next to the residence of the victim, Gray Lineberry. Over the next 1½ to 2 hours, defendants had several drinks of whiskey and smoked three or more marijuana cigarettes. Defendants then walked outside the mobile home with the whiskey. May hid the whiskey near a dog pen and defendant Lloyd looked towards the victim's home and said, "You think you're bad, Gray

[the victim]. I'll shoot you if you come over here." Apparently, the victim began walking towards Lloyd's yard. Lloyd told Sides to get Lloyd's gun but Sides did not do so. Lloyd then went into his mobile home, procured a 22-caliber rifle along with some ammunition, and went back outside. It is unclear who loaded the gun. May walked over to Lloyd and "grabbed" the rifle from Lloyd. Lloyd then told May to shoot the victim "because he's on my property." The victim was standing still somewhere in the area between the residences. May aimed the rifle and then fired, killing the victim with a wound to the head. May reloaded the rifle and aimed it at the victim who was now lying on the ground but did not fire again. May and Lloyd then walked over to the body of the victim where May grabbed the victim's hair and shook his head. The defendants walked back towards Lloyd's mobile home and shook hands. There was also evidence that Lloyd had previous arguments with the victim and on one other occasion in 1983 had threatened to shoot the victim.

Lloyd introduced evidence through a psychiatrist that he had a verbal I.Q. of 70, a performance I.Q. of 79 and a full scale I.Q. of 73. The psychologist classified Lloyd in the borderline range of intellectual functioning between mild mental retardation and well below average. He also testified that Lloyd possessed limited judgment and social skills and "would deal less well with stressful situations than the average person" and the use of alcohol and marijuana "could make it worse."

The sentencing judge found the following factors in aggravation and mitigation:

EDWARD EARL LLOYD

Aggravating Factors

The defendant induced another to participate in the commission of the offense.

The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.

The murder was committed with premeditation and deliberation.

Mitigating Factors

The defendant was suffering from a mental condition that was insufficient to constitute a defense [but] significantly reduced his culpability for the offense.

The defendant was suffering from a physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.

Prior to arrest, the defendant voluntarily acknowledged wrong-doing in connection with the offense to a law enforcement officer.

The defendant has been a person of good character or has had a good reputation in the community in which he lives.

ARCHIE GRAY MAY JR.

Aggravating Factors

The murder was committed with premeditation and deliberation.

Mitigating Factors

The defendant has no record of criminal convictions.

The defendant's immaturity at the time of the commission of the offense significantly reduced his culpability for the offense.

Prior to arrest, the defendant voluntarily acknowledged wrong-doing in connection with the offense to a law enforcement officer.

At an early stage of the criminal process, the defendant voluntarily acknowledged wrong-doing in connection with the offense to a law enforcement officer.

The defendant has some limitation of intelectual [sic] ability.

Defendants appeal from the judge's finding of certain factors in aggravation and his failure to find certain factors in mitigation.

The issues presented are: I) Whether the evidence supports a finding in aggravation (A) that Lloyd "induced another to par-

ticipate in the commission of the offense" and (B) that defendants committed the murder with premeditation and deliberation; II) whether the evidence required a finding in mitigation (A) that Lloyd had limited mental capacity that significantly reduced his culpability for the offense and (B) that May's use of alcohol and marijuana significantly reduced his culpability for the offense.

I

In imposing a prison term in excess of the fifteen-year presumptive sentence for the Class C felony of second-degree murder, N.C.G.S. Sec. 15A-1340.4(f)(1) (1983), the sentencing judge must consider the statutory aggravating and mitigating factors set out in N.C.G.S. Sec. 15A-1340.4(a), and may consider other aggravating and mitigating factors if reasonably related to the purposes of sentencing. *State v. Melton*, 307 N.C. 370, 373, 298 S.E. 2d 673, 676 (1983). Each factor must be proved "by a preponderance of the evidence." N.C.G.S. Sec. 15A-1340.4(b). The burden of persuasion on aggravating factors rests with the State. *State v. Jones*, 309 N.C. 214, 219, 306 S.E. 2d 451, 455 (1983). The defendant has the burden of persuasion on mitigating factors. *State v. Taylor*, 309 N.C. 570, 576, 308 S.E. 2d 302, 307 (1983). The sentencing judge must finally find that the factors in aggravation outweigh the factors in mitigation if he imposes a term greater than the presumptive one. *Jones*, 309 N.C. at 219, 306 S.E. 2d at 455. The weight to be attributed to each factor is within the sound discretion of the sentencing judge. *State v. Blackwelder*, 309 N.C. 410, 419, 306 S.E. 2d 783, 790 (1983).

A

[1] Defendant Lloyd first contends the evidence does not support the sentencing court's finding that he induced May to participate in the murder. Specifically, Lloyd argues May acted independently of anything Lloyd did or said. We disagree.

Section 15A-1340.4(a)(1)(a) provides as an aggravating factor: "The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants." In defining "induced" as used in the above subsection this Court has stated:

> Induce is defined by Black's Law Dictionary . . . as "[t]o bring on or about, to affect, cause, to influence to an act or

> course of conduct, lead by persuasion or reasoning, incite by motives, prevail on. Webster's *New Collegiate Dictionary* . . . similarly defines induce as "to lead on: move by persuasion or influence," to "bring about by influence," and "effect, cause."

State v. SanMiguel, 74 N.C. App. 276, 281, 328 S.E. 2d 326, 328 (1985).

The evidence shows that Lloyd, a 26-year-old adult, by his actions and his words influenced May, a 16-year-old minor, to a course of conduct. Lloyd, after threatening to shoot the victim and getting a gun, told May to shoot the victim. The crime did not occur until after the encouragement from Lloyd. This was sufficient to prove by a preponderance of the evidence that defendant induced May to participate in the offense. *See Jones*, 309 N.C. at 223, 306 S.E. 2d at 457. We thus hold the evidence supports the sentencing judge's finding in aggravation that Lloyd induced May to participate in the murder.

B

[2] Defendants next argue there was insufficient evidence to support a nonstatutory finding in aggravation that the murder was committed with premeditation and deliberation. If the sentencing court's finding is supported by the preponderance of the evidence and is reasonably related to the purposes of sentencing, there is no error. N.C.G.S. Sec. 15A-1340.4(a).

When a defendant charged with first-degree murder pleads guilty to second-degree murder, the aggravating factor of premeditation and deliberation is reasonably related to the purposes of sentencing. *State v. Gaynor*, 61 N.C. App. 128, 132, 300 S.E. 2d 260, 262 (1983). No fixed length of time is necessary for a finding of premeditation and deliberation. *State v. Hutchins*, 303 N.C. 321, 344, 279 S.E. 2d 788, 802 (1981). Premeditation means thought before the act for some length of time however short. *Id.* Deliberation "connotes the execution of an intent to kill in a cool state of blood without legal provocation in furtherance of a fixed design" but does not require any applicable length of time for reflection. *Id.*

Premeditation and deliberation are usually proved by circumstantial evidence. Among the circumstances which may tend to prove the killing was with premeditation and deliberation are:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Gladden, 315 N.C. 398, 430-31, 340 S.E. 2d 673, 693 (citations omitted), *cert. denied*, --- U.S. ---, 92 L.Ed. 2d 166 (1986).

The testimony here supports a finding of premeditation and deliberation by the preponderance of the evidence. Defendant Lloyd threatened to shoot the victim on one other occasion and on the day of the killing again threatened the victim a few minutes prior to the actual shooting. There is no evidence of any provocation on the part of the victim and yet after seeing the victim, Lloyd told Sides to get the gun and when he failed to do so, procured it himself.

Defendant May aimed the rifle, and then killed the victim with one shot to the head after Sides asked him not to shoot the victim. May then reloaded the rifle and again aimed at the victim but did not fire the rifle. After the shooting, both defendants walked over to the victim where May grabbed the deceased's head and shook it. Defendants walked away and shook hands.

[3] This evidence was sufficient to support the sentencing judge's finding of premeditation and deliberation as an aggravating factor. The evidence of intoxication of the defendants was not sufficient to negate the finding of premeditation and deliberation. *See State v. McLaughlin*, 286 N.C. 597, 606, 213 S.E. 2d 238, 244 (1975) (a showing of legal intoxication negates premeditation and deliberation), *vacated in part*, 428 U.S. 903, 49 L.Ed. 2d 1208 (1976). The evidence must demonstrate the defendant's mind and reason at the time of the killing is "so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Id.* at 607, 213 S.E. 2d at

244 (quoting *State v. Shelton*, 164 N.C. 513, 520, 79 S.E. 883, 886 (1913)). While there is evidence both defendants consumed alcohol and smoked marijuana prior to the killing, there is no evidence to support a conclusion that either defendant was so intoxicated that he did not know what he was doing.

In addition, since defendant Lloyd's mental incapacity does not rise to the level of legal insanity, it did not negate the finding of premeditation and deliberation. *State v. Carter*, 318 N.C. 487, 492, 349 S.E. 2d 580, 582-83 (1986); *State v. Anderson*, 303 N.C. 185, 200, 278 S.E. 2d 238, 247 (1981). Defendant does not contend his mental incapacity constituted legal insanity at the time of the offense and therefore the judge was not precluded from finding he acted with premeditation and deliberation.

[4] Defendant Lloyd argues the judge considered the same item of evidence to prove both aggravating factors thereby violating Section 15A-1340.3(a)(1) (same item of evidence may not be used to prove more than one factor in aggravation). Specifically, Lloyd argues the only evidence supporting the finding of premeditation and deliberation was Lloyd's statement to May urging him to shoot the victim and that this was also the only item of evidence supporting the inducement factor.

However, as discussed above, there was other evidence besides Lloyd's statement to support both findings. Defendant's plea of guilty does not prevent the trial judge from reviewing all the circumstances surrounding the offense in finding aggravating factors. *State v. Melton*, 307 N.C. 370, 377, 298 S.E. 2d 673, 678 (1982). The evidence of premeditation and deliberation included Lloyd's previous threats, the absence of provocation from the victim, and the handshaking after the shooting. Evidence showing inducement included the procurement of the weapon and the age difference of Lloyd and May. Thus, we conclude there was sufficient evidence separate and apart to support the judge's finding of each factor. *Cf. State v. Avery*, 315 N.C. 1, 35-36, 337 S.E. 2d 786, 806 (1985) (Court held there was sufficient evidence to find aggravating factor that defendant was dangerous and mentally abnormal person separate and apart from evidence which supported finding that defendant engaged in a pattern or course of violent conduct).

Defendant Lloyd also argues the sentencing judge erred by using the same evidence necessary to prove an element of the offense to prove an aggravating factor in violation of Section 15A-1340.4(a)(1). However, Lloyd failed to assign error to this use of the evidence and therefore we do not address this issue. *See* N.C.R. App. P. 10(c) (1986).

II

Defendants argue the evidence offered required the sentencing judge to find certain factors in mitigation. If a statutory mitigating factor is supported by "uncontradicted, substantial and manifestly credible evidence," the sentencing judge must find the mitigating factor. *State v. Spears*, 314 N.C. 319, 321, 333 S.E. 2d 242, 244 (1985). Consideration of *nonstatutory* mitigating factors requested by defendants and proven by "uncontradicted, substantial and manifestly credible evidence" is a matter "entrusted to the sound discretion of the sentencing judge . . . ." *Id.* at 322, 333 S.E. 2d at 244.

A

[5] Defendant Lloyd argues the evidence supports a finding in mitigation because he possessed limited mental capacity. N.C.G.S. Sec. 15A-1340.4(a)(2)(e) provides:

> The defendant's immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense.

"[L]imited mental capacity is defined as a low level of intelligence or I.Q." *State v. Hall*, 85 N.C. App. 447, 454, 355 S.E. 2d 250, 254, *disc. rev. denied*, 320 N.C. 515, 358 S.E. 2d 525 (1987).

The sentencing judge's determination under Section 15A-1340.4(a)(2)(e) is a two-part inquiry: first, whether defendant is of limited mental capacity, and if so, the effect of this limited mental capacity on the defendant's culpability for the offense. *Hall*, 85 N.C. App. at 455, 355 S.E. 2d at 255. The defendant bears the burden of showing that the "evidence so clearly establishes the fact in issue that no reasonable inference to the contrary can be drawn . . . ." *Jones*, 309 N.C. at 220, 306 S.E. 2d at 455 (quoting *North Carolina National Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E. 2d 388, 395 (1979)). Lloyd's evidence established that he

had well below average intelligence which would impair his ability to handle stressful situations. However, the evidence of Lloyd's low intelligence, limited social skills and limited judgment did not clearly establish that these traits significantly reduced his culpability for the offense under the circumstances present at the time of the shooting. *See Hall*, 85 N.C. App. at 455, 355 S.E. 2d at 255. All the evidence indicated the victim was not threatening Lloyd at any time during the events surrounding the shooting, yet Lloyd procured the gun after threatening the victim and specifically told May to shoot the victim. Therefore, the sentencing judge was not required to find defendant's limited mental capacity as a mitigating factor.

B

[6] Defendant May argues his use of alcohol and marijuana prior to the killing was sufficient to support a statutory factor in mitigation pursuant to N.C.G.S. Sec. 15A-1340.4(a)(2)(d) or a non-statutory factor that "defendant was under the influence of alcoholic beverages and marijuana to such an extent as to significantly reduce his culpability."

N.C.G.S. Sec. 15A-1340.4(a)(2)(d) provides: "The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense."

However, the evidence was conflicting concerning the degree of intoxication of May. An officer testified that May had been drinking but was not "staggering drunk." Even assuming May was suffering from a mental or physical condition brought about by alcoholic beverages and marijuana, there was no evidence that May's culpability for the offense was significantly reduced. *See State v. Upright*, 72 N.C. App. 94, 106, 323 S.E. 2d 479, 487 (1984) (evidence that defendant has been drinking, without more, does not show defendant was so inebriated that his ability to understand the consequences of his actions was impaired), *disc. rev. denied*, 313 N.C. 513, 329 S.E. 2d 400, *cert. denied*, 313 N.C. 610, 332 S.E. 2d 82 (1985). Therefore, the sentencing judge committed no error in failing to find either of the mitigating factors put forward by defendant May.

III

For the reasons above, we hold there was no error in the sentencing hearing. Likewise, we hold the judge did not abuse his discretion in weighing the aggravating and mitigating factors and arriving at the sentences. *See State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983).

No error.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. THON JAIRO AGUDELO, AND JESUS BEATON

No. 8720SC682

(Filed 19 April 1988)

1. **Criminal Law § 10.2— trafficking in cocaine—accessories before the fact—sufficiency of evidence**

Defendants could properly be convicted of trafficking in cocaine, though they were not present when the cocaine was actually sold or delivered, where the evidence showed that defendants participated as accessories before the fact. N.C.G.S. § 14-5.2.

2. **Conspiracy § 8— one agreement—judgments for multiple conspiracies improper**

The trial judge erred in entering judgments for multiple conspiracies against defendants where the evidence revealed only one agreement; however, because the judge imposed the minimum sentence for each conviction and provided that the sentences run concurrently, the case is not remanded for resentencing.

3. **Narcotics § 3.1— laboratory analysis of seized substance—validity and reliability of tests**

In a prosecution for trafficking and conspiring to traffic in cocaine, there was no merit to defendants' contention that the trial judge erred in admitting testimony regarding the results of laboratory analysis of the seized substance because the State failed to demonstrate the validity and reliability of the tests, since an SBI chemist testified that he performed two tests on the substance, named those tests, described his expertise in administering those tests but did not explain how the tests worked, and testified that the tests revealed that the substance was cocaine; defendants failed to inquire into the reliability of the tests during *voir dire* or cross-examination; and the person who sold the substance to undercover agents testified that it was extremely strong cocaine.

4. Criminal Law § 80.1— telephone records generated by machine—reliability not shown—admission as harmless error

In a prosecution for trafficking and conspiring to traffic in cocaine, telephone records of a hotel were improperly admitted under the business records exception where the records were produced by a machine, but several hotel personnel had access to the records, and the hotel employer testifying with regard to the records had no idea when the machine was last serviced; however, the error was harmless where there was other evidence showing the same facts which the telephone records showed. N.C.G.S. § 8C-1, Rule 803(6).

5. Criminal Law § 92.1— trafficking and conspiring to traffic in cocaine—joinder of cases against two defendants proper

The trial judge did not abuse his discretion in joining for trial cases against the two defendants for trafficking and conspiring to traffic in cocaine where evidence of activities of each was admissible against the other, and evidence seized from one defendant's room was admissible against both.

6. Criminal Law § 162— evidence improperly admitted—similar evidence previously admitted without objection

One defendant was not prejudiced by the erroneous admission of testimony concerning the discovery of drug paraphernalia in a motel room occupied by two of the participants in a cocaine conspiracy, since one of the participants had previously testified without objection that he used cocaine in his hotel room.

7. Constitutional Law § 60; Jury § 7.14— peremptory challenges based on race—failure of record to show

Defendants failed to make a *prima facie* showing that the prosecutor's exercise of his peremptory challenges was based on race where the record did not show the racial composition of the jury, the number of blacks who were excluded, or the extent to which the excluded jurors were otherwise qualified to serve.

8. Searches and Seizures § 24— statements from informer in custody—reliability—sufficiency of affidavit to support search warrant

There was no merit to defendant's contention that the affidavit on which a search warrant was based was insufficient because nothing in the warrant attested to the reliability of the informant, since the warrant was obtained during a continuing investigation after the informant was taken into custody for her participation in the suspected crime, and such statements have inherent indicia of reliability.

APPEAL by defendants from *F. F. Mills, Judge*. Judgment entered 20 March 1987 in Superior Court, UNION County. Heard in the Court of Appeals 11 December 1987.

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

Purser, Cheshire, Parker, Hughes, and Dodd by Gordon Widenhouse for defendant-appellants.

BECTON, Judge.

Defendants Thon Jairo Agudelo and Jesus Beaton were each convicted of two counts of trafficking in cocaine and two counts of conspiring to traffic in cocaine. They were each sentenced to two 35-year prison terms, with the sentences to run concurrently, and were fined $250,000. Defendants appeal. We vacate the second conspiracy conviction of each defendant but find no other errors.

I

Defendants were arrested as a result of an intricate undercover police drug investigation. The State presented evidence that Detective Roger Laney of the Union County Sheriff's Department and Agent Mark Hawkins of the State Bureau of Investigation (S.B.I.) purchased marijuana from Don Flock and Brenda Huggett in October 1986. After the marijuana transaction was consummated, Detective Laney asked Flock and Huggett to aid him in purchasing a large quantity of cocaine.

Huggett traveled to Miami, Florida to arrange the cocaine purchase through Jose Rodriguez and Elizabeth Chandros. Chandros and Rodriguez, in turn, contacted defendant Jesus Beaton. Defendant Beaton coordinated Rodriguez's and Chandros' efforts to acquire the cocaine. Defendant Beaton informed Rodriguez and Chandros that "the Columbian," Thon Jairo Agudelo, had the cocaine. Then defendant Beaton, accompanied by Rodriguez and Chandros, visited Luis Otero, who, in turn, contacted defendant Agudelo and arranged the transfer. Defendant Beaton, Rodriguez and Chandros then drove to defendant Agudelo's Miami apartment. Otero and defendant Agudelo also drove to the apartment. Defendants Beaton and Agudelo entered the apartment together but returned to their respective vehicles after approximately ten minutes.

The two groups then drove separately to Charlotte, North Carolina. When Chandros' party arrived in Charlotte, she telephoned Huggett to arrange accommodations. They obtained two

rooms at the Ramada Inn. Room 511 was shared by Rodriguez and Chandros, and Room 509 was occupied by defendant Beaton. There was circumstantial evidence that defendant Beaton then telephoned Otero and defendant Agudelo who were sharing Room 202 at Travel Lodge. Upon instructions from defendant Beaton, Rodriguez went to Room 202 at Travel Lodge to pick up the cocaine which was contained in a bag identified by the Kentucky Fried Chicken trademark. Defendant Agudelo gave the bag to Rodriguez. Rodriguez gave the bag to Huggett. Huggett gave the bag to Flock. Flock examined the contents, tested the strength of the substance therein and gave the bag to Detective Laney and Agent Hawkins. The officers arrested Flock.

Flock agreed to lead the officers to his source. Flock led the officers to Huggett by enticing her to meet him to accept the payoff for the sale. When Huggett arrived, she too was arrested. Huggett led the officers to Ramada Inn Rooms 509 and 511 where the officers arrested defendant Beaton, Rodriguez and Chandros. Chandros cooperated with the officers and told them that they had acquired the cocaine from defendant Agudelo who could be found in Travel Lodge Room 202. After a warrant was obtained, defendant Agudelo and Otero were arrested.

Defendants raised eight issues on appeal.

II

[1] Defendants first contend that the trial judge erred in denying their motions to dismiss the trafficking charges because the evidence was insufficient to support the verdict. Defendants argue that the State proceeded against them regarding the charges of trafficking in cocaine by possession, sale, and delivery on the theory that each man aided Don Flock in the sale and delivery of cocaine to Agent Hawkins and Detective Laney. However, they argue that neither of them was present when Flock sold or delivered the cocaine to Hawkins and Laney, and therefore they are not guilty of "aiding."

Defendants misapprehend the law. Defendants may be convicted of the substantive offense of trafficking in cocaine if they were "accessories before the fact." See N.C. Gen. Stat. Sec. 14-5.2; *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982). The elements of "accessory before the fact" are as follows: (1) defendant advised

and agreed, or urged the parties or in some way *aided* them to commit the offense; (2) defendant was *not present* when the offense was committed; and (3) the principals committed the crime. *State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. denied*, 431 U.S. 916, 53 L.Ed. 2d 226 (1977). Thus, under our law the State was not required to prove that defendants were present during sale, delivery, or possession of the cocaine. The evidence, when considered in the light most favorable to the State, showed that defendants participated as accessories before the fact by aiding Don Flock. This assignment of error is overruled.

III

[2] Defendants next contend that the trial judge erred in entering judgments for multiple conspiracies against them because the evidence revealed only one agreement. We agree. In *State v. Rozier*, 69 N.C. App. 38, 316 S.E. 2d 893, *cert. denied*, 312 N.C. 88, 321 S.E. 2d 907 (1984), this court held that where each act is the product of but one agreement, only one conspiracy may be charged. We therefore vacate the second conspiracy conviction against each defendant. However, because the trial judge imposed the minimum sentence for each conviction and provided that the sentences run concurrently, we do not remand for resentencing.

IV

[3] Defendants next contend that the trial judge erred in admitting testimony regarding the results of laboratory analysis of the seized substance because the State failed to demonstrate the validity and reliability of the tests.

Agent McSwain, a chemist at the State Bureau of Investigations' crime laboratory, testified that he personally conducted two tests to identify the substance seized. He testified that he obtained an infra-red spectrum of samples and conducted microcrystalline tests on a portion of the powdered substance. He described his expertise in administering these tests, but he did not explain how the tests worked, i.e., how results were obtained or whether the tests were reliable. He testified that the tests revealed that the substance was cocaine. In our view, the foundation met the minimum requirement for admission of results from scientific tests. Equally important, however, defendants failed to inquire into the reliability of the tests during *voir dire* or cross-examina-

tion as they were permitted to do under Rule 705 of the N.C. Rules of Evidence. The State's position is also buttressed by other evidence that the substance was cocaine. Don Flock testified, without objection by defendants, that the substance was extremely strong cocaine. This assignment of error is overruled.

V

[4] Defendants next contend that the trial judge erred by admitting the Ramada Inn telephone records in evidence. They argue that the State failed to demonstrate the trustworthiness of the records.

The telephone records of the Ramada Inn were admitted under Rule 803(6), the business records exception, of the North Carolina Rules of Evidence. The records were introduced through the testimony of Greg Clark who was employed as a "front office person" at Ramada Inn during October 1986. Clark testified that the records were produced by a machine installed for that purpose by the telephone company. The machine registered the room number from which each call from the hotel was made, the time the call began and ended, and the phone number that was called. Other hotel personnel had access to the records, and Clark had no idea when the machine was last checked for maintenance.

We do not subscribe to the view urged by defendants that the records were untrustworthy simply because they were recorded by a machine as opposed to a person. *See State v. Springer*, 283 N.C. 627, 197 S.E. 2d 530 (1973) (computer printout cards are admissible as business records so long as the foundation shows trustworthiness). We are troubled, however, by the fact that the machine's accuracy had not been verified. Thus, we hold that the foundation was insufficient to admit the evidence as business records. Nevertheless, there was substantial circumstantial evidence which indicated that defendant Beaton was communicating with defendant Agudelo and Luis Otero. Soon after defendant Beaton placed a telephone call in Rodriguez's presence, he gave Rodriguez a note advising him where to find defendant Agudelo to receive the cocaine. Thus the error was harmless.

VI

[5] Defendants next contend that the trial judge erred by joining their cases for trial. Defendants argue that they were prejudiced

because evidence was admitted against one of them which was inadmissible against the other. Specifically, defendant Beaton contends he was prejudiced by the admission of evidence seized from defendant Agudelo's hotel room, and both contend each was prejudiced by the admission of hearsay that was admissible only against the other.

The trial judge has broad discretion in ruling on the matter of severance. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976); *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). The test for determining whether a trial judge abused his discretion is "whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *State v. Nelson*, 298 N.C. 573, 587, 260 S.E. 2d 629, 640 (1979), *cert. denied*, 446 U.S. 929 (1980).

In the instant case, defendants were charged with conspiracy and other related crimes. The activities of each of them and the other participants in furtherance of the conspiracy were admissible against them both. Thus, evidence seized in defendant Agudelo's room was likewise admissible against both defendants. Although the transcript contains a few hearsay statements, in light of the great abundance of the evidence and the intricacy of the operation, we hold that the trial judge did not abuse its discretion in this case. This assignment of error is overruled.

VII

[6] Defendant Beaton alone next contends that the trial judge erred in admitting, over his objection, testimony concerning the discovery of drug paraphernalia in the motel room occupied by Rodriguez and Chandros. Defendant argues that the evidence was irrelevant. We agree. However, Rodriguez had testified previously, without objection, that he used cocaine in his hotel room and that he received a small amount of cocaine from defendant Beaton earlier in the day. Thus, any harm caused by the inadmissible evidence was negligible. In light of all the evidence, we do not believe defendant was prejudiced by the erroneously admitted evidence.

VIII

[7] Defendants next contend that the trial judge erred by failing to conduct a proper inquiry into the prosecutor's motives for exercising peremptory challenges to exclude prospective black jurors. Defendant Beaton objected to the exclusion of blacks from the venire. After hearing the prosecutor's explanations, the trial judge overruled the objection. The prosecutor proceeded to excuse more blacks and defendant objected again. The trial judge then ruled that because defendants were Hispanic, not black, they were not entitled to challenge the exclusion of blacks under *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986) or *State v. Cofield*, 320 N.C. 297, 357 S.E. 2d 622 (1987).

Defendants argue, that notwithstanding their inability to raise an Equal Protection challenge to the jury selection process, the Sixth Amendment to the U.S. Constitution guarantees an impartial jury to all citizens and that this guarantee gives standing to all defendants to challenge the use of peremptory challenges to exclude prospective jurors based solely on race. Moreover, defendants argue, the North Carolina Constitution, in Article I, Sections 19 and 26, mandates fairness and equality in the jury selection process. See *Cofield.* The question whether defendants may raise a Sixth Amendment challenge to the racially motivated exercise of peremptory challenges is an open one. See *Teague v. Lane*, 820 F. 2d 832 (7th Cir. 1987), *cert. granted*, --- U.S. ---, --- L.E. 2d --- (No. 87-5259, March 7, 1988). Indeed, the degree to which the North Carolina Constitution constrains racially motivated use of peremptory challenges in this case is open as well. Only two justices addressed this issue in *Cofield.* In his opinion concurring in the result, Justice Mitchell, joined by Justice Whichard, said:

> . . . Nor do I believe that the people intended that, in order to raise questions concerning alleged violations of this section, a person must be a member of any cognizable racial or ethnic group. Instead, the intent of the people of North Carolina was to guarantee *absolutely unto themselves* that in *all* cases *their* system of justice would be free of both the reality and the appearance of racism, sexism and other forms of discrimination in these twilight years of the Twentieth Century. (Emphasis in original.)

320 N.C. at 310, 357 S.E. 2d at 630.

However, even if defendants had standing to raise such an issue, defendants would have the threshold requirement of making a *prima facie* showing that exclusion was based on race. *See, e.g., McCray v. Abrams*, 750 F. 2d 1113 (2d Cir. 1984), *cert. denied*, 471 U.S. 1097, 85 L.Ed. 2d 837 (1985). The record here is inadequate for us to address this issue. The record does not show the racial composition of the jury, the number of blacks who were excluded, nor the extent to which the excluded jurors were otherwise qualified to serve.

This assignment of error is overruled.

IX

[8] Defendant Agudelo finally contends that the trial judge erred in admitting the evidence seized from his motel room and automobile because the search warrant was not based on probable cause. Defendant argues that the affidavit on which the warrant was based was insufficient because nothing in the warrant attested to the reliability of the informant. We disagree. The warrant was obtained during a continuing investigation after the informant, Chandros, was taken into custody for her participation in the suspected crime. Such statements have inherent indicia of reliability. *See U.S. v. Harris*, 403 U.S. 573, 29 L.Ed. 723 (1971); *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984). This assignment is overruled.

In summary, we vacate the second conspiracy conviction against each defendant; we find no other prejudicial error.

Judgment is vacated in part.

Judges EAGLES and COZORT concur.

PROCESS COMPONENTS, INC. v. BALTIMORE AIRCOIL CO., INC.

No. 8726SC1058

(Filed 19 April 1988)

1. **Damages § 16.3— lost profits—sufficiency of evidence**

Plaintiff presented sufficient evidence of lost profits so that defendant was not entitled to a directed verdict in plaintiff's breach of contract and unfair and deceptive trade practices action.

2. **Damages § 13.2— lost profits—evidence of another company's sales—admissibility**

In an action to recover damages for breach of contract and unfair and deceptive trade practices, the trial court did not err in admitting evidence of another company's sales to show plaintiff's lost profits since defendant used those figures to induce plaintiff to enter into a distributorship agreement, and the other company's sales were made in the same geographic area and to the same customers as plaintiff's sales would have been but for the alleged breach.

3. **Unfair Competition § 1— plaintiff promised sole distributorship—false representation—unfair or deceptive trade practice**

Evidence was sufficient to be submitted to the jury on plaintiff's claim for unfair or deceptive trade practices where it tended to show that defendant represented to plaintiff that it would be the only industrial distributor for defendant's pumps in the Carolinas; defendant represented that another company would handle the building trades part of the market; the other company was in fact never out of the industrial market; and plaintiff presented sufficient evidence to show that it was damaged.

4. **Fraud § 12— false representations—no intent that statements be relied on—insufficient evidence of fraud**

The trial court did not err in directing a verdict for defendant with respect to plaintiff's claim for fraud where there was evidence that defendant made false representations to plaintiff, but there was no evidence that defendant made them with intent that they be relied on by plaintiff; moreover, plaintiff could not have recovery on both a fraud claim and a claim under N.C.G.S. § 75-1.1 since they would arise from the same course of conduct.

5. **Corporations § 6— right of shareholders to maintain action**

The individual plaintiffs lacked standing to sue since shareholders generally cannot maintain individual actions against third persons for wrongs or injuries to the corporation which result in depreciation or destruction of the value of their stock.

APPEAL by defendant and plaintiff from *Allen (C. Walter), Judge.* Judgment entered 25 June 1987 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 March 1988.

This is a civil action wherein plaintiff seeks actual and punitive damages from defendant for fraud, for breach of contract, and for unfair and deceptive trade practices pursuant to G.S. 75-1.1. The evidence presented at trial tends to show:

Defendant Baltimore Aircoil Company, Inc. (hereafter BAC), manufactures and markets hydraulic pumps. Paco Pumps (hereafter Paco) is a division of BAC through which pumps are sold. BAC depends partly on distributors to get the pumps into the marketplace.

In 1983, Larry Seitz, Wayne Gravitte, James Leshock and Marshall Hollingsworth all worked for Pnucor, a distributor of industrial pumps. When Pnucor and BAC failed to reach an agreement on distributorship, Seitz, Gravitte, Leshock and Hollingsworth all left Pnucor and Gravitte set up Process Components, Inc. (hereafter PROCOM).

BAC had a contract with The Gene Hewitt Company (hereafter Hewitt) as a representative taking orders to be filled by BAC. BAC had grown dissatisfied with Hewitt, and Travis Glover, Southeast Regional Sales Manager for BAC, began representing to PROCOM that Hewitt had been terminated in the "industrial" market.

Glover further indicated to Gravitte that Hewitt remained only in the commercial-building trades market and that PROCOM would be the only industrial market distributor in the Carolinas if they became a Paco distributor. Glover also showed Hewitt's sales figures for 1981, 1982 and 1983 to Gravitte. He continually stated that PROCOM could expect higher returns than those of Hewitt. At numerous meetings, Glover repeated his statements about the possible distributorship.

PROCOM then leased a warehouse and began preparation for a distributorship by obtaining sales leads. PROCOM began holding itself out as a distributor of Paco pumps. A written contract was later signed.

A conflict eventually arose because Hewitt continued to contact some customers which PROCOM believed were "industrial" customers and should have only been contacted by PROCOM. On 24 April 1984 PROCOM's distributorship was terminated because of the conflict. In the letter terminating the distributorship, BAC

stated there was an existing representative contract with Hewitt which had to remain in effect until it was terminated. PROCOM had no prior knowledge of such a complete representative contract between BAC and Hewitt.

At trial, PROCOM presented evidence of damages in the form of money spent and lost opportunity to make profits. Evidence of expenditures was admitted to show money spent. Evidence of statements made by Glover and of Hewitt's past earnings were admitted to prove lost benefits.

After hearing the evidence, issues were submitted to the jury, and the jury found that PROCOM and BAC had an exclusive distributorship contract, that BAC breached the contract, and that PROCOM was entitled to $1 in damages. The jury further found that BAC falsely represented that Hewitt had been terminated as industrial market representative, that PROCOM was the exclusive industrial distributor for Paco pumps in the Carolinas, and that PROCOM would receive all the parts business for industrial markets in the Carolinas. The jury also found BAC's conduct was in commerce or affected commerce, and that PROCOM was injured in the amount of $210,000. The trial court ruled BAC's conduct violated G.S. 75-1.1 as an unfair or deceptive trade practice, and pursuant to that statute trebled the damages. Defendant and plaintiff appealed.

William D. Acton, Jr., and Frank B. Aycock, III, for plaintiff.

Moore & Van Allen, by Charles E. Johnson, Holly J. Hickman, and Robert J. Greene, Jr., for defendant.

HEDRICK, Chief Judge.

[1] Liberally construing defendant's brief, it seems defendant contends the trial court erred in denying its motion for directed verdict because plaintiff had not proved damages. In order to recover damages for lost profits, an injured plaintiff must prove its losses with reasonable certainty. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 356 S.E. 2d 578 (1987). Where the action is in tort, as in this case, damages must be the natural and probable result of the tortfeasor's misconduct. *Id.* The measure of damages under G.S. 75-1.1 should also reflect the fact that the cause of action is broader than traditional common law

actions. *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981); *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E. 2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984). Here, plaintiff proved some damage. The amount of damages was for the jury, under proper instructions from the court, to decide. We hold the trial court did not err in denying defendant's motion for a directed verdict.

[2] Defendant next argues the trial court erred by admitting evidence of another company's profits. The record indicates no evidence of Hewitt's past *profits* was admitted, but instead evidence of gross sales was admitted. Even so, the connection between Hewitt's past sales and PROCOM's lost profits is especially strong since defendant used these figures to induce PROCOM into entering into a distributorship agreement. Hewitt's sales were made in the same geographic area and to the same customers as PROCOM's sales would have been. For these reasons, the evidence of Hewitt's prior sales was relevant and therefore admissible. It was for the jury to decide how much weight to give such evidence.

[3] Defendant further assigns error to denial of its motion for a directed verdict with respect to plaintiff's claim for unfair or deceptive trade practices. G.S. 75-1.1(a) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." There is no precise definition of unfair or deceptive acts, but whether a particular act is unfair or deceptive depends on the facts surrounding the transaction and the impact on the marketplace. *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).

In this case issues were submitted to the jury, and they were answered as follows:

> 4. Did the Defendant do any one or more of the following:
>
> (a) Falsely represent to the Plaintiff that the Gene Hewitt Company was terminated as Industrial Market Representative for PACO pumps in North and South Carolina?
>
> ANSWER: Yes

(b) Falsely represent to the Plaintiff that the Plaintiff was the exclusive Industrial Distributor for PACO pumps in North and South Carolina?

ANSWER: Yes

(c) Falsely represent to the Plaintiff that the Plaintiff would receive all of the parts business for the Industrial Market in North and South Carolina?

ANSWER: Yes

5. Was the Defendant's conduct in commerce or did it affect commerce?

ANSWER: Yes

6. Was the Plaintiff injured as a proximate result of the Defendant's conduct?

ANSWER: Yes

7. By what amount, if any, has Plaintiff been injured?

ANSWER: 210,000

The trial court found that these answers "establish as a matter of law that defendant injured plaintiff by unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. . . ." Defendant argues there is insufficient evidence that it made any false representations as found by the jury in issues 4(a), (b) and (c) and insufficient evidence that plaintiff was proximately damaged, and that these issues should not have been submitted to the jury. We disagree.

Wayne Gravitte testified at trial that Travis Glover was "asking for someone who would be their only industrial distributor that would cover that market in the two Carolinas." He also testified that he and Glover discussed PROCOM being the only distributor of pumps in the industrial market and that he indicated PROCOM was not interested in a distributorship unless it had the total market. Gravitte further testified Glover never indicated Hewitt would still be selling in the industrial market and that when asked whether PROCOM was the only industrial distributor in the Carolinas, Glover answered "yes." James Leshock also

testified that his understanding with Glover was that "the Gene Hewitt Company would handle the building trades part of the market as a representative, and that PROCOM would handle, as a distributor, the industrial market." Additional evidence at trial indicates Hewitt was never out of the industrial market as defendant had represented. This evidence is sufficient to raise an inference which would support the jury's answers to issues 4(a) and (b). Gravitte also testified as to discussions about the parts business, and this testimony is sufficient to support issue 4(c). Sufficient evidence was also presented to show plaintiff was proximately damaged. This argument has no merit.

Defendant also contends, based on Assignment of Error No. 5, that the trial court erred in concluding the acts of defendant injured plaintiff in violation of G.S. 75-1.1 because there is insufficient evidence of unfair or deceptive acts or practices and because the issues answered by the jury do not constitute unfair or deceptive acts or practices. G.S. 75-1.1 provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful. Although there is no precise definition of unfair or deceptive acts or practices, *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), a practice is generally unfair when it "offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious. . . ." *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980). The evidence of defendant's misrepresentations clearly supports the court's conclusion that defendant's unfair or deceptive acts or practices caused injury to plaintiff.

Finally, defendant assigns error to denial of its motion for directed verdict with respect to plaintiff's claim for damages due to breach of contract. Defendant argues the evidence is not sufficient to show it entered into and breached an exclusive contract with plaintiff. We disagree. As we have stated, testimony indicates defendant represented to plaintiff that plaintiff would have an exclusive distributorship. Evidence further clearly establishes that plaintiff and defendant did enter into a contract and that defendant breached it.

For the reasons set out above, we find no prejudicial error in defendant's appeal.

[4] Plaintiff assigns error to the trial court's directing a verdict for defendant with respect to plaintiff's claim for fraud. Our Supreme Court, in *Britt v. Britt*, 320 N.C. 573, 579, 359 S.E. 2d 467, 471 (1987), set out the essential elements of fraud:

> . . . (1) the defendant's false representation of a past or existing fact, (2) defendant's knowledge that the representation was false when made or it was made recklessly without any knowledge of its truth and as a positive assertion, (3) defendant made the false representation with the intent it be relied on by the plaintiff, and (4) the plaintiff was injured by reasonably relying on the false representation.

While there is evidence defendant made false representations to plaintiff, there is no evidence defendant made them with intent they be relied on by plaintiff, and the trial court did not err with respect to defendant's motion for directed verdict. Even if there were evidence to support the fraud claim, plaintiff could not have a recovery on both a fraud claim and a claim under G.S. 75-1.1 since they would arise from the same course of conduct. *Borders v. Newton*, 68 N.C. App. 768, 315 S.E. 2d 731 (1984); *Wilder v. Hodges*, 80 N.C. App. 333, 342 S.E. 2d 57 (1986). Plaintiff's argument has no merit.

Plaintiff next contends the trial court erred by allowing defendant's motion for a directed verdict as to individual plaintiffs' claims. Because the trial court found there was lack of evidence to support a fraud claim, there was no error in not submitting an issue concerning individual plaintiffs' claims of fraud. Since the trial court did not submit an issue of fraud with respect to individual plaintiffs there could also be no conceivable prejudice by the court not allowing evidence of damages by individual plaintiffs.

[5] As to other claims, the individual plaintiffs lacked any standing. Generally, shareholders cannot maintain individual actions against third persons for wrongs or injuries to the corporation which result in depreciation or destruction of the value of their stock. *Howell v. Fisher*, 49 N.C. App. 488, 272 S.E. 2d 19 (1980), *disc. rev. denied*, 302 N.C. 218, 277 S.E. 2d 69 (1981). The only exception is where the injury to individual stockholders results from a special duty owed to the stockholder by the wrongdoer and having an origin independent of plaintiff's status as

stockholder. *Id.* This exception would apply if the individual plaintiffs were induced to buy stock because of defendant's representations. There is no evidence of this in the record. All of the claims properly belong to the corporate plaintiff PROCOM, and the argument has no merit.

Plaintiff, in Assignment of Error No. 4, argues the trial court erred in allowing defendant's motion for directed verdict on the punitive damages claim. With respect to the claims of individual plaintiffs, they had no claim at all and therefore there could be no claim for punitive damages. As for the corporate plaintiff, since there was no evidence of fraud there could be no punitive damages awarded. Generally, punitive damages are not awarded for a violation of G.S. 75-1.1. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). In this case, treble damages were awarded for a violation of G.S. 75-1.1, and for that reason punitive damages for fraud could not be awarded even if fraud could be proven since there cannot be a recovery on both claims arising from the same course of conduct. *Wilder v. Hodges*, 80 N.C. App. 333, 342 S.E. 2d 57 (1986). In plaintiff's appeal we find no error.

The result is on defendant's appeal, no error; on plaintiff's appeal, no error.

Judges EAGLES and COZORT concur.

SHIRLEY O. COLLINGWOOD, PLAINTIFF-APPELLANT v. GENERAL ELECTRIC REAL ESTATE EQUITIES, INC., WALSH PROPERTIES, INC. AND SHARON KAY NELMS, DEFENDANTS-APPELLEES

No. 8726SC915

(Filed 19 April 1988)

1. Negligence § 47— negligent design and construction of apartment—no violation of building codes—insufficient evidence of negligence

In an action to recover for injuries sustained by plaintiff when she jumped from her burning apartment, the trial court properly entered summary judgment for defendant owner and defendant manager where plaintiff claimed that, by virtue of certain negligent acts of construction, defendants breached a duty owed her under the common law and under N.C.G.S. § 42-42 to maintain premises fit and safe for occupancy and to keep all common areas of the

premises in safe condition, since all the evidence showed that the apartments were in compliance with the North Carolina State Building Code and all other building codes and regulations; defendant landlord was under no duty to install safety equipment not required by the applicable building codes; and defendant manager of the apartments was not responsible for possible defects of design or construction. N.C.G.S. § 42-42(a).

2. **Negligence §§ 29.1, 35.3— apartment fire—negligence of tenant—sufficiency of evidence—tenant jumping from window—no contributory negligence as a matter of law**

The trial court erred in entering summary judgment for defendant in plaintiff's negligence action where plaintiff alleged that defendant was negligent in failing to shut her apartment door so as to confine the fire to her apartment rather than allowing it to spread to the rest of the building, and failing to awaken her neighbors or warn them of the fire, and the evidence tended to support plaintiff's allegations. Furthermore, the evidence did not show that plaintiff was contributorily negligent as a matter of law in jumping from her third-floor apartment window where the evidence tended to show that plaintiff was confronted with sheets of flames when she opened her apartment door; the apartment had only one door, and there was no other exit except windows; and another female resident of the apartments also jumped from her apartment.

Judge GREENE concurring in the result.

APPEAL by plaintiff from *Burroughs, Robert M., Judge.* Judgment entered 30 April 1987 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 11 February 1988.

Plaintiff filed this action on 22 April 1985 seeking damages for injuries allegedly caused by the negligence of defendants. Each defendant answered, denying liability. In April, 1987, each defendant filed a Motion for Summary Judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. The trial court reviewed the pleadings and discovery materials submitted, heard oral arguments, found no genuine issue of material fact, and allowed the defendants' motions. Plaintiff appealed.

Shelley Blum for plaintiff-appellant.

Smith Helms Mulliss & Moore, by Peter J. Covington, Scott P. Vaughn, and Richard W. Ellis, for defendant General Electric Real Estate Equities, Inc.

Golding, Crews, Meekins & Gordon, by James P. Crews, for defendant Walsh Properties, Inc.

Hedrick, Eatman, Gardner & Kincheloe, by Mel Garofalo and Brian D. Lake, for defendant Sharon Kay Nelms.

WELLS, Judge.

The question is whether the trial court's order of summary judgment in favor of all the defendants was proper. For reasons stated below, we affirm the order as to landlord defendants General Electric Real Estate Equities, Inc. (G.E.) and Walsh Properties, Inc. (Walsh) but reverse as to individual defendant Sharon Kay Nelms (Ms. Nelms).

Both plaintiff and Ms. Nelms formerly resided at Cedar Creek Apartments, located in Mecklenburg County, owned by G.E. and managed by Walsh. The depositions of plaintiff and Ms. Nelms tend to establish the following facts. On the early morning of 19 February 1984 Ms. Nelms was awakened by the alarm of a smoke detector in her apartment. She awoke to find a fire at the base of her bed which apparently had originated in her electric blanket. Ms. Nelms threw a comforter over the flames in an attempt to smother them, then ran out of her apartment across a hallway to a neighboring apartment for help. A neighbor tried to put out the fire with his fire extinguisher while his wife called the fire department. Subsequently, Ms. Nelms and the neighbor's wife ran through the apartment building banging on doors, shrieking "Fire!" and blowing whistles in an effort to arouse the other residents.

The plaintiff lived on the third floor above defendant. She was awakened by the noise of the whistles and by the shouts of people. She ran to her apartment door, opened it, and saw sheets of flames. She closed the door, proceeded to her bedroom window, opened it, and jumped out injuring herself.

[1] The plaintiff alleges in her complaint that landlord defendants G.E. and Walsh were negligent, jointly and severally, in the following four respects: (1) in constructing an apartment complex with materials conducive to the rapid spread of fire; (2) in constructing the apartment building with a lengthy escape path made entirely of untreated wood and without a sprinkler system; (3) in constructing the building so that apartments had only one door and escape path; and (4) in failing to install an alarm system to warn plaintiff before the escape path was in flames. Plaintiff contends that by virtue of these negligent acts G.E. and Walsh breached a duty owed to plaintiff under the common law and under N.C. Gen. Stat. § 42-42 to maintain premises fit and safe for

occupancy and to keep all common areas of the premises in safe condition. We disagree.

G.S. § 42-42 provides in pertinent part as follows:

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; . . .

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in safe condition; . . . .

Only subdivision (a)(1) is relevant to plaintiff's allegations. However, plaintiff concedes, and all the evidence submitted by the parties establishes, that Cedar Creek Apartments was in compliance with the North Carolina State Building Code and all other applicable building codes and regulations. G.E. was under no duty to install safety equipment not required by the applicable building codes. Walsh cannot be held liable under subsection (a)(1) because Walsh was merely managing Cedar Creek Apartments and is not responsible for possible defects of design or construction. Compliance with G.S. § 42-42 (a)(1) insulates landlords from liability for building design or construction.

Plaintiff contends, however, that G.S. § 42-42 (a)(2) and (a)(3) impose liability for unsafe conditions not contemplated by the State Building Code and that a jury of twelve should decide whether the landlords' failure to provide safety features such as a sprinkler system, a second escape path, or a loud alarm system was negligence. This argument cannot prevail. Subsections (a)(2) and (a)(3) contemplate a repair or maintenance function and have no relevance to the construction and design of rented dwellings, which is the basis of plaintiff's negligence claim. North Carolina cases construing subsection (a)(3) have applied it in the context of safety maintenance of common areas. *See, e.g., Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 284 S.E. 2d 702, *disc. rev. denied*, 305 N.C. 300, 290 S.E. 2d 702 (1982) (landlord's failure to remove ice from walkway in common area of apartment complex). Plaintiff does not allege that either G.E. or Walsh failed to *main-*

tain Cedar Creek Apartments in fit and habitable condition or to *keep* its common areas safe. Thus, plaintiff has not shown the breach of any duty owed her under subsections (a)(2) or (a)(3) or the common law. Where there is no breach of a legal duty, there can be no actionable negligence, and summary judgment is proper. Summary judgment is appropriate where it is established that an essential element of the opposing party's claim is nonexistent. *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E. 2d 355 (1985).

[2] Plaintiff's action against individual defendant Ms. Nelms stands on a different footing. Plaintiff complains that Ms. Nelms was negligent, *inter alia*, (1) in failing to put out the fire when it was small, (2) in failing to shut her apartment door so as to confine the fire to her apartment rather than allowing it to spread to the rest of the building, and (3) in failing to awaken her neighbors or warn them of the fire. Ms. Nelms contends that plaintiff has produced no evidence to support these allegations. We disagree. Ms. Nelms concedes in her deposition that when she awoke the flames were located exclusively in the lower portion towards the foot of the bed. She further concedes that in her only independent attempt to put out the flames she "just kind of plopped" a comforter, presumably flammable, over only a portion of the fire. She further concedes that when she ran to the neighbor for help, she left the door to her own apartment open. Thereafter, she reentered her apartment solely for the purpose of retrieving a lock box from her bedroom. Ms. Nelms states that she knocked on all four doors on the third level of the apartment building. However, the plaintiff asserts, in her deposition, that she never heard anyone bang on her door. In the light of this evidence we cannot hold, as a matter of law, that no rational juror could find Ms. Nelms' conduct negligent. Therefore, the trial court's summary judgment for Ms. Nelms must be reversed.

Defendant Ms. Nelms contends that plaintiff was contributorily negligent for, *inter alia*, (1) jumping from the window of her apartment when there was no immediate threat to her safety and (2) jumping from her apartment window when the fire department was on the scene and prepared to erect a ladder. However, plaintiff states that when she went to her front door and opened it, she was confronted with sheets of flames. Plaintiff's apartment had only one door, and there was no other exit except the windows. Moreover, another female resident of

Cedar Creek Apartments also jumped from her apartment. In view of this evidence, it is manifest that the question of plaintiff's contributory negligence is for the jury to decide. Summary judgment should not be granted unless the evidence establishes contributory negligence so clearly and convincingly that no other reasonable conclusion may be reached. *Branks v. Kern*, 83 N.C. App. 32, 348 S.E. 2d 815, *rev'd on other grounds*, 320 N.C. 621, 359 S.E. 2d 780 (1987). Such is not the case herein.

Summary judgment for defendants G.E. and Walsh is

Affirmed.

Summary judgment for defendant Ms. Nelms is

Reversed.

Judge EAGLES concurs.

Judge GREENE concurs as to defendant Ms. Nelms and concurs in the result as to defendants G.E. and Walsh.

Judge GREENE concurring in the result.

While I agree with the majority's disposition of this case, I disagree with any holding that compliance with the Building Code by defendants General Electric and Walsh absolutely insulates them from liability for building design or construction. While there is no evidence these defendants violated Section 42-42(a)(1) and the Building Code, it does not necessarily follow that compliance with the Code conclusively demonstrates the exercise of due care. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on The Law of Torts* Sec. 36 at 233 (5th ed. 1984); Restatement (Second) of Torts Sec. 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions"). Section 101.2 (1978) of the North Carolina Building Code specifically states that its purpose is to "provide *certain minimum standards*, provisions and requirements for safe and stable design . . . ." (Emphasis supplied.) *See also Thomas v. Dixson*, 88 N.C. App. 337, 343, 363 S.E. 2d 209, 213

(1988) (whether or not a building meets building code standards is not determinative of negligence); *cf. Pasour v. Pierce*, 76 N.C. App. 364, 367, 333 S.E. 2d 314, 317 (1985) (issuance of building permit is not necessarily evidence of the safety of a building), *disc. rev. denied*, 315 N.C. 589, 341 S.E. 2d 28 (1986).

The defendants submitted evidence in support of their motion for summary judgment that the building was constructed in accordance with industry standards. Therefore, the plaintiff had the burden to come forward with a forecast of evidence showing defendants G.E. or Walsh did not exercise due care in the construction of the building. *Campbell v. Board of Education*, 76 N.C. App. 495, 499, 333 S.E. 2d 507, 510 (1985) (when movant adequately supports motion for summary judgment, nonmovant must come forward with facts controverting facts put forward by movant), *disc. rev. denied*, 315 N.C. 390, 338 S.E. 2d 878 (1986). Plaintiff failed to show any applicable standard of care with which G.E. or Walsh had to comply. The submitted affidavits do not purport to establish a standard of care, merely stating that in the affiants' opinions, the Building Code was not enough protection since it provided only "minimal fire safety regulations." There were no affidavits alleging defendants did not comply with industry standards or exercised anything other than reasonable care under the circumstances in regard to the premises. *See* 65 C.J.S. *Negligence* Sec. 81(1) at 977 (1966) (due care ordinarily exercised when construction is substantially the same as that in common and general use in similar buildings). In the absence of a showing by plaintiff of a breach by G.E. or Walsh of the applicable standard of care, summary judgment was properly entered for defendants G.E. and Walsh. *See Rorrer v. Cooke*, 313 N.C. 338, 357, 329 S.E. 2d 355, 367 (1985) (fact that one attorney-witness testifies he would have acted differently from defendant in attorney malpractice case is not sufficient forecast of evidence showing breach of duty of care). I therefore concur in the result as to defendants G.E. and Walsh and concur in the majority opinion as to defendant Nelms.

ROBERT L. JONES, AS TRUSTEE FOR WILLIAM ISAAC SWAIN, UNDER THE WILL OF WILLIAM E. SWAIN, AND MARIE RENEE SWAIN v. KIMBERLY SWAIN

No. 8710DC1127

(Filed 19 April 1988)

Ejectment § 1.1 – summary ejectment – requirement of landlord-tenant relationship – insufficiency of evidence

The district court had no authority to enter summary judgment summarily ejecting defendant since there was no evidence that a trustee and decedent's daughter, who took decedent's homeplace pursuant to his will, were "landlords" or that defendant, who was the mother of decedent's minor son and who moved into the house four months before decedent's death, was a "tenant"; there was no evidence that there was ever any contract or lease, actual or implied, between the parties or between defendant and a person under whom the plaintiffs claimed in privity; and the statute for summary ejectment, N.C.G.S. § 42-26, therefore had no application in this case.

APPEAL by defendant from *Morelock, Judge*. Summary judgment entered 19 August 1987 in District Court, WAKE County. Heard in the Court of Appeals 6 April 1988.

This is a summary ejectment proceeding instituted pursuant to the provisions of G.S. 42-26 *et seq.* before a magistrate to evict defendant from a residence located at 1705 Oberlin Road, Raleigh, North Carolina.

The record before us establishes the following uncontroverted facts: William E. Swain died testate in December 1986. In his will Mr. Swain appointed his sister, Margaret Blythe, as executrix of his estate. Article 3 of Mr. Swain's will provides:

> All the residue of the property which I may own at the time of my death, real or personal, tangible and intangible, of whatsoever nature and wheresoever situated, including all property which I may acquire or become entitled to after the execution of this will, I bequeath and devise in shares of equal value to my daughter, Marie Renee Swain, and my son, William Isaac Swain, if they shall survive me, and subject to the provisions hereinafter set forth in regard to my said son.
>
> . . .

Article 3 further provides:

> Should my said son survive me, but not yet have attained 30 years of age at the time of my death, I direct that my personal representative deliver and convey my said son's share of my residuary estate to my friend, Robert L. "Roddy" Jones, in trust for the benefit of my said son. The net income derived from this trust and all or any part of the principal thereof may be paid to or applied for the benefit of my said son in such manner and at such intervals and in such amounts as my Trustee in his sole discretion shall from time to time deem necessary or appropriate in providing for the suitable support, maintenance, health, and education of my son until he shall attain the age of 30 years, and upon his attainment of the age of 30 years, the principal and accumulated income, if any, then constituting the trust shall be delivered and conveyed to him, discharged of the trust. Furthermore, after my said son has attained 22 years of age my Trustee may make advancements to him for the purpose of enabling him to make the downpayment on the purchase of a home, beginning a business which may provide him with a source of employment, or any other worthy endeavor. In deciding the amount and timing of distributions authorized hereunder, both prior to my said son's attainment of 22 years of age and thereafter, my Trustee shall bear in mind that my intention in creating this trust is to provide for the exclusive benefit of my said son and that the funds of this trust are to be used to supplement income otherwise available to provide for his needs.
>
> It is my preference, and to the extent that it is reasonably possible, I hereby direct that my Trustee shall not make distributions to my son's mother [defendant, Kimberly Swain] for his benefit, but shall pay such funds directly to the provider of the goods or services rendered to or for the benefit of my son.

On 30 January 1987 plaintiff, trustee, wrote a letter to defendant, Kimberly Swain, mother of William Isaac Swain, which stated:

Mrs. Kimberly Swain
1705 Oberlin Road
Raleigh, North Carolina 27608

Re: William E. Swain Estate

Dear Kimberly:

Since Bill's death in December, those of us responsible for various segments of his estate have diligently been working out the details to settle all the issues at hand. As you know, Bill owned three residential pieces of property, plus the commercial land on the corner of Powell Drive and Western Boulevard. It has now become clear that it will be necessary to liquidate and sell all these properties in order to satisfy various indebtedness that is encumbered on some of this land as well as to prepare for state and federal estate taxes.

I am pleased that we were able to allow you and Isaac to occupy the current dwelling at 1705 Oberlin Road for this period of time, since I consider it especially beneficial for Isaac after his father's death. However, I must at this time give you a one month's notice to secure additional housing for yourself and Isaac while we attempt to put this house on the market for sale.

It will be necessary that some remedial repair work take place regarding the sunken front porch during this period of time and we will work closely with you on scheduling any of this kind of activity. I will be happy to answer any questions in this regard and hope that you will understand the necessity for this action.

Best wishes.

Sincerely,

Robert L. Jones

cc: Larry Bolton, Attorney
Maria Swain

On 16 April 1987, Margaret Blythe, as executrix of William E. Swain's estate, by special warranty deed, purported to convey her one-half undivided interest in land located at 1705 Oberlin Road to Robert L. Jones, as trustee for William Isaac Swain.

On 7 May 1987, attorney Charles L. Fulton, of Manning, Fulton & Skinner, wrote the following letter to defendant:

Mrs. Kimberly Swain
1705 Oberlin Road
Raleigh, North Carolina 27605
Re: Estate of William E. Swain
(Our File T-11546)

Dear Mrs. Swain:

Title to the property at 1705 Oberlin Road has now been conveyed to Robert L. Jones as Trustee for William Isaac Swain under the will of William E. Swain. The deed conveying that property was recorded in the Wake County Registry on May 7, 1987.

This is to advise that Mr. Jones, Trustee, requires immediate possession of the dwelling at 1705 Oberlin Road, in order that he might do certain repair work to it and sell it in order to raise funds needed by the estate and by the trust.

You are accordingly requested to vacate the property immediately, having previously been given notice by letter dated January 30, 1987 to move within 30 days.

While Mr. Jones is reluctant to have this action taken, he feels that he cannot delay any longer because he is losing valuable time, particularly time during one of the best seasons for selling homes that we have in Raleigh. Unless you are out of the house by May 15, we are instructed to bring action to have you evicted, and we sincerely hope this will not be necessary. Please advise me or Mr. Jones as soon as possible when the house will be vacant so that they can make their plans to start working on it.

Sincerely yours,

MANNING, FULTON & SKINNER

Charles L. Fulton

cc: Mr. Robert L. Jones

In support of his motion for summary judgment in the summary ejectment proceeding, the trustee, Robert L. Jones, filed an affidavit containing the following pertinent statements:

3. William E. Swain's daughter, Marie Renee Swain, owns the other one-half interest in this property located at 1705 Oberlin Road.

4. William Isaac Swain's mother, Kimberly Swain, has resided at 1705 Oberlin Road since approximately August 1986 and has paid not [sic] rent during this period nor has any been requested from her. She is residing in the premises under no lease.

5. On January 30, 1987, I corresponded with Ms. Swain and advised her that, in my judgment, we needed to sell the home to raise funds to provide for the support for the minor child, Isaac. A copy of my letter is attached hereto as Exhibit C and incorporated by reference.

6. On May 7, 1987, my attorney again contacted Ms. Swain and advised her to vacant [sic] the premises. A copy of his letter is attached hereto as Exhibit D.

This the 16th day of July, 1987.

Defendant filed no evidentiary matter in opposition to the motion for summary judgment. The district court allowed plaintiff Robert L. Jones' motion for summary judgment and entered an order stating:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Summary judgment is granted in favor of the plaintiffs against the defendant and the defendant is ordered to vacate the premises located at 1705 Oberlin Road, Raleigh, North Carolina and surrender possession of the premises to the plaintiffs.

2. The plaintiffs are hereby awarded a writ for possession of the real properly [sic] located at 1705 Oberlin Road, Raleigh, North Carolina.

. . .

Defendant appealed.

Manning, Fulton & Skinner, by Robert S. Shields, Jr., for plaintiffs, appellees.

Dan Lynn, for defendant, appellant.

HEDRICK, Chief Judge.

The question before us is whether the district court had authority to enter summary judgment for plaintiffs summarily evicting defendant from the premises at 1705 Oberlin Road.

G.S. 42-26 states:

> Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:
>
> (1) When a tenant in possession of real estate holds over after his term has expired.
>
> (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.
>
> (3) When any tenant or lessee of lands or tenements, who is in arrears for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated.

Under this statute it is no longer necessary to allege that a landlord-tenant relationship exists between the parties as a jurisdictional matter, but it is still necessary to show that the relationship exists in order to bring the case within the provisions of this section before the summary ejectment remedy may be properly granted. *Chandler v. Savings and Loan Assoc.*, 24 N.C. App. 455, 211 S.E. 2d 484 (1975). The remedy given by G.S. 42-26 is restricted to the case where the relation between the parties is simply that of landlord and tenant. *Hauser v. Morrison*, 146 N.C. 248, 59 S.E. 693 (1907). Furthermore, G.S. 42-26 was only intended to apply to a case in which the tenant entered into possession under some contract or lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in

privity with some person who had so entered. *McCombs v. Wallace*, 66 N.C. 481 (1872).

The record before us discloses that defendant and her minor son, William Isaac Swain, have resided in the house at 1705 Oberlin Road since August 1986. Defendant and her son still live there. In his affidavit in support of his motion for summary judgment, the trustee, Robert L. Jones, states that "William Isaac Swain's mother, Kimberly Swain, has resided at 1705 Oberlin Road since approximately August 1986 and has paid not [sic] rent during this period nor has any been requested from her." Jones, in his affidavit, further states that defendant "is residing in the premises under no lease."

There is absolutely no evidence in this record that the trustee or Marie Renee Swain are "landlords" or that defendant is a "tenant." Furthermore, there is absolutely no evidence in this record that there was ever any contract or lease, actual or implied, between the parties or between defendant and a person under whom the plaintiffs claim in privity. Thus, the statute providing for summary ejectment, G.S. 42-26, has no application in this case and the district court therefore had no authority to enter summary judgment summarily ejecting defendant.

Our decision makes it unnecessary to discuss other defects appearing in the record with respect to plaintiffs' claim to summarily evict defendant. We point out, however, that the trustee has no authority to administer the estate of William E. Swain—that is the exclusive province of the executrix.

Summary judgment summarily evicting defendant from the premises at 1705 Oberlin Road is reversed, and the cause is remanded to the district court for the entry of an order dismissing plaintiffs' claim to summarily evict defendant.

Reversed and remanded.

Judges PHILLIPS and EAGLES concur.

MYRTLE R. GOSNEY, WIDOW AND ADMINISTRATRIX OF THE ESTATE OF LOUIS M. GOSNEY, DECEASED, EMPLOYEE, PLAINTIFF v. GOLDEN BELT MANUFACTURING, EMPLOYER, AND SEABOARD FIRE & MARINE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8710IC542

(Filed 19 April 1988)

1. **Master and Servant § 68.1— workers' compensation—asbestosis—insufficient exposure to asbestos**

Evidence was sufficient to support the Industrial Commission's finding of fact and conclusion of law that plaintiff failed to show the length of exposure to asbestos required under N.C.G.S. §§ 97-57 and 97-63 to establish his asbestosis claim where the last possible exposure occurred in February 1975; claimant was required to meet the statutory time limitations between February 1965 and February 1975; there was only one exposure to asbestos of any merit during that time; and this exposure lasted only six days.

2. **Master and Servant § 68— workers' compensation—asbestosis—cigarette smoking as cause of obstructive pulmonary disease—sufficiency of evidence**

Although there was conflicting medical testimony, there was sufficient evidence to support the Industrial Commission's finding that plaintiff's obstructive pulmonary disease was caused by his fifty pack year history of cigarette smoking and not in significant part by his exposure to cotton dust in his employment.

APPEAL by plaintiff from an Opinion and Award of the Full Commission filed 19 January 1987. Heard in the Court of Appeals 1 December 1987.

Roger M. Cook and Charles R. Hassell, Jr., for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Hatcher B. Kincheloe and John F. Morris, for defendants-appellees.

JOHNSON, Judge.

Louis Gosney filed this claim on 15 March 1983 alleging that he suffered from an occupational disease caused by exposure to cotton dust, chemical fumes and asbestos, among other substances, while he was employed by defendant, Golden Belt Manufacturing. He filed an additional claim on 15 August 1983 alleging that the exposure to asbestos and fibers caused him to contract asbestosis, an occupational disease.

Both claims were denied by the Deputy Commissioner, and the denial was affirmed on appeal by the Full Commission, which in so doing, amended finding of fact number 8 to more completely set forth the facts surrounding decedent's exposure to asbestos. In the interim, Louis Gosney died, and his widow and administratrix, Myrtle R. Gosney, was substituted as party-plaintiff. She presently appeals from the Opinion and Award of the Full Commission.

Plaintiff's decedent began working for defendant employer in 1949 as a carpenter, and worked until his early retirement in 1975. Defendant, Golden Belt Manufacturing, was composed of three separate operations, a cotton textile mill, a printing and labeling department, and a textile bag mill. Plaintiff's decedent worked in the carpentry shop, which was located within the confines of the cotton mill building and separated by a fire wall. His duties, which included repairing and replacing windows, patching floors, replacing belts for the machinery, and painting, required him to work throughout all areas of the operation. He spent two or three days each week, on the average, replacing windows in the cotton mill, before its windows were bricked up and air conditioning was installed in 1960. After that time, decedent's work activities in that area substantially decreased, primarily because there were no longer any windows to repair. In 1965, the carpentry shop, decedent's base work station, was moved from the cotton mill to the printing plant, and in 1971, the cotton mill ceased all operations.

The scope of review this Court must utilize when evaluating an award of the Industrial Commission is limited to whether the findings of fact and conclusions of law are supported by competent evidence from the record. *Inscoe v. DeRose Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977). This Court is bound by the Commission's findings when they are supported by direct evidence or by reasonable inferences, although evidence which would support a contrary result may also be present. *Searcy v. Branson*, 253 N.C. 64, 116 S.E. 2d 175 (1960).

In denying compensation on decedent's asbestosis claim, the Full Commission relied upon both G.S. 97-57 and G.S. 97-63. G.S. 97-57 provides, in pertinent part, that "when an employee has been exposed to the hazards of asbestosis or silicosis for as much

as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious; . . . " G.S. 97-63 in turn states, in pertinent part, that:

> [c]ompensation shall not be payable for disability or death due to silicosis and/or asbestosis unless the employee shall have been exposed to the inhalation of dust of silica or silicates or asbestos dust in employment for a period of not less than two years in this State, provided no part of such period of two years shall have been more than 10 years prior to the last exposure.

The Commission made the following findings of fact to which plaintiff objects by this appeal:

> [Decedent's] restrictive lung disease is caused by his asbestosis. [Decedent] did not have as many as thirty days of exposure to the hazards of asbestos within seven consecutive months while in the employment of the defendant employer. In addition, [decedent's] total exposure to the hazards of asbestos while in the defendant employer's employment did not equal two years.
>
> 12. [Decedent's] chronic obstructive lung disease was caused by his fifty pack years of cigarette smoking. [Decedent's] chronic obstructive lung disease was not in significant part caused, aggravated or accelerated by his minimal exposure to the hazards of cotton dust in his employment with the defendant employer as a carpenter. Chronic obstructive lung disease not so significantly caused, aggravated or accelerated is an ordinary disease of life to which the general public is equally exposed and is not due to causes and conditions which are characteristic of and peculiar to [decedent's] employment.

[1] Plaintiff first contends that there is no competent evidence in the record to support the Commission's finding of fact and following conclusion that claimant failed to satisfy the statutory requirements needed to establish an asbestosis claim. We cannot agree. As aforementioned, G.S. 97-57 requires a claimant to show exposure of 30 working days within seven consecutive calendar months in order that it may be considered injurious, and G.S. 97-63 requires not less than two years exposure, provided that no part of which shall have occurred 10 years before the last exposure.

The evidence before us establishes that decedent's last day of employment with Golden Belt Manufacturing was 28 February 1975. Therefore, decedent's last possible exposure occurred in February of 1975 and he was required to meet the statutory time limitations between February of 1965 and February of 1975. The evidence, however, establishes only one exposure to asbestos of any merit during that time. The exposure which occurred prior to 1964 cannot be used to calculate decedent's level of exposure since it occurred over ten years prior to the last exposure. Decedent's second exposure occurred in 1966 when he helped to tear out asbestos walls in the print department. The evidence discloses that this activity took a total of approximately six days to complete. There is no evidence to support plaintiff's contention that decedent continued to have exposure to asbestos after 1966 when the asbestos walls were removed. In fact, Benny Parks, engineering manager and decedent's supervisor, testified that after 1966 decedent had no responsibility for maintenance of any asbestos products at Golden Belt Manufacturing.

Therefore, we hold that the evidence is sufficient to support the Commission's finding of fact and conclusion of law that plaintiff failed to show the length of exposure to asbestos required under G.S. 97-57 and G.S. 97-63.

[2] Plaintiff next contends that there is no competent evidence in the record to support the Commission's finding and conclusion of law that decedent's chronic obstructive pulmonary disease was caused by his fifty pack year history of cigarette smoking and not in significant part by decedent's exposure to cotton dust in his employment.

Our Courts have held that in order for a claimant suffering from chronic obstructive lung disease to receive compensation, the employee must show: (1) that the occupation in question exposed him to a greater risk of contracting the disease than ordinary members of the public, and (2) that the employee's exposure to substances peculiar to the occupation in question significantly contributed to, or was a significant causal factor in, the disease's development. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983); *Goodman v. Cone Mills Corp.*, 75 N.C. App. 493, 331 S.E. 2d 261 (1985).

At the hearing before Deputy Commissioner Page, medical evidence was introduced through testimony by Dr. Herbert Sieker, decedent's treating physician since December of 1982, testimony by Dr. D. Allen Hayes, and through the testimony of Dr. Hillis Seay, a member of the Advisory Medical Commission for the Industrial Commission, who testified before Deputy Commissioner Haigh.

Dr. Hayes, an expert in the field of pulmonary medicine, who examined decedent at defendant's request for the purpose of rendering a diagnosis, testified to the following: that based upon the history related to him by decedent, decedent had a forty-eight to fifty pack year history of tobacco usage; that decedent spent 10% of his time working in the cotton mill where he was exposed to cotton dust; that decedent's impairment in lung function was primarily due to airway obstruction which is secondary to tobacco consumption, rather than to the mild impairment secondary to asbestosis; that based upon his findings and testing, the decedent's obstructive pulmonary disease could have been caused entirely by the consumption of cigarettes; and that he did not feel that exposure to cotton dust at Golden Belt Manufacturing was a significant contributing factor to the development of decedent's chronic obstructive pulmonary disease.

Although decedent's personal physician testified that decedent's exposure to cotton dust, while employed by defendant employer, significantly contributed to the development of his pulmonary disease, and that this occupation placed him at an increased risk of developing the disease, we are required to affirm the decision of the Commission. The Industrial Commission is the sole judge of the credibility of the witness and the weight to be given to his testimony. "The Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not." *Hilliard v. Apex Cabinet Company*, 305 N.C. 593, 595, 290 S.E. 2d 682, 684 (1982) (citation omitted). The Commission has resolved the conflict in medical testimony against the plaintiff and entered its findings of fact and conclusions of law accordingly. As the findings of fact to which plaintiff objects were based upon competent medical testimony, we are not at liberty to disturb the Opinion and Award on appeal. Accordingly, the decision is

Affirmed.

Judges ARNOLD and ORR concur.

PANNILL KNITTING COMPANY, INC. v. GOLDEN CORRAL CORPORATION, EDENTON HOUSING PARTNERSHIP, BERNARD P. BURROUGHS AND WIFE, ANNE J. BURROUGHS AND THURMAN E. BURNETTE, TRUSTEE

No. 871SC783

(Filed 19 April 1988)

Mortgages and Deeds of Trust § 40.1— attack on second foreclosure sale—failure of record to contain a copy of deed of trust—no showing of impropriety of sale

Plaintiff failed to show as a matter of law that the substitute trustee conducted a second foreclosure sale improperly where the record did not contain a copy of the deed of trust or a stipulation by the parties as to its contents, and the court on appeal therefore could not determine whether the deed of trust foreclosed upon expressly authorized the trustee to sell the property in parcels upon default or whether the property was actually described in separate parcels in the instrument. N.C.G.S. §§ 45-21.8, 45-21.9.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Fountain, Judge.* Judgment signed 30 April 1987 in Superior Court, CHOWAN County. Heard in the Court of Appeals 13 January 1988.

This case arises out of the second foreclosure sale instituted under a purchase money deed of trust dated 14 January 1982 from L. F. Amburn, Jr., and William B. Gardner to Max S. Busby, trustee for Bernard P. Burroughs, grantee. This deed of trust, duly recorded in Book 137, page 672 of the Chowan County Public Registry, created a lien upon all of Amburn's and Gardner's interest in the property described therein. At the time of execution the property described in the deed of trust was owned by Judy H. Earnhardt (now Adams), Amburn and Gardner as tenants in common.

On 26 August 1983, plaintiff docketed a $150,000 judgment against Amburn individually in the Chowan County Clerk of Court's office. After this judgment was docketed, the tenants in common desired to sell part of the property described in the

above deed of trust. They could not convey clear title, however, because of plaintiff's judgment. Thus on 15 March 1984 the substitute trustee instituted foreclosure proceedings against Amburn's interest in the property. This would enable the tenants in common along with the purchaser at the foreclosure sale to convey the property free of plaintiff's subsequently recorded judgment.

Because the prospective buyers desired to purchase only portions of the property described in the deed of trust, the substitute trustee instituted foreclosure proceedings upon two parcels only. He sold both parcels to Burroughs, the mortgagee and highest bidder at the foreclosure sale. Plaintiff was served with notice of the foreclosure sale approximately one month before it was held.

After the final account was filed and approved, the parties discovered that the substitute trustee had sold both parcels without providing any means of access to them. The substitute trustee therefore instituted a second foreclosure proceeding on the same purchase money note and deed of trust. This proceeding sought to foreclose Amburn's interest in two additional parcels of the unsold property. These parcels were both access strips sixty feet in width. The substitute trustee claimed authority to foreclose on these two access strips because the first foreclosure sale had fallen approximately $2,000 short of satisfying the outstanding balance of the debt, plus expenses. Plaintiff was again served with notice of the foreclosure sale approximately one month before the sale.

Burroughs purchased both access strips at the second foreclosure sale. He then, along with the remaining tenants in common, sold both original parcels along with their respective access strips. Golden Corral Corporation bought one of the parcels and an easement over the sixty foot access strip for $38,317.50. Golden Corral Realty Corporation has since constructed improvements on the parcel costing in excess of $300,000. Edenton Housing Partnership purchased the other original parcel together with its access strip for approximately $63,000. Housing units have been constructed on this parcel and a paved street placed on the sixty foot access strip.

Amburn filed bankruptcy on 7 February 1985. Plaintiff attempted to collect its $150,000 judgment in the bankruptcy pro-

ceeding. After failing to obtain full satisfaction, plaintiff filed this action seeking a declaratory judgment declaring the second foreclosure sale of the access strips void and attempting to establish its right to execute upon Amburn's interest in them. Defendants filed motions for summary judgment and answers to the complaint denying that plaintiff had a right to execute on the access strips. Defendants also alleged laches and estoppel as affirmative defenses. The trial court granted summary judgment in favor of defendants. Plaintiff appeals.

Trimpi, Thompson & Nash, by Thomas P. Nash, IV and John Trimpi, attorneys for plaintiff-appellant.

Shearin & Archbell, by Roy A. Archbell, Jr., attorney for defendant-appellees Golden Corral Corporation and Golden Corral Realty Corporation.

Hornthal, Riley, Ellis & Maland, by M. H. Hood Ellis, attorney for defendant-appellees Edenton Housing Partnership and Thurman E. Burnette, Trustee.

Earnhardt & Busby, P.A., by Charles T. Busby, attorney for defendant-appellees Charles T. Busby, Substitute Trustee, and Bernard P. Burroughs and wife, Anne J. Burroughs.

ORR, Judge.

Procedures for conducting foreclosure sales of parts or parcels of real property described in a deed of trust are set out in N.C.G.S. §§ 45-21.8 and 45-21.9. These statutes read as follows:

§ 45-21.8. Sale as a whole or in parts.

(a) When the instrument pursuant to which a sale is to be held contains provisions with respect to whether the property therein described is to be sold as a whole or in parts, the terms of the instrument shall be complied with.

(b) When the instrument contains no provisions with respect to whether the property therein described is to be sold as a whole or in parts, the person exercising the power of sale may, in his discretion, subject to the provisions of G.S. 45-21.9, sell the property as a whole or in such parts or parcels thereof as are separately described in the instrument, or

he may offer the property for sale by each method and sell the property by the method which produces the highest price.

(c) This section does not affect the equitable principle of marshaling assets. (1949, c. 720, s. 1.)

§ 45-21.9. Amount to be sold when property sold in parts; sale of remainder if necessary.

(a) When a person exercising a power of sale sells property in parts pursuant to G.S. 45-21.8 he shall sell as many of such separately described units and parcels as in his judgment seems necessary to satisfy the obligation secured by the instrument pursuant to which the sale is being made, and the costs and expenses of the sale.

(b) If the proceeds of a sale of only a part of the property are insufficient to satisfy the obligation secured by the instrument pursuant to which the sale is made and the costs and expenses of the sale, the person authorized to exercise the power of sale may readvertise the unsold property and may sell as many additional units or parcels thereof as in his judgment seems necessary to satisfy the remainder of the secured obligation and the costs and expenses of the sale. As to any such sale, it shall not be necessary to comply with the provisions of G.S. 45-21.16 but the requirements of G.S. 45-21.17 relating to notices of sale shall be complied with.

(c) When the entire obligation has been satisfied by a sale of only a part of the property with respect to which a power of sale exists, the lien on the part of the property not so sold is discharged.

(d) The fact that more property is sold than is necessary to satisfy the obligation secured by the instrument pursuant to which the power of sale is exercised does not affect the validity of the title of any purchaser of property at any such sale. (1949, c. 720, s. 1; 1975, c. 492, s. 15.)

In order for us to determine whether the trustee properly conducted the second foreclosure sale according to law the record must reflect: (1) whether the deed of trust foreclosed upon expressly authorized the trustee to sell the property in parcels upon

default, or (2) whether the property was actually described in separate parcels in the instrument. The record does not contain a copy of the deed of trust nor a stipulation by the parties as to its contents. Therefore, no evidence was presented upon which we could conclude that the second foreclosure violated any statutory provisions. "There is a presumption of law in favor of regularity in the exercise of the power of sale in a mortgage or deed of trust." *Edwards v. Hair*, 215 N.C. 662, 664, 2 S.E. 2d 859, 860 (1939) (citations omitted).

"Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 392, 320 S.E. 2d 273, 275 (1984), *disc. rev. denied*, 312 N.C. 796, 325 S.E. 2d 485 (1985) (citation omitted). On the record as it currently stands, we find no genuine issue of material fact. Plaintiff has failed to show that as a matter of law the substitute trustee conducted the second foreclosure sale improperly. We must conclude therefore that defendants are entitled to a judgment as a matter of law. We affirm the trial court's order granting defendants summary judgment.

Affirmed.

Judge JOHNSON concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Though the record is not as complete as it might be, that it does not show whether the deed of trust described the separate parcels of encumbered land and expressly authorized the trustee to sell the parcels separately is immaterial in my opinion. For the record we have shows that the Clerk's order of foreclosure is invalid on its face; not because it directed that only a parcel of the encumbered land be sold, but because it directed that only the undivided commonly held interest of one of the two joint mortgage debtors be sold. In pertinent part the pleadings and other parts of the record show that: The mortgaged land was owned in common by the Amburns and the Gardners and the mortgage indebtedness was their common or joint debt; in ordering that only the

Amburns' one-fourth undivided interest in the particular parcel be foreclosed the Clerk did not find either that there had been a division of the jointly held land or that the mortgage debt was severable, but merely found that "the indebtedness was in default" and the noteholder desired to foreclose only upon the interest of the Amburns. Such a tactic by foreclosing parties is not sanctioned by the law, nor should it be; for it would permit them to in effect divide undivided lands held in common and sever a joint indebtedness without complying with the laws pertaining thereto.

STATE OF NORTH CAROLINA v. CHARLES LEE SCOTT

No. 8728SC1007

(Filed 19 April 1988)

Rape and Allied Offenses § 5— second degree rape—sexual act accomplished by force—insufficiency of evidence

The trial court erred in denying defendant's motions to dismiss a charge of second degree rape where the evidence was sufficient to disclose that defendant had sexual intercourse with a sixteen-year-old female against her will, but it was insufficient to show that the sexual act was accomplished "by force" as required by N.C.G.S. § 14-27.3(a)(1).

Judge WELLS dissenting.

APPEAL by defendant from *Lewis (Robert D.), Judge.* Judgment entered 6 April 1987 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 11 April 1988.

Defendant was charged in a proper bill of indictment with the second-degree rape of a sixteen-year-old female in violation of G.S. 14-27.3(a)(1).

The evidence considered in the light most favorable to the State tends to show the following: On the morning of 18 September 1986 the victim, a sixteen-year-old girl, spoke with defendant, her neighbor, on the telephone several times about buying a car. The victim also asked defendant if he would pick up a pack of cigarettes for her if he was out that day, and she told him she would repay him. Defendant told her he would.

Later that morning defendant called the victim and told her that he had run out of gas. He asked her to get the owner of the trailer park, where both defendant and the victim lived, to bring him some gas. After conveying that message the victim returned to the trailer where she lived with her mother and brother. Her mother had gone to work, and her brother had gone to school. The victim began washing dishes. Defendant entered the victim's mobile home through an unlocked door and gave the victim a pack of cigarettes. The victim told him her mother had left her a dollar to pay for the cigarettes but defendant told her that it was not necessary for her to pay him. The victim thanked him for the cigarettes, and after talking with him for a while, told him that she needed to finish the dishes and clean the house before leaving for school. Defendant approached the victim and "pinned" her against the kitchen sink. When the victim asked defendant to leave he told her that "it would just take a minute." The victim told him that she really needed to get back to what she was doing, that she didn't have time for this, and that he really needed to go on home because she was extremely busy. Defendant put his hands on the victim's sides and back and began moving his hips against her. The victim kept repeating her requests for him to leave her alone and to go away. The victim pushed at defendant, but he would not let go. Defendant then started "angling" the victim toward the back of the trailer. Thinking there was no way to get out of the trailer through the front or the back, the victim backed down the hallway and stumbled into the bathroom. Defendant followed her into the bathroom and began kissing her neck and unbuttoning her blouse. The victim told him to leave her clothes alone and to get out of her house. Defendant unbuttoned the victim's pants and lifted her up onto the bathroom sink. The victim got off, and defendant lifted her back up on the sink. When she slid down again defendant lifted her back up onto the sink. Defendant then unzipped and removed his pants. Defendant pulled down the victim's underwear, ignoring her pleas to leave her alone. When the victim told defendant that "this wasn't going to do . . . [b]ecause I'm on my period," defendant removed her tampon. Defendant attempted to penetrate the victim's vagina with his penis but was unsuccessful. At this point the victim thought about "picking up the hair spray bottle and beating him to death with it," but she did not pick up the bottle. After placing Vaseline on his penis, defendant succeeded in penetrating the vic-

tim's vagina. After having sexual intercourse defendant left, telling the victim she "dare not" tell her mother or defendant's wife what he had done. After defendant left, the victim began to cry. She then called the Rape Crisis Center and reported the incident.

Defendant was found guilty as charged and appealed from a judgment imposing a prison sentence of 12 years.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. David Steinbock, for the State.

Assistant Appellate Defender David W. Dorey for defendant, appellant.

HEDRICK, Chief Judge.

Defendant assigns error to the denial of his timely "motions to dismiss" made at the conclusion of the State's evidence and at the conclusion of defendant's evidence. The record discloses that at the close of the State's evidence when defendant made a motion to dismiss, the following colloquy took place between the judge and the assistant district attorney:

> COURT: What does the State say to the essential element the defendant used force sufficient to over come [sic] any resistance the victim might make?
>
> MR. CLARK: Your Honor, the State would have a copy of a summary of *State vs. Strickland*, 318 North Carolina Supreme Court from the Advance Sheet, Pages 656 and 657 that I will review, and I have a copy, if you wish to see that.
>
> COURT: All right.
>
> MR. CLARK: The State's position would be that certainly more showing being made than that of constructive force, which Your Honor is aware in the law as to what constructive force is. My recollection of the evidence was that the defendant in this case did place his hands and body upon the victim, that she verbally and physically resisted that, verbally by telling him to leave, to not continue; that, physically, she testified at one point, again from my recollection, that she pushed him away; that at another time within the bathroom area, that her recollection was that she thought that she had slapped at him with her hands.

COURT: Well, in this case you've given me, for example, he refused to leave the premises, broke the latch from behind, put his hand over her mouth. "He pulled me into the bedroom, pulled me by the arm. Did you scream or holler? No, I was so scared of what would happen. Did he have hold of you at the time? Yes, sir. What happened when he pushed you on the bed? He pulled my pants off and had sex. Did he have power over you the entire time? Yes, sir."

That's quite a whole bushel basket full of evidence different from what you have here. There is no evidence of any scared or frightened. She never testified that she was in fear. The only thing he did was put her on the sink every time she got off.

MR. CLARK: Well, I would have to review all my notes, Your Honor, but she was—she considered striking him with a hairspray bottle that was there on the sink; that the defendant tugged on clothing that she was wearing and did stretch, as Your Honor has seen, the items in evidence, that the button has been stretched. Taking the evidence in the light most favorable to the State, that she did strike at him while she was in the bathroom by smaking [sic] at his hand, but she did, in fact, at the outset of the assault fight back by pushing at him, and he would not let go.

COURT: There's no evidence that he ever had hold of her.

MR. CLARK: Your Honor, the evidence—

COURT: I'll submit it to the jury, but it will never last in Raleigh, if it gets by the 12. If you want it to go to the jury that will be fine, but it will never last.

. . .

In his brief defendant cites *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984) in support of his contention that the evidence in the present case fails to disclose either actual or constructive force. In *Alston* the Court held that the victim's "general fear" of the defendant was not sufficient to show that the defendant used the force required to support a rape conviction, absent evidence that the defendant used force or threats to overcome the will of

the victim to resist the sexual intercourse alleged to have been rape. In *State v. Strickland*, 318 N.C. 653, 351 S.E. 2d 281 (1987), the North Carolina Supreme Court distinguished the facts in that case from the facts in *Alston*. In *Strickland*, the State presented evidence that the defendant used both actual and constructive force in that the defendant refused to leave the victim's premises, broke the latch off her screen door, forced his way into her home, grabbed the victim from behind, and put his hand over her mouth before pulling her into the bedroom and raping her.

In our opinion the trial judge's statement with respect to *Strickland* and the sufficiency of the evidence in the present case "[t]hat's quite a whole bushel basket full of evidence different from what you have here," and "I'll submit it to the jury, but it will never last in Raleigh, if it gets by the 12," is most prophetic. We do not understand, however, why the able judge proceeded thereafter to submit the case to the jury and to allow its verdict to stand.

While the evidence in the present case is sufficient to disclose that defendant had sexual intercourse with the sixteen-year-old female against her will, it is, in our opinion, devoid of evidence sufficient to show that the sexual act was accomplished "by force" as is required by G.S. 14-27.3(a)(1). *See State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984), and *State v. Strickland*, 318 N.C. 653, 351 S.E. 2d 281 (1987). Therefore, we hold that the trial court erred in denying defendant's motions to dismiss.

Reversed.

Judge COZORT concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

There is no question in my mind that the State's evidence clearly showed that the victim in this case did not consent to sexual intercourse with defendant. I am also persuaded that the State's evidence showed several acts of physical force used by defendant to accomplish his will and to overcome the victim's will —or to put it more precisely—to overcome her lack of consent. I

would render the trial court's interesting comments less prophetic than found by the majority, and I vote to find no error in the trial.

IN THE MATTER OF: DOUGLAS YATES HALL, MINOR CHILD

No. 8728DC983

(Filed 19 April 1988)

Parent and Child § 1.5— termination of parental rights—action to set aside judgment—no showing of excusable neglect

The trial court properly denied respondent's motion to set aside a judgment terminating her parental rights, concluding that respondent had not shown excusable neglect, where respondent was duly served with summons, a copy of the petition, and a note informing her of her right to have a court-appointed attorney and providing her a telephone number to call to have an attorney appointed; respondent did not reply; she was unemployed at the time and was receiving money, food, and gas from police and charitable organizations; she returned to North Carolina two months after she was served, in her own car, by obtaining food and gasoline at various police stations and churches; the court found no evidence that respondent was unable to return to North Carolina by that method when she was served at the time of the hearing; and respondent's poor financial situation and her limited ability to understand the importance of the petition did not establish excusable neglect. N.C.G.S. § 1A-1, Rule 60(b)(1).

APPEAL by respondent from *Tate, Judge*. Order entered 9 July 1987 in District Court, BUNCOMBE County. Heard in the Court of Appeals 3 March 1988.

This is a proceeding initiated by the Buncombe County Department of Social Services (DSS) to terminate respondent's parental rights. On 29 January 1987, after a hearing at which respondent failed to appear, the court terminated respondent's parental rights. Respondent's infant child, Douglas Yates Hall, was born on 27 May 1986, after only 26 weeks of gestation. Respondent and Douglas' father visited him in the hospital on several occasions, the last of which was on 12 October 1986. Shortly thereafter, respondent went to Alabama with Douglas' father and her other minor child, without making any arrangements for Douglas' care. When he was ready to be discharged

from the hospital in early November 1986, respondent's whereabouts were unknown.

On 12 November 1986, DSS filed a petition to terminate the parental rights of both parents. Respondent was properly served on 18 December 1986 but did not answer and did not appear at the hearing. The trial court concluded that Douglas had been neglected by his parents and that it was in Douglas' best interests to terminate both parents' parental rights and release him for adoption.

Respondent returned to North Carolina in February 1987 and contacted legal counsel in April 1987. On 24 June 1987, respondent moved pursuant to G.S. 1A-1, Rule 60(b)(1), to set aside the judgment and conduct a new hearing. Her motion alleged that she had a meritorious defense and that her failure to appear at the hearing was due to "excusable neglect." The trial court denied respondent's motion, concluding that her motion was not filed within a reasonable time after entry of judgment, that she had not shown excusable neglect, and that she had not pled a meritorious defense. Respondent appeals.

Legal Services of the Blue Ridge, Inc., by Louise Ashmore, for the respondent-appellant.

Rebecca B. Knight, for petitioner-appellee Buncombe County Department of Social Services.

Richard Schumacher, for petitioner-appellee Guardian Ad Litem.

EAGLES, Judge.

Rule 60(b)(1) of the North Carolina Rules of Civil Procedure allows the trial court to relieve a party from a final judgment for "[m]istake, inadvertence, surprise, or excusable neglect." G.S. 1A-1, Rule 60(b)(1). A Rule 60(b)(1) motion must be made within a reasonable time, *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E. 2d 446 (1971); G.S. 1A-1, Rule 60(b)(1), and the movant must show both the existence of one of the stated grounds for relief, and a "meritorious defense." *Howard v. Williams*, 40 N.C. App. 575, 253 S.E. 2d 571 (1979). Even if we were to assume that respondent filed her motion within a reasonable time and had pled a

meritorious defense, respondent failed to show "excusable neglect."

Although the decision to set aside a judgment under Rule 60(b)(1) is a matter within the trial court's discretion, *Sawyer v. Goodman*, 63 N.C. App. 191, 303 S.E. 2d 632, *disc. rev. denied*, 309 N.C. 823, 310 S.E. 2d 352 (1983), what constitutes "excusable neglect" is a question of law which is fully reviewable on appeal. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E. 2d 552 (1986). However, the trial court's decision is final if there is competent evidence to support its findings and those findings support its conclusion. *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E. 2d 787 (1975). Whether the movant has shown excusable neglect must be determined by his actions at or before entry of judgment. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *disc. rev. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976). Here, the relevant findings of the trial court show, as a matter of law, an absence of excusable neglect.

When a party is duly served with a summons, yet fails to give her defense the attention which a person of ordinary prudence usually gives her important business, there is no excusable neglect. *East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.*, 82 N.C. App. 746, 348 S.E. 2d 165 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E. 2d 745 (1987). The trial court found that respondent was personally served with the summons, and a copy of the petition. Respondent also received an enclosed notice, which informed her of her right to have a court appointed attorney if she could not afford to hire counsel, and provided a telephone number for her to call to have an attorney appointed. The court found that respondent saw the telephone number but failed to call, either to get an attorney or to request a continuance. The trial court also found that respondent was unemployed at the time and was receiving money, food and gas from police and charitable organizations. Respondent returned to North Carolina in February 1987, in her own car, by obtaining food and gasoline at various police stations and churches. The court found no evidence that respondent was unable to return to North Carolina by that method in December or January. These findings establish that respondent failed to use ordinary prudence to defend the action against her. Consequently, the trial court properly concluded that respondent did not show excusable neglect.

Respondent does not argue that the trial court's findings are unsupported by the evidence. Instead, she contends that the court's findings, and other evidence not addressed in the findings, regarding her poor financial situation and her limited ability to understand the importance of the petition, establish excusable neglect. We do not agree.

The trial court found that respondent was unemployed and was receiving food and money from charitable organizations. Other evidence shows that she was living in a trailer, rent-free, was caring for her nine year old daughter, had lost her driver's license, had tried calling DSS on two occasions, and had no money to travel to North Carolina. Respondent's poor financial condition, however, does not account for her failure to call or write court authorities, or to make further attempts to contact DSS. Moreover the record contains no evidence that respondent made any effort to seek local legal counsel or attempt to get financial or other assistance from the Texas Department of Social Services, or the charitable organizations which were providing her with money, food, and gasoline; nor can we speculate that such efforts would have been unavailing. In addition, her return to North Carolina in February belies her argument that she was financially unable to return for the hearing in January. In fact, respondent testified that she could have returned to North Carolina in January but did not think about it because she was worrying about finding work, caring for her other child, and the termination of her relationship with Douglas' father. Respondent's financial situation may, indeed, have been a difficult one but, under the circumstances, it does not constitute excusable neglect.

Respondent's claim that she was confused about the summons and what she should do in response also fails to establish excusable neglect. A party may not show excusable neglect by merely establishing that she failed to obtain an attorney and was ignorant of the judicial process. *See Gregg v. Steele*, 24 N.C. App. 310, 210 S.E. 2d 434 (1974). Similarly, the fact that the movant claims he did not understand the case, or did not believe that the court would grant the relief requested in the complaint, has been held insufficient to show excusable neglect, even where the movant is not well educated. *See Boyd v. Marsh*, 47 N.C. App. 491, 267 S.E. 2d 394 (1980). Respondent could read and write and there is no evidence she was suffering from a mental incapacity. *Cf.*

Wynnewood Corp. v. Soderquist, supra. The evidence shows that respondent knew both the nature of the proceedings against her and her obligation to return to North Carolina for the hearing. Under the circumstances, respondent's failure to take action to defend her case is not excusable neglect.

Absent a showing of excusable neglect, whether the movant pled a meritorious defense becomes immaterial. *Bundy v. Ayscue*, 5 N.C. App. 581, 169 S.E. 2d 87, *appeal dismissed*, 276 N.C. 81, 171 S.E. 2d 1 (1969). Therefore, we need not address respondent's remaining argument regarding the admission of allegedly irrelevant evidence concerning the merits of the petition for termination.

Affirmed.

Judges COZORT and SMITH concur.

LINDA T. STERN v. ROGER C. STERN

No. 8711DC533

(Filed 19 April 1988)

1. **Divorce and Alimony § 23.3— child support—nonresident defendant—parties' permanent residence in North Carolina until separation**

Evidence was sufficient to support the trial court's finding that the parties maintained their permanent residence in North Carolina from 1971 through the date of their separation where the evidence tended to show that plaintiff moved to North Carolina to accept a teaching position; defendant established a temporary residence in Pennsylvania for employment purposes as a golf pro; all of the parties' household furnishings remained in North Carolina during this time; defendant maintained no household property in Pennsylvania; when defendant was not employed, he lived in North Carolina; and plaintiff continued to maintain her residence in North Carolina the entire time.

2. **Divorce and Alimony § 23.2— child support requested in original complaint—personal jurisdiction not contested—right to challenge jurisdiction waived**

Where plaintiff requested child support in her original complaint filed in 1978 and defendant filed his answer then without contesting personal jurisdiction, his right to challenge the court's exercise of personal jurisdiction over him in the child support action was waived. N.C.G.S. § 1-75.7.

APPEAL by defendant from *Pridgen, Judge.* Order entered 12 January 1987 in District Court, JOHNSTON County. Heard in the Court of Appeals 1 December 1987.

This is an action from an order denying defendant's motion to dismiss for lack of personal jurisdiction on plaintiff's motion in the cause for child support.

Thomas H. Lock for plaintiff-appellee.

Narron, O'Hale, Whittington and Woodruff, P.A., by Gordon C. Woodruff, for defendant-appellant.

JOHNSON, Judge.

Plaintiff, Linda Stern, and defendant, Roger Stern, were married on 29 November 1969 in Johnston County, North Carolina. Shortly after their marriage, they moved to Pennsylvania where they lived together as husband and wife until the birth of their daughter, Suzanne Michelle Stern, on 28 August 1970. In September 1971, plaintiff moved to Four Oaks, North Carolina after accepting employment as a teacher with the Johnston County Board of Education. Defendant resided with his family in Four Oaks periodically in 1971 and early 1972 until he moved to Four Oaks permanently in the winter of 1972. Then, beginning in late 1973, the defendant began employment as an assistant golf pro in Pennsylvania. Defendant moved to Pennsylvania at that time and resided at his father's house. Defendant moved his personal possessions to Pennsylvania but maintained his household possessions in North Carolina.

From March through November of each year from 1971 until the parties separated on 19 May 1978, the defendant resided in Pennsylvania while working as an assistant golf pro. The remaining four months, defendant would reside in North Carolina. The plaintiff and the parties' minor child remained in North Carolina throughout each year, but resided with defendant in a rented mobile home in Pennsylvania during the summer months. During a two week period in early 1978, plaintiff and her daughter moved into defendant's Pennsylvania residence in a reconciliation attempt. The reconciliation attempt failed, and on 19 May 1978, both parties separated and plaintiff and her daughter moved back to North Carolina.

Plaintiff's complaint in this action was filed on 3 November 1978, in which she sought custody of the minor child and child support. Defendant filed his answer on 11 December 1978. As his first defense, he moved to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. In his second defense, defendant answered all of plaintiff's allegations. As his third defense, defendant raised the issue of res judicata, alleging that an earlier reciprocal action brought by plaintiff in Pennsylvania was a bar to this action.

On 8 February 1979, by consent order, the plaintiff was awarded temporary custody of their minor child. On 11 December 1980, by order of the court, plaintiff was awarded permanent custody. Neither order addressed the issue of child support, nor the issue of personal jurisdiction.

On 8 August 1986, plaintiff filed a motion in the cause for child support. At a hearing on the matter, on 30 December 1986, defendant made a special appearance and moved to dismiss plaintiff's action on the grounds that the court lacked personal jurisdiction over the defendant. Following an evidentiary hearing on defendant's motion, and after making findings of fact and conclusions of law, the court denied defendant's motion. Defendant appeals.

We note at the outset that defendant has not brought forward one of his Assignments of Error. We deem it abandoned and decline to review it. N.C. Rules of App. P., Rule 28.

Defendant's remaining five Assignments of Error all center around one major issue, to wit: whether the trial court retained in personam jurisdiction over the defendant. We hold that the trial court retained in personam jurisdiction over the defendant and affirm the order of the trial court.

[1] Defendant first contends that the trial court erred in finding that the parties maintained their permanent residence in Johnston County from 1971 through the date of their separation. We disagree.

While the trial court must make findings of fact to support its order, these findings are conclusive on appeal if supported by any competent evidence and a judgment or order supported by

such findings will be affirmed. *See, e.g., Paschall v. Paschall*, 21 N.C. App. 120, 203 S.E. 2d 337 (1974).

It is undisputed that defendant established a temporary residence in Pennsylvania for employment purposes as a golf pro; that all of their household furnishings remained in North Carolina during this time; that defendant maintained no household property in Pennsylvania; that when defendant was not employed, he lived in North Carolina; and that plaintiff maintained her residence in North Carolina. All of this occurred during the period from 1971 until the day of the parties' separation, 19 May 1978. Therefore, there was competent evidence in the record to support the trial court's findings of fact.

[2] Next, defendant argues that the trial court did not have personal jurisdiction over defendant by virtue of any general appearance. Defendant maintains that his answer, filed on 11 December 1978, constituted a special appearance, because his third defense in the answer specifically referred to and incorporated the Pennsylvania order of the reciprocal action, by which the Pennsylvania court exercised in personam jurisdiction over the defendant relative to child support. This argument is without merit.

G.S. 1-75.7 states in part:

> A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:
>
> (1) Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance . . .

"A general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person." *Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E. 2d 279, 287-88 (1978), *cert. denied and appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181-83 (1979), *quoting In re Blalock*, 233 N.C. 493, 504, 64 S.E. 2d 848, 856 (1951). Thus, where a defendant makes a general appearance before filing a motion contesting personal jurisdiction, he waives his right to challenge the court's exercise of personal jurisdiction over him

from that date forward. *Lynch v. Lynch*, 303 N.C. 367, 279 S.E. 2d 840 (1981).

Plaintiff requested child support in her original complaint filed in 1978. In defendant's answer, filed in 1978, he made a motion under Rule 12(b)(6), and a res judicata motion, without making a motion to contest personal jurisdiction. By filing his answer without contesting personal jurisdiction, his right to challenge the court's exercise of personal jurisdiction over him was waived. G.S. 1A-1, Rule 12(h); *Lynch, supra.*

Since we find that defendant waived his right to challenge the court's exercise of personal jurisdiction over him, we need not address his final contention that the trial court did not have personal jurisdiction over him pursuant to G.S. 1-75.4(12). Therefore, for all the aforementioned reasons, the order denying defendant's motion to dismiss is

Affirmed.

Judges ARNOLD and ORR concur.

DAVID E. BUFFALOE, PLAINTIFF v. UNITED CAROLINA BANK, DEFENDANT

No. 8716SC1124

(Filed 19 April 1988)

1. Master and Servant § 10— discharge of bank employee—termination by board of directors not required

There was no merit to plaintiff's contention that his employment, which was for an indefinite term, was terminated in violation of N.C.G.S. § 55-34(d) because it was not accomplished by the board of directors of defendant bank, since that statute merely provides that the board of directors *may* remove an officer, but it is not mandatory that the board do so.

2. Master and Servant § 8— employment manual not part of contract

Even though defendant's employment manual stated that plaintiff would be fired only for "illegal, immoral or unethical conduct," the policy was unilaterally promulgated by defendant and therefore was not a part of the contract between plaintiff and defendant.

3. Master and Servant § 10— move between cities for promotion—no additional consideration—employment at will doctrine still applicable

Plaintiff's move from defendant's bank in Charlotte to its bank in Lumberton in order to receive a promotion was not sufficient additional consideration for employment to remove this wrongful discharge action from the employment at will doctrine.

4. Master and Servant § 10— bank officer elected for one-year term—officer still employee at will

There was no merit to plaintiff's argument that he was not an employee at will because his election to a one-year term as an officer of defendant bank fulfilled the requirement of employment for a specified term, since the election of officers was clearly a timetable adopted unilaterally by defendant and did not represent a contractual agreement as to a specific term of employment.

APPEAL by plaintiff from *Williams, Judge*. Judgment entered 6 June 1987 in Superior Court, ROBESON County. Heard in the Court of Appeals 6 April 1988.

This is a civil action for damages caused by wrongful discharge. Plaintiff was an employee of defendant and in 1982 left defendant's Charlotte branch and took a position as Vice President and City Officer of defendant's Lumberton branch. In August 1985, plaintiff requested that Michael Uzzell, Senior Vice President and Regional Executive of defendant, investigate some problems with personnel at the Lumberton branch.

After Uzzell's investigation, he consulted with Ed Kizer, Executive Vice President, and Thomas Nicholson, Senior Vice President in charge of Human Resources. They decided plaintiff should be removed from his position because of the personnel problems. Kizer and Nicholson then discussed the situation with Rhone Sasser, President and Chief Executive Officer, who agreed plaintiff should be removed. On 17 September 1985, Uzzell informed plaintiff that he had "lost his effectiveness as a leader," and that his employment was terminated. On 24 September 1985, Kizer reported plaintiff's termination to the Executive Committee of defendant's Board of Directors. The committee concurred with replacement of plaintiff. The minutes of this meeting were later approved by the Board of Directors, and on 24 January 1986, in accordance with plaintiff's termination, the Board of Directors did not re-elect plaintiff as an officer.

Plaintiff filed a complaint for wrongful discharge, making six claims for relief. Defendant moved to dismiss the claims, and on

20 December 1986 the court dismissed claims three, four, five and six. Both plaintiff and defendant then moved for summary judgment as to the remaining claims, and on 6 June 1987 summary judgment was granted for defendant. Plaintiff appealed.

Susan D. Crooks and G. Eugene Boyce for plaintiff, appellant.

Haynsworth, Baldwin, Miles, Johnson, Greaves and Edwards, P.A., by Robert S. Phifer and Gregory P. McGuire, for defendant, appellee.

HEDRICK, Chief Judge.

[1] Plaintiff contends the trial court erred by granting summary judgment in favor of defendant because genuine issues of material fact existed. Generally, where a contract of employment does not fix a definite term, it is terminable at the will of either party, with or without cause, except in those instances where the employee is protected from discharge by statute. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). It is undisputed in this case that plaintiff had no written contract, and plaintiff testified that his employment term was "indefinite." He argues, however, that his employment was terminated in violation of G.S. 55-34(d), which provides:

> (d) Any officer or agent elected or appointed by the board of directors may be removed by the board of directors whenever in its judgment the best interests of the corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed.

Since plaintiff's employment was not terminated by the board of directors, he argues he was wrongfully discharged. We disagree. G.S. 55-34(d) states that "[a]ny officer or agent elected or appointed by the board of directors *may* be removed by the board of directors. . . ." [Emphasis added.] Chapter 55, the Business Corporation Act, uses the terms "shall" and "may." The term "shall" indicates intent to make a provision mandatory while "may" is used when the intent is to make a provision permissive. Therefore, the board of directors *may* remove an officer, but there is no indication it is mandatory that the board do so. For this reason, this case is not outside of the scope of the employment-at-will doctrine.

Plaintiff also argues the corporate by-laws mimic G.S. 55-34(d) and therefore make the employment-at-will doctrine inapplicable. We disagree for the same reasons as in our discussion of G.S. 55-34(d) and because plaintiff has alleged nothing that would indicate standing to compel performance of by-laws. *See* G.S. 55-18.

Plaintiff next argues he provided additional consideration for his employment and this makes the employment-at-will doctrine inapplicable. He contends he moved from a branch of defendant's bank in Charlotte to one in Lumberton because he was induced by defendant's employment manual and by Michael Uzzell to believe that he would be fired only for "illegal, immoral or unethical conduct."

[2] Even though defendant's employment manual does state this policy, it is not a part of the contract between plaintiff and defendant. It is undisputed that the policy was unilaterally promulgated by defendant. It is well-settled law in North Carolina that unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it. *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E. 2d 357 (1987); *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E. 2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E. 2d 39 (1986). No evidence was presented by plaintiff that the manual was included in the contract between plaintiff and defendant.

[3] Plaintiff argues further, however, that Michael Uzzell induced him to believe he would be fired only for "illegal, immoral or unethical conduct," and that these promises became part of his contract with defendant because they were made in consideration for his promise to move to Lumberton. Plaintiff contends this additional consideration removes the employment from the scope of the at-will doctrine.

Without a finding that plaintiff's move constituted additional consideration, Uzzell's alleged promise would be nothing more than gratuitous. *Tuttle v. Lumber Co.*, 263 N.C. 216, 139 S.E. 2d 249 (1964). Plaintiff cites *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), to show that his move to Lumberton was additional consideration. In *Sides*, the plaintiff left a job in Michigan to take a job in North Carolina, thus foregoing career opportunities. In this case, plaintiff testified that he did not forego any other em-

ployment opportunities, and he merely moved in order to receive a promotion within the same bank. In *Burkhimer v. Gealy*, 39 N.C. App. 450, 454, 250 S.E. 2d 678, 682, *disc. rev. denied*, 297 N.C. 298, 254 S.E. 2d 918 (1979), this Court held that there was additional consideration when an employee "remov[ed] his residence from one place to another in order to accept employment. . . ." Plaintiff moved in order to get a promotion and not to accept a new job. We hold this was not sufficient additional consideration to remove this case from the employment-at-will doctrine.

[4] Finally, plaintiff argues he "was not an employee at will because his election to a one year term fulfills the requirement of employment for a specified duration." We disagree. The election of officers to a one-year term is not a part of plaintiff's bargained-for contract. The record indicates plaintiff did not even know officers were elected annually. The election of officers was clearly a timetable adopted unilaterally by defendant and does not represent a contractual agreement as to a specific term of employment. This argument is without merit.

The judgment appealed from is

Affirmed.

Judges PHILLIPS and ORR concur.

CHARLOTTE OFFICE TOWER ASSOCIATES v. CAROLINA SNS CORPORATION AND PEPI'S CHEESE AND WINE, INC.

No. 8726DC991

(Filed 19 April 1988)

Landlord and Tenant § 18— nonpayment of rent—lease provisions—inapplicability of N.C.G.S. §§ 42-3 and 42-33

Where plaintiff lessor and defendant lessee agreed in their lease that, should nonpayment of rent occur, the plaintiff could elect to terminate the lease or to terminate only the lessee's right of possession, N.C.G.S. §§ 42-3 and 42-33 did not apply, since those statutes are remedial in nature and apply only where the parties' lease does not cover the issue of forfeiture of the lease term upon nonpayment of rent.

Charlotte Office Tower Assoc. v. Carolina SNS Corp.

APPEAL by defendants from *Jones (William G.), Judge.* Judgment entered 8 June 1987 in District Court, MECKLENBURG County. Heard in the Court of Appeals 3 March 1988.

Plaintiff brought this summary ejectment action to regain possession of premises leased to defendant Pepi's Cheese and Wine, Inc. (Pepi's) and subsequently sublet to defendant Carolina SNS Corporation (SNS). Plaintiff claimed that SNS had failed to pay the monthly rent when due. The magistrate ordered that plaintiff was entitled to possession but stayed judgment until a subsequent default. Plaintiff appealed to the district court.

In district court the case was tried without a jury. The trial court granted plaintiff a judgment of possession for the premises. *Inter alia* the court found the following unexcepted to facts:

> 1. Charlotte Office Tower Associates is the owner of the Charlotte Plaza office building located in downtown Charlotte, North Carolina.
>
> 2. Pursuant to a Lease dated March 15, 1982 . . . , Plaintiff leased space on the second floor of the Charlotte Plaza to Defendant Pepi's.
>
> 3. On February 1, 1985, with Plaintiff's consent Pepi's subleased the same premises to Defendant Carolina SNS . . . pursuant to a Sublease Agreement. . . . By its terms the Sublease was subject to the Lease between Pepi's and Plaintiff.
>
> 4. Beginning in December, 1985 and continuing through and beyond February 12, 1987, Defendants were in default under the Lease for their failure to make rent payments in a timely manner.
>
> * * *
>
> 7. As of February 12, 1987, Defendants were four months behind in rent, having failed to pay rents for the months of November, December, January, and February, as well as other accrued charges.
>
> * * *
>
> 11. On February 12, 1987 at the instruction and authorization of Plaintiff, Plaintiff's attorney wrote Defend-

ants and informed them in accordance with Paragraph 19 of the Lease that Plaintiff was terminating Defendants' right to possession of the leased premises, requesting that SNS vacate the premises, demanding payment of past due rents and other charges and making other demands.

12. Subsequent to February 12, 1987, SNS tendered to Plaintiff the amount of $14,633.00 for past due rents. Plaintiff accepted these rents, but also informed SNS and counsel for both Defendants that it would not reinstate the Lease and again requested that SNS vacate the premises.

13. Defendants subsequently tendered late charges allegedly due and owing in the amount of $9,301.51, under protest and subject to certain conditions. . . . This conditional tender was refused by Plaintiff and the money returned.

Defendants appeal.

Moore & Van Allen, by Hayden J. Silver, III, for plaintiff-appellee.

Perry, Patrick, Farmer & Michaux, by Roy H. Michaux, Jr., for defendant-appellant Carolina SNS Corporation.

Waggoner, Hamrick, Hasty, Monteith, Kratt, Cobb and McDonnell, by Dean Gibson, for defendant-appellant Pepi's Cheese and Wine, Inc.

EAGLES, Judge.

The sole issue on appeal is whether the trial court erred in refusing to apply G.S. 42-33 to stay the order of possession. Defendants contend that application of the statute was appropriate and would have allowed defendants to maintain possession of the leased premises. We disagree and affirm.

Defendants argue that *Couch v. Realty Corp.*, 48 N.C. App. 108, 268 S.E. 2d 237 (1980), too restrictively limits application of G.S. 42-33. Defendants contend that G.S. 42-33 should apply to stay dispossession of the tenant except where the lessor has the right under the lease to terminate for nonpayment of rent and has, in fact, terminated the lease for nonpayment of rent. We disagree.

Here paragraph 19(b)(1) of the lease between plaintiff and Pepi's expressly states that the "Landlord may, at its election, terminate this Lease or terminate Tenant's right to possession only, without terminating the Lease." The trial court found that the sublease between Pepi's and SNS was subject to the lease between Pepi's and plaintiff. Appellants have not excepted to this finding. We find there is competent evidence supporting the trial court's finding and, therefore, we are bound by it. *Hoover v. Crotts*, 232 N.C. 617, 61 S.E. 2d 705 (1950).

We note that G.S. 42-33 is to be construed *in pari materia* with G.S. 42-3. *Ryan v. Reynolds*, 190 N.C. 563, 130 S.E. 156 (1925). G.S. 42-3 applies *only* when a lease does not expressly provide for the landlord's reentry upon nonpayment of rents. *Id.* This statute implies a forfeiture of the remainder of the term and allows the landlord to dispossess a nonpaying tenant who refuses to vacate. *Id.*

G.S. 42-33 on the other hand, protects the tenant. In part, it provides that

> [i]f, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease.

As the *Ryan* court indicated, this provision does not always protect the tenant. In *Ryan* the lease at issue did not address the forfeiture of the term due to nonpayment of rent by the lessee. Nevertheless, the court stated that "[t]he parties could have agreed in the lease upon strict terms." *Ryan*, 190 N.C. at 566, 130 S.E. at 158.

In *Tucker v. Arrowood*, 211 N.C. 118, 189 S.E. 180 (1937) (per curiam), the Supreme Court held that a previous version of G.S. 42-33 did not apply when the lease granted the lessor the option to terminate the lease upon the tenant's nonpayment of rent. The court there stated "[i]n view of the fact that the option of the plaintiff [to terminate the lease], . . . , contained in the lease, to declare the lease forfeited had not been waived, the appellants are not entitled to the relief provided by [G.S. 42-33]." *Id.* at 119, 189 S.E. at 181.

In *Couch* our court applied G.S. 42-33 because there was no lease provision addressing forfeiture of the term based on the tenant's failure to pay his rent. The court noted that G.S. 42-33 "has no application if the terms of the lease provide the lessor can terminate the lease upon nonpayment of the rent." *Couch*, 48 N.C. App. at 113, 268 S.E. 2d at 241.

We conclude that G.S. 42-3 and G.S. 42-33 are remedial in nature and will apply only where the parties' lease does not cover the issue of forfeiture of the lease term upon nonpayment of rent. Where the contracting parties have considered the issue, negotiated a response, and memorialized their response within the lease, the trial court appropriately should decline to apply these statutory provisions. Here, plaintiff and Pepi's agreed in their lease that should nonpayment of rent occur, the plaintiff could elect to terminate the lease or terminate Pepi's right of possession. The statute has no application to this case. The judgment of the trial court is affirmed.

Affirmed.

Judges COZORT and SMITH concur.

THE ESTATE OF BETTY J. GOSNELL, BY AND THROUGH HER ADMINISTRATOR, ELDRIDGE LEAKE v. CLAYTON GOSNELL AND ANGELINE DILLARD

No. 8724SC755

(Filed 19 April 1988)

Death § 7.6— death of daughter in gun battle—mother's initiation of battle—directed verdict for mother improper

The trial court in a wrongful death action erred in directing verdict for defendant Dillard where a genuine issue of fact existed as to whether she initiated a gun battle and whether her actions constituted a proximate cause of her daughter's death.

APPEAL by plaintiff from *Lupton, Judge*. Judgment entered 12 March 1987 in Superior Court, MADISON County. Heard in the Court of Appeals 6 January 1988.

Eldridge Leake, administrator of the estate of Betty Jean Gosnell, filed suit against Clayton Gosnell and Angeline Dillard alleging that both defendants were negligent and jointly and severally liable for the wrongful death of Betty Jean Gosnell. Both defendants denied liability and affirmatively pled contributory negligence on the part of decedent. At the conclusion of plaintiff's evidence, both defendants filed motions for directed verdict. The motion as to defendant Gosnell was denied but granted as to defendant Dillard. Plaintiff appeals from the directed verdict in favor of Angeline Dillard.

The evidence presented at trial consisted largely of the conflicting testimony of the two defendants. Viewed in the light most favorable to plaintiff, the evidence tended to show the following.

On 22 May 1980 at approximately 2:00 a.m. Angeline Dillard was sitting in her living room watching television. As she rose to turn off the set she heard a truck "a roaring and a spinning" on the road behind her house. From the sound of its engine, Angeline recognized the truck as that belonging to her son-in-law Clayton Gosnell.

Angeline's thirty-eight-year-old daughter Betty Jean Gosnell had separated from her husband Clayton approximately five weeks earlier. Betty Jean and her two children were living with Angeline. All three were present in Angeline's home that night along with other visitors.

Although Clayton and Betty Jean were separated, the testimony indicated that they were seeing each other on the weekends in an effort to work out their marriage. According to Clayton, Betty Jean asked him to meet her at Angeline's that night. They decided to meet early in the morning because Angeline did not like Clayton.

As Clayton pulled into the driveway, he saw Angeline standing on the porch outside her back door. She shouted "[g]o on buddy boy. Don't want no trouble." As he started to pull out of the driveway, Angeline stepped back into the house and brought out a .22 caliber rifle and started shooting. The porch light was on and Clayton could see Angeline pointing the rifle towards him.

Clayton immediately pulled out of the driveway and swerved his car across the road to avoid colliding with a car coming down

the mountain. As he did so, he observed a white 1965 Fairlane and a green pickup truck in Angeline's driveway. According to Clayton, gunshots were being fired from both of these vehicles. Clayton could not tell from which direction the shots were being fired. The Fairlane and pickup truck backed out of Angeline's driveway and onto the road preventing Clayton from driving away. Shots were still being fired from both vehicles.

Allegedly fearing for his life and unable to drive away, Clayton lay down on the seat of his truck and reached for his .32 caliber pistol. He rolled his window down a few inches and fired two shots. He thought he fired the shots into the air but testified that the bullets may have traveled toward Angeline's house. One of the bullets from Clayton's gun entered Angeline's house killing his wife Betty Jean. After he fired the two shots the shooting stopped and Clayton was able to drive away. Clayton subsequently pled guilty to voluntary manslaughter pursuant to a plea bargain agreement.

Alley, Hyler, Killian, Kersten, Davis & Smathers, by Patrick U. Smathers, attorney for plaintiff-appellant.

Morris, Golding, Phillips & Cloninger, by William C. Morris, III and William C. Morris, Jr., attorneys for defendant-appellee Angeline Dillard.

ORR, Judge.

On a motion for directed verdict we must consider the evidence in the light most favorable to the non-moving party.

> This means that the evidence in favor of the non-movant must be taken as true, resolving all conflicts in the non-movant's favor and entitling him to the benefit of all reasonable inferences. . . . The motion should be denied if there is 'any evidence more than a scintilla' sufficient to support plaintiffs' prima facie case.

Rice v. Wood, 82 N.C. App. 318, 323, 346 S.E. 2d 205, 208, *disc. rev. denied*, 318 N.C. 417, 349 S.E. 2d 599 (1986) (citations omitted).

Here the evidence tends to show that Angeline had reason to believe Clayton would be armed that night. At trial Angeline, her-

self, testified that she knew Clayton was "carrying a gun for me and Betty." On the previous Friday Clayton stopped Betty Jean and her boyfriend in the middle of the road, threatened them at gunpoint, struck the boyfriend in the face and fired a shot from his pistol.

Viewing the evidence, as we must, in the light most favorable to appellant, we are forced to conclude that more than a scintilla of evidence supports appellant's prima facie case. A reasonable jury could find that Angeline initiated the gun battle and could have reasonably foreseen that Clayton would return fire endangering the lives of innocent bystanders.

Admittedly, Angeline Dillard's testimony of what took place that night is substantially different from Clayton Gosnell's. Credibility of witnesses, however, is for the jury to decide and not the trial court. In *Fowler-Barham Ford v. Insurance Co. and Fowler v. Insurance Co.*, 45 N.C. App. 625, 263 S.E. 2d 825, *disc. rev. denied*, 300 N.C. 372, 267 S.E. 2d 675 (1980), this Court stated that:

> it is the established policy of this State—declared in both the Constitution and the statutes—that the credibility of testimony is for the jury, not the court, and that a genuine issue of fact must be tried by a jury unless the right is waived.

45 N.C. App. at 628, 263 S.E. 2d at 827.

We believe a genuine issue of fact exists as to whether Angeline Dillard initiated the gun battle and whether her actions constituted a proximate cause of her daughter's death. We vacate the directed verdict entered by the trial court and remand for a trial on the merits.

Vacated and remanded.

Judges JOHNSON and PHILLIPS concur.

JACKIE DWAYNE JENKINS v. KAY DAVIS JENKINS (BRIDGES)

No. 8728DC871

(Filed 19 April 1988)

1. **Process § 8— personal service on nonresident in this state**

A nonresident defendant's personal service within this state is itself sufficient to confer personal jurisdiction under N.C.G.S. § 1-75.4(1)(a), and the minimum contacts test of due process is therefore inapplicable in such circumstances.

2. **Divorce and Alimony § 26— foreign divorce decree—registration in North Carolina—modification by North Carolina court proper**

There was no merit to respondent's contention that only a Tennessee court could modify a Tennessee divorce decree to increase respondent's child support obligation, since the parties' divorce decree was registered in Buncombe County pursuant to the provisions of N.C.G.S. § 52A-29, and registration allowed the decree to be treated as any other support order issued by a North Carolina court.

APPEAL by plaintiff-respondent from *Fowler (Earl J.), Judge.* Order entered 14 July 1987 in District Court, BUNCOMBE County. Heard in the Court of Appeals 4 February 1988.

Gum and Hillier, P.A., by Howard L. Gum, for plaintiff-appellant.

No brief filed for defendant-appellee.

GREENE, Judge.

This appeal arises from the denial of a motion to dismiss a child support action for lack of personal and subject matter jurisdiction. The trial court found, among other things, that the parties divorced in 1984 pursuant to a Tennessee divorce decree which incorporated an agreement providing for child support. After the divorce, the husband (plaintiff in the Tennessee action and hereinafter called "respondent") moved to Georgia where he still resides. The respondent owned no real property in North Carolina. In 1987, the wife (defendant in the Tennessee action and hereinafter called "movant") registered the Tennessee decree in the Office of the Clerk of Superior Court of Buncombe County, North Carolina pursuant to N.C.G.S. Sec. 52A *et seq.* (1984). She subsequently moved to modify the divorce decree in order to increase respondent's child support obligation. Notice of the hear-

ing and a copy of the motion were mailed to the husband's residence in Georgia. He was also served with process while temporarily in North Carolina for a brief visit in connection with his employment. The Buncombe County District Court denied respondent's motion to dismiss for lack of personal and subject matter jurisdiction. The court specifically found that respondent had "minimum contacts" with the state of North Carolina. Pursuant to his right of immediate review under N.C.G.S. Sec. 1-277(b) (1983), respondent appeals the court's denial of his motion to dismiss this action for lack of jurisdiction.

These facts present the following issues: I) where a nonresident respondent was personally served with notice of an action to increase his child support obligation, whether the district court acquired personal jurisdiction of respondent under N.C.G.S. Sec. 1-75.4(1)(a) (1983) despite respondent's arguable lack of "minimum contacts" with the state; and II) whether the district court had subject matter jurisdiction under N.C.G.S. Sec. 52A (1984) to increase respondent's child support obligation under a Tennessee divorce decree.

I

[1] Under these facts, the district court concluded respondent had "minimum contacts" with North Carolina such that the court had personal jurisdiction of respondent under N.C.G.S. Sec. 1-75.4 (1983). *Cf. International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945) (setting forth minimum contacts test of due process); *see generally Tom Togs, Inc. v. Ben Elias Inds. Corp.*, 318 N.C. 361, 365, 348 S.E. 2d 782, 786 (1986). However, it is not disputed that respondent was served with process while in North Carolina. Therefore, we need not determine whether the court's finding minimum contacts was proper since our Supreme Court has recently held that a nonresident defendant's personal service within this state is itself sufficient to confer personal jurisdiction under Section 1-75.4(1)(a). *Lockert v. Breedlove*, 321 N.C. 66, 361 S.E. 2d 581 (1987). In *Lockert*, a nonresident defendant was served with process while present in North Carolina. Rejecting defendant's claim that dismissal for lack of minimum contacts was appropriate, the *Lockert* Court reasoned that the minimum contacts test of due process set forth in *International*

Shoe and later cases is inapplicable where the defendant is served in the forum state:

> In *Pennoyer v. Neff* [citation omitted] . . . the . . . Court recognized, *inter alia*, what came to be known as the transient rule of jurisdiction whereby mere service of process upon a nonresident present in the forum state was sufficient to establish personal jurisdiction. . . . We conclude . . . that a close reading of *International Shoe* and later cases reveals that the Supreme Court has not abolished the transient rule of jurisdiction . . . [R]ather it set out an alternative means of establishing personal jurisdiction when the defendant is 'not present within the territory of the forum.' [Citation omitted] . . . For the foregoing reasons, we hold that the rule continues to be personal service on a nonresident party, at a time when that party is present in the forum state, suffices in and of itself to confer personal jurisdiction over that party.

321 N.C. at 69-72, 361 S.E. 2d at 583-85.

As there is no dispute that respondent was served with process while in North Carolina, we must accordingly conclude under *Lockert* that such service within the state conferred personal jurisdiction over respondent under Section 1-75.4(1)(a).

II

[2] Respondent also argues that only a Tennessee court could modify the Tennessee divorce decree to increase respondent's child support obligation. We disagree. Respondent concedes the parties' divorce decree was registered in Buncombe County pursuant to the provisions of N.C.G.S. Sec. 52A-29 (1984). Under Section 52A-30(a), registration of the decree allows it to be treated as any other support order issued by a North Carolina court: "[o]nce the order is so treated, [either party] may request modifications in the order . . . ." *Pinner v. Pinner*, 33 N.C. App. 204, 207, 234 S.E. 2d 633, 636 (1977).

As the Buncombe County District Court therefore had both personal and subject matter jurisdiction in this action, respondent's assignments of error are rejected and the court's denial of respondent's motion to dismiss for lack of jurisdiction is

Affirmed.

Judges WELLS and EAGLES concur.

CONCERNED CITIZENS OF THE NORTHEAST CAPE FEAR RIVER, AND HOKE BULLOCK v. NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, NORTH CAROLINA WILDLIFE RESOURCES COMMISSION, DEPARTMENT OF TRANSPORTATION AND INLET BAY UTILITIES, INC.

No. 8710SC1005

(Filed 19 April 1988)

Waters and Watercourses § 3.2— permit allowing discharge of treated domestic wastewater—appropriate remedy of aggrieved parties

Plaintiffs' claim for declaratory judgment and injunctive relief attacking the validity and propriety of a permit granted by defendant Commission allowing discharge of treated domestic wastewater into the Northeast Cape Fear River was properly dismissed by the trial court, since plaintiffs' only remedy, assuming they were aggrieved parties within the meaning of N.C.G.S. § 150B-43, was to obtain judicial review of defendant's issuance of the permit pursuant to N.C.G.S. § 150B-45.

APPEAL by plaintiffs from *Farmer, Judge.* Judgment entered 18 May 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 5 April 1988.

This purports to be a civil action wherein plaintiffs pray for the following:

1. A temporary restraining order and preliminary injunction requiring the Environmental Management Commission to rescind the permit pending resolution of these issues, and restraining Inlet Bay Utilities, Inc. from discharging any effluent pursuant to its NPDES permit for discharge into the Northeast Cape Fear River.

2. Declaratory judgment that the permit issued to Ammons-Boykin Development Company, and subsequently transferred to Inlet Bay Utilities, Inc., is invalid.

3. In the alternative thereto, a mandatory injunction requiring the Environmental Management Commission to rescind the permit for defects in its issuance.

4. A permanent injunction against Inlet Bay Utilities, Inc. prohibiting it from discharging any effluent into the waters of the Northeast Cape Fear River without a valid NPDES permit.

5. An order of this Court setting aside the easement granted by the Wildlife Resources Commission as inconsistent with State policy and/or requiring the Wildlife Resources Commission to perform an environmental impact statement prior to granting any such easement.

6. A permanent injunction prohibiting the Environmental Management Commission from issuing NPDES permits that allow the incremental degradation of water quality.

7. The costs of this action.

8. Such further relief as the Court may deem appropriate.

The record before us discloses that on 2 December 1985, the North Carolina Environmental Management Commission issued a permit allowing discharge of treated domestic wastewater into the Northeast Cape Fear River to defendant Inlet Bay Utilities, Incorporated, and this permit was reissued on 25 April 1986. An easement was also granted for the wastewater pipeline by the North Carolina Wildlife Resources Commission over property it leased from the North Carolina Department of Transportation.

On 4 September 1986, plaintiffs instituted this proceeding for a declaratory judgment and for injunctive relief. Defendants moved for summary judgment, and on 18 May 1987 their motion was granted and summary judgment was entered dismissing plaintiffs' complaint. Plaintiffs appealed.

Harlow, Derr and Stark, by Thomas A. Stark, for plaintiffs, appellants.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Daniel F. McLawhorn, for defendants, appellees, North Carolina Environmental Management Commission, North Carolina Wildlife Resources Commission and North Carolina Department of Transportation.

Poisson, Barnhill & Britt, by Donald E. Britt, Jr., for defendant, appellee, Inlet Bay Utilities, Incorporated.

HEDRICK, Chief Judge.

The Environmental Management Commission ("the Commission") is authorized to issue permits allowing discharge of wastewater into surface waters. G.S. 143-215.1. G.S. 143-215.5 provides that judicial review with respect to issuance of such permits is to be as provided in Article 4 of Chapter 150B which provides:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

G.S. 150B-43.

G.S. 150B-45 provides the procedure for seeking review:

> To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides.
>
> The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision. A person who fails to file a petition within the required time waives the right to judicial review under this Ar-

ticle. For good cause shown, however, the superior court may accept an untimely petition.

Assuming *arguendo* plaintiffs are aggrieved parties within the meaning of G.S. 150B-43, they could obtain judicial review of the Commission's issuance of the permit pursuant to G.S. 150B-45. This they did not do. While we recognize the superior court could extend the time within which to file a petition for judicial review, it did not do so in this case because plaintiffs' claim in no way purports to be a petition for judicial review. Plaintiffs simply attempt to attack collaterally the validity and propriety of the permit issued by the Commission, and the easement granted by the Wildlife Resources Commission to Inlet Bay Utilities, Inc., to pipe the wastewater pursuant to the permit. The record discloses an insurmountable bar to plaintiffs' claim for declaratory judgment and injunctive relief. Plaintiffs' only remedy, if any, is to obtain judicial review of the action of the Commission and the action of the Wildlife Resources Commission in granting the easement pursuant to G.S. 150B-45.

Therefore, summary judgment for defendants dismissing plaintiffs' complaint must be affirmed.

Affirmed.

Judges PHILLIPS and EAGLES concur.

IN RE: GEORGE A. GUESS, M.D., RESPONDENT

No. 8710SC618

(Filed 19 April 1988)

Physicians, Surgeons and Allied Professions § 7— Board of Medical Examiners reviewed by superior court—appeal to Supreme Court

Where any decision of the Board of Medical Examiners is reviewed by the superior court, appeal must be taken to the Supreme Court rather than to the Court of Appeals. N.C.G.S. § 90-14.11.

APPEAL by petitioner Board of Medical Examiners of the State of North Carolina from *Farmer, Judge.* Order entered 20

May 1987 in Superior Court, WAKE County. Heard in the Court of Appeals 8 December 1987.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington and Susan M. Parker, for petitioner appellant.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for respondent appellee.

PHILLIPS, Judge.

G.S. 90-14(a) authorizes the Board of Medical Examiners of the State of North Carolina to suspend or revoke licenses to practice medicine in this State for several activities or practices deemed to be improper, one of which is—

> (6) Unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, . . .

Proceeding under this provision the Board charged Dr. George Albert Guess, a family medicine specialist practicing in Asheville, of unprofessional conduct in that he customarily treated his patients with preparations known generally as "homeopathic medicines," a practice not in accord with the standards of acceptable and prevailing medical practice in this State. Following a hearing in which both parties presented evidence the Board found and concluded that the charge had been established and conditionally revoked his license to practice; but in doing so no finding was made that the homeopathic medicines admittedly administered by Dr. Guess either injured or threatened to injure any of his patients and no evidence that would have warranted such a finding is recorded. Upon appeal to the Superior Court the Board's order was reversed and vacated and the Board appealed to this Court.

Since "[t]he State can only regulate for the protection of the public," *State v. McKnight*, 131 N.C. 717, 724, 42 S.E. 580, 582 (1902), one of the questions raised by the record, though not by the appealing Board, is—Can the Board of Medical Examiners validly suspend or revoke the license of a physician to practice his profession for merely departing from the standards of acceptable

and prevailing medical practice in this State or must the departure have endangered the public by exposing his patients to harm? But neither this nor any other question raised by the appeal can be determined by us because, though overlooked by the parties, this Court has no jurisdiction over it. For in 1953, the General Assembly provided by G.S. 90-14.11 that upon any decision of the Board of Medical Examiners being reviewed by the Superior Court appeal could be taken "to the Supreme Court . . . under rules of procedure applicable in other civil cases," and this statute, which has not been directly or indirectly amended or repealed, is still in force.

Though repeal by implication is not favored by our law and ordinarily a statute applicable only to a specific entity is not repealed by a later statute of general application, 12 Strong's N.C. Index 3d, *Statutes* Secs. 11.1 and 11.2 (1978), since the Supreme Court was our only appellate court before Chapter 7A of the General Statutes became effective in 1967, we have considered the possibility that in creating this Court and requiring most appeals from the trial division since then to come here, *see* G.S. 7A-27(b), the General Assembly intended to amend or repeal G.S. 90-14.11. But that the General Assembly did not so intend is plainly indicated by the fact that two years after this Court began receiving appeals they enacted Sections 55, 61, 63, 64, 65, 66 and 67, Chapter 44 of the 1969 Session Laws, which had the effect of making this Court, instead of the Supreme Court, the appellate court of first resort in several situations similar to that involved here; enactments that would have been unnecessary if the same thing had already been accomplished by Chapter 7A. Nor was the Supreme Court's jurisdiction of this appeal ousted by the enactment of the Administrative Procedure Act, since its judicial review article does not apply to cases in which "adequate procedure for judicial review is provided by another statute." G.S. 150B-43. Furthermore, eleven years after this Court was organized our Supreme Court accepted an appeal directly from the Superior Court in a similar license revocation proceeding initiated by the Board of Medical Examiners pursuant to G.S. 90-14(a). *See In re Wilkins*, 294 N.C. 528, 242 S.E. 2d 829 (1978).

Since no statute of which we are aware authorizes us to consider the appeal, we dismiss it.

Appeal dismissed.

Judges WELLS and PARKER concur.

STATE OF NORTH CAROLINA v. WILBER MERCER

No. 873SC760

(Filed 19 April 1988)

1. **Narcotics § 2— intent to sell and deliver charged in indictment—intent to sell or deliver submitted to jury**

The trial court did not err by submitting to the jury the possible verdict of guilty of possession of cocaine with intent to sell or deliver, though the indictment charged possession with intent to sell and deliver.

2. **Narcotics § 3.1— "records" seized from defendant's residence—authenticity—admissibility**

In a prosecution of defendant for possession of cocaine with intent to sell and deliver, the trial court did not err in admitting into evidence "records" which showed numbers in addition or multiplication sets and in some cases initials and names, since defendant was the sole occupant of the residence in which the documents were found, and this was sufficient evidence of authenticity. N.C.G.S. § 8C-1, Rule 901(a).

3. **Narcotics § 4— possession of cocaine with intent to sell or deliver—sufficiency of evidence**

Documents, cash, and sodium bicarbonate found in a locked closet in defendant's residence, coupled with vials of cocaine, constituted sufficient evidence to take the charge of possession with intent to sell or deliver to the jury.

APPEAL by defendant from *Watts, Judge.* Judgment entered 11 March 1987 in Superior Court, PITT County. Heard in the Court of Appeals 5 April 1988.

This is a criminal action wherein defendant was charged in a proper bill of indictment with possession of cocaine with intent to sell and deliver in violation of G.S. 90-95(a)(1). The evidence at trial tends to show:

Law enforcement officers, acting pursuant to a search warrant, entered defendant's residence. There they found defendant and Ruthie Lynn Watson lying on a bed. One officer, Thomas

Shane, found six vials about an inch in height and with a circumference the size of his little finger. Each contained a white substance later determined by the SBI to be "crack," cocaine in its base form.

A locked closet was broken open by the officers, who found inside sodium bicarbonate, sometimes used to manufacture cocaine in the "crack" form. The officers also found $177 in cash, a tinfoil packet with white powdery residue, letters addressed to defendant, men's clothing, photographs of defendant, and some papers with numbers and names on them in a storage box.

Other "records" with numbers and words on them were found in the kitchen. The officers also found in the kitchen cut pieces of tinfoil, knives, scissors and an empty aluminum foil roll.

The jury found defendant guilty of possession of cocaine with intent to sell or deliver. From a judgment imposing a prison sentence of four years, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Richard G. Sowerby, Jr., for the State.

Assistant Public Defender Arthur M. McGlauflin for defendant, appellant.

HEDRICK, Chief Judge.

[1] In defendant's first argument he contends the trial court erred by submitting to the jury the possible verdict of guilty of possession of cocaine with intent to sell *or* deliver. The indictment charged that defendant "unlawfully, willfully and feloniously did possess with intent to sell *and* deliver . . ." (emphasis added). Defendant argues this would have been the proper wording of the possible verdict and that the use of the disjunctive "or" allowed the State to meet a lower burden of proof than required under the indictment. We disagree.

It is proper for a jury to return a verdict of possession with intent to sell *or* deliver under G.S. 90-95(a)(1). *State v. McLamb*, 313 N.C. 572, 330 S.E. 2d 476 (1985); *State v. Pulliam*, 78 N.C. App. 129, 336 S.E. 2d 649 (1985). Such a verdict is no less proper when the indictment charges possession with intent to sell *and* deliver since the conjunctive "and" is acceptable to specify the ex-

act bases for the charge. *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed and cert. denied*, 402 U.S. 1006, 91 S.Ct. 2199, 29 L.Ed. 2d 428 (1971), *overruled on other grounds, State v. Hurst*, 320 N.C. 589, 359 S.E. 2d 776 (1987). For these reasons, this argument has no merit.

[2] Defendant next contends the trial court erred in admitting State's exhibits two, three and four and exhibiting them to the jury. These exhibits were "records" which showed numbers in addition or multiplication sets, and in some cases, initials and names. Defendant argues the documents were not properly authenticated and no effort was made to show his handwriting was on them.

G.S. 8C-1, Rule 901(a) provides for authentication:

> (a) General provision—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Under the identical Rule 901 of the Federal Rules of Evidence, federal courts have held that a *prima facie* showing, by direct or circumstantial evidence, such that a reasonable juror could find in favor of authenticity, is enough. *United States v. Black*, 767 F. 2d 1334, *cert. denied*, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed. 2d 557 (1985). In this case, defendant was sole occupant of the residence in which the documents were found. This is sufficient for them to be admitted into evidence, and the weight given the evidence is for the jury to decide. *Milner Hotels v. Mecklenburg Hotel*, 42 N.C. App. 179, 256 S.E. 2d 310 (1979). We hold there was no error as to admission of the exhibits.

[3] Finally, defendant argues the trial court erred in denying his motion to dismiss because the evidence was insufficient for a guilty verdict of possession with intent to sell or deliver. We disagree. The documents, cash, and sodium bicarbonate found in defendant's locked closet, coupled with the vials of cocaine, constitute sufficient evidence to take the charge of possession with intent to sell or deliver to the jury. Defendant's contention is without merit.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges PHILLIPS and EAGLES concur.

MARVIN BROWN v. RHYNE FLORAL SUPPLY MANUFACTURING COMPANY, INCORPORATED; MORRIS PASOUR AND WIFE, ROXIE PASOUR; EULAS PASOUR AND WIFE, MARIAN FOX PASOUR; THEADOS PASOUR, UNMARRIED; MARY JANE PASOUR SETZER, WIDOW; BEVERLY JOYCE JOHNSON AND HUSBAND, BILLY RAY JOHNSON; DARRELL WILLIAM HARRIS, UNMARRIED; NORMAN LEON HARRIS, AN UNMARRIED MINOR; ODENA PASOUR BROWN AND HUSBAND, CASPER BROWN; ESTELLA PASOUR NIXON AND HUSBAND, NAMON NIXON; ROBERTA PASOUR, UNMARRIED; ETOISE PASOUR BOOKER AND HUSBAND, WARREN BOOKER; J.C. WILSON AND WIFE, GWENDOLYN WILSON; DOROTHY WILSON JONES AND HUSBAND, JOHN JONES; JOYCE WILSON, UNMARRIED; IRVIN LEE WILSON, UNMARRIED; GEORGE BERNARD WILSON AND WIFE, MARY WILSON; GRACE PASOUR BROWN AND HUSBAND, HERBERT BROWN; AND DEVISES OR HEIRS AT LAW, AND ALL OTHER PERSONS, FIRMS OR CORPORATIONS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED HEREIN

No. 8727SC804

(Filed 19 April 1988)

Attorneys at Law § 7.5— action to quiet title—appeal dismissed as frivolous—award of attorney's fees for appeal improper

Where plaintiff's action to quiet title to real property was dismissed as frivolous and not brought in good faith, plaintiff appealed, and the appeal was dismissed for failure to perfect the appeal, the trial judge erred in awarding defendant additional attorney's fees incurred in defending against plaintiff's appeal in the absence of statutory authority therefor.

APPEAL by plaintiff from *Charles Lamm, Judge.* Order entered 13 April 1987 in Superior Court, GASTON County. Heard in the Court of Appeals 8 February 1988.

Pamela A. Hunter for plaintiff-appellant.

Whitesides, Robinson, and Blue and Wilson by Henry M. Whitesides for Rhyne Floral Supply Manufacturing Company, Inc., defendant-appellee.

BECTON, Judge.

Plaintiff, Marvin Brown, brought an action against defendant, Rhyne Floral Supply Manufacturing Company, Inc. (Rhyne) and the other named defendants to quiet title to real estate in May of 1986. Brown, representing himself, claimed to have acquired title through adverse possession. The trial judge dismissed Brown's case at the close of the evidence, concluding that there was a complete absence of a justiciable issue, that the action was not brought in good faith, and that the action was frivolous. The trial judge also awarded attorneys fees to all the defendants' attorneys. Brown appealed to this court, and his appeal was dismissed on 16 December 1986 for failing to perfect the appeal. Upon motion by defendant Rhyne, the trial judge then awarded to Rhyne additional attorneys fees in the amount of $1,000 and expenses of $419.10 for the costs they incurred in defending against Brown's appeal, finding that the appeal was frivolous. Brown appeals this award.

Although defendant cites several statutes that authorize a trial judge to tax *costs* against the losing appellant (see N.C. Gen. Stat. Secs. 6-20, 7A-305(d), and N.C. Rules of Appellate Procedure 34 and 35(a)), nowhere in those statutes do we find authority for a trial judge to award *attorneys fees* under the circumstances that exist here. As a general rule, attorneys fees are not awarded to the prevailing party without statutory authority. *Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E. 2d 578 (1952).

Judgment is vacated.

Chief Judge HEDRICK and Judge SMITH concur.

DUKE UNIVERSITY MEDICAL CENTER, PRIVATE DIAGNOSTIC CLINIC v. DOROTHY L. HARDY, TIMOTHY LEE HARDY, THOMAS L. HARDY, A MINOR BY AND THROUGH HIS GUARDIAN AD LITEM AND ROBERT C. WEAVER, TRUSTEE FOR CERTAIN FUNDS BELONGING TO THOMAS L. HARDY

No. 8714DC833

(Filed 19 April 1988)

Physicians, Surgeons and Allied Professions § 10— judgment for injured minor— failure of medical provider to file claim of lien within 30 days of institution of action

Where the minor defendant was injured in an automobile accident, plaintiffs rendered him medical services, and defendant subsequently recovered damages for his injuries, plaintiffs were not entitled to a hospital and medical services lien on those funds being held by the clerk of court on behalf of the minor defendant, since plaintiffs did not file a claim of lien with the clerk of court within 30 days after defendant's institution of his damages action, as required by N.C.G.S. § 44-49.

APPEAL by plaintiffs from *Chaney, Judge*. Order entered 20 August 1987 in District Court, DURHAM County. Heard in the Court of Appeals 9 February 1988.

Newsom, Graham, Hedrick, Bryson & Kennon, by Vicky W. Ayers, for plaintiff appellants.

Attorney General Thornburg, by Special Deputy Attorney General Charles J. Murray, for defendant appellee Robert C. Weaver, Trustee.

PHILLIPS, Judge.

Plaintiffs' appeal from an order of summary judgment presents only one question—whether plaintiffs are entitled to a hospital and medical services lien upon certain funds belonging to the minor defendant that are being held in trust for him by the defendant Weaver. The pertinent facts, few and undisputed, follow: For several days following his injury in an automobile collision that occurred on 18 May 1983, the defendant minor, then eight years old, was hospitalized and treated by plaintiffs and their charges have not been paid. On 23 September 1983 an action to recover for his injuries, then pending in the Superior Court of Edgecombe County, was settled and the net sum recovered by the plaintiff was turned over to the defendant Weaver, in his

capacity as Clerk of that court, who has held it in trust for the minor ever since. Plaintiffs did not file claim for a lien in the Edgecombe County Superior Court within thirty days after the minor's action was instituted; and if they claimed by any act or means to have a lien on the minor's recovery of funds before 29 July 1986, when their amended complaint claiming that they have a lien on the minor's funds held by the Clerk of Court was filed in this action, the record does not show it.

The lien that plaintiffs seek is authorized by G.S. 44-49 and G.S. 44-50; statutes that contain provisions which drastically limit their effect, as was pointed out in *A Survey of Statutory Changes in North Carolina in 1947*, 25 N.C.L. Rev. 376, 450-52 (1947), and that must be strictly construed since the lien did not exist at common law. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E. 2d 925 (1955). Though G.S. 44-49 purports to create a lien "upon any sums recovered as damages for personal injury in any civil action in this State" in favor of anybody the recipient owes for medical and hospital care, it also provides that—

> [N]o lien therein provided for shall be valid with respect to any claims whatsoever unless the person or corporation entitled to the lien therein provided for shall file a claim with the clerk of the court in which said civil action is instituted within 30 days after the institution of such action . . . .

Since the action for the child's damages was instituted in the Edgecombe County Superior Court and plaintiffs did not file a claim for their lien with the Clerk of that court within the time designated by the statute, they are not entitled to a lien under its provisions, as the trial court correctly ruled.

Affirmed.

Judges ARNOLD and COZORT concur.

VERNON F. HOWELL v. DONALD RAY WATERS

No. 872SC1043

(Filed 19 April 1988)

Cancellation and Rescission of Instruments § 10.1— reformation of deed—insufficient evidence of fraud

In an action to rescind or reform a deed on the grounds of fraud or mistake, the trial court did not commit reversible error by failing to submit requested issues of fraud to the jury since the jury's answers to the issues which were submitted established that plaintiff's fraud claim had no basis in that the jury found that defendant neither knew of nor caused plaintiff's mistaken belief as to the tract boundaries, and plaintiff's reliance upon the agent's representations was not reasonable.

APPEAL by plaintiff from *Lewis, John B., Jr., Judge.* Judgment entered 7 July 1987 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 5 April 1988.

Pritchett, Cooke & Burch, by Stephen R. Burch and W. W. Pritchett, Jr., for plaintiff appellant.

John A. Wilkinson for defendant appellee.

PHILLIPS, Judge.

In January, 1979 defendant deeded approximately 480 acres of Beaufort County land to plaintiff. Based upon allegations that the boundaries of the tract are not as defendant's agent represented them to be plaintiff seeks to rescind or reform the deed on the grounds of fraud or mistake; not mutual mistake, though, but his unilateral mistake caused or known about by the seller, as laid down in this case when it was here before. *Howell v. Waters*, 82 N.C. App. 481, 347 S.E. 2d 65 (1986), *disc. rev. denied*, 318 N.C. 694, 351 S.E. 2d 747 (1987); Restatement (Second) of Contracts Sec. 153 (1981). Upon the case being retried after the first appeal the jury rendered verdict against plaintiff and judgment was entered thereon.

In appealing plaintiff makes only one contention—that the court committed reversible error in failing to submit "issues on fraud to the jury" as he requested. Assuming *arguendo* that it was error not to submit plaintiff's requested fraud issues plaintiff could not have been prejudiced thereby because the jury's an-

swers to the issues that were submitted establish that plaintiff's fraud claim has no basis. For in answering the issues the jury found, *inter alia*, that (1) defendant neither knew of nor caused plaintiff's mistaken belief as to the tract boundaries; and (2) plaintiff's reliance upon the agent's representations was not reasonable. These findings were fatal to plaintiff's fraud claim for reasons that the law of that subject make self-evident. *See Lamm v. Crumpler*, 240 N.C. 35, 81 S.E. 2d 138 (1954); 37 C.J.S. *Fraud* Sec. 3 (1943). Since the issues submitted were comprehensive enough to resolve the fraud claim additional issues on that claim were not required. *Johnson v. Lamb*, 273 N.C. 701, 161 S.E. 2d 131 (1968).

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 APRIL 1988

ASHEVILLE OIL v. COLVARD No. 8728SC895	Buncombe (86CVS3667)	Affirmed
DALAND v. DALAND No. 8714DC1172	Durham (83CVD2252)	Affirmed
EVANS TREE v. DUCKWORTH No. 877SC877	Nash (87CVS135)	Affirmed
GRAY v. GRAY No. 8721DC1137	Forsyth (86CVD3174)	Appeal Dismissed
HASTY v. HASTY No. 876DC896	Halifax (83CVD204)	Vacated and Remanded
HOWELL v. HOWELL No. 8727DC962	Gaston (86CVD2081)	No Error
IN RE ESTATE OF BARNES No. 8719SC1092	Randolph (84E333)	Appeal Dismissed
KISER v. BEATTY No. 8726SC1081	Mecklenburg (86CVS7192)	Affirmed
LOCKLEAR v. LOCKLEAR No. 8716DC882	Robeson (86CVD1137)	Vacated and Remanded
NEARBY EGGS v. SMITH No. 878SC818	Wayne (86CVS97)	Affirmed
STATE v. ANDERSON No. 879SC778	Granville (86CRS5562)	No Error
STATE v. ANTHONY No. 8727SC862	Gaston (86CRS31324) (87CRS1933)	No Error
STATE v. BAKER No. 8722SC986	Davidson (87CRS263)	As to the trial phase — no error. As to the sentencing phase, appeal dismissed.
STATE v. BROWN No. 8714SC978	Durham (85CRS37211)	No Error
STATE v. BYRD No. 8726SC953	Mecklenburg (81CRS75336) (81CRS75337)	Remanded for Resentencing
STATE v. ELLERBEE No. 8711SC1163	Johnston (86CRS14039)	No Error

STATE v. FARMER No. 8717SC995	Stokes (86CRS3102) (87CRS415) (87CRS416)	No Error
STATE v. FINLEY No. 872SC893	Washington (83CRS1161) (83CRS1162) (83CRS1163) (83CRS1164) (83CRS1165) (83CRS1166) (83CRS1167) (83CRS1168) (83CRS1169) (83CRS1170)	No Error
STATE v. GREEN No. 8718SC1205	Guilford (85CRS70601) (85CRS70602) (85CRS70603) (85CRS70604)	Affirmed
STATE v. INGRAM No. 8725SC1148	Caldwell (86CRS8916)	Remanded for Resentencing
STATE v. JACKSON No. 877SC1173	Wilson (86CRS10199) (86CRS10200)	Affirmed
STATE v. JONES No. 8712SC1169	Cumberland (86CRS56053)	No Error
STATE v. LAY No. 8714SC1030	Durham (86CRS45762) (86CRS45763)	No Error
STATE v. PARKER No. 874SC361	Onslow (85CRS15343)	No Error
STATE v. PARNELL No. 8716SC1000	Robeson (86CRS24350)	Appeal Dismissed
STATE v. RHODES No. 872SC934	Tyrrell (87CRS21)	Affirmed
STATE v. SEGAR No. 875SC1102	New Hanover (87CRS2462)	No Error
STATE v. SMITH No. 8712SC950	Cumberland (86CRS40061)	No Error
STATE v. SMOTHERS No. 8720SC458	Richmond (86CRS3493)	No Error

STATE v. SUTTON No. 878SC956	Lenoir (87CRS1719)	No Error
STATE v. VOSS No. 8721SC1123	Forsyth (86CRS46606)	Remanded for Resentencing
STONE v. STONE No. 8729DC1143	Rutherford (87CVD0258)	Affirmed
TEAGUE v. TEAGUE No. 8722DC816	Davidson (86CVD1201)	Affirmed in part, vacated in part and remanded.
VARNELL v. VARNELL No. 877DC884	Edgecombe (83CVD656)	Vacated and Remanded
WEAVER v. BROWN & CO. No. 8727SC976	Lincoln (86CVS265)	No Error
WSOC TELEVISION v. FAST FARE No. 8726DC933	Mecklenburg (86CVD15433)	Reversed and Remanded

APPENDIX

AMENDMENTS TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are hereby amended to add a new Rule 2.1, *Designation of Exceptional Civil Cases*, as follows:

RULE 2.1 DESIGNATION OF EXCEPTIONAL CIVIL CASES

(a) The Chief Justice may designate any case or group of cases as "exceptional." A senior resident superior court judge, chief district court judge, or presiding superior court judge may ex mero motu, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional.

(b) Such recommendation may include special areas of expertise needed by the judge to be assigned and may include a list of recommended judges.

(c) Such recommendation shall be communicated to the Chief Justice through the Administrative Office of the Courts.

(d) Factors which may be considered in determining whether to make such designation include: the number and diverse interests of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.

(e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases.

This amendment shall be effective on and after the fifth day of January, 1988, and shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

By order of the Court in Conference, this 5th day of January, 1988.

WHICHARD, J.
For the Court

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are hereby amended by rewriting the second paragraph of Rule 2(a), *Calendaring of Civil Cases*, to read as follows:

> The effective date of the plan and any amendments thereto shall be either January 1 or July 1. The plan must be promulgated in writing and copies of the plan must be distributed to all attorneys of record within the judicial district. In order to provide for statewide dissemination, copies of plans effective January 1 shall be filed with the Administrative Office of the Courts on or before October 31 and on or before April 30 for plans effective July 1.

Said rules are further amended by deleting the first paragraph of Rule 8, which now reads as follows:

> All desired discovery shall be completed within 120 days of the date of the last required pleading. For good cause shown, a judge having jurisdiction may enlarge the period of discovery.

These amendments shall be effective on and after the 1st day of July, 1988, and shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals.

By order of the Court in Conference, this 16th day of May, 1988.

WHICHARD, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW

§ 2. Exclusiveness of Statutory Remedy

An action to determine whether plaintiff's eye surgery is covered under the State Employees' Comprehensive Major Medical Plan should be brought under the Administrative Procedure Act. *Vass v. Bd. of Trustees of State Employees' Medical Plan*, 333.

§ 8. Scope and Effect of Judicial Review

Although G.S. § 136-134.4 limits the scope of the findings of fact and conclusions of law which can be made, it does not limit the requirements for properly setting forth findings and conclusions. *Appalachian Poster Advertising Co. v. Harrington*, 476.

The superior court was not required to make findings and conclusions in its judgment affirming a final agency decision. *Shepherd v. Consolidated Judicial Retirement System*, 560.

ADOPTION

§ 2. Parties and Procedure Generally

In an action arising from a guardian ad litem's motion to compel DSS to grant his request to visit the child and for information on prospective adoptive parents, a district court's order allowing DSS's motion to dismiss respondent as guardian ad litem and denying respondent's motion was reversed. *In the Matter of N.C.L.*, 79.

ADVERSE POSSESSION

§ 25.2. Insufficiency of Evidence

The trial court did not err by allowing plaintiffs' motion for a directed verdict on the issue of adverse possession in an action in which plaintiffs alleged ownership of a right of way across defendant's property and defendant alleged adverse possession. *Cochran v. Keller*, 496.

APPEAL AND ERROR

§ 1. Jurisdiction in General

The issue of subject matter jurisdiction was properly before the Court of Appeals regardless of any failure to set forth exceptions or assignments of error relating to the issue. *Ramsey v. Interstate Insurors, Inc.*, 98.

§ 3. Review of Constitutional Questions

The Court of Appeals declined to address constitutional challenges to G.S. 97-10.2(j) which were not presented to or passed upon by the trial court. *Williams v. International Paper Co.*, 256.

§ 6. Right to Appeal Generally; Effect of Statutes

Partial summary judgment for defendant on the issue of liability for medical expenses plaintiff incurred before she reached the age of majority was immediately appealable. *Vaughan v. Moore*, 566.

§ 6.2. Finality as Bearing on Appealability

An appeal from the denial of an attorney's motion for a charging lien and to intervene in the underlying domestic action was dismissed as interlocutory. *Howell v. Howell*, 115.

APPEAL AND ERROR—Continued

§ 9. Moot Questions

An action seeking an injunction prohibiting defendant from renting his condominium was rendered moot when defendant sold his condominium. *Southwood Assn., Ltd. v. Wallace*, 327.

§ 16. Powers of Trial Court after Appeal

The trial court in a divorce and equitable distribution action was not divested of jurisdiction to impose sanctions for failing to answer discovery questions where defendant had given notice of appeal after an earlier order. *Benfield v. Benfield*, 415.

§ 27. Assignments of Error to Rulings on Motions to Nonsuit

A summary judgment for defendant was affirmed where plaintiff made only a broadside assignment of error. *Pamlico Properties IV v. SEG Anstalt Co.*, 323.

APPEARANCE

§ 1.1. What Constitutes a General Appearance

Defendant's meeting with plaintiff and her attorney to discuss the finances of a divorce constituted an appearance in plaintiff's divorce action so that plaintiff was required to give defendant three days' written notice of her application for a default judgment in the divorce action. *Stanaland v. Stanaland*, 111.

ARREST AND BAIL

§ 11.4. Judgments against Sureties

Defendants were not liable as sureties on appearance bonds where they executed the bonds as bail bond runners on behalf of a named bail bondsman even though defendants signed only their own names on the bonds as sureties. *S. v. Bridges and S. v. Moser*, 532.

ASSAULT AND BATTERY

§ 5.3. Assault with a Deadly Weapon; Relation to other Crimes

The trial court did not err in a prosecution for attempted armed robbery by refusing defendant's requested instruction on assault with a deadly weapon. *S. v. Rowland*, 372.

§ 15.2. Instructions on Assault with Deadly Weapon with Intent to Kill or Inflicting Serious Injury Generally

The trial court did not err in refusing to add the words "and without justification or excuse" to the jury instructions in a prosecution for assault with a deadly weapon inflicting serious injury. *S. v. Hall*, 491.

§ 15.7. Defense of Self or Others; Instruction not Required

Defendant was not entitled to an instruction on self-defense where all of the evidence clearly showed that defendant was at fault in bringing on both encounters with the victim. *S. v. Brewer*, 431.

Defendant was not entitled to an instruction on self-defense in a felonious assault case where defendant was not without fault in bringing on the affray and at no time withdrew from the fight and gave notice to the victim of his withdrawal. *S. v. Hall*, 491.

AUTOMOBILES AND OTHER VEHICLES—Continued

§ 108.1. Family Purpose Doctrine; Circumstances where Applicable

The trial court erred by granting summary judgment for defendant husband in an action by a wife against her husband and daughter arising from an automobile accident. *Camp v. Camp*, 347.

§ 117. Criminal Liability for Speeding; Prosecutions Generally

G.S. § 20-141(m) is not unconstitutionally vague. *S. v. Worthington*, 88.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The State's failure to comply with its continuing duty under G.S. 15A-907 to disclose defendant's 1972 conviction for credit card theft pursuant to his request for discovery of his criminal record did not require the trial court to forbid the State to use such conviction to impeach defendant. *S. v. Blankenship*, 465.

BROKERS AND FACTORS

§ 4.1. Rights and Liabilities of Real Estate Brokers to Principals

The trial court erred by granting defendant's motion for dismissal for failure to state a claim upon which relief could be granted in an action in which plaintiffs alleged that defendant realtors had negligently advised them. *Ness v. Jones*, 504.

§ 6.6. Right to Commission where Broker Does Not Procure Purchaser

Plaintiff real estate broker was entitled to recover a commission under an exclusive listing contract for the sale of defendants' real estate although defendants contended that the parties had orally agreed that plaintiff was not entitled to a commission upon a sale generated solely by the efforts of defendants. *Oak Island Southwind Realty, Inc. v. Pruitt*, 471.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 4. Cancellation and Rescission for Mutual Mistake

Defendant was not entitled to rescind a contract for the purchase of land on the ground of mutual mistake as to what percentage of the land would "perk." *Deans v. Layton*, 358.

§ 10.1. Sufficiency of Evidence of Fraud

The trial court in an action to rescind a deed did not commit reversible error by failing to submit requested issues of fraud to the jury since the jury's answers to the issues which were submitted established that plaintiff's fraud claim had no basis. *Howell v. Waters*, 721.

CONSPIRACY

§ 8. Verdict and Judgment

The trial judge erred in entering judgments for multiple conspiracies against defendants where the evidence revealed only one agreement. *S. v. Agudelo*, 640.

CONSTITUTIONAL LAW

§ 28. Due Process Generally in Criminal Proceedings

Defendant was not denied due process in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into an occupied vehicle where defendant alleged that the prosecution failed to correct perjured testimony. *S. v. Edwards*, 529.

§ 30. Discovery

The trial court did not err in ruling, after an in camera inspection of certain Chatham County Department of Social Services records pertaining to a sexual offense victim, that all records material to defendant's defense were made available to defendant and that the remaining records were not material to his case. *S. v. Bailey*, 212.

The State did not fail to disclose favorable or exculpatory evidence to defendant in violation of due process in a prosecution for taking indecent liberties and crime against nature. *S. v. Hoover*, 199.

§ 34. Double Jeopardy

Defendant was not placed in double jeopardy by convictions for both crime against nature and sexual activity by a substitute parent. *S. v. Hoover*, 199.

§ 40. Right to Counsel Generally

Defendant's right to counsel was not violated by the collection of blood, hair and fingerprint samples pursuant to a nontestimonial identification order without an attorney present. *S. v. Pearson*, 620.

§ 48. Effective Assistance of Counsel

Evidence was sufficient to support the trial court's conclusion that defendant received the effective assistance of counsel. *S. v. Hoover*, 199.

A statement to the jury during closing argument by defendant's attorney in a rape and sexual offense case that "I think there was anal intercourse" did not amount to the ineffective assistance of counsel. *S. v. Watkins*, 599.

§ 51. Delays between Arrest and Indictment

The passage of six years from the date of the offense to the date that charges were brought against defendant did not violate his constitutional rights to due process and a speedy trial. *S. v. Hoover*, 199.

§ 60. Racial Discrimination in Jury Selection Process

Defendants failed to make a prima facie showing that the prosecutor's exercise of his peremptory challenges was based on race. *S. v. Agudelo*, 640.

§ 66. Right of Confrontation; Presence of Defendant at Proceedings

In a prosecution for taking indecent liberties with a four-year-old child, the trial court's exclusion of defendant from the courtroom during testimony by the victim in a voir dire hearing to determine the victim's competency to testify at trial did not violate defendant's right to confrontation under the Sixth Amendment to the U.S. Constitution or his rights under the open courts provision of Art. I, § 18 of the N.C. Constitution. *S. v. Jones*, 584.

Defendant's right to confrontation was not violated by the State's use of hearsay evidence where the declarant was unavailable to testify and the evidence was admissible under established exceptions to the hearsay rule. *Ibid.*

CONTRACTS

CORPORATIONS

COUNTIES

CRIMINAL LAW—Continued

§ 34.6. Admissibility of Evidence of other Offenses to Show Intent

An FBI agent's testimony concerning flight coupons, boarding passes and revalidation stickers discovered in a search of defendant's home and schemes defendant engaged in involving the airline industry was admissible to show defendant's intent to deceive in a prosecution for attempting to obtain property by false pretense by boarding an airplane using another person's flight coupon after it had expired. *S. v. Roth*, 511.

§ 34.8. Admissibility of Evidence of other Offenses to Show Common Plan or Scheme

In a prosecution of defendant for taking indecent liberties by rubbing the child victim's vagina with his finger, a social worker's testimony that the victim stated that defendant had also put his organ in her mouth was admissible to establish a common plan or scheme by defendant to sexually abuse the victim. *S. v. Jones*, 584.

§ 51.1. Qualification of Experts; Showing Required; Sufficiency

The trial court did not err in permitting a physician's assistant to testify as an expert in child abuse. *S. v. Jones*, 584.

§ 55.1. Blood Tests

Defendant's blood type was properly admitted in a murder and robbery case as some proof of identity. *S. v. Pearson*, 620.

§ 73.2. Statements not within Hearsay Rule

Defendant's name and address on an envelope or its contents is not hearsay. *S. v. Peek*, 123.

§ 73.4. Spontaneous Utterances

Statements made by a child victim to her parents within ten hours after leaving defendant's custody that defendant "pulled my pants down and touched my pee patch again" and that he had done so before were admissible as excited utterances under Rule 803(2). *S. v. Jones*, 584.

§ 73.5. Hearsay Testimony; Medical Diagnosis and Treatment

Testimony that the four-year-old victim told her mother that defendant had sexually assaulted her was admissible under the medical diagnosis exception to the hearsay rule. *S. v. Jones*, 584.

Testimony by a social worker who was a member of the Duke Child Protection Team describing a child victim's identification of defendant as the person who committed indecent liberties upon her was admissible under the medical diagnosis exception to the hearsay rule although the child was examined and evaluated by the Team three months after the molestation upon the recommendation of the district attorney. *Ibid.*

§ 80.1. Records; Foundation and Authentication

Telephone records of a hotel were improperly admitted under the business records exception, but such error was harmless where there was other evidence showing the same facts which the telephone records showed. *S. v. Agudelo*, 640.

§ 84. Evidence Obtained by Unlawful Means

Although an affidavit submitted to obtain a search warrant did not establish probable cause for issuance of the warrant, the trial court properly denied defendant's motion to suppress evidence seized in a search under the warrant because of the good faith exception to the exclusionary rule. *S. v. Hyleman*, 424.

CRIMINAL LAW—Continued

Although the withdrawal of a blood sample without a warrant from a defendant in custody violated defendant's Fourth Amendment right to be free from unreasonable searches and seizures, the blood sample could properly be admitted into evidence under the good faith exception to the exclusionary rule where the blood was withdrawn pursuant to an invalid nontestimonial identification order. *S. v. Pearson*, 620.

§ 85.3. Character Evidence Relating to Defendant; State's Cross-examination of Defendant

The trial court erred in a prosecution for attempted armed robbery by allowing the prosecution to cross-examine defendant regarding his addiction to cocaine. *S. v. Rowland*, 372.

§ 86.2. Impeachment of Defendant; Prior Convictions Generally

The State's use of a prior conviction more than ten years old to impeach defendant's testimony was not prohibited by Rule 609(b) where it was not used to impeach defendant's character in general but was offered to impeach defendant based on an assertion made by him during direct examination. *S. v. Blankenship*, 465.

§ 89.1. Evidence of Character Bearing on Credibility; Character Witnesses

Expert testimony by a social worker and a pediatrician as to why a child would cooperate with an adult who had been sexually abusing the child did not constitute testimony on a character trait of the child in violation of Rule of Evidence 405(a) or impermissible expert testimony regarding the credibility of the child but was specialized knowledge admissible under Rule 702. *S. v. Bailey*, 212.

Testimony by a social worker and a pediatrician stating their opinions that the alleged child victim had been sexually abused was not improper opinion testimony as to the credibility of the victim's testimony and defendant's guilt or innocence but constituted proper expert testimony. *Ibid.*

While opinion testimony by a social worker and a psychologist that other members of the child victim's family were aware that defendant was sexually abusing the child may have constituted inadmissible opinion evidence as to the child's credibility, the admission of such opinion testimony was not reversible error. *Ibid.*

The trial court did not err in permitting a psychologist to testify concerning his observations of anxiety and anger exhibited by an alleged sexual offense victim during his examination of her and to give his expert opinion as to the relationship between the victim's anxiety and anger and the events she described during the examination. *Ibid.*

§ 90.1. Rule that Party May Not Discredit own Witness; Showing Facts to Be other than as Testified by Witness

The trial court did not err in permitting the State to use a prior inconsistent statement to impeach its own witness. *S. v. Hyleman*, 424.

§ 92.1. Consolidation of Charges against Multiple Defendants Held Proper; Same Offense

The trial judge did not abuse his discretion in joining for trial cases against the two defendants for trafficking and conspiring to traffic in cocaine. *S. v. Agudelo*, 640.

CRIMINAL LAW—Continued

§ 99.3. Expression of Opinion by Court; Remarks and other Conduct in Connection with Admission of Evidence

The trial court did not express an opinion that a fact had been proved by instructing that there was evidence which tended to show that defendant cut the victim's throat with a knife over some beer. *S. v. Brewer*, 431.

§ 113.1. Instructions; Summary of Evidence

The trial court did not err in failing to summarize exculpatory evidence elicited through cross-examination where there was no exculpatory evidence which went to any of the crucial issues of the case. *S. v. Brewer*, 431.

§ 122.1. Jury's Request for Additional Instructions

The trial judge did not err in granting the jury's request to have certain portions of a rape victim's testimony read to them. *S. v. Watkins*, 599.

§ 138.13. Fair Sentencing Act and Presumptive Sentences

Where the trial court is required by statute to impose a particular sentence on resentencing, G.S. 15A-1335 does not prevent the imposition of a more severe sentence. *S. v. Kirkpatrick*, 353.

§ 138.14. Consideration of Aggravating and Mitigating Factors in General

The trial judge was not required to make findings of aggravating or mitigating factors where defendant was sentenced pursuant to a plea arrangement. *S. v. Hoover*, 199.

§ 138.15. Aggravating Factors in General

The trial judge did not consider the same item of evidence to prove the aggravating factors of inducing another to participate in the crime and premeditation and deliberation. *S. v. Lloyd*, 630.

§ 138.16. Aggravating Factor of Position of Leadership or Inducement of Others to Participate

Evidence supported the sentencing judge's finding in aggravation that the 26-year-old defendant induced the 16-year-old defendant to participate in the murder with which they were both charged. *S. v. Lloyd*, 630.

§ 138.28. Aggravating Factor of Prior Convictions

Where the prosecutor recited defendant's two prior convictions and defense counsel immediately stated that defendant had had no convictions for almost ten years, such response was tantamount to an admission or stipulation that defendant had the convictions and supported the trial court's finding of the prior convictions as an aggravating sentencing factor. *S. v. Brewer*, 431.

§ 138.29. Other Aggravating Factors

Evidence was sufficient to support the sentencing judge's finding of premeditation and deliberation as an aggravating factor for second degree murder to which defendants pled guilty. *S. v. Lloyd*, 630.

Evidence of intoxication of defendants was not sufficient to negate the finding of premeditation and deliberation as an aggravating factor for second degree murder. *Ibid.*

§ 138.34. Mitigating Factor of Mental or Physical Condition

The trial court in a rape case was not required to consider defendant's intoxication as a mitigating factor where defendant failed to prove that his intoxication reduced his culpability. *S. v. Watkins*, 599.

DIVORCE AND ALIMONY—Continued

§ 24.1. Determining Amount of Child Support

The trial court did not abuse its discretion in a child support action by considering the Chief District Court Judges' Child Support Guidelines. *Smith v. Smith*, 232.

The trial court in an action for child support could give "due regard" to defendant's paying of a financial obligation which plaintiff would otherwise have had to pay. *McLemore v. McLemore*, 451.

§ 24.5. Modification of Child Support Order; Changed Circumstances

Evidence was sufficient to support the trial court's finding that there had been a substantial change of circumstances warranting an increase in child support. *Craig v. Kelley*, 458.

§ 24.8. Modification of Child Support Orders; Where Changed Circumstances Are not Shown

Defendant failed to show a substantial change of circumstances which would warrant modification of a child support order. *Outlaw v. Outlaw*, 538.

§ 24.9. Child Support; Findings

The trial court did not err in a child support case in making findings concerning defendant father's expenses. *Smith v. Smith*, 232.

The trial court did not err in an action for child support by not stating specifically the actual past expenses of the minor children or by including in its findings estimated expenses for certain items that plaintiff mother could not currently afford. *Ibid.*

There was sufficient evidence in a child support action to support the court's findings of fact concerning health insurance for the minor children and the special needs of one child. *Ibid.*

The trial court's findings in a child support action were insufficient. *McLemore v. McLemore*, 451.

§ 25. Child Custody Generally

The evidence supported the trial court's award of custody to plaintiff mother who had had actual custody of the child since its birth. *Craig v. Kelley*, 458.

§ 25.4. Child Custody with Father

The trial court did not abuse its discretion in awarding child custody to plaintiff father rather than to defendant mother who now lives in another state. *Schrock v. Schrock*, 308.

§ 26. Modification of Foreign Child Custody Orders

A Tennessee divorce decree could be modified by a North Carolina court to increase respondent's child support obligation where the decree was registered in Buncombe County under the provisions of G.S. 52A-29. *Jenkins v. Jenkins*, 705.

§ 26.1. Modification of Foreign Child Custody Orders; Cases Involving Full Faith and Credit Clause

The trial court properly declined to give full faith and credit to a Michigan custody award although the Michigan petition was filed before the North Carolina action was commenced. *Schrock v. Schrock*, 308.

DIVORCE AND ALIMONY—Continued

§ 27. Attorney's Fees Generally

The trial court did not err in ordering defendant to pay $400.00 in attorney's fees in an action for child custody and support. *Craig v. Kelley*, 458.

The trial court's conclusion in a child custody and support action that plaintiff had sufficient assets to pay his own attorney's fees was remanded where the court failed to determine plaintiff's disposable income after the child's reasonable needs were met. *McLemore v. McLemore*, 451.

§ 30. Equitable Distribution

The trial court erred in an equitable distribution action by reducing the market value of the marital home because of the risk of foreclosure. *Coleman v. Coleman*, 107.

The trial court could not consider abandonment itself but could consider defendant's misconduct to the extent it dissipated the value of marital assets in determining whether equal is equitable. *Ibid.*

The court erred in failing to treat post-separation appreciation of the marital home as a distributional factor under G.S. 50-20(c)(11a) or (12). *Truesdale v. Truesdale*, 445.

EASEMENTS

§ 5.3. Creation of Easements by Implication; Sufficiency of Evidence

Genuine issues of material fact were presented on defendants' counterclaim for an easement by implication. *McFadyen v. Olive*, 545.

§ 6.1. Creation of Easements by Prescription; Evidence

Evidence that plaintiff and his predecessors maintained and repaired a road at great expense raised a genuine issue of material fact for the jury as to whether their use of the road was sufficient to give defendants notice that such use was adverse, hostile or under a claim of right. *Delk v. Hill*, 83.

§ 7.1. Actions to Establish Easements; Evidence

A jury question was presented as to whether plaintiff had an easement by estoppel in a road across defendants' land. *Delk v. Hill*, 83.

The trial court properly denied defendant's motion for a directed verdict in an action involving an alleged easement across defendant's property. *Cochran v. Keller*, 496.

Plaintiffs' use of defendants' land did not constitute an easement by prescription where the use of the land from 1960 until 1983 was always with defendants' permission. *Joines v. Herman*, 507.

Reputation as to customs affecting land is not excluded by the hearsay rule and is not limited to the lifetime of the witness. *McFadyen v. Olive*, 545.

§ 11. Termination

The trial court did not err in concluding that an easement by necessity across defendants' land terminated when plaintiffs obtained a deeded easement to their tract from another adjacent landowner. *Joines v. Herman*, 507.

§ 13. Licenses

An oral right-of-way creates a license, not an easement, which terminates upon the death of either the licensor or licensee, and use of land under a license is not adverse. *Delk v. Hill*, 83.

EJECTMENT

§ 1.1. Requirement of Landlord-Tenant Relationship

The summary ejectment statute did not apply where there was no evidence that a trustee and decedent's daughter, who took decedent's homeplace pursuant to his will, were landlords or that defendant, who was the mother of decedent's minor son and who moved into the house four months before decedent's death, was a tenant. *Jones v. Swain*, 663.

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

Plaintiffs' complaint was sufficient to state a claim for inverse condemnation based upon damages to their property from pile driving operations during bridge construction. *Robinson v. N.C. Dept. of Transportation*, 572.

§ 11. Condemnation Proceedings; Exceptions

The trial court properly dismissed respondents' appeal from a final judgment in a condemnation action. *Carolina Power & Light Co. v. Crowder*, 578.

EVIDENCE

§ 20. Rebuttal of Matters Adduced by Adverse Party

The trial court did not abuse its discretion in an automobile accident case by excluding rebuttal evidence. *Wentz v. Unifi, Inc.*, 33.

FALSE PRETENSE

§ 3.2. Instructions

In a prosecution for attempting to obtain property by false pretense by boarding an airplane using another person's flight coupon after it had expired, the trial court's characterization of the other person's name on the coupon as a "representation" in the jury instructions may have misled the jury and was prejudicial error. *S. v. Roth*, 511.

FRAUD

§ 3. Material Misrepresentation of Past or Subsisting Fact

Plaintiff's evidence was insufficient for the jury on the issue of fraud by defendant corporate directors in submitting to plaintiff applications for construction payments misrepresenting that certain specialty items had been purchased and stored where one defendant asserted in the payment applications only that the work covered by the applications had been completed "to the best of his knowledge, information, and belief." *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 41.

§ 12. Sufficiency of Evidence

Plaintiff's evidence on motion for summary judgment was insufficient to establish the damage element of fraud in the sale of a tractor to plaintiff at an auction. *Knapp v. Dickerson Group*, 330.

Defendant failed to forecast evidence sufficient to raise a question of fact as to any misrepresentation by plaintiffs concerning the drainage of property which defendant contracted to purchase from plaintiffs. *Deans v. Layton*, 358.

The trial court properly directed a verdict for defendant on plaintiff's fraud claim where there was no evidence that defendant made false representations to

HOMICIDE

§ 21.2. Sufficiency of Evidence that Death Resulted from Injuries Inflicted by Defendant

The evidence was sufficient to support defendant's convictions of armed robbery and second degree murder of a pool hall owner. *S. v. Pearson*, 620.

§ 28.1. Duty of Trial Court to Instruct on Self-Defense

A defendant who suffered from abused spouse syndrome was entitled to an instruction on perfect self-defense in a prosecution for the murder of her husband by shooting him while he was sleeping. *S. v. Norman*, 384.

§ 28.4. Self-Defense; Instruction on Duty to Retreat

The trial court in a murder case erred in refusing to instruct the jury that defendant had no duty to retreat before using deadly force to repel an attack against her in her own home. *S. v. Hearn*, 103.

§ 30.2. Submission of Lesser Offense of Manslaughter

The trial court did not err in a prosecution for second degree murder and kidnapping by failing to submit voluntary manslaughter as a possible verdict after telling the jury before closing arguments that the issue would be submitted. *S. v. Payton*, 151.

HOSPITALS

§ 2.1. Selection of Hospital Site

An appeal by Rowan Hospital Authority from a decision by the Department of Human Resources that Rowan Health Properties was not entitled to a contested case hearing was dismissed because an actual contested case hearing is a jurisdictional prerequisite for direct appeal to the Court of Appeals. *Rowan Health Properties, Inc. v. N.C. Dept. of Human Resources*, 285.

HUSBAND AND WIFE

§ 3. Agency of one Spouse for the Other

A paper writing memorializing a contract for the sale of land which names only one of the two tenants by the entirety as vendor is enforceable against the vendee where the uncontradicted evidence shows that the cotenant signing the contract was acting as agent for the non-signing cotenant. *Deans v. Layton*, 358.

INDICTMENT AND WARRANT

§ 13.1. Discretionary Denial of Motion for Bill of Particulars

The trial court did not err in denying defendant's motion for a bill of particulars as to the exact location of an alleged offense of taking indecent liberties with a minor. *S. v. Bailey*, 212.

INFANTS

§ 3. Right of Infant to Recover for Torts

Although plaintiff obtained a waiver and assignment of her mother's claim for medical expenses incurred by plaintiff during her minority as a result of an automobile accident, she was not entitled to recover those medical expenses from defendant after reaching majority where the waiver and assignment were obtained

LARCENY

§ 1. Definition

Defendant could be convicted of separate offenses of larceny of car keys and larceny of a car. *S. v. Spruill*, 580.

LIBEL AND SLANDER

§ 9. Qualified Privilege

The trial court erred in entering summary judgment for defendant policemen in a slander action based on statements allegedly made to plaintiff's fiancee and the fiancee's mother that plaintiff had his own car stolen to defraud his insurance company and that plaintiff was a drug dealer where there were questions of fact as to whether the publication of the statements was for the protection of the interest of the recipient or a third party. *Shuping v. Barber*, 242.

§ 10. Particular Communication as Qualifiedly Privileged

Statements made by a hospital administrator investigating charges of sexual misconduct against plaintiff employee were qualifiedly privileged, and the privilege was not lost on the ground of the administrator's malice toward plaintiff and excessive publication where the administrator spoke only to those who were part of the investigative process. *Troxler v. Charter Mandala Center*, 268.

§ 14. Pleadings Generally

Plaintiff's complaint alleging that defendant publishing company intentionally and negligently failed to include anything about plaintiff's contributions to the sit-in movement of the 1960s in Ebony magazine was insufficient to state a claim for libel. *Matthews v. Johnson Publishing Co.*, 522.

§ 16. Sufficiency of Evidence

Defendant hospital was entitled to summary judgment in an action for slander based on statements by an employee of defendant that plaintiff had sexual relations with a minor female patient since the defense of qualified privilege applied if the employee was acting within the scope of his employment, and defendant would not be liable under the doctrine of respondeat superior if the employee was motivated by malice and resentment and was therefore acting outside the scope of his employment. *Troxler v. Charter Mandala Center*, 268.

LIMITATION OF ACTIONS

§ 8. Exceptions to Operation of Limitation Laws Generally

In an action for negligence in permitting a fire to spread to plaintiff's land, summary judgment for defendant based on the statute of limitations was not improperly granted despite plaintiff's allegations of undisclosed partnership. *Pamlico Properties IV v. SEG Anstalt Co.*, 323.

MASTER AND SERVANT

§ 8. Terms of Employment Contract Generally

Defendant's employment manual stating that plaintiff would be fired only for "illegal, immoral or unethical conduct" was unilaterally promulgated by defendant and therefore was not a part of plaintiff's employment contract. *Buffaloe v. United Carolina Bank*, 693.

MASTER AND SERVANT—Continued

§ 10. Termination of Employment

The termination of plaintiff's employment as a bank officer did not violate G.S. 55-34(d) because it was not accomplished by the board of directors of defendant bank. *Buffaloe v. United Carolina Bank*, 693.

Plaintiff's move from defendant's bank in Charlotte to its bank in Lumberton in order to receive a promotion was not sufficient additional consideration for employment to remove his wrongful discharge action from the employment at will doctrine. *Ibid.*

The election of defendant's bank officers annually was clearly a timetable adopted unilaterally by defendant and did not represent a contractual agreement to a specific term of employment. *Ibid.*

§ 66. Workers' Compensation; Mental Disorders

The evidence supported a determination by the Industrial Commission that, although plaintiff's compensable hand injury was a contributing factor in his disabling mental illness, his willful abuse of various controlled substances was an intervening cause which prohibits an award of benefits for his mental illness. *Wagoner v. Douglas Battery Mfg. Co.*, 67.

§ 68. Workers' Compensation; Occupational Diseases

The evidence, although conflicting, was sufficient to support the Industrial Commission's finding that plaintiff's obstructive pulmonary disease was caused by cigarette smoking and not in significant part by his exposure to cotton dust in his employment. *Gosney v. Golden Belt Manufacturing*, 670.

§ 68.1. Workers' Compensation; Asbestosis

Plaintiff failed to show the length of exposure to asbestos required by statute to establish his asbestosis claim. *Gosney v. Golden Belt Manufacturing*, 670.

§ 69. Workers' Compensation; Amount of Recovery Generally

The State was required to pay workers' compensation for a work-related injury even though the employee, by electing to use accumulated sick and vacation leave, had received his full salary until he retired, but the cause is remanded for a determination by the Industrial Commission as to whether the sick and vacation leave payments were "due and payable" when made and thus whether the State is entitled to credit for such payments. *Estes v. N.C. State University*, 55.

§ 79. Workers' Compensation; Persons Entitled to Payment Generally

The trial court erroneously decided the issue of employer negligence without a jury in an action in which plaintiff had received workers' compensation, filed this action against the general contractor and other subcontractors, the defendants were dismissed or reached a settlement agreement, and defendants then applied to the court for a determination of the amount to be paid to plaintiff and to the employer/carrier. *Williams v. International Paper Co.*, 256.

§ 85. Workers' Compensation; Jurisdiction and Functions of Industrial Commission in General

Under the doctrine of primary jurisdiction, plaintiff chiropractors are required to seek a determination of the underlying workers' compensation issues by the Industrial Commission before they can maintain in the superior court an action alleging that defendant workers' compensation insurers have interfered with their contractual rights by refusing to honor employers' choices of chiropractors as health care providers under the Workers' Compensation Act, have committed un-

MASTER AND SERVANT—Continued

fair trade practices by representing to its employer insureds that their policies do not provide coverage for chiropractic treatment, and have committed an illegal restraint of trade by conspiring with members of the medical profession to deprive plaintiffs of business opportunities by refusing to pay for chiropractic services provided in workers' compensation cases. *N.C. Chiropractic Assoc. v. Aetna Casualty & Surety Co.*, 1.

§ 108. Right to Unemployment Compensation Generally

Claimant voluntarily left her employment as a cook where she quit because the employer reduced her hours and it became economically unfeasible for her to continue working in that job. *Couch v. N.C. Employment Security Comm.*, 405.

An employer's substantial reduction of an employee's working hours may constitute good cause attributable to the employer for leaving the employment for the purpose of determining whether the employee is entitled to unemployment compensation benefits. *Ibid.*

§ 108.2. Right to Unemployment Compensation Generally; Availability for Work

An appeal was remanded for findings of fact to determine whether the statutory provisions dealing with unemployment of full-time students applied. *In the Matter of: McNeil v. Employment Security Comm.*, 142.

MORTGAGES AND DEEDS OF TRUST

§ 40.1. Suits to Set Aside Foreclosure; Practice and Procedure

Plaintiffs failed to show as a matter of law that the substitute trustee conducted a second foreclosure sale improperly where the record did not contain a copy of the deed of trust and failed to show whether the deed of trust expressly authorized the trustee to sell the property in parcels upon default or whether the property was actually described in separate parcels in the instrument. *Pannill Knitting Co. v. Golden Corral Corp.*, 675.

MUNICIPAL CORPORATIONS

§ 9.1. Duties of Police Officers

The trial court did not err in a wrongful death action against the City of Raleigh arising from the deaths of two child witnesses who were victims of sexual abuse. *Coleman v. Cooper*, 188.

§ 10. Civil Liability of Municipal Officers

The trial court did not err by granting summary judgment against plaintiffs in an action against the Raleigh Police Department. *Coleman v. Cooper*, 188.

§ 12.1. Liability as Determined by Nature of Functions; Governmental or Proprietary Functions, Tests and Applications

Summary judgment was properly entered for defendant city in a slander action based on statements by city police officers since a showing of actual malice was necessary to overcome the defense of qualified privilege, and governmental immunity barred an action against the city because the city's liability insurance did not cover claims based on the malicious conduct of its law enforcement employees. *Shuping v. Barber*, 242.

MUNICIPAL CORPORATIONS — Continued

§ 30.9. Spot Zoning

The rezoning of defendants' property from residential agricultural to mobile home district was illegal spot zoning and illegal contract zoning. *Alderman v. Chatham County*, 610.

NARCOTICS

§ 1.3. Elements of Offenses

The State was not required to elect between the charges of transporting and possessing marijuana. *S. v. Cash*, 563.

§ 2. Indictment

The trial court did not err in submitting the possible verdict of guilty of possession of cocaine with intent to sell "or" deliver although the indictment charged possession with intent to sell and deliver. *S. v. Mercer*, 714.

§ 3.1. Competency and Relevancy of Evidence

The trial court did not err in a prosecution for possession with intent to sell and deliver heroin by admitting evidence of defendant's presence at the airport two days earlier with no luggage and evidence of defendant's possession of airline tickets in other names. *S. v. Welch*, 135.

Testimony regarding the results of laboratory analysis of a seized substance was not inadmissible because the State failed to demonstrate the reliability of the tests conducted. *S. v. Agudelo*, 640.

"Records" showing numbers in addition or multiplication sets and in some cases initials and names were properly admitted in a narcotics case since defendant's sole occupancy of the residence in which the documents were found was sufficient evidence of authenticity. *S. v. Mercer*, 714.

§ 4. Sufficiency of Evidence

The evidence was sufficient to convict defendant of possession with intent to sell and deliver heroin. *S. v. Welch*, 135.

The evidence was sufficient to support defendant's conviction of trafficking in cocaine by selling more than 28 grams thereof. *S. v. Hyleman*, 424.

Evidence of documents, cash, sodium bicarbonate and vials of cocaine found in defendant's residence was sufficient for submission to the jury of a charge of possession with intent to sell or deliver. *S. v. Mercer*, 714.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The trial court properly denied defendant's motion to dismiss narcotics charges based on insufficient evidence of constructive possession. *S. v. Peek*, 123.

§ 4.6. Instructions as to Possession

The trial court did not err in a prosecution on narcotics charges by instructing the jury that they could infer that defendant had constructive possession of the contraband if they found beyond a reasonable doubt that she had control of the premises. *S. v. Peek*, 123.

NEGLIGENCE

§ 1.1. Elements of Actionable Negligence

While there is no longer an absolute prohibition of any recovery for the negligent infliction of emotional distress caused by concern for another, the trial judge

NEGLIGENCE – Continued

OBSCENITY

§ 1. Statutes Proscribing Dissemination of Obscenity

The statute prohibiting the dissemination of obscenity is not unconstitutional for failing to include the phrase "taken as a whole" in subsection (b)(3) or for failing to include an express "public place" requirement, and the "contemporary community standards" test set forth in the statute is constitutional. *S. v. Smith*, 19.

A defendant can be convicted of a separate offense for each obscene item disseminated in a single sales transaction. *Ibid.*

§ 3. Prosecutions for Disseminating Obscenity

The trial court in an obscenity case erred in instructing the jury that it should apply a community standard rather than a reasonable man standard in deciding the question of a work's value, but such error was harmless because no rational juror could find value in the materials in question. *S. v. Smith*, 19.

PARENT AND CHILD

§ 1.5. Procedure for Termination of Parental Rights

The trial court properly denied respondent's motion to set aside a judgment terminating her parental rights. *In re Hall*, 685.

§ 2. Liability of Child for Injury to Parent

The trial court properly granted summary judgment for defendant in an action by her mother arising from an automobile accident. *Camp v. Camp*, 347.

§ 3. Contributory Negligence of Parent in Causing Injury to Child

In a wrongful death action by a parent arising from the murder of her two abused children after an investigation began into their abuse, the question of the parent's contributory negligence was a matter for the jury. *Coleman v. Cooper*, 188.

§ 5.1. Right of Parent to Recover for Injuries to Child

Although plaintiff obtained a waiver and assignment of her mother's claim for medical expenses incurred by plaintiff during her minority as a result of an automobile accident, she was not entitled to recover those medical expenses from defendant after reaching majority where the waiver and assignment were obtained after the mother's claim was barred by the statute of limitations. *Vaughan v. Moore*, 566.

PARTITION

§ 9. Proceeds of Sale; Distribution

The trial court properly distributed partition sale proceeds where its method of distribution took into account the variation between the percentage of ownership and the percentage of total indebtedness of the parties, and the actual net distribution correctly reflected both parties' net share of equity in the property. *Cleary v. Leden*, 338.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 7. Appeal and Review of Orders of Licensing Boards

Where any decision of the Board of Medical Examiners is reviewed by the superior court, appeal must be taken to the Supreme Court rather than to the Court of Appeals. *In re Guess*, 711.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS—Continued

§ 10. Compensation of Health Care Giver

Where plaintiffs rendered medical services to a minor injured in an automobile accident, and the minor recovered damages for his injuries, plaintiffs were not entitled to a hospital and medical services lien on funds being held by the clerk of court on behalf of the minor where plaintiffs did not file a claim of lien with the clerk within 30 days after the minor instituted his damages action. *Duke Univ. Medical Center v. Hardy*, 719.

§ 13. Limitation of Actions for Malpractice

Plaintiff's action for medical malpractice was filed within the three-year statute of limitations pursuant to the continued course of treatment exception. *Callahan v. Rogers*, 250.

PROCESS

§ 8. Personal Service on Nonresident Individuals in this State

The North Carolina courts properly obtained jurisdiction over an Ohio defendant in a divorce and child custody action where the North Carolina long-arm statute was satisfied in that defendant was personally served while visiting his parents and children in Wilkes County. *Brookshire v. Brookshire*, 48.

A nonresident defendant's personal service within this state is itself sufficient to confer personal jurisdiction, and the minimum contacts test of due process is inapplicable. *Jenkins v. Jenkins*, 705.

§ 14.2. Service of Process on Foreign Corporation; Minimum Contacts Test

The exercise of personal jurisdiction over defendant nonresident corporate directors did not violate due process. *Pasquinelli v. Wilson*, 341.

RAPE AND ALLIED OFFENSES

§ 1. Nature and Elements of the Offense

Marriage as a defense to rape is raised by a plea in bar. *S. v. Getward*, 26.

The trial court erred by not granting defendant's motion for dismissal of the charge of raping his estranged wife where there was no written separation agreement and no final order granting a divorce. *Ibid.*

§ 3. Indictment

An indictment for rape of defendant's estranged wife was sufficient. *S. v. Getward*, 26.

§ 4. Relevancy and Competency of Evidence

Expert testimony by a social worker and a pediatrician as to why a child would cooperate with an adult who had been sexually abusing the child did not constitute testimony on a character trait of the child in violation of Rule of Evidence 405(a) or impermissible expert testimony regarding the credibility of the child but was specialized knowledge admissible under Rule 702. *S. v. Bailey*, 212.

While opinion testimony by a social worker and a psychologist that other members of the child victim's family were aware that defendant was sexually abusing the child may have constituted inadmissible opinion evidence as to the child's credibility, the admission of such opinion testimony was not reversible error. *Ibid.*

Testimony by a social worker and a pediatrician stating their opinions that the alleged child victim had been sexually abused was not improper opinion testimony

RAPE AND ALLIED OFFENSES—Continued

as to the credibility of the victim's testimony and defendant's guilt or innocence but constituted proper expert testimony. *Ibid.*

The trial court did not err in permitting a psychologist to testify concerning his observations of anxiety and anger exhibited by an alleged sexual offense victim during his examination of her and to give his expert opinion as to the relationship between the victim's anxiety and anger and the events she described during the examination. *Ibid.*

The trial judge did not express an opinion as to the rape victim's credibility when he limited defense counsel's questioning of the victim as to what she drank immediately before the rape. *S. v. Watkins*, 599.

§ 4.3. Evidence of Character or Reputation of Prosecutrix

The trial court in a prosecution for taking indecent liberties with a minor did not err in refusing to permit defense counsel to cross-examine the prosecutrix about whether she had previously accused her father and stepfather of sexually abusing her. *S. v. Anthony*, 93.

Portions of a recorded statement concerning a rape victim's prior sexual history were not admissible because the witness who made the recorded statement testified and had told a detective that the victim was a "nice person." *S. v. McCrimmon*, 525.

The trial court properly limited questions with regard to the victim's prior sexual conduct. *S. v. Watkins*, 599.

§ 5. Sufficiency of Evidence

The evidence was insufficient to support defendant's conviction of second degree rape where it showed that defendant had sexual intercourse with the sixteen-year-old female against her will but was insufficient to show that the sexual act was accomplished by force. *S. v. Scott*, 680.

§ 6. Instructions

The trial court properly instructed the jury with respect to defendant's use of a pocketknife and whether the knife was a deadly weapon. *S. v. Watkins*, 599.

§ 6.1. Instructions on Lesser Degrees of the Crime

Where there was conflicting evidence as to whether defendant used a knife, the trial court properly submitted lesser-included charges of second degree rape and second degree sexual offense to the jury. *S. v. Watkins*, 599.

§ 19. Taking Indecent Liberties with Child

The evidence was sufficient to sustain defendant's convictions for taking indecent liberties with a child and crime against nature. *S. v. Hoover*, 199.

The evidence was sufficient to permit the jury to infer that defendant took indecent liberties with the child victim for the purpose of gratifying his sexual desire. *S. v. Jones*, 584.

RETIREMENT SYSTEMS

§ 5. Claims of Members

Petitioner was not entitled to have restored service credits with the Teachers' and State Employees' Retirement System counted in determining his retirement benefit under the Consolidated Judicial Retirement System. *Shepherd v. Consolidated Judicial Retirement System*, 560.

ROBBERY

§ 4.3. Armed Robbery Cases where Evidence Held Sufficient

The evidence was sufficient to support defendant's conviction of armed robbery and second degree murder of a pool hall owner. *S. v. Pearson*, 620.

§ 5.4. Instructions on Lesser Included Offenses

The trial court did not err in a prosecution for attempted armed robbery with a pocketknife by not instructing the jury on attempted common law robbery. *S. v. Rowland*, 372.

RULES OF CIVIL PROCEDURE

§ 12. Pleadings; Defenses and Objections

Where the trial court's order indicated that the court considered discovery materials in dismissing plaintiffs' claims, but the record on appeal contains only the parties' unverified pleadings, the adequacy of plaintiffs' allegations will be judged by the standards appropriate to a judgment on the pleadings rather than by the standards applicable to summary judgment. *Johnson v. Ruark Obstetrics*, 154.

§ 18. Joinder of Claims

The trial court did not err in granting plaintiff's motion to join his wife as an additional party and in ordering that she be allowed to adopt plaintiff's complaint as amended. *Deans v. Layton*, 358.

§ 37. Failure to Make Discovery; Consequences

The trial court did not abuse its discretion in an action for divorce and equitable distribution by ordering defendant to give more complete answers to discovery questions. *Benfield v. Benfield*, 415.

The trial court was required by Rule 37(a)(4) to order defendant to pay plaintiff's attorney's fees for a motion to compel discovery, but the order was remanded because there were no findings of fact to support any conclusion that the fees were reasonable. *Ibid.*

The trial court did not abuse its discretion in a divorce and equitable distribution action by striking defendant's pleadings and prohibiting him from supporting his contentions where defendant willfully disregarded the order of the court to provide further answers. *Ibid.*

§ 52. Findings by Court Generally

The trial court erred in an appeal from a DOT revocation of a sign permit by failing to make proper findings of fact. *Appalachian Poster Advertising Co. v. Harrington*, 476.

§ 52.1. Findings by Court; Particular Cases

The trial court's conclusions in a de novo review of a DOT decision to revoke a sign permit were not supported by its findings. *Appalachian Poster Advertising Co. v. Harrington*, 476.

§ 55. Default

Defendant's meeting with plaintiff and her attorney to discuss the finances of a divorce constituted an appearance in plaintiff's divorce action so that plaintiff was required to give defendant three days' written notice of her application for a default judgment in the divorce action. *Stanaland v. Stanaland*, 111.

SEARCHES AND SEIZURES – Continued

§ 23. Application for Warrant; Probable Cause; Cases where Evidence Is Sufficient Generally

There was adequate cause for the issuance of a search warrant for a body cavity search for narcotics. *S. v. Fowler*, 10.

§ 24. Application for Warrant; Probable Cause; Cases where Evidence Is Sufficient; Information from Informers

An affidavit for a search warrant was not insufficient because nothing therein attested to the reliability of the informant who had been taken into custody for her participation in the suspected crime since such statements by the informant have inherent indicia of reliability. *S. v. Agudelo*, 640.

§ 29. Form and Contents of Warrant Generally

Omission of the time of issuance of a search warrant above the signature of the magistrate was not prejudicial. *S. v. Hyleman*, 424.

§ 39. Execution of Search Warrant; Places which May Be Searched

Officers searching for dilaudid did not exceed the scope of a search warrant by a body cavity search. *S. v. Fowler*, 10.

A rectal examination and removal of dilaudid did not constitute an unreasonable search and seizure where the search and seizure were conducted pursuant to a valid search warrant. *Ibid.*

A garage could be searched under a warrant for defendant's residence even though it was a separate building and a place of business. *S. v. Hyleman*, 424.

A delay of three and one-half days between execution of a warrant and return of the inventory of the items seized was not unreasonable or prejudicial. *Ibid.*

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

The DHR erred in applying the "first moment of the first day of the month" rule to deny Medicaid benefits to petitioner for the last two weeks of February 1985 during which her financial resources were within the allowable limits for Medicaid eligibility. *Johnson v. Div. of Social Services*, 481.

The DHR's denial of petitioner's request for Medicaid disability assistance on the basis that she did not suffer from a severe impairment which would limit her ability to do work was contrary to the medical evidence. *Sherrod v. N.C. Dept. of Human Resources*, 500.

SUBROGATION

§ 1. Generally

Plaintiff was not entitled to institute its subrogation action against defendant until the Industrial Commission's final determination of liability on 31 January 1985, and plaintiff's complaint filed on 10 May 1985 was therefore filed within the period of any applicable statute of limitations. *Nationwide Mutual Ins. Co. v. American Mutual Liability Ins. Co.*, 299.

§ 2. Volunteers

Plaintiff's payments to an injured employee were made in good faith under the erroneous impression that plaintiff's liability policy covered the employee's injuries, and plaintiff was thus not a volunteer and was entitled to recover by equitable

WILLS

§ 11. Proof of Lost or Destroyed Instruments

The evidence was sufficient to establish that a paper writing offered for probate was the last will and testament of the propounder's aunt. *In the Matter of The Will of Jolly*, 576.

§ 32. Precatory Words

A will devised to testator's children a remainder interest in real property in fee simple absolute, and a clause purporting to grant the authority to sell the devised property at a public auction was precatory and did not limit or defeat the devise in fee simple absolute. *Slater v. Lineberry*, 558.

WITNESSES

§ 1.2. Competency of Children as Witnesses

The trial court in an indecent liberties case did not err in informing the jury that the child victim had been found incompetent to testify as a witness at trial. *S. v. Jones*, 584.

§ 7. Refreshing Memory

The trial court's error in permitting plaintiffs' counsel to examine defendants' entire file when cross-examining a witness who had referred to documents in the file without making an in camera examination of papers in the file claimed by defendants to be privileged was not prejudicial. *Myers v. Liberty Lincoln-Mercury*, 335.

WORD AND PHRASE INDEX

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